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

**MARY C. HRUDKAJ, TABITHA GRABARCZYK, PAMELA E.
OWENS,
JOI CAUDILL,**

Respondents,

v.

**QUEEN ANN WATER WORKS, LLC, and
GERARD A. FITZPATRICK and CATHERINE FITZPATRICK,**

Appellants.

BRIEF OF APPELLANTS

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On behalf of Appellants
Queen Ann Water Works, LLC and
Gerard A. Fitzpatrick and Catherine
Fitzpatrick

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A. INTRODUCTION

This case involves a contractual dispute between four water users and the owners of a water system. The plaintiffs Mary Hrudkaj and Joy Caudill purchased their homes from the original owners/developers, Peter and Jean Bakker. (Bakkers). Tabitha Grabarczyk also purchased from the Bakkers. Ms. Grabarczyk passed April 25, 2015. Ms. Pamela Owens (Culy) purchased a house and separate lot in 2008. The defendants, Gerard and Catherine Fitzpatrick, purchased their home and lots from the Bakkers. In 2007 the Fitzpatricks were asked to take over the water system which they did, officially signing the paperwork July 17, 2008.

The parties are governed by three contracts. The contracts are Third Party Beneficiary Contract Agreement (Third Party Agreement), Declaration of Water Service for Queen Ann-Hill Water Division of Belfair View Estates (Water Service Agreement), and Declaration of Protective Covenants for Queen Ann-Hill Division of Belfair View Estates (Protective Covenants Agreement). The trial began September 21, 2016, and testimony was completed January 31, 2018. The length of the trial was due to medical problems of defendant Gerard Fitzpatrick.

The plaintiffs allege defendants breached the Third Party Agreement, Section 5, in wrongfully shutting off the water of two plaintiffs for over two days, and in charging excess fees and penalties for

alleged water rate increases of \$5.00 in October 2012 and March 2015. Plaintiffs also allege defendants breached the Third Party Agreement, Section 7, in not negotiating and/or arbitrating increased water usage rates of \$5.00 monthly in October 2012 and March 2015. Plaintiffs further allege that an assessment for cutting trees was improper under the Water Service Agreement. During the trial, the Court also admitted into evidence for Court consideration, additional assessments that defendants submitted in July 2017 to all users, including the plaintiffs. Defendants objected to the Court considering those assessments, but the Court admitted the evidence and considered whether those assessments were proper.

Plaintiffs sought to have a receiver appointed for breach of Section 5 and Section 7 of the Third Party Agreement and sought attorney fees.

Under Section 5, defendants deny they improperly shut off the water, as two users, Pamela Owens (Culy) and Tabitha Grabarczyk, were delinquent in paying for their water usage, and proper procedure was followed allowing water shut-off. The defendants did raise the rates \$5.00 in October 2012 (from \$37.00 to \$42.00) and March 2015 (from \$42.00 to \$47.00 per month.)

Under Section 7, defendants contend there was not sufficient number of users to arbitrate the raised rates in 2012 and 2015. There were

a requisite number of people objecting to the raise, one-third plus one, but then those objecting paid the new rate increases except the plaintiffs. The defendants continued to bill all the users the same rate, and if a user did not pay the correct water usage rate there would be a late fee though defendants did not try to collect the late payments nor penalties from plaintiffs who are still paying \$37.00 monthly. Defendants did not lien plaintiffs' properties.

The Court ruled for the plaintiffs that defendants breached Section 5 and Section 7 of the Third Party Agreement, and authorized appointment of a receiver, and awarded attorney fees under the Water Service Agreement. The Court also ruled on all the assessments, the assessment for tree cutting raised in the complaint and the July 16, 2017 assessments that the Court admitted. The defendants object to some of the Court rulings, as well as object to consideration of the 2017 assessments.

Defendants first contend that the parties entered into a binding CR2A agreement on November 12, 2015. Secondly, plaintiffs proposed a settlement agreement in July of 2016, based on the CR2A agreement and defendants signed it on July 26, 2016 returning it to plaintiffs. This case should be dismissed.

If the CR2A agreement or subsequent signed agreement of 2016 is not upheld, as an agreement, defendants contend that the substantial

majority of the case was under the Third Party Agreement, which does not provide for attorney fees. The Water Service Agreement would provide for attorney fees regarding assessments, but both parties prevailed on assessments and fees would not be proper. If deemed they should be awarded, the matter should be remanded for that determination.

Defendants contend the Court should not have appointed a Receiver; and if a Receiver is appointed, the Court failed to make proper findings as to whether a receiver was reasonably necessary and other available remedies either were not available or deemed inadequate.

Defendants contend their actions were reasonable under the circumstances.

B. ASSIGNMENTS OF ERROR

1. The trial Court erred in vacating the parties CR2A settlement agreement of November 12, 2015. The Court erred in not accepting the proposed written agreement by plaintiffs accepted by defendants, based on the CR2A agreement and signed by the defendants on July 26, 2016, as an enforceable, binding agreement.
CP
2. The trial Court erred in awarding attorney fees and to plaintiff under the Declaration of Water Rights contract for claims brought under the Third Party Contract. Conclusion of Law 52, 53, 55, Judgment, Conclusion of Law
3. The trial Court erred in appointing a custodial receiver and not making appropriate determinations that a receiver was

reasonably necessary and other available remedies either were not available or deemed inadequate. Conclusion of Law 15, 16, 17.

4. The trial court erred in allowing new assessments to be admitted in evidence in the middle of trial to determine their validity and amount over objection of defendants.
- 5.. The trial Court erred in finding defendants breached Section 5 of the Third Party Agreement in turnings off plaintiffs water for more than two days and in charging plaintiff for not paying rate increases and penalties. Findings of Fact 38, 44, 45, 46 and 47. Findings of Fact 54, 55, 56, 57.
6. The trial Court erred in finding defendants breached Section 7 of the Third Party Contract when they did not negotiate or seek arbitration pursuant to Section 7 of the Third Party Contract. Findings of Fact 43. 44, 45, 46.
7. The trial Court erred in directing the defendant to repay all the users on the water system who voluntarily paid new monthly rates above \$37.00 per month, for several years, after defendants notice of increased monthly rate increases. Conclusion of Law 20
8. The trial Court err in denying certain assessments. Conclusion of Law 20, Finding of Fact 67, 74, 76, 78, Conclusion of Law 34, 38, 41, 42, 48, 49. RP 1-10.

1. Issues Pertaining to Assignments of Error

- A. Plaintiffs and defendants, through their counsel, put a CR2A agreement on the record with Judge Toni Sheldon November 12, 2015. On August 29, 2016 Judge Sheldon invalidated the CR2A agreement. Can the Court invalidate a CR2A agreement when the Court and parties agree to its validity? Can the Court invalidate the CR2A agreement on the basis the language did not meet the requirements of a CR2A? Did the Court fail to recognize the written agreement proposed by plaintiffs and signed by defendants

which mirrored the CR2A Agreement. Was this a valid contract? Assignment of Error 1

- B. Did the Court err in awarding attorney fees under RCW 4.84.330 for work performed under the Third Party Agreement where there is no provision in that contract to allow attorney fees to the prevailing party? Should there be a division of fees between the Third Party Contract and the Water Service Agreement? Should there be any fees under the Water Service Agreement where the contract allows attorney fees, but both parties prevailed? Assignment of Error 2.
- C. Did the Court err in not complying with RCW 7.60.025 when appointing a receiver in failing to determine that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate. Assignment of Error 3.
- D. Did the Court err in admitting new assessments in the middle of trial. Assignment of Error 4.
- E. Was it error for the Court to find defendants breached Section 5 of the Third Party Agreement. Defendants were trying to collect unpaid debt for water use and late payments from two (2) plaintiffs, Pamela Culy and Tabitha Grabarczyk when their water was turned off.

Was it error for the Court to find defendants breached Section 5 of the Third Party Agreement when defendants raised water usage rates \$5.00 in October 2012 and July 15, 2015 and billed all the users monthly including plaintiffs who were objecting to the rate increases but did not try to collect them increases, penalties or lien their properties.

- F. Was it an error for the Court to find defendants breached Section 7 of the Third Party Agreement in allegedly not negotiating and/or arbitrating plaintiffs objection to raising water rates in October 2012 and March 2017.

- G. If the Court finds the defendants did breach the Third Party Contract Section 7 should the defendant have to pay the users monies they paid to defendant for water from the increased rates in 2012 and 2015 when the users payments were made voluntarily?
- H. Did defendant meet the burden of proof on assessments and their cost under the Water Service Agreement?

C. STATEMENT OF THE CASE

1. Overview

The plaintiffs are customers of the Queen Ann Water Works LLC. Tabitha Grabarczyk died April 25, 2015. The plaintiffs Mary Hrudkaj and Joy Caudill were customers of Peter and Jean Bakker (Bakkers). The Bakkers were the original owner/developers. Pamela Owens (Culy) purchased a home and a separate lot in Queen Ann in 2008. RP 226. Defendants Gerald and Catherine Fitzpatrick had purchased a home and property from the Bakkers. RP 335-38. Peter Bakker died in 2004. Robert Smalser, son-in-law, took over administrating the development. RP 340-41. In 2007 Mr. Smalser asked the Fitzpatricks to take over the Queen Ann water system which had a well, pump house, fourteen (14) hookups with one (1) hookup reserved for the fire department. RP at 340-41. The Fitzpatricks agreed to take over the water system in 2007 and changed the name to Queen Ann Water Works, LLC. They officially took over July 17, 2008. Ex. 4.

The Bakkers developed Queen Ann-Hill Division of Belfair View Estates on 50 acres of land within Queen Ann-Hill Division of Belfair View Estates. RP 343. There are eighteen lots. The plaintiffs' and defendants' rights and duties are governed by three contracts drafted by the Bakkers. The lots are subject to protective and restrictive covenants set out by the Bakkers in the Declaration of Protective Covenants for Queen Ann-Hill Division of Belfair signed November 20, 1992. Ex. 3 (Protective Covenants). The Bakkers signed a Declaration of Water Service for Queen Ann-Hill Water Division of Belfair View Estates November 20, 1992. (Water Service Agreement) Ex. 2 The Bakkers owned the well system called Queen Ann-Hill Water Division of Belfair View Estates. Ex. 2. Purchasers of a lot could not have a well and had to purchase water from the Bakkers. Ex. 2. Gerard and Catherine Fitzpatrick signed the Declaration of Water Service for Queen Ann-Hill Water Division of Belfair View Estates on April 17, 2008, an identical agreement, Ex. 2, replacing the Bakkers. Ex. 4. The Bakkers signed a Third Party Beneficiary Contract Agreement June 24, 1994. Ex. 1 (Third Party Agreement)

The plaintiffs complained the defendants breached Section 5 of the Third Party Agreement by turning off Ms. Owens and Ms. Grabarczyk's

water and in trying to collect excessive fees and/or penalties. CP 2.

Section 5 of the Third Party Agreement, states:

In the event the Company should fail to operate and maintain the water supply systems in the manner and under the conditions specified herein (failure due to Acts of God, natural disasters or other causes beyond the control of the Company, including labor troubles or strikes, excepted) or in the event the Company collects or attempts to collect from the consumers of water charges in excess of the rate or rates specified or provided for in this Agreement, then in either of such contingencies, if such default shall continue for a period of thirty (30) days (or for a period of two (2) days in the event such default consists of a shutdown of the water or suspension of water services, except for the causes above set forth) after written notice to the Company by any consumer, mortgagees, or by any person for whose benefit this contract is made, then and in such event any such person for whose benefit this contract is made, may enforce this Agreement by action, instituted for such purpose in any court of competent jurisdiction.... Ex. 1

Plaintiffs also complained Fitzpatrick's breached Section 7 of the Third Party Agreement about monthly water rate increases in October 12, 2012, from \$37.00 to \$42.00 and March 1, 2015, from \$42.00 to \$47.00 and alleged the defendants failed to follow the procedure for negotiation and arbitration in Section 7 of the Third Party Beneficiary Contract Agreement. Section 7 states:

Changes in the initial rates described in Section 4 hereof may be proposed by the Company and by third party beneficiaries of this Agreement in the following manner:

If within ninety (90) days after notice to the Representative and to all parties connected to the water supply systems of a rate change proposed by the Company, not more than one-third of such parties have signified in writing their opposition to such proposed rate change, the

Company may forthwith establish such new rates. If more than one-third of such parties signify, in writing, their opposition to a rate change proposed by the Company, or if more than one-third of such parties proposed in writing a rate change which the Company approves, and the parties cannot negotiate an agreement within ninety (90) days to the reasonableness of the new rates, then the matter of the reasonableness of such new rates shall be referred to a board of arbiters selected as follows: The Company shall designate one arbiter, the objecting parties shall designate one arbiter, and the two arbiters thus selected shall choose a third arbiter....

The plaintiffs further complained that an assessment on September 31, 2012, under the Water Service Agreement (included with notice of the rate increase) was improper (cutting trees to protect wires and well house) and not allowed by the Water Service Agreement in that it was not a “non-recurring repair”. Ex.4, CP 2. The Court during the trial also allowed new assessments admitted as evidence. RP 282- 83. The Fitzpatricks gave notice of new assessments by letter to all the users on July 16, 2017. Ex. 64. Defendants objected to such late admission of these assessments in the middle of trial. Defendants objects to some of the Court’s rulings and agrees with others concerning assessments. RP 282-83

Queen Ann Water Works LLC (Queen Ann Water) is a privately owned water system, but subject to regulations set out by the Washington State Department of Health and Department of Ecology. RP 769-71

The Fitzpatricks contend they entered into a CR2A agreement on November 12, 2015. CP 65. Fitzpatricks deny that they have violated

Section 5 and Section 7 of the Third Party Contract. Defendants deny the Queen Ann Water should be in receivership, deny that plaintiffs are entitled to attorney fees, and that if there was a violation of Section 7, the defendants should not have to pay back money to the majority of users that voluntarily paid the rate increases to Queen Ann Water for water use at the rate of \$42.00 and \$47.00 monthly.

2. History

The Fitzpatricks took over the water system in 2007. RP 340. Mr. Fitzpatrick was a general contractor at the time. RP 344. In 2011 Mr. Fitzpatrick went to work for the Belfair Water Department. Ms. Fitzpatrick has worked cleaning homes and taking care of elders in their homes since they have had the water system. RP 344. On June 7, 2011, Mr. Fitzpatrick injured his right wrist and low back while working for the City of Belfair. RP 395. Mr. Fitzpatrick has been unable to return to work and still is under medical treatment. RP 395. He is able to function somewhat, but can no longer do heavy repairs or heavy work. Fitzpatricks hired Drew Noble, a certified water operator to do the physical work for Queen Ann Water on July 1, 2017. RP 396-98. The Fitzpatricks still read the water meters monthly and perform other simple tasks, as well as operating the business.

When the Fitzpatricks began operating the water system in 2007 Gerard Fitzpatrick attended the Washington State Department of Health classes to become a certified licensed operator for water systems. RP 346-47. The Fitzpatricks officially had title to the water system on July 17, 2008, when they signed the Declaration of Water Service for Queen Ann-Hill Water Division of Belfair View Estates. (Water Service Agreement) Ex. 4. The Fitzpatricks renamed the company Queen Ann Water Works, LLC.Ex. 4. The company has approximately four miles of water lines. RP 349.

In 2007 when Fitzpatricks became involved the monthly water rate was \$20.00 per month for water with provisions for charges over the allotted use of 2444 gallons monthly. RP 350. Queen Ann Water has fourteen hookups. RP 351. The Fitzpatricks raised the rates to \$35.00 a month in 2008 to meet the actual operating expenses without a provision for excess usage over 2444 gallons monthly. The Fitzpatricks raised the monthly water rates \$1.00 in 2010 and \$1.00 in 2011 for a monthly rate of \$37.00. After several years of operation the Fitzpatricks changed from personal preparation of billings to a bookkeeper, Dennis Apgood. Mr. Apgood did billing and kept records of water usage. RP 436. Mr. Apgood would also send notices of assessments to the users, water rate increases and other important information at the time of billing if necessary. RP

360-62. The Fitzpatricks read the water meters of each user monthly, record the same for Washington State Department of Health, for their records, as well as notifying the customers of the amount of water used. RP 352-53. The Fitzpatricks would take monthly water samples to be tested to meet State requirements. RP 365.

Fitzpatricks are entitled to submit assessments to the users for “unexpected nonrecurring repairs” after the repair is made. Ex. 4 at 2, ¶ 3.3. In 2008 when the Fitzpatrick’s took over it was discovered that all six (6) pump bladders were failing. Mr. Smalser bought new bladders for \$4,500.00. RP 584. The users were assessed the \$4,500.00 and repaid the costs over a number of months. RP 355-56. This was the only assessment made prior to the assessment in 2012 for cutting three trees by the well house. RP 689-90.

The evidence showed that from 2007 – 2016 the Fitzpatricks generally made several hundred dollars or lost several dollars each year. Ex. 41, 67, 71. They have not received income from the operation of the water system. In 2014, Fitzpatricks did sell one hookup for \$5,000.00. (this was for a new user). RP 455. The Fitzpatricks do not pay for their water. They do pay their share of any tax or assessment, which amounts usually to 1/14 of the cost as there are generally fourteen (14) users, including Fitzpatricks. RP 304, 352, 447, 497.

The company was not able to save monies for an emergency, as all income was needed for operational cost. RP 354-55, 375-76, 378-79. In addition, Mr. Fitzpatrick put much of his own monies and time into the operation of the well system. RP 380, 402.

In September 2012 Fitzpatrick's gave notice of a \$5.00 raise in water rates to become effective November 1, 2012. An assessment was included in the notice for \$3,300 .00 for cutting down three large maples surrounding the well head.

RP 425- 26. Fitzpatrick's were concerned about the trees and tree limbs falling on the wiring to the wellhead and the wellhead itself, and had the trees taken down. Ex. 48, RP 425.

An objection was made to the \$5.00 increase by a letter, November 1, 2012, signed by five users, the four plaintiffs and Timothy Stewart, pursuant to the Third Party Agreement Sec. 7. Ex. 10. Plaintiffs and Mr. Stewart also objected to the assessment for cutting the trees. Ex 10.

Assessments are not subject to arbitration, as they are made pursuant to the Water Service Agreement. Ex 4. Mr. Fitzpatrick turned this notice over to his attorney, Robert Clough, who indicated he would handle the matter. RP 397-98.

In January 2013 defendants gave written notice to plaintiff Tabitha Grabarczyk, Pamela Owens (Culy), James Lowery, and Jeff Roberts that

they were delinquent in monthly payments for water use. Ex. 69, RP 401-16. This notice was pursuant to the regulations of Queen Ann for collection of delinquent accounts. Ex. 4, Ex. 34. James Lowery and Jeff Roberts called and made arrangements for payment. Plaintiff Tabitha Grabarczyk did not call Mr. Fitzpatrick, Pamela E. Owens did not call Mr. Fitzpatrick. RP 233. Mr. Fitzpatrick turned off their water. RP 415. The plaintiffs brought suit against Queen Ann Water Works, LCC and Gerard and Catherine Fitzpatrick on January 23, 2013. They also sought an Order to have Fitzpatricks turn on their water which was granted and defendants turned on the water. RP 417.

Mr. Fitzpatrick turned off Ms. Garbarczyk and Ms. Owens' water when they were delinquent in the payments for water use. This action was taken under the regulations for Queen Ann Water Works LLC for non-payment. Ex. 4, Ex. 32 ¶ 3, 6, 7, RP 233.

Five individuals signed the letter of objection to the monthly increase to \$42.00. Timothy Steward signed the objection, but paid the \$5.00 increase to \$42.00, as did the rest of the users in Queen Ann Division. In order to enforce negotiation there had to be one-third plus one of the users signing the request. There were a sufficient number of people requesting negotiation; however, one of the users requesting

negotiation, Timothy Stewart, began paying the \$5.00 increase.¹ The same sequence of events took place in 2015 when defendants gave notice to raise rates from \$42.00 to \$47.00 per month. Seven users signed the objection to the increase of \$47.00. One of the plaintiffs passed away after this increase and there was one user and the remaining three plaintiffs, four people, not paying the increase. Ex. 23, RP 238 -39.

Throughout this time both parties were represented by counsel. Plaintiffs were represented by Eugene Austin. Defendants were represented by Robert Clough and then Sarah Blossom through the summer of 2014. RP 400, 418. The undersigned appeared in late 2014, but became active in 2015. The plaintiffs and defendants were actively represented and did have Mediation in 2014. RP 397, 401, 417-20.

On November 15, 2015, the parties, through their attorneys, had a CR2A settlement put on the record. RP 1-10. The plaintiffs prepared a settlement document in July 2016, defendants signed this agreement on receipt of the document, July 26, 2016. On August 29, 2016, plaintiffs moved for Determination of the Status of CR2A Agreement and the Court agreed that it was based on insufficient language for a CR2A agreement.

¹ The Stewarts signed the objection to raising the water rate from \$37 to \$42, but paid the new assessment. The Stewarts also signed the objection to raising the rate from \$42-\$47 and did not pay this raise, though there were still only four users not paying the raise, as Ms. Grabarczyk had passed away.

RP 17-23. Trial began September 16, 2016. Defendants Motion for Reconsideration of the Courts denial of a CR2A Agreement was denied at the beginning of trial. RP 17-23.

Queen Ann Water Works, LLC sent another list of assessments to all the users in a July 16, 2017, letter. The Court, over defendants' objections, ruled she was going to resolve any issues concerning those assessments in trial. Ex. 64, RP 282-83.

Assessments are made under the Water Service Agreement. Ex. 3. at 2, ¶ 3.33. The Water Service Agreement states, "additional fees known as assessments for unexpected nonrecurring repairs." The Court found that cutting trees to protect power lines was not an unexpected nonrecurring repair. CP 158. Defendants did fail to prove the cost of cutting said trees. The Court found that repairs at the wellhead are subject to recovery. Defendants failed to show by a preponderance of the evidence that they paid for repairs at the wellhead. The Court found electrical panel repairs were recoverable, but only \$445.37 of the cost was proven by a preponderance of the evidence. Rebuilding the well house was subject to recovery, but defendants failed to prove the cost beyond a preponderance of the evidence, as they paid the monies to a different company than they

ordered the well house from. The Court found that expenses incurred from an e-coli outbreak and repairs made by defendants as required by the Department of Health were not recoverable. The Court awarded attorney fees to plaintiffs pursuant to RCW 4.84.330 “where actions on contracts or leases provide that attorney’s fees and cost be awarded to one of the parties, the court shall award the prevailing party reasonable attorney fees and costs.” RP 158. There are three contracts in this case. Ex. 1, 2, 3. Each contract provides its own remedy for the parties. The Court awarded attorney fees for the whole case apparently under the Water Service Agreement. Ex. 2. The defendants object to this ruling as the majority of the case was under the alleged breaches of the Third Party Contract Section 5 and Section 7 and other remedies therein. There are no provisions in the Third Party Agreement allowing attorney fees. Ex. 1.

The Court appointed a receiver at plaintiff’s request. CP 158, 3-4.

The Court Ordered that defendants pay back all the users the monies they paid for water above the \$37.00 monthly fee existing in October 2012, as well as monies paid on assessments. CP 158. The users not in the lawsuit all voluntarily paid the rate increases when they were asked, including the users who signed the objection to the rate increases. RP 449-51.

D. ARGUMENT AND BASIS FOR RELIEF

1. CR2A SETTLEMENT AGREEMENT SHOULD BE UPHELD.

On November 15, 2015, counsel for the parties orally put on record the terms of their agreed settlement. RP 1-10. On or about July 25, 2016, plaintiffs presented to defendants a written Settlement Agreement. CP 87. The written agreement set forth the terms and conditions, as counsel entered in the record with their CR2A presentation with Judge Toni Sheldon November 15, 2015. The defendants signed the proposed Settlement Agreement July 26, 2016, returning the document to counsel for plaintiffs. RP 1-10, CP 81, 87, 93, 94.

On August 19, 2016, plaintiffs filed a Motion for Determination of Non-CR2A Status. CP 81. The defendants responded. CP 87. The Court granted plaintiffs' motion. Judge Sheldon stated "the provisions read into the record on November 15, 2015, do not satisfy the requirements of CR2A; therefore there is no CR2A agreement." CP 90. Defendants disagree with the Court's ruling. The defendants filed a Motion of Reconsideration. CP 93, 94. This Motion was heard the first day of trial and the Court affirmed her earlier Order. RP 1-10.

There is no specific language required by a CR2A agreement other than an agreement is reached. The rule requires the attorneys for the

parties put their agreement on the record. The parties agreed that they could put the terms of the settlement on the record. There was no showing or allegation by the plaintiffs that there was error, mistake or misunderstanding when it was put on the record. The written agreement plaintiffs provided defendants in July 2016 confirmed their agreement on the record. CP 87. The parties had a CR2A agreement which was also as stated in the July 26, 2016 Settlement Agreement. This was presented by the plaintiffs and signed by the defendants, which was an offer and acceptance. valid contract.

Trial court rulings concerning CR2A matters are reviewed on the basis of abuse of discretion standard. Abuse of discretion occurs when a decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons. *Morris v. Maks* 69 Wn. App. 865, 850 P.2d 1357 1993.

Washington Civil rule CR2A states:

No 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.

Relevant too is RCW 2.44.010 which reads in part:

“An attorney and counselor has authority: (1) to bind his or her client in any of the proceedings in an action or special proceeding by his

or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her or signed by the party against whom the same is alleged, or his or her attorney”

Judge Sheldon closed the November 15, 2015, CR2A presentation by asking, “(a)nything else that either of you would like to place on the record regarding this stipulated agreement?” Both parties declined to add anything further. RP 10.

Settlement agreements are contracts. There was a CR2A agreement entered into and put on the record pursuant to CR2A and RCW 2.44.010. Mr. Austin stated, “And I believe that’s the agreement and with that the lawsuit would be dismissed and the parties would proceed with the dispute resolution of the final matter remaining.” RP 6. The Court asked the undersigned if that was my clients’ agreement as well, which I replied “Yes”. RP 6, 9-18. The Court vacated this Agreement August 29, 2016. CP 90. The Court’s action should be reviewed under the abuse of discretion standard. Discretion is abused when it is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Morris v. Maks, supra.*

The Court’s opinion makes no sense. At the conclusion of the CR2A presentation, the Court agrees that the parties have a “stipulated

agreement.” RP 10, 2-4. The CR2A agreement was put on the record with the Court recognizing an agreement and both parties agreed that it was their agreement on behalf of their clients. There is no reason for dismissing the parties’ agreement by the Court other than a vague reference to language not satisfying CR2A which requires that an “agreement or consent to proceedings in a cause” must be put on the record to be regarded by the Court. In this case an agreement was made on the record, before the Court, and the attorney for each party agreed that what they put on the record was their agreement on behalf of their clients. This agreement should be enforced and these proceedings be dismissed.

Further confirmation of the agreement is found in the written agreement proposed by plaintiffs and sent to defendants and signed by defendants July 26, 2016. This document is based on the CR2A agreement entered on the record during the CR2A proceeding November 12, 2015, however, it stands on its own. There was an offer from Plaintiffs and defendant signed the offer. Formation of a contract is based on offer and acceptance with no other conditions. *McGregor v. Inter-Ocean Ins. Co* 48 Wn2d 268, 292 P.2d 1054 (1956); *Travis v. Tacoma Pub. Sch. Dist.* 120 Wn.App. 542, 85 P.3d 959 (2004). An offer and acceptance is what occurred in this case.

The CR2A agreement or Settlement Agreement should be upheld and the case dismissed.

2. ATTORNEY FEES WERE IMPROPERLY AWARDED

The Court awarded plaintiffs' attorney fees and cost pursuant to RCW4.84.330.

Conclusion of Law 13 states, "(T)he Plaintiffs are the prevailing party and the Water System Agreement provides for Bakker (Fitzpatrick) to awarded reasonable cost and attorney's fees in any action. Pursuant to RCW 4.84.330, actions on contracts or lease which provides that attorney's fees and costs incurred to enforce provisions be awarded to one of the parties, that court shall award the prevailing party reasonable cost and attorney fees in bringing this suit to enforce the terms of the three governing documents." Conclusions of Law 52, 53, 54, 55, 56.

The evidence showed there was no contractual provision to support the award of attorney fees to enforce terms of the governing documents except in the Water Service Agreement, *infra*. There were three contracts between the plaintiffs and defendants. Each contract provided remedies for the users and/or owners for issues arising under each specific contract. The Third Party Agreement provides remedies for violation of Section 5 in allowing suit against the owner, and remedies for violation of Section 7 would be to Order negotiation or arbitration. The Third Party Agreement does not provide attorney fees for either party under Section 5 or Section 7, nor is there a provision the Third Party Agreement awarding fees to either users or owners. Ex. 1, at 4, Ex. 1 at 5. The Protective Covenant Agreement provides that if there is a dispute it should be referred to an

Arbiter and the Arbiter could award attorney fees. Ex. 2 at 2-3. The Water Service Agreement provides for attorney fees if the provisions of the agreement have to be enforced through legal action. Ex. 3, at 4, §11.1. The nature of the legal action would be seeking payment for water use, filing liens or assessments. Ex. 3 at 2, 3.1, 3.3, at 3, §VII.

A large majority of testimony during trial dealt with the parties' rights and obligations under the Third Party Beneficiary Contract, Section 5 and Section 7. Ex 1. There was minimal testimony under the Water Service Agreement. Plaintiffs sought resolution of an Assessment in 2012 for cutting trees. CP 2. The Court on its own motion included assessments sent to the users by defendants in July 2017 be evaluated. This was objected to by defendants. Ex. 64, RP at 282, 5-25, RP at 283, 1-13. If it is deemed that fees should be awarded under the Water Service Agreement then both parties should be awarded fees. The third contract, Protective Covenants Agreement, was not mentioned in this case other than one of the governing contracts. Ex. 2.

The Water Service Agreement set out the owners' duties to provide safe water meeting State requirements. Ex. 3 at 1, 1.2. The owners' rights to collect delinquent accounts, assessments and file liens for the same. Ex. 3, at 2, ¶ 6.1, Ex. 3, 3, § VII. If Fitzpatrick had to place liens on the users' properties and/or had to use legal assistance he would be entitled to

attorney fees and cost. Ex. 3, §XI, 11.1. RCW 4.84.330 would make the above provision concerning attorney fees and cost reciprocal to the prevailing party.

On appeal whether a party is entitled to attorney fees is an issue of law that is reviewed de novo. *Boguch* 153 Wn. App. 595, 615 (2009). The general rule in Washington is the prevailing party is not entitled to attorney fees. The exception to this general rule is attorney fees and costs can be awarded by agreement of the parties, statute or equity. *Dempere v. Nelson* 776 Wn.App. 403 (1994). In this case there is no contractual provision in the Third Party Agreement which would entitle plaintiffs or defendants to attorney fees whether the action was under Section 5 or Section 7 or other related provisions therein.

The plaintiffs might contend under the Water Service Agreement attorney fees are allowed to the prevailing party regardless of the basis of their claim. Such allegation would be improper. There are three (3) separate contracts dealing with separate remedies for the parties depending on the nature and type of dispute. If it is deemed there are separate contracts then the Court should segregate the fees. Attorney fees should be segregated from other claims where no fees are allowed. *Boguch v. Landover Corp.*, supra, *King County v. Vinci Construction Grands Projects/Parsons RCI/Frontier-Kemper*, JV 188 Wn2nd 618, 632 (2017);

Fisher Properties, Inc. V. Arden-Mayfair, Inc. 106 Wn2nd 826, 849-850 (1986).

Where attorney fees are not allowable on all claims then there has to be a segregation of attorney fees under the contract allowing the fees. In *King County v. Vinci Construction Grands Projects/Parson RCI/Frontier-Kemper, JV*, 188 Wn. 2d618, 632 (2017) the Court stated “If . . . an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues.”

If it is determined that time should be segregated the plaintiffs billing records reflect less than 10 hours of time spent on assessments. Both parties prevailed concerning assessments and there should be no award of fees to either party or remanded to determine the fees.

3. THE COURT ERRED IN APPOINTING A RECEIVERSHIP AND NOT MAKING FINDINGS SHOWING IT WAS REASONABLY NECESSARY AND THERE WERE NO OTHER OPTIONS

The court ruled a custodial receiver should be appointed. CP 157, 158, Conclusion of Law 15. The Court further stated, “(F)or purpose of operating and maintaining the water system, the custodial receiver shall

have full right to hold, use, operate and manage and control the same for the benefit of the parties for whom the Third Party Beneficiary Contract Agreement was made, with full right to collect the charges for services at rates not in excess of those specified or provided for in that Agreement.” Conclusion of Law 16. The Court also directed, “(T)he custodial receiver appointed by the court shall be entitled to such reasonable compensation and expenses including reasonable attorneys’ fees as may be determined by the Court.” Conclusion of Law 17.

A receiver may be appointed by the superior court under RCW 7.60.025. RCW 7.60.025 was enacted in 2004. RCW 7.60.025 states, “A receiver may be appointed by the superior court of this state in the following instances, . . . a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate.” (Emphasis on added). There were no findings by the Court that a receiver was reasonably necessary nor what other available remedies were either available or are inadequate. The Court further ordered that whomever would act as receiver is bound by the three contracts. Ex. 1, Ex. 2, Ex. 3. The defendants tried to bring the company under the jurisdiction of the Utility and Transportation Commission in 2016 and plaintiffs objected to such action due to the pending suit. There are many options

other than a receiver, with much less expense, that should be evaluated.
RP 720-24.

Queen Ann Water Works, LLC is in a very precarious position. The testimony showed the owners have not been able to build up an emergency fund. RP 354- 55, 375-76, 378-79. The owners have not received income from providing water for the users and have not been able to recoup their expenses from the users to keep the system functioning.
Ex.71.

4. DID THE DEFENDANTS VIOLATE SECTION 5 AND SECTION 7 OF THE THIRD PARTY AGREEMENT.

Did the Court abuse its discretion in Finding of Fact 57
“Defendants Fitzpatrick collected \$47.00 per month from some water users and attempted to collect this amount from other water users. This has continued for more than 30 days.”

The evidence showed that Fitzpatrick's did raise the rates to \$42.00 in November 2012 and again in March 2015. In both instances there were objections to the raises by five users in October 2012 and seven users in 2016. In both instances after notice of the objections only four persons were not paying the increases. The rest of the users were paying the increases, all the users received the same billing monthly and those that

didn't pay, primarily the plaintiffs were assessed late charges. There is no indication that defendants tried to collect the late payments, late fees or place liens on any of the plaintiffs' property. Defendant does not think that this evidence would be sufficient to allow suit under Section 5 of the Third Party Agreement.

If the above action is not a violation of Section 5 then there should be no lawsuit filed and the case should be dismissed. If the claim is plaintiffs violated Section 7 in not negotiating or arbitrating this matter the matter should be remanded with an Order that defendants arbitrate with users concerning the new rates.

However defendant does not feel he violated Section 7 of the Third Party Agreement. First, the defendant turned this matter over to an attorney as did plaintiffs. Both parties have been represented by attorneys since the objection by plaintiffs in November 2, 2012. Ex. 10. The demand of the users in Ex. 10 is confusing in that the first thing they wanted was Arbitration which only occurs if negotiation would not lead to resolving the issues.

It is beyond reason that the parties can be represented by attorneys from 2012 – 2016 when trial began without either party making a demand for arbitration which the process can be used by either party in requesting arbitration. Nonetheless the parties exchanged numerous attempts to

resolve in part as they did have a mediation, had active representation and entered into a CR2A agreement in 2015. For the Court to conclude that defendant failed in this aspect of the Third Party Agreement, Section 7, not negotiating or arbitrating without knowledge of what occurred all those years in without good basis.

There is no indication that defendants tried to collect the late payments, late fees or place liens on any the plaintiffs' property. Defendant does not think that this evidence would be sufficient to allow suit under Section 5.

5. ASSESSMENTS SHOULD BE RECONSIDERED

Plaintiffs raised concern in their complaint concerning a 2012 assessment made under the Water Service Agreement, CP 2, Ex. 3, at 2, ¶3.3. Under the Water Service Agreement defendants could submit assessments for “unexpected nonrecurring repairs. Ex. 3, at 2, ¶ 3.3. Assessments cannot be made until such time Fitzpatrick has “installed the required equipment/well apparatus or made the repairs and such work is performed in accordance with the laws of the State of Washington, Department of Health Services.” Ex. 3, at 2, ¶ 3.3. The assessment was made for cutting three large maple trees that surrounded and overhung the wiring to the well house and well house. cite These trees constituted a danger to the well house and wiring. RP 423-30, 585-98.

The Court ruled that cutting the maple trees was not an “unexpected nonrecurring repairs” Conclusion of Law 25. Logic would imply that saving electrical wire or water shed destruction should qualify as an “unexpected non-recurring repair.” That would fall within the scope and intent of unexpected nonrecurring repairs. We agree the defendant did not prove his expenses for cutting the trees but ask that cutting dangerous trees to protect from having property damage would be considered a “non-recurring expense.” RP 425, Ex. 72.

The defendants submitted new assessments to plaintiffs on July 6, 2017. Ex. 75. The Court, over defendants’ objection, admitted the assessments for the Court’s consideration. The defendant objected for the reason not prepared for trial on these issues and this would only involve plaintiffs and there are other users involved that were not represented or in Court. The Court abuse its discretion in admitting these assessments. Ex. 64.

The July 6, 2017, letter to the customers listed several repairs and expenses the defendants had incurred for these repairs. There were several instances in the list of expense that the defendant provided bills and testified that he paid same. I think common sense indicates that he paid these bills. The last item mentioned was the building of the new well house. Finding of Fact 40 indicates that “Rebuilding the well house is

subject to recovery by assessment under terms of the Water Service Agreement.” Mr. Fitzpatrick provided a proposal to build the well house. Ex. 64, and provided a copy of a cashier check to pay the bill of \$2,999.00 (\$3,000.00). The check was made to a different company. This was the same person. CP 168 Defendants would ask that this be corrected.

The defendants would agree that there should be no recovery for e-coli correction expenses and repairs of the hatch on the reservoir as they were mandated by the Department of Health pursuant the Third Party Agreement. Ex.1.

6. DEFENDANTS SHOULD NOT BE PROHIBITED FROM COLLECTION OF WATER FEES OVER \$37.00

Remedies for perceived breach of contract were contained within the contract. In this matter some parties contested the rate increase as a breach of the contract. Other parties assented to the rate increase. It was open knowledge that the plaintiffs were contesting the rate increase. Even so, assenting parties chose not to join in contesting the rate increase. Assenting parties to the rate increase are free to waive any breach of contract if they freely chose to do so with knowledge that a breach may have occurred. At no point in time did the parties who assented to the rate increase take affirmative steps to join in the challenge to the rate increase. Because the assenting parties voluntarily and with knowledge of existing

remedies chose to assent to the rate increase, the trial court should not impose a remedy for the rate increase to non-challenging assenting parties. Therefore, the court imposition of refund for the rate increase to the non-challenging assenting parties, who are not parties to the litigation, should not be allowed.

E. CONCLUSION

Defendants request that this case be dismissed as the parties entered into a Settlement Agreement, both on the record and in writing.

If the Court finds there is not a Settlement Agreement, defendants ask:

1. The case be dismissed as plaintiffs failed to prove defendants breached the Third Party Agreement or the Water Service Agreement.
2. Attorney fees not be allowed to plaintiffs.
3. If attorney fees are allowed under The Water Service Agreement that the matter be remanded for that consideration.
4. That the case be remanded for the appropriate findings under RCW 7.60.025.

5. That assessments be awarded to defendants in those instances where a bill was provided and testimony that those bills were paid, including the wellhouse bill for \$4,000.00.

DATED this 22nd day of May, 2019.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that on the 22n day of May, 2019, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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