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Division II
State of Washington
Case No. 529840-0-II
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**IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE
OF WASHINGTON**

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

Respondents/Respondents,

vs.

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

Appellants.

Appeal from the Superior Court of Mason County

Superior Court Case No. 13-2-00049-4

BRIEF OF RESPONDANT

Eugene C. Austin
Attorney for the Respondents
WSBA #31129
PO Box 1753
Belfair, WA 98528
(360) 551-0782

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1 STATEMENT OF THE CASE

2 This case involves the enforcement of Contractual agreements
3 between Queen Ann Waterworks and its customers. Queen Ann
4 Waterworks has repeatedly breached its obligations to its customers who
5 are entitled "as a matter of right to the entry of an order appointing a
6 receiver" to operate the water system. Exhibit 1.

7 Queen Ann Waterworks is a small residential water system serving
8 approximately 14 properties. It is currently operated by the Queen Ann
9 Water Works LLC, which is owned and managed by its members, Gerard
10 A. Fitzpatrick and Catherine L. Fitzpatrick, who in turn are successors to
11 the original owners, Peter J. Bakker and Jean T. Bakker. CP at 248-252.
12 As successors to the rights, duties, and obligations entered into by the
13 Bakkers for the operation of the Queen Ann-Hill Water System, Queen
14 Ann Water Works LLC and the Fitzpatricks are subject to the terms of the
15 existing agreements established for the operation of the water system and
16 for the benefit of its customer. Those agreements are:

- 17 1. The Declaration of Water Services for Queen Ann-Hill
18 Water Division of Belfair View Estates, dated November
19 20, 1992 (1992 Declaration)
- 20 2. The Declaration of Protective Covenants for Queen Ann-
21 Hill Division of Belfair View Estates, dated November 20,
22 1992 (Covenants); and
- 23 3. The Third Party Beneficiary Contract Agreement, Dated
24 June 24, 1994 (Beneficiary Contract).

1 Exhibits 1, 2, 3. In creating these agreements, the Bakkers intended them
2 to run with the land, encouraged people to buy land service by the water
3 system, that they would benefit the future owners, and they would govern
4 the operation of the water system. The agreements included the rights and
5 responsibilities of the parties and outlined how the water system was to
6 operate in relation to the users. All of the agreements were unilaterally
7 issued by the Bakkers in preparation of their development project.
8 Because the agreements run with the land, the users had to accept them
9 when they purchased their properties.

10 In 2008, Gerard Fitzpatrick began operating Queen Ann
11 Waterworks and issued the 2008 Declaration. See, Exhibit 4. Soon
12 thereafter, Appellants began increasing the water rates and defaulting on
13 obligations under the governing agreements for the water systems. In
14 November 2011, Appellants attempted to increase that rates and Pamela
15 Owens¹ sent a letter to Appellants objecting to the rate increase and
16 notifying them of the need to provide a 90 day notice. Exhibit 22. Gerard
17 Fitzpatrick claimed he was not aware of the requirement prior to this
18 letter. VRP at 412. Because no other users objected, the rate went into
19 effect. In 2012 the Appellants attempted to raise the rates once again and
20 assess additional assessments. Exhibit 25. Despite being aware of the 90

21 ¹ Now Pamela Culy.

1 notice requirement, the Appellants failed to give the proper notice. *Id.* This
2 time five users objected in writing to the rates and requested evidence to
3 support the assessment. Exhibit 10. This met the requirement outlined in
4 the Third Party Beneficiary Contract Agreement. Exhibit 1. The
5 Appellants did not respond and declined to negotiate or submit the mater
6 to arbitration as required. VRP at 675. The Respondents the filed their
7 lawsuit to enforce their rights under the agreements. CP at 1-7.

8 After filing the complaint, attempts were made at negotiating a
9 settlement, including mediation. However, despite some progress, these
10 efforts were unsuccessful. Mr. Fitzpatrick left the mediation during
11 opening statements and did not return, citing medical issues. CP at 58. The
12 mediation continued with Appellants' attorney, after the initial meeting
13 Appellants' attorney informed that Respondents' attorney that her clients
14 would refuse to negotiate any of the remaining issues. As a result, no
15 agreement was reached.

16 In October 2014, negotiations continued with new counsel. In
17 2015, the Respondents made an offer to Appellants in an effort to compete
18 a settlement. On November 12, 2015, the parties stated the "basic
19 principles" of a possible agreement to the court. VRP at 2. There were
20 numerous issues that remained to be resolved. VRP at 2-7. It was believed
21 that these issues could be resolved quickly, but negotiations dragged on
22

1 for another eight months. CP at 45. The Appellants sought to enforce the
2 "basic principles" as a CR2A agreement, and Respondents asked the court
3 for a determination of Non-CR2A Status. CP at 45 - 50. Because the
4 "basic principles" did not represent a complete agreement and it did not
5 meet the requirements of a CR2A, the Superior Court found that no
6 agreement existed and set the matter for trial. CP at 83.

7 Trial began on September 21, 2016. The trial was delayed
8 numerous times, mostly to accommodate health needs of Appellant,
9 Gerard Fitzpatrick. VRP at 283. During the pendency of the trial
10 Appellants attempted to make additional rate increases and assessments
11 without following the proper procedure; these were objected to in writing.
12 Exhibit 11. The Appellants also attempted to have the UTC take
13 jurisdiction without the court's permission. VRP 297-298. Because the
14 court already had jurisdiction and these new actions involved the same
15 agreements, issues, and subject matter, they were included in the trial for
16 judicial economy. VRP 283. The trial finally concluded January 31, 2018.
17 VRP at 1001. On August 13, 2018, the court issued extensive Findings of
18 Fact and Conclusions of Law. CP at 248-271. The court also issued a
19 Memorandum Decision, Findings of Fact and Conclusions of Law Re:
20 Award of Attorney's Fees. CP at 272-291. The Superior Court found that
21 Appellants had breached the agreements on numerous occasions, had
22

1 attempted to increase rates in violation of the agreement, had attempted to
2 charge for improper items, had failed evidence to justify most of the
3 assessments, determined that the contracts allowed for the appointment of
4 a receiver as a matter of right, and awarded attorney fees to the
5 Respondents. CP 248-291.

6 Appellants appealed.

7 ARGUMENTS

8 *I. No CR2A Agreement exists because the parties never agreed*
9 *on all of the material terms and did not resolve all issues.*

10 Trial court rulings concerning CR2A matters are reviewed on the
11 basis of abuse of discretion standard. Abuse of discretion occurs when a
12 decision of the trial court is manifestly unreasonable or based on untenable
13 grounds or reasons. *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357
14 (1993).

15 Appellants neglected to create a transcript of the hearing on August
16 29, 2016, which dealt with the determination of non-CR2A status. This
17 means that the record submitted by the Appellants is lacking important
18 information relating to the lower court's findings and reasons for ruling
19 that no CR2A agreement existed. In such cases, the appellate court should
20 not rule on the matter and defer to the findings of the trial court. *Bulzomi*
21 *v. Dep't of Labor & Indus.*, 72 Wn.App. 522, 525, 864 P.2d 996 (1994);

1 see also RAP 9.2(b). However, even absent this information, there are
2 sufficient facts to demonstrate that a valid CR2A was never completed and
3 that the agreement stated in the record outlined part of an anticipated
4 agreement.

5 This case was brought against Appellants by the Respondents in
6 2013. The Respondents sought to enforce the agreements governing the
7 operation of Queen Ann Water Works and seeking the appointment of a
8 receivership for the water system as provided by the Beneficiary Contract
9 for breach of said agreements. CP at 1-7. Among other alleged breaches of
10 the governing agreements, Appellants had, on several occasions, sought to
11 unilaterally raise rates, change the terms of the agreements, and impose
12 special assessments. *Id.* The Respondents, along with other members of
13 the water system, provided written objection as provided in the agreement
14 and demanded arbitration/mediation of the issues. Exhibit 10, 11.
15 Appellants declined to comply, as required by governing agreements
16 (VRP at 675), and instead began charging the Respondents for the
17 improper amounts, along with late fees. Exhibits 25 - 31, 65. The
18 Respondents filed suit, after which the court ordered mediation. The
19 mediation was unsuccessful. Trial dates were set thereafter, but were
20 continued when Appellants' present attorney began representing them in
21 October 2014 and negotiations began, again.

1 Some progress was made, but the process was slow. About
2 November of 2015, in an effort to resolve the matter quickly, the
3 Respondents offered to pay their own attorney fees along with some other
4 concessions. However, this was subject to the matter actually being
5 resolved. The parties believed that they were close to an agreement and
6 notified the court so that trial could be continued. At a hearing on
7 November 15, 2015, the "basic principles" for the tentative Settlement
8 Agreement was presented to the court (VRP at 2), but this was not an
9 actual agreement. The reason was that a number of issues were left
10 unresolved and other items prerequisite to the final agreement were never
11 completed.

12 There were amendments that were to be added to the agreement
13 that were not part of the record. VRP 3. Wording on key parts was yet to
14 be finalized. VRP at 2. There was unresolved "contention over a special
15 assessment for tree cutting." *Id.* The Appellants were to provide proof that
16 the work was done and what amounts were paid. *Id.* A deadline for this
17 was to be established; however, even that was still to be determined. *Id.*, at
18 3 - 4. There were unresolved issues relating to notice requirements for an
19 assessment, providing proof of work being done, and when the proof had
20 to be provided. *Id.*, at 5. A new dispute resolution clause still needed to be
21 negotiated. *Id.*, at 6. Once all the open issues were completed and all

1 parties agreed "the effective date will be the date of the last signature
2 obtained for the settlement." *Id.* This last requirement demonstrates that
3 the parties had not yet agreed to a full binding CR2A agreement.

4 Appellants' attorney suggested that the remaining issues could be
5 resolved in "two weeks." VRP at 8. Despite this, no agreement was
6 actually concluded, and negotiations continued for another eight months,
7 driving up costs significantly. The Respondents believed that the lengthy
8 negotiations constitute a rejection of their offer from November 2015.

9 Rule 2A states that:

10 No agreement or consent between parties or attorneys in
11 respect to the proceedings in a cause, the purport of which
12 is disputed, will be regarded by the court unless the same
13 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.

14 CR 2A. Civil Rule 2A allows agreements that are read into the record to
15 be enforced by the court. However, such agreements are governed by the
16 laws and rules that govern in contractual agreements. *Cruz v. Chavez*, 186
17 Wn.App. 913, 347 P.3d 912, 920 (Div. 1 2015) citng *Lavigne v. Green*,
18 106 Wn.App. 12, 20, 23 P.3d 515 (Div. 3 2001). The appellants admit that
19 settlement agreements are contracts. Brief of Appellants, at 24. Therefore,
20 for a 2A agreement to be binding, there must be a meeting of the minds,
21 there must be mutual assent. *Cruz v. Chavez*, 186 Wn.App. 913, 347 P.3d

1 912, 920 (Div. 1 2015); *Badgett v. Security State Bank*, 807 P.2d 356, 116
2 Wn.2d 563, 574 (Wash. 1991). In the current case, there was clearly no
3 meeting of the minds because negotiations dragged on for over eight
4 months after the Respondents offer to settle. Further, for an offer to be
5 accepted, the acceptance must mirror the offer. *Hodge v. Development*
6 *Services of America*, 65 Wn.App. 576, 581 - 582, 828 P.2d 1175 (Div. 1
7 1992). In the current case, this did not happen as evidenced by eight
8 months of additional negotiation. The fact that there were additional
9 negotiations and counter offers, demonstrate that the Respondents' offer
10 was actually rejected. Further, contractual agreements require that all the
11 terms be agreed upon for it to be binding on the parties. *Hubbell v. Ward*,
12 40 Wn.2d 779, 246 P.2d 468, 785 (1952). In the current case, what was
13 read into the record on November 15, 2015, was the "basic principles," not
14 an actual agreement. There were numerous clauses that had yet to be
15 completed. VRP at 2-7. The language of the agreement was not settled.
16 *Id.*. Without the completion of the terms, language, and all requirements, it
17 is not possible to call the framework of the agreement, as presented to the
18 court, a complete agreement. As such, it is not an agreement at all. If a
19 party agrees to do "A and B" if "X and Y" are agreed to, there is no
20 agreement if "X and Y" are never agreed to. Half an agreement is no
21 agreement at all. This is what has happened here. It would be unjust to
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1 force such an agreement upon a party when the terms of the agreement
2 were never completed.

3 CR 2A actually prohibits the enforcement of incomplete
4 agreements.

5 Civil Rule 2A precludes enforcement of a settlement
6 agreement where there is a genuine dispute of material fact
7 regarding the existence of the agreement. Under principles
8 of contract law, which govern settlement agreements,
9 mutual assent is an essential element for the formation, or
10 existence, of a valid agreement.

11 *Cruz v. Chavez*, 186 Wn.App. 913, 347 P.3d 912, 915 (Div. 1 2015).

12 While it is true that Rule 2A stipulations can be enforced by the
13 court, this can only be done where the agreements are complete and can
14 stand by themselves. *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468, 785
15 (1952). There cannot be any dispute over the material terms of the
16 agreement. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 696 -697, 994 P.2d
17 911 (Div. 1 2000). If an agreement that is read into the record is not
18 complete, it is not an agreement and is unenforceable. 2A stipulations are
19 intended to be complete agreements by themselves. This requires that all
20 the language, rights, and duties of the parties must be included. In other
21 words, the 2A agreement only needs to be printed out and signed. This is
22 not the case here. Further, even if this were a 2A agreement, it should not
23 be enforced where the parties intended something else. Here the

1 Respondents anticipated that specific terms would be accepted, actions
2 performed, and language agreed upon, which was to happen within a very
3 short time. VRP at 2 - 8. Instead, the terms continued to be negotiated and
4 changed for another eight months. This is not an agreement; rather it
5 becomes a tool to punish the Respondents for seeking to enforce their
6 rights and trying to resolve the issue in an amicable way. The court should
7 not treat the incomplete settlement framework as presented in court as an
8 enforceable agreement.

9 Since the framework for the Settlement Agreement presented to
10 court was not complete and was not agreed upon by the parties as
11 demonstrated by the protracted negotiations that followed, it is not an
12 enforceable agreement. The Superior Court found "that the provisions read
13 into the record on November 15, 2015, do not satisfy the requirements of
14 CR 2A. CP, at 83. When it is disputed that negotiations resulted in an
15 agreement, noncompliance with the rule renders an agreement
16 unenforceable. *Bryant v. Palmer Coking Coal Co.*, 67 Wn.App. 176, 834
17 P.2d 662 (Div. 1 1992). It is unjust to require one party to abide by a
18 partially formed agreement after the other party has rejected the offer
19 through repeated counter offers and substantially increased the other
20 parties' costs.

21 These reasons justify the Superior Court finding that "the
22

1 provisions read into the record do not satisfy the requirements of CR2A"
2 and that there was no CR2A Agreement. CP at 83. The Court of Appeals
3 should uphold the decision of the Superior Court and find that there was
4 no agreement.

5 *II. Attorney Fees Were Properly Awarded*

6 Appellate courts in Washington

7 apply a two-part review to awards or denials of attorney fees: (1)
8 we review de novo whether there is a legal basis for awarding
9 attorney fees by statute, under contract, or in equity and (2) we
10 review a discretionary decision to award or deny attorney fees and
11 the reasonableness of any attorney fee award for an abuse of
12 discretion.

13 *Gander v. Yeager*, 167 Wn.App. 638, 647, 282 P.3d 1100 (Div. 2 2012).

14 An award of attorney fees is an issue of law that this court reviews de
15 novo. *King County v. Vinci Construction Grands Projets/Parsons*

16 *RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 625, 398 P.3d 1093 (2017)

17 citing *Durland v. San Juan County*, 182 Wn.2d 55, 76, 340 P.3d 191

18 (2014). A "court may award fees only when doing so is authorized by a

19 contract provision, a statute, or a recognized ground in equity." *Id.*, citing

20 *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 325, 88 P.3d

21 395 (2004). RCW 4.84.330 authorizes an award of attorney's fees and costs to

22 the prevailing party whether that party is the party specified in the contract or

23 not. If there are grounds to award attorney fees, the reasonableness of

1 those fees is a matter within the discretion of the trial court. *Gander v.*
2 *Yeager*, at 647. "Whether the three agreements constitute one contract or
3 more is a question of interpretation or law for the court and does not create
4 a factual issue." *Turner v. Wexler*, 14 Wn.App. 143, 147, 538 P.2d 877
5 (Div. 3 1975). The purpose of contract interpretation is to ascertain the
6 intent of the parties. *Kelley v. Tonda*, 198 Wn.App. 303, 311, 393 P.3d
7 824 (Div. 1 2017) citing *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169
8 Wn.App. 263, 274, 279 P.3d 943 (2012); see also, *Turner v. Wexler*, at
9 146.

10 In November 1992, the original developers executed two unilateral
11 contracts; the Declaration of Water Service, and Declaration of Protective
12 Covenants. Exhibit 3, 2. Each of these agreements purported to be binding
13 on the future owners of property purchased from the developers. *Id.* The
14 Declaration of Protective Covenants dealt with various unrelated matters,
15 but required owners to obtain their water exclusively from QAWS. Exhibit
16 2, at 2. Thereafter, the developers executed the Beneficiary Contract, which
17 was for the benefit of future owners and intended to induce financing for the
18 purchase of land serviced by the water system. Exhibit 1, at 1-2. The agreement
19 provided additional details and obligations for the purpose of supplying of water.
20 Exhibit 1. The Declaration of Water Service and Beneficiary Contract deal
21 specifically with the provision of water, billing, and related items. After

1 these documents were created by the developers, the future owners were
2 required to accept the agreements when they purchased property covered
3 by the agreements. These agreements are necessarily interrelated and
4 interdependent; they are part of the same transaction and should be read together
5 as a single contract. *Kenney v. Read*, 100 Wn.App. 467, 474, 997 P.2d 455
6 (Div. 3 2000).

7 A contract may consist of one or several writings. *Smith v. Skone*
8 & *Connors Produce, Inc.*, 107 Wn.App. 199, 206, 26 P.3d 981 (2001). All
9 writings that are part of the same transaction are interpreted together.
10 Restatement (Second) of Contracts § 202(2) (Am. Law Inst. 1981). "When
11 several instruments are made as part of one transaction, they will be read
12 together and construed with reference to each other." *Kenney v. Read*, at
13 474 citing *Boyd v. Davis*, 127 Wash.2d 256, 261, 897 P.2d 1239 (1995).
14 "This is true even when the instruments do not refer to each other and
15 when the instruments are not executed by the same parties." *Kenney v.*
16 *Read*, at 474 citing *Turner v. Wexler*, 14 Wash.App. 143, 146, 538 P.2d
17 877, *review denied*, 86 Wash.2d 1004 (1975). "Instruments which are part
18 of the same transaction, relate to the same subject matter and are executed
19 at the same time should be read and construed together as one contract,
20 even though they do not refer to one another." *Turner v. Wexler*, 14
21 Wn.App. 143, 146, 538 P.2d 877 (Div. 3 1975). Although, the agreements
22

1 were not created on the same date, they are essentially contemporaneous
2 because they were created by the developer for the same purpose and
3 cover the same subject matter. Further, one of the intended parties, the
4 landowner, only becomes a party to the agreements at a later date and
5 becomes a party to all three at the same time. However, it is not necessary
6 for the contracts to be created on the same date because the developers
7 intended them to run with the land and function together as they arose out
8 of the same "contractual relationship". *Turner v. Wexler*, at 147. "Whether
9 the three agreements constitute one contract or more is a question of
10 interpretation or law for the court and does not create a factual issue." *Id.*

11

12 Although the Declaration of Water Service established first in
13 1992, Beneficiary Contract deals with same issues and transactions (for
14 example, rates, charges, assessments for repairs, procedural matters, etc).
15 These agreements are contemporaneous because the landowners enter into
16 them when they buy the land; prior to that time, the owners are not parties
17 to the agreements. However, because the agreements run with the land, the
18 landowners become parties to all three agreements at the same time, when
19 they purchased their land. "When parties contemporaneously execute
20 multiple agreements that address interrelated subjects, [courts] are bound
21 to construe them together as one contract to discern the parties' intent."

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1 *Hays v. Hug*, 243 Or. 175, 177, 412 P.2d 373 (1966); *Waxwing Cedar*
2 *Products v. C & W Lumber*, 44 Or.App. 167, 170, 605 P.2d 719 (1980);
3 see also, *Turner v. Wexler*, at 146 - 147; *Kelley v. Tonda*, 198 Wn.App.
4 303, 311, 393 P.3d 824 (Div. 1 2017) citing Restatement (Second) of
5 Contracts § 202(2) (Am. Law Inst. 1981).

6 In the current case, the Superior Court found that

7 The Declaration of Protective Covenants for Queen Ann-Hill
8 Division of Belfair View Estates; the Declaration of Water Service
9 for Queen Ann-Hill Water Division of Belfair View Estates (aka
10 the Water Service Agreement); and the Third Party Beneficiary
11 Contract Agreement, are the governing agreements In the current
case. These agreements run with the land; bind the Bakkers'
successors in interest to the water system and bind the owners of
the properties within the Queen Ann-Hill Division of Belfair View
Estates and their successors.

12 CP at 251 (Findings of Fact and Conclusions of Law); see also *Id.*, 262.

13 The Appellants do not dispute this fact. Brief of Appellant, at 11. These
14 documents are interdependent and Respondents brought their action to
15 enforce their contractual rights under all three agreements. The Appellants
16 apparently believe that the governing agreements are completely
17 independent and that attorney fees in the case can be divided between
18 them. Brief of Appellant, at 28.

19 Attorney fees are proper where the contract allowing the fees is
20 central to the case. *Boguch v. Landover Corp.*, 153 Wn.App. 595, 600, 224
21 P.3d 795 (Div. 1 2009); *Columbia State Bank v. Invicta Law Group PLLC*,

1 199 Wn.App. 306, 330-331, 402 P.3d 330 (Div. 1 2017). Here the
2 Beneficiary Contract was central to the case. All three agreements were
3 needed for establishment for the water system in 1994. The Declaration of
4 Water Service and Beneficiary Contract both dealt specifically with the
5 operation of the water system. Under the Beneficiary Contract, the
6 company was to establish a water system

7 for the purpose of supplying water service to buildings, residences
8 and other improvements located in areas and subdivisions adjacent
9 to or in the vicinities of said water supply systems and for that
10 purpose will construct, lay and maintain water storage and
11 distribution facilities, water mains, lateral lines, manholes,
pumping stations, and all other facilities and appurtenances
necessary to maintain an adequate water supply for domestic
consumption for the occupants of such buildings, residences, and
other improvements in said areas and subdivision;"

12 Exhibit 1 at 1.

13 [T]he company warrants that all the property described in
14 Schedule A, as well as all water supply system and or sewage
15 systems hereafter acquired by the Company shall be made subject
16 to the Agreement by recordation of appropriate covenants,
reservations, restrictions, or conditions in such mAnnr as is
required by Washington law to put all persons on notice that such
properties have been subjected to the terms of the Agreement . . .

17 *Id.* The Agreement further "contemplated" that properties serviced by the
18 water system would be developed and that the agreement would aid in
19 inducing "mortgage loans" for properties and improvements. *Id.*
20 Additionally, the agreement states that

21 (a) This Agreement is made not only with the Representative in its
22

1 individual capacity but also as the representative of and for the
2 benefit of the present and future owners or occupants of all and
3 each of the properties, buildings, residences, and other
4 improvements which are now or may hereafter be served by the
5 water supply systems of the Company as well as the holders of any
6 mortgage or mortgages covering any such buildings, residences,
7 and other properties and improvements.

8 *Id.*, at 2. In section 10 of the agreement the terms are made to run "with
9 the land" and

10 . . . the Company shall make all water supply systems now owned
11 or hereafter acquired subject to this Agreement by recordation or
12 appropriate covenants, reservations, restrictions, or conditions in
13 such manner as is required by Law to put all persons on notice that
14 such water supply systems have been subjected to the terms of this
15 Agreement are deemed to be covenants, reservations, restrictions
16 or conditions imposed upon and running with the land and
17 properties now owned or hereafter acquired by the Company.

18 *Id.*, at 5, § 10. Section six authorizes the company to

19 *establish, amend or revise from time to time and enforce Rules*
20 *and Regulations for water Service and Rules and covering the*
21 *furnishing of water supply service within said areas* or
22 subdivisions, provided, however, all such rules and regulations
23 established by the Company from time to time shall at all times be
24 reasonable and subject to such regulations as may now or hereafter
be provided by law; and *provided further that no such rule or*
regulation so established, amended or revised can be inconsistent
with the requirements of this Agreement nor shall the same
abrogate any provisions hereof.

25 *Id.*, at 3-4, § 6 (emphasis added). The Beneficiary Contract was the central
26 agreement to the water system. It established initial rates, provided for
27 notice, established procedures for objecting to rates and enforcing
28 conditions. The two other agreements give further effect to the purposes of

1 the Beneficiary Contract. For example, the Declaration of Water Service
2 for Queen Ann-Hill Water Division of Belfair View Estates (Declaration
3 of Water Service) establishes "Rules and Regulations for water Service
4 and Rules and covering the furnishing of water supply service" as
5 contemplated by section 6 of the Beneficiary Contract. Also, the
6 Declaration of Water Service cannot alter or invalidate any of the terms of
7 the Beneficiary Contract. Exhibit 4, § 6. The Declaration of Water Service
8 cannot charge rates or assessments not contemplated by the Beneficiary
9 Contract, as this would be inconsistent with that agreement. Yet the
10 Declaration of Water Service established some charges and required
11 "reasonable rates" in Section 3. Exhibit 2. The Beneficiary Contract then
12 established initial rates in Schedule "B," including the same hook up fee
13 that was set out in the Declaration of Water Service in section 2. Exhibit 1
14 and 2. The Declaration of Water Service is, therefore, dependent on the
15 Beneficiary Contract and the Beneficiary Contract is dependent on the
16 Declaration of Water Service and should be read together. *Turner v.*
17 *Wexler*, 14 Wn.App. 143, 146 - 147, 538 P.2d 877 (Div. 3 1975); see also
18 *Kenney v. Read*, 100 Wn.App. 467, 474, 997 P.2d 455 (Div. 3 2000).
19 Further, the Declaration of Water Service states that it is made "to
20 establish an agreement for providing water service," the same purpose
21 stated in the Beneficiary Contract. Exhibits 1; Exhibit 2. All three of these

1 agreements run with land and are "so closely connected in purpose . . .
2 that in reality only one contractual relationship existed." See, *Marsch v.*
3 *Williams*, 23 Cal.App.4th 250, 256; *Turner v. Wexler*, at 146-147.

4 Appellants argue that attorney fees are improper because some
5 issues arose under the Declaration of Water Service. Brief of Appellants at
6 26. They cite *Boguch v. Landover* as authority. However, in *Boguch*, the
7 Court held that "a party may recover attorney fees under a contractual
8 provision such as the one at issue herein only where the underlying action
9 is brought on the contract and the contract is central to the dispute."
10 *Boguch v. Landover Corp.*, at 600. Boguch's claim failed because it was
11 actually based on "the common law and statutory duties they owed to
12 Boguch in representing his interests," not on the contract. *Id.* In the current
13 case, the claims are based on the contract provisions.

14 In *Columbia State Bank v. Invicta Law Group PLLC*, the Court
15 ruled that

16 A prevailing party in a contract action may recover attorney fees
17 under a contractual fee shifting provision such as the one at issue
18 here " only if a party brings a 'claim on the contract,' that is, only if
19 a party seeks to recover under a specific contractual provision."
20 *Boguch*, 153 Wn.App. at 615. If the claimed breach of duty is
21 based on another source, such as a statute or the common law, "the
22 party does not bring an action on the contract, even if the duty
23 would not exist in the absence of a contractual relationship."
24 *Boguch*, 153 Wn.App. at 615. "[A]n action is on a contract for
purposes of a contractual attorney fees provision if the action arose
out of the contract and if the contract is central to the dispute."

1 *Tradewell Grp., Inc. v. Mavis*, 71 Wn.App. 120, 130, 857 P.2d
2 1053 (1993). "Stated differently, an action 'sounds in contract
3 when the act complained of is a breach of a specific term of the
4 contract, without reference to the legal duties imposed by law on
 that relationship.'" *Boguch*, 153 Wn.App. at 616 (quoting *G.W.
 Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn.App. 360, 364,
 853 P.2d 484 (1993)).

5 *Columbia State Bank v. Invicta Law Group PLLC*, at 330 - 331. In the
6 current case, as in *Columbia State Bank* the central breach arises as "a
7 breach of a specific term of the contract, without reference to the legal
8 duties imposed by law on that relationship." Therefore, the contract is
9 central to the case. *Boguch v. Landover Corp.*, at 600; *Columbia State
10 Bank v. Invicta Law Group PLLC*, at, 330-331.

11 Appellants argue that Attorney Fees are improper because "there
12 was no contractual provision to support the award of attorney fees to
13 enforce terms of the governing documents except in the Water Service
14 Agreement." Brief of Appellant, at 26. Appellants assert that the
15 Protective Covenant Agreement allows an arbiter to award attorney fees
16 and Water Service Agreement allows it if enforcement is through legal
17 action. *Id.*, at 26-27. Apparently, Appellants believe that the agreements
18 are completely independent in an action to enforce related rights under all
19 three, and that attorney fees can be apportioned, based on the amount of
20 evidence presented in one area of the case. *Id.* However, they provide no
21 authority for this. The Appellants argue that attorneys fees are generally

1 not allowed and "[t]he exception to this general rule is attorney fees and
2 costs can be awarded by agreement of the parties, statute or equity." *Id.*, at
3 28. While this correctly states the general rule, in the current case, the
4 three agreements were created together for the benefit of future owners, to
5 encourage purchase of the properties, and to supply water service to future
6 owner, the documents were then presented to the parties as a whole when
7 they purchased their property. This makes all three agreements part of the
8 same transaction, with the same purpose, and contemporaneously
9 executed, which should be construed together. *Turner v. Wexler*, at 146 -
10 147; *Kelley v. Tonda*, 198 Wn.App. 303, 311, 393 P.3d 824 (Div. 1 2017)
11 citing Restatement (Second) of Contracts § 202(2) (Am. Law Inst. 1981);
12 see also, *Snow Mountain Pine, CA A75677, Ltd. v. Tecton Laminates*
13 *Corp.*, 126 Or.App. 523, 869 P.2d 369 (1994) citing *Hays v. Hug*, 243 Or.
14 175, 177, 412 P.2d 373 (1966); *Waxwing Cedar Products v. C & W*
15 *Lumber*, 44 Or.App. 167, 170, 605 P.2d 719 (1980).

16 Appellants argue the Water Service Agreement covers assessments
17 and the Third Party Agreement covers fees, that these are completely
18 separate. Further, they reason because the Beneficiary Contract makes no
19 mention of fees, fees can only be recovered under the Water Service
20 Agreement, requiring the court to determine fees based on what proportion
21 of the work dealt with each agreement. The Appellants offer no legal
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1 authority for this position. However, the agreements and issues are
2 interdependent. For example the Superior Court determined that an
3 assessment by the Appellants for work directed by the Department of
4 Health was improper because it was prohibited by the Third Party
5 Agreement even though it was an assessment under the Water Service
6 Agreement. CP - Vol. 1, at 70. Interdependent contracts can be viewed as
7 one single agreement. *Turner v. Wexler*, at 146-147; *Kelley v. Tonda*, 311.

8 Finally, it should be noted that the issues and work performed in
9 the current case are so closely related and intertwined that it would not be
10 possible to separate the Declaration of Water Service from the Beneficiary
11 Contract. The Agreements cover the same purpose and transaction. Even
12 the assessments were imposed and billed on the same billing statements as
13 were rates and rate increases. Exhibits 25-31.

14 The governing agreements function as one contractual transaction
15 and the attorney fees clause is an integral part of that transaction the
16 Superior Court properly allowed for attorney fees. Further, the Superior
17 Court properly exercised its discretion in determining the reasonableness
18 of the attorney fees. The Court of Appeals should, therefore, affirm the
19 judgment of the Superior Court.

20 *III. The Superior Court did not err in appointing a receivership.*

21 The Appellants raise the claim that RCW 7.60.025 prohibits the
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1 Superior Court from appointing a receiver, despite a contractual
2 agreement, without making special findings. Brief of Appellants at 30.
3 Appellants mention this statute once in their trial brief, but made no
4 motion for the trial court to determine its applicability, nor was the statute
5 raised as an objection at trial or thereafter prior to this appeal. CP at 123.
6 Under RCW 7.60.025 the appointment of a receiver is a matter of
7 discretion and is, therefore, reviewed for an abuse of discretion. *Bero v.*
8 *Name Intelligence, Inc.*, 195 Wn.App. 170, 175, 381 P.3d 71 (Div. 1 2016)
9 citing *MONY Life Ins. Co. v. Cissne Family LLC* 135 Wn.App. 948, 952-
10 53, 148 P.3d 1065 (2006).

11 RCW 7.60.025 was enacted in 2004, by which time, the
12 Beneficiary Contract had already been binding on the parties for ten years.
13 While RCW 7.60 covers receiverships, its language does not give it
14 retroactive active effect upon existing contracts nor does it say it
15 supersedes contractual requirements for a receiver. However, Washington
16 courts have upheld the appointment of receivers where it was contractually
17 accounted for, without requiring special findings called for by RCW
18 7.60.025(1)(b). See, *Umpqua Bank v. Santwire*, 68832-4-I (RCW 7.60.025
19 did not prevent appointment of receiver where the deed of trust expressly
20 provided for the remedy of receivership upon default). While Washington
21 courts recognize that a contracting party cannot waive a statutory right

1 before the right exists" (*Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885,
2 899, 28 P.3d 823 (2001)), RCW 7.60.025 does not create rights for the
3 Appellants; rather it places requirements on the court. However, in the
4 current case, the Appellants as assigns of the original developers created a
5 right for the users of the water system that exists outside of the statute.

6 Even so, there were adequate findings to show that a receiver was
7 necessary. In the current case, the appointment of a receiver is a
8 contractually agreed to remedy. The Beneficiary Contract states that it was
9 created for "the benefit of the present and future owners" of the water
10 system. Exhibit 1 Section 1(b) of the Beneficiary Contract grants any
11 person served by the water system the right to bring legal proceedings on
12 their "own behalf or on behalf of others for whose benefit this Agreement
13 is made" to enforce the agreement. Section 5 of the Beneficiary Contract
14 states:

15 SECTION 5.

16 In the event the Company should fail to operate and maintain the
17 water supply systems in the mAnnr and under the conditions
18 specified herein (failure due to Acts of God, natural disasters or
19 other causes beyond the control of the Company, including labor
20 troubles or strikes, excepted) or in the even[t] the Company
21 collects or attempts to collect from the consumers of water charges
22 in excess of the rate or rates specified or provided for in this
23 Agreement, then in either of such contingencies, if such default
24 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

1 consumer, mortgagees, or by any person for whose benefit this
2 contract is made, then and in such event any such person for whose
3 benefit this contract is made, may enforce this Agreement by
4 action, instituted for such purpose in any court of competent
5 jurisdiction and *in such action shall be entitled as a matter of*
6 *right to the entry of an order appointing a receiver or other*
7 *officer appointed by the court to take immediate possession of the*
8 *water supply systems of the Company for the purpose of*
9 *operating and maintaining the same with the full right to hold,*
10 *use, operate, manage and control the same* for the benefit of the
11 parties for whom this Agreement is made, with full right to collect
12 the charges for services at rates not in excess of those specified or
13 provided for in this Agreement. Such receiver or other officer of
14 the Court, during the period of its operation, shall be entitled to
15 such reasonable compensation and expenses, including reasonable
16 attorneys fees, as may be determined by the Court.

17 Exhibit 1 (emphasis added). Generally, the parties to a contract are
18 allowed to agree to terms that do not violate the law or public policy.
19 *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wash.2d 171, 176, 94 P.3d
20 945 (2004). The appointment of a receiver to possess, operate, and control
21 the water system, is a contractually guaranteed right that exists separate of
22 RCW 7.60.025, because the statute does not remove the contractual
23 authority of private individuals to create this right, the court derived its
24 authority directly from the governing agreements.

The appointment of a receiver is a contractual right granted to the
landowners by the developers of the water system, so that the landowners
would have a viable method for protecting their rights and interests.

Exhibit 1 at 3. RCW 7.60.025 does not apply to the appointment of a

1 receiver when it is required by the terms of a valid contract, especially a
2 contract that was created by the developers of the water system to entice
3 people into buying their property in reliance on the terms of the
4 agreement. The developers drafted the governing agreements and used
5 them to entice people to buy land in the development. Such terms should
6 be construed against the drafter of the agreement. *Viking Bank v. Firgrove*
7 *Commons 3, LLC*, 183 Wn.App. 706, 713, 334 P.3d 116 (2014). ("We
8 generally construe ambiguities against the contract's drafter."). The Court
9 of Appeals should deny the Appellants appeal on this issue and affirm the
10 Superior Court.

11 *IV. Appellants Violated Section 5 and Section 7 of the Third Party*
12 *Agreement*

13 "Findings of fact are reviewed under a substantial evidence
14 standard, defined as a quantum of evidence sufficient to persuade a
15 rational fair-minded person the premise is true." *Sunnyside Valley Irr.*
16 *Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) citing *Wenatchee*
17 *Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123
18 (2000). "If the standard is satisfied, a reviewing court will not substitute its
19 judgment for that of the trial court even though it may have resolved a
20 factual dispute differently." *Id.*, at 879 - 880 citng *Croton Chem. Corp. v.*
21 *Birkenwald, Inc.*, 50 Wash.2d 684, 314 P.2d 622 (1957). Further, the

1 appellate "court must defer to the trier of fact on issues of conflicting
2 testimony, credibility of witnesses, and the persuasiveness of the evidence.
3 *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004) citing *State*
4 *v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990) and *State v. Cord*,
5 103 Wash.2d 361, 367, 693 P.2d 81 (1985). "[T]he burden upon a party in
6 a civil suit is merely to establish his claim by a fair preponderance of the
7 evidence..." *Haley v. Brady*, 17 Wn.2d 775, 787, 137 P.2d 505 (1943); see
8 also, *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476,
9 528, 585 P.2d 71 (1978) (The normal civil burden of proof is
10 "preponderance of the evidence.").

11 The Appellants argue that the court abused its discretion in finding
12 Appellants violated Section 5 and Section 7 of the Third Party Agreement.
13 Brief of Appellants at 31-33. Although a court's ruling on the admissibility
14 of the evidence is reviewed for an abuse of discretion, a trial court's
15 findings of fact are not. *Sunnyside Valley Irr. Dist. v. Dickie*, at 879.
16 Additionally, "[c]redibility determinations are for the trier of fact and are
17 not subject to review" (*Erickson v. Chase*, 156 Wn.App. 151, 231 P.3d
18 1261 (Div. 2 2010) citing *State v. Thomas*, 150 Wash.2d 821, 874-75, 83
19 P.3d 970 (2004).) and In the current case the Superior Court provided
20 findings supported by substantial evidence and also found that Appellants
21 were not credible. CP at 260 - 262. The appellate court should defer to the

1 trier of fact on issues of credibility and the persuasiveness of the evidence.
2 *State v. Thomas*, 150 Wn.2d 821, 874-875, 83 P.3d 970 (2004) citing *State*
3 *v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990) and *State v. Cord*,
4 103 Wash.2d 361, 367, 693 P.2d 81 (1985).

5 The Appellants appear to be arguing insufficiency of the evidence.

6 However,

7 When findings of fact are made in actions tried by the court
8 without a jury, the question of the sufficiency of the evidence to
9 support the findings may thereafter be raised whether or not the
10 party raising the question has made in the court an objection to
11 such findings or has made a motion to amend them or a motion for
12 judgment.

13 *Yakima County v. Evans*, 135 Wn.App. 212, 223, 143 P.3d 891 (Div. 3
14 2006). However, the Respondents fail to show any insufficiency and fail
15 to provide legal citation to support their position. The Respondents met
16 their burden by a preponderance of the evidence.

17 The Appellants argue that Finding of Fact 57 is invalid. That
18 finding states that:

19 Appellants Fitzpatrick collected \$47 per month from some
20 water users and attempted to collect this amount from the
21 other water users. This has continued for more than 30 days.

22 CP at 256. The Appellants make a number of irrelevant arguments such as
23 claiming "only four persons were not paying the increases" (Brief of
24 Appellants, at 31), everyone "received the same billing monthly (*Id.*), and

1 no indication Appellants tried to collect the assessed late fees (*Id.*, at 32).
2 These arguments are meaningless as they are not actually arguments
3 against the finding. First, how many people were paying the increase has
4 nothing to do with what Appellants tried to do. Further, it actually
5 confirms Appellants were attempting to collect the amount. Second,
6 sending out bills is, itself, an attempt to collect the amount. It is irrelevant
7 whether some users paid the amount and others did not because any user is
8 allowed to sue on behalf of the other users. Exhibit 1 at 2. The four who
9 did not pay were the persons who filed the lawsuit. They were also
10 signatories on the written objections to Appellants' improper rate
11 increases. Exhibits 10, 11. Third, absent a written waiver, paying a bill to
12 avoid late fees or water shutoff is not a waiver of an invalid rate hike, in
13 the current case. There is no evidence that it was intended as such. Fourth,
14 it is irrelevant whether the Appellants failed to take other steps to collect
15 late fees; they attempted to collect the invalid rate increase by billing for
16 the improper amounts. CP at 256, 264; Exhibit 25-31. Further, the threat
17 of having the water shut off or liens placed on the property was always
18 present because Appellants controlled the water supply. When the
19 Appellants claim some users paid the \$47 per month charge, they actually
20 admit they attempted to collect the invalid amount and support the finding.
21 This finding is simply a statement of demonstrable fact. The finding is

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1 supported by substantial evidence and the evidence supports the
2 conclusion that the Appellants "breached their contractual obligation
3 under the Third Party Beneficiary Contract Agreement." CP, at 264 - 265.

4 The Appellants also complain the Superior Court improperly found
5 they violated Section 5 of the Beneficiary Contract. Section 5 states:

6 . . . in the event the company collects or attempts to collect from
7 the consumers of water charges in excess of the rate or rates
8 specified or provided for in this Agreement, then in either of such
9 contingencies, if such default shall continue for a period of thirty
10 (30) days ... after written notice to the Company by any consumer,
11 mortgagees, ***or by any person for whose benefit this contract is***
12 ***made, then and in such event any such person for whose benefit***
13 ***this contract is made, may enforce this Agreement by action,***
14 ***instituted for such purpose in any court of competent jurisdiction***
15 and in such action shall be entitled as a matter of right to the entry
16 of an order appointing a receiver or other officer appointed by the
17 court to take immediate possession of the water supply systems of
18 the Company for the purpose of operating and maintaining the
19 same with the full right to hold, use, operate, manage and control
20 the same for the benefit of the parties for whom this Agreement is
21 made . . .

22 Exhibit 1; CP, at 265. Section 7 of the Beneficiary Contract sets out how
23 rate changes worked. If the company "proposed" a rate increase, the users
24 had 90 days to object. If "more than one-third" objected, the parties then
had 90 days "negotiate an agreement." If private negotiations failed, then
the matter would be submitted to nonbinding arbitration. If arbitration
failed, then the matter would be subject of review by a court of competent
jurisdiction" with the rate increases "held in abeyance and shall not

1 become effective until the conclusion of such proceedings." Exhibit 1 at 4.

2 The Appellants made improper rate increases throughout the course
3 of the pendency of the proceedings.² Exhibit 11, 26, 27. Each time, more
4 than one-third of the users properly objected to the proposed rates and
5 assessments in writing. VRP at 270-271; Exhibits 10, 11. Each time the
6 Appellants breached their obligations under the governing agreements.
7 VRP at 675; CP at 256, 264; Exhibits 25-31. Turning the matter over to
8 attorneys after the initiation of a lawsuit, as called for in the governing
9 agreements does not negate the obligations under those agreements, nor
10 does it allow the appellants to implement new rate increases without
11 following the outlined procedures that still governed. Exhibit 1. Further,
12 the Appellants' argument that the demand letter was confusing because
13 they asked for "arbitration" does not make it any less of a valid objection.
14 Brief of Appellants at 32. The Appellants could have followed the
15 contractual procedure, but they did not. VRP at 675. Additionally, Mr.
16 Fitzpatrick testified in court that he didn't know what the Beneficiary
17 Contract required or what the procedure was. VRP at 412. Despite being a
18 party to the agreements as a landowner and having received notice from

19 _____
20 ² The Appellants also attempted to bypass the court by petitioning to have the UTC take
21 jurisdiction of the water system, which would have effectuated a rate increase outside of
22 the governing agreements. VRP 297-298. Further, the action, if successful, would have
23 invalidated the governing agreements without the consent of the beneficiaries. Exhibit 1
24 at 5.

1 the users. VRP at 506-507. It should also be pointed out that the
2 November 2, 2012, objection letter does not refer to the rate increase in
3 Finding of Fact 57. Exhibit 10. The \$47.00 rate increase was one of the
4 invalid rate increases that the Appellants attempted to impose while the
5 case was pending. VRP at 299. These rate increases were invalid because
6 Appellants failed to follow the proper procedure, but also because the
7 2012 rate increase they purported to raise was held in abeyance pending
8 resolution by the Superior Court. Exhibit 1 at 4. There could be no new
9 rate increase until that issue was resolve. Additionally, because the \$47.00
10 rate increase was objected to, it had to be held in abeyance as well. *Id.*

11 The Appellants raise no valid objection to the Superior Court's
12 Finding of Fact 57, nor do they provide any case law or statutes to support
13 their position. Brief of Appellants at 31-33. However, in the current case,
14 the Respondents have more than met their burden of a preponderance of
15 the evidence. *Haley v. Brady*, 17 Wn.2d 775, 787, 137 P.2d 505 (1943);
16 see also, *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d
17 476, 528, 585 P.2d 71 (1978) (The normal civil burden of proof is
18 "preponderance of the evidence."). The Court of Appeals should defer to
19 the trier of fact on issues of conflicting testimony, credibility of witnesses,
20 and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821,
21 874-875, 83 P.3d 970 (2004) citing *State v. Camarillo*, 115 Wash.2d 60,

1 71, 794 P.2d 850 (1990) and *State v. Cord*, 103 Wash.2d 361, 367, 693
2 P.2d 81 (1985). The "fair preponderance of the evidence" supports the
3 findings of the Superior Court. The Respondents have more than met their
4 burden In the current case and the Appellants arguments actually support
5 the Superior Court's findings. The Court of Appeals should affirm the
6 Findings and Conclusions of the Superior Court.

7 *V. The Superior Court properly ruled on the assessments*

8 "Questions and conclusions of law are reviewed de novo."
9 *Edmonson v. Popchoi*, 172 Wn.2d 272, 278, 256 P.3d 1223 (2011) citing
10 *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73
11 P.3d 369 (2003). However, while the Appellants question one of the trial
12 court's conclusions, they do not appear to appear to be arguing against a
13 legal conclusion of the court and cite no cases or statutes in support of
14 their position. See, Brief of Appellants, at 33 - 35. Rather, Appellants
15 make arguments against the factual findings of the trial court "that cutting
16 the maple trees was not an 'unexpected nonrecurring repairs'" as
17 contemplated in the agreement. *Id.* at 34. The Appellants admit they failed
18 to prove the claimed expenses, but argue that the judgment of the Superior
19 Court should be overturned because they believe cutting trees is "non-
20 recurring" if they are not cut until they become a danger to other property.
21 *Id.* There is no basis in law to support this position. Further, it is not

1 supported by the language of the Water System Agreement.

2 *1. Cutting of trees is a foreseeable and recurring effort*

3 Under the Declaration of Water Service, the water system is allowed
4 to make assessments for "unexpected nonrecurring repairs." Exhibit 3, §
5 3.3; CP, at 267. The trial court specifically found that

6 67. Tree removal is neither an unexpected nonrecurring repair nor
7 is it equipment/well apparatus.

8 68. Additionally, despite years to do so, Appellants Fitzpatrick
9 have not been able to document how much, if any, was paid for the
10 tree removal.

11 CP, at 258. Even if the trees qualified as repairs or well equipment, the
12 growth of trees and foliage in western Washington is a foreseeable
13 occurrence that requires the constant attention of residents. Even so, the
14 Respondents were willing to consider the assessments if the Appellants
15 would provide evidence that the work was performed and paid for. VRP at
16 303. As the court found, despite years to do so, the Appellants failed to
17 provide the needed documents. CP, at 258. Further, what they did provide
18 was generally insufficient. CP at 10- 13. The failure of the Appellants to
19 prove how much the work cost was also a reason for denying the claims.
20 CP at 257-260.

21 *2. Allowing evidence that was not objected to is not err*

22 The Appellants argue that on July 6, 2017, they submitted new
23 assessments and that the court abused its discretion when it admitted these

1 items, Exhibits 75 and 64. Brief of Appellant, at 34. It is unclear what
2 Appellants are talking about; there was no objection to either exhibit and
3 Exhibit 64 was submitted by the Appellants. CP, at 270, 532-535. The
4 admission of exhibits not objected to at trial cannot be raised on appeal.
5 RAP 2.5(a). Especially, if the exhibit was offered by the complaining
6 party.

7 The Appellants offer no case law to support their position, but only
8 argue that they were "not prepared for trial on these issues and this would
9 only involve Respondents and there are other users involved that were not
10 represented or in Court." *Id.* At the time these assessments were made, the
11 court case had been pending for 5 years. The trial began on September 21,
12 2016, but had been delayed numerous times because of defendant Gerard
13 Fitzpatrick's health issues. VRP at 283; CP at 58.³ Further, because of
14 these delays, the trial portion of the case was not concluded until January
15 31, 2018. During this time, Appellants improperly raised the rates and
16 made assessments in violation of the governing agreements. CP at 255-
17 256, 264. Appellants made improper assessments. CP at 257-260; 268-
18 270. Appellants also attempted to bypass the court proceedings altogether
19 by going to the UTC. VRP at 297-298. These were the exact same
20 contractual issues originally complained of by Respondents. Further, these

21 ³ The trial was delayed so long that Respondent Tabitha Grabarczyk died before it could
22 be completed. VRP at 11.

1 rate increases were totally dependent on the validity of the 2012 rate
2 increase already before the Superior Court. It logically follows, if the 2012
3 rate increase was invalid, so were any subsequent rate increases that were
4 based on the invalid 2012 increase. Given the delays caused by the
5 Appellants and same issues involved, the Appellants certainly had
6 sufficient time to prepare to defend their own actions. Also, because the
7 rate increases were the exact same issues already pending before the court,
8 it is unlikely that Appellants needed additional time, nor did they request
9 more time. The court properly determined that it was a matter of judicial
10 economy to hear all related claims against Appellants at the same time.

11 *3. Appellants failed to prove payments*

12 The Appellants also allege that the trial court erred in finding that
13 Appellants had failed to prove they were entitled to collect an assessment
14 for building a new well house. Brief of Appellant, at 34 - 35. The court
15 found that the well house would be a valid assessment. CP at 269.
16 However, the Appellants failed to prove they paid the amounts they
17 claimed. *Id.* Appellants provided a proposal from one company for \$3,299
18 and check for approximately the same amount made out to a different
19 individual. CP at 259. The Appellants provided no evidence that this was
20 for the same work and paid to the same individual. As a result, the
21 Superior Court found that

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1 79. Appellants Fitzpatrick's July 2017 assessment included a claim
2 for rebuilding the well house. Appellants Fitzpatrick produced a
3 proposal for a new well honse submitted by Aer Lingus Homes in
the amount of \$3,299.99 and a copy of a cashier's check payable to
Beisley Incorporated in the amount of \$3,300.00.

4 80. Appellants Fitzpatrick's July 2017 assessment included claims
for expenses related to E. coli contamination of the water system
and for replacement of a hatch in the water system.

5 CP at 259. The court concluded that

6 41. A proposal from one entity for construction of a well house and
7 a cashier's check to a different entity for a similar amount does not
show by a preponderance of the evidence that Appellants
8 Fitzpatrick paid for replacement of the well house.

9 42. The water users should not be assessed for the cost of
replacement of the well house.

10 CP at 269. Six years after the case was filed, over nine months after the
11 conclusion of the trial, and three months after the Superior Court issued its
12 written Findings of Fact and Conclusions of Law, Appellants filed a
13 declaration of William Joseph Beisley stating:

14 My CPA considers Aer Lingus as doing business as Beasely, Inc.,
15 therefore the money we received from Queen Ann Water Works,
LLC was paid to Beasely, Inc., but our quote was done on my Aer
Lingus Homes, LLC letterhead.

16 CP, at 292. Appellants now argue that they should be allowed to revisit the
17 evidence produced at a trial that last approximately 18 months, and have
18 the court change its ruling based on an affidavit not subject to cross-
19 examination that does not clearly address the amounts or work in question.

20 Brief of Appellant, at 34 - 35. Once again, the Appellants offer no legal
21

1 case law or rational to allow the appellate court to do this.

2 Appellants' argument fails for several reasons. First, even
3 assuming the affidavit contained sufficient proof to support the
4 assessment, it is new evidence raised for the first time on appeal. As such,
5 appellate courts will not consider it in a direct appeal. *State v. Sandoval*,
6 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Second, the Appellants may
7 intend it as a motion for reconsideration, which is brought in the trial
8 court, and would be untimely under CR 59(b). Third, the Appellants may
9 intend the affidavit as a motion for a new trial or to vacate the judgment,
10 which should have been brought in the trial court, but does not satisfy the
11 conditions of CR 59(a), and would also be untimely under CR 59(b).
12 Because the appellate court should not hear new evidence in this matter,
13 and because the Appellants failed to bring motions pursuant to CR 59; this
14 Court should deny Appellants appeal on this issue and affirm the Superior
15 Court.

16 *VI. Appellants were properly prohibited from collection of water*
17 *fees over \$37.00 because there has been no valid rate*
increase

18 Appellants argue that they should be allowed to collect the rate
19 increases over \$37.00 on users that did not join the law suit, even though
20 the trial court found they breached their contractual obligations by
21 improperly raised the rates and the court invalidated those rate increases.

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1 Once again the Appellants offer no legal justification for this argument.

2 The Appellants argue that parties paid the increases and did not
3 join the law suit. Brief of Appellant, at 35 - 36. However, the Respondents
4 are granted the right by the Beneficiary Contract to sue the Appellants on
5 behalf of the other users of the water system. Exhibit 1, § 1(b). The
6 Superior Court specifically found that

7 14. The Third Party Beneficiary Contract Agreement granted any
8 person served by the water system the right to file suit on his or her
9 own behalf and on behalf of others who benefit from the
10 agreement. The Third Party Beneficiary Contract Agreement
specifically provided that any person served by the water system
may enforce the agreement including by bringing a lawsuit for
receivership and injunction.

11 CP, at 250; see also, Exhibit 1, § 1(b). Additionally, the Superior Court
12 found that sufficient users joined in the objection to the rate increase. CP
13 at 6-7. As a result, it is completely irrelevant whether all users join in the
14 suit or not.⁴ It is also not true that other users took no action in this matter
15 as Appellants claim. Brief of Appellant, at 35. In fact, a number of them
16 signed the objection letters protesting the rate increases. Exhibit 10, 11. In
17 any case, the terms of a contract should be enforced if they are not illegal
18 or against public policy. *Keystone Land & Dev. Co. v. Xerox Corp.*, at
19 176. There is no reason to conclude the Appellants have not asserted their
20 rights or that Superior Court erred in any of its findings and conclusions.

21 _____
22 ⁴ Additionally, the reasons for not joining the law suit are not known.

1 The Beneficiary Contract provides the only means by which the users can
2 protect their rights under the agreement and the court should not change
3 the clear meaning of the terms of a contract or read into it terms are not
4 there.

5 It is a basic rule of contract law that courts will not revise an
6 agreement for the parties--or for one party, where the agreement
7 itself is clear and unambiguous. Neither abstract justice nor the
8 rule of liberal construction justifies the creation of a contract for
9 the parties which they did not make themselves or the imposition
10 upon one party to a contract of an obligation not assumed.

11 *Puget Sound Power & Light Co. v. Shulman*, 84 Wn.2d 433, 439, 526 P.2d
12 1210 (1974) citing *Chaffee v. Chaffee*, 19 Wash.2d 607, 145 P.2d 244
13 (1943); *Accord, Mead v. Anton*, 33 Wash.2d 741, 207 P.2d 227 (1949).

14 Additionally, what the Appellants ask the Court to do is validate
15 Appellants breach of the governing agreement by allowing them to collect
16 fees that have been ruled invalid by the Superior Court pursuant to the
17 process established in the Beneficiary Contract. Exhibit 1. If this is
18 allowed it would improperly invalidate legitimate contractual terms and
19 rights that have governed the parties since 1994. *Id.* It would also create a
20 situation where users are treated differently by the water system by forcing
21 some users to pay the invalid rate increase, while others do not. It would
22 also make it impossible for Respondents to object to a future improper rate
23 increases against them because they would not be able to obtain the

1 necessary signatures needed to object to a rate increase raising the
2 Respondents rates to equal that of the other users. This in turn would
3 invalidate the ruling of the Superior Court and make any future attempt to
4 object to improper rate increases pointless and cost prohibitive. It should
5 also be noted that the Beneficiary Contract requires that all "proposed
6 change of rates shall be held in abeyance and shall not become effective
7 until the conclusion" of the proceedings. Exhibit 1, § 7. This means that no
8 one should have been paying any rate increase until the court had made its
9 decision. Further, once the court determined that the rate increases were
10 invalid, the Appellants had no authority to bill for them going forward
11 without complying with the proper procedure.

12 Because the Beneficiary Contract allows the respondents to sue on
13 behalf of other users as well as their own and the rate increases were
14 invalid from their inception, the Court of Appeals should affirm the
15 decision of the Superior Court.

16 *VII. Pursuant to RAP 18.1 Respondents request an award of fees
17 and costs incurred in defending this matter on appeal.*

18 Pursuant to RAP 18.1 Respondent asks the Court of Appeals to
19 award reasonable attorney fees for the cost of defending this matter on
20 appeal. Respondents were awarded attorney fees in the lower court and as
21 such are entitled to the reasonable costs and fees incurred in defending this
22

1 matter on appeal. In responding to appellants' petition it has been
2 necessary to review and respond to Appellants' brief, research claims and
3 issues raised, review record for supporting facts, draft response, etc.

4 **CONCLUSION**

5 The Court should affirm the decision of the Superior Court and
6 award costs and fees to the respondents necessarily incurred in defending
7 this case.

8 **DATED** this 30th day of July, 2019.

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Eugene C. Austin, WSBA # 31129
Attorney for
12 Respondents/Respondents
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of **BRIEF OF RESPONDANT** in the above entitled case was sent, via

Email to:

Thomas Moulton Geisness
Attorney for Defendants
tom@geisnesslaw.com
melinda@geisnesslaw.com

Electronic Filing:

Washington State Court of Appeals Division II
950 Broadway #300,
Tacoma, WA 98402

DATED this 30th day of July, 2019.

Eugene C. Austin, WSBA # 31129

AUSTIN LAW OFFICE, PLLC

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