

FILED
Court of Appeals
Division II
State of Washington
9/16/2019 4:11 PM
No. 529840-0-II

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.

REPLY BRIEF OF APPELLANTS

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Queen Ann Water Works, LLC and
Gerard A. Fitzpatrick and Catherine
Fitzpatrick

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A. INTRODUCTION

The parties put a CR2A agreement on the record November 12, 2015. This agreement was complete. On July 26, 2016 respondents presented a Settlement Agreement to appellants that was agreed to in the CR2A hearing, November 12, 2015. CP65 That agreement should be valid. The Court vacated the agreement. The appellant contends the Court abused its discretion in reaching that decision. The July 26, 2016, Settlement Agreement accepted by the appellants would also stand alone as a complete agreement to settle this case.

There are three (3) agreements that govern the relationship of the parties in The Queen Ann Hill Belfair View Estates. Attorney fees should not be awarded in this case under the Third Party Agreement, as there is no contractual provision allowing attorney fees in the Third Party Agreement. Ex 1

Attorney fees are allowed under the Water Service Agreement concerning enforcement of assessments, actions for non-payment of water rates, or filing and pursuing liens. Ex 3 The Protective Covenants Agreement allows attorney fees be awarded by an arbitrator if he/she determines a party would be entitled to fees. Ex 2 The intent manifested by each agreement would not allow combining or reading the agreements

as one nor attorney fee provisions be moved from one agreement to another.

Respondents argue RCW 7.60.025 does not apply to their contractual right to a receivership. Receivership is a drastic and harsh remedy, but if it is to be used, the Court is directed by the RCW 7.60.025 to see if there are more reasonable means of resolving the parties' situation. Queen Ann Water Works, LCC is a public utility. The evidence in this case indicates there has been no income to the owners from the operation of the utility and there certainly would not be funds to pay a receiver if one could be found. This should be foremost in the Court's mind. The Court must follow the statutory requirements in appointing a receiver.

The respondents argue the persons that objected to the increased rates in 2012 and 2015 paid the new rates, so they wouldn't have late penalties for not paying. This is completely opposite to Section 7 of the Third Party Agreement, which states the parties have 90 days to work things out or have arbitration. Certainly during this time the rates can't be increased nor can there be penalties, as the new rates have not gone into effect. The findings of the trial court that appellants breached Section 5 & 7 of the Third Party Agreement is erroneous. The language of the Third Party Agreement can only be read this way. Ex 1

B. REPLY ARGUMENT

1. The CR2A Settlement Agreement Should Be Upheld as Should the Settlement Agreement Offered by Respondents

The respondents contend that appellants failed to provide the transcript of the argument and oral decision of the Court of August 29, 2016, when the Court heard respondents' Motion for Determination of Non-CR2A Status and only provided the signed Order dismissing the CR2A agreement. CP 82, 90 Appellants have responded to respondents' Objection to Appellants' Supplemental Statement of Arrangements. This was filed on September 13, 2019.

Respondents don't accurately reflect the sequence of events concerning the CR2A Agreement. The CR2A Agreement was placed on the record on November 12, 2015. CP 65 Discussions were intermittent following the hearing. CP 93 The evidence on the record shows that appellants waited from the time of the CR2A hearing of November 12, 2015, until May 25, 2016, to receive a copy of an agreement between the appellants and respondents from an August 2014 mediation. The appellants had different representation at that hearing. There is no evidence produced by respondents of new negotiations or alleged counter-offers that were made except what respondents' attorney stated in oral argument, which is not evidence. After receiving the items agreed to in the

2014 Mediation, appellants received the Settlement Agreement in July 2016. Appellants agreed with the offer, signed the agreement July 26, 2016 returning it to respondents. After signing the CR2A Settlement Agreement prepared by respondents, appellants believed the case was settled. Respondents state, “(A)ppellants sought to enforce the “basic principles” as a CR2A Agreement (contract) and respondents asked the court for a Determination of Non-CR2A Status.” *See* Respondents’ Br. P.4 On August 19, 2016, respondents filed their Motion for Determination of Non-CR2A Status. CP 90 This writer does not know what was meant by the “basic principles” or what was meant by the appellants sought to enforce the “basic principles”, as appellants did not take any action.

A finding that a CR2A agreement is invalid based on the “language put on the record does not meet the requirements of a CR2A agreement” is reviewed on appeal for abuse *Morris v. Maks 69, Wn. App 865 (1993)*. Abuse of discretion is generally defined as when it is “manifestly unreasonable or is based on untenable grounds or untenable reasons.” *Morris v. Maks*, at 868. In this case the Court’s decision is based on untenable grounds or reasons. A close reading of the November 12, 2015, CR2A Agreement shows, at most, there were two issues undecided concerning a complete recorded agreement and they dealt with time issues

and not issues of substance. Appellants were unsure of the number of days needed for proof of the cost of paying for trees, 30 days was suggested and appellants indicated it might be just a few days longer than 30.

Respondents did not have the exact time to be provided to appellants in giving notice of assessments, they were thinking 90 days. Other than those issues, the terms of the agreement were set out in the record November 12, 2015. CP 65 The Settlement Agreement presented by respondents to appellants in July 2016 is based the CR2A oral agreement. The time issues were exactly as referenced in the CR2A presentation. This is what the parties agreed to on the record, through their attorneys at the November 12, 2015, hearing. The agreement expresses an agreement to settle the case and dismiss the proceedings. CP 65

C. SETTLEMENT AGREEMENT OFFER BY RESPONDENTS

The respondents proposed a Settlement Agreement to appellants in July 2016. CP 93, 94 Appellants accepted this offer July 26, 2016. This offer, whether intended as a confirmation of the November 12, 2015, agreement or as a new offer, was accepted by the appellants/defendants on July 26, 2016. This is a binding contract concerning the disputes of Queen Ann Water Works, LLC. *Trotzer v. Vig* 149 Wn.App 594, 203 P.3d 1056 (2009). In *Trotzer*, the elements of a contract were set out, the subject matter, the parties, the promise, the terms and conditions and

consideration. In the present case the parties were identified, promises were made to duties and obligations, the terms were set forth and consideration was given, including settlement and dismissal of the lawsuit. As stated in *Restatement of the Law Second Sec. 24*. “Offer Defined. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”, *Section 50 Topic 5*. “Acceptance of Offers (1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.” The written Settlement Agreement was offered to appellants and they accepted the offer July 26, 2016 by their signatures. CP 93, 94 This agreement should be enforced and the case dismissed.

The respondents did not respond to appellants’ opening brief discussion of the effect of this binding Settlement Agreement.

D. ATTORNEY FEES ARE NOT ALLOWED FOR WORK PERFORMED UNDER THE THIRD PARTY AGREEMENT

Whether a party is entitled to attorney fees is a question of law reviewed de novo on appeal. *Boguch v. Landover Corporation* 153 *Wn.App.* 595 (2009). There are three contracts creating the duties and obligations of the parties. The Court determines the intent, construction and legal effect of a contract as a matter of law de novo. *Trotzer v. Vig.*,

The respondents contend that the three contracts of Queen Ann Hill Division of Belfair View Estates should be read as one and they would be entitled to attorney fees under the Water Service Agreement for legal work performed under the Third Party Beneficiary Agreement. Ex 1 Such construction is not supported by the law or common sense.

The Protective Covenants Agreement, November 20, 1992; Water Service Agreement, November 20, 1992; and Third Party Beneficiary Agreement, June 25, 1994 are contracts to be reviewed by the Court. Ex 1, 2, 3 These contracts (agreements) form the basis for the people living in Queen Ann Hill Division of Belfair View Estates. These three contracts set forth the home owners' rights and duties, as well as the rights and duties of the operator of Queen Ann Water Works, LLC. These agreements by their language run with the land for the present or future owners or assigns. The contracts by their nature are each different. This is shown in their purpose, subject matter and parties affected.

The Protective Covenants Agreement states, "These Protective Covenants are established to provide for the aesthetic, healthful, and uniform development of the real estate." Ex 2 The Covenants address issues such as a permanent dwelling is to have 1050 square feet of ground floor, excluding porches, balconies and garages, mobile homes must be new and, as a constructed home is to have 1050 square feet of living area

exclusive of porches, etc., no radio, television, or other antennas shall extend beyond a roof line....If a dispute arises between the owners that can't be resolved, owners can seek resolution through arbitration. An arbitrator may award attorney fees.

The Water Service Agreement states, "...by and between the... Bakkers, husband and wife and the future property owners IS BASED ON THE FOLLOWING RECITALS: A..., B....,C. BAKKER desires to establish an agreement for providing water service to the real estate described on Exhibit A which will be owned by future property owners." Appellants Fitzpatricks have replaced the Bakkers. Ex 4 The Fitzpatricks are not drafters of any of the agreements. The Fitzpatricks also signed as a party to all three contracts, as they own land in Queen Ann Hill Belfair View Estates. The Bakkers, in the Water Service Agreement, set out the owners' water service and facility maintenance, cost of a water hookup, water service charges, including assessments, maintenance of the waterlines, liability of property owner and owner liens, disconnection fees and reconnection fees for delinquent accounts, duties of Mr. Fitzpatrick regarding the water system. Water rates are limited by the Utilities & Transportation Commission. The agreement allows attorney fees if an owner of the water system has to take legal action (fees to the prevailing party, (RCW 4.84.330). The legal action would be to collect monies due

on delinquent monthly water charges, failure to pay assessments, and/or filing liens and enforcing the same to obtain payment to keep the water system operating.

The Third Party Beneficiary Contract, written two (2) years later includes the operator of the water system, the home owners and a new group of individuals, third party beneficiaries, which includes mortgagees, institutions, lenders, guarantors or like entities. Ex 1 The Third Party contract sets out remedies for the third party beneficiaries, or users, which includes either legal action and/or arbitration, depending on the subject matter. Section 1 (b) states:

“(A)ny person, firm, association, governmental agency, or corporation (1) served by the water supply system of the Company, or (2) holding any mortgage on any property connected to the said systems or either of them, is hereby granted the right and privilege, and is hereby authorized, in its own name and on its own behalf or on behalf of others for whose benefit this Agreement is made, to institute and prosecute any suit at law or in equity in any court having jurisdiction of the subject matter, to interpret and enforce this Agreement or any of its terms and provisions, including, but not limit suits for specific performance, mandamus, receivership and injunction.”

This agreement allows direct action to the courts in seeking remedies for improper actions or failure to act under Section 5. Ex 1

The Court should review each contract and ascertain the parties’ intentions from the entire writing. *Grant Cty. Const’rs v. EV Lane Corp.*, 77 Wash.2d 110, 459 P.2d 947 (1969). These contracts should not be

considered as one, as contended by the respondents. The purpose and intent of each contract is different: each contract represents a subject matter and purpose; the contract is directed toward certain parties; and each contract provides a separate remedy related to its subject matter. The language of each contract is clear, as is the intent. Respondents cite numerous cases stating a contract may consist of one or several writings. For example, *Smith v. Skone & Connors Produce, Inc.* 107 Wn.App. 199,206, 26 P. 3d 981 (2001) *Kelley v. Tonda* 198 Wn.App. 143, 393 P.3d 824 (2017), *Kenney v. Read*, 100 Wn.App. 467, 997 P.2d 455 (2000), *Turner v. Wexler* 14 Wn. App. 143, 146, 538 P.2 d 877 (1975) *Snow Mountain Pine, CA A75677, Ltd. v. Tecton Laminates Corp.*, 126 Or. App. 523 869 P.2d 369 (1994) citing *Hays v. Hug*, 243 Or. 175, 177, 412 P.2d 373 (1966); *Waxwing Cedar Products v. C & W Lumber*, 44 Or. App. 167, 170, 605 P.2d 719. These cases and others cited by respondents are referring to transactions where several documents might be referred to in determining the intent of the parties in a contract or in forming a contract. In *Smith*, supra, there was a verbal agreement, defendant confirmed the same by letter unsigned by plaintiff, they reviewed account records recognizing that a contract can consist of several documents including prior memorandum or correspondent writings. In *Kelley v. Tonda*, it was relevant to review several documents in determining the deeding of a strip

of property to ascertain the intent of the parties. *Kenney v. Read*, refers to a time brokerage agreement and a letter of credit created at the same time during negotiations and both documents should be construed to determine the intent of parties. *Turner v. Wexler*, involved two parties to a contract in 1965 involving the sale of property from Turner to Wexler. In 1969 there was a problem with money that the purchaser, Wexler, didn't have and a new agreement was made with Turner and Wexler, one new party, and an addition of a surety. The new agreement specifically deferred to the 1965 agreement as controlling, except as modified by the 1969 agreement. Hence, a provision allowing attorney fees was still viable in the 1965 contract and was not altered or modified with the new 1969 contract modifications. In *Snow Mountain Pine*, a review of contracts to see if an arbitration clause prevailed under Oregon Statutes, the four contracts made at the same time refer to each contract and includes a statement this is our entire agreement. Only two contracts pertained to the lawsuit which resulted in arbitration which included statutory interpretation, *Hays v. Hug*, was a case where there was a real estate sales contract breached by the buyer, relief sought from the breach by language in escrow instructions, which was denied, documents written at the same time were construed together, but the escrow agreement did not modify the sales contract. In *Waxwing Cedar Products v. CW Lumber*, plaintiff

Waxwing sold assets connected with his lumber yard to CW Lumber, defendant Cumbo was guarantor of the buyer's performance. On the date of the sale, Waxwing entered into a contract with Yunker assigning to pay him the proceeds of the sale, as he was owed monies and had guaranteed bank loans. It appears both contracts had to be read, but the court remanded and ruled additional parties had to be added. These cases are not helpful in understanding the present case as they address the issue of formation of a contract from the contract itself and other documents made at or near the time of the contract.

In this case, there are three contracts that apply to any purchaser of property in Queen Ann Hill Division of Belfair View Estates. There was no testimony concerning the creation of the contracts. The contracts are clearly written. These agreements have stood alone, each involves different subject matter and the Third Party Agreement involves different parties, third party beneficiaries, that are not part of the Water Service Agreement or the Protective Covenant Agreement. There is reference in the Third Party Beneficiary Agreement to the water system so as to include third parties in the agreement, that certainly has to be set out, but that doesn't change the Water Service Agreement or the Third Party Agreement or make them interrelated.

In reviewing these contracts, it is clear the purpose/intent of each agreement is different. The intent expressed in the Third Party Agreement is to give the owners, third party mortgagees, surety, lenders, etc. security that they could bring legal action to protect their loans on these properties from any wayward action by the developer. The Bakkers had to set out terms of his obligation which was repetitive of some of the Water Service Agreement to encompass and accommodate new parties to the agreement. These protections in the Third Party Agreement for third parties or owners would apply even if the water system had a different owner, such as the Fitzpatricks, though these protections would disappear, as would the Third Party Agreement, if the state or government agency took over the water system. Ex. 1 §12.

The Third Party contract sets out remedies for third party beneficiaries, or owners, in Section 5 and in Section 7. Ex 1 Neither remedy allows for attorney fees for any party to the agreement. The owners or third parties could not borrow the attorney provision from the Water Service Agreement if they prevailed in an action against the Fitzpatricks under the Third Party Beneficiary Agreement. The Fitzpatricks could not claim attorney fees from third parties or owners if they successfully defended a lawsuit by them under the Third Party Agreement.

Washington follows the American Rule which states that each party in a civil action will pay its own attorney fees and costs. In *Boguch*, supra, the Court stated “A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue here only if a party brings a “claim on the contract,” that is, only if a party seeks to recover under a specific contractual provision. There is no contractual provision for attorney fees in the Third Party Agreement. The contract cannot be re-written. In *Barker v. Sartori*, 66 Wash. 260, 264, 119 Pac. 611(1911), a case affirming the rule that other writings can be examined when interpreting the intent of a contract, the Court cited *Thorp v. Minedman*, 122 Wis. 149, 101 N.W. 417, 107 Am. St.l 1003, 68 L.R.A. 146, a case involving a promissory note and a mortgage, as two distinct agreements, stated, ...”

(T)he rule that instruments are to be construed together... simply means that, if there be any provisions in one instrument limiting, explaining or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things...”

Williston on Contracts 4th §30:26, p 328. states...”

“(T)he principle that contemporaneous writings should be construed together means simply that if any provision in one them limits, explains or otherwise affects the provisions of another, all of the provisions should be

harmonized and given effect as between the parties and as against others who are charged with notice of them, the purpose of the rule being to give effect to the intent of the parties and the entire agreement that was actually made. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties.”

The Water Service Agreement and Third Party Beneficiary Agreement are separate contracts. The intent of each agreement, the subject matter of each agreement and the remedy for each agreement is separate. The contractual provisions of each agreement cannot be lifted out of one agreement and placed in another agreement. There should not be an award of attorney fees for work done under the Third Party Beneficiary Agreement based on an attorney fee provision in the Water Service Agreement.

E. RECEIVERSHIP

Respondents argued under RCW 7.60.025 that Washington courts “have upheld the appointment of receivers where it was contractually accounted for, without requiring special findings called for by RCW 7.60.025(1)(b) citing to *Umpqua Bank v. Santwire*, 68832-4-1(*non-published opinion*). Umpqua Bank was a holder of a deed of trust that was in default. Umpqua sought receivership. The Court “found appointment of a receiver appropriate both in accordance with the deeds of trust and under the court’s statutory authority.” Umpqua Bank at

page 4. Further discussion in the *Umpqua Bank* case indicated the bank had argued there were no adequate alternative remedies for receivership in light of difficulties collecting rents and preparing the property for sale and a receiver should be appointed. The defendant did not put on evidence of need for other remedies but the Court was clearly aware of other options as the plaintiff argued that receivership was the only appropriate remedy at the time of appointment of a receiver, which would be the proper analysis by the trial court under RCW 7.060.025.

In this case receivership was not discussed nor did the Court make any findings concerning other remedies. There were multiple issues from the evidence that would raise questions of whether receivership of Queen Ann Water Works, LLC would be beneficial, the record showed that from 2008 to 2016 there were no problems with water or the water system and Queen Ann Water, LLC was considered by the State of Washington Department of Health to be blue. RP4, 193, 3-7 There was no income payable to the owners of the water system and the Fitzpatricks never received income from the system, other than receiving water without cost. RP 1 at 380, 402, 455, Ex 41, 71 There were no funds for a reserve account and this was true even when a majority of users were paying increased rates of \$42.00 in 2012 and \$47.00 in 2015. In 2016, the company had to hire Drew Noble of H2O Management Services to

manage Queen Ann Water Works, LLC due to Gerard Fitzpatrick's physical condition.

The allegations of respondents are that appellants didn't provide 90-day notices of rate increases, failed to arbitrate rate increases, continued billing the new rate increases and penalties for failing to pay increased water rates. Though not in agreement with these findings, such alleged violations certainly don't appear to necessitate the need of a receiver to correct.

F. DID APPELLANTS VIOLATE SECTION 5 AND/OR SECTION 7 OF THE THIRD PARTY AGREEMENT

The Third Party Agreement states that if the owner gives notice of a rate increase and no one objects, then within 90 days that rate increase becomes the new rate. Ex 1, §7 If there is an objection by more than one-third of parties to the rate increase, then if the matter cannot be resolved in 90 days, it shall be referred to three arbitrators. Ex. 1, §7 In this case Mr. Fitzpatrick gave notice of a \$5.00 increase from \$37.00 to \$42.00 for water rates in of October 2012. Five (5) people gave a written objection to the increase. Mr. Stewart, one of the objecting parties, then started paying the \$5.00 monthly increase, leaving only four people objecting, which was not more than one-third of the parties. It was under these circumstances that appellants continued to bill the monthly rate of \$42.00 to all water

users and those individuals did the increase with late penalties (the respondents, including Ms. Grabarczyk, who is deceased). The same sequence of events took place when the rates were increased from \$42.00 to \$47.00 in 2015. Appellants gave notice in March of 2015 of the \$5.00 increase. They received an objection to the increase from \$42.00 to \$47.00 from seven parties. Ms. Grabarczyk passed away and only the remaining three respondents and Mr. Singer did not pay the increase, the other objecting parties did start paying the new monthly rate. RP 3, 530-531 This left only one-third of the users objecting not one-third plus one. This did not meet the Third Party Agreement requirement of the more than one-third necessary to seek arbitration within 90 days if an agreement could not be reached. Ex 1 Appellants billed all thirteen users \$47.00 monthly, with late fees for those who did not pay, which included the three respondents and Mr. Stewart. This left the question of whether people could sign an objection but waive the significance of objection by paying the new rate increase. It seems reasonable that would be the effect, or else people could object to increases and force delays and expenses with consequences. The respondents claim that those that objected then paid the rate increase were fearful of late charges, penalties or water shut-off. Respondents B at 30, 16 -18 The point of having one third plus one was to prevent a raise, negotiable for 90 days and if not successful then

arbitration. In this case the persons over one third paid the increase. If Mr. Fitzpatrick's interpretation is correct, then he would not be in violation of Section 5 of the Third Party Agreement.

Section 5 of the Third Party Agreement addresses the obligations of the Company to maintain the water system as set out in the Third Party Agreement and the Company should not collect or attempt to collect from the users water charges in excess of the rate or rates specified or provided in the Third Party Agreement. If Mr. Fitzpatrick's interpretation of Section 7, is correct, then there would be no issue that he was collecting excess water charges or improper fees. Notwithstanding the argument of Section 7, Mr. Fitzpatrick billed all the users the same rates and those users not paying the billed rate were assessed late charges. There is no evidence that Mr. Fitzpatrick tried to collect the late charges nor did he lien anyone's property for excess rates for late fees. Fitzpatrick's should not be in violation of Section 5 or 7 of the Third Party Agreement. Ex 1

G. ASSESSMENTS

There were several assessments the plaintiff testified too that he had repaired including a broken water pipe at the well, a blown out electrical box, and a new well house that was built. The costs for the repairs were \$596.75, \$1,938.15 and \$3,000.00 respectively. RP 4, 609 –

632. These amounts should be awarded. The repairs were necessary repairs defendant had to pay from his pocket.

1. Defendants Should Have to Reimburse Water Users

Whether the defendants violated the terms of the Third Party Contract or not they should not have to reimburse those water users of voluntarily paid the requested raises. As explained earlier defendants do not believe they violated the Third Party Agreement by raising rates as there never was one-third + one objecting to the rate increases for 90 days.

H. CONCLUSION

Defendants request that this case be dismissed as the parties entered into a Settlement Agreement, both on the record November 12, 2015 and in writing July 26, 2016 either confirming the CR2A agreement or as a separate Settlement Agreement offered to appellants.

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

1. The case be dismissed as respondents failed to prove defendants breached the Third Party Agreement or the Water Service Agreement.

2. Attorney fees not be allowed to respondents.

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 appropriate action be taken as to assessments defendants are entitled too.

DATED this 16th day of September, 2019.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 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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Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52984-0
Appellate Court Case Title: Mary C. Hrudkaj et al., Respondent v. Queen Anne Water Works LLC, et al.,
Appellant
Superior Court Case Number: 13-2-00049-4

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