

No. 86130-7

SUPREME COURT OF THE STATE OF WASHINGTON

VANESSA CONDON,
Appellant,
v.
FELY CONDON,
Respondent.

BRIEF OF APPELLANT

Gordon A. Woodley, WSBA #7783
Woodley Law
14929 SE Allen Road
Bellevue, WA 98006
(425) 453-2000

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A.

INTRODUCTION

After the case had already been dismissed with prejudice, Farmers defense counsel tried to get the court to change the terms of the parties' CR 2A agreement and impose increased burdens upon the dismissed party, three weeks after the trial court had already accepted the CR 2A settlement agreement which defense counsel put on the record in open court on March 29, 2011.

The CR 2A settlement included the March 29, 2011 stipulated order of dismissal with prejudice, which was entered on April 1, 2011 and ended the court's jurisdiction.

The CR 2A settlement, which ended the Kitsap County case, which was one aspect of the litigation arising from Fely Condon's 1996 negligent, high-speed collision which ejected her pre-teenage daughter Vanessa through the window of the family car, causing her serious injuries. The first part of the litigation that resolved was an Underinsured Motorist [UIM] Arbitration in

King County in December 2010, which resulted in an award of UIM benefits to Vanessa for her collision injuries. When Farmers did not pay the UIM benefits awarded, Vanessa Condon obtained a \$108,000 judgment plus costs, attorney fees, and interest in Farmers Insurance v. Vanessa Condon, King County Cause No. 11-2-03245-1 SEA.

The CR 2A settlement in the underlying Kitsap County case was an avenue for collecting the lion's share of Vanessa's UIM benefits, which Farmers refused to pay before the March 29, 2011 CR 2A settlement in Kitsap County.

~~Yet, even after Vanessa Condon had performed her side of CR 2A~~ compromise settlement to the fullest extent possible, Farmers still refused to perform its CR 2A promise to pay the \$100,000 toward her UIM benefits.

Farmers wanted Vanessa, its UIM insured, to take on additional burdens and obligations that were never part of the CR 2A settlement, before Farmers and former defendant Fely Condon, would honor the CR 2A settlement and pay Vanessa her long overdue UIM benefits.

Vanessa had done everything she agreed to. The case was already dismissed and over. The only thing left was Farmers' CR 2A payment of the \$100,000 policy limits as a credit reducing Vanessa's \$108,000 UIM judgment against Farmers in King County. Understandably, she was not willing to give more concessions to the very company which had been delaying payment of her UIM benefits, which had refused to pay her UIM arbitration award, which had failed to pay any part of the substantial judgment for UIM benefits, and which was not even honoring its CR 2A commitment.

So, instead of complying with its CR 2A settlement to pay Vanessa ~~\$100,000 and receive a \$100,000 credit against her UIM benefits judgment,~~ Farmers and former defendant Fely Condon [herein "Farmers"] and its defense counsel, who represented Farmers interests in both the King County UIM case and the Kitsap County CR 2A proceedings, went back to Kitsap County Superior Court, after the case was over, seeking to impose additional burdens and obligations upon Vanessa, three weeks after the Kitsap County case had already been dismissed with prejudice.

Despite the court's lack of jurisdiction and the unfairness to Farmers' UIM insured, Farmers' counsel urged Judge Spearman to impose burdens and obligations which were never part of the CR 2A settlement under the guise of "enforcing" the March 29, 2011 CR 2A agreement.

On April 22, 2011, the court, acting without jurisdiction, gave Farmers counsel everything Farmers wanted which Farmers did not include in the March 29, 2011 CR 2A settlement:

- * A financial and legal obligation imposed upon Vanessa Condon to indemnify Farmers Insurance against any lien claim that might arise from the collision;
- ~~* A financial and legal obligation imposed upon Vanessa Condon to hold Farmers Insurance harmless for expenses including attorney fees and costs; and~~
- * A legal obligation imposed upon Vanessa Condon to release all known and unknown claims and to release non-party entities such as Farmers Insurance

Acting without jurisdiction, the judge not only granted all of Farmers' requests and commanded that Vanessa release all known and unknown claims against non-party entities, including Farmers and its agents, but the judge also

ordered that if Vanessa refused to sign the belatedly proposed indemnification, hold harmless agreement, and release of Farmers Insurance and its agents, the judge would deem them signed.

All this was done at Farmers' insistence under the guise of "enforcing" the CR 2A settlement, without the court having jurisdiction, weeks after the case was already over and dismissed.

The net effect of Farmers' untimely post-dismissal motion was:

- 1) to further delay payment of Vanessa's UIM benefits;
- 2) to unfairly saddle Vanessa with financial and legal obligations were never part of the CR 2A settlement; and
- 3) to embroil her in vexatious litigation which interfered with Vanessa receiving the benefits of her UIM contract.

Vanessa Condon asks this Court to rule that the Order Granting Farmers' Post-Dissmissal Motion is null and void for lack of jurisdiction.

B.

ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The court erred in ruling on the post-dismissal motion, since the court was without jurisdiction to hear the matter.
2. The court erred in granting defendant's/Farmers' motion to "enforce" [change] the CR 2A settlement.
3. The court erred in imposing financial and legal obligations upon the former plaintiff, which were never part of the CR 2A settlement which had already ended the Kitsap County case.
- ~~4. The court erred in ordering that these new obligations were deemed signed against the former party's will.~~
5. The court erred in not imposing CR 11 sanctions against Farmers' counsel who brought the post-dismissal motion which was not well grounded in fact nor warranted by existing law or a good faith argument for modifying or reversing existing law.

(2) Issues Pertaining to Assignments of Error

1. Did the Kitsap County judge lack jurisdiction to consider the former defendant's motion ["Farmers' post-dismissal motion"] to add additional obligations upon the former plaintiff, weeks after the court had accepted the CR 2A settlement and dismissed the case with prejudice? (Assignment of Error Number 1)
2. Did the judge violate long-standing Washington law by commanding the former plaintiff to undertake new financial and legal burdens which were not part of the agreed upon CR 2A settlement, after the case had been dismissed with prejudice?
(Assignments of Error Number 2,3,4, and 5)
3. Did the judge lack the authority to order that the post-dismissal indemnification, hold harmless agreement, and release of all known and unknown claims against Farmers and its agents would be deemed signed by the former plaintiff when she declined to

voluntarily take on new obligations after the case was settled?

(Assignment of Error Number 4)

4. Does a former party have the right to expect that the CR 2A settlement will be strictly adhered to without any additional burdens being levied against her, when she had fully performed her obligations under the CR 2A court-approved stipulation which led to dismissal of her case with prejudice and without costs? (Assignments of Error Number 1,2,3, and 4)
5. Is Vanessa Condon entitled to recover her fees under Olympic Steamship or other equitable ground? (Assignments of Error Number 1 and 2)

C.

STATEMENT OF THE CASE

Vanessa Condon was just a youngster in 1996 when she was ejected from the family car negligently driven by her mother in a high-speed collision which left Vanessa with serious injuries. CP 12. When the family insurer Farmers failed to pay its policy limits, the injured daughter, as a young adult, brought suit in Kitsap County to recover damages caused by her mother's driving. CP 3-4. She also initiated an underinsured motorist arbitration in King County where she obtained an award of \$108,000. CP 11. Farmers did not pay that January 2011 UIM award. The UIM benefits award was then ~~judicially confirmed and Vanessa Condon obtained a King County UIM~~ judgment against Farmers for \$108,000 together with interest, costs, and attorney fees in *Farmers Insurance v. Vanessa Condon*, King County Cause No. 11-2-03245-1 on February 11, 2011. CP 16. Farmers did not pay any part of the UIM judgment during the months of February and March 2011.

In order to obtain at least part of her UIM awarded benefits, Vanessa

settled her Kitsap County injury case by having Farmers and her mother agree to pay \$100,000 toward her UIM benefits under the terms of the March 29, 2011 CR 2A settlement agreement. CP 18, 36. The CR 2A settlement was presented by the parties on the record in open court and was accepted by the judge on March 29, 2011. CP 18. In exchange for Farmers paying \$100,000 toward her UIM benefits, Vanessa Condon promised to do three things:

- 1) Vanessa promised to accept less than her damages and that the \$100,000 policy limit settlement would be credited against Farmers' obligation to pay her UIM benefits judgment in King County;
- 2) Vanessa agreed to the CR 2A settlement being put on the record in open court in Kitsap County Superior Court; and
- 3) Vanessa agreed to having her Kitsap County case dismissed with prejudice and without costs.

CP 18.

THE COURT: I hear we have a settlement.

MR. WALL: Yes.

THE COURT: And they will be sending the other counsel through in just a few seconds.

MR. WALL: He is going to call in?

THE COURT: Yes. He has already called in. He is on hold. Hello, who is on the line?

MR. WOODLEY: Yes. Good afternoon, your Honor. This is Gordon Woodley, attorney for Vanessa Condon, and Vanessa Condon is also on the line.

~~THE COURT: Thank you. This is the case of Condon versus Condon, Cause No. 05-2-02872-8.~~

Counsel, would you put your name on the record?

MR. WALL: Gregory J. Wall for Fely Condon.

THE COURT: I understand that this case is scheduled for trial. It would be going to trial shortly, but I understand that you folks have worked out a settlement.

Who wishes to put it on the record?

MR. WALL: I would prefer to. Is that okay with you, Gordon?

MR. WOODLEY: I can't quite hear you, Greg.

MR. WALL: Why don't I go ahead and recite the settlement.

MR. WOODLEY: You may.

THE COURT: Okay.

MR. WALL: This case is going to be resolved for the payment to Vanessa Condon of \$100,000.

In addition, there is an underinsured motorist action in King County, which will be satisfied out of this \$100,000 and the \$8,000, in addition to that, that we will pay.

The only remaining issue in the case in the King County action regarding the confirmation of the underinsured motorist award is we have an issue about whether or not Mr. Woodley is entitled to some fees, and that is subject to a motion this Saturday. And depending on how the motion turns out, that will resolve the case.

THE COURT: Is that your understanding, Mr. Woodley?

MR. WOODLEY: It is pretty darn close. We have settled the Kitsap County case for \$100,000. We agree to enter a stipulated order

of dismissal. We agree to put this settlement of the Kitsap County case on the - -before the Court today.

As to the offer of Farmers to settle the UIM case, we have not accepted that offer yet, but we have informed Mr. Wall that upon the payment of the \$100,000 in the Kitsap County case we will give him a \$100,000 credit against the existing UIM judgment that has already been entered in King County.

And then Mr. Wall is free to proceed with his motion to revise the King County UIM award that was made by Commissioner Wattness (phonetic) in February, and we will argue that motion Friday morning at 10 a.m.

THE COURT: So there is no action left in Kitsap County?

MR. WOODLEY: That is correct.

~~MR. WALL: That is correct. . . .~~

* * *

THE COURT: Very well. An order of dismissal will be provided to this court. . .

TR, 3/29/11, pages 2-5.

After Vanessa performed her settlement requirements and the case was dismissed with prejudice, Farmers refused to pay her the agreed-upon \$100,000

policy limit toward her UIM benefits judgment. CP 33-34.

After the case was settled and dismissed, Farmers insisted that Vanessa do more than the parties agreed to do in the CR 2A settlement; Farmers wanted this young lady to indemnify Farmers for certain expenses that may arise in the future; Farmers wanted her to hold Farmers harmless for any lien claims that may be raised in the future arising out of the 1996 collision; and Farmers wanted Vanessa to release all known and unknown claims, including Farmers wanting her to release all known and unknown claims against Farmers and its agents. CP 63-65.

~~Farmers tried to force these new obligations upon its UIM insured~~
before it would make the \$100,000 payment toward her King County UIM benefits. CP 23.

Since the Kitsap County case was already over and dismissed, Vanessa declined to take on additional burdens in order to obtain payment of her UIM benefits which she was already entitled to receive as a matter

of law. CP 47.

Farmers continued to delay payment of UIM benefits to Vanessa and Farmers brought its defendant's post-dismissal motion to force these new burdens and obligations upon its UIM insured. CP 45.

By its actions, Farmers embroiled its UIM insured in vexatious litigation trying to obtain Farmers' promised payment of her UIM benefits. CP 34. By this vexatious and time-consuming litigation with its insured, Farmers succeeded in further delaying payment of Vanessa's UIM benefits, causing her to incur additional attorney fees and costs to recover the ~~benefits of her family's UIM contract with Farmers.. CP 34.~~

Vanessa, through her counsel, opposed Farmers' attempt to impose additional burdens upon her after the Kitsap County case was already settled, over, and dismissed. CP 36-43. She presented the independent sworn testimony of personal injury attorney John Acheson who informed the court that:

Entry of a stipulated Order of Dismissal with prejudice ends the case. Once the case is dismissed with prejudice, all claims that might have been brought in that case are concluded.Once the Order is signed and entered, that's the end of the matter. Nothing further is required of plaintiff.

CP 30-31, Sworn Declaration of John Acheson, WSBA 9162, dated April 18, 2011.

Vanessa, through her counsel, reviewed long-standing principles of Washington law that the case is over when it is dismissed with prejudice, that the CR 2A agreement is binding, that the court should not rewrite the parties's CR 2A agreement, that Farmers' belated motion offended both CR 11 and fundamental fairness, and that Vanessa's due process and contractual rights were being trampled. CP 27-49.

With Farmers' encouragement, the court ignored these objections and granted Farmers' post-dismissal motion. CP 61-62. Direct review to the Supreme Court was timely requested. CP 66-71.

D.

SUMMARY OF ARGUMENT

The parties settled the Kitsap County litigation with a CR 2A agreement which was made in open court and approved by the court on March 29, 2011. leading to the case being dismissed on April 1, 2011. Thereafter, respondent and Farmers Insurance brought unwarranted post-dismissal litigation to a court which lacked jurisdiction and authority to force additional financial and legal obligations upon Farmers' UIM insured, deeming them signed against her will.

Farmers' post-dismissal motion, which exposed Farmers' UIM insured to unnecessary, vexatious, and costly litigation, was not well-grounded in fact or law as required by CR 11, and needlessly delayed the payment of UIM benefits to the insured. The post-dismissal motion and the order granting the motion upended more than half a century of well-established Washington legal principles; the order should be null and void, lacking jurisdiction and violating well-established Washington law.

E.

ARGUMENT

- (1) The Court Was Without Jurisdiction to Hear Farmers' Post-Dismissal Motion to Impose Additional Burdens that Were Not Part of the CR 2A Agreement Which Settled the Case.

“Whether a court may exercise jurisdiction is a question of law subject to de novo review”. *Conom v. Snohomish County*, 155 Wn.2d 154, 118 P.3d 344 (2005). Farmers and its defendant did not have the right to invoke the court’s jurisdiction under the circumstances of this case. Once the dismissal order was entered, the court lost jurisdiction. As the Court said in *Cork Insulation Sales v. Torgeson*, 54 Wn.App. 702, 775 P,2d 970 (1989):

Dismissal was granted June 20, 1988, at which time, the court lost jurisdiction of the matter. Entry of a judgment after the order of dismissal exceeds the jurisdiction of the court.

Cork Insulation Sales, supra at 705. Likewise, in the present case, the court was without jurisdiction to impose additional burdens upon a former party

against her will. The Order granting defendant's/Farmers' post-dismissal motion "exceeds the jurisdiction of the court". *Ibid.*

The case was already over. In the absence of fraud or other narrowly prescribed ground for upsetting the parties' explicit CR 2A settlement agreement, Farmers had no right to ask the court to exercise non-existent jurisdiction, after the case was fully settled and dismissed with prejudice.

Snyder v. Tompkins, 20 Wn. App. 167, 579 P.2d 994 (1978) said:

We subscribe to the principle that a person attempting to dislocate an in-court settlement of a claim had the burden of showing that the agreement was a product of fraud or overreaching.

Farmers never claimed fraud or overreaching as a reason to impose additional burdens upon its UIM insured before paying her UIM benefits that she was already legally entitled to receive; Farmers just wanted more than it bargained for, which was not part of the CR 2A settlement agreement. And Farmers was willing to embroil its UIM insured and the

judge in vexatious litigation to get it.

Since the court lost jurisdiction after the case was dismissed with prejudice, the Kitsap County judge's post-dismissal order, which exceeded the jurisdiction of the court, *Cork Insulation Sales, supra* at 705, should be held null and void for lack of jurisdiction.

As a Texas appellate court aptly noted:

Jurisdiction of a court must be legally invoked, and when not legally invoked, the power of the court to act is absent as if it did not exist." *Ex parte Caldwell*, 383 S.W.2d 587, 589 (Texas Cr. App. 1964).

Olivo v. State, 918 S.W.2d 519, 523 (Tex. Crim. App. 1996).

(2) The Court Upped Long-Standing Washington Law By Imposing Post-Dissmissal Burdens Upon a Former Party.

Farmers' bringing the post-dismissal motion, weeks after the case was already dismissed with prejudice, was wrong on many levels. First, it was a baseless motion. Farmers' counsel, by his signature on the post-dismissal motion, certified in part under Civil Rule 11 that the post-dismissal was in

compliance with the requirements of CR 11(a) that:

- (1) it is well grounded in fact;
- (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

CR 11(a).

Farmers' Post-Dismissal Motion: Not Well-Founded In Fact

~~Farmers' post-dismissal motion did not measure up to CR-11(a). It was~~
not "well grounded in fact". Farmers brought its motion under the guise of "enforcing" the CR 2A settlement when, in fact, the CR 2A settlement did not contain any agreement that Vanessa would sign a release of all known and unknown claims or indemnify Farmers or hold Farmers harmless, all of which Farmers sought to impose outside the CR 2A agreement after the case was

settled and dismissed.

The very title of Farmers' pleading was misleading and was not true. Farmers was not "enforcing" the CR 2A agreement. Farmers had already breached the CR 2A agreement by not paying the promised \$100,000 toward Vanessa's UIM benefits. Farmers then sought to impose new financial and legal burdens on its UIM insured, after Vanessa performed her CR 2A obligations, allowing her case to be dismissed with prejudice.

Not only was Farmers not "enforcing" the CR 2A agreement, but it was not candid with the judge, by not telling him that he lacked jurisdiction to ~~even consider Farmers' post-dismissal motion when there was no allegation of~~ fraud or recognized ground to attack a CR 2A settlement agreement.

Clearly, Farmers' motion was not "well-grounded in fact" as required by CR 11(a). When an attorney lacks a factual basis for pursuing a matter, CR 11 sanctions are appropriate. *MacDonald v. Korum Ford*, 80 Wn.App. 977, 912 P.2d 1052 (1996).

Farmers' Post-Dismissal Motion: Not Warranted By Existing Law

Farmers motion was not “warranted by existing law”. CR 11(a). As discussed above, the court lost jurisdiction when the order of dismissal was entered on April 1, 2011 and ended the case. CP 19-20. Without jurisdiction, the judge was powerless to act on Farmers’ post-dismissal motion. *Cork Insulation Sales, supra* at 705.

Farmers’ motion was not warranted, even if the court had not already lost jurisdiction. The former parties’ CR 2A settlement agreement was binding on the court and upon Farmers. As our court said in *Cook v. Vennigerholz*, 44 Wn.2d 612, 615, 269 P.2d 824 (1954) a stipulation reported in open court “is binding upon the parties and the court”, citing the predecessor rule to CR 2A. The March 29, 2011 CR 2A agreement was binding on the court, as well as upon the parties. *Ibid.* CR 2A provides that:

RULE 2A STIPULATIONS

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court, unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

On March 29, 2011, Farmers' counsel set forth the parties' CR 2A settlement on the record in open court, including Farmers paying the \$100,000 toward Vanessa Condon's UIM benefits judgment in King County. March 29, 2011 TR 2-4 . The transcript at page 5 and the court's minutes reflect that the court accepted the parties' CR 2A agreement on March 29, 2011. CP 18. The stipulated order of dismissal was signed that day and Farmers' counsel faxed the stipulated order to the court. CP 19. As a result, the case was dismissed with prejudice based on the parties's CR 2A agreement and their stipulated order of dismissal. CP 18; CP 19-20. The court was bound by the Cr 2A agreement, as were the parties. *Cook v. Vennigerholz, supra* at 615.

When the stipulation includes the parties' consent to the entry of an order of dismissal with prejudice, as it did in this case, it "operates to end all controversy between the parties within the scope of the judgment". *Washington Asphalt v. Kaeser*, 51 Wn.2d 89, 91, 316 P.2d 126 (1957).

Farmers' post-dismissal motion ran roughshod over these well-established principles of Washington law and pushed the judge to disregard its obligation to respect and be bound by the parties' CR 2A agreement, which he approved in open court. *Ibid.*

Farmers' post-dismissal motion also ran afoul of the well-established rules that courts are not permitted to rewrite the terms of parties' agreement and are not in the business of rewriting agreements. *Seattle-First National Bank v. Earl*, 17 Wn.App. 830,, 565 P.2d 1215 (1977).

It is a longstanding rule that courts cannot, and ought not, make a contract for the parties which they did not make for themselves or impose upon one party an obligation which was not assumed.

Seattle First National Bank v. Earl, supra at 835.

Farmer's post-dismissal motion, imposing upon Vanessa obligations which were not assumed by her and were not part of the parties' CR 2A settlement agreement, squarely violated the *Earl* rule, as well as CR 11(a) that the motion be warranted by existing law. Farmers did not make any good faith arguments why these well-established principles of Washington law should be modified or reversed, as it would be required to do if it was to comply with CR 11(a).

Farmers failed to heed the rule that court-approved CR 2A stipulations are binding upon the court, as well as upon the parties. *Cook, supra* at 615.

Farmers should never have asked the judge to exercise non-existent jurisdiction to hear Farmers' post-dismissal motion in order to "impose upon one party an obligation which was not assumed" by that party in the CR 2A agreement.

Seattle First National Bank v. Earl, supra at 835.

A court opinion from New York summarized the reasons why open-

court stipulations are binding and strictly enforced. In *First United Methodist Church v. Tot-Spot, Inc.*, 2011 NY Slip Op 51684 (NY Dist. Ct. 2011), the court said at page 4:

a stipulation and order is a binding agreement between the parties to a dispute that is an enforceable agreement [citations omitted]. This Court has recognized that “[s]tipulations of settlement which put an end to litigation promote efficient dispute resolution and are essential to the litigation process” (Matter of Siegel, 5 Misc 3d 1017[A][Nassau Sup Ct 2004], aff’d 29 AD2d 914 [2d Dept 2006]).

The New York court noted that strict enforcement of “open court” stipulations is “essential to the management of court calendars and integrity of the litigation process”, *First United Methodist Church, supra* at 4, and concluded that

Courts will not set aside a stipulation merely because in ‘hindsight’ a party decides that the terms of the stipulation were ‘improvident’. (see *Town of Clarkston v. M.R.O. Pump & Tank*, 287 AD2d 497 [2d Dept 2001]).

Ibid. Farmers’ and its defendant’s CR 2A settlement, put on the record in open court and approved by the court, was the complete expression of the parties’s

settlement. After the case was settled, dismissed, and over, Farmers was not entitled in hindsight to anything more than what it expressly obtained in the CR 2A agreement. *First United Methodist Church, supra* at 4.

Closer to home, our Washington Supreme Court long ago recognized that RCW 2.44.010 and the predecessor rule to CR 2A “give certainty and finality to settlements and compromises. . .” *Eddleman v. McGhan*, 45 Wash.2d 430, 432, 275 P.2d 729 (1954). Indeed, the Court in *Eddleman, supra* at 432, said that the very “purpose of the civil rule and statute is to avoid such disputes” [over what a party could have included, but did not include in the open court stipulation]. ~~The Court added that in the face of such disputes, “the~~ rule and statute leaves the court with no alternative.” *Ibid.*

Washington courts encourage the compromise of litigation and recognize that court-approved settlements are binding and end the litigation. “If the rule were otherwise, the judicial process would be fouled with uncertainty.” *Snyder v. Tompkins*, 20 Wn.App. 167, 174, 579 P.2d 994 (1978).

These well-established principles of Washington law further demonstrate that Farmers' post-dismissal motion was not warranted by existing law or by good faith argument why these well-established principles should be modified or reversed, as required by CR 11(a).

Farmers' Post-Dissmissal Motion: No Case for New Law

Furthermore, Farmers did not make a legal case for establishing new law. Farmers' post-dismissal motion was brought in spite of CR 11(a), in spite of Washington law that jurisdiction was lost, and in spite of Farmers' CR 2A agreement which was binding on itself and upon the court. Farmers failed to make a case that new law was needed in this arena of well-settled Washington law.

Farmers' Post-Dismissal Motion Harrassed Its UIM Insured, Further Delayed Payment of Her UIM benefits, and Needlessly Increased the Cost of Litigation Which She Had Good Reason To Believe Was Over.

Farmers' post-dismissal motion not only further delayed its payment of Vanessa's UIM benefits, but it deprived her of the finality represented by the CR 2A agreement and the knowledge that the case was over. Vanessa did not expect that Farmers would embroil her with vexatious post-dismissal litigation, trying to force upon her obligations which she never agreed to in the CR 2A settlement. This was fundamentally unfair to Vanessa, Farmers' UIM insured.

Not only did Vanessa have the right to expect finality and prompt payment, as discussed in Section 4 below, and to be free from further vexatious litigation with her insurer, but she also had a state constitutional right to expect that she would not be deprived of her personal rights [forced assumption of financial and legal obligations] without due process of law under Article 1, Section 3 of the Washington State Constitution which

guarantees her:

Personal Rights

No person shall be deprived of life, liberty, or property, without due process of law.

Article 1, Section 3, Washington State Constitution (1889).

As stated on page two of “Vanessa Condon’s Opposition to Changing the CR 2A Stipulated Settlement After the Case Has Been Dismissed With Prejudice”, Farmers and the court were warned that

resurrecting the case at this stage raises substantial due process issues [and] burdens Vanessa Condon with prolonged litigation to resolve these issues.

CP 37. Farmers was undeterred. It was perfectly willing to subject its UIM insured to costly post-dismissal litigation even when the court lacked jurisdiction.

Farmers’ post-dismissal motion was unwarranted and harmful, embroiling Vanessa in unnecessary post-dismissal litigation, violating her CR

2A rights, violating CR 11(a), and violating long-established principles of Washington law that a) a court loses jurisdiction when the case is dismissed with prejudice; b) a person shall not be deprived of her personal rights without due process; c) a court must not rewrite contracts made by the parties; and d) a court must not impose obligations upon a former party that the person did not take upon herself. Farmer's post-dismissal motion caused "unnecessary delay" and "needless increase in the cost of litigation". CR 11(a). Vanessa's counsel informed the court that Farmers' post-dismissal motion caused Vanessa "increased attorney fees and expenses of more than \$1250 to object to and respond to this meritless motion". CP-34.

This Court should consider what would be appropriate sanctions for the CR 11 violations by Farmers' counsel. At the very least, Farmers and its counsel should be ordered to pay Vanessa's reasonable expenses incurred because of Farmers' unwarranted post-dismissal motion.

(3) The Court Lacked Authority to Deem the Indemnification, Hold Harmless, and Release Signed, Against the Will of the Former Party.

Farmers' post-dismissal motion was particularly offensive because Farmers was withholding payment of the promised UIM benefits as leverage to force upon Vanessa financial and legal obligations and burdens which she never agreed to undertake. And Farmers was willing to trample upon its UIM insured's constitutional rights in its ill-advised quest to extract more concessions from her after the case was dismissed. When the court said it would "deem" the additional obligations signed against Vanessa's will, Farmers remained silent:

THE COURT:I am going to order it deemed signed. Your client doesn't have to sign it, but it's going to be deemed signed by the court if he continues to refuse to, but I am going to allow you to make an argument on any specific provisions within the [re]lease that are not customary or usual. Do you understand?

MR. WOODLEY: I hear what the Court has said. I am not sure that I understand, but I hear what the Court has said,

and I will review the case law and review it with other counsel and –

THE COURT: I am not asking you to review case law. You have the option, of course, if you want to appeal this, or a reconsideration, I guess, could be appropriate.

But what I am asking you to do is to review the release with Mr. Wall and let him know what provisions are not unusual and customary for a release. Is that understood?

MR. WOODLEY: I hear what you are asking me to do.

THE COURT: It's called "ordering you to do."

MR. WOODLEY: I hear what you have ordered me to do.

THE COURT: Counsel, do you have any follow-up?

MR. WALL: No, your Honor, and I am always happy to discuss release language, but I think that this at least clarifies that we do get a release.

THE COURT: Yes.

MR. WALL: All right.

April 22, 2011 TR 9-10.

Even in its reply briefing, CP 24-26, Farmers ignored the question raised by its insured at CP 37 which asked:

Q. What is the impact on Vanessa's constitutional rights of due process and fundamental fairness when a court deems a new release signed against that person's free will to contract ?

Farmers offered no response and did not express any concern that financial and legal obligations that were not part of the CR 2A settlement would be forced upon its insured against her will, after the case was settled, over, and dismissed.

Not only was there no justification to impose new obligations and burdens upon Vanessa Condon, but there was absolutely no authority in Washington permitting a court to impose obligations upon a party or a former party and to hold that such person's signature would be deemed given to a document that was forced against her will. As noted above, Farmers' counsel raised no objection to the court deeming a person's acceptance and signature

forced against its UIM insured's will. Farmers' silence on this point encouraged the court to go off the deep end and to order that the involuntary indemnification, hold harmless, and release of all known and unknown claims against non-parties such as Farmers and its agents would be *deemed signed* by Vanessa Condon, an action that was without known precedent in Washington. April 22, 2011 TR 9-10. Farmers did not offer any legal authority or argument permitting such fundamental unfairness to its UIM insured, but was content to let the court go out on a very long, unsupportable limb without a word of caution or restraint.

~~The judge found no authority in Washington by which he could deem a~~
person's acceptance and signature against her will. He tried to to justify his bizarre ruling that the involuntarily-imposed document would be *deemed signed*, by relying on what was later discovered to be an unpublished opinion, CP 55, out of the state of California called *El-Fadly v. Northridge Park Townhome Owners*, 2005 WL 1503857; the judge claimed that "the same facts

that came up in this case came up in that case, but it was a little more particular”. April 22, 2011 TR 7.

But, the facts in *El-Fadly* were not the same as in the instant case. In *El-Fadly*, the case had not been dismissed and the court had not already lost jurisdiction. In *El-Fadly*, plaintiff had agreed to sign a release as part of the court-approved stipulation in a case that had not been dismissed. In *Condon*, there was no CR 2A agreement to sign any release [or indemnification or hold harmless which was requested by Farmers after the case was already settled on March 29, 2011 and dismissed. Clearly, the same facts did not come up in *El-Fadly*. The judge was mistaken on the central facts of that case.

The judge also mistakenly claimed that the California *El-Fadly* case gave him rationale to deem a release signed against the will of the party, but just the opposite was the outcome in *El-Fady*. The California court of appeals in *El-Fady* ruled that the plaintiff could *not* be compelled to sign anything that was beyond his express stipulation and the court struck the broader release

language which was not agreed to that the trial court wrongly deemed signed.

Unfortunately, the judge misread the California unpublished opinion and failed to recognize that even where there was an agreement to sign a general release and the case had not been dismissed so the court retained jurisdiction, the *El-Fadly* case did not support imposing post-dismissal obligations upon a former party against her will. In *El-Fadly*, the appellate court reversed the trial court's ruling that a document releasing statutory rights as to unknown claims was deemed signed. The court struck the lower court's ruling, warning that:

~~The trial court is not authorized to create the material terms of a settlement agreement. (*Weddington, supra*, 60 Cal.App. 4th at p. 810.) Mutual consent to the essential terms of the contract is necessary, and the existence of mutual consent is determined by objective criteria and outward manifestations of consent (*Id. at p.811*).~~

* * *

If defendant's counsel wanted more than a general release of claims and contemplated a *section 1542* waiver, he could

have sought to include it among the agreed terms in the signed stipulation for settlement. But there is no indication he even attempted to do so.

* * *

We may not add to or modify the terms of their agreement. We may not add terms regarding a release that was not mutually agreed to by the parties. (See *Weddington, supra*, 60 *Cal.App. 4th* at p. 810.)

El-Fadly, App. 3.

The Kitsap County judge completely misread the *El-Fadly* case. It was 180 degrees opposite from what the judge represented the case to be when he selectively quoted from the case in open court on April 22, 2011. The judge's reluctance to share the case with counsel compounded the problem.

The judge was without jurisdiction and was without authority to impose indemnification, hold harmless and release obligations which he deemed signed, which were not included in the CR 2A settlement agreement; he had no business even considering Farmers' post-dismissal motion which was not well grounded in fact and law as required by CR 11(a). His reliance on an

unpublished opinion which he badly misread led the judge to make a radical departure from well-established Washington law in order to grant Farmers' unwarranted and harassing post-dismissal motion.

Farmers upended more than half a century of solid Washington law when Farmers wrongly urged the judge who lacked jurisdiction to hear Farmers' post-dismissal motion to increase the financial and legal burdens upon its UIM insured in violation of CR 11(a). Farmers needlessly increased the cost of litigation with its post-dismissal motion, CR 11(a), and exposed its UIM insured to vexatious litigation with multiple hearings on Farmers' meritless post-dismissal motion. CR 11 sanctions should have been imposed to deter this baseless post-dismissal motion and to curb abuse of the judicial system. *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992). The lack of subject matter jurisdiction did not preclude the court from imposing sanctions under Rule 11. *Orange Production Credit Association v. Frontline Ventures Ltd.*, 792 F.2d 797, 5 Fed. R. Serv. 3d 71 (9th Cir. 1986).

- (4) The Farmers UIM Insured Had the Right to Believe that the Litigation in Kitsap County Was Over and that She Could Finally Expect Prompt Payment Of \$100,000 Toward Her UIM Benefits Award and Judgment in King County.

When Vanessa Condon agreed on March 29, 2011 that her case could be dismissed and that the \$100,000 Kitsap County settlement monies would be a credit toward her UIM benefits, CP 18, Vanessa had every right to expect that Farmers and the former defendant would honor the CR 2A settlement agreement and would promptly pay her the long-delayed UIM benefits. She had every right to believe that the case was over. She did not expect that Farmers would engage in further delaying tactics and embroil her in time-consuming, vexatious litigation.

Vanessa, through her counsel, reminded the judge of the public policy reasons why the judge should have rejected Farmers' post-dismissal motion:

- Q. Doesn't unilaterally imposing new conditions.... prolong the litigation and the burdens of litigation, which defeats the purpose of the CR 2A settlement?

Q. Doesn't imposing new conditions this way run contrary to Washington's policy of encouraging voluntary settlements and bringing an end to litigation?

Doesn't imposing new conditions this way deprive Vanessa of the benefits of a CR 2A settlement which had brought a final end to the Kitsap County litigation against her mother?

Doesn't this expose Vanessa to vexatious, expensive and time-consuming litigation just to preserve the benefits of her CR 2A settlement ?

CP 38.

Vanessa's expectations were reasonable. She had every right to expect that the CR 2A settlement was final and that the case against her mother was finally over. Washington law clearly supports these reasonable expectations. *See Eddleman, supra* at 432.

Basic contract law should have ruled the day, with the court denying Farmers' post-dismissal motion to upend the very CR 2A agreement it made with Vanessa weeks earlier on March 29, 2011. The court and Farmers were

bound by Farmers' CR 2A agreement with Vanessa which settled the case on March 29, 2011. *Cook, supra* at 815.

(5) Farmers' UIM Insured Is Entitled to Recover Her Attorney Fees Incurred in this Post-Dismissal Litigation.

Vanessa Condon had to assume burden of legal action to obtain the benefit of her UIM insurance by trying to uphold the CR 2A settlement which was to pay her \$100,000 of her UIM benefits.

Under these circumstances where the insured had to engage in vexatious and time-consuming litigation instigated by her insurer, it is fair and equitable that she be awarded her attorney fees incurred to obtain the benefit of her contract. *Olympic Steamship v. Centennial Insurance Co.*, 117 Wn. 2d 37, 54, 811 P.2d 673 (1991) ("We also extend the right of the insured to recoup attorney fees that it incurs because an insurer refuses . . .to pay the justified action or claim of the insured, regardless of whether a lawsuit is filed against

the insured.” *Olympic Steamship, supra* at 52)

Farmers and its defendant’s post-dismissal motion forced Vanessa Condon into vexatious litigation just to obtain the very UIM benefits which she was already entitled to receive by contract, by UIM arbitration award against Farmers, by judgment against Farmers, and by the CR 2A settlement agreement. She incurred attorney fees and costs trying to uphold her CR 2A settlement which was intended to pay her \$100,000 in UIM benefits without further delay and without further hurdles.

If she were not entitled to recoup her attorney fees and costs, her UIM benefits would be diminished and Farmers would be rewarded for not promptly paying the promised UIM benefits.

Farmers used its post-dismissal motion to further delay payment of its insured’s UIM benefits for another two months. Farmers should pay for its insured’s litigation expense incurred to uphold the integrity of the CR 2A settlement and Farmers’ promise to pay \$100,000 of her UIM benefits without

additional hurdles or delays.

A significant purpose of an insurance contract is frustrated if, in order to gain the benefits of the contract, the insured is forced to engage in costly and time-consuming litigation.

Colorado Structures, Inc. v. Insurance Company of the West, 161 Wn.2d 577, 604, 167 P.3d 1125 (2007). “Further, allowing an award of attorney fees will encourage the prompt payment of claims. 352 S.E.2d at 79” [citing *Hayseeds Inc. v. State Farm*, 352 S.E.2d 73 (W.Va. 1986)]. *Olympic Steamship, supra* at 53. As our Supreme Court noted in *McRory v. Northern Insurance Company of New York*, 138 Wn.2d 550, 560-61, 980 P.2d 736 (1999), “the purpose of Olympic S. S. is better served by placing the financial burden” upon the party whose conduct exposed the insured to the vexatious litigation. . . “See *Gossett v. Farmers Ins. Co.*, 133 Wash.2d 954, 980, 948 P.2d 1264 (1997) (the potential for an attorney fee award under Olympic S.S. encourages insurers to satisfy fiduciary obligations, including prompt payment of claims).”

Pursuant to RAP 18.1, Vanessa Condon requests that she recover her attorney fees and costs incurred as a result of Farmers' post-dismissal litigation so that her UIM benefits are not diminished as a result of Farmers' post-dismissal motion which further delayed payment of her UIM benefits. *Olympic Steamship, supra* at 53.

F. CONCLUSION

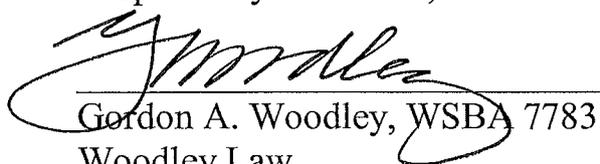
The post-dismissal litigation was brought to a court which lacked authority to impose involuntary indemnification, hold harmless and release provisions deemed accepted and signed against the will of the former party who had already settled the case. Instead of granting Farmers'/respondent's post-dismissal motion, the court should have recognized that it lacked jurisdiction and was bound to respect and uphold the parties' CR 2A agreement which settled the case weeks earlier on March 29, 2011.

This Court should declare the May 13, 2011 post-dismissal order null and

void and should consider appropriate sanctions under CR 11 which will deter Farmers' counsel from bringing such an unwarranted motion in the future. Costs on appeal, including reasonable attorney fees, should be awarded to Vanessa Condon.

Dated this 6th day of February, 2012.

Respectfully submitted,



Gordon A. Woodley, WSBA 7783

Woodley Law
14929 SE Allen Road
Bellevue, WA 98006
(425) 453-2000