No. 99456-1

THE SUPREME COURT
STATE OF WASHINGTON

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

Petitioners

v.

QUEEN ANN WATER WORKS, LLC, and CATHERINE and GERARD FITZPATRICKS

Respondents

ANSWER TO PETITIONERS' PETITION FOR REVIEW

Appeal of Decision by Judge Toni Sheldon, in Case No.13-2-00049-1
Superior Court of Mason County, Court of Appeals No. 52984-0-II

Thomas M. Geisness, WSBA #1878
Peter T. Geisness, WSBA #30897
811 First Avenue, Suite 300
Seattle, WA 98104
Phone: 206-728-8866

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Other Authorities

APPENDIX

A. STATEMENT OF THE CASE

Gerard Fitzpatrick and Catherine Fitzpatrick lived in the Queen Ann-Hill Division of Belfair View Estates (Queen Ann). Queen Ann was separate from other homes in a large development. The Fitzpatricks moved into their home in Queen Ann in 2002. In 2007 the developers of Queen Ann asked Fitzpatricks to take over the water system, which they did. Each residence in Queen Ann had to be on the water system. Each residence/user had to sign three agreements, a Protective Covenants Agreement dated November 20, 1992, a Water Service Agreement dated July 17, 2008 (signed by Fitzpatricks), and a Third Party Beneficiary Contract dated June 25, 1994. There were fourteen users allowed on the water system by the State of Washington Department of Ecology.

The Fitzpatricks named the water company Queen Ann Water Works, LLC. Mr. Fitzpatrick went to school and obtained a Water Distribution Specialist license to be able to operate the water system. The water system included a lot for the pump house where six pumps were located and a lot where the well was located.

The water system never provided income for the Fitzpatricks. They did not pay for their water use. They did pay for $1/14^{th}$ of any assessment for repairs to the water system.

As the owners of the water system they operated the business with the normal interruptions; late payments, the necessity to file liens, doing monthly water tests for the state, reading each users monthly water use, reporting the same to the state, and hiring outsiders for repairs when Mr. Fitzpatrick was unable to make the repairs.

A dispute arose between the petitioners and respondents concerning raises in the monthly charges for water and other issues concerning liens, door knocking fees and management practices. The petitioners eventually brought suit against the Fitzpatricks and Queen Ann Waterworks, LLC on January 22, 2013. The suit was brought under the Third Party Beneficiary Agreement. Section 1(b), it states,

> "any 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." Appendix 5.

There was a court ordered mediation in August 2014. Some agreements were reached in the mediation, but the mediation was not completed, as Mr. Fitzpatrick had to be taken to the hospital. The

undersigned was not involved in the case until the latter part of 2014 after the mediation.

The parties put a CR 2A agreement on the record November 12, 2015. RCW 2.44.010, CR 2A, Appendix 4. This agreement was complete. Mr. Austin, who read the agreement into the record, stated, "I believe that's the agreement and with that the lawsuit would be dismissed....the Court asked the undersigned, "(A)nd is that your clients' agreement as well?" and I answered "Yes." Appendix 1, Page 6.

In July 2016 petitioners presented a Settlement Agreement to respondents based on what was agreed to in the CR 2A hearing of November 12, 2015. Appendix 3. The Fitzpatricks signed the Settlement Agreement July 26, 2016. The Settlement Agreement included all the terms set out by the parties at the CR 2A hearing. Petitioners did not sign the Settlement Agreement.

The trial Court vacated the CR 2A agreement August 29, 2016 on motion by the petitioners. The parties then had a bench trial beginning September 21, 2016 ending January 31, 2018. The Judge signed her decision on August 13, 2018. The petitioners prevailed at trial.

The respondents appealed the decision. On appeal the respondents contended the Court abused its discretion in not upholding the CR 2A settlement agreement. The Court of Appeals agreed that the CR 2A

settlement agreement was enforceable and the subsequent written Settlement Agreement of July 2016 was valid. Appendix 2, Page 11.

A Motion for Reconsideration was filed by petitioners, which was denied December 28, 2020. Petitioners then filed a Motion for Discretionary Review on January 27, 2021 with this Court, which was late and improper in several respects.

B. REPLY ARGUMENT

Respondents object to petitioners' Petition for Review as further review in this case is not warranted under RAP 13.4(b). RAP 13.4(b) states a petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved. Petitioner does not argue that RAP 13.4 (b) (1), (2) or (3) applies to this case.

This case involves a non-published decision involving a CR 2A agreement and/or contractual formation and has little if any substantial public interest to merit review under RAP 13.4(b)(4). This Court determines if there is substantial public interest. Petitioners make no argument that this should be subject to review based on "substantial public

interest." RAP 13.4(b)(4). The issues petitioners raise in their Petition for Review were issues determined by the Appellate Court, which were supported by case law from the Supreme Court and Court of Appeals decisions. Petitioners are asking to have this court review the Court of Appeals decision finding an enforceable CR 2A agreement and abuse of discretion by the trial court. See Petition for Discretionary Review to Supreme Court, Page 5.

Respondents respectfully request the Petition for Review be denied.

Respondents will respond to the issues raised by petitioners. Petitioners' issues are hypothetical questions, speculative or vague issues without direct reference to facts or rulings. Respondents will try to respond appropriately.

1. The CR 2A settlement agreement should be upheld as should the Settlement Agreement offered by Petitioners.

The Court of Appeals found a valid CR 2A agreement was put on the record in court November 12, 2015 by the attorneys of the parties. Appendix 1, 4. The petitioners formalized the agreement in a document entitled Settlement Agreement in July 2016. Appendix 3. Respondents signed the agreement July 26, 2016. Petitioners refused to sign the Settlement Agreement.

The oral agreement put on the record was memorialized in writing by petitioners in July 2016 when they provided respondents the Settlement Agreement. Appendix 1, 3. Petitioners argued after formulating the Settlement Agreement there was not a meeting of the minds and there were ongoing negotiations in seeking to vacate the CR 2A agreement. This makes no sense with the written Settlement Agreement setting forth all the items set forth in the CR 2A agreement. Petitioners have never denied that the written Settlement Agreement was not complete.

Petitioners didn't accurately reflect the sequence of events concerning the CR 2A Agreement. The CR 2A Agreement was placed on the record on November 12, 2015. Appendix 1. Discussions were intermittent following the hearing. The evidence on the record shows respondents waited from the time of the CR 2A hearing of November 12, 2015 until May 25, 2016 to receive a copy of an agreement on some items incorporated into the Settlement Agreement between the petitioners and respondents from an August 2014 mediation. Appendix 6.

There is no evidence produced by petitioners of new negotiations or alleged counter-offers that were made, except petitioners' attorney's statements in argument without specificity. In fact, when petitioners presented the Settlement Agreement in July 2016 to respondents it was exactly what the parties had put on the record. However, discussion of

these issues does not change the fact the parties put on record a CR 2A settlement agreement. The CR 2A agreement should be upheld as determined by the Court of Appeals.

2. If a party agrees to be bound by other agreements or existing contracts then that is what he/she agrees to and would be bound by the terms of their agreements.

The petitioners' attorney read the terms of a CR 2A agreement to the Court. The terms of the agreement were the subject matter of the agreement based on what petitioners sued for. It is proper in an agreement to acknowledge other legal obligations of the parties and how they relate to agreements they made in court. Petitioners referenced the three agreements signed by each user of the Queen Ann water agreement. The Third Party Beneficiary Contract put in the CR 2A agreement in Court gave the petitioners a right to bring an action against respondents. Appendix 5.

Petitioners cannot argue against an agreement they made by later disclaiming the significance of their agreement they made for all users. The record shows they were acting on behalf of all users under the Third Party Beneficiary contract. In their reply brief to the Court of Appeals petitioners stated that the Third Party Beneficiary Contract granted the petitioners/respondents the right to bring legal proceedings on their own behalf or on the behalf of others. Appendix 5, Section 1(b), Section 5. In

their Petition for Review they are now arguing that this is not correct and there has to be agreement with other users on the water system. Petition for Discretionary Review, Page 13. Their argument that any user can bring an action on his/her behalf or on the behalf of others, would be correct. Appendix 5.

Petitioners further state the issue concerning liens (lean) were trivial and didn't apply to petitioners. The liens apply to other users who were not a part of the lawsuit. This is arguing against what petitioners put in as part of the agreement. These were items in the agreement to which the respondents agreed to take care of. Petitioners cannot argue against an agreement they made by later disclaiming the significance of their agreement they made for all users. This confirms they were acting on behalf of all users under the Third Party Beneficiary contract. Appendix 5.

These additional issues were not before the Court in the CR 2A hearing or before the Appellate Court and have no bearing on the finding of a CR 2A agreement between the parties.

3. According to the CR 2A agreement the parties agreed to add amendments to this agreement from a mediation in 2014. This was done, no other amendments are mentioned.

The petitioners attended mediation in 2014 with respondents. Both parties were represented by counsel. Certain issues were agreed upon at the mediation, which were included in the Settlement Agreement. There

were no other amendments known to this writer. As mentioned elsewhere, the respondents waited until May 2016 before receiving the items agreed to at the mediation for verification. Appendix 6.

The petitioners drafted the Settlement Agreement, which set forth all the items agreed to by the parties, including the items from the mediation. Respondents signed the Settlement Agreement July 26, 2016. Appendix 3.

4. Is an agreement that requires the assent of third parties on material terms an enforceable agreement if the third parties never agree to the terms?

This issue was not brought up in the Court of Appeals or the trial court.

The parties entered into a CR 2A agreement November 15, 2015. Both parties agreed to the terms orally. The agreement recognized that the parties acknowledged the three governing agreements of Queen Ann were binding on the parties. This is also in the Settlement Agreement written by petitioners in July 2016. Appendix 1, 3. The petitioners' actions did not affect other users of the water system, but did effect the obligations of the respondents under the settlement agreement. Petitioners cannot argue against an agreement they made by later disclaiming the significance of their agreement they made for all users. Their agreement shows they were

acting on behalf of all users under the Third Party Beneficiary contract. Appendix 5. The Third Party Beneficiary Contract, Section 1 states,

> "any 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." Appendix 5.

Respondents have agreed to the terms as set forth in the settlement agreement, which affects their rights under the founding agreements.

5. The Court of Appeals did not err in their ruling.

As the Court stated, there was an oral agreement November 12, 2015 between the parties, the agreement was placed on the record and agreed to by the attorneys representing their respective clients. The petitioners confirmed this agreement with a written Settlement Agreement in July 2016. In reviewing the November 12, 2015 oral agreement, there was no error and the parties had an agreement. In the July 2016 Settlement Agreement, there was no error in finding that the parties reached an agreement. There was a meeting of the minds as to subject matter of the agreements. Each event shows there was a complete agreement between

the parties. *Morris v. Maks 69 Wn.App. 865, 850 P.2d 1357, review denied, 122 Wn2d1020 (1993),* Appendix 1, 3.

6. It is not error for the Court to allow augmentation of the record.

This is a matter of discretion, it is best that the court has the complete record in reaching its decision. Both parties provided the Court of Appeals with their position and the Court ruled to admit the transcription for filing. Appendix 7.

The petitioners do not show evidence of prejudice or error.

C. CONCLUSION

For the reasons mentioned in the statement of the case, responses to petitioners' issues, the rules for Petition for Review and review of the Appellant Court's decision, the respondents respectfully request petitioners' Petition for Review be denied.

DATED this 22nd day of March 2021.

Respectfully Submitted

By: s/Thomas M. Geisness
Thomas M. Geisness, WSBA #8178
Peter T. Geisness, WSBA #30897
THE GEISNESS LAW FIRM
811 First Avenue, Suite 300
Seattle, Washington 98104

CERTIFICATE OF SERVICE

I certify that on the 22nd day of March, 2021, I caused a true and correct copy of this Respondents' Answer to Petitioners' Petition for Review to be served on the following in the manner indicated below:

Counsel for Petitioners:
Eugene C. Austin
P.O. Box 1753
Belfair, WA 98528

Electronic Mail

s/ Thomas M. Geisness
Thomas M. Geisness

APPENDIX 1

VRP NOVEMBER 12, 2015

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

MARY C. HRUDKAJ, TABITHA GRABARCZYK, PAMELA E. OWENS and JOI CAUDILL, Plaintiffs, vs. QUEEN ANNE WATER WORKS LLC, and GERARD A. FITZPATRICK and CATHERINE FITZPATRICK, Defendants.	)	Mason County Cause No. 13-2-00049-4

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 12th day of November, 2015, Mason County Cause No. 13-2-00049-4 came on for Trial before the HONORABLE TONI A. SHELDON, Judge of the Superior Court, sitting at the Mason County Courthouse, City of Shelton, County of Mason, State of Washington; and the parties appearing with their respective counsel as follows:

EUGENE C. AUSTIN, Attorney at Law, appearing on behalf of the plaintiffs;

THOMAS M. GEISNESS, Attorney at Law, appearing on behalf of the defendants; and

WHEREUPON, the following proceedings were had and done, to-wit:

Carolyn Putvin, Authorized Transcriptionist
MASON COUNTY SUPERIOR COURT
P.O. Box X
Shelton, WA 98584
(360) 427-9670 Ext. 289

THE COURT: Please be seated. Good morning.

MR. AUSTIN: Good morning, Your Honor.

THE COURT: The Court calls on for trial this morning the matter of Hrudkaj versus Queen Anne. I'm sorry if I've mispronounced the plaintiff's name.

MR. AUSTIN: That's alright; I can't pronounce it either.

UNIDENTIFIED VOICE: Hrudkaj. Hrudkaj.

THE COURT: Hrudkaj.

Telephone rings.

COURT CLERK: We have the other attorney appearing by phone.

THE COURT: And you may transfer it up. Oh, it's already here.

Hello, this is Judge Sheldon.

MR. GEISNESS: Yes, hi. This is Don Geisness.

THE COURT: And your last name again, Sir?

MR. GEISNESS: Geisness.

THE COURT: Spell, please.

MR. GEISNESS: G-E-I-S-N-E-S-S.

THE COURT: And I'm Judge Sheldon. You're coming over a speaker phone in our modular courtroom. We're on the record and the Court is just now calling the matter of Hrudkaj versus Queen Anne, Cause No. 13-2-49-4, coming on this morning for trial. And Mr. Austin is present in the courtroom and the

CERTIFICATE OF AUTHORIZED TRANSCRIPTIONIST

STATE OF WASHINGTON)
: ss.
COUNTY OF MASON)

I, CAROLYN PUTVIN, an authorized transcriptionist for the Superior Court of the State of Washington in and for the County of Mason, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That the foregoing Verbatim Report of Proceedings, Pages One through and including Page Ten, is a true and correct transcript of the digitally-recorded audio recording I received directly from the trial court conducting the Trial Call on November 12, 2015, in the matter of Mary C. Hrudkaj et al v. Queen Anne Water Works LLC et al, Mason County Cause No. 13-2-00049-4, before the HONORABLE TONI A. SHELDON, Judge, Mason County Superior Court, sitting at the Mason County Courthouse, Shelton, Washington, on the date hereinbefore mentioned.

This transcript is a true and correct record of the proceedings to the best of my ability. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and I have no financial interest in the litigation.

DATED at Shelton, Washington this 8th day of August, 2016.

CAROLYN S PUTVIN
Notary Public
State of Washington
My Commission Expires
December 20, 2017

Carolyn Putvin

Carolyn Putvin, Authorized
Transcriptionist and
Notary Public

Court was advised that there had been a settlement reached; is that correct?

MR. GEISNESS: That's correct.

THE COURT: And who would like to read the terms of the settlement into the record?

MR. AUSTIN: I guess I would, Your Honor.

THE COURT: Would you come up please, Mr. Austin, and pick up one of these pod microphones and take it back to your table?

MR. AUSTIN: Oh, okay.

THE COURT: That way we'll know that counsel can hear you over the phone.

MR. GEISNESS: And Judge, I'd like to say - and Mr. Austin will probably indicate the same - is that this is - we're going to give you the basic principles of our agreement, but we haven't finalized the wording of some of the parts of it.

THE COURT: Alright. Go ahead.

MR. AUSTIN: Alright. Your Honor, the parties' agreement is for settlement of this matter that the applicable agreements are, there's three applicable agreements that will be binding on the parties: the Declaration of Water Services from November 20th, 1992; the Queen Anne Hill Water Division Belfair Estates document from July 17th, 2008; and the Third Party Beneficiary Contract of June 25th, 1994. The - there's a

Naming Rates Document from 2012 which is not applicable.

In exchange for this agreement Mr. Fitzpatrick and QAW agree that they will abide by the, these agreements and the terms thereof. There are some amendments to the agreement. These arise out of this settlement agreement and a mediation that took place in August of 2014. Those shall be - will be attached to the settlement agreement and made a part of the governing documents.

Mr. Fitzpatrick agrees to facilitate the release of three liens that are still showing as being active, although the Fitzpatricks had agreed that they've been satisfied. There's a 2012 rate increase, and the parties agree that they will accept the rate increase to $42.00 monthly, effective as of the date of the signing of this agreement. There will be no retroactive payments.

There is contention over a special assessment for tree cutting. There's some disagreement over whether it's a special assessment or not, but the defendants agree that they will provide some proof of - that the work was done and what amounts were paid on that assessment, and there will be a deadline established. I believe the deadline is still thirty days from the agreement, date of the agreement?

MR. GEISNESS: Well, no, I haven't had a chance to confirm that.

MR. AUSTIN: Okay, so that's up in the air --

MR. GEISNESS: I think that will probably --

MR. AUSTIN: -- but there will be a deadline.

MR. GEISNESS: -- be a little bit longer, but I, you know.

MR. AUSTIN: Yeah, so there will be --

MR. GEISNESS: We might be able to absolve that before we ever have to finish signing the agreement, but anyway.

MR. AUSTIN: Okay. Yeah, so --

MR. GEISNESS: But I think that if - it wouldn't be much longer than thirty days, okay.

MR. AUSTIN: Okay. Yeah, so there'll be a deadline for providing that evidence, and if that evidence is provided then the - there'll be a - my clients agree that's a - that they'll make the payments on that and it'll be, there'll be some arrangement for that to be paid in a monthly - on a monthly basis.

There's another 2015 rate increase. Defendants agree that they'll treat this rate increase as it is outlined in the existing documents, that they'll have - we'll have a meeting as soon as possible to discuss it, provide evidence. If there is no agreement then it'll go through the dispute resolution process for the rate increases as outlined in the third party beneficiary contract.

There's -- door knock fees; is that still . . . ?

MR. GEISNESS: Yeah. We've agreed to that, yeah.

MR. AUSTIN: Okay, yeah. There'll be a - they agree that there'll be no door knock fees for just delivering notices to the customers in lieu of mail, and so they won't charge for doing that. That's a courtesy that you see for the defendants, but that does not apply to official notice of process - service of process as required by law or court rule.

Any future expansion of the water system will not be paid for or charged or assessed to the existing customers. The defendants agree to present a financial plan for creating an emergency fund to cover repairs - you know, emergency repairs to the water system, and agree that that account will have a second party signature.

Any - the special assessments, we're working out some - beginning to require that there be proper notice before the assessment is made and the timely proof of the work being done, that it be limited to a specific time, like perhaps ninety days.

Each of the parties agree to refrain from blocking the roadway or harassing the other party. This lawsuit, in exchange for these agreements, would be dismissed. Each party will agree to pay their own attorney's fees. And we have some - [unintelligible] clause that there's a binding - will include the binding effect of this agreement on the parties, that no waiver will be - of any of the terms will be binding going

forward or will count as a continuing waiver. A severability clause. And there will be a dispute resolution clause, which we have a little bit of modification to do to, and each of the authorities - each of the parties agree that they have authority to sign the document, and finally, the effective date will be the date of the last signature is obtained for the settlement.

And I believe that's the agreement and with that the lawsuit would be dismissed and the parties would proceed with the dispute resolution of the final matter remaining.

THE COURT: And Counsel, have you been able to hear okay?

MR. GEISNESS: I think I heard most of it.

THE COURT: Alright. And is that your clients' agreement as well?

MR. GEISNESS: Yes.

THE COURT: And at what future date can the Court be able to expect the final document in this case, which is I'm looking - I'm thinking about is just an order of dismissal. When can we get that?

MR. GEISNESS: I have one question that kind of comes up.

THE COURT: Go ahead.

MR. GEISNESS: And maybe I can voice that. One of the plaintiffs is in arrears by about nine months of payment,

and I don't know, under those circumstances, whether her signature is needed in this settlement. I just throw that out as a question.

MR. AUSTIN: Oh, are you talking about the one party that's --

MR. GEISNESS: Grabarczyk.

MR. AUSTIN: Yeah. Well, I think what the agreement would be is that any late fees would be, you know, that's appropriate. She would be entitled to the payment that existed for everybody else, but she has to make the payments for that time period. I understand that there's - she had some health problems and financial problems, and so I think that'll just be dealt with properly.

MR. GEISNESS: I'm not --

MR. AUSTIN: I think - in short, I'm saying that the late fees and back payments are owing for her, you know, at the amount that --

MR. GEISNESS: Yeah. No, I'm not - I wasn't so worried about that. I was just wondering what her standing would be --

MR. AUSTIN: Oh.

MR. GEISNESS: -- be a signatory to the document; that's what it was.

MR. AUSTIN: Well, she's a party, so I think she would sign the agreement and - based on the same terms, yeah.

MR. GEISNESS: Okay. Okay.

THE COURT: Alright. So my --

MR. GEISNESS: I have no further questions. Thanks.

THE COURT: And again, the Court's question is, I'm going to have to note this on for one of our staff to monitor that --

MR. AUSTIN: Uh-hum.

THE COURT: -- your final document comes in, and what's a reasonable period of time to get this concluded?

MR. AUSTIN: I think for working out the wording it's not going to take too long. Mr. Geisness has indicated that he has, you know, a little bit of difficulty getting the documents to and from his client because he has no computer, but - so, I think I'd have to defer to Mr. Geisness on that time limit.

MR. GEISNESS: Well, here's what I think. I'd like to - how about two weeks?

MR. AUSTIN: That's fine.

MR. GEISNESS: You know, I'd like to get it done sooner than later, actually, and I'll try and - I think we can get the written document done in just a few days, you know, by Monday or so. Today's Thursday? Yeah. Monday. So, but I'd like to - so, I - but I just - then the question is how soon you can get all your people to sign. That's my question, I guess.

MR. AUSTIN: I don't have a problem getting them to

sign it within a few days after we get the final agreement, so I think that --

MR. GEISNESS: Yeah.

MR. AUSTIN: If you can do two weeks, we could probably meet that as well.

MR. GEISNESS: Okay.

THE COURT: Alright. So we're looking at probably checking this court file at the end of the first week of December, so December 4th is when we're going to be looking to see that our court file has an order of dismissal in it. That gives you two weeks and some more days in order to get signatures.

MR. AUSTIN: It was December 4th?

THE COURT: December 4th.

MR. GEISNESS: And so - and that's when you want to have a written motion and order for dismissal --

THE COURT: That's --

MR. GEISNESS: -- with a copy of the agreement?

THE COURT: That's correct.

MR. GEISNESS: Okay. And do you want our appearance there, Your Honor, or just --

THE COURT: No.

MR. GEISNESS: -- the documents submitted?

THE COURT: Yeah, it's just an administrative check by our office that this has come to a close by that date.

MR. GEISNESS: Okay. Okay.

THE COURT: Anything else that either of you would like to place on the record regarding this stipulated agreement?

MR. GEISNESS: Nothing else from the defendants' side.

MR. AUSTIN: Nothing else from the plaintiff, Your Honor.

THE COURT: Alright. Thank you for being available by phone, and Mr. Austin, thank you for coming in person.

MR. AUSTIN: Thank you.

MR. GEISNESS: Oh. Thank you for allowing me to do it by phone. So --

Matter is adjourned.

****

APPENDIX 2

COURT OF APPEALS, DIVISION II DECISION
SEPTEMBER 1, 2020

Filed
Washington State
Court of Appeals
Division Two

September 1, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARY C. HRUDKAJ, TABITHA GRABARCZYK, PAMELA E. OWENS, AND JOI CAUDILL, Respondents, v. QUEEN ANN WATER WORKS, LLC, AND GERARD A. FITZPATRICK AND CATHERINE FITZPATRICK, Appellants.	No. 52984-0-II UNPUBLISHED OPINION

LEE, C.J. — Queen Ann Water Works, LLC, Gerard Fitzpatrick, and Catherine Fitzpatrick appeal the trial court's rulings, arguing that the trial court erred by 1) failing to enforce the CR 2A agreement and written agreement memorializing the CR 2A agreement read into the trial court's record, 2) awarding attorney fees to Respondents, 3) appointing a receiver without making findings required by RCW 7.60.025, 4) ruling that they had violated Sections 5 and 7 of the Beneficiary Contract, and 5) ruling that their assessments were improper.

We hold that the trial court erred by failing to enforce the parties' CR 2A agreement placed on the record before the trial court. Accordingly, we reverse the trial court's Findings of Fact and Conclusions of Law; Memorandum Decision, Findings of Fact and Conclusions of Law re: Award

of Attorney's Fees; and Judgment and Order, and we remand to the trial court to enforce the CR 2A agreement that was placed on the record before the trial court.

FACTS

Mary C. Hrudkaj, Tabitha Grabarczyk (deceased), Pamela Culy (formerly Pamela Owens), and Joi Caudill (collectively "Respondents") filed suit for contractual breaches against Queen Ann Water Works, LLC and Gerard and Catherine Fitzpatrick (collectively "Fitzpatrick"). Gerard and Catherine Fitzpatrick own and manage Queen Ann Water Works, LLC, a private water system (Queen Ann water system).

A. HISTORY OF THE QUEEN ANN WATER SYSTEM

Peter and Jean Bakker (Bakkers) developed the Queen Ann-Hill Division of Belfair View Estates (Estate), a 50-acre plot of land, containing eighteen lots. As part of the development of the Estate, the Bakkers obtained a water right from the State of Washington for five acre-feet of water per year with 14 water hookups permitted.

The lots in the Estate are subject to the Declaration of Protective Covenants for Queen Ann-Hill Division of Belfair View Estates (Protective Covenants). Under the Protective Covenants, the lots in the Estate are burdened by the restriction that the Queen Ann water system must be the sole provider of water. And the Protective Covenants are binding on future lot owners, their heirs, successors, and assigns of the Estate.

The Bakkers also executed a Declaration of Water Service for Queen Ann-Hill Water Division of Belfair View Estates (Declaration of Water Service) on the same day as the Protective Covenants in 1992. The Declaration of Water Service laid out the terms and conditions relating

to the Queen Ann water system for the Bakkers and their successors in interest, as well as for the future owners of the eighteen lots in the Estate and their successors in interest.

On June 24, 1994, the Bakkers executed a Third Party Beneficiary Contract Agreement (Beneficiary Contract). The Beneficiary Contract was for the benefit of present and future owners of lots in the Estate served by the Queen Ann water system and their mortgage holders.

After Peter Bakker's death in 2004, his son in law, Robert Smalser, took over management of the Queen Ann water system. Smalser initially hired Gerard Fitzpatrick to operate the Queen Ann water system in 2007. By 2008, Gerald and Catherine Fitzpatrick became the owners of the Queen Ann water system.

B. GOVERNING CONTRACTS

The Protective Covenants, Declaration of Water Service, and Beneficiary Contract all run with the land. The Protective Covenants executed by the Bakkers state, in relevant part:

> WATER SERVICE. Water is provided by [the Bakkers] to the land described herein. Under no circumstances shall additional water wells be drilled on the lands described on page 1 of this document; [the Bakkers'] private water system shall be the sole provider of water. Water shall be provided by execution of an individual water agreement between [the Bakkers] and the Property Owner who purchases a portion of the land, described on Exhibit A.

Ex. 2 at 2.

The Declaration of Water Service was between the Bakkers and the future property owners of the Estate. The Declaration of Water Service states, in relevant part:

> 3.3 BAKKER may charge additional fees known as assessments for unexpected nonrecurring repairs. Such assessments shall be charged to all according to the percentage of their hookup(s) in relation to the total number of hookups sold including standby hookups. No Property Owner shall be billed more than One hundred fifty dollars ($150.00) per hookup in any one month for such additional assessments. However, in the event that the assessment

> totals more than One hundred fifty dollars ($150.00) per month per hookup, BAKKER may charge each Property Owner for each hookup up to One hundred fifty dollars ($150.00) per month each until such time as the total assessment shall be paid. No such assessment shall be made until such time as BAKKER has installed the required equipment/well apparatus or made the repairs and such work is performed in accordance with the laws of the State of Washington, Department of Social and Health Services.
>
> . . . .
>
> 11.1 In the event legal action is brought by BAKKER or their assigns as owner of the water system, the supply lines up to the "point of hookup" herein described and which includes the well and pumping apparatus and tanks, against the Property Owner or their successors in interest, for any reason arising out of the Agreement, the Property Owner or his/her assigns agree to pay, in addition to any judgment or obligation, a reasonable attorney's fee and costs of suit. Any judgment rendered in favor of BAKKER shall be a lien against the land of the Property Owner described herein. Said lien may be foreclosed upon and the property sold pursuant to the laws of the State of Washington. Venue shall be in Mason County regardless of whether any other court has concurrent jurisdiction.

Ex. 3 at 2, 4.

The Beneficiary Contract was between the Bakkers and third party beneficiaries of the property purchasers (i.e., mortgage or title companies of the property purchasers). The Beneficiary Contract states, in relevant part:

> WHEREAS, the [Bakkers] hereby warrants that existing and future encumbrances, liens or other indebtedness, if any, to the title of water supply systems now owned or hereafter acquired by the [Bakkers] shall be subordinated and made subject to this Agreement.
>
> . . . .
>
> Section 2. . . .
>
> (a) The [Bakkers] shall supply at all times and under adequate pressure for the use of each of the properties, duly connected to its water supply system a sufficient quantity of water to meet the reasonable needs of each of the properties duly connected to said water supply systems. Such water shall be of the quality

and purity as shall meet the 1974 Safe Drinking Water Act of the U.S. Environmental Protection Agency (EPA), . . . In the event said Board shall determine that the purity of the water does not meet the aforesaid Standards, the [Bakkers] shall immediately at its sole cost and expense make any adjustment, repair, installation, or improvement to its facilities that shall be necessary or required or recommended by said Board to bring the purity of the water up to said Standards.

. . . .

Section 5.

In the event the [Bakkers] should fail to operate and maintain the water supply systems in the manner and under the conditions specified herein (failure due to Acts of God, natural disasters or other causes beyond the control of the [Bakkers], including labor troubles or strikes, excepted) or in the even [sic] the [Bakkers] collects or attempts to collect from the consumers of water charges in excess of the rate or rates specified or provided for in this Agreement, then in either of such contingencies, if such default shall continue for a period of thirty (30) days (or for a period of two (2) days in the event such default consists of a shutdown of the water or suspension of water services, except for the causes above set forth) after written notice to the [Bakkers] by any consumer, mortgagees, or by any person for whose benefit this contract is made, then and in such event any such person for whose benefit this contract is made, may enforce this Agreement by action, instituted for such purpose in any court of competent jurisdiction and in such action shall be entitled as a matter of right to the entry of an order appointing a receiver or other officer appointed by the court to take immediate possession of the water supply systems of the [Bakkers] for the purpose of operating and maintaining the same with the full right to hold, use, operate, manage and control the same for the benefit of the parties for whom this Agreement is made, with full right to collect the charges for services at rates not in excess of those specified or provided for in this Agreement. Such receiver or other officer of the Court, during the period of its operation, shall be entitled to such reasonable compensation and expenses, including reasonable attorneys' fees, as may be determined by the Court.

. . . .

Section 7.

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

> If within ninety (90) days after notice to the Representative and to all parties connected to the water supply systems of a rate change proposed by the [Bakkers], not more than one-third of such parties have signified in writing their opposition to such proposed rate change, the [Bakkers] may forthwith establish such new rates. If more than one-third of such parties signify, in writing, their opposition to a rate change proposed by the [Bakkers], or if more than one-third of such parties proposed in writing a rate change which the [Bakkers] approves, and the parties cannot negotiate an agreement within ninety (90) days to the reasonableness of the new rates, then the matter of the reasonableness of such new rates shall be referred to arbiters selected as follows: The [Bakkers] shall designate one arbiter, the objecting parties shall designate one arbiter, and the two arbiters thus selected shall chose a third arbiter. The three arbiters shall me [sic] their written recommendations to the parties to the dispute as to the reasonableness of the new rates within ninety (90) days after the reference of the dispute to them. Written notice of the hearing of the dispute by the arbiters shall be given to the [Bakkers] and to all objecting parties. All proceedings before the arbiters shall be recorded in writing. Either side to the arbitration may present written objections to the recommendations within thirty (30) days after the decision. If no written objections are made, it shall be considered that all parties agreed that the new rates recommended by the arbiters are reasonable. If written objections are filed by either side, the questions of the reasonableness of the new rates shall be the subject of review by a court of competent jurisdiction in appropriate legal proceedings initiated for such purpose. In the event of arbitration of court proceeding the proposed change of rates shall be held in abeyance and shall not become effective until the conclusion of such proceedings.

Ex. 1 at 1-4.

C. WATER RATES

When Gerard and Catherine Fitzpatrick took over the Queen Ann water system in 2008, the water rate was $20 per month. Fitzpatrick increased the rate to $35 per month effective March 1, 2008. Fitzpatrick again raised the rates to $36 and $37 in 2010 and 2011, respectively.

On September 30, 2012, Fitzpatrick issued notice that the water rate would increase from $37 to $42, effective November 1, 2012. Five water users, including Respondents, objected to the rate increase and requested arbitration under Section 7 of the Beneficiary Contract. Fitzpatrick did not respond to the objection and increased the water rate to $42.

Also on September 30, Fitzpatrick notified the water users that a $3,300 assessment will be charged for removing large trees at the wellhead, repairing vandalism to the wellhead, and installing lighting at the wellhead to deter vandalism. Fitzpatrick did not provide proof of payment or that the work had been completed as required by Section 3.3 of the Declaration of Water Service.

D. COMPLAINT

Respondents filed a complaint against Fitzpatrick on January 22, 2013. The complaint alleged that Fitzpatrick improperly raised water rates and imposed assessments in violation of existing agreements. Respondents sought an injunction and permanent restraining order against Fitzpatrick to prevent improper assessments and water rate increases, appointment of a receiver as allowed for in the Beneficiary Contract, damages, and attorney fees and costs.

During the course of the lawsuit, on November 30, 2014, Fitzpatrick gave notice that the water rate would again increase to $47 per month, effective March 1, 2015. Seven users, including Respondents, objected. Fitzpatrick responded by saying a meeting will be planned with the water system users, but a date for the meeting was never provided, and the water rate was increased to $47 per month on March 1.

E. NOVEMBER 12, 2015 AGREEMENT ON THE RECORD

On November 12, 2015, the day trial was scheduled to begin, the parties reached an agreement and orally presented their agreement to the judge in open court. The parties stated that they had reached agreement on the "principles" of their agreement, but they had not finalized the wording of the agreement. Verbatim Report of Proceeding (VRP) (Nov. 12, 2015) at 2.

The parties agreed that the Protective Covenants, Declaration of Water Service, and Beneficiary Contract were applicable to the settlement of the matter and that Fitzpatrick will abide

by the terms of those agreements. The parties also agreed that previously agreed to amendments to the applicable agreements will be attached to a written settlement agreement and will be made a part of the applicable documents. The parties further agreed to (1) Fitzpatrick releasing 3 liens he had filed against properties; (2) accepting the September 30, 2012 water rate increase to $42, which will become effective on the date of the signing of the agreement with no retroactive payments; (3) Fitzpatrick providing proof that the September 30, 2012 special assessments were done and the amounts paid within 30 days, and once proof is provided, Respondents will pay the special assessment on a monthly basis; (4) having the November 2015 water rate increase go through the process outlined in the applicable documents, and if no agreement can be reached, the matter will proceed to a dispute resolution process outlined in the Beneficiary Contract; (5) eliminating "door knock fees" for delivering notices to Fitzpatrick's customers; (6) not charging existing customers for any future expansion of the water system; (7) requiring Fitzpatrick to present a financial plan for the creation of an emergency fund to cover emergency repairs to the water system and have a second party signature for those funds; (8) requiring that proof of work being done be provided within 90 days after any notice of special assessments; (9) refrain from blocking the roadway or harassing each other; (10) dismiss the lawsuit; (11) each party paying their own attorney fees; (12) the agreement being binding on all parties; (13) not having any prior waiver be considered a continuing waiver; (14) including a dispute resolution clause; (15) including a severability clause; (16) the parties having authority to sign the document memorializing the agreement; and (17) the agreement having an effective date of the date the last signature is obtained on the settlement document memorializing the agreed terms before the court.

The parties also discussed providing the trial court with a signed written settlement agreement within 2 weeks. The trial court directed the parties to have a written motion and order for dismissal in the court file by December 4.

F. WRITTEN SETTLEMENT AGREEMENT

Respondents drafted, and Fitzpatrick signed, a written settlement agreement. The written agreement reflected the terms agreed to on the record before the trial court, including the three applicable agreements the parties agreed to abide by, the amendments to those agreements the parties had previously agreed to, the release of liens, the 2012 rate increase, the 2015 rate increase, the special assessments, the door knock fees, future expansion of the water system, a financial plan for an emergency fund, an agreement to refrain from blocking the roadway or harassing the other party, the severability clause, the dismissal of the lawsuit, attorney fees, the binding effect of the agreement, waivers, dispute resolution, and the authority of the parties to enter into the agreement.

G. MOTION FOR NON-CR 2A STATUS

Although they drafted the written settlement agreement, Respondents did not sign the agreement. Instead, Respondents filed a motion for non-CR 2A status, which came on for hearing on August 29, 2016. Respondents argued that the parties only read into the record a "basic framework" and it was not a completed agreement. VRP (Aug. 29, 2016) at 2. Respondents also argued that because the parties did not agree to all the terms of the agreement, the agreement was not complete. According to Respondents, the parties had continued negotiating after the agreement was placed on the record on November 2015. Respondents further argued that there was no "mutual assent" as required under contract law. VRP (Aug. 29, 2016) at 6.

Fitzpatrick argued that on July 25, 2016, Respondents sent him a final version of the written settlement agreement. Fitzpatrick signed the document on July 26. Fitzpatrick asserted that

> [n]ow when you compare that document that was signed by my clients on July 26 compared to what was written into the court—spoken into the court record on November of last year, it's—every item that was mentioned in that agreement is an item that is mentioned in the settlement agreement. There's no new items in the settlement agreement. And there was, I would say, changes. But there was no changes in the principle of any of the items that were brought forth.

VRP (Aug. 29, 2016) at 7.

The trial court ruled that the written settlement agreement was not signed by both parties, so it was not effective under CR 2A. The trial court noted that several matters had not been agreed to when the parties' agreement was placed on the record before the trial court: "the special assessment for tree cutting, the special assessment in general, notice provisions for that, and that the payment plan for paying back the amount of the special assessment for tree cutting." VRP (Aug. 29, 2016) at 14-15. The trial court also noted that the agreement placed on the record was "not a bare outline of how the agreement will look. They are very specific, and they're agreed to." VRP (Aug. 29, 2016) at 15. But the trial court ruled that

> there are material matters in the four or five areas that agreement was not yet read into the record as to where the parties, and if they agree on the special assessment, for tree cutting, if they agree on the notice for special assessments. They haven't agreed definitely on the payment plan. And the severability clause, we don't know what's being severed and not severed, which I'm thinking [Respondents' counsel] is—brought up an issue that I didn't see here at all, and that is if things go south, then they can go back and re-litigate the things that they've already agreed to here.
>
> So the Court does find overall that even though there are a number of things that are very clearly read into the record and very clearly agreed to, that are material elements of this total agreement that are not present in the written—it's not a written, it was an oral—orally read into the record, attempt at a full settlement.
>
> So the Court does find that the provisions that were read into the record on November 12, 2015, just prior to trial, do not bind the parties. They do not fully set forth a full agreement to settle the matter.

VRP (Aug. 29, 2016) at 15-16. Because the trial court found the agreement read into the record before the court did not fully set forth a full agreement to settle the matter and did not bind the parties, the court invalidated the agreement and set a new trial date.

Fitzpatrick filed a motion for reconsideration on September 8, 2016. The trial court denied the motion because Fitzpatrick's arguments were a repeat of the arguments made in response to the Respondents' motion for non-CR 2A status.

H. BENCH TRIAL

A bench trial was held to resolve the case. The trial began on September 21, 2016, and concluded on January 31, 2018.[1] VRP 11; CP 248. The trial court entered Findings of Fact and Conclusions of Law; a Memorandum Decision, Findings of Fact and Conclusions of Law re: Award of Attorney Fees; and a Judgment and Order in favor of the Respondents.

Fitzgerald appeals.

ANALYSIS

A. CR 2A AGREEMENT

Fitzpatrick argues that the trial court erred by not upholding the CR 2A settlement agreement placed on the record before the trial court and the subsequent written settlement agreement memorializing the agreement that was placed on the record. We agree.

[1] Plaintiff Tabitha Grabarczyk had passed away since the complaint was filed, so the representative of her estate was present.

1. Enforceability of CR 2A Agreement on the Record

CR 2A states:

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

RCW 2.44.010 states:

> An attorney and counselor has authority:
>
> (1) To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney[.]

We review the trial court's decision to enforce a settlement agreement pursuant to CR 2A and RCW 2.44.010 under the abuse of discretion standard. *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357, *review denied*, 122 Wn.2d 1020 (1993). An abuse of discretion occurs when a decision of the trial court is manifestly unreasonable or based on untenable grounds or reasons. *Id.* A trial court abuses its discretion when it erroneously interprets a contract. *See Bauman v. Turpen*, 139 Wn. App. 78, 93-94, 160 P.3d 1050 (2007).

An informal agreement may be "sufficient to establish a contract even though the parties contemplate signing a more formal written agreement" in certain circumstances. *Morris*, 69 Wn. App. at 869. To determine whether the informal agreement is enforceable, we consider "whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings,

and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract." *Id.*

"[T]he fact that the parties contemplated drafting a formal settlement agreement does not necessarily mean that they intended to be bound only upon execution of that document." *Id.* at 872. "If the subject-matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them by virtue of the informal writings, even though they may contemplate that a more formal contract shall be subsequently executed and delivered." *Loewi v. Long*, 76 Wn. 480, 484, 136 P. 673 (1913).

The rules of contract interpretation apply to a CR 2A agreement. *In re Marriage of Pascale*, 173 Wn. App. 836, 841, 295 P.3d 805 (2013). Absent disputed facts, the legal effect of a contract is a question of law we review de novo. *Matter of Estate of Petelle*, 195 Wn.2d 661, 665, 462 P.3d 848 (2020).

Our primary goal is to ascertain the intent of the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). We determine intent by focusing on the objective manifestation of the parties in the written contract. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Accordingly, we consider only what the parties wrote; giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent. *Id.* at 503-04. A contract "should be construed as a whole and, if reasonably possible, in a way that effectuates all of its provisions." *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007).

An enforceable contract requires "a mutual intention or 'meeting of the minds' on the essential terms of the agreement." *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn.

App. 846, 851, 22 P.3d 804 (2001). The terms agreed to must be sufficiently definite. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004). If an offer is so indefinite that a court cannot decide just what it means and fix exactly the legal liability of the parties, acceptance does not result in an enforceable contract. *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957).

a. Subject matter

Here, the parties represented to the trial court that they agreed to the applicable governing agreements, the amendments to the governing agreements from the 2014 mediation, the release of three liens, the 2012 rate increase, the assessment for tree cutting, the 2015 rate increase, the door knock fees, the future expansion terms, the financial plan for an emergency fund, the management of the special assessments, refraining from blocking the roadway or harassing the other party, the dismissal of the lawsuit, attorney fees, the binding effect of the agreement, waivers, and dispute resolution, severability of the contract provisions, parties' authority to sign, and effective date of a written agreement. Thus, the record shows that the parties had agreed to the subject matter in the agreement and placed that agreement on the record.

b. Terms agreed upon

The trial court found that there were "four or five areas that agreement was not yet read into the record." VRP (Aug. 29, 2016) at 15. However, the trial court only specified that the documentation deadline and payment plan for the tree cutting assessment, the notice and payment plan for the special assessment, and what the severability clause applied to had not been agreed upon when the agreement was placed on the record.

i. Tree cutting assessment

The trial court found that the parties had not agreed on the record to the terms for the tree cutting assessment. Specifically, the trial court found that the parties did not agree on "the specific deadline for turning in the documentation" to prove the work done and the amount paid and the parties did not agree on a "payment plan for paying back the amount" for tree cutting. VRP (Aug. 29, 2016) at 13-14. With regard to the discussion of the tree cutting assessment when the parties placed their agreement on the record before the court, the parties stated:

> [Respondents' Counsel:] [Fitzpatrick] agree[s] that they will provide some proof of—that the work was done and what amounts were paid on that—that assessment. And there will be a deadline established. I believe the deadline is still 30 days . . .
>
> [Fitzpatrick's Counsel]: Well, no, I—I haven't had a chance to determine that.
>
> . . . .
>
> [Fitzpatrick's Counsel]: But I think—if—if—it wouldn't be much longer than 30 days, okay.
>
> . . . .
>
> [Respondents' Counsel:] And if that evidence is provided, then the—they'll be—[Respondents] agree that that's a—that they'll make the payments on that and it'll be—there'll be some arrangement made for that to be paid . . . on a monthly basis.

VRP (Nov. 12, 2015) at 3-4. From this record, a court can decide what the terms relating to the tree cutting assessment mean and fix exactly the legal liability of the parties: Fitzpatrick must provide proof of work done and the amount paid within 30 days, and Respondents would then be obligated make monthly payments for the assessment. Also, the parties agreed that the Declaration of Water Service was a binding agreement between the parties. Paragraph 3.3 of the Declaration of Water Service sets forth the payment requirements for assessments. Thus, there was a meeting

of the minds on these terms relating to the documentation deadline and payment plan relating to the tree cutting assessment. *See Saluteen-Maschersky,* 105 Wn. App. at 851. Therefore, we hold that the trial court erred in concluding that the terms of the assessment for tree cutting had not been agreed to on the record.

ii. Special assessments

The trial court also found that the parties had not agreed to notice and a payment plan for special assessments. With regard to the discussion relating to special assessments when the parties placed their agreement on the record, the parties stated:

> [Respondents' Counsel:] Any—the special assessments, we're working out some dealing to require that the—the proper notice before the assessment is made, and that there be timely proof of the work being done; that it be limited to a specific time, like perhaps 90—90 days.
>
> . . . .
>
> The Court: All right. And is that your clients [sic] agreement as well?
>
> [Fitzpatrick's Counsel]: Yes.

VPR (Nov. 12, 2015) at 5-6. Based on the record, the parties agreed to a 90-day notice provision for special assessments. And, as noted above, the parties agreed to be bound by the terms of the Declaration of Water Service, which sets for the payment requirements in paragraph 3.3. Therefore, even if there was no separate agreement as to a 90-day notice and payment plan for special assessments, it was not a material term that would undermine the agreement. Thus, we hold that the trial court erred in concluding that the notice and payment plan for special assessments had not been agreed to on the record.

iii. Severability clause

The trial court appears to have found that the parties agreed to a severability clause, but "we don't know what's being severed and not severed." VRP (Aug. 29, 2016) at 15. According to the court, "I'm thinking [Respondents' counsel] is—brought up an issue that I didn't see here at all, and that is if things go south, then they can go back and re-litigate the things that they've already agreed to here." VRP (Aug. 29, 2016) at 15.

In a severability clause, if any part, clause, provision, or condition is held to be void, invalid, or unenforceable, then such provision shall not affect any other part, clause, provision, or condition of the agreement and shall be deemed deleted. The remainder of the agreement shall be effective and shall continue in full force and effect. 7 Wash. Prac., UCC Forms § 1-108. Generally, courts are "loathe to upset the terms of an agreement and strive to give effect to the intent of the parties" especially where the agreement contains a severance clause. *Zuver v. Airtouch Communications Inc.,* 153 Wn.2d 293, 320, 103 P.3d 753 (2004).

Under basic principles of contract law, provisions that are unenforceable can be excluded if there is a severability clause in the contract. Thus, when the parties agreed to a severability clause, they agreed to have severed any provisions found to be unenforceable so as not to upset the other enforceable terms of the agreement. Therefore, we hold that the trial court erred in concluding that "we don't know what's being severed and not severed."

c. Parties' intent

The parties stated on the record their intent regarding the "binding effect of this agreement on the—the parties." VRP (Nov. 12, 2015) at 6. The parties advised the trial court that they had reached a settlement, Respondents' counsel read the terms into the record, and Fitzpatrick's

counsel affirmed that what Respondents' counsel read into the record was his client's agreement as well.

The attorneys' reading of their CR 2A agreement into the record before the trial court on November 12, 2015 was binding on their clients under RCW 2.44.010 because it was made in open court. The trial court erred in interpreting the agreement reached by the parties; therefore, the trial court's decision to not enforce the CR 2A agreement was manifestly unreasonable. Accordingly, we hold that the trial court abused its discretion in not upholding the CR 2A agreement that was read into the record before the trial court.

2. Written Settlement Agreement

Fitzpatrick argues that the trial court erred in not enforcing the written Settlement Agreement. Fitzpatrick contends that the written Settlement Agreement was "presented by the [Respondents] and signed by [Fitzpatrick], which was an offer and acceptance." Br. of App. At 23.

RCW 2.44.010 states:

> An attorney and counselor has authority:
>
> (1) To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney[.]

Here, Respondents' attorney provided the written agreement to Fitzpatrick, and Fitzpatrick signed the written agreement. But Respondents never signed the written agreement. Thus, Respondents' attorney did not bind his clients to the written agreement in open court, in the

presence of the clerk, or by entering it in the minutes of the court as required under CR 2A. Moreover, the parties agreed when they placed their agreement on the record before the trial court that any written agreement would have an effective date of the last signature on the agreement. Thus, we hold that the trial court did not err in finding the written agreement was "not an effective agreement under Civil Rule 2A." VRP (Aug. 29, 2016) at 11.

ATTORNEY FEES ON APPEAL

Respondents request an award of attorney fees for the cost of defending this matter on appeal. Respondents argue that because it was awarded attorney fees in the trial court, it is "entitled to the reasonable costs and fees incurred in defending this matter on appeal." Br. of Resp. at 42-43.

We may grant an award of reasonable attorney fees on appeal to a party that requests it in its opening brief, as long as applicable law provides for such an award. RAP 18.1. RCW 4.84.330 provides that a prevailing party is entitled to attorney fees if the contract which is the subject of the action authorizes such an award. *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). When both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party is entitled to attorney's fees under RCW 4.84.330. *Id.*

Here, because we reverse the trial court's Findings of Fact and Conclusions of Law; Memorandum Decision, Findings of Fact and Conclusions of Law re: Award of Attorney's Fees; and Judgment and Order, and remand to the trial court to enforce the CR 2A agreement read into the record before the trial court, Respondents are not the prevailing party. Therefore, we deny Respondent's request for appellate attorney fees pursuant to RAP 18.1.

CONCLUSION

We reverse the trial court's Findings of Fact and Conclusions of Law; Memorandum Decision, Findings of Fact and Conclusions of Law re: Award of Attorney's Fees; and Judgment and Order, and we remand to enforce CR 2A agreement that was placed on the record before the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Le, C.J.

We concur:

Melnick, J.

Glasgow, J.

APPENDIX 3

SETTLEMENT AGREEMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

Mary C. Hrudkaj, Pamela E. Owens, Joi Caudill, Plaintiffs vs. Queen Anne Water Works LLC, and Gerard A. Fitzpatrick and Catherine Fitzpatrick, Defendants.	**No. 13-2-00049-4** **SETTLEMENT AGREEMENT**

The parties in the above entitled matter agree to the following settlement of the current case:

SETTLEMENT TERMS

1. APPLICABLE AGREEMENTS: The Parties acknowledge and agree that the following agreements (collectively "governing agreements"), as presently existing and as hereafter validly amended, are enforceable and legally binding documents applicable in their

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

entirety to the operation of the Queen Anne Water System (QAW). The Parties agree that they will abide by these agreements and that a failure to do so will constitute a breach of this Settlement Agreement. These governing agreements are:

- Declaration of Water Service for Queen Ann-Hill Water Division of Belfair View Estates, November 20, 1992. Aud. No. 555464.
- Queen Ann-Hill Water Division of Belfair View Estates, July 17, 2008. Aud. No. 1924322.
- Third Party Beneficiary Contract Agreement, June 25, 1994. Aud. No. 590456.

Further, the Defendants agree that if there is a material breach of the governing agreements, the plaintiffs may raise any claim brought in the current case in any ensuing litigation if deemed relevant by the court; and if allowed, may seek any relief afforded by these agreements, regardless of any statute of limitations for the original claims, and the prevailing party shall be entitled to reasonable attorney's fees and costs.

2. INVALID NAMING RATES DOCUMENT: Defendants acknowledge and agree that the document entitled Naming Rates for Queen Anne Water Works LLC, dated October 1, 2012, is not a governing agreement and is intended only as a mechanism for conveying the 2012 rate increase proposed by QAW.

3. AMENDMENTS TO GOVERNING AGREEMENTS: The parties agree to amend the governing agreements, subject to the approval of the QAW customers, to include the amendments agreed to in the mediation that took place on August 22, 2014. These amendments are; 1. Water meter can only be read between 8:00 AM and 5:00 PM, 2. Water bills will be mailed on the 1st of each month to be paid by the 15th of each month. 3. Claims for regular mileage by QAW should be included in the existing rates, but this would not include mileage for abnormal and emergency mileage needed for system repairs, e.g. multiple trips for testing for

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

contaminated water. ~~as such~~, Justification for claimed/estimated mileage will be presented and justified at any meeting with customers on proposed rate increase.

4. RELEASE OF LIENS: The defendants acknowledge that the following liens have been satisfied:

- Auditor # 1908999, against Paul Wells, parcel # 32213-75-90061, now owned by Pamela E. Owens.
- Auditor # 1929633, against Paul Wells, parcel # 32213-75-90065, now owned by Pamela E. Owens.
- Auditor # 1986799, Ross Ferrell, parcel # 32213-75-90010, now owned by Allison Riley

Defendants will release these liens and show proof of such liens release within 30 days of the effective date of this Settlement Agreement, and file a lien release with Mason County. Defendants will release any other satisfied liens as required by law.

5. 2012 RATE INCREASE: The Plaintiffs agree and accept that QAW may increase the standard monthly rate to $42.00 effective as of the effective date of this Settlement Agreement. There will be no retroactive payments for the signatories of the letter dated November 2, 2012, objecting to the rate increase. The rate increase for those customers who did not sign the letter shall remain unaffected.

6. 2012 SPECIAL ASSESSMENT FOR TREE CUTTING: Within thirty (30) days from the date of this Settlement Agreement, the Defendants shall provide documentation that the work was done and paid for. The document shall include a statement from the contractor, under penalty of perjury, that work was performed on a given date, how it was paid for, and what amount, if any, is still owing. Because an initial payment was made in cash, the Defendants may provide evidence of that payment in the form of a bank statement showing the funds were withdrawn or an explanation of how the funds were obtained. The Defendants will provide an explanation as to why the cash payment did not appear in its Profit and Loss Statement for the

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

relevant time period. If the Defendants fail to provide the required proof by the stated deadline, then the 'special assessment' shall be considered void and the Defendants will have no further claims to it. If the Defendants provide proper verification as provided by this section, then the Plaintiffs agree to pay their proportional share, effective thirty (30) days from the effective date of this Settlement Agreement, and arrange payment as provided in the Governing Agreements or as otherwise agreed to by the parties.

7. 2015 RATE INCREASE: The parties agree that the rate increase to $47.00, objected to by QAW customers in the letter dated January 3, 2015, is of non-effect as to the parties and any members of QAW who signed the letter petition objecting to the rate increase and will be submitted to the process outlined in the Third Party Beneficiary Contract Agreement, section 7. The parties agree to participate in a meeting open to all customers of QAW and their representatives for the purposes of negotiating an agreement as soon as reasonably possible, after notice to the customers, but no later than the 90-day time limit described in section 7. QAW shall provide documentation of the need to increase the rate due to increased costs since the last rate increase. QAW will not attempt to collect the new rate until it is properly approved as required by section 7. For the purposes of the $47.00 increase proposal only, the parties may proceed directly to the customers meeting, objection having been previously given by the customers. QAW shall provide notice of the meeting to its customers.

8. "DOOR KNOCK" FEES: Door knock fees may be assessed only in cases where persons are:

1. 3 months late on paying their bill, and
2. they have been mailed appropriate billings, and
3. the parties have talked at least twice on the phone, and

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

4. no alternative agreement has been reached between QAW and the delinquent party.

9. FUTURE EXPANSION: Any costs related to any future or present expansion of the QAW system for new users shall not be assessed or charged to the current customers of QAW or their assigns. Any expansion for benefit of existing users must be approved by such users except where such expansion is required by law.

10. FINANCIAL PLAN FOR EMERGENCY FUND: QAW shall provide its customers with a plan, for the establishment of an emergency fund for unexpected damage and repairs to the system. The parties may object in writing to specific provisions of the plan within two weeks after receiving a copy of the plan. Said fund is for the benefit of QAW and its customers and shall be used solely for payment of expenses for emergency repairs to the QAW system. The account established for such emergency funds shall be subject to the signatures of two individuals, one of whom (hereafter referred to as Second Signer) shall not be an owner or employee of QAW. The parties may object in writing to the Second Signer for cause, and if the parties are unable to reach an agreement the matter shall be submitted to mediation.

11. FINANCIAL PLANS FOR ANTICIPATED IMPROVEMENTS & SPECIAL ASSESSMENTS: QAW shall, whenever possible, provide its customers with 90 day notice of anticipated improvements/efforts that might be subject to a special assessment. QAW shall include and estimate of when the work will be performed and cost thereof. Such improvements/efforts and plan shall be subject to the notice requirements of the Third Party Agreement, Section 7. If it is not possible to provide such advanced notice due to an emergency situation, then QAW shall provide the notice as soon as reasonably possible. QAW will notify its customers of the actual amount due within 90-days of receiving an invoice for the work

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

performed. This clause is intended to ensure prompt payment for valid special assessments and prevent hardship and disagreement among QAW and its customers.

13. MISCELLANEOUS: The parties agree to refrain from blocking the roadway, parking on the property of others without permission, or harassing any party to this agreement without just cause.

14. DISMISSAL OF LAWSUIT: The parties each agree to dismissal of the current action subject to the terms of this Settlement Agreement and will cooperate to execute any necessary documentation to this effect.

15. ATTORNEY FEES: Each party shall be responsible for their own attorney fees. QAW agrees that its attorney fees, if any, shall not be assessed to the customers of QAW.

16. BINDING EFFECT: This Settlement Agreement shall be binding on any successors in interest to the parties to this agreement, and shall be provided to any individual or entity to which the parties assign any interest to any property or company cover by this Settlement Agreement.

17. WAIVERS: No waiver of any terms, provisions or conditions of this Settlement Agreement whether by conduct or otherwise in any one or more instances shall be deemed to be or construed to be as a further or continuing, waiver of any such term, provision, or condition, or as a waiver of any other term, provision or condition of this Settlement Agreement or any term under the governing agreements.

18. SEVERABILITY: If any term or provision of this Settlement Agreement or any application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable; the remainder of this Settlement Agreement and the application of such terms or provisions to persons or circumstances other than those to which it is held invalid or

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

unenforceable shall not be affected thereby, and each term and provision of the Settlement Agreement shall be valid and enforceable to the fullest extent permitted by law.

19. DISPUTE RESOLUTION: Any controversy or claim arising out of or relating to this Settlement Agreement, or its breach, shall be settled through the process established in the Third Party Agreement, section 7. However, the parties may mutually agree to submit the mater to mediation before invoking section 7. The parties further agree that, for the purposes any disputes arising under this Settlement Agreement, any arbitration hearing shall only require one arbiter.

20. AUTHORITY: The Parties signing below affirm that they have legal authority to enter into this agreement personally and on behalf any entity to which this Settlement Agreement pertains.

21. EFFECTIVE DATE: The effective date of this Settlement Agreement shall be the date of the last signature.

_____ Date: _____
Mary C. Hrudkaj
Plaintiff

_____ Date: _____
Pamela E. Owens
Plaintiff

_____ Date: _____
Joi Caudill
Plaintiff

Austin Law Office, PLLC
PO Box 1753
Belfair. WA 98528
360-551-0782

Gerard A. Fitzpatrick
Queen Anne Water Works LLC

Date: 7/26/16

Catherine Fitzpatrick
Queen Anne Water Works LLC

Date: 7/26/16

Eugene C. Austin, WSBA # 31129
Attorney for Plaintiffs

Date: _____

Tom Geisness, WSBA #
Attorney for Defendants

Date: _____

Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528
360-551-0782

APPENDIX 4

RCW 244.010

SUPERIOR COURT RULE 2A

RCW 2.44.010

Authority of attorney.

An attorney and counselor has authority:

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

(2) To receive money claimed by his or her client in an action or special proceeding, during the pendency thereof, or after judgment upon the payment thereof, and not otherwise, to discharge the same or acknowledge satisfaction of the judgment;

(3) This section shall not prevent a party from employing a new attorney or from issuing an execution upon a judgment, or from taking other proceedings prescribed by statute for its enforcement.

[**2011 c 336 § 57**; Code 1881 § 3280; **1863 p 404 § 6**; RRS § 130.]

Superior Court Civil Rules

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.

Click here to view in a PDF.

APPENDIX 5

THIRD PARTY BENEFICIARY CONTRACT AGREEMENT

SS0456

THIRD PARTY BENEFICIARY CONTRACT AGREEMENT

THIS AGREEMENT made this 25th day of June, 1994 by and between Peter J. Bakker and Jean T. Bakker, husband and wife, First Party (hereinafter called "Company") and Mason County Title Insurance Company [MCTI], a corporation only, chartered, organized and existing under the Laws of Washington (hereinafter called "Representative")

W I T N E S S E T H:

WHEREAS, the Company is now the owner or was previously the owner and developer of property in Mason County, State of Washington described in Schedule A, attached hereto, upon which there is located the Company's water supply system; and

WHEREAS, the Company warrants that all the property described in Schedule A, as well as all water supply system and or sewage systems hereafter acquired by the Company shall be made subject to the Agreement by recordation of appropriate covenants, reservations, restrictions, or conditions in such manner as is required by Washington law to put all persons on notice that such properties have been subjected to the terms of the Agreement; and

WHEREAS, the Company hereby warrants that existing and future encumbrances, liens or other indebtedness, if any, to the title of water supply systems now owned or hereafter acquired by the Company shall be subordinated and made subject to this Agreement.

WHEREAS, the Company intends to construct operate, and maintain said water supply systems for the purpose of supplying water service to buildings, residences and other improvements located in areas and subdivisions adjacent to or in the vicinities of said water supply systems and for that purpose will construct, lay and maintain water storage and 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; and

WHEREAS, it is contemplated that the buildings, residences and other improvements to be served by the said water supply systems of the Company will be located on properties in said areas or subdivisions which will be security for mortgages given to various lenders, including the Representative, which mortgages may be insured under the National Housing Act and/or guaranteed under Servicemen's Readjustment Act of 1944, as amended; and

WHEREAS the Representative is MCTI.

WHEREAS, one of the inducing factors to the granting of mortgage loans on properties, buildings, residences, and other improvements in the area to be served by the water supply system of the Company by the Representative and other lenders and the insuring thereof under the National Housing Act and/or Servicemen's Readjustment Act of 1944, as amended, is that there will be continuous operation and maintenance of the water supply systems according to the approved standards set forth in this Agreement, and that rate charges by the Company for its services will be reasonable, and the Company is desirous of assuring that its rates will be reasonable, and also assuring the continuance of the

operation and maintenance of said water supply systems for the benefit of the present and future owners of properties, buildings, residences and other improvements, and mortgagees holding mortgages covering such buildings, residences, and other improvements, including the Representative;

NOW, THEREFORE, for and in consideration of the reliance upon this Agreement by the Representative and by present and future owners of buildings, residences, and other improvements to be served by the water supply systems of the Company, and by mortgagees (who will make and hold mortgage loans on such buildings, residences, and other improvements) and by HUD/FHA and Veterans Administration in insuring or guaranteeing respectively such loans, the Company and the Representative do hereby covenant and agree as follows:

SECTION 1.

(a) This Agreement is made not only with the Representative in its individual capacity but also as the representative of and for the benefit of the present and future owners or occupants of all and each of the properties, buildings, residences, and other improvements which are now or may hereafter be served by the water supply systems of the Company as well as the holders of any mortgage or mortgages covering any such buildings, residences, and other properties and improvements.

(b) Any 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.

SECTION 2. The Company covenants and agrees:

(a) The Company shall supply at all times and under adequate pressure for the use of each of the properties, duly connected to its water supply system a sufficient quantity of water to meet the reasonable needs of each of the properties duly connected to said water supply systems. Such water shall be of the quality and purity as shall meet the 1974 Safe Drinking Water Act of the U.S. Environmental Protection Agency (EPA), so as to produce water without excessive hardness, corrosive properties, or other objectionable characteristics making it unsafe or unsuitable for domestic and ground use or harmful to any or all pipes within and/or without the buildings, residences, and other improvements. Records of any and all tests conducted in connection with said water supply systems shall be kept as permanent records by the Company and said records shall be open to inspection by the State Board of Health of the State of Washington and the owners of the properties in the subdivisions. The said Board of Health and/or its agents shall at all times have access to the water supply system of the Company to conduct any and all tests as said Board shall determine necessary to ascertain compliance with the said Standards and characteristics. In any event, the Company shall have said Board make such analyses at least Quarterly and the Company shall pay all cost and expenses in connection therewith. In the event said Board shall determine that the purity of the water does not meet the aforesaid Standards, the Company shall immediately at its sole cost and expense make any adjustment, repair, installation, or improvement to its facilities that shall be necessary or required or recommended by said Board to bring the purity of the water up to said Standards.

SECTION 3.

The Company agrees to maintain said water supply systems at all times in good order and repair so that satisfactory water services as provided in the foregoing paragraphs may be supplied to each of said buildings, residences, and other improvements in said areas or subdivisions in the quantity and in the quality provided in the foregoing paragraph. The water supply systems shall be open for inspection at all times by the agents of the Washington State Board of Health.

SECTION 4.

(a) The Company reserves and has the right to establish and collect as a charge or charges for water furnished and consumed by the owners or occupants of each of the buildings, residences, and other improvements the initial rates described in Schedule "B" attached hereto and made a part hereof. The Company shall have the right to install on the premises of each of the individual buildings, residences, and other improvements a water meter to be maintained by the Company through which all water supplied to the consumer shall pass and to which the Company shall have access at reasonable times for the purpose of taking meter readings and keeping said meters in repair. In the event said meters shall be installed and the consumer shall have used in excess of two thousand two hundred fortyfour (2,244) gallons per month, the Company may charge for any such excess at the rate or rates set forth in the attached Schedule "B".

SECTION 5.

In the event the Company should fail to operate and maintain the water supply systems in the manner and under the conditions specified herein (failure due to Acts of God, natural disasters or other causes beyond the control of the Company, including labor troubles or strikes, excepted) or in the even the Company collects or attempts to collect from the consumers of water charges in excess of the rate or rates specified or provided for in this Agreement, then in either of such contingencies, if such default shall continue for a period of thirty (30) days (or for a period of two (2) days in the event such default consists of a shutdown of the water or suspension of water services, except for the causes above set forth) after written notice to the Company by any consumer, mortgagees, or by any person for whose benefit this contract is made, then and in such event any such person for whose benefit this contract is made, may enforce this Agreement by action, instituted for such purpose in any court of competent jurisdiction and in such action shall be entitled as a matter of right to the entry of an order appointing a receiver or other officer appointed by the court to take immediate possession of the water supply systems of the Company for the purpose of operating and maintaining the same with the full right to hold, use, operate, manage and control the same for the benefit of the parties for whom this Agreement is made, with full right to collect the charges for services at rates not in excess of those specified or provided for in this Agreement. Such receiver or other officer of the Court, during the period of its operation, shall be entitled to such reasonable compensation and expenses, including reasonable attorneys' fees, as may be determined by the Court.

SECTION 6.

The Company may establish, amend or revise from time to time and enforce Rules and Regulations for Water Service and Rules and covering the furnishing of water supply service within said areas or subdivisions, provided, however, all such rules and regulations established by the Company from time to time shall at all times be 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. Any such rules and regulations established, amended, revised and enforced by the Company from time to time shall be binding upon any owner or occupant of any of the property located within the boundaries of such areas or subdivisions, the owner or occupant of any building, residence or other improvement constructed or located upon such property and the user or consumer of any water supply service.

SECTION 7.

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

If within ninety (90) days after notice to the Representative and to all parties connected to the water supply systems of a rate change proposed by the Company, not more than one-third of such parties have signified in writing their opposition to such proposed rate change, the Company may forthwith establish such new rates. If more than one-third of such parties signify, in writing, their opposition to a rate change proposed by the Company, or if more than one-third of such parties proposed in writing a rate change which the Company approves, and the parties cannot negotiate an agreement within ninety (90) days to the reasonableness of the new rates, then the matter of the reasonableness of such new rates shall be referred to a board of arbiters selected as follows: The Company shall designate one arbiter, the objecting parties shall designate one arbiter, and the two arbiters thus selected shall choose a third arbiter. The three arbiters shall me their written recommendations to the parties to the dispute as to the reasonableness of the new rates within ninety (90) days after the reference of the dispute to them. Written notice of the hearing of the dispute by the arbiters shall be given to the Company and to all objecting parties. All proceedings before the arbiters shall be recorded in writing. Either side to the arbitration may present written objections to the recommendations within thirty (30) days after the decision. If no written objections are made, it shall be considered that all parties have agreed that the new rates recommended by the arbiters are reasonable. If written objections are filed by either side, the questions of the reasonableness of the new rates shall be the subject of review by a court of competent jurisdiction in appropriate legal proceedings initiated for such purpose. In the event of arbitration of court proceeding the proposed change of rates shall be held in abeyance and shall not become effective until the conclusion of such proceedings.

SECTION 8.

Notwithstanding any provisions of this Agreement no third party beneficiary shall have or claim to have any right, title, lien, encumbrance, interest or claim of any kind or character whatsoever in and to the Company's water supply system, or properties and facilities, and the company may mortgage, pledge or otherwise encumber, or sell or otherwise dispose of, any or all of such water supply systems, properties and facilities without the consent of such third parties. The words "properties and facilities: as used in this Section shall not only include physical properties and facilities but all real, personal and other property of every kind and character owned by the Company and used, useful, or held for use in connection with its water supply systems, including revenues and income from the users of water services, cash in bank and otherwise; provided, however, that this Agreement as set forth herein shall be binding upon all successors and assigns of the Company.

SECTION 9.

All notices provided for herein shall be in writing or by telegram, and if to Company, shall be mailed or delivered to Company at 821 Sheridan Road, Bremerton, WA 98310, and if to parties for whose benefit this contract is made shall be mailed or delivered to their last known business or residential addresses.

SECTION 10.

(a) The covenants, reservations, restrictions or conditions herein set forth are and shall be deemed to be covenants, reservations, restrictions or conditions imposed and running with the land and properties now owned or hereafter acquired by the Company, and limiting the use thereof for the purposes and in the manner set forth herein and shall be binding upon and shall inure to the benefit of the Company, its successors and assigns, and shall likewise be binding upon and shall inure to the benefit in all parties, who in any manner what so ever, shall acquire title to the Company's water supply systems, and properties and facilities as defined in Section 8 hereof. To this and the Company shall make all water supply systems now owned or hereafter acquired subject to this Agreement by recordation or appropriate covenants, reservations, restrictions, or conditions in such manner as is required by Law to put all persons on notice that such water supply systems have been subjected to the terms of this Agreement are deemed to be covenants, reservations, restrictions or conditions imposed upon and running with the land and properties now owned or hereafter acquired by the Company.

(b) This Agreement shall also be binding upon and shall inure to the benefit of the Representative, its successors and assigns, and as set forth in Section 1 hereof, all present and future owners or occupants of all and each of the properties, buildings, residences, and other improvements which are now or may hereafter be served by the water supply systems of the Company as well as the holders of any mortgage or mortgages covering any such properties, buildings, residences and other improvements, as well as the successors and assigns of all such present and future owners and occupants and holders of mortgages.

SECTION 11.

This Agreement shall be governed by the laws of the State of Washington.

SECTION 12.

This Agreement shall remain in full force and effect and for the benefit of all parties mentioned herein until either (a) the water supply systems described herein are taken over by governmental authority for maintenance and operation; or (b) other adequate water supply is provided by a governmental authority through means other than the water supply systems owned by the Company; or (c) the rates, services and operation of the Company are placed by law under the jurisdiction of a regulatory commission or other governmental agency or body empowered to fix rates and to which a consumer of the Company may seek relief. Upon the happening of any of the aforesaid events, this Agreement shall automatically terminate; and, at the request of the Company, the Company and the Representative shall execute an instrument cancelling this Agreement.

IN WITNESS WHEREBY, the Company and the Representative have caused this Agreement to be duly executed in several counterparts, each of which counterpart shall be considered an original executed copy of this Agreement.

(COMPANY)

BY: _____
PETER J. BAKKER

BY: _____
JEAN T. BAKKER

(REPRESENTATIVE)
MASON COUNTY TITLE INSURANCE COMPANY

BY: _____
DAVID C. BAYLEY,
Vice President

Individually and as the Representative of all parties for whose benefit the foregoing Agreement is made.

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

On this day personally appeared before me Peter J. Bakker and Jean R. Bakker to me known to be the individual(s) described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 25th day of June, 1994.

_____ OSCAR ABALAHIN
NOTARY PUBLIC in and for the State of Washington, residing at GIG HARBOR

My commission expires 1-17-97

STATE OF WASHINGTON)
) ss.
COUNTY OF MASON)

On this 24 day of June, 1994, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared David C. Bayley to me known to be the Vice President of Mason County Title Insurance Company, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he is authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year first above written.

_____ LEIGH A. JOHNSON
NOTARY PUBLIC in and for the State of Washington, residing at Shelton

My commission expires 3/19/98

LEIGH A. JOHNSON NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 3-19-98

SCHEDULE A

Lots A, B, C and D of Short Subdivision No. 1217, recorded December 13, 1982, Auditor's File No. 409915;

Lots A, B and C of Short Subdivision No. 1218, recorded December 13, 1982, Auditor's File No. 409916;

Lots A, B, and C of Short Subdivision No. 1219, recorded December 13, 1982, Auditor's File No. 409917;

Lots A, B, C and D of Short Subdivision No. 1220, recorded December 13, 1982, Auditor's File No. 409918; and

Lots A, B, C and D of Short Subdivision No. 1221, recorded December 13, 1992, Auditor's File No. 409919.

All of the above short subdivisions are located in the South half (S 1/2) of the Southwest quarter (SW 1/4) of Section thirteen (13), Township twentytwo (22) North, Range three (3) West, W.M.

The Company hereby reserves the right to expand the herein described water service to include additional land located as follows:

Tracts 11 to 15, both inclusive of survey recorded September 22, 1986, in Volume 12 of Surveys, page 31, Auditor's File No. 457676;

Tracts of land in the South half (S 1/2) of the Southeast quarter (SE 1/4) of Section thirteen (13), Township twentytwo (22) North, Range three (3) West, W.M.

Tracts of land in Section twentyfour (24) Township twentytwo (22) North, Range three (3) West, W.M.

Tracts of land in the East half (E 1/2) of the Northeast quarter (NE 1/4) and the Southeast quarter (SE 1/4), all in Section twentythree (23), Township twentytwo (22) North, Range three (3) West, W.M.

Tracts of land in the Northeast quarter (NE 1/4) of the Northwest quarter (NW 1/4) and the North half (N 1/2) of the Northeast quarter (NE 1/4), all in Section twentysix (26), Township twentytwo (22) North, Range three (3) West, W.M.

SCHEDULE "B"

Initial Water Rates to be charged

The basic rate for each lot shall be $18.00 per month based on a usage of 300 cubic feet. Any usage over that amount shall be billed at .0045 per cubic foot. There will be a standby fee of $5.00 per month, regardless of usage, commencing August 1, 1994. Once a home has been built thereon, the charge will go to $18.00 per month per lot. The developer (Company) of the properties described on Schedule "A" shall be exempt from all standby fees. This rate is based on one single family dwelling per lot. If there are additional dwelling units over one, there will be an additional charge for $18.00 for each dwelling unit. These rates may be increased as costs for operation, maintenance, repair, and replacement of the water system increase.

There shall also be a $5,000.00 hookup fee to the water system for each lot that has a single family dwelling located thereon. If there are additional dwelling units located on said lot, the Company reserves the right to charge additional hookup fees for each dwelling unit. This rate may be increased as costs for operation, maintenance, repair, and replacement of the water system increase.

FEE $ 14.00
REEL 629 PAGE 353-354
AUDITOR MASON COUNTY
ALLAN T. BRISTOW

94 JUN 27 AM 10:33

REQUEST OF:
Peter J. Bakker
821 Rhododendron Rd.
Bremerton, WA. 98310

APPENDIX 6

DECLARATION OF THOMAS M. GEISNESS

SEPTEMBER 5, 2016

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

Mary C. Hrudkaj,
Tabitha Grabarczyk,
Pamela E. Owens,
Joi Caudill,

Plaintiffs,

v.

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

Defendants.

NO. 13-2-00049-4

DECLARATION OF THOMAS M. GEISNESS

I, Thomas M. Geisness, declare the following to true and correct to the best of my knowledge.

I am the attorney for Defendants Gerard A. Fitzpatrick and Catherine Fitzpatrick. They are the owners/operators of Queen Ann Water Works, LLC.

I have been negotiating with Mr. Austin over a period of time beginning in 2015. We have met on four or five occasions and exchanged numerous thoughts and documents by email or letter. On November 15, 2015 we presented the Court with the terms of our settlement agreement. There were some language changes to the agreement but as far as I can tell the agreement we reached at the end of July was what we had presented to the Court on November 15, 2015.

I do believe that there have been good faith efforts to resolve this matter. Following the presentation November 15, 2015, there were six or seven exchanges of agreements as corrections between the parties though early December. Unfortunately I was out of town for the latter part of December through early January. We exchanged ideas or

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

agreements through every month except April 2016. On May 25, 2016, I did receive the mediation agreement from 2014, which drawn up before I was involved with the case. These items in part were added to our agreement. I am out of the office a lot in the late winter through May and part of July. This amounted to about 6-7 weeks time.

Dated this 5th day of September 2016

THOMAS M. GEISNESS #1878

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

Mary C. Hrudkaj,
Tabitha Grabarczyk,
Pamela E. Owens,
Joi Caudill,

Plaintiffs,

v.

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

Defendants.

NO. 13-2-00049-4

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that I served the below documents to the parties and/or their counsel of record listed below, via the method indicated:

DOCUMENTS: DEFENDANTS' MOTION FOR RECONSIDERATION OF DETERMINING CR2A STATUS WAS NOT SATISFIED

TO: Eugene Austin
P.O. Box 1753
Belfair, WA 98528

E Mail

DATED this 7th day of September, 2016.

Melinda Birch

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

APPENDIX 7

APPELLANTS' REPLY TO RESPONDENTS' OBJECTION TO SUPPLEMENTAL STATEMENT OF ARRANGEMENTS

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

Mary C. Hrudkaj, Tabitha Grabarczyk, Pamela E. Owens, Joi Caudill,

Respondents.

Superior Court No. 13-2-00049-4
Court of Appeals No. 529840-0-II

APPELLANTS' REPLY TO RESPONDENTS' OBJECTION TO SUPPLEMENTAL STATEMENT OF ARRANGEMENTS

Appellants are requesting to supplement the record with the oral testimony of Judge Toni Sheldon's decision vacating a CR2A agreement on August 29, 2016.

The respondents contend that appellants failed to provide 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. The respondents indicated in their brief this transcript was, "...important

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

information relating to the lower court's findings and reasons for ruling that no CR2A agreement existed." The respondents cite *Bulzomi v. Department of Labor & Indus., 71 Wn.App.522, 864 P.2d 996 (1994)* and Rules of Appellate Procedure 9.2(b) which states, "A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." *Bulzomi* concerns failure to provide jury instructions on an appeal, which is required. In this case all the material the Court had for the August 29, 2016, hearing has been made available, as well as Judge Sheldon's oral decision of appellants' Motion for Reconsideration, argued the first day of trial September 21, 2016. CP 90, CP 93, 94, RP 1-10. The record is complete as to the information the Court had in making her decision. This included the respondents' motion, affidavits, appellants' responses and affidavits, including a transcript of the CR2A agreement on record and the signed order of August 29, 2016. The record also included a copy of the Settlement Agreement offered by respondents and accepted by appellants dated July 26, 2016. Nonetheless, appellants have supplemented the record with written findings of the Court from August 29, 2016. The Court proceedings are audio and I believed that all the testimony before and during the trial had been provided.

Respondents, in their brief, Response Br. p. 5, 15-18, indicate the appellants are, "...lacking important information...", referencing the oral decision of the Court August 29, 2016, in response to respondents' Motion for Determination of Non-CR2A Status of August 15, 2016. Appellants provided a transcript of the oral testimony of August 29, 2016.

Respondents argue against admission of the August 29, 2016, report. Counsel argues that, "Respondents do not believe the transcripts will add anything of value...", yet still oppose their admission. As mentioned, it was believed that all the audio transcription had been

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

ordered. By allowing this document to be admitted, it would give the Court all the information concerning the CR2A agreement, even though the record would be explanatory without this information. It is my understanding that RAP 9.11 would not apply to this situation, as it refers to additional evidence that the Court of Appeals would request at the trial level.

Dated this 13th day of September, 2019.

THE GEISNESS LAW FIRM

By: s/Thomas M. Geisness
Thomas M. Geisness, WSBA #1878
Peter T. Geisness, WSBA #30897
811 First Avenue, Suite 300
Seattle, Washington 98104
Phone: 206-728-8866
Attorneys for Appellants

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

CERTIFICATE OF SERVICE

I certify that service of a copy of the document on which this certificate appears was made on the 13th day of September, 2019, by sending the same via electronic mail to the following:

Eugene C. Austin
Austin Law Office, PLLC
PO Box 1753
Belfair WA 98528-1753
Cell: (360) 551-0782
E-mail: eugene.c.austin@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 13th day of September, 2019.

THE GEISNESS LAW FIRM

By: s/ Melinda Birch
Melinda Birch

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

Mary C. Hrudkaj, Tabitha Grabarczyk, Pamela E. Owens, Joi Caudill,

Appellees.

Superior Court No. 13-2-00049-4
Court of Appeals No. 529840-0-II

DECLARATION OF THOMAS M. GEISNESS

I, Thomas M. Geisness, declare the following to be true and correct to the best of my knowledge.

I am the attorney for Appellants Gerard A. Fitzpatrick and Catherine Fitzpatrick. They are the owners/operators of Queen Ann Water Works, LLC.

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

I believe all hearings in Mason County Superior Court are recorded by audio. I believed all testimony of the CR2A hearing from respondents' Motion for non CR2A Status on August 29, 2016, had been provided to the Court of Appeals, Division II.

Dated this 13th day of September, 2019.

THE GEISNESS LAW FIRM

By: s/Thomas M. Geisness
Thomas M. Geisness, WSBA #1878
Peter T. Geisness, WSBA #30897
811 First Avenue, Suite 300
Seattle, Washington 98104
Phone: 206-728-8866
Attorneys for Appellants

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

CERTIFICATE OF SERVICE

I certify that service of a copy of the document on which this certificate appears was made on the 13th day of September, 2019, by sending the same via electronic mail to the following:

Eugene C. Austin
Austin Law Office, PLLC
PO Box 1753
Belfair WA 98528-1753
Cell: (360) 551-0782
E-mail: eugene.c.austin@gmail.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 13th day of September, 2019.

THE GEISNESS LAW FIRM

By: s/Melinda Birch
Melinda Birch

THE GEISNESS LAW FIRM
The Colman Building, Suite 300
811 First Avenue
Seattle, WA 98104
(206) 728-8866; Fax (206) 728-1173

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

September 16, 2019

Peter Thomas Geisness
The Geisness Law Firm
811 1st Ave Ste 300
Seattle, WA 98104-1462
peter@geisnesslaw.com

Thomas Moulton Geisness
Geisness Law Firm
811 1st Ave Ste 300
Seattle, WA 98104-1462
tom@geisnesslaw.com

Eugene Clayton Austin
Austin Law Office, PLLC
PO Box 1753
Belfair, WA 98528-1753
eugene.c.austin@gmail.com

CASE #: 52984-0-II\Mary C. Hrudkaj et al., Respondent v. Queen Anne Water Works LLC, et al., Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The objection to the supplemental statement of arrangements is overruled. It is accepted for filing.

Very truly yours,

Derek M. Byrne
Court Clerk

THE GEISNESS LAW FIRM

March 22, 2021 - 11:05 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99456-1
Appellate Court Case Title:	Mary C. Hrudkaj et al. v. Queen Anne Water Works LLC, et al.
Superior Court Case Number:	13-2-00049-4

The following documents have been uploaded:

- 994561_Answer_Reply_20210322110429SC663020_1667.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petitioners Petition for Review.pdf

A copy of the uploaded files will be sent to:

- gaustin@co.mason.wa.us
- peter@geisnesslaw.com

Comments:

Sender Name: Melinda Birch - Email: melinda@geisnesslaw.com
Filing on Behalf of: Thomas Moulton Geisness - Email: tom@geisnesslaw.com (Alternate Email: melinda@geisnesslaw.com)

Address:
811 FIRST AVENUE
SUITE 300
SEATTLE, WA, 98104
Phone: (206) 728-8866

Note: The Filing Id is 20210322110429SC663020