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No. 72266-2-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In re the Marriage of

RODNEY ALAN DOHNER  
Respondent

and

HOLLY R. DOHNER  
Appellant

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

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BRIEF OF APPELLANT

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PATRICIA NOVOTNY  
ATTORNEY FOR APPELLANT  
3814 NE 65<sup>th</sup> Street, Suite A  
Seattle, WA 98115  
(206) 525-0711

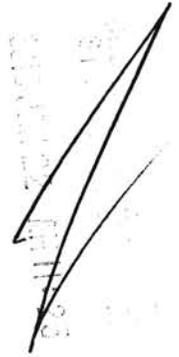
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## I. INTRODUCTION

CR 2A sets forth specific requirements for binding agreements and this case illustrates why compliance with the rule is so important. Rodney Dohner asserts there was a settlement, but there is no document bearing Holly Dohner's signature in agreement, nor her attorney's, nor did the parties put their agreement on the record in open court. There is no record of an agreement because the parties did not reach an agreement; they continued to negotiate, as their informal writings show. This hodgepodge, which Rodney offers as proof of their agreement, is internally inconsistent and incomplete, omitting, for example, the family fishing business and awarding Holly a bank account the court later awards to Rodney. These parties had attempted settlement before, but failed, and continued to litigate. The record shows only another failed attempt. The court tried to cobble together evidence of the parties' negotiations, but negotiations toward a binding agreement are not themselves an agreement. Nor is an agreement to continue negotiating an agreement beyond that. The trial court, both the commissioner and the judge, seemed to sense this fact, each vacillating between denying Rodney's motion to enforce and granting it. When the court landed on the latter, it erred. The court also erred by awarding Rodney fees simply because he prevailed, which is not a basis for fees in a family law matter.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the husband's motion to enforce and entering final orders. CP 53-89.

2. The trial court erred by entering the following findings of fact and conclusions of law:

The parties made an enforceable agreement to resolve this matter and that when they did so, Mrs. Dohner was aware that Mr. Dohner owned a fishing business and that that business included a business checking account, the balance of which varied seasonally. Their agreement to resolve the case, with the fishing business allocated to Mr. Dohner, necessarily included allocation of the business account to Mr. Dohner.

CP 200-201.

3. The trial court erred by considering inadmissible evidence, including the hearsay testimony of the husband's attorney.

4. The trial court erred by awarding attorney fees to the husband without any basis in statute or equity.

5. The wife moves for an award of attorney fees on appeal.

### *Issues Pertaining to Assignments of Error*

1. Can the court enforce a settlement agreement where there is no evidence of "a writing acknowledged by the party to be bound" or "a stipulation in open court on the record" and where the existence and material terms of the agreement are disputed?

2. Can the court find an agreement where informal writings are inconsistent in material terms and omit other material terms and where the parties did not intend to be bound by the informal writings?

3. In determining whether an agreement was reached, must the court consider only admissible evidence?

4. May a court award attorney fees in a family law matter based on a “prevailing party” theory?

5. Should the wife receive her fees on appeal?

### III. STATEMENT OF THE CASE<sup>1</sup>

The Dohners separated after thirteen years of marriage and have three children. CP 6, 59. The children reside primarily with Holly. CP 62. Holly was a stay-at-home mother throughout the marriage. CP 245. She has little job training and works as a personal trainer for \$17/hour, though she has only enough clients for approximately 10 hours per week. CP 246.

The parties own a fishing business, Pacific Dream Fishing, Inc., which Rodney operates and on which the family depends for support. CP 21, 245-246. The business assets include a boat and other fishing and

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<sup>1</sup> The report of proceedings consists of three volumes, which are referred to in this brief as follows:

|     |   |
|-----|---|
| 1RP | 12/20/13, 01/17/14, 02/07/14 (Comm. Heydrich presiding) |
| 2RP | 04/11/14 (Judge Garrett presiding)                      |
| 3RP | 06/27/14 (Judge Garrett presiding)                      |

crabbing gear, as well as licenses permitting commercial activity in Washington and Alaska. CP 21. The business income flows from fish caught and from “rents” paid by other fishermen for use of the equipment. CP 21.

The parties separated in September 2011; several months later, Rodney petitioned for dissolution. CP 245. In the meantime, Rodney emptied the parties’ bank accounts; in response, Holly intercepted a wire transfer. CP 245-247. The litigation was contentious: for example, both parties made motions to compel discovery (CP 251-252, 262-267) and requests for accounting (CP 253-255 256-259).

The parties attempted to settle the case in a two-day private mediation in March 2013 (CP 256, 258), striking the settlement conference of March 12 and trial date of May 15 (CP 249, 250).

No settlement resulted and a new trial date was set for November 6. A settlement conference was held on October 21 with Commissioner Gross. CP 268. At its conclusion, the commissioner noted the parties had reached no agreement but had “negotiated in good faith and are still negotiating.” Id.

On Thursday, October 31, Rodney’s attorney, Nancy Berg, sent a one-page letter to Holly’s attorney, Lynette Korb Philip, rejecting an offer made by Holly on October 29. CP 20, 124. (Holly’s offer is not in the

record.) Berg's letter included, "in general terms," a counter-offer by Rodney, offering to Holly "the house, the furnishings, her car and the joint bank account with \$248,618," as well as a transfer payment of \$190,000. CP 124. Rodney "would receive the land, the boat and the other assets as listed in the spreadsheets." CP 124. The letter did not identify the "spreadsheets" and appears to have been sent without any enclosures (i.e., no spreadsheets); at least none are noted in the letter. The letter offers \$4000/monthly maintenance for four years and says child support would be calculated with income imputed to Holly, resulting in a combined family support payment of "somewhat less than \$6,000." Id. Holly rejected Rodney's counter-offer. CP 21, 127.

Over the weekend, the parties met without their attorneys and discussed settlement. According to Holly, they did not resolve all the disputed issues, nor did Holly believe their oral statements were binding; she understood any agreement had to be in writing. CP 21.

According to Rodney, they "agreed on the transfer payment amount and the combined support amount." CP 24. He said later that same evening, "Holly started asking me to continue the trial date," which he described as "a pattern with her." CP 24-25. In lieu of agreeing to a continuance, he agreed to "pay her an amount" more than her attorney had suggested. CP 25. He claimed Holly "knew the only way to get out of

going to trial was to agree to something so the trial would be stricken and then she could back out and this is exactly what she did.” CP 25. Despite the lengthy history of negotiations, he claimed “[t]he material terms of the agreement and how the property would be divided were never in dispute.” CP 25.

On Monday morning, November 4, at 9:19 a.m., two days before the Wednesday trial date, Philip (Holly’s attorney), apparently having heard nothing from Holly, emailed Berg (Rodney’s attorney), as follows:

Hi Nancy, Last time we spoke you were going to see if your client was willing to make another offer. Just want to know where we stand because I need to prepare trial brief and don’t want to waste attorney fees if you think he has another offer. Thanks, Lynette Philip

CP 127. That same day, at 11:00 a.m., Berg replied to Philip by email:

Lynette, Rod and Holly discussed this over the weekend. Based on my last conversation with you, Rod will make this final offer which I believe exceeds your last proposal. Based on my letter of October 31<sup>st</sup>. He will increase the transfer payment to \$250,000 which is \$60,000 more than you were requesting. The maintenance and child support would be as in the letter. He would pay ½ of the transfer payment upon signing of the papers and the other half in one year with no interest. Each party pays their own fees. The cost of medical insurance and uninsured medical, etc. would be covered proportionally in the OCS. If this is acceptable I will draw up the final papers. Nancy Berg

CP 126. In the next 15 minutes, the two attorneys had this email exchange:

[Philip]: Just so that I understand. The \$250,000 plus the funds in the joint WECU [sic] account?

[Berg]: Yes that's right.

CP 126. There is no additional correspondence, by email or otherwise, from Philip.

Overlapping the attorney email correspondence, Berg exchanged emails with the superior court clerk, as follows:

[Berg, 11:01]: Christy, earlier today I would have said it was a go, but we have been working on a settlement so I will know better after lunch. Thanks for asking.

[Clerk, 11:05]: Thank you. I'll look forward to hearing from you this afternoon.

[Berg, 1:44]: Christy, Looks like we have a deal so we won't need the courtroom on Wednesday.

[Clerk: 2:14]: Great – thanks!

CP 128.

In a declaration, Berg described these events as follows:

The parties came to agreeable terms for a settlement over the weekend of November 2, 2013. Neither party wanted to attend trial.

A letter was sent to Ms. Philip dated October 31, 2013 which described the terms of the settlement. Ms. Philip and I ex-changed [sic] emails and confirmed the agreement in telephone conferences.

Ms. Philip advised me to strike the trial date because we had an agreement. Based on her verbal confirmation the trial date was cancelled on Monday afternoon, November 4, 2013.

CP 15.<sup>2</sup> Subsequently, on 11/05, Berg had delivered to Philip proposed final documents, which Holly refused to sign, after she requested and received some clarifying changes. CP 15-16. Even as clarified, Holly testified the proposed orders drafted by Berg did “not accurately reflect any agreement that was reached and are not acceptable to me.” CP 21. Rodney also testified that Holly “began demanding changes and making additional requests and refused to sign.” CP 25. Philip did not sign these orders either.

On the trial date, November 6, Philip signed a Notice of Withdrawal. CP 12-13. On November 8, Rodney moved to enforce the settlement he alleged the parties had reached, supported only by Berg’s declaration. CP 14-16. He also moved to shorten time so the matter could be heard while Philip remained counsel of record. CP 32, 269-270. However, substitute counsel appeared for Holly (Smith Kosanke & Wright) and, through them, Holly opposed Rodney’s motion. CP 17-19, 32-36.

In support of his claim to there being a settlement, Rodney submitted the following as documentation of the supposed agreement:

- the 10/31 letter from Berg to Philip;
- an undated spreadsheet entitled “For Settlement Purposes Only”;

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<sup>2</sup> As noted below, the declaration includes hearsay, to which Holly objected.

- the 11/04 email exchange between counsel and between Berg and the court clerk (set forth above); and

- Rodney's declaration, which included a claim to have received from Holly a text message sent at 1:17 p.m. on November 4, which in its entirety reads:

Ok, just talked with my attny, She is calling yours. I'm agreeing to save attny fees and stress

CP 25, 123-128.

In contrast to these informal writings, the proposed orders include a parenting plan, an order of child support, findings of fact, and a decree of dissolution. The parenting plan is not mentioned in the informal writings, nor is income. The proposed child support order states a gross income for Rodney of \$12,000, whereas, in temporary orders entered the year before, the court adopted Rodney's income figure of \$15,208. CP 68, 77; Supp. CP [sub 37, 38].

The child support order includes a finding that Holly is voluntary underemployed and imputes income to her at \$2,693, whereas the temporary order imputed income to her of \$747. *Id.* (court expressly declines to impute full-time income). The imputation in the proposed final order of support drives Holly's proportional share of child support to 43%, compared to 36% in the temporary orders. *Id.* Similarly, the informal writings say nothing about who will pay for health insurance, which

Rodney paid under temporary orders but which the final child support order obligates Holly to pay. Supp. CP [sub 37, 38]; CP 73, 74.

Likewise, the informal writings make no mention of the family business, Pacific Dream Fishing, Inc., whereas the proposed decree awards the business “along with all assets, gear, tools, equipment, inventory associated with that business” to Rodney. CP 83. The decree also awards Rodney the “US Bank accounts-business and personal.” CP 84. Holly testified Rodney had not disclosed the business earnings nor had they discussed the business bank account over the weekend following the 10/31 letter nor had she agreed to his receiving the earnings. CP 22. She said Rodney took the position that the post-separation business earnings were his alone and refused to provide her with information regarding them. CP 50. The last information she had regarding the account value was from August. CP 98-99, 100. As she learned after Rodney moved to enforce the purported settlement, two deposits totaling \$310,831 had been made in September. CP 40. As a consequence, the award to Rodney of the business and “all assets” resulted in a 2:1 distribution to him: \$1 million to Holly’s \$500,000. CP 50-51.

The informal writings disagree with one another regarding the bank accounts. The 10/31 letter refers to Holly receiving “the joint bank account with \$248,618,” but the spreadsheet Rodney submitted awards

two bank accounts to Holly (“WECU” and “US Bus. Acct.”). CP 124-125. Holly receives one account under the proposed orders, the one that has a value on the spreadsheet of \$77,472 (“WECU”), rather than \$248,618. CP 84 (describing as “WECU joint bank account – balance of \$248,618”). The proposed orders award to Rodney the “US Bank accounts - business and personal.” CP 84. On the undated spreadsheet, a US Bank account shows a value of \$171,046. CP 125.

Not only does the spreadsheet disagree with the 10/31 letter, its provenance is unclear. Attorney Berg claimed in an oral hearing before the court commissioner (after all the written pleadings were submitted, thus allowing Holly no opportunity to respond) that this spreadsheet was “sent concurrently with the letter” (2RP 6), though the 10/31 letter refers to “spreadsheets” (i.e., multiple spreadsheets), indicates no enclosures, and the spreadsheet Rodney submitted is undated, not otherwise identified, and titled “For Settlement Purposes Only.” However, Berg later (01/16/14), in a written pleading, described the spreadsheet without suggesting it had been included in the 10/31 letter. CP 121 (“a spreadsheet illustrating the division of assets”). Rodney’s declaration does not identify the spreadsheet as an attachment to a letter or with any other specificity. CP 26. Repeatedly, Holly’s counsel questioned the provenance of the spreadsheet, observing that the 10/31 letter does not appear to include an

enclosure. See, e.g., 1RP 13-14, 39, 2RP 14. Nevertheless, the commissioner and, later, the judge, relied on the spreadsheet Berg endorsed as being included with the 10/31 letter to Philip. See, e.g., CP 121 (“a spreadsheet illustrating the division of assets”); 1RP 11-12, 29; 2RP 19. The commissioner conceded he was not sure the parties exchanged the same spreadsheet as Rodney submitted, but concluded “a spreadsheet” had been exchanged. 1RP 29.

In any case, the spreadsheet appears outdated. According to records obtained by Holly’s new counsel, the account balance exceeded \$500,000, reflecting the two large deposits in September (about which Holly did not know). CP 40. In court, the attorneys also discussed whether the monies in the two accounts had been combined. 1RP 16-17.

The parties argued these issues before Commissioner Heydrich at a hearing on December 20, 2013. In determining the parties had reached an agreement, the commissioner relied heavily on Berg’s statement in her pleadings that Philip told her there was an agreement. 1RP 30.<sup>3</sup> The commissioner also inferred an agreement from the fact that Berg contacted the clerk to strike the trial date. CP 172; 1RP 30. Commissioner Heydrich

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<sup>3</sup> Berg also testified before the commissioner and the judge regarding her communications with Philip. See, e.g., 1RP 12 (“the agreements made orally between Ms. Philip and myself”); 2RP 16-17 (“Ms. Korb [Philip] and I had a meeting of the minds and we jointly said ‘okay, we have an agreement...’”). Mr. Wright, Holly’s counsel, objected to Ms. Berg “testifying to things that aren’t in the record...” 2RP 17. Holly also objected to evidence of “compromise negotiations” under ER 408. CP 33.

entered final orders, including findings of fact “based on agreement.” CP 53.

However, on January 17, 2014, Commissioner Heydrich granted Holly’s motion to reconsider, ordering a trial on the distribution and division of funds present in the US Bank account “at the time of the parties’ agreement on November 4, 2013....” CP 142; see, also CP 87-89 (Holly’s motion). Otherwise, the final orders remained as previously entered. CP 143.

In her motion to reconsider, Holly argued the court could not rely on “information not contained in the record ...” CP 88. She argued the evidence in the record “does not support or establish the terms of a settlement agreement as proposed by the petitioner.” *Id.* She specifically objected to the court’s reliance on inadmissible evidence, including testimony from Berg and documents either unidentified or lacking foundation. CP 110-111. She argued the requirements of CR 2A were unmet, i.e., that “[s]ettlement agreements must be in writing and reflect agreement on all essential terms.” CP 111. To the extent the record included any inconsistent or contradictory evidence, that evidence had to be viewed in the light most favorable to Holly. CP 112, 133.

Rodney responded that Holly knew about the U.S. Bank account and the pattern of income for the business and that her text message about saving attorney fees indicated her agreement to settle. CP 98-99.

Both parties moved for revision of the commissioner's order. CP 144-147; 148-150. A hearing was held before Judge Garrett on April 11. At the hearing, Judge Garrett disagreed with the commissioner's piecing out the disputed bank account and ordered the matter remanded to the commissioner for fact-finding on whether "the parties made an agreement that addresses all the material terms of the settlement." 2RP 25-26 (emphasis added). The court held the record did not establish "clearly enough as a factual matter what the terms of the party's agreement was," though the court thought the parties had reached an agreement and did not doubt that the attorneys "felt that this was a complete agreement." 2RP 20. However, the court concluded "we don't have the factual information in the record that specifies exactly what that agreement was." Id. The court found there was no enforceable agreement "because the \$500,000 [fishing business] account is a material term that wasn't addressed and that puts the parties back to square one." 2RP 25-26. The court found that "it's an all or nothing deal. The parties either had an agreement for all material terms or if they didn't everything is on the table." 2RP 22.

Before entering an order to this effect, the judge changed her mind. In a May 20 letter to counsel, Judge Garrett communicated her determination that the final orders as entered by the commissioner on December 20 should be reinstated. CP 187.

On June 16, Holly filed a motion for reconsideration of the letter ruling. CP 188-89. She also specifically objected to the court entering findings absent any basis in the record to do so. CP 192-94.

At a hearing on June 27, Holly argued again, that CR 2A's requirements were unmet and that the distribution was inequitable, since it appeared Rodney would receive twice as much in the distribution as she (\$1 million versus \$500,000). 3RP 6-7; see, also, 1RP 18-20, 39. The judge rejected the argument, declaring how she viewed the equitable nature of the settlement with an awareness of "Mr. Dohner's fairly significant separate property interest in this business, which he established before the marriage," though acknowledging the issue was not "fleshed out factually at trial ...." 3RP 7.

In fact, the spreadsheet (which may or may not have been attached to Rodney's 10/31 letter) includes no separate property values whatever, not even for the sole item ("crab license & gear") identified as "b/f marriage." CP 125. (Holly testified earlier that even these assets were obtained during the marriage. CP 21.) Moreover, the spreadsheet does

not even list the business itself. To the judge's comment about Rodney's separate property, Holly's counsel responded that he was unaware of "a separate property interest of Mr. Dohner's asserting in anything." 3RP 8. When the court wondered aloud whether it had misremembered, Rodney's counsel noted the file included "a lot of information" and there was "probably" mention of "a separate property interest in some licenses to permits [sic] ..." Id. Rodney's counsel did not identify where this mention was made.

Judge Garrett entered an order revising Commissioner Heydrich's Order on Reconsideration. CP 200-201. The judge found:

the parties made an enforceable agreement to resolve this matter and that when they did so, Mrs. Dohner was aware that Mr. Dohner owned a fishing business and that that business included a business checking account, the balance of which varied seasonally. Their agreement to resolve the case, with the fishing business allocated to Mr. Dohner, necessarily included allocation of the business account to Mr. Dohner.

CP 200-201. The judge reinstated the final orders entered on December 20, 2013. CP 201.

The court also awarded attorney fees to Rodney of \$7,000, unsupported by written findings. CP 201. Rodney had argued Holly acted in "bad faith" (CP 14, 16, 144, 146; 1RP 9-10; 13), but the judge's letter ruling simply stated, "Attorney fees are awarded to Mr. Dohner as

described in the Court's oral opinion." CP 187. In the April 11 hearing, the court stated as follows:

But based on the information in front of me it looks unlikely to me that they didn't discuss or make some assumption about the Pacific Dream bank account and it's for that reason that I'm going to order that Ms. Dohner pay attorneys fees in the amount of \$7,000 for Mr. Dohner's costs incurred in going back to the court and then coming up to this court.

2RP 20. The court went on to observe that the record did not establish "clearly enough as a factual matter what the terms of the party's [sic] agreement was." Id.

I don't doubt that they reached an agreement and I don't doubt that the lawyers felt that this was a complete agreement. The fact that they called off the trial in the day before a much-valued trial setting indicates to me that the lawyers felt that a settlement had been reached. A text from Mr. [sic] Dohner also indicates that, but we don't have factual information in the record that specifies exactly what that agreement was.

2RP 20. The court nevertheless awarded fees to Rodney, an award the court affirmed later when it reversed its 4/11 decision.

At the hearing on reconsideration of that reversal, the court rejected Rodney's allegation of bad faith against Holly as a basis for fees and held, rather, that fees were awarded "simply based on that Mr. Dohner's having prevailed and the reasonable cost of defending this motion." 3RP 10; CP 201-203.

Holly timely appealed. CP 204-243.

#### IV. ARGUMENT

##### A. THE STANDARD OF REVIEW.

Where “the evidence before the trial court consist[s] entirely of affidavits and the proceeding is similar to a summary judgment proceeding,” this Court reviews *de novo* a trial court order enforcing a settlement agreement. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000).

This Court reviews the award of attorney fees for an abuse of discretion. *In Re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989). However, “[i]f the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

##### B. NO BINDING AGREEMENT EXISTED.

“The purpose of CR 2A is to give certainty and finality to settlements.” *Condon v. Condon*, 177 Wn.2d 150, 157, 298 P.3d 86, 89 (2013). These virtues flow from the clarity of the rule’s requirements, i.e., a stipulation assented to “in open court on the record” or a writing “subscribed by the attorneys denying the same.” CR 2A. *See, also*, RCW 2.44.010 (limiting attorney’s authority to bind client).<sup>4</sup> If an agreement is

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<sup>4</sup> The statute and rule provide:

not made on the record in open court or memorialized in a writing signed by the disputing party, CR 2A precludes enforcement, “whether or not common law requirements are met.” *In re Marriage of Ferree*, 71 Wn. App. 35, 40, 856 P.2d 706 (1993) (citing *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954)). Without dispute, neither of these conditions is satisfied. There is no agreement made on the record in open court or an agreement in writing signed by the parties or their attorneys.

Accordingly, the rule precludes enforcement where the “purport” of the agreement is disputed, meaning a dispute regarding the agreement’s “existence or material terms.” *Ferree*, 71 Wn. App. at 40. The courts have analogized a CR 2A enforcement proceeding to summary judgment, imposing on the party moving to enforce a requirement to prove there is no genuine dispute regarding the agreement's existence and material

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(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; ...

CR 2A provides:

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.

terms. *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005); *see, also, Ferree*, 71 Wn. App. at 43-44 (must prove “the absence of a genuine dispute of fact”) (emphasis the court’s).

Applied here, Rodney must prove the parties reached an agreement on all material terms and he must do so by means of “affidavits, declarations or other cognizable materials[.]” *Ferree*, 71 Wn. App. at 43. In other words, he must prove the existence and material terms of the agreement with admissible evidence. (This limitation matters here because of the hearsay offered by his attorney in her declaration as well as her unsworn statements in the various hearings, including her statements attempting to provide a foundation for the spreadsheet.)<sup>5</sup>

As in summary judgment proceedings, where the facts are inconsistent, they must be viewed in the light most favorable to the nonmoving party, here, Holly. *Id.* If Rodney carries his burden, Holly can still defeat his effort if she can show a material dispute of fact. *Ferree*, 71 Wn. App. at 44. Importantly, the question for the court is limited to whether there is a genuine dispute; as in summary judgment, the point is not to engage in an extensive evidentiary inquiry into the nature of the

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<sup>5</sup> It is not clear why the court allowed or considered the testimonial statements Nancy Berg made at the hearings, or inadmissible evidence in her declaration. Apart from its numerous evidentiary deficiencies (foundation, hearsay, etc.) and ER 408 restrictions, Berg’s testimony is a kind of evidence ethically prohibited out of concern for the conflict and potential prejudice arising from a lawyer occupying the dual roles of advocate and witness. RPC 3.7.

dispute. *Id.*, at 41 (point is to “avert or simplify trial...not propagate additional disputes”). In short, the rule assumes a summary proceeding; it does not encourage a trial to determine whether a settlement occurred.

Here, Rodney offered his proposed orders as constituting the agreement, which were not even drafted when his attorney, Berg, asked the clerk to strike the trial date. CP 14-16. While these proposed orders appear to address all material terms, they did not do so based on any agreement. Indeed, Holly refused to sign the orders because she and Rodney had not “resolve[d] all issues” and the documents did “not accurately reflect any agreement that was reached and are not acceptable to me.” CP 21. She also did not authorize her attorney to accept these terms and her attorney did not sign the orders. CP 21.

At most, all Rodney proves is that he and his attorney believed a settlement was reached, which is as insufficient here to prove an agreement as it was in *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992). In *Bryant*, the parties and the attorneys met to negotiate a settlement agreement to a property dispute. The Bryants left the meeting thinking an agreement was reached and their attorney sent a letter to the coal company’s attorney setting forth the terms. The coal company declined to proceed with the settlement, asserting “the framework for a settlement had been discussed but that

many details were left to future agreement.” *Bryant*, 67 Wn. App. at 178. The Bryants moved to enforce. The trial court found the letter accurately reflected the agreement, but was not itself the agreement. Nevertheless, it ordered execution of an agreement and enforcement. This Court reversed for lack of compliance with CR 2A and RCW 2.44.010, holding the “alleged settlement agreement is unenforceable because it was not stipulated to on the record in open court or memorialized by a writing signed by the party to be bound.” 67 Wn. App. at 179. This Court noted the policy of avoiding disputes is ill-served by claims to an agreement where the parties fail to memorialize the agreement. *Id.*

Here, there is not even a letter, as there was in *Bryant*, or other evidence in writing, that reflects an agreement, certainly not an agreement to the terms set forth in Rodney’s proposed orders. Indeed, the fact that Rodney accepted clarifications to the draft orders requested by Holly proves the negotiations were ongoing, as we learn from *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 149 P.3d 691 (2006). There, the parties agreed on an amount to settle their dispute, but they exchanged drafts with variations on the release language. The City claimed it made all the changes Evans requested, but Evans maintained the release language in the last draft was broader than he intended. This Court concluded there was “a genuine issue of material fact” regarding whether

a “meeting of the minds” occurred on the scope of the release. 136 Wn. App. at 477.

Here, too, the proposed orders served as a negotiating platform; they did not reflect completed negotiations. Rather, negotiations were ongoing, just as Holly testified. CP 20 (“I have not agreed to any final resolution of this case... We have not reached a settlement agreement ...”). Here, as in *Bryant* and *Evans*, the fact that Rodney believed (or wanted to believe) the proposed orders reflected an agreement does not prove an agreement.

*Ferree, supra*, also is instructive because of the way it is distinguishable. In *Ferree*, following settlement discussions, the trial was stricken and the husband’s attorney drafted proposed orders. He withdrew, but testified by affidavit along with the wife and her attorney that “an agreement had been reached, and that its material terms were incorporated in [the husband’s attorney’s] proposed findings and decree.” 71 Wn. App. at 45.<sup>6</sup> The husband offered no evidence to contravene the affidavits, not even his own testimony, and the court found the wife had proved there was no genuine dispute of fact regarding the existence of the agreement and its terms.

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<sup>6</sup> As variously noted in *Ferree*, the testimony by the attorneys introduces other problems. See, 71 Wn. App. at 38 n.4 (not testimony by an attorney in the cause); see, also, ER 408 (evidence of negotiations); RPC 3.7 (conflict of interest).

By contrast, here, the wife produced an affidavit stating that, in the weekend negotiations, she and Rodney “did not resolve all issues or come to a complete agreement ...” CP 21. Moreover, the proposed final documents did “not accurately reflect any agreement that was reached and are not acceptable to me.” CP 21. Their attorneys were not present at these discussions, so neither attorney could attest to the contents of those discussions, particularly not to whether the proposed orders reflected any agreements reached. In any case, Holly’s attorney did not produce an affidavit as did the husband’s attorney in *Ferree*. Indeed, it appears Holly’s attorney was unprepared for trial; she may have hoped a settlement was reached out of concern for potential consequences to her.<sup>7</sup> Indeed, Holly felt she was “being pressured and bullied into signing off on final documents” to which she had not agreed. CP 22. Whether or not Philip and Berg believed there was an agreement, the noncompliance with CR 2A and Holly’s testimony makes clear any such belief was not warranted. In other words, “[t]he attempted compromise by the parties did not pass from a stage of negotiation to one of finality.” *Eddleman*, 45 Wn.2d at 432. In sum, Rodney fails to prove the existence of an agreement reflected in the draft orders. Under CR 2A, there is nothing to enforce.

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<sup>7</sup> There is no cognizable evidence on what Philip did or said or thought, except her email on the eve of trial indicating she needed to write a trial brief.

Nor can Rodney prove an agreement through informal writings, since he cannot satisfy the applicable three-part test, which requires him to prove:

(1) the parties agreed to the subject matter;

(2) “all of the provisions of the agreement were set out in the writings;” and

(3) “the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract.”

*Evans*, 136 Wn. App. at 475-476. This he cannot do.

While the parties agree the subject matter is their dissolution, Rodney fails to satisfy the other two prongs. There is nothing to show the parties intended the informal writings to form an agreement, prior to the execution of formal documents. How could they? They are not even complete or consistent. In any case, here, as in *Evans*, all the informal writings prove is that the parties wanted to continue the trial date, they wanted to agree, and, perhaps, their attorneys thought they had agreed. 136 Wn. App. at 474-478. Here, also as in *Evans*, “there is no suggestion ... that the letters themselves are the binding agreement.” 136 Wn. App. at 478. Indeed, the last writing from Philip, Holly’s attorney, is a question about the transfer payment, a far cry from the kind of confirmation found

in the cases.<sup>8</sup> Rather, the facts here are like those in *Eddleman*, where the last draft of a stipulation was never returned to its proponent; instead it was “in the stages of preparation....” 45 Wn.2d at 432.

In any event, the writings Rodney produces fail to set forth all of the provisions of an agreement. Rodney’s evidence consists of a 10/31 letter offering settlement “in general terms,” an offer rejected by Holly (CP 21); a spreadsheet entitled “For Settlement Purposes Only,” which may or may not have been attached to the letter but which is, in any case, inconsistent with the letter; an exchange of email between the attorneys regarding the transfer payment; and Rodney’s declaration asserting that he and Holly met over the weekend and agreed on the combined support amount and transfer payment, though later in the evening he said he agreed to a higher amount, and that he received a text message from Holly saying she wanted to save stress and attorney fees.

None of this evidence even mentions the family fishing business, which is the community’s principal asset. Yet in the orders he drafted, Rodney gets the business hook, line, and sinker – the proverbial goose that lays the golden egg. Many other material terms are also missing, as discussed in the statement of facts. For example, the writings make no

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<sup>8</sup> Even this exchange is confusing, since Berg says to Philip that Rodney is offering “\$60,000 more than you were requesting” (CP 126, emphasis added), in reference to the \$250,000 figure, which is actually \$60,000 more than Rodney offered in Berg’s 10/31 letter.

mention of income for purposes of family support and the final orders include an income figure for Rodney several thousand dollars less than in temporary orders and an income figure for Holly at least a thousand dollars more than in temporary orders. The child support order includes a finding that Holly is voluntary underemployed and imputes income to her at \$2,693, whereas the temporary order did not do so. *Id.* Where in the informal writings does Holly agree to a finding of voluntarily underemployment? Again, as mentioned earlier, the imputation drives Holly's proportional share of child support to 43%, which is remarkable given the real disparity in their earning capacities. CP 71. Similarly, the writings say nothing about health insurance, which Rodney paid under temporary orders but which the final child support order obligates Holly to pay. Supp. CP [sub 37]; CP 73, 74. Numerous other issues of characterization and valuation are omitted.

What writings exist cannot be squared with each other. The spreadsheet is inconsistent with the letter and inaccurate and incomplete, as is Rodney's declaration. The emails between the attorneys merely continue the negotiations; they do not confirm an agreement was reached. Holly's text merely endorses the idea of coming to an agreement, not a particular agreement. Altogether, this hodgepodge cannot be stitched into a written agreement consistently setting forth all the material terms. This

case is in far worse shape than the informal writings offered in the *Evans* case, where at least a letter included all the material terms (though one of them was disputed).

The facts of this case are also distinguishable from another “informal writings” case, *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357 (1993). Not only did the informal writings (letters) in *Morris* specifically set forth all the terms, Maks signed a letter confirming the settlement and its terms, as did his attorney. 69 Wn. App. at 871. No such clarity of terms or intent is present here. The writings Rodney submits do not include all material terms and do not even agree among themselves. They absolutely do not include any confirmation of an agreement from Holly’s attorney; Philip’s last writing is in the form of a question. Nor are these defects altered by the purported text message from Holly, where she agrees to save “stress” and attorney fees. At this point, she had not seen proposed orders and had rejected the last written offer made by Rodney, which was, in any case, incomplete, as described above. Also, notably, the writings here are very informal, including email and a purported text message, further reinforcing Holly’s belief that “there was no final binding agreement until written documents were prepared, reviewed and signed off on by both parties.” CP 21. In other words, understandably, she did not intend these very informal and cryptic writings to comprise the agreement.

The court simply cannot fashion an agreement out of these ingredients; in fact, the court is forbidden to read material terms into an agreement. *Condon*, 177 Wn.2d at 163. In *Condon*, the parties reached a settlement on the record in an automobile injury case. Later, one party asked the other to sign a release, which the parties had not discussed or placed on the record. The trial court read the release as implied and enforced the settlement, an error reversed by the Supreme Court. Here, as in *Condon*, the court was wrong to read material terms into the “agreement.” Compare *Morris v. Maks, supra* (settlement found where parties reached agreement on all points under negotiation).

In sum, by the end of the day trial was stricken, the parties had a number of issues to resolve, from family support to property distribution. From Holly’s perspective, additional disclosure of information was required, particularly regarding income from the family business. Much of the discussion in the trial court revolved around the family business, particularly with regard to what Holly knew about the business. She claimed Rodney failed to disclose information she requested. He claimed she had access to the information. However, the question under CR 2A is what Holly agreed to, not what she knew about the family business.<sup>9</sup>

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<sup>9</sup> The last information Holly had was from August, before the fishing season receipts. CP 98-99. By the end of October, presumably, Rodney would have been required under CR 26(e)(2) to supplement his interrogatory answers with this information. It appears he did

Whatever the reason, she felt (and was right to feel) she had insufficient information to finalize an agreement, a fact further underscoring that she did not intend to be bound by the parties' weekend negotiations.

She was not the only one in the dark. The trial court lacked sufficient information from which it could conclude the proposed orders satisfied the requirements of law. Prominently, the court has an independent duty to examine the parenting plan for compliance with statute and service to the child's best interests. *See, In re Marriage of Coy*, 160 Wn. App. 797, 805, 248 P.3d 1101 (2011) (modification of parenting plan requires an independent inquiry by the trial court). Likewise, just as importantly, the distribution of assets and liabilities must "appear just and equitable" after consideration of the relevant factors. RCW 26.09.080. Here, the court had no information from which to conclude "[t]he distribution of property as set forth in the decree is fair and equitable." CP 57. For good reason, Holly did not agree the distribution was fair and equitable. *See, e.g., CP 51*. And the court had no basis to conclude otherwise. The business was not valued, surely one of the most material facts. There was no information on its income stream. There was no evidence to explain the income figures Rodney inserted into the child support orders. There were no adequate facts against which to

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not do so from a mistaken belief that the post-separation business income from the community asset was his alone. CP 50. Of course, disclosure is required regardless.

measure the award of maintenance. The values for other assets appeared on a mystery spreadsheet titled “For Settlement Purposes Only” and were, apparently, otherwise unreliable. The court mistakenly attributed separate property to Rodney when not even his own informal writings did. These many defects constitute yet another bar against enforceability: fairness. *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 414-415, 36 P.3d 1065 (2001). Rodney gained the business, with an apparent potential for substantial future earnings. Holly, having spent the marriage performing the family’s domestic labor and with no apparent marketable skills, faces the same future with half as much in assets.

Here, as in *Evans*, the court should not have enforced what Rodney claimed was a settlement agreement. These parties failed to close the deal. Rodney seems to acknowledge as much, complaining that Holly had a “pattern” of retreating from the brink of agreement. CR 2A is not a mechanism for forcing a party over that brink. Rodney’s remedy for what he viewed as the problem was to take Holly to trial. Or, from Holly’s perspective, Rodney could supply the essential information she felt missing from the negotiations.

What should not have happened is this detour through five hearings wherein judicial officers strained to piece together an agreement from incomplete and inconsistent fragments. Though compromise of

litigation is encouraged, “the purpose of CR 2A is to insure that negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one.” *Ferree*, 71 Wn. App. at 41. Not surprisingly, Rodney’s effort to transmute negotiations into an agreement resulted in more, not less, litigation, a result completely at odds with the purpose of the rule, which is “to avoid such disputes and to give certainty and finality to settlements and compromises, if they are made.” *Eddleman*, 45 Wn.2d at 432. Here, as in *Eddleman*, the rules direct the court to “disregard the conflicting evidence.” *Id.* Here, as in *Eddleman*, where “it is disputed that the negotiations culminated in an agreement, noncompliance with the rule and statute leaves the court with no alternative.” *Id.*

Because the requirements of CR 2A were not met, the court could not enforce the “agreement” Rodney claimed the parties made. The settlement attempted here was never achieved and the court erred when it ordered enforcement. The orders should be vacated and this cause remanded for trial.

C. THE TRIAL COURT AWARDED ATTORNEY FEES ON AN IMPROPER BASIS.

The trial court awarded fees to Rodney because he prevailed. 3RP 10; CP 201. Earlier, before Rodney prevailed, the court awarded fees to compensate him for “costs incurred in going back to the court and then

coming up to this court.” 2RP 20. In the next breath, the court said the record failed to establish “what the terms of the party’s [sic] agreement was.” Id. And the court simply ignores that Rodney wanted to continue trial as much as Holly did and that his refusal to disclose relevant income information undoubtedly contributed to Holly’s reluctance to settle. Simply, not only is the court’s view of the facts unsubstantiated, there is not a proper legal basis for an award of fees in a family law matter. “Under the American rule, the parties are responsible for their own attorney fees unless an award of fees is authorized by a private agreement, statute, or a recognized ground of equity.” *Bentzen v. Demmons*, 68 Wn. App. 339, 349, 842 P.2d 1015 (1993). There is no such authorization here, no statute and no agreement. The court expressly, and properly, rejected Rodney’s bad faith argument. See 3RP 10. See, also, CP 14, 16, 144, 146; 1RP 9-10; 13 (arguing for fees). Rodney was awarded twice the assets as Holly, including the family business, so he cannot argue need based on RCW 26.09.140. Certainly, he cannot argue it for the first time on appeal. RAP 2.5(a). In any case, this statute has long been interpreted to mean “[t]he prevailing party standard does not apply in such proceedings.” *In re Marriage of Wilson*, 117 Wn. App. 40, 51, 68 P.3d 1121, 1127 (2003), citing *In re Marriage of Belsby*, 51 Wn. App. 711, 719, 754 P.2d 1269 (1988). In short, there was no basis for the court to

award fees to Rodney and the order doing so should be vacated. The court's failure to enter findings supporting this award is secondary to the utter lack of any basis to award fees. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998).

#### V. MOTION FOR ATTORNEY FEES

Holly seeks attorney fees based on her need relative to Rodney's ability to pay on the authority of RAP 18.1 and RCW 26.09.140. The statute provides that:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

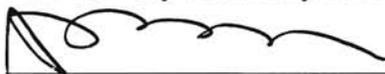
This statute has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a party with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" pertaining to a child. *King v. King*, 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). Holly is vastly disadvantaged in this

litigation, precisely the kind of party who is the subject of the statute's concern. Accordingly, she requests her fees.

VI. CONCLUSION

For the foregoing reasons, Holly Dohner respectfully asks this Court to vacate the orders described above and remand for a trial. She asks further to be awarded attorney fees on appeal.

Respectfully submitted this 20<sup>th</sup> day of January 2015.



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Patricia Novotny, WSBA #13604  
3418 NE 65<sup>th</sup> Street, Suite A  
Seattle, WA 98115  
Telephone: 206-525-0711  
Fax: 206-525-4001  
Email: novotnylaw@comcast.net