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No. 72658-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ACT NOW PLUMBING, LLC, a Washington limited liability company,
d/b/a GARY FOX PLUMBING & HEATING; IGOR IVANCHUK, an
individual,

Appellants,

v.

DAVID N. BROWN, INC., a Washington corporation d/b/a Fox Plumbing
& Heating,

Respondent.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The “action” at issue is the trial court’s ongoing jurisdiction over the parties’ settlement agreement. There has been no “Final Judgment,” “Decision Determining Action” or other final appealable order with respect to that action. *See* RAP 2.2(a)(1) & (3). Although the October 2014 Order and Judgment was interlocutory, Act Now Plumbing was forced to file a notice of appeal so that it could supersede any effort by Fox Plumbing to enforce the supposed final “judgment” entered on the fee award (and, ironically, to preempt Fox Plumbing from later arguing that the October order, rather than the December order, was the relevant “final judgment”). The interlocutory orders at issue are not final appealable orders because—at Fox Plumbing’s insistence—the trial court retained jurisdiction in this matter and will continue to do so until it enters a final order confirming Act Now Plumbing’s compliance with the settlement agreement and entitlement to the settlement funds that should have been paid to it immediately upon settlement of this case. If this court reverses the trial court’s order granting Fox Plumbing’s motion for judicial interpretation of the CR 2A Settlement Agreement and orders that the remaining settlement funds in the court registry be paid immediately to Act Now Plumbing, then the “Judgment” would be a final appealable order.

II. COUNTERSTATEMENT OF RELEVANT FACTS

Fox Plumbing's recitation of the procedural history in this matter is generally accurate. There are, however, several key facts that Fox Plumbing omits and/or intentionally glosses over. In its May 30, 2014 Motion for Judicial Interpretation of CR 2A Settlement Agreement, Fox Plumbing asked the trial court to supply a term to the parties' settlement that would allow it to pay only \$10,000 of the \$45,000 settlement to Act Now Plumbing, and place the remaining \$35,000 of the settlement funds in the court's registry for six months while Act Now Plumbing transitioned its trade name, at which point it must then seek the court's approval before it would be entitled to the remaining settlement funds. (CP 448-456). At no time did Act Now Plumbing agree to any of these terms and conditions as part of the settlement. (CP 544-568).

The trial court (erroneously) ruled on June 11, 2014 that the parties' settlement should include court-supplied terms and conditions specifying that the "remaining thirty-five thousand dollars (\$35,000) shall be deposited into the Court registry, *pending further order of the Court*. (CP 577-580). Upon completion of performance, Defendants' counsel may apply for disbursement of funds, supported by a declaration of counsel and supporting evidence of full performance." (CP 577-580) (emphasis added). Instead of being paid the entire \$45,000 settlement in

consideration for ceasing using the trade name “Gary Fox Plumbing & Heating” and transitioning its plumbing business to an entirely new trade name, the court’s order now requires Act Now Plumbing to prove to the court its entitlement to the settlement funds. The trial court’s order also required the parties to “prepare and execute a written Settlement & Release Agreement consistent with their CR 2A and with this Order.” (CP 577-580).

Pursuant to the trial court’s order, the parties included the court-supplied terms and conditions in their final settlement agreement. (CP 595-605). The parties thereafter agreed to a stipulated order of dismissal of Brown’s claims, which the trial court signed. (CP 1048-1049) The trial court recognized, however, that the action was not over. The court’s July 2, 2014 order specifically states that: “*The Court shall retain jurisdiction* in accordance with the Court’s order granting plaintiff’s motion for judicial interpretation of CR 2A Settlement Agreement.” (CP 1048-1049) (emphasis added).

Fox Plumbing asked the court to exercise its ongoing jurisdiction just one month later, when—well before the end of the 6-month transition period—it accused Act Now Plumbing of violating the terms of the settlement agreement by using the domain name of “garyfix.com” for its new website for “Gary’s Fix-It Plumbing & Heating.” (CP 581-589). The

trial court (again, erroneously) entered an order August 21, 2014 Granting Plaintiff's Motion to Enforce Settlement Agreement ruling that although a "domain name" is legally not the same as a "trade name or trademark," Act Now Plumbing breached the settlement agreement by using an internet domain name "garyfix.com." (CP 658-661). Its order noted that its "ruling in this matter necessarily shall be consistent with its prior ruling on the prior Motion for Judicial Interpretation of CR 2A Settlement Agreement." (CP 658-661).

Fox Plumbing thereafter filed a motion for attorneys' fees incurred in connection with the August 21, 2014 order. (CP 662-668). The trial court granted the motion and, at Fox Plumbing's request, on October 3, 2014 entered an "Order and Judgment" awarding more than \$6000 in fees and costs. (CP 737-740). The order contains findings of fact and conclusions of law and a "Judgment Summary" in accordance with RCW 4.64.030, making it immediately enforceable. (CP 737-740).

In order to forestall Fox Plumbing's threats to enforce the purported October 3, 2014 "Judgment," Act Now Plumbing filed a notice of appeal on October 31, 2014 so that it could seek the supersedeas stay permitted by RAP 8.1. Act Now Plumbing then filed a Motion for Approval of Alternate Supersedeas Funds to Stay Execution of the 10/3/14 Judgment Pending Review, which was granted by the court on November

18, 2014. The Court's Order allowed Act Now Plumbing to use the remaining \$35,000 settlement funds in the court registry as alternate supersedeas funds to stay Fox Plumbing's enforcement of the 10/3/14 Judgment.

Fox Plumbing contends that the Settlement Release Agreement prohibits Act Now Plumbing from using the domain name "Gary Fix" in its business. However, the Settlement Release Agreement only refers to the use of a trade name or trade mark, and not a domain name. The settlement agreement only prohibits Act Now Plumbing (and Fox Plumbing) from using the *trade name* "Gary Fox Plumbing" or "Gary Fox Plumbing & Heating." (CP 595-604). With respect to Act Now Plumbing's new trade name, the settlement agreement provides in pertinent part:

Defendants shall have the right to use the *trade name* "Gary's Fix-It Plumbing & Heating" or "Gary's Plumbing & Heating" or any other *trade name* or trademark it chooses so long as the *trade name* or trademark does not include the word "Fox," or the word Gary together with any variation of the word "Fox," either by rhyming (i.e., "Box Plumbing & Heating") or by replacing the vowel in "Fox" (i.e., "Gary Fix Plumbing & Heating.") (emphasis added).

(CP 595-604).

Act Now Plumbing's use of the domain name "www.garyfix.com" for its new web site for "Gary's Fix-It Plumbing & Heating" is not a

violation of the CR 2A Agreement or the March 31, 2014 settlement agreement.

III. ARGUMENT

A. Neither the June 11, 2014 nor the August 21, 2014 Orders are Final Appealable Orders Under RAP 2.2 With Respect to Enforcement of the Parties' Settlement Agreement.

Under Fox Plumbing's argument, Act Now Plumbing was required to file a first notice of appeal after the June 11, 2014 order, then a second notice of appeal after the July 2, 2014 dismissal order, then a third notice of appeal after the August 21, 2014 order and, presumably, a fourth notice of appeal after the trial court decides whether Act Now Plumbing is entitled to the remaining \$35,000 settlement funds. Not only is that theory contrary to the policy against piecemeal appeals and the RAPs, it ignores the fact that Fox Plumbing asked the trial court to retain jurisdiction over the parties' settlement agreement before entering a final order. Fox Plumbing cannot get its theory straight.

Fox Plumbing argues that the June 11, 2014 order was a "decision determining action" under RAP 2.2(a)(3)—even though it required Act Now Plumbing to seek a further order from the court. Then Fox Plumbing argues that the July 2, 2014 dismissal order was actually the "final judgment" under RAP 2.2(a)(1)—even though the order expressly states that the trial court "shall retain jurisdiction." Finally, Fox Plumbing

claims that the August 21, 2014 order was likewise an appealable “final order” under RAP 2.2(a)(13)—even though the trial court has not yet issued its final order on Act Now Plumbing’s compliance with the settlement agreement.

Fox Plumbing is wrong on all counts. Neither the June 11, 2014, the July 2, 2014 nor the August 21, 2014 orders were final appealable orders under RAP 2.2 with respect to enforcement of the parties’ settlement agreement. Fox Plumbing simply refuses to acknowledge the one fact that negates all of its arguments: the trial court retained jurisdiction over Act Now Plumbing’s compliance with the settlement agreement and—at Fox Plumbing’s own insistence—will not enter a final order in this action until after it decides whether Act Now Plumbing has “complied” with the settlement agreement and is entitled to the remaining \$35,000 settlement funds. Until that happens or this court reverses the trial court’s decision, all the orders are interlocutory, and Act Now Plumbing cannot (and, thus, did not) appeal them. Act Now Plumbing filed a notice of appeal in October 2014 only because the trial court—again, at Fox Plumbing’s own insistence—improperly entered a premature final “Judgment” on an interim fee award.

June 11, 2014 Order. Under RAP 2.2(a)(3), a party may appeal “[a]ny written decision affecting a substantial right in a civil case that in

effect determines the action and prevents a final judgment or discontinues the action.” The June 11, 2014 order did not determine or discontinue the action. As Fox Plumbing recognizes, the relevant “action” for purposes of appealability analysis is not Fox Plumbing’s underlying claims against Act Now Plumbing, but rather the litigation related to the enforceability of the parties’ settlement agreement. *See Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 442, 783 P.2d 1124 (1989) (for purposes of RAP 2.2(a)(3), “a proceeding under the statute to determine whether arbitration should be compelled has a status independent from the underlying cause of action or controversy”).

Fox Plumbing argues that the June 11, 2014 order “effectively determined” the action because it resolved a dispute regarding the timing of Fox Plumbing’s settlement payment, allowing the parties to finalize the settlement agreement and dismiss Fox Plumbing’s claims. Not so. The trial court did not resolve the parties’ dispute by supplying a “missing term” to the parties’ settlement agreement. It simply deferred resolution until after December 2014. The June 11, 2014 order expressly conditions Act Now Plumbing’s receipt of the remaining settlement funds on further proceedings and entry of a final court order.

Indeed, far from resolving the dispute of when Act Now Plumbing will receive the remaining funds, the June 11, 2014 order requires Act

Now Plumbing to file a motion with the trial court no earlier than December 12, 2014, “supported by a declaration of counsel and supporting evidence,” to show that it complied with the settlement agreement. Brown may oppose the motion, and has suggested that it will. In any event, until the trial court enters an order releasing the funds after December 2014 (or, refuses to do so), or this court reverses the June 11, 2014 order, the present action relating to the parties’ settlement is most definitely not over. *See Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 452, 54 P.3d 1194 (2002) (“an ‘interlocutory’ decision ... decides some point or matter, but is not a final decision of the whole controversy” (citations omitted)).

July 2, 2014 Order. The July 2, 2014 stipulated order dismissing Fox Plumbing’s claims did not act as a “final judgment” under RAP 2.2(a)(1) with respect to the court’s June 11, 2014 order or the parties’ ongoing litigation regarding the settlement agreement generally. A final judgment is “a court’s last action that settles the rights of the parties and disposes of all issues in controversy.” *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009) (quoting Black’s Law Dict. at 859 (8th ed. 2004)). “Final has a specific meaning in context of appellate jurisdiction. A final decision is one which leaves nothing open to further dispute and which sets at rest cause of action between parties.”

Samuel's Furniture, 147 Wn.2d at 452 (quotation marks and citation omitted).

While the July 2, 2014 order dismissed Fox Plumbing's substantive claims against Act Now Plumbing, it did not settle or dispose of all the issues related to the parties' settlement. As noted, there is a distinction between Fox Plumbing's underlying claims and the parties' separate litigation over the meaning and effect of the settlement agreement; dismissal of the former did not resolve the latter. The trial court recognized this itself in unequivocal terms. Not only did the June 11, 2014 order expressly leave the issue open until Act Now Plumbing obtains a final order from the court approving the release of the funds after December 2014, the July 2, 2014 dismissal order likewise specifically states that the "Court shall retain jurisdiction in accordance with the Court's order granting plaintiff's motion for judicial interpretation of CR 2A Settlement Agreement." (CP 577-580).

Indeed, it is axiomatic that where a trial court has or retains continuing jurisdiction to adjudicate a particular dispute, there can be no "final judgment" within the meaning of RAP 2.2(a)(1). *See, e.g., In re Detention of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999); *State v. Sponburgh*, 84 Wn.2d 203, 206, 525 P.2d 238 (1974); *In re Moore's Estate*, 36 Wn.2d 854, 857-58, 220 P.2d 1079 (1950); *State v. Smits*, 152

Wn. App. 514, 523-24, 216 P.3d 1097 (2009). Again, for the same reasons described above, as it relates to the parties' dispute regarding the settlement agreement and Act Now Plumbing's compliance thereunder, there will be no "final judgment" until the trial court considers and decides the matters left open sometime after December 12, 2014, or this court orders the remaining settlement funds be paid to Act Now Plumbing.

August 21, 2014 Order. Fox Plumbing's argument that the August 21, 2014 Order was separately appealable under RAP 2.2(a)(13) also fails. RAP 2.2(a)(13) permits an appeal of "[a]ny final order made after judgment that affects a substantial right." To qualify, there must be a previously entered final judgment, and the subsequent final order must affect a right separate than those adjudicated in the earlier final judgment. *State v. Campbell*, 112 Wn.2d 186, 190, 770 P.2d 620 (1989); *State v. Howland*, 180 Wn. App. 196, 201 n. 3, 321 P.3d 303 (2014). Here, as explained, there is no "final judgment" (or "decision determining the action") as to the parties' ongoing and unresolved dispute regarding the settlement agreement and, thus, RAP 2.2(a)(13) simply cannot apply by its own terms.

Moreover, the August 21, 2014 order is not separate from the issues over which the trial court previously ruled and retained jurisdiction, nor was it "final" in its own right. In the August 21, 2014 order, the trial

court expressly relied on its own prior interpretation of the parties' settlement agreement, as reflected in the June 11, 2014 order, and rejected Act Now's argument that it did not violate the settlement agreement, and that it could not violate the settlement agreement before the 6-month transition and payment period had lapsed. By the same token, if Act Now Plumbing has to seek an order to release the funds after December 12, 2014, it will have to show that it complied with court's August 21, 2014 order. All of these related issues can and must be brought up for review in any appeal of that final order.

October 3, 2014 Order. Fox Plumbing is correct that a timely appeal of a fee award does not bring up for review the underlying final judgment that was not timely appealed. RAP 2.4(b). But this rule has no applicability where, as here, there is no final judgment. Indeed, because that is the case, the October 3, 2014 order was not a final appealable order in its own right, and the trial court's entry of findings of fact and conclusions of law and a "Judgment" with respect to this interlocutory fee award was plain error. *See Fluor Enterprises, Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 766, 172 P.3d 368 (2007) (trial court erred in allowing party to enforce interlocutory partial judgment, absent CR 54(b) findings that there is no just reason for delay, prior to entry of final judgment).

Because the order is labeled “Judgment” and complies with RCW 4.64.030, it can be entered on the judgment rolls. Even though it should not have been necessary, filing an appeal enabled Act Now Plumbing to invoke RAP 8.1 to supersede the “Judgment.” Second, given Fox Plumbing’s history of aggressively litigating this dispute, Act Now Plumbing was convinced that Fox Plumbing would later argue that the October 2, 2014 “Judgment” was the “final judgment” in this matter; so, to head off any claim that an appeal of the December final order was tardy as to the June 11 and August 21 orders, Act Now Plumbing filed a precautionary notice of appeal, designating all interlocutory orders entered to date. Otherwise, Fox Plumbing would have most definitely attempted to enforce the “Judgment.”

All of the trial court’s related (erroneous) orders relating to the meaning and performance of the parties’ settlement agreement should be reviewed at one time in one appeal. *See* RAP 5.2(g).

B. Fox Plumbing’s Subjective Intentions are Immaterial to the Interpretation of the CR 2A Agreement, Which Clearly Required Payment of \$45,000 to Act Now Plumbing.

Fox Plumbing does not deny that the settlement agreement was silent about exactly when the \$45,000 payment would be paid to Act Now Plumbing. Fox Plumbing also does not deny that the CR 2A Agreement did not provide for installment payments or mention anything about

conditioning the settlement payment on Act Now Plumbing's proving to the trial court that it had "fully performed" after the six month transition period. Nonetheless, Fox Plumbing argues that it was both fair and reasonable for the trial court to imply additional terms and conditions to the parties' CR 2A Agreement, including that Act Now Plumbing would receive only \$10,000 of the \$45,000 settlement payment, that the remaining settlement proceeds of \$35,000 would be deposited into the Court registry, and that Act Now Plumbing would not be entitled to the remaining \$35,000 until it had proved to the trial court it has "fully performed."

Where, as here, the moving party relies on documentary evidence in a motion to enforce a settlement agreement, the trial court must proceed as if it is considering a summary judgment motion. *Condon v. Condon*, 177 Wn.2d 150, 161, 298 P.3d 86 (2013). The parties' submissions must be read in light most favorable to the nonmoving party. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 697, 994 P.2d 911 (2000). If the nonmoving party raises an issue of material fact and the court enforces the agreement without first holding an evidentiary hearing, its decision is manifestly unreasonable and based on untenable grounds or reasons. *Brinkerhoff*, 99 Wn.App. at 697; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the CR 2A Agreement says nothing about Fox Plumbing paying the \$45,000 settlement in installments, or conditioning payment upon Act Now Plumbing's proving to the trial court after the six month transition period, that it had complied with the terms of the settlement agreement. Fox Plumbing's argument unilaterally modifies the CR 2A Agreement's material terms, and places a burden on Act Now Plumbing to prove to the trial court that it has complied with the settlement agreement before it is entitled to the entire \$45,000 settlement payment. There is no evidence that these terms or conditions were even contemplated by the parties. The CR 2A Settlement Agreement plainly states: "For payment in the amount of \$45,000 from Plaintiff, Defendants (and successors and assigns) agree to cease using the name "Gary Fox Plumbing & Heating" in perpetuity." To allow Fox Plumbing to imply additional terms and conditions in the CR 2A Settlement Agreement directly contradicts the settlement agreement's unambiguous express terms and blindsides Act Now Plumbing with unexpected conditions and obligations.

Settlement agreements are contracts. *Riley Pleas, Inc. v. State*, 88 Wn.2d 937-38, 568 P.2d 780 (1977). A formation of a contract requires that there be an objective manifestation of mutual assent of both parties. *Condon*, 177 Wn.2d at 162-63. Washington follows the objective manifestation theory of contracts, which has us determine the intent of the

parties based on the objective manifestations of the agreement, rather than any unexpressed subjective intent of the parties. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). “It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.” *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 349, 147 P.2d 310 (1944). The subjective intent of the parties is irrelevant if the intent can be determined from the actual words used. *Hearst*, 154 Wn.2d at 504, 115 P.3d 262. Courts should not revise a clear and unambiguous agreement or contract for parties or impose obligations that the parties did not assume for themselves. *Puget Sound Power & Light Co. v. Shulman*, 84 Wn.2d 433, 439, 526 P.2d 1210 (1974); *Seattle-First Nat'l Bank v. Earl*, 17 Wn.App. 830, 835, 565 P.2d 1215 (1977).

David Brown's self-serving statements that he never intended to pay Act Now Plumbing the entire \$45,000, or that he did not trust Act Now are immaterial and irrelevant. The CR 2A Agreement expressly provides that Fox Plumbing would pay Act Now Plumbing \$45,000 in consideration for Act Now Plumbing agreeing to cease using the name “Gary Fox Plumbing & Heating,” and that Act Now Plumbing “may” retain their logo and use the name “Gary's Fix-it Plumbing & Heating” or “Gary's Plumbing & Heating.” Implicit in the use of the term “may” is that Act Now Plumbing could use any other trade name it wishes, so long

as it did not use a “Fox” in their logo or trademark. There is nothing in the agreement’s provisions that implies that the \$45,000 settlement payment would be paid in installments, or that Act Now Plumbing would have to prove to the trial court it has “fully performed” before it was entitled to the remaining \$35,000.

The trial court improperly implied payment terms into the parties’ settlement that were never contemplated by the parties. There is no dispute that the parties had agreed on the specific amount of the settlement to be paid, which was \$45,000. Act Now Plumbing never negotiated or agreed to accept payment of the settlement in installments, as shown in the CR 2A Agreement and even in Fox Plumbing’s counsel’s original proposed settlement agreement on April 10, 2014. Fox Plumbing admitted that it unilaterally added these new payment terms and conditions after the parties had entered into their CR 2A Agreement.

The trial court had no discretion to enforce a settlement agreement where disputed facts remain unresolved. *Brinkerhoff*. Here, the trial court should have implied a reasonable time period for Fox Plumbing’s payment of the \$45,000 settlement amount. *Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987). The trial court did not have the authority to change the terms of the CR 2A Agreement, or require that Act Now Plumbing prove that it has “fully performed” before it is entitled to the

remaining \$35,000 settlement. The trial court abused its discretion by not first holding an evidentiary hearing to resolve the disputed issues of fact concerning timing of the payment of the settlement. *Brinkerhoff*, 99 Wn.App. at 697. The trial court then improperly added new terms and obligations to the settlement agreement that Act Now Plumbing never agreed to and were not part of the parties' CR 2A Agreement. A court cannot, based on general considerations of abstract justice, make a contract for parties which they did not make for themselves. *Jackson v. Domschot*, 40 Wn.2d 30, 34, 239 P.2d 1058 (1952).

It would be unjust and unreasonable for this court to affirm the trial court's order granting Fox Plumbing's motion for judicial interpretation of the CR 2A Settlement Agreement. Act Now Plumbing is entitled to the remaining \$35,000 settlement funds in the court registry, which it should have been paid over ten months ago.

C. Act Now Plumbing's Appeal of the June 11, 2014 Order is Not Barred by the Doctrine of Waiver and/or Estoppel.

The trial court's June 11, 2014 order states that "the parties shall prepare and execute a written Settlement & Release Agreement consistent with their CR 2A and with this Order." Fox Plumbing contends that by Act Now Plumbing's complying with the trial court's June 11, 2014 order, and including the trial court's implied terms in the CR 2A Settlement

Agreement as ordered, it has now waived or is estopped from appealing the trial court's June 11, 2014 order. Fox Plumbing's argument is without merit.

Fox Plumbing's argument is that Act Now Plumbing should have defied the court's order and not included the court implied terms into the Settlement Agreement, be found in contempt, and then appeal the contempt order. Fox Plumbing has advanced no legal theory supporting this argument. By arguing waiver and estoppel, Fox Plumbing in effect is claiming that Act Now Plumbing made some irrevocable choice to comply with the court's order.

The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Bowman v. Webster*, 44 Wn.2d 667, 670, 269 P.2d 960 (1954). It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. *Id.* The right, advantage, or benefit must exist at the time of the alleged waiver. *Id.* Estoppel requires (1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to

contradict or repudiate such admission, statement or act. *Harbor Air Serv. Inc. v. Board of Tax Appeals*, 88 Wn.2d 359, 560 P.2d 1145 (1977).

Here, Act Now Plumbing had no choice but to comply with the court's order or be found in contempt. Pursuant to the trial court's order, the parties included the court-supplied terms and conditions in their final settlement agreement. Act Now Plumbing did not have a choice or intentionally waive any right, including the right to appeal, by complying with the court's order. Moreover, there has been no injury to Fox Plumbing resulting from the court-supplied terms in the Settlement Agreement. The only party that has been injured is Act Now Plumbing because it has not been paid the entire \$45,000 settlement, despite full compliance with the terms of the settlement agreement, and still must obtain the trial court's "approval" before it is entitled to the settlement funds.

Furthermore, as previously discussed, the court's July 2, 2014 order specifically states that: "***The Court shall retain jurisdiction*** in accordance with the Court's order granting plaintiff's motion for judicial interpretation of CR 2A Settlement Agreement." The June 11, 2014 Order was not a final appealable order under RAP 2.2 with respect to enforcement of the parties' settlement agreement. Act Now Plumbing did not have a right to appeal that order. Clearly, Act Now Plumbing's

compliance with the Court's June 11, 2014 Order does not constitute a waiver or estop Act Now Plumbing from exercising its right to appeal that order now that a "Judgment" has been entered.

D. Neither the CR 2A Agreement nor the Final Settlement Agreement Prohibits Use of the Domain Name "garyfix.com" for Gary's Fix-It Plumbing & Heating's New Website.

Fox Plumbing contends that Act Now Plumbing's use of the domain name "garyfix.com" for its new web site for Gary's Fix-It Plumbing & Heating is a clear and material breach of the Settlement Agreement. Fox Plumbing does not deny the fact that the Settlement Agreement mentions nothing about a domain name. Instead, Fox Plumbing argues that it should be implied that the reference to trade names also means an internet "domain" name. Fox Plumbing admits that the parties never discussed or even inquired about prohibiting the use of an internet domain address, and that there was no mutual assent as to the use or nonuse of any domain name. The court's duty is to declare the meaning of what is written, and not what was intended to be written. *J.W. Seavey Hop. Corp.*, 20 Wn.2d at 349. Courts should not revise a clear and unambiguous agreement or contract for parties or impose obligations that the parties did not assume for themselves. *Puget Sound Power & Light Co.*, 84 Wn.2d at 439.

Fox Plumbing fails to cite a single authority that would support treatment of an internet domain name the same as a trade name. The settlement agreement deals only with “Defendants’ name, logo, and trademark.” The settlement agreement does not govern use of domain names, which Fox Plumbing and the trial court recognize are separate legal and practical concepts. A ‘trade name’ symbolizes the reputation of a company or organization and the activities it engages in.” 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 9:3 (4th ed. 2010). It is not the same as a domain name, which is merely an internet address. *See e.g., Carefirst of Md., Inc., v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 394 (4th Cir. 2003) (“A ‘domain name’ is a unique Internet address that serves as the primary identifier of an Internet user.”). Act Now Plumbing’s use of the domain name “garyfix.com” for its new web site for “Gary’s Fix-It Plumbing & Heating” prominently shows the trade name “Gary Fix-It Plumbing & Heating.” Act Now Plumbing has not used the name “garyfix.com” in any trademark or trade name capacity. The settlement agreement specifically refers to only trade names and trademarks but nowhere mentions domain names.

Contrary to Fox Plumbing’s contention, the issue is not whether a “technical” definition or an “ordinary” definition applies. The fact is that a domain name is not the same as a trade name or trademark. *See* 15

U.S.C. § 1127; *See also* International Trademark Association (“INTA”) Fact Sheet “Differences Between Trademarks and Domain Names” (“a trademark is not the same thing as a domain name ... A domain name in and of itself is not the same thing as a trade name.”) Fox Plumbing’s argument challenges the Lanham Act’s definitions of “domain name” and “trade name” as “hyper-technical” legal definitions which it claims is impermissible. Even the trial court’s order acknowledges that a domain name is not legally the same thing as a trademark or trade name. Nonetheless, the trial court inserted its own subjective beliefs to add new terms to the settlement agreement.

Whether other companies around the world choose to use their trade name in an internet domain name, it is irrelevant to interpreting the parties’ Settlement Agreement. The difference is that Act Now Plumbing is not using “Gary Fix” as a trade name. Act Now Plumbing has registered and is using its new trade name “Gary Fix-It Plumbing & Heating” to offer its goods and services. It has never registered or used a trade name “Gary Fix.”

This case most resembles the example of the apple grower registering a domain name *www.apple.com* to sell apples. Although APPLE is a famous registered trademark of Apple Computer, Inc., many other companies also use the term APPLE to describe a variety of

products. The apple distributor probably does not infringe Apple Computer's trade mark because APPLE is also a common noun, used by many companies. Like Apple Computer (or Hasbro), Fox Plumbing has no exclusive claim to any trademark "Gary Fix" or even "Gary Fox." Indeed, on the internet, the use of the word "Gary" is commonly used in an internet domain name. In fact, another company has registered "garyfox.net" as an internet domain, and uses the terms in connection with Gary Fox's profession ministry services. Another company has registered "garysplumbingheating.com" as an internet domain, and uses the terms in connection with Gary's Plumbing & Heating & Air services.

There is no indication in the CR 2A Agreement or the final Settlement Agreement that the parties intended to prohibit Act Now Plumbing from using any internet domain name, much less the domain name "garyfix.com." Act Now Plumbing agrees with Fox Plumbing that neither party can manufacture an exception to the prohibition on the use of certain trade names. The difference here is that the parties never negotiated or even discussed the prohibition on the use of any domain names. Because the CR 2A Agreement and the March 31, 2014 Settlement Agreement specifically refer only to trade names and trademarks and nowhere mentions domain names, and because Act Now Plumbing raised a genuine issue of material fact that a domain name is not

legally the same as a trade name or trademark, the trial court's order granting Fox Plumbing's motion to enforce the settlement should be reversed.

Moreover, the trial court's award of attorney's fees should be vacated and Act Now Plumbing is entitled to an award of its attorney's fees and costs to oppose Fox Plumbing's motion to enforce the settlement agreement and to oppose Fox Plumbing's motion for Attorney's Fees and Costs. Additionally, Act Now Plumbing is also entitled to attorney's fees and costs under RAP 18.1(a).

IV. CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the trial court's rulings, and award Act Now Plumbing its attorney's fees and costs incurred in responding to Fox Plumbing's motion to enforce and motion for attorney's fees and costs, and their attorney's fees and costs incurred on appeal under RAP 18.1.

DATED this 11th day of March, 2015.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I, Denise A. Campbell, hereby certify under the penalty of perjury of the laws of the State of Washington that on March 11, 2015, I caused to be served a copy of the foregoing **REPLY BRIEF OF APPELLANTS** to the following counsel of record in the manner indicated below at the following address:

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