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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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NO. 40933-0-II

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

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G. ELDON MARSHALL and GERALDINE (GERRY) MARSHALL,

Appellants,

v.

THURSTON COUNTY

Respondent.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The trial court properly granted Thurston County's Motion for Summary Judgment, based on the principles of release and res judicata. Marshall does not dispute that he filed a Claim for Damages in 2001 and a lawsuit against Thurston County in 2003, seeking recovery for flood damage which he attributed to certain drainage improvements undertaken by the County in 1994. The claim and the lawsuit were settled. As a part of the settlement, Marshall signed a broad release covering not only past damages but "all future damages, lawsuits, injuries and expenses resulting or alleged to result from such matters."

In his Opening Brief, Marshall asks the Court to look only at certain language in the Claim and the Release, and to ignore other portions of those documents. Specifically, he notes that the Release refers to the "incident," and that the 2001 Claim for Damages referred to the "date of the incident" as corresponding to the dates of the flood damage in 1996, 1997 and 1999. Marshall apparently wishes the Court to ignore language of the Claim for Damages in which Marshall identified the cause of the injury as the 1994 County drainage improvements, and described the injury or damage as ongoing flood problems which continued to be experienced "with any substantial rain."

Marshall also seeks to ignore the fact that the Release was signed in connection with the dismissal of a lawsuit which was filed by

Marshall arising out of the same 1994 County drainage improvements, and that the Release expressly applied to all claims “arising out of or in any way connected with the incident which is the subject of the above-referenced cause of action.”

Marshall apparently also attempts to ignore the broad language of the Release, which refers not only to the “incident,” but expressly applies to “all future damages, lawsuits, injuries and expenses resulting or alleged to result *from such matters.*” Further, Marshall seeks to ignore language indicating that the release applies to “all claims whether known or unknown; suspected or unsuspected.”

Applying Washington rules for interpretation of contracts, including releases, the trial court correctly held that the 2009 lawsuit filed by Marshall was barred by his execution of a release and dismissal of his lawsuit against Thurston County in 2003. That decision should be affirmed.

## II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The issues pertaining to the appellant’s Assignment of Error can best be stated as follows:

A. Whether the trial court properly held that this lawsuit for flood damage caused by the County’s 1994 drainage improvements is barred by release, where the plaintiff had previously signed a broad

release of all claims arising from or related to those Thurston County drainage improvements.

B. Whether summary judgment was also warranted based on the doctrine of res judicata, where the plaintiff had settled and dismissed a lawsuit for flood damage, including claims for inverse condemnation and diminution in property value, arising from the County's drainage improvements.

### III. STATEMENT OF THE CASE

In 1993, plaintiffs Eldon and Gerry Marshall ("Marshall") purchased a home at 2539 Blooms Court SW, near Champion Drive in the Scott Lake subdivision in Thurston County. The property is located near a low point in the drainage basin of Scott Creek. (CP 28). Historically, rainwater has drained and settled in and around the property owned by the Marshalls. In major rain storms, the Marshall property has repeatedly experienced flood damage. (CP 28-29, 77).

Contrary to the assertions in Appellant's Opening Brief at pages 3 and 4, the property had a history of flooding even before Marshall purchased the property and before the County performed drainage improvements in 1994. When Marshall purchased the property, he was particularly concerned about the propensity of the property to flood. Indeed, he had witnessed the ponding and drainage problems himself before he acquired the property. He was aware that

the property was susceptible to flooding because it is surrounded by hills on all sides. (CP 27-28).

In 1993, a major rainstorm hit the area. Following that storm, Thurston County performed improvements to the drainage along Champion Drive, close to Marshall's home. Specifically, the County obtained a flowage easement from surrounding property owners in 1994 and installed a drain which conveyed water into a buried culvert and then into a ditch between Shoreview Drive and Champion Drive. (CP 45).

Marshall alleges that over the next 10 years, his property was flooded on several occasions. (CP 22). He contends that substantial flooding occurred in 1996 and again in 1997 and 1999. (CP 29-31).

In October 2001 Marshall filed a Claim for Damages against the County alleging that the improvements made by the County in 1994 had caused flooding problems. The substance of Marshall's claim was set forth in paragraph K of the Claim for Damages where Marshall was asked to "Describe the Cause of the Injury or Damage." In response, Marshall's description unambiguously refers to the 1994 drainage improvements undertaken by the County as the cause of his damages and the target of his claim:

Thurston County in 1994 diverted water from Shoreview Dr (by obtaining an easement) to Champion Drive. They did not provide for adequate runoff. . . .

Marshall then described the results of the County's drainage improvements and specifically indicated that the problems caused by the County's actions were ongoing, such that they occur with "any substantial rain":

With any substantial rain I have water under house, a condition which did not exist prior to this occurrence. . . .

Immediately beneath the description of the Cause of the Injury or Damage, the 2001 Claim for Damages form asked Marshall to "Describe Injury or Damage." In response to this question, Marshall described not only previous flooding, but ongoing losses in the nature of diminution of value as a result of the County's action:

Flooded under house where furnace is located – house settlement has now occurred – insulation under floor continues to drop – loss in salability and house value as a result of County action.

(CP 84).

Marshall subsequently retained an attorney and filed a lawsuit against Thurston County in January 2003: Marshall v. Thurston County, Thurston County Cause No. 03-2-00071-7. That lawsuit alleged that the drainage improvements constructed by the County on and above Champion Drive in October 1994 were the cause of flood damage to Marshall's property in 1996 and 1999. The Complaint sought recovery against the County based on theories of tort, trespass and inverse condemnation (taking). (CP 40-42). Importantly, the 2003

Complaint sought recovery not only for the 1996 and 1999 floods, but also for future damage from storm events. According to the Complaint, the County's 1994 drainage improvements created a permanent condition which leads to flood damage in rainstorms:

However, Plaintiffs still faces further damages arising out of the 1996 and 1999 floodings. Normal amounts of stormwater which would otherwise not flow underneath the residence on the Property will now do so via a channel created by the previous floodings.

(CP 40).

The Complaint also alleged that as a result of the County's "diversion of stormwater," the County had in effect taken Marshall's property and permanently diminished its value:

As a result of this diversion of stormwater, the value of the property and its improvements have been diminished in an amount to be determined at trial.

(CP 42).

The County denied that it was responsible but in an effort to resolve their differences, the parties entered into a Settlement Agreement on or about May 13, 2003. In exchange for a monetary payment from the County, Marshall signed a "Release of All Claims," in which he released and discharged all claims for damages resulting from the County's actions. The Release was broad and unambiguously stated that it applied not only to past damages but also to future damages and lawsuits. The Release provided in relevant part:

[t]his release is inclusive of damage to property, bodily injury or death *growing out of or in any way related to the matters set forth in and described in the releasor's claim for damages* filed with the Thurston County Risk Management Division on October 24, 2001. This matter is referred to as Thurston County Claim No. 2001-10-095. This Release includes, but is not limited to, *all future damages, lawsuits, injuries and expenses resulting or alleged to result from such matters.*

It is understood and agreed that this is a full and final release pertaining to the above-named Releasor and Releasees. *This Release is in full compromise and settlement of all claims of the Releasor of every nature and kind whatsoever, and releases all claims whether known or unknown; suspected or unsuspected.*

\* \* \*

The undersigned hereby declares that the terms of this settlement are *for the express purpose of precluding forever any further additional claims arising out of or in any way connected with the incident that is the subject of the above-referenced cause of action.* It is understood and agreed that the Releasor and Releasees have specifically contemplated the possibility that injuries of an unknown type or extent may exist, and the Releasor agrees, for the consideration exchanged, *to assume the risk of such unknown injuries becoming evident in the future.*

(CP 103). (Emphasis added). The lawsuit was dismissed with prejudice on May 15, 2003. (CP 47-48).

On or about January 6, 2009, Marshall's property flooded in a major storm event. Marshall filed suit in June 2009 (Thurston County Cause No. 09-2-01356-7) seeking recovery for property damage resulting from the flood, as well as seeking recovery for diminution in

property value due to conditions allegedly caused by the County's 1994 improvements:

Further, the fact that the property is again vulnerable to winter flooding reduces its value by a considerable amount.

(CP 23).

Thurston County filed a motion for summary judgment based on release, res judicata and limitations. The motion noted that Marshall was making no allegation that Thurston County had undertaken any new tortious activity to negatively impact the drainage in and around the plaintiffs' property since the drainage repair in 1994, and that certainly no changes had been made by the County since Marshall signed a Release of All Claims in 2003. The County asserted that the release and the dismissal of Marshall's earlier lawsuit constitute a complete defense to his new lawsuit.

In response to the County's motion, Marshall argued that the Release did not reflect his wishes, and that he did not intend to release claims for future damages.

The trial court, the Honorable Carol Murphy, after reviewing the materials submitted by the parties and considering oral argument, granted Thurston County's Motion for Summary Judgment. This appeal followed.

#### IV. ARGUMENT

##### A. Marshall's Claims Are Barred by Release.

##### 1. Releases, Like Other Agreements, Must be Construed so as to Carry Out the Parties' Expressed Intentions.

In Washington, there is a strong public policy favoring resolution of disputes through execution of settlement agreements and releases. Generally, the courts are loathe to ignore or vacate a properly executed release because Washington favors finality in private settlements. Bennett v. Shinoda Floral, 108 Wn.2d 386, 395, 739 P.2d 648 (1987). A release generally extends to all matters within the parties' contemplation at the time it is executed. Chadwick v. Northwest Airlines, Inc., 33 Wn. App. 297, 654 P.2d 1215 (1982), aff'd 100 Wn.2d 221. The sufficiency of the language to effect a release is generally a question of law. Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 490, 834 P.2d 6 (1992).

Washington applies the "context rule" with regard to contract interpretation. Thus, it is appropriate for this Court, in construing the release, to also look at the Claim for Damages that was filed by Mr. Marshall in 2001, as well as the Complaint and the Stipulation and Order of Dismissal in the lawsuit Marshall filed in 2003. It is not permissible, however, in the guise of contract interpretation, to ask the Court to alter contract language, to add language which is not in the agreement or to focus on only a portion of the agreement, while ignoring

the rest. When interpreting a contract, the courts do not interpret what was intended to be written, but what was written. Hearst Communications, Inc. v. Seattle Times Company, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

A contract or agreement should be interpreted as a whole. The provisions of the contract must be construed together and each provision must be given effect. Thatcher v. Salvo, 128 Wn. App. 579, 587, 116 P.3d 1019 (2005). An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the contract language meaningless or ineffective. Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc., 166 Wn.2d 475, 487, 209 P.3d 863 (2009); Bogomolov v. Lake Villas Condominium Ass'n, 131 Wn. App. 353, 361-62, 127 P.3d 762 (2006).

In determining the intent of the parties to a contract, the courts look to the “objective manifestations of the agreement.” A contracting party’s unexpressed intent has no relevance when interpreting a contract, even where extrinsic evidence is otherwise admissible. Hearst v. Seattle Times, 120 Wn. App. 784, 795, 86 P.3d 1194 (2004), aff’d, 154 Wn.2d 493. Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties. Davis v. State, 138 Wn. App. 811, 159 P.3d 427 (2007), rev. denied, 163 Wn.2d 1019. In Washington, extrinsic evidence may be used to help place the contract in

context. Such evidence may not be used, however, to add to, modify or contradict a contract provision absent fraud, accident or mutual mistake. Id. at 819.

Applying the above rules to the undisputed facts in this case, the trial court properly found that Marshall's 2009 lawsuit was barred by the release he signed in 2003. Simply put, it would be inappropriate to interpret the Marshall release as not applying to future damages and lawsuits, because to do so would render all of the language about future damages and lawsuits absurd or meaningless. The Court should note that the Release was executed some seven (7) years after the 1996 flood, and four (4) years after the 1999 flood. Surely by that time, Marshall knew the nature and extent of his damages from those events. The language "all future damages, lawsuits, injuries and expenses," and "all claims whether known or unknown, suspected or unsuspected," would have no meaning if the parties intended to limit the release to only those flooding incidents which occurred many years earlier.

The interpretation urged by Marshall is also unreasonable in view of the fact that the original claim in 2001 and the Complaint filed in 2003 recited that the drainage problem was ongoing and that future rain storms would result in surface water collecting under the Marshall home. In the 2001 Claim for Damages, Marshall identified not only the flood events of 1996, 1997 and 1999, but also ongoing flooding

problems that occur “with any substantial rain.” (CP 103). Similarly, the 2003 Complaint sought recovery not only for the damages sustained in the 1996 and 1999 storms, but also for the County’s having allegedly created a condition which would result in flood damage in future storm events:

However, plaintiff still faces further damages arising out of the 1996 and 1999 floodings. Normal amounts of stormwater which would otherwise not flow underneath the residence on the property will now do so via a channel created by the previous floodings. Therefore, plaintiffs must rely on a temporary sump and pump system to keep water out of their basement.

(CP 40). Further, the 2003 Complaint alleged that as a result of the County’s 1994 alteration of the stormwater drainage system, the value of the property has been permanently diminished. (CP 42). In short, both the 2001 Claim for Damages and the 2003 Complaint -- which gave rise to the Release signed by Marshall -- involved an explicit recognition that damages would occur in future storm events.

Marshall argues that his interpretation should be adopted because “specific terms prevail over general language.” (Appellant’s Opening Brief, p. 15). But while the proposition may be accurate as a general principle, it does not support Marshall’s argument in this case. The identified dates of the past flood events are not more “specific” than the date of Thurston County’s alleged tortious conduct. In the Claim for Damages, Marshall described the cause of his damage as follows:

Thurston County in 1994 diverted water from Shoreview Dr. (by obtaining an easement) to Champion Drive. They did not provide for adequate runoff. . . .

(CP 40). Further, by its very terms, the Release applies not only to the specific past flood events, but also to all damage “growing out of or in any way related to the matters” set forth in the claim. In other words, the Release in several places makes clear that it applies not only to the past losses, but to all claims arising out of the County’s 1994 drainage improvements.

In view of the nature of the claims asserted by Marshall in his Claim for Damages and in his Complaint, the broad language of the Release regarding future damages and claims is clear and unambiguous. A contract provision is not ambiguous simply because the parties suggest opposing meanings. If a contract can be interpreted in two ways, one of which is ambiguous and the other of which is not, the latter interpretation should be adopted. Dice v. City of Montesano, 131 Wn. App. 675, 128 P.3d 1253 (2006), rev. denied, 158 Wn.2d 1017.

Marshall does not contend that the County undertook any changes to the drainage system after 1994 which damaged his property. Therefore, the 2003 Release must be viewed as applying to and releasing claims for damages (including diminution in property value) asserted by Marshall in this lawsuit, allegedly attributable to the County’s 1994 drainage improvements. It would be unfair, and contrary to settled

Washington law, for this Court to ignore or vacate the Release executed by Marshall.

B. A Release of “All Claims and Damages” Must be Interpreted Broadly.

The Washington Supreme Court has frequently had occasion to interpret contracts purporting to release or protect against “any and all claims and damages.” For example, in Cambridge Townhomes, *supra*, an indemnity agreement provided that it covered “any and all claims, demands, losses and liabilities.” The Supreme Court rejected the indemnitor’s argument that it should not apply to future damages, because the language was broad and to interpret it as urged by the indemnitor would be contrary to the parties’ express intent. 166 Wn.2d at 487.

A similar ruling was made by the Washington Supreme Court in the context of interpreting a release. In Nationwide Mutual v. Watson, 120 Wn.2d 178, 840 P.2d 851 (1992), the Court held that release language applying “to any and all claims, damages, actions . . . of any kind or nature” was clear and should be interpreted broadly. 120 Wn.2d at 189. The Supreme Court rejected Watson’s argument that only certain claims should be covered, noting that at best Watson was alleging a unilateral mistake:

Extrinsic evidence admitted under the Berg rule shows that, at best, the intent of respondent Watson to release only third party claims was a unilateral mistake. The

release should be upheld as a matter of law and petitioner Nationwide is thus entitled to summary judgment in its favor.

120 Wn.2d at 193.

The same result is called for in this case. The language of the Marshall release is broad, and expressly applied to future injuries and lawsuits as well as damages which had already been sustained. Moreover, the language in the Release provides that it applies to all damage “growing out of or in any way related” to the matters set forth in the Claim for Damages. Such language belies any argument that it should apply only to the specific flood events identified in the Claim for Damages. It would be unreasonable to conclude that the damage to Marshall’s property in the January 2009 rainstorm allegedly caused by the County’s 1994 drainage improvements is not “in any way related” to the matters set forth in the 2001 claim, which was also directed to flood drainage from the same County drainage improvements.

Furthermore, at the bottom of the page, the Release recites that it precludes forever “any further additional claims arising out of or in any way connected with the incident that is the subject of the above-referenced *cause of action*.” Such language must be broadly interpreted. Because the 2003 lawsuit asserted a cause of action seeking recovery for permanent flooding problems attributable to the County’s 1994 drainage

improvements, it is preposterous to suggest that the 2009 claims were not “in any way connected” to the claims set forth in the 2003 lawsuit.

C. Plaintiffs’ Claims Are Also Barred by Res Judicata.

In addition to the defense based on release, Thurston County is also protected from liability by application of the doctrine of res judicata. That doctrine provides that where a party has pursued litigation against a defendant and the litigation has resulted in a judgment or a dismissal with prejudice, the claimant cannot file a new lawsuit seeking recovery for the same tortious conduct by the defendant. Landry v. Luscher, 95 Wn. App. 779, 783, 976 P.2d 1224 (1999). Res judicata applies to settlement agreements as well as to judgments on the merits. Hadley v. Cowan, 60 Wn. App. 433, 439, 804 P.2d 1271 (1991).

In the absence of fraud or collusion, the compromise of a tort claim determines with finality all claims, known and unknown, arising therefrom. The fact that injuries may have proved to be more severe than was apparent at the time of the compromise and settlement does not constitute a basis for setting aside the settlement and dismissal. Handley v. Mortland, 54 Wn.2d 489, 494, 342 P.2d 612 (1959); Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 441, 423 P.2d 624 (1987).

Marshall filed a lawsuit against Thurston County in 2003 seeking recovery for flood damage and diminution in property value based on the

County's 1994 drainage improvements on and above Champion Drive. Not only was the earlier lawsuit based on the same drainage structures and improvements undertaken by the County in 1994, but it also sought relief under the same legal theories as those asserted in the instant case, i.e., tort and trespass, as well as inverse condemnation ("takings"). (CP 40-42).

Res judicata clearly applies here, because the first lawsuit against Thurston County alleged not only that Marshall had suffered property damage in the 1996 and 1999 storm events, but also alleged that the damages allegedly attributable to the County's 1994 drainage improvements created a permanent condition which would recur. (CP 40). Further, Marshall's 2003 Complaint alleged that because the damages were permanent and/or recurring in nature, he was entitled to recover in inverse condemnation for the permanent reduction in value of his residence. (CP 40-42). This alleged reduction in property value is the same recovery sought by Marshall in this case. The current lawsuit was therefore properly dismissed under the doctrine of res judicata, as well as release.

When the parties entered into a settlement in May 2003, they filed a Stipulation and Order of Dismissal which provided that all of the plaintiffs' claims were dismissed "with prejudice." It would be both unfair and a violation of the doctrine of res judicata to allow Marshall to

obtain further recovery based on the same drainage improvements which were the subject of the earlier tort and takings lawsuit. A compromised settlement is res judicata as to all matters relating to the subject matter of the dispute. In re Phillips' Estate, 46 Wn.2d 1, 14, 278 P.2d 627 (1955).

V. CONCLUSION

The Court properly applied the doctrines of release and res judicata in dismissing Marshall's lawsuit against Thurston County. The order of summary judgment should be affirmed by this Court.

DATED this 6<sup>th</sup> day of October, 2010.

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**DECLARATION OF SERVICE**

STATE OF WASHINGTON

MARK R. JOHNSEN declares as follows:

BY CM  
DEPUTY

I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101.

I am over the age of 18 years and am not a party to this action. On the below date, a true copy of the Brief of Respondent Thurston County was served on the following via First Class mail:

Mark D. Erickson  
3329 Donnely Drive SE  
Olympia, WA 98501

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 6<sup>th</sup> day of October, 2010, at Seattle, Washington.

  
\_\_\_\_\_  
MARK R. JOHNSEN