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**COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON**

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EAGLE SYSTEMS, INC., a Washington corporation; GORDON TRUCKING, INC., a Washington corporation; HANEY TRUCK LINE, INC., a Washington corporation; JASPER TRUCKING, INC., a Washington corporation; KNIGHT TRANSPORTATION, INC., an Arizona corporation; PSFL LEASING, INC., a Washington corporation; and SYSTEM-TWT TRANSPORT, a Washington corporation,

Respondents/Cross-Appellants

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY  
DEPARTMENT,

Appellant/Cross-Respondent.

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**APPELLANT'S BRIEF**

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## I. INTRODUCTION

This case is about the improper use of a summary show cause proceeding to enforce a disputed settlement agreement, the terms of which were allegedly reached in an email exchange between counsel during administrative proceedings. Respondents trucking carriers (Carriers) obtained *ex parte* an order to show cause to enforce what they termed a settlement allegedly reached with the Employment Security Department on their unemployment insurance tax liabilities. Although there was no action pending at the court, the superior court enforced the disputed settlement agreement. The superior court decision is erroneous and should be reversed.

First, for a court to enforce a disputed settlement, it must have jurisdiction over the controversy, either from the underlying action in which the settlement was reached or a separate action in contract. Neither statute nor case law permits the summary show cause process used by the superior court in this case. Second, enforcement of a disputed settlement agreement based on informal writings requires a clear showing of intent to be bound by such writings and a meeting of the minds on all material terms. The email exchange at issue here shows no such intent or meeting of the minds.

The superior court engaged in an impermissible exercise of jurisdiction and erred in enforcing a settlement agreement that did not exist. The Department asks the Court to reverse the superior court.

## **II. ASSIGNMENT OF ERRORS**

1. The superior court erred in entering findings of fact, conclusions of law, and an order granting enforcement of agreement. CP 427-33.
2. The superior court erred in enforcing a disputed settlement agreement on a show cause motion without any action pending at the court. CP 431 (Conclusions of Law 1, 2).
3. The superior court erred in finding and enforcing a settlement agreement that did not exist. CP 428-32 (Findings of Fact 1-7, Conclusion of Law 3, 4).

## **III. STATEMENT OF ISSUES**

1. Did the superior court lack jurisdiction to enforce a disputed settlement agreement when the agreement was not the subject of any underlying superior court action, and the Carriers did not institute a new action through filing and service of a summons and complaint? (Assignments of Error 1 and 2).
2. Did the superior court err in enforcing a disputed settlement agreement based solely on attorneys' email exchange, where the evidence showed the parties were still negotiating and intended to be bound only after executing a formal settlement agreement? (Assignments of Error 1 and 3).

## **IV. STATEMENT OF THE CASE**

The superior court enforced a disputed settlement agreement based solely on the declarations and exhibits attached to the parties' briefs filed with the court and the parties' argument. CP 428. The following facts are based on those documents.

This case stems from administrative proceedings at the Office of Administrative Hearings involving eight trucking carriers, seven of which

are Respondents in this appeal. CP 167 at ¶ 3. The Department assessed unpaid unemployment insurance taxes, interest, and penalties against the Carriers, finding their “owner-operator” drivers were employees under the Employment Security Act, Title 50 RCW. The Carriers appealed the assessments and requested a hearing. CP 219 at ¶ 5. The collection on the assessments and accrual of interest and penalties were stayed pending the final decision. *See* RCW 50.32.030. The cases were assigned to Administrative Law Judge (ALJ) Todd Gay. CP 167 at ¶ 3, 219 at ¶ 6.

In January 2011, four of the Carriers filed a joint motion for summary judgment in their administrative cases, arguing, among other things, that federal law preempts the Employment Security Act with respect to their owner-operator drivers. CP 167-68 at ¶ 4. The ALJ denied the motion, rejecting the Carriers’ preemption argument based on this Court’s opinion in *Western Ports*. CP 171-81; *W. Ports v. Emp’t Sec. Dep’t*, 110 Wn. App. 440, 450-57, 41 P.3d 510 (2002). The ALJ also noted that *Western Ports* had already rejected the Carriers’ argument that practices mandated by federal regulations could not be considered when determining whether the owner-operator drivers were “employees” for unemployment tax purposes. CP 180-81. The ALJ further stated there “is a genuine issue of material fact as to the extent of the indicators of control

beyond those mandated by federal regulation.” CP 180 (emphasis added).<sup>1</sup>

In April 2011, the ALJ remanded these cases to the Department to reconsider and amend its assessments to, among other things, exclude the portions of the Carriers’ payments to the owner-operator drivers that represented the value of the lease of their trucks, as opposed to the value of their driving services. CP 168 at ¶ 5, 185-88. The remand order required the Carriers to provide additional information for the Department to consider in its reassessments. CP 186-87

In July 2011, six of the Carriers filed a lawsuit in federal court for damages and other relief against various Department employees and their spouses based on the audits and assessments at issue in the administrative proceedings. CP 168 at ¶ 6, 190-207. In February 2012, the federal court granted the state defendants’ motion to dismiss. CP 168 at ¶ 7; 209-16.

After the dismissal of the federal case, the parties engaged in settlement negotiations, and ALJ Gay continued the proceedings pursuant to the parties’ joint request. CP 168-69 at ¶ 8. On September 26, 2012, assistant attorney general Marc Worthy sent an email to the Carriers’ attorney Tom Fitzpatrick (CP 78-79), stating:

I have been authorized by my client to make the following offer. My client is willing to drop penalties and interest [in]

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<sup>1</sup> The direction and control is but one of the elements for an exemption from unemployment tax. ALJ Gay pointed out there were genuine issues of fact on another element as well. CP 180-82 (independently established business); RCW 50.04.140.

all 8 cases in return for payment of the back taxes (as seen in the far right column) and your clients' stipulation to liability. In other words, the assessments are affirmed and your clients drop their appeals at OAH. Neither side pays any attorney fees. Your clients are then free to pursue whatever legal issues they want in superior court.

Please note that my client is most interest [sic] in having all of your clients settle at the OAH level. Please let me know what your clients' view of this offer is. Thanks.

CP 78. On October 8, Fitzpatrick sent Worthy an email entitled, "Response to Resolution Proposal":

Marc, attached is a response to the proposal you previously sent in regard to resolving the cases at OAH. As the letter indicates, we have heard back from everyone except Eagle. Thus, this proposal does not include Eagle.

CP 85-86. The attached letter described itself as a "response" and "a proposal from the carriers to resolve the cases":

This is a follow-up to the settlement offer contained in your email to me of September 26, 2012.

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This response is on behalf of Gordon, Haney, Hawkings, PSFL, System-TWT, Knight, and Jasper. As of the time when this letter is being sent, I have not heard back from Eagle. As soon as I do, I will let you know whether or not Eagle agrees with this approach.

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This letter is a proposal from the carriers to resolve the cases in the administrative process by obtaining final orders with the exception of Hawkings.

CP 81. The letter then listed the following terms:

1. ESD will drop any claim to penalties and interest.

2. The respective carrier and ESD will stipulate that the final amount of the assessment is amount listed above. The respective carrier will pay that amount to ESD as the final assessment amount. The payment will not prejudice the carrier's ability to appeal the law of the case. Payment may be made under protest. This resolution establishes the amount of the assessment, if any, owed by a carrier. If the case is reversed after any appeal set forth in ¶ 4, ESD will refund the amount paid plus interest.
3. The carriers will stipulate that under the law of the case as established in the rulings of Judge Gay acting as the tribunal in this matter, with which the carriers disagree, there would be a finding that the persons or entities for which there is an assessment are employees of the respective carriers for purposes of RCW Title 50.
4. Under the resolution, the carriers retain their full rights to appeal and pursue their legal remedies in the courts. ESD will not challenge the right of any carrier to appeal and will not appeal the final resolution of the administrative process.
5. Neither ESD nor any carrier will seek attorney fees and costs in the current administrative process.
6. The parties will craft a final order based upon the above for entry by Judge Gay and the OAH administrative process will be complete except for the appeal to the Commissioner which must be undertaken to preserve our right to seek judicial review. The Commissioner will not change or alter the resolution of these matters as outlined above.

CP 82. The letter proposed a different settlement approach for carrier Hawkings. CP 82. The letter then said, "If this is acceptable to your client, please advise me as soon as possible so that we can advise Judge Gay and

bring the numbered cases to resolution.” CP 82.<sup>2</sup>

On October 16, Worthy responded by email to Fitzpatrick’s October 8 letter, stating the Department had a few issues:

My client has a few issues with the phrasing used in your letter. First, just to be clear, if your client prevailed at Superior Court on the preemption issue, my client would retain the right to appeal. Second, the agreement could not contain any language regarding the [Commissioner’s Review Office] since they operate independently and ESD cannot instruct them what to do.

CP 85. Worthy also stated his understanding that the Carriers wanted to pursue only the preemption issues in superior court and asked Fitzpatrick to send him a draft, if the Carriers agreed:

I understand that your client wants to keep the right to go forward on pre-emption and my client willing to agree that but, in our view, the agreement should be written in the positive rather than the negative. That is, that the purpose of the agreement is for all parties to agree that if there is no preemption then drivers are employees, but resolution of the preemption issue is outside scope of OAH, yet the Superior court cannot hear until administrative remedies exhausted, etc. Can we agree to something along these lines? If so, can you send me a short draft and we can work on it together?

CP 85. On the same day, Worthy sent another email to Fitzpatrick, stating this was “still an ER 408 communication”:

When do you think you can have a first draft to me that I can share with my client? (obviously, still with the understanding it is still an ER 408 communication).

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<sup>2</sup> The Department and Hawkings later reached a settlement by executing a formal settlement agreement signed by both parties in January 2013. CP 219-20 at ¶ 7. Hawkings is not a party in this case.

CP 85.

The attorneys then began exchanging proposed settlement agreement drafts with track changes and comments. CP 88-111. The drafts stated the agreement would “become operative as of the date of the last signature affixed herein.” CP 91, 100. “By signing this Agreement,” the parties would “voluntarily accept it.” CP 95, 104. “Upon mutual execution, the Carriers’ administrative appeals will be dismissed.” CP 95, 104. “No modification of this Agreement shall be binding upon them unless made in writing and signed by both.” CP 93, 102. “The terms of this Agreement constitute the entire agreement between ESD and the Carriers regarding the subject matter described herein.” CP 93, 102. During the negotiations, neither party objected to any of these provisions. CP 90-111.

On November 15, Worthy emailed Fitzpatrick a revised draft and asked him to see “if this is acceptable so I can get my client’s final sign off.” CP 111. Fitzpatrick responded: “I think we are okay. If you can, give me a quick call about format etc.” CP 110. Worthy replied: “We still have a couple issue [sic] on our end outside of the language choice discussed.” CP 110. In his November 16 email, Worthy explained that the draft as written as a whole would not provide finality, and a court might remand the cases to the administrative tribunal for necessary fact finding before reaching the

legal issues. CP 113. Worthy suggested they either have a final settlement without a right of appeal or seek resolution of the remaining questions of fact at the administrative tribunal so an appeal could proceed without a remand. CP 113. The settlement negotiations then broke down. CP 169 at ¶ 13.

In December 2012, the Carriers asked ALJ Gay to enforce a settlement they claimed had been reached through the exchange of Worthy's and Fitzpatrick's initial emails on September 26 and October 8. CP 220 at ¶ 10; 225-301. On January 22, 2013, the ALJ denied the Carriers' motion, stating he had no authority to grant such relief. CP 221 at ¶ 12, 315-16. The administrative hearing was set to begin on February 20, 2013, for one of the Carriers, with the hearings for the others to follow. CP 220 at ¶ 8.

On January 31, 2013, the Carriers filed with Pierce County Superior Court *ex parte* a motion for an order to show cause regarding enforcement of settlement and contempt. CP 2-10, 222-23 at ¶ 20. The Department was never served with this motion. CP 222-23 at ¶ 20. On February 4, the assistant attorneys general then representing the Department in the administrative cases received an email from the Carriers' attorneys that attached an order to show cause issued *ex parte* by the superior court. CP 22-23, 223 at ¶ 20. The order required the Department to appear on February 15 to show cause why the court should not enforce a claimed settlement and find the Department in contempt. CP 22-23. On February

6, the Carriers served their brief in support of their motion with declarations, exhibits, and proposed orders. CP 24-137, 223 at ¶ 20. The Department then had until February 13 to file its response, which it did. CP 141-316.

After the show cause hearing on February 15, the Honorable Stanley Rumbaugh issued an order finding that the early exchange of emails between counsel constituted a settlement agreement. CP 427-33. Although the Carriers neither filed nor served a summons and complaint, the superior court concluded it had jurisdiction over the matter through its general jurisdiction in contracts and “ancillary jurisdiction” under the Administrative Procedure Act (APA), RCW 34.05.510(2). CP 431 (Conclusion of Law 1). The court also concluded a show cause proceeding is a proper method to enforce a disputed settlement agreement. CP 321 (Conclusion of Law 2). The superior court order directed ALJ Gay to issue a consent order resolving and dismissing the Carriers’ administrative appeals, while allowing the parties to seek judicial review “as provided by the agreement of the parties and ordered by this Court.” CP 432. The court denied the Carriers’ motion for contempt. CP 432.

The Department appealed the superior court order to this Court. CP 138-140. The Carriers filed a cross appeal. CP 508-581.<sup>3</sup>

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<sup>3</sup> As required by the superior court order, ALJ Gay issued a consent order dismissing the Carriers’ appeals with prejudice under WAC 192-04-180. The Carriers filed a petition for judicial review from the consent order in Spokane County Superior

## V. STANDAR OF REVIEW

This appeal raises several issues related to the show cause process and the enforceability of the disputed settlement agreement. First, this appeal challenges the superior court's exercise of jurisdiction in enforcing a disputed settlement agreement on a show cause motion, without any action pending at the court. The superior court's proper exercise of jurisdiction is a question of law this Court will review de novo. *See Condon v. Condon*, No. 86130-7, slip op. at 5 (Wash. Mar. 21, 2013) (attached) (jurisdiction to enforce a settlement after dismissal).

Second, this appeal challenges the superior court's enforcement of a disputed settlement agreement as a matter of law. "Settlement agreements are contracts." *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 477, 149 P.3d 691 (2006) (citation omitted). Because a "motion to enforce a settlement agreement is like a summary judgment motion," an order granting such a motion is reviewed de novo. *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001); *Condon*, slip op. at 10 n.4, 11. The Carriers have "the burden of proving that there is no genuine dispute over the existence and material terms of the agreement." *Condon*, slip op. at 11 (citation omitted). This Court must view all of the parties' submissions "in the light most favorable to" the Department, the nonmoving party.

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Court. Copies of the consent order and the Carriers' petition for judicial review have been filed with this Court in conjunction with the Department's motion for stay.

*Condon*, slip op. at 11 (citation omitted). If there is any genuine issue on the existence of a disputed settlement, enforcing it without an evidentiary hearing is “an abuse of discretion.” *Id.* at 10 n.4 (citation omitted).

In reaching its decision, the superior court entered findings of fact and conclusions of law. CP 428-32. Because this Court reviews the superior court order de novo, these findings and conclusions are superfluous and need not be considered by this Court. *Hemenway v. Miller*, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) (“findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court”).

## VI. ARGUMENT

### A. **The Superior Court Engaged in an Impermissible Exercise of Jurisdiction in Enforcing a Disputed Settlement on a Show Cause Motion with No Underlying Action Pending at the Court**

For a court to enforce a disputed settlement agreement, it must have existing jurisdiction over the underlying action where the settlement was reached or a separate action for a breach of contract. *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). A show cause motion does not initiate a civil action. *E.g.*, *Zimmerman v. Auto Mart, Inc.*, 910 A.2d 171, 176 (Pa. Commw. Ct. 2006) (show cause order “is auxiliary in nature, based on an existing controversy, and may not substitute for original process”). Here,

there was no underlying court action. Nor did the Carriers institute a new action by filing a summons and complaint. Thus, the court lacked jurisdiction over the Carriers' settlement enforcement claim.

The superior court's reliance on the APA as a basis for jurisdiction was misplaced. The APA provision cited by the superior court provides only that non-conflicting court rules govern "ancillary procedural matters" in judicial review of an agency decision. RCW 34.05.510(2). It does not provide ancillary *jurisdiction* to determine *substantive* contract claims. Nor do RCW 2.28.150 or CR 60 allow a party to initiate an action by a show cause motion, as the Carriers argued below.

To pursue court relief, the Carriers had to first initiate a civil action by filing and serving a complaint following the civil rules. They chose not to do so. No authority permitted the superior court to enforce a disputed settlement agreement on a show cause motion alone.

**1. Enforcement of a disputed settlement agreement requires an underlying court action**

As a "commonly accepted practice," a party may file a motion to enforce a settlement agreement in the original action where the settlement was reached. *Condon*, slip op. at 5 (citing cases where a party in a pending action moved the trial court in that action to enforce a settlement allegedly reached in that action); *In re Marriage of Ferree*, 71 Wn. App.

35, 856 P.2d 706 (1993); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 994 P.2d 911 (2000); *Howard v. Dimaggio*, 70 Wn. App. 734, 855 P.2d 335 (1993); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 176 P.3d 510 (2008).

However, when there is no underlying action, courts that have considered the issue have held that enforcement of a settlement agreement “requires its own basis for jurisdiction.” *Kokkonen*, 511 U.S. at 378; *Marisco, Ltd. v. F/V Madee*, 631 F. Supp. 2d 1320, 1325 (Hawaii 2009); 15B Am. Jr. 2d, *Compromise and Settlement* § 43 (updated Feb. 2013) (attached). In *Kokkonen*, the United States Supreme Court held that enforcement of a settlement “is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.” *Kokkonen*, 511 U.S. at 378. Following *Kokkonen*, Iowa’s Supreme Court held that where the original action no longer exists, a party may not enforce a settlement agreement through a contempt proceeding “unless a separate action for breach of contract was filed.” *Reis v. Iowa Dist. Ct.*, 787 N.W.2d 61, 67-68 (Iowa 2010).

The Washington Supreme Court’s recent opinion in *Condon* follows the same principle. The *Condon* court discussed *Kokkonen* in deciding whether a stipulated settlement and dismissal with prejudice in open court deprived the trial court of its jurisdiction to then enforce a disputed term in that settlement. *See Condon*, slip op. at 7. The court

noted that some states “appear to agree that a court can enforce a settlement following dismissal *where it has expressly retained jurisdiction at the time of settlement.*” *Id.* at 9 (emphasis added). The court also noted that King and Pierce County court rules allow the parties to delay dismissal for purposes of enforcing a settlement. *Condon*, slip op. at 9 (citing KING COUNTY LOCAL R. 41(e)(3); PIERCE COUNTY LOCAL R. 41(e)(4)). The court further looked to *Washington Practice*, which suggests that “a party wishing to enforce a settlement could commence a new action for breach but a motion to enforce under the original cause number is preferred.” *Condon*, slip op. at 9 (citing 15 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 53.28, at 450 (2d ed. 2009)).

The trial court in *Condon* neither expressly retained its jurisdiction for enforcing the settlement nor entered a conditional or delayed dismissal. *Condon*, slip op. at 10. Thus, the parties “could have moved to vacate the original dismissal under appropriate grounds and then made a motion to reinstate or commenced a new action for breach of the settlement.” *Id.*<sup>4</sup>

This case presents a factually different issue than that in *Condon* and *Kokkonen*. In those cases, the parties at least filed motions to enforce settlement agreements *in the courts where the settlements were reached*,

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<sup>4</sup> *Condon* did not decide whether the trial court in that case followed a proper process. Instead, the Court reversed the trial court’s order of enforcement on the ground that even if the process was proper, the enforcement was in error because the trial court improperly implied additional terms into the settlement. *Condon*, slip op. at 10.

although the cases had been dismissed due to the settlements. Even in those cases, the courts held the trial courts lacked jurisdiction to enforce the settlements. Here, the Carriers sought to enforce a disputed settlement agreement on a show cause motion, without initiating any action, based on the ongoing *administrative proceedings*. No authority permits such an attempt to avoid the civil rules for initiating an action.

To initiate a civil action, a party must file a summons and complaint in accordance with the civil rules. “Proper service of summons and complaint is essential to invoke personal jurisdiction over a party.” *Prof'l Marine Co. v. Those Certain Underwriters at Lloyd's*, 118 Wn. App. 694, 706, 77 P.3d 658 (2003); RCW 4.28.020 (“From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.”); CR 4.

The proper method to enforce a settlement allegedly reached in an administrative proceeding is to initiate an original action in the superior court for a breach of contract and to properly serve the summons and complaint pursuant to the civil rules. Because the Carriers never filed a complaint, and the Department was never served with a complaint (or with the Carriers’ original motion for a show cause order), the superior court

lacked jurisdiction over the Department on the Carriers' contract claim.<sup>5</sup>

**2. A show cause motion does not substitute for an original action for a breach of contract**

A show cause motion does not substitute for original process for a breach of contract. "An order or rule to show cause is an ex parte procedure, is auxiliary by nature, and may not substitute for original process." 60 C.J.S. Motions and Orders § 22 (attached); *Zimmerman*, 910 A.2d at 176. As other states' courts have found, an "order to show cause can issue only after the commencement of the action," and "prior to service of the complaint the court had no jurisdiction over the controversy." *Vermont Div. of State Bldgs. v. Town of Castleton Bd. of Adjustment*, 415 A.2d 188, 193 (Vt. 1980).

"The jurisprudence is well settled that the right to proceed by rule or on motion implies the pendency of a suit between the parties, and is confined to incidental matters which may arise in the progress of the contestation, except in certain cases where a summary proceeding is expressly allowed by law." *Voinche v. Lecompte Trade Sch.*, 55 So. 2d 889, 891 (La. 1951). For example, a court may not enter a money judgment on a property settlement embodied in a divorce decree on a

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<sup>5</sup> The superior court does have subject matter jurisdiction in contract. However, the court's jurisdiction over a subject matter does not excuse a party from properly invoking that jurisdiction through mandatory requirements such as the filing of a summons and complaint.

show cause motion as incident to the divorce decree. *Mickens v. Mickens*, 62 Wn.2d 876, 881, 385 P.2d 14 (1963) (“We hold that the judgment could not properly be entered upon a petition and order to show cause as an incident to the divorce decree.”). Monetary relief under the settlement had to be brought in a separate action. *Mickens*, 62 Wn.2d at 881.<sup>6</sup>

“The right to initiate an original proceeding by a rule to show cause must derive from express statutory authority.” 60 C.J.S. Motions and Orders § 22. Here, no such authority allows the use of an *ex parte* show cause motion to initiate an action to enforce a disputed settlement.

A show cause proceeding is limited in its scope and purpose and is ancillary to a pending action. For example, the show cause process is available by statute for an unlawful detainer plaintiff *who has initiated an action*, not for “the final determination of the rights of the parties” but as a threshold process “to determine the issue of possession *pending a lawsuit*.” *IBF, LLC v. Heuft*, 141 Wn. App. 624, 634, 174 P.3d 95 (2007) (emphasis added); RCW 59.18.370. The process is also available by statute as ancillary to a sexually violent predator action, where, at a

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<sup>6</sup> The *Mickens* court held the husband, who responded to the show cause order, waived any sufficiency of the process or personal jurisdiction objections by filing an answer without challenging the jurisdiction of the court and by failing to raise any question as to the manner in which the proceedings were instituted until at the trial after the petitioning wife had rested. *Mickens*, 62 Wn.2d at 879, 881.

Courts have allowed *contempt* proceedings to secure compliance with a properly executed settlement embodied in a divorce decree, if the provision sought to be enforced is reasonably related to an alimony or child support duty. See *Decker v. Decker*, 52 Wn.2d 456, 465, 326 P.2d 332 (1958).

committed sexually violent predator's release request, "the trial court makes a *threshold* determination of whether there is evidence amounting to probable cause to hold a full hearing." *In re Petersen*, 138 Wn.2d 70, 86, 980 P.2d 1204 (1999) (emphasis added); RCW 71.09.090(2)(a).

The show cause process is also available on a motion to vacate *an established conviction* if the trial court does not transfer the motion to an appellate court as a personal restraint petition. CrR 7.8(c); RCW 10.73.090. Further, the process has been found appropriate as a "preliminary" hearing for prejudgment attachment *in an existing action* to recover unpaid rent to determine whether the landlord's claim was "at least probably valid so as to permit the writ of attachment to issue." *Rogoski v. Hammond*, 9 Wn. App. 500, 503-05, 513 P.2d 285 (1973).

Unlike these limited uses of the show cause process ancillary to a pending action, where only preliminary issues are determined, the superior court used this process to fully adjudicate the parties' rights in a contract dispute with no action pending at the court. No authority permits such use of this summary process.

**3. A motion to enforce a disputed settlement agreement is not an "ancillary procedural matter" under the APA, and the Carriers' reliance on RCW 2.28.150 and CR 60 is misplaced**

At the show cause hearing, the superior court pointed to an APA provision, RCW 34.05.510(2), and indicated that the show cause

proceeding was ancillary to the pending administrative proceedings. RP 12-13. However, the APA provision does not provide “ancillary jurisdiction” to determine a contract claim. This provision only addresses the applicability of court rules to “ancillary procedural matters” in a judicial review of an agency action governed by the APA:

*Ancillary procedural matters before the reviewing court, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not consistent with this chapter, by court rule.*

RCW 34.05.510(2) (emphasis added); *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 179-80, 979 P.2d 374 (1999) (time to file a cross petition for a judicial review was not an “ancillary procedural matter” subject to court rule but was governed by the APA); *see also Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 213-17, 103 P.3d 193 (2004) (APA, not CR 4, governs the service requirement in an APA judicial review proceeding).

By its terms, RCW 34.05.510 applies only to *procedural* matters *before the reviewing court*. The statute does not provide ancillary jurisdiction for a court on a show cause motion to enforce a disputed settlement agreement allegedly reached in an administrative proceeding. Further, the existence of a settlement agreement is a substantive legal

question, not a *procedural* matter.<sup>7</sup>

The Carriers argued RCW 2.28.150 permits the use of a show cause motion to enforce a disputed contract. CP 322-23. They were wrong. The statute gives the trial court, *after* its jurisdiction was properly invoked, flexibility as to the choice of any “suitable process” that may appear “most conformable to the spirit of the laws,” where no statute provides for any specific mode of proceeding. RCW 2.28.150. It does not permit a show cause motion to initiate an action in contract. Nor does it authorize disregarding the civil rules for initiating a civil action. Permitting the Carriers to avoid the civil rules for initiating a contract action would lead to abuse of the available *ex parte* show cause process, which is not “most conformable” to the spirit of contract law.<sup>8</sup>

The Carriers cited no case that permitted a show case motion to initiate a civil action under RCW 2.28.150. The Carriers relied on a child support case. CP 322; *State ex rel. Burleigh v. Johnson*, 31 Wn. App. 704,

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<sup>7</sup> The Carriers did not argue in their superior court briefs below that RCW 34.05.510(2) granted ancillary jurisdiction. The superior court raised this statute on its own during the show cause motion hearing. RP 12-13.

<sup>8</sup> RCW 2.28.150 provides (emphasis added):

*When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.*

644 P.2d 732 (1982). But *Johnson* is inapposite. In *Johnson*, there was a divorce action, where the court ordered the husband to pay child support. *Johnson*, 31 Wn. App. at 706. The wife then petitioned a Minnesota court to enforce the order, and the court found her petition stated sufficient facts to support a finding the husband owed child support and transferred “the matter to King County for further proceedings.” *Johnson*, 31 Wn. App. at 705-06. Unlike the enforcement of a child support duty already determined in a divorce action, here, the superior court enforced a disputed contract on a show cause motion without any underlying action.<sup>9</sup>

The Carriers also pointed to CR 60, claiming, “Washington Law utilizes show cause hearings all of the time.” RP 3. But a CR 60 motion is not analogous to the Carriers’ show cause motion to enforce a disputed settlement, because a “motion to vacate under CR 60(b) is *part of the original suit* and, as such, does not require independent jurisdictional grounds.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 591, 794 P.2d 526 (1990) (emphasis added). A “CR 60(b) motion is ancillary to or a continuation of the original suit and so long as the court had jurisdiction in

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<sup>9</sup> Also, *Johnson* was decided under the former Uniform Reciprocal Enforcement of Support Act (URESAs), chapter 26.21 RCW, which was later replaced by the Uniform Interstate Family Support Act (UIFSA), currently codified at chapter 26.21A RCW. See *In re Marriage of Titterness*, 77 Wn. App. 182, 183 n.1, 890 P.2d 32 (1995). URESAs had “been enacted in similar form in all states,” and the purpose was “to provide a uniform and convenient means of enforcing duties of support imposed or imposed by law.” *Johnson*, 31 Wn. App. at 706. The trial court in *Johnson* thus had the existing jurisdictional basis under URESAs transferred from Minnesota to Washington.

the original suit, jurisdiction continues for the purposes of the CR 60(b) motion.” *Lindgren*, 58 Wn. App. at 592 (citation omitted). Here, there was no original action. Thus, the superior court lacked proper authority to enforce the disputed settlement on a show cause motion alone.

Without its jurisdiction properly triggered, the superior court lacked authority to rule on the Carriers’ motion. The superior court order enforcing the disputed settlement should thus be reversed.

**B. The Superior Court Erred in Finding the Existence of a Settlement Agreement Based on an Exchange of Emails Early in the Negotiations**

The superior court erred in finding the existence of a settlement agreement based on an early exchange of emails that did not constitute unequivocal offer and acceptance, especially when later communications between counsel demonstrated the intent to be bound only after executing a formal settlement. Settlements are considered under the common law of contracts, supplemented by CR 2A and RCW 2.44.010. *Condon*, 298 P.3d at 92 (citation omitted). No contract was formed here.

**1. The September 26 email and the October 8 letter did not create a binding settlement**

The superior court concluded that Worthy’s September 26 email and Fitzpatrick’s October 8 response created a binding settlement agreement as a matter of law. CP 428-432 (Findings of Fact 1-7,

Conclusion of Law 3). The court was wrong. The September 26 email was too incomplete and indefinite to constitute a firm offer, and the October 8 response was a counteroffer, not an acceptance. These emails created no binding settlement agreement.

“Contract formation requires an objective manifestation of mutual assent of both parties.” *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 207, 289 P.3d 638 (2012) (citation omitted). Where there are outstanding terms that require a further meeting of the minds to make an agreement complete, it is an “agreement to agree,” which is “unenforceable in Washington.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175-76, 94 P.3d 945 (2004) (citation omitted). Washington law avoids “trapping parties in surprise contractual obligations.” *Keystone*, 152 Wn.2d at 178 (citation omitted).

“An enforceable contract requires, among other things, an offer with reasonably certain terms.” *Andrus v. Dep’t of Transp.*, 128 Wn. App. 895, 898, 117 P.3d 1152 (2005) (job offer upon application was too indefinite where it contained no start date, salary, or benefit information). “If an offer is so indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement.” *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957). “Mutual assent to definite terms is normally a

question of fact for the fact finder,” unless reasonable minds could not differ. *P.E. Sys.*, 176 Wn.2d at 207 (citation omitted).

“The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.” *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) (citation omitted). “Generally, a purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate the contract.” *Sea-Van*, 125 Wn.2d at 126 (citation omitted). An acceptance can request a modification of terms only if “the additional terms are not conditions of acceptance and *the acceptance is unequivocal.*” *Id.* (emphasis added).

Worthy’s September 26 email offered general settlement terms to resolve the eight administrative cases. Specifically, the email proposed that the Department would drop penalties and interest in all eight (now seven) cases in return for the Carriers’ payment of specified back taxes and “stipulation to liability.” CP 78. The Carriers would agree to the appealed tax assessments being “affirmed” and would “drop their appeals at OAH [Office of Administrative Hearings].” CP 78. However, they would still be “free to pursue whatever legal issues they want in superior court.” CP 78. The Department was most interested “in having all [of the Carriers] *settle at the OAH level.*” CP 78 (emphasis added). These

general terms were proposed for the Carriers' consideration.

Fitzpatrick's October 8 response was a counteroffer, not an acceptance. The letter attached to Fitzpatrick's October 8 email did not even purport to be an acceptance. It described itself as a "follow-up" and "response" to the September 26 email and "a proposal from the carriers to resolve the cases." CP 81. Fitzpatrick's email similarly described the letter as a "response" and "proposal." CP 86. Nothing in the letter or email indicates the Carriers unequivocally accepted the September 26 offer. To the contrary, the Carriers put forth a different proposal.

The October 8 letter proposed new terms modifying the September 26 offer and called for the Department's acceptance. CP 82 (*"If this is acceptable to your client, please advise me as soon as possible so that we can advise Judge Gay and bring the numbered cases to resolution."*). For example, the letter sought to define the term "stipulation to liability" by proposing that the Carriers would "stipulate that under the law of the case as established in the rulings" of ALJ Gay, "with which the carriers disagree, there would be a finding that the persons or entities for which there is an assessment are employees of the respective carriers." CP 82 at ¶ 2. Because the meaning of "stipulation to liability" required a further meeting of the minds, the letter was not an acceptance.

The October 8 letter also added a new term precluding the

Department Commissioner from changing “the resolution of these matters as outlined above” upon the Carriers’ petition for Commissioner review, which is a necessary step in order to exhaust administrative remedies. CP 812 at ¶ 6; RCW 50.32.050, .070. This new term modified the terms in the September 26 email and required a further meeting of the minds. In fact, Worthy’s October 16 email rejected this new term, saying, “the agreement could not contain any language regarding the [Commissioner’s Review Office] since they operate independently and [the Department] cannot instruct them what to do.” CP 85.

Further, the October 8 letter expressly excluded one carrier, Eagle, CP 81, and proposed different terms for another carrier, Hawkings, CP 82. Eagle was later added to the negotiations, CP 88-111, and the Department and Hawkings later separately settled by executing an agreement signed by both parties, CP 219-20, ¶ 7. But the exclusion of Eagle and new terms for Hawkings in the October 8 letter modified the terms in the September 26 email, which stated the Department was most interested in “having *all of your clients* settle at the OAH level.” CP 78 (emphasis added).

The October 8 letter was a counteroffer. The superior court erred in concluding otherwise. After the October 8 response from Fitzpatrick, the attorneys continued to negotiate settlement terms and exchanged settlement drafts, which, as shown below, showed intent not to be bound

before formal execution. *See Rorvig v. Douglas*, 123 Wn.2d 854, 859, 873 P.2d 492 (1994) (court may consider the parties' conduct to see if they have reached an agreement).<sup>10</sup>

**2. The Carriers failed to show the parties intended to be bound before executing a formal settlement**

“Both CR 2A and RCW 2.44.010 require a stipulation in open court on the record, or a writing acknowledged by the party to be bound.” *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992). “While the compromise of litigation is to be encouraged, negotiations toward a compromise are not binding upon the negotiators.” *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954). Noncompliance with CR 2A “dictates that the agreement is unenforceable.” *Bryant*, 67 Wn. App. at 179.<sup>11</sup>

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<sup>10</sup> Later in the negotiations, the Department realized that factual issues remained and needed to be resolved at the administrative proceedings before a court may properly determine the legal issues. CP 113. Ultimately, the parties did not reach a meeting of the minds, resulting in the breakdown of settlement discussions.

<sup>11</sup> CR 2A provides (emphasis added):

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

RCW 2.44.010(1) similarly provides (emphasis added):

An attorney and counselor has authority . . . [t]o bind his or her client in any of the proceedings in any 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

The rule and the statute are designed to avoid disputes and “give certainty and finality to settlements and compromises, if they are made.” *Eddleman*, 45 Wn.2d at 432. They ensure “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.

For example, in a divorce case, our Supreme Court held the attorneys’ exchanged stipulation was unenforceable, where the wife’s attorney did not sign it although she signed the cover letter attached to the stipulation. *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 562, 106 P.3d 212 (2005). After months of negotiation, the wife’s attorney sent an unsigned proposed stipulation to the husband’s attorney, saying, “I enclose a stipulation on the stock options.” *Langham*, 153 Wn.2d at 562. The husband’s attorney then signed the stipulation. *Id.* The Supreme Court rejected the husband’s attempt to enforce the stipulation, because the wife’s attorney “did not sign the stipulation, and attempting to use the signature on the letter is too attenuated.” *Id.*

Although the rule and the statute do not necessarily require execution of a formal settlement agreement, informal writings must contain a clear expression of the terms and intent to be bound by such

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*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.*

writings. *Evans*, 136 Wn. App. at 478-79 (citation omitted). The court “must be able to conclude,” among other things, that “all of the provisions of the agreement were set out in the writings” and that “the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract.” *Evans*, 136 Wn. App. at 475-76 (citation omitted). “If the preliminary agreement is incomplete” or “if an intention is manifested in *any way* that legal obligations between the parties shall be deferred until the writing is made, the preliminary negotiations and agreements do not constitute a contract.” *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 521, 408 P.2d 382 (1965) (citation omitted) (emphasis added).

The language of unsigned settlement drafts may show parties’ intent not to be bound before formal execution. *See, e.g., Zucker v. Katz*, 836 F. Supp. 137, 144-47 (S.D.N.Y. 1993). For example, a court has found the language of settlement drafts made “plain that a formal signing was intended to be essential to give rise to a binding contract,” where the drafts provided that there were no other agreements between the parties, any modification would require a writing signed by both parties, and the agreement would set forth the parties’ rights and obligations when duly executed. *Zucker*, 836 F. Supp. at 144-45.<sup>12</sup>

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<sup>12</sup> *Zucker* applied the New York law on the enforceability of a settlement, which, like Washington’s law, holds that “a contract is unenforceable if the parties did not intend

Here, the Carriers' exhibits, especially when viewed in the light most favorable to the Department, showed the parties intended to be bound only after executing a formal settlement. The attorneys' settlement drafts showed formal execution was essential to bind the parties.

As in *Zucker*, under the settlement drafts here, the agreement would not become operative until signed by both parties: "This Agreement will become operative *as of the date of the last signature affixed herein.*" CP 91, 100 (emphasis added). "*By signing this Agreement,*" the parties would "voluntarily accept it." CP 95, 104 (emphasis added). "*Upon mutual execution,* the Carriers' administrative appeals will be dismissed." CP 95, 104 (emphasis added). The settlement drafts further placed importance on the formalities of execution: "No modification of this Agreement shall be binding upon them *unless made in writing and signed by both.*" CP 93, 102 (emphasis added). "The terms of this Agreement constitute the *entire agreement* between ESD and the Carriers regarding the subject matter described herein." CP 93, 102 (emphasis added). During negotiations, neither party objected to any of these provisions. CP 90-111. These terms show the parties did not intend to be bound without formal execution.

The attorneys' emails also consistently showed the parties' intent

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to be bound until after the execution of a formal written agreement." *Zucker*, 836 F. Supp. at 144 (citations omitted).

not to be bound before formal execution. In his October 16 email to Fitzpatrick, Worthy asked Fitzpatrick when he could have a first draft Worthy could share with his client, saying, “Obviously, still with the understanding *it is still an ER 408 communication.*” CP 85 (emphasis added); *Bros. v. Pub. Sch. Emps. of Wash.*, 88 Wn. App. 398, 406, 945 P.2d 208 (1997) (ER 408 “is intended to promote freedom of communication in compromise negotiations”). In mid November, even when the attorneys appeared close to reaching a final agreement, Worthy indicated that the settlement was still contingent on his “client’s final sign off”: “Please let me know if this is acceptable *so I can get my client’s final sign off.*” CP 111 (emphasis added).

The language in the attorneys’ settlement drafts and emails confirm the parties were still at the negotiation stage and intended their negotiated settlement to take effect only when fully executed. The negotiated terms in the drafts further confirm that Worthy’s September 26 email did not set out “all of the provisions of the agreement” to create a binding settlement. *Evans*, 136 Wn. App. at 476.

The superior court cited *Morris* as supporting its decision. RP 61; *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357 (1993). However, *Morris* does not support finding an enforceable settlement as a matter of law in this case. First, *Morris* applied the abuse of discretion standard in

affirming the trial court's finding of an enforceable settlement. *Morris*, 69 Wn. App. at 868. As our Supreme Court recently confirmed, the correct standard is de novo. *Condon*, slip op. at 10 n.4.

Second, in *Morris*, there was a clear showing of intent to be bound, and the client signed a letter confirming a settlement. *Morris*, 69 Wn. App. at 870-71; *Evans*, 136 Wn. App. at 479 (“The intention to be bound by the settlement was clear in the letters in *Morris*.”); *Evans*, 136 Wn. App. at 478 (“Moreover, in *Morris*, the client himself signed a letter confirming a settlement.”). *Morris*'s counsel wrote: “This will confirm your assurance to me that Tom Maks has agreed to *this settlement* and I have confirmed Evan Morris' approval,” listing specific “settlement points.” *Morris*, 69 Wn. App. at 871, 870 n.1 (emphasis added). Maks' attorney replied that *Morris*' attorney's letter “accurately reflects the terms of *the agreed settlement*.” *Id.* at 867 (emphasis added). Further, the client to be bound signed a letter acknowledging *the existence of a settlement* based on these letters. *Id.* at 869. Unlike *Morris*, no communication of Worthy acknowledged the existence of any settlement.

The Carriers failed to show as a matter of law that the parties “intended a binding agreement prior to the time of the signing and delivery of a formal contract.” *Evans*, 136 Wn. App. at 476. There was not an enforceable settlement. The superior court erred in concluding otherwise.

**3. If there was any genuine issue of fact, the superior court erred in enforcing a disputed settlement agreement without holding an evidentiary hearing**

“The existence and material terms of an agreement are a question of fact,” unless “reasonable minds could reach only one conclusion.” *Ferree*, 71 Wn. App. at 43. Any issue of material fact requires a fact finding hearing. *Brinkerhoff*, 99 Wn. App. at 697. A “trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact.” *Id.*

If there were genuine issues of fact as to the existence of the disputed settlement agreement, the superior court erred in enforcing the disputed settlement without holding an evidentiary hearing.

**VII. CONCLUSION**

For the foregoing reasons, the Department asks the Court to reverse and vacate the superior court order with an instruction that the Office of Administrative Hearings vacate its consent order of dismissal and reinstate the administrative proceedings for further proceedings.

RESPECTFULLY SUBMITTED this 14th day of May 2013.

ROBERT W. FERGUSON  
Attorney General

  
Masako Kanazawa, WSBA # 32703  
Assistant Attorney General  
Attorneys for Appellant

**PROOF OF SERVICE**

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

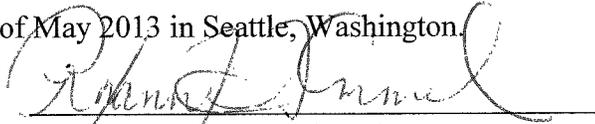
2. That on the 14th day of May 2013, I caused to be served a copy of **Appellant's Brief** on the Respondents/Cross Appellants of record on the below stated date as follows:

U.S. mail postage prepaid and e-mail  
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 14th day of May 2013 in Seattle, Washington.

  
Roxanne Immel, Legal Assistant

# Appendices

**FILE**

IN CLERKS OFFICE  
SUPREME COURT, STATE OF WASHINGTON

DATE MAR 21 2013

Madsen, C.J.  
CHIEF JUSTICE

This opinion was filed for record  
at 8:00 am on March 21, 2013

Ronald R. Carpenter  
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VANESSA CONDON,

Appellant,

v.

FELY CONDON,

Respondent.

No. 86130-7

En Banc

Filed MAR 21 2013

MADSEN, C.J.—In open court, appellant Vanessa Condon<sup>1</sup> and respondent Fely Condon entered into a stipulated settlement and dismissal with prejudice of Vanessa’s claims against Fely, stemming from an automobile accident. Before payment of the settlement funds, Fely requested that Vanessa sign a release agreement, which the parties had not discussed nor placed on the record. Vanessa refused to sign the release and Fely made a motion to enforce the settlement and the release. The trial court entered an order deeming the release signed. Vanessa filed a motion for discretionary review in this

<sup>1</sup> For clarity, the parties will be referred to by their first names.

court,<sup>2</sup> arguing the trial court lacked jurisdiction to enforce release terms that were not a part of the original agreement. Fely contended Vanessa waived her right to appeal by accepting the settlement check. We hold that Vanessa Condon did not waive her right to appeal and that the trial court improperly added implied terms to the agreement.

Accordingly, we reverse.

#### FACTS AND PROCEDURAL HISTORY

On August 24, 1996, Fely Condon was driving with her daughter, Vanessa Condon, when they were struck by another vehicle. Vanessa was ejected from her mother's car and sustained several injuries including a concussion, a damaged tooth, and cuts and contusions. Vanessa was entitled to coverage by Farmers Insurance Co. of Washington under an underinsured motorist (UIM) policy, which provided for arbitration of disputes. Her claim was arbitrated. The award of \$108,000 was confirmed and judgment entered on February 10, 2011 in King County.

Vanessa also instituted an action in Kitsap Superior Court against Fely in 2005. The parties settled before trial. In open court on March 29, 2011, the parties agreed that Vanessa would receive a \$100,000 payment from Farmers, credited against the King County UIM arbitration judgment, and Fely would pay the remaining \$8,000 to satisfy the UIM judgment, with attorney fees to be argued at a later date. No written settlement or release was presented. The parties signed a stipulation and order of dismissal on March 29, and on April 1 the court ordered dismissal with prejudice.

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<sup>2</sup> Commissioner Steven Goff ruled that “[t]he notice for discretionary review shall be given the same effect as a notice of appeal.” Ruling, *Condon v. Condon*, No. 86130-7, at 4 (Wash. Oct. 25, 2011).

On March 30, 2011, prior to the dismissal, Fely's counsel sent Vanessa's counsel a receipt and release of claims form to sign. On April 1, 2011, Vanessa notified Fely that she would not sign the release. Fely then moved to enforce the settlement and compel Vanessa to sign the receipt and release. Vanessa objected to the motion, arguing that the release was never part of the settlement and that the stipulated order of dismissal with prejudice ended all litigation. She also asked for CR 11 sanctions against Fely. Fely argued that the separate release was a common practice in settlements and that she would not have entered into the agreement had she been aware that Vanessa did not intend to sign the release.

At the April 22, 2011 hearing on the motion, the trial court asked Vanessa's attorney whether she objected to a particular part of the release, or rather the "concept" of a release. Verbatim Report of Proceedings (VRP) (Apr. 22, 2011) at 5.

Her attorney replied that Vanessa had not agreed to any release. Referencing an unpublished case from California, *El-Fadly v. Northridge Park Townhome Owners Ass'n*, No. B172684, 2005 WL 1503857 (Cal. Ct. App. June 27, 2005) (unpublished), the trial court ruled that the settlement would stand and that the settlement check would not be released until a release was signed. The parties were ordered to create a "customary and usual release." VRP at 9.

At a subsequent hearing, the trial court heard the parties' arguments on the release language provided by Fely's attorney. Vanessa's attorney expressed concern that the language was overly broad and could preclude Vanessa from receiving the unsatisfied

judgment from the King County UIM decision and bringing any potential bad faith claims. Her attorney filed a declaration that included the release Fely had provided the court, with certain sections redacted. Fely's counsel argued that the portions of the release, indemnity, and hold harmless provisions to which Vanessa objected were standard, saying, "[T]his is a standard release in this case which we ordinarily and routinely have people sign." VRP (May 13, 2011) at 14. The court was satisfied with the unredacted release and entered an order deeming the release signed, noting that the record of the May 13 proceeding was sufficient to support Fely's claim that "the release only applies to this case." *Id.* at 12.

#### ANALYSIS

Citing RAP 2.5(b), Fely contends that Vanessa waived her right to appeal because she received the benefit of the settlement when she cashed the \$100,000 check. *See Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 941-42, 813 P.2d 125 (1991). RAP 2.5(b)(1) allows a party to accept the benefits of a trial court decision without losing the right to appeal under only four circumstances, including "if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision." "The purpose of RAP 2.5(b) is to ensure that a party seeking review will be able to make restitution if a decision is reversed or modified on appeal." *Scott v. Cascade Structures*, 100 Wn.2d 537, 541, 673 P.2d 179 (1983) (citing RAP 2.5(b)(2) cmt., 86 Wn.2d 1151 (1976)). In

this case, even if the settlement was vacated, Vanessa would be entitled to the \$100,000 through the King County UIM arbitration. We find no waiver on these facts.

Next, Vanessa argues that the trial court lacked jurisdiction to enforce a settlement following dismissal of claims. This is a question of law that is reviewed de novo.

*Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999); *State v. Squally*, 132 Wn.2d 333, 340-41, 937 P.2d 1069 (1997). Enforcement of this settlement is governed by CR 2A. *In re Marriage of Ferree*, 71 Wn. App. 35, 39, 856 P.2d 706 (1993). The rule 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.

CR 2A. The purpose of CR 2A is to give certainty and finality to settlements. *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954) (discussing the predecessor of CR 2A, which used identical language).

Where the CR 2A requirements are met, a motion to enforce a settlement is a commonly accepted practice. *See Ferree*, 71 Wn. App. at 45 (trial court did not err when it enforced a settlement agreement); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000) (determining a trial court abuses its discretion when it enforces a settlement without holding an evidentiary hearing when there are disputed issues of fact); *Howard v. Dimaggio*, 70 Wn. App. 734, 739, 855 P.2d 335 (1993) (trial court improperly enforced settlement where agreement prior to settlement was not reached on hold

harmless and release documents); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 479, 176 P.3d 510 (2008) (“We review a trial court's order enforcing a settlement agreement de novo.”).

The premise of Vanessa’s argument is that a dismissal with prejudice ends all litigation, thus removing the court’s jurisdiction. Vanessa cites *Cork Insulation Sales Co. v. Torgeson*, 54 Wn. App. 702, 705, 775 P.2d 970 (1989), as support for her position. In *Cork*, the Court of Appeals held that the trial court lacked jurisdiction to enter a judgment awarding terms against the defendant in connection with a motion to vacate a default judgment weeks after the plaintiff obtained a voluntary dismissal of his claims. Unlike this case, *Cork* did not involve enforcement of a settlement, the terms of which were in dispute. Moreover, the Court of Appeals subsequently explained the limited scope of its holding in *Cork* in *Hawk v. Branjes*, 97 Wn. App. 776, 782, 986 P.2d 841 (1999). In *Hawk*, the trial court awarded the defendant tenant costs and attorney fees after granting the landlords’ motion to voluntarily dismiss their complaint. *Hawk*, 97 Wn. App. at 778-79. The landlord appealed, claiming that its voluntary dismissal ended the case, and the trial court, therefore, based on *Cork* lacked jurisdiction to make the award. *Id.* at 782. The Court of Appeals in *Hawks* distinguished its *Cork* decision, stating that *Cork* did not involve an attorney fee awarded under a statute or contractual provision. *Id.* The court noted that “[w]hile a voluntary dismissal under CR 41 (a)(1) generally divests a court of jurisdiction to decide a case on the merits, an award of attorneys’ fees pursuant to a statutory provision or contractual agreement is collateral to the underlying proceeding.”

*Id.* at 782-83. The court observed that “to hold otherwise would unnecessarily subject the courts to separate actions to recover fees readily ascertainable upon dismissal of the underlying claim.” *Id.* at 783.

Although enforcement of a settlement is different from an award of attorney fees or costs provided by a contract or statute, there are similar concerns regarding subjecting courts to separate actions to enforce the very settlements upon which the dismissals are based. For instance, the United States Supreme Court considered a similar issue as it pertained to district courts retaining ancillary jurisdiction over a settlement. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380-81, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). There, the Court said that ancillary jurisdiction could exist following dismissal of a settlement in order to protect its proceedings and vindicate its authority

if the parties’ obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision “retaining jurisdiction” over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

*Id.* at 381. In the absence of ancillary jurisdiction, the court held that enforcement of the settlement could only proceed in state court. *Id.* at 382. Although *Kokkonen* does not address a state trial court’s jurisdiction, it does provide some guidance.

Several states have also grappled with this question, including Florida, California, and Illinois. In Florida, the supreme court in *Paulucci v. General Dynamics Corp.*, 842 So. 2d 797, 803 (2003), considered whether a court has jurisdiction to enforce a

settlement agreement where the court has either incorporated the agreement into a final judgment or approved of the agreement by order and retained jurisdiction to enforce the terms. *Paulucci* affirmatively held that a court does have jurisdiction under those circumstances, but noted that the extent of the court's continuing jurisdiction was circumscribed by the terms of the agreement. *Id.*

Similarly, California amended its code in 1993 to permit the court to retain jurisdiction to enforce a settlement following dismissal, upon the parties' request.<sup>3</sup> CAL. CIV. PROC. § 664.6. There, it is insufficient for a settlement agreement to simply state that jurisdiction is retained for enforcement; a request must be made to the court in order to retain jurisdiction. *Hagan Eng'g, Inc. v. Mills*, 115 Cal. App. 4th 1004, 1010-11, 9 Cal. Rptr. 3d 723 (2003) (noting that Hagan could have had a conditional judgment entered, had the trial court retained jurisdiction before dismissal, or provided another enforcement mechanism, but that instead, he would have to file a new action for breach of the settlement agreement).

There is also authority in Illinois that grants a trial court jurisdiction to enforce a settlement following dismissal. *Dir. of Ins. v. A & A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721, 725, 891 N.E.2d 500 (2008). The Court of Appeals in *A & A* concluded that because the trial court expressly made the dismissal contingent on the terms of the settlement agreement and most compellingly, because the court stated it retained

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<sup>3</sup> "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." CAL. CIV. PROC. § 664.6.

jurisdiction, the trial court had jurisdiction to enforce the settlement. *A & A*, 383 Ill. App. 3d at 725. It also noted that “a court retains the inherent authority to enforce its own orders.” *Id.* at 723 (citing *County of Cook v. Ill. Fraternal Order of Police Labor Council*, 358 Ill. App. 3d 667, 671, 832 N.E.2d 395 (2005)). Florida, California, and Illinois all appear to agree that a court can enforce a settlement following dismissal where it has expressly retained jurisdiction at the time of settlement.

Within Washington, several counties have enacted court rules addressing this issue. In King County, parties who have reached a settlement fully resolving all claims can delay dismissal for the purpose of enforcing a settlement agreement. KING COUNTY LOCAL R. 41(e)(3). Pierce County also acknowledges that enforcement may delay dismissal in Pierce County Superior Court Local Civil Rule 41(e)(4). There, if the parties have reached an agreement and file a stipulation with the court, and the execution of the settlement will take more than 90 days, an order of dismissal by the court under PCLR 41(e)(3) is waived.

Guidance can also be found within secondary sources. *Washington Practice* suggests that a party wishing to enforce a settlement could commence a new action for breach but that a motion to enforce under the original cause number is preferred. 15 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 53:28, at 450 (2d ed. 2009) (citing *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 36 P.3d 1065 (2001)). However, it goes on to note that it is probably necessary to simultaneously move to vacate under CR 60. *Id.* This view on vacating is shared by David F. Herr et al.,

*Motions to Enforce Settlements: An Important Procedural Tool*, 8 AM. J. TRIAL ADVOC. 1 (1984-85), which suggests that a party should combine the motions to reinstate and enforce, due to the overlapping documents required. *Id.* at 3. Additionally, it states that a court may reopen a matter following dismissal on the basis of its inherent authority, the interests of justice, and because a breach of settlement would be misconduct under Fed. R. Civ. P. 60(b)(3), or would be “any other reason justifying relief” under Fed. R. Civ. P. 60(b)(6). *Id.* at 4.

Here, the trial court acted informally to enforce the settlement. The best practice would have been for the court, at the time of the settlement, to expressly retain jurisdiction for purposes of enforcement or to enter a conditional or delayed dismissal. Since that did not occur, the parties could have moved to vacate the original dismissal under appropriate grounds and then made a motion to reinstate and enforce or commenced a new action for breach of the settlement. Assuming, however, that the process that the trial court followed was adequate, we nevertheless find the court improperly implied additional terms into the agreement, as discussed below.

The trial court follows summary judgment procedures when a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed.<sup>4</sup> *Brinkerhoff*, 99 Wn. App. at 696; *Lavigne v. Green*, 106 Wn. App. 12, 16, 23

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<sup>4</sup> Although the Court of Appeals has used an abuse of discretion standard in the past when reviewing the enforcement of a settlement agreement, its more recent rulings clarify that de novo review is appropriate. *Brinkerhoff*, 99 Wn. App. at 696; *Lavigne*, 106 Wn. App. at 16. As discussed in *Brinkerhoff*, summary judgment procedures are used in motions to enforce a settlement agreement. *Brinkerhoff*, 99 Wn. App. at 696. However, a trial court abuses its

P.3d 515 (2001); *Ferree*, 71 Wn. App. at 43. “[T]he party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement.” *Brinkerhoff*, 99 Wn. App. at 696-97 (citing *Ferree*, 71 Wn. App. at 41). The parties’ submissions must be read in the light most favorable to the nonmoving party in order to determine whether reasonable minds could reach only one conclusion. *Id.* at 697. Because the proceeding to enforce a settlement is similar to a summary judgment proceeding, we review the court’s order de novo. *Id.* at 696.

Settlements are considered under the common law of contracts. *Ferree*, 71 Wn. App. at 39 (CR 2A acts as a supplement but does not supplant the common law of contracts in settlements). 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). Determining the intent of the parties is paramount in settlements. *See, e.g., Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 479, 149 P.3d 691 (2006) (holding that there was a genuine issue of material fact over whether the parties agreed on all material terms); *see also Nationwide Mut. Fire Ins. Co. v. Watson*, 120

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discretion if the nonmoving party raises a genuine issue of material fact and the trial court fails to hold an evidentiary hearing to resolve the disputed issues of fact. *Id.* at 697.

Wn.2d 178, 190, 840 P.2d 851 (1992) (considering whether there was mutual mistake by the parties). However, “the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Hearst*, 154 Wn.2d at 504. These words are given their ordinary, usual, and popular meaning unless a contrary intent is shown from the entirety of the agreement. *Id.* Courts will 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). Courts will also not imply obligations into contracts, absent legal necessity typically resulting from inadequate consideration. *Oliver v. Flow Int’l Corp.*, 137 Wn. App. 655, 662, 155 P.3d 140 (2006) (citing as support *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917), in which the *Wood* court implied an obligation upon the plaintiff to make reasonable efforts to market the defendant’s goods under an exclusive licensing contract, where otherwise the defendant could have no compensation for agreeing to transfer her rights).

Applying the principles of contract law to this settlement agreement, we conclude that the trial court erred by enforcing terms that were not implied within the agreement. Here, there is no indication in the record or transcripts that the release agreement was intended by the parties. Instead, the record suggests that the settlement consisted entirely of Fely’s payment to Vanessa and dismissal of the dispute, which is sufficient consideration for an enforceable settlement. *See Rogich v. Dressel*, 45 Wn.2d 829, 843,

278 P.2d 367 (1954) (stating that in a settlement, consideration takes the form of payment and release of claims, acting as an accord and satisfaction); *Nationwide*, 120 Wn.2d at 195 (“A good faith settlement of a dispute has been held to be sufficient consideration for a compromise to settle that claim.”). We cannot read the release proposed by Fely into this otherwise valid settlement agreement when there is no evidence that the parties intended such terms.

The trial court concluded the release was implied by incorrectly interpreting an unpublished opinion from California, *El-Fadly*, 2005 WL 1503857, at \*1. In *El-Fadly*, the parties entered into a signed settlement agreement that stipulated the defendant would prepare a “Settlement/Release Agreement” to facilitate the terms. *Id.* The release prepared by the defendant included language outside of a general release, which the plaintiff then objected to. *Id.* at \*1-2. The Court of Appeals considered the intent of the parties and determined that only a general release was contemplated, rather than the broader release that waived additional protected rights. *Id.* at \*3. Here, unlike in *El-Fadly*, there is no evidence from the record that the parties agreed to the release proposed by Fely.

Although the trial court improperly implied Fely’s proposed release into the agreement, its inclination to believe the parties intended a general release was correct because a dismissal with prejudice has the effect of limiting future claims. However, the release the court deemed signed went far beyond the scope of a release that is achieved through a dismissal with prejudice. For instance, the release stated:

The undersigned, in consideration of FARMERS INSURANCE COMPANY tendering the settlement check directly to releasor's attorney, without naming lien holders as payees, further hereby covenants to defend, to indemnify, and hold harmless FARMERS INSURANCE COMPANY, its attorneys, agents, employees and assigns from and against all such lien and subrogation claims, including all costs and attorney's fees incurred in the defense of such claims.

Clerk's Papers at 70. Yet there is no evidence from the record that these terms were contemplated by the parties. When Vanessa agreed to dismiss her claims she only released Fely as to those claims, she did not agree to indemnify or hold Farmers harmless as to any other claims.

In so holding, we disagree with Fely's contention that the release she proposed was implied and the burden was on Vanessa to object. Indeed, it follows from case law that such a release must be expressly stated and not implied. *See, e.g., Howard*, 70 Wn. App. at 739 (trial court improperly enforced settlement where agreement prior to settlement was not reached on hold harmless and release documents); *Skiles v. Farmers Ins. Co.*, 61 Wn. App. 943, 945, 814 P.2d 666 (1991) (release and hold harmless agreement obtained as part of a settlement); *In re Marriage of Greenlee*, 65 Wn. App. 703, 709, 829 P.2d 1120 (1992) (discussing a hold harmless provision within a settlement agreement).

Both parties are seeking sanctions and attorney fees. Fely is requesting sanctions against Vanessa for citing to unpublished authority and citing to matters outside the record. In Vanessa's motion for discretionary review, she cited to an unpublished case, *Thurston v. Godsil*, No. 48959-3-I, 2003 WL 21690529 (Wash. Ct. App. July 21, 2003)

(unpublished), in violation of GR 14.1(a).<sup>5</sup> Additionally, Vanessa also cited to an unpublished New York opinion, *First United Methodist Church v. Tot-Spot, Inc.*, 32 Misc. 3d 1242, 938 N.Y.S.2d 226 (Dist. Ct. 2011). GR 14.1(b) authorizes a party to cite to unpublished opinions from other jurisdictions if citation to the opinion would be permitted in the jurisdiction of the issuing court. In New York, case law suggests unpublished opinions are entitled to respectful consideration, but are not binding precedent. *Eaton v. Chahal*, 146 Misc.2d 977, 983, 553 N.Y.S.2d 642 (1990). However, even if an unpublished case may be cited in another jurisdiction, GR 14.1(b) still requires the party to file and serve a copy of the opinion with the brief, which Vanessa did not do.

Fely contends that Vanessa should be sanctioned for her reliance on these cases, citing to *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701 (2001), for the rule that “[u]npublished opinions have no precedential value and should not be cited or relied upon in any manner.”<sup>6</sup> To the extent Vanessa violated GR 14.1, we strongly disapprove but will not sanction Vanessa or her attorney as Fely requests. Rather, as the Court of Appeals in *Woodall* admonished, we will not consider the cases in violation of this rule. We also will not sanction Vanessa for referencing matters outside of the record, as Fely contends. While Vanessa does refer to Fely’s insurance coverage

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<sup>5</sup> GR 14.1(a) states that “[a] party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.”

<sup>6</sup> Although Fely claims in her brief that the *Woodall* court sanctioned the party making the improper citation, this is inaccurate. The court only said that the superior court relied heavily upon an unpublished opinion and stated the aforementioned rule that unpublished opinions should not be relied upon. *Woodall*, 104 Wn. App. at 536 n.11.

and the UIM claim, these matters are central to this case and are discussed in the record, including during settlement.

Nor will we impose sanctions against Fely, as Vanessa requests. Vanessa argues that we should sanction Fely for bringing a claim that is not well grounded in fact or warranted by existing law under CR 11(a). This is not the type of meritless appeal that requires sanctions. *See Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992) (stating that “[t]he purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system,” but “the rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories”).

Fely is requesting attorney fees under RAP 18.1, contending that Vanessa’s appeal was not based on law and facts and that the criteria for direct review are not satisfied. Since this court accepted review, Fely is not entitled to attorney fees.

Vanessa also is not entitled to attorney fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 53-54, 811 P.2d 673 (1991). In *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 606-07, 167 P.3d 1125 (2007), we agreed with the lower court’s determination that *Olympic Steamship* applies when an insurer contests the meaning of a contract, but not when it contests other questions, including tort liability. *See also McRory v. N. Ins. Co. of N.Y.*, 138 Wn.2d 550, 555, 980 P.2d 736 (1999) (“We have declined to award fees under this exception where the case did not concern a coverage issue, but rather a dispute over the value of the claim after the insurer had accepted coverage.”). Here, no party is contesting the

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meaning of the insurance contract. Instead, there is only a question as to the terms of the settlement.

#### CONCLUSION

We hold that Vanessa Condon did not waive her right to appeal by taking the settlement check. Additionally, we hold that the trial court erred when it implied and enforced additional terms that were not agreed to by the parties. We reverse the trial court. Sanctions and attorney fees will not be imposed.

Madsen, C. J.

WE CONCUR:

[Signature]  
[Signature]  
Fairhurst, G.  
[Signature]

Stevens, J.  
Wiggins, J.  
González, J.  
Chamberlain, P.T.

15B Am. Jur. 2d Compromise and Settlement § 43

American Jurisprudence, Second Edition

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Compromise and Settlement

Anne Knickerbocker, J.D.

VI. Procedural Matters

Topic Summary Correlation Table References

§ 43. Jurisdiction

**West's Key Number Digest**

**West's Key Number Digest, Compromise and Settlement** § 21

Generally, enforcement of a settlement agreement, whether through an award of damages<sup>1</sup> or a decree of specific performance,<sup>2</sup> is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.<sup>3</sup> The voluntary dismissal of a case divests the trial court of continuing jurisdiction over the case, but if the parties, prior to dismissal, present a settlement agreement for approval and the court enters an order of dismissal predicated on the agreement, the court retains jurisdiction to enforce its terms,<sup>4</sup> at least where the parties request such a retention of jurisdiction before the dismissal.<sup>5</sup> A trial court lacks jurisdiction to enforce a settlement agreement through contempt proceedings where the agreement is never entered by the court and the underlying case has been dismissed.<sup>6</sup>

Footnotes

1 § 40.

2 §§ 41, 44.

3 *Marisco, Ltd. v. F/V Madee*, 631 F. Supp. 2d 1320 (D. Haw. 2009); *Thompson v. City of Atlantic City*, 190 N.J. 359, 921 A.2d 427 (2007) (noting that enforcement of a federal settlement agreement can occur through ancillary jurisdiction when a federal court has specifically retained jurisdiction by incorporating the terms of a settlement agreement in a dismissal order).

A trial court's lack of jurisdiction to consider a plaintiff's complaint to enforce a settlement allegedly reached in mandatory mediation on appeal does not deprive the plaintiff of a remedy in violation of due process rights. *Nielsen v. Brocksmith*, 2004 MT 259, 323 Mont. 98, 99 P.3d 181 (2004).

4 *Albert v. Albert*, 36 So. 3d 143 (Fla. Dist. Ct. App. 3d Dist. 2010).

5 *Hines v. Lukes*, 167 Cal. App. 4th 1174, 84 Cal. Rptr. 3d 689 (2d Dist. 2008).

6 *Reis v. Iowa Dist. Court for Polk County*, 787 N.W.2d 61 (Iowa 2010).

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60 C.J.S. Motions and Orders § 22

Corpus Juris Secundum  
Database updated March 2013  
Motions and Orders

Sonja Larsen, J.D.

II. Motions  
C. Order to Show Cause

Topic Summary References Correlation Table

§ 22. Generally

**West's Key Number Digest**

**West's Key Number Digest, Motions § 22**

A rule or order to show cause is one directing a party to appear and show cause why a certain thing should not be done; the process is civil and auxiliary, shortening the notice generally prescribed for ordinary motions.

An order or rule to show cause is an order requiring a party to appear and show cause why a certain thing should not be done or permitted.<sup>1</sup> It can be understood as providing notice of a legal proceeding to a relevant party.<sup>2</sup> It is a contradictory motion which commands a party to appear.<sup>3</sup> Like a summons, an executed show cause order provides the adverse party with notice that an action has been instituted, prescribes the time in which response is to be made, and at least by implication apprises the party of the consequences of failing to respond.<sup>4</sup> On the other hand, an unexecuted order to show cause has no legal effect.<sup>5</sup> A proposed or unexecuted show cause order lacks the indicia of a summons and, until it has been executed, not only can the proposed order not issue, but it also does not contain the critical information necessary to constitute proper notification.<sup>6</sup>

An order to show cause may constitute process<sup>7</sup> to which the person to whom it is directed may or may not respond by appearance before the issuing tribunal since it lacks the compulsory character of the direction in a criminal process.<sup>8</sup> A rule or order to show cause usually implies a pending suit.<sup>9</sup> It can issue only after commencement of the action.<sup>10</sup>

The right to initiate an original proceeding by a rule to show cause must derive from express statutory authority.<sup>11</sup> A rule to show cause is an ex parte procedure, is auxiliary by nature, and may not substitute for original process.<sup>12</sup>

***Rule nisi.***

In general, a rule nisi is a process of court which issues in pending litigation to formally notify parties of, and compel them to appear at, hearings for determination, prior to trial, of preliminary, temporary, or other interlocutory matters.<sup>13</sup> Issues that can be litigated in a rule nisi proceeding are limited; a rule nisi proceeding is for enforcement purposes only.<sup>14</sup> Rules to show cause are rules nisi, which the court must allow after notice and an opportunity to respond;<sup>15</sup> they are either discharged or made absolute by the court.<sup>16</sup> A rule nisi orders the respondent to show cause why certain actions should not be taken, but the burden of showing the necessity for taking the action is on the movant.<sup>17</sup> Nisi orders are conditional and empower the affected

party either to avoid the adverse order of the court or to cause an existing adverse order to be set aside or vacated by complying with specified conditions.<sup>18</sup> The rule is obtained on an ex parte motion to show cause against the particular relief sought.<sup>19</sup>

Footnotes

- 1 Md.—Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).  
Pa.—Com. ex rel. Zimmerman v. Auto Mart, Inc., 910 A.2d 171 (Pa. Commw. Ct. 2006).
  - 2 Conn.—State v. Miscellaneous Fireworks, 132 Conn. App. 679, 34 A.3d 992 (2011).
  - 3 La.—Barrios v. Barrios, 694 So. 2d 290 (La. Ct. App. 1st Cir. 1996), writ denied, 672 So. 2d 691 (La. 1996).
  - 4 Md.—Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).
  - 5 N.Y.—Way v. Goord, 15 A.D.3d 741, 790 N.Y.S.2d 248 (3d Dep't 2005).
  - 6 Md.—Prince George's County v. Vieira, 340 Md. 651, 667 A.2d 898 (1995).
  - 7 Mo.—Schwartz v. Jacobs, 352 S.W.2d 389 (Mo. Ct. App. 1961).
- Used only as initial process**
- N.J.—Solondz v. Kornmehl, 317 N.J. Super. 16, 721 A.2d 16 (App. Div. 1998).
  - 8 W.Va.—State ex rel. Calandros v. Gore, 126 W. Va. 614, 29 S.E.2d 476 (1944).
  - 9 Vt.—Vermont Division of State Bldgs. v. Town of Castleton Bd. of Adjustment, 138 Vt. 250, 415 A.2d 188 (1980).
  - 10 Vt.—Vermont Division of State Bldgs. v. Town of Castleton Bd. of Adjustment, 138 Vt. 250, 415 A.2d 188 (1980).
  - 11 La.—Voinche v. Lecompte Trade School, 220 La. 126, 55 So. 2d 889 (1951).  
N.J.—Schuster v. Board of Ed. of Hardwick Tp., Warren County, 8 N.J. Super. 415, 72 A.2d 910 (Ch. Div. 1950), judgment aff'd on other grounds, 17 N.J. Super. 357, 86 A.2d 16 (App. Div. 1952).
  - 12 Pa.—Com. ex rel. Zimmerman v. Auto Mart, Inc., 910 A.2d 171 (Pa. Commw. Ct. 2006).
  - 13 Ga.—Herring v. Standard Guaranty Ins. Co., 238 Ga. 261, 232 S.E.2d 544 (1977).
  - 14 Fla.—Gruber v. Caremark, Inc., 853 So. 2d 540 (Fla. 5th DCA 2003).
  - 15 Pa.—Plank v. Monroe County Tax Claim Bureau, 735 A.2d 178 (Pa. Commw. Ct. 1999).
  - 16 Pa.—Com. ex rel. Zimmerman v. Auto Mart, Inc., 910 A.2d 171 (Pa. Commw. Ct. 2006).
  - 17 Ga.—Herring v. Standard Guaranty Ins. Co., 238 Ga. 261, 232 S.E.2d 544 (1977).
  - 18 Conn.—State v. Miscellaneous Fireworks, 132 Conn. App. 679, 34 A.3d 992 (2011).
  - 19 Ga.—Herring v. Standard Guaranty Ins. Co., 238 Ga. 261, 232 S.E.2d 544 (1977).

# WASHINGTON STATE ATTORNEY GENERAL

**May 14, 2013 - 2:45 PM**

## Transmittal Letter

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Case Name: Eagle systems, Inc. et al. v. State of Washington Employment Security Department

Court of Appeals Case Number: 44635-9

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

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