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DIVISION II

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STATE OF WASHINGTON

BY ~~DEPUTY~~

NO. 67809-4

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

ALFRED BARBER, III, Appellant,

v.

BEVERLY ANKENY and CHARLES ANKENY, Respondents.

Appeal from the Superior Court of King County  
The Honorable Cheryl Carey, Department No. 2  
King County Superior Court Cause No. 11-2-08033-1 KNT

REPLY BRIEF OF APPELLANT

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## I. APPELLANTS' REPLY BRIEF

In the Respondents' Reply Brief, the Respondents Ankeny have misconstrued the facts and cited inapposite or outdated cases.

**1. The authority urged by Respondents is inapposite.**

The cases urged by the Respondents involved a general release in which there was no language of reservation, and they are thus distinguishable from the instant case. In the instant case, the opinions in those cases apply only where there is no contrary contractual term. Having no express language indicating an intent to preserve a right, the releases and cases cited by respondent were all subject to only one interpretation.

Respondent relies heavily on *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1993), claiming that it is factually similar to the instant case. It is not. Nor is it pertinent. Watson signed an unconditional release which contained no limiting language or reservation of rights. *Watson* at 182. The absence of language indicating an intent to reserve claims was a driving factor in the analysis. *See, Watson* at 188. In

the instant case, however, the release signed by the plaintiff Barber indicated that “Nothing in this General Release of All Claims applies to the liability insurance applicable to this claim provided by GMAC, the insurance company of Beverly Ankeny and Charles Ankeny.” The release signed by Mr. Barber thus contained an express provision reserving rights. As such, interpretation of the contract language and the intent of the parties are critical to the outcome of this case.

The *Watson* opinion indicates that a factor in the outcome was the availability of Watson's own UIM coverage to make him whole. Having no excess insurance coverage, Mr. Barber was not made whole.

Watson received benefits from Nationwide. It was therefore a contract supported by consideration. The *Watson* court noted that the release was valid as to a third party because it was supported by consideration. *Watson* at 194 – 195. In the instant case, no consideration was given by the Respondents. Mr. Barber received no benefits from the Ankenys or GMAC. As such, the Ankenys seeks to avail themselves of a contract for which they gave no consideration.

The other two mainstay cases in the Respondent's reply brief are also readily distinguishable. In *Metropolitan insurance Company v. Ritz*,

70 Wn.2d 317, 422 P.2d 780 (1967), the injured plaintiff signed an unconditional general release of all claims which contained no limiting language, and no reservation of rights. Unlike the instant case, there was absolutely nothing in the release which indicated an intent to preserve a claim. The release in that case was subject to only one interpretation.

Similarly, in *Brinkerhoff v. Campbell*, 99 Wash. App. 692, 697, 994 P.2d 911 (2000), the injured plaintiff signed a general unconditional release containing no limiting language. In that case, the injured plaintiff believed the available third-party policy limits were \$100,000. In reality, the policy limits were \$250,000. *Id.* At 694. Noting that there was a factual dispute as to whether the defense had deliberately misrepresented the policy limits, the court remanded for an evidentiary hearing to resolve the factual disputes. *Id.* at 700. *Brinkerhoff* was not a summary judgment case. It involved concerns about misrepresentation; no such concerns are present in the instant case. The analysis in *Brinkerhoff* is of no import to the instant case.

2. **The parole evidence rule has been abrogated and the declarations of Chad Legg and Olga Rodriguez should not have been stricken.**

“The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” *Berg v. Hudesman*, 115 Wash.2d 657, 663, 801 P.2d 222 (1990), quoting Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 Cornell L.Q. 161, 162 (1964 -1965).

The intent of the contracting parties is most clearly obtained by considering the declarations of the contracting parties. The lower court struck the declarations of Chad Legg and Olga Rodriguez, which were submitted by Appellant Barber in opposition to respondent’s motion for summary judgment. Presumably, this was done under the auspices of the parole evidence rule.

Respondents Ankeny contend here, as they did below, that the parole evidence rule precludes admission of the declarations of the contracting parties. In support of that contention, Respondents urge a number of cases, all of which were authored decades prior to *Berg v. Hudesman*, 115 Wash.2d 657, 801 P.2d 222 (1990), which struck down the parole evidence rule: “We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the

surrounding circumstances is admissible. Cases to the contrary are overruled.” *Berg* at 669. Clearly, parole evidence is admissible for the purpose of ascertaining the intention of the parties and properly construing the writing. *Id.* It was error for the lower court to strike the declarations of Olga Rodriguez and Chad Legg.

**3. The Respondents Ankeny lack standing to enforce the release contract.**

The declarations of Olga Rodriguez and Chad Legg clearly indicate an intent by the contracting parties to reserve a claim. The parties did not intend to confer a benefit upon the Ankenys. Because no benefit was intended, the Ankenys lack standing. The Ankenys were not a party to the contract. They gave no consideration in support of the contract. They had no part in the negotiation or drafting of the release contract. A third-party beneficiary contract exists when the contracting parties intended to create one. *Postlewait Constr., Inc. V. Great Am. Ins. Cos.*, 106 Wash. 2d 96, 99, 720 P.2d 805 (1986). The test is whether the contracting parties intended that a third person should receive the benefit which might be enforced in the courts. 17 Am.Jur 2d Contracts §430 (2008).

“The question whether a contract is made for the benefit of a third person is one of construction. The intention of the parties in

this respect is determined by the terms of the contract as a whole construed in the light of the circumstances under which it was made. *Grand Lodge of Scandinavian Fraternity, etc. v. United States Fidelity & Guar. Co.*, 2 Wash.2d 561, 569, 98 P.2d 971, 975 (1940). In regard to the requisite intent, in *Vikingstad v. Baggott*, 46 Wash.2d 494, 282 P.2d 824, we recognized the rule stated in 81 A.L.R. 1271, 1287, that such 'intent' is not a desire or purpose to confer a benefit upon the third person, nor a desire to advance his interests, but an intent that the promisor shall assume a direct obligation to him. *American Pipe & Constr. Co. v. Harbor Constr. Co.*, 51 Wash.2d 258, 266, 317 P.2d 521, 526 (1957).”

*McDonald Const. Co. v. Murray*, 5 Wash. App. 68, 70 – 71, 485 P.2d 626 (1971).

Conferring a benefit upon the Ankenys was never the intent of the contracting parties. As the language of the contract indicates, and as the declarations of the contracting parties indicate, the intent of the parties was to preserve rather than release a claim.

Respondents urge that the language of the contract must be interpreted to preserve only a direct claim against the Ankenys insurer, GMAC. The contract interpretation urged by Respondents is one that yields absurd results, for this is a claim that does not exist under Washington law. One cannot release what one does not have, and an injured party does not have a direct cause of action against a third-party insurer in the State of Washington. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 393-394, 715 P.2d 1133 (Wash. 1986). Axiomatic principles of contract construction would dictate that this court must avoid

strained or forced construction of contract language which leads to absurd results. *See, e.g. Eurick v. Pemco Ins. Co.*, 108 Wash.2d 338, 341, 738 P.2d 251 (1987); *McMahan & Baker, Inc. v. Continental Cas. Co.*, 68 Wash.App. 573, 843 P.2d 1133 (1993).

**4. Equitable Estoppel is applicable to this case.**

The Respondents' insurer had notice of the claim, processed the claim, and is estopped from asserting that the Ankenys have been released from liability.

Because the claims representative for GMAC accepted and processed the claim, GMAC is equitably estopped from asserting the release defense. For equitable estoppel to apply, the plaintiff must prove: (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act. *Laymon v. Washington State Dept. of Natural Resources*, 99 Wn. App. 518, 526, 994 P.2d 232 (Wash.App. Div 2 2000); *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 831, 881 P.2d 986 (1994).

In the instant case, all three components of equitable estoppel are present. As to the first prong of the test, an admission, statement or act inconsistent with a claim later asserted, GMAC notified Appellant Barber that "...As you know, we are providing excess coverage for this loss." *CP at 93*.

The second prong of the equitable estoppel test contemplates reasonable reliance on that admission, statement, or act by the other party. In the instant case, GMAC acknowledged plaintiff's claim and continued to work towards resolution of the claim, thus inducing Appellant Barber to act in reliance on GMAC having stated it would provide coverage for the subject incident and offering settlement on the claim.

Finally, the plaintiff must demonstrate injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act. In the instant case, the plaintiff's statute of limitations period has expired. Had GMAC indicated that it would not settle the claim with Mr. Barber based on the release provided to them during the course of negotiations, the plaintiff would have not completed settlement and filed suit prior to settling the claim with Pemco, as advised by GMAC. A summary judgment dismissal terminates the claim and leaves the

plaintiff with no relief for his injuries and the economic burdens attendant to the claim.

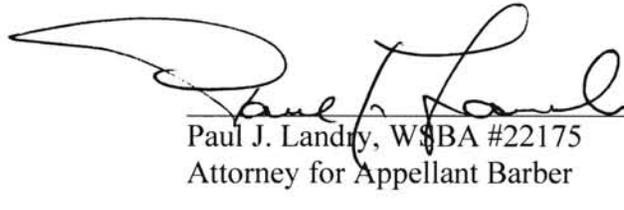
Equitable estoppel is based on the notion that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Kramarevcky v. Department of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993). The Ankenys and GMAC, through its claims representative acknowledged receipt of the plaintiff’s claim, negotiated and offered to pay a portion of the claim, and expressly stated a desire to negotiate and resolve the injury component of the plaintiff’s claim. Plaintiff justifiably and in good faith relied upon those assertions. The Ankenys and GMAC should be held to those representations and the motion for summary judgment should have been denied.

### **CONCLUSION**

The intent of the parties is controlling, and it can be discerned not only through the language in the contract, but also in the declarations of Chad Legg and Olga Rodriguez. Those declarations should not have been stricken by the lower court.

The language of the release in the instant case clearly indicates that the parties intended to reserve a claim against the Ankenys. The contracting parties did not intend to confer a benefit upon the Ankenys. Because no benefit was intended, the Ankenys lack standing to enforce the release agreement. The contract interpretation urged by respondent is one that yields absurd results. For the foregoing reasons, this matter should be remanded for trial.

RESPECTFULLY SUBMITTED this 8th day of June, 2012.



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**CERTIFICATE OF SERVICE**

I certify that on the 8<sup>th</sup> day of June, 2012, I filed the Original Appellant's Reply Brief to the Washington State Court of Appeals, Division I, and a copy of the same to the following recipient via ABC LEGAL MESSENGER:

**THE COURT OF APPEALS, DIVISION I**

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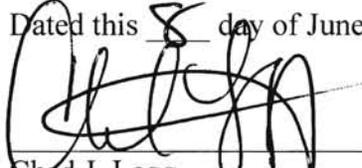
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Dated this 8 day of June, 2012.

  
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