

No. 72658-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

Respondent/Plaintiff David Brown, Inc. *dba* Fox Plumbing & Heating (“**Fox Plumbing**”) is a major player in the Seattle metropolitan area’s retail plumbing business, and advertises with a cartoon fox fixing a leaky pipe on a yellow backdrop.



Appellant/Defendant Act Now Plumbing LLC *dba* Gary Fox Plumbing (“**Act Now Plumbing**”), is owned by a Ukrainian immigrant, Igor Ivanchuk, who has limited English proficiency, is a small Kent plumbing company which serves as David to Fox Plumbing’s Goliath. In 1984, Fox Plumbing sued Act Now Plumbing’s predecessor in business, Gary Fox, alleging trade mark infringement based on its using the name “Fox Delux” and a fox animal logo of a fox in its mark. That suit was resolved with a stipulated order barring use of a fox logo but allowing use of the name “Gary Fox.” What was “Fox Delux” became “Gary Fox Plumbing,” and instead of a fox logo a cartoon plumber logo was adopted:



In 2009, Fox Plumbing again sued Act Now Plumbing d/b/a Gary Fox Plumbing and Igor Ivanchuk (now owned by the Defendant) for trademark infringement, seeking to enjoin its use of the “fox” name all together. The trial court granted Act Now Plumbing’s motion for summary judgment, finding that no reasonable person could find the Gary Fox Plumbing and the Fox Plumbing marks confusingly similar. Fox Plumbing subsequently appealed the trial court’s decision to this Court of Appeals, arguing in part that the October 27, 2008 Purchase and Sale Agreement and Bill of Sale between Gary Fox and Ivanchuk was not valid, and that Fox Plumbing owned the rights to the Gary Fox Plumbing mark. On September 24, 2012, this Court of Appeals affirmed the trial court’s dismissal of Fox Plumbing’s claims against Act Now Plumbing.

However, within two weeks of the Court of Appeals’ decision, Fox Plumbing filed a second lawsuit against Act Now Plumbing and Igor Ivanchuk for declaratory judgment and injunctive relief based on the same facts and issues that it raised and litigated in the first lawsuit. Because the

evidence was undisputed that Gary Fox had abandoned the Gary Fox Plumbing mark in October 2008 prior to any alleged assignment of the mark to Fox Plumbing in January 2011, and because Fox Plumbing had also abandoned the mark through non-use for three consecutive years, Act Now Plumbing filed a motion for summary judgment seeking to dismiss Fox Plumbing's claims. Fox Plumbing argued that the Gary Fox mark was a surname, and even though it was a trademark, it cannot be abandoned through nonuse. Incredibly, the trial court denied Act Now Plumbing's motion ruling that even if a surname has been adopted and used as a trademark or trade name, it is not subject to the common law principles and statutory provisions pertaining to all types of marks, including abandonment and assignment in gross. The trial court denied Act Now Plumbing's motion for reconsideration.

Within weeks of the court's denial of Act Now Plumbing's motion for reconsideration, the case was placed on standby for trial, which was originally scheduled on March 24, 2014. Fox Plumbing argued that the trial court's order denying Act Now Plumbing's motion for summary judgment precluded Act Now Plumbing from raising its affirmative defenses of abandonment and assignment in gross. Because Act Now Plumbing believed that the trial court would prohibit it from raising these affirmative defenses at trial, and due to the expense of a trial and another

appeal, it felt it had no choice but to settle the case. On March 31, 2014, the parties agreed on a CR 2A settlement whereby Fox Plumbing agreed to pay Act Now Plumbing the lump sum of \$45,000 in exchange for Act Now Plumbing agreeing to cease using the trade name "Gary Fox Plumbing & Heating" in perpetuity. The Agreement was that Act Now Plumbing would retain their logo and use the trade name "Gary's Fix-It Plumbing & Heating" or "Gary's Plumbing & Heating," and that Act Now Plumbing would have six months to transition their trade name.

Two weeks later, Fox Plumbing's counsel proposed a formal Settlement Agreement that contained numerous new terms and conditions that were never negotiated or agreed to Act Now Plumbing. Over the next two months, Fox Plumbing's counsel added even more new terms and conditions to the parties' settlement agreement, including changing the agreement of a lump sum settlement payment of \$45,000 to now require that the settlement be paid in installments with \$10,000 being paid within five days and the remaining \$35,000 being deposited into Fox Plumbing's counsel's trust account which would not be paid to Act Now Plumbing until after the 6 month transition period. After numerous discussions, on May 22, 2014, the parties finally reached an agreement on the terms of the formal settlement agreement, with the exception of the timing of the \$45,000 settlement payment to Act Now Plumbing.

Fox Plumbing then filed a “Motion for Judicial Interpretation of CR 2A Settlement Agreement” requesting that the trial court rule that the CR 2A Settlement Agreement was ambiguous concerning when payment of the \$45,000 settlement was due, and to supply the payment terms which should include an installment payment of \$10,000, and the remaining \$35,000 payment to be paid upon completion of Act Now Plumbing’s completion of the transition. Act Now Plumbing argued that it never agreed to any installment payments, and that Fox Plumbing agreed to pay a lump sum settlement of \$45,000 which was a condition precedent to its agreement to cease use of the name “Gary Fox Plumbing & Heating” in their business. The trial court erroneously ruled that the parties’ settlement should include court supplied terms and conditions, including that Fox Plumbing may pay the \$45,000 in installments, with \$10,000 to be paid immediately, but the “remaining \$35,000 shall be deposited into the Court registry, pending further order of the Court. The trial court’s order provided that upon completion of performance, Defendant’s counsel may apply for disbursement of funds, supported by a declaration of counsel and supporting evidence of full performance.” The trial court improperly added new terms and obligations to the settlement agreement that were never agreed to by Act Now Plumbing. The trial court’s order

now requires Act Now Plumbing to prove to the court its entitlement to the remaining \$35,000 settlement funds, which have yet to be paid.

Even before the six month transition period was up, Fox Plumbing accused Act Now Plumbing of violating the terms of the settlement agreement by using a domain name “garyfix.com” for its new website for “Gary’s Fix-It Plumbing & Heating.” The trial court again erroneously entered an order granting Fox Plumbing’s Motion to Enforce the Settlement Agreement ruling that although technically a trademark or trade name is not legally the same thing as a domain name, in the modern world a business domain name is integral with that business’ trade name. The trial court improperly implied new terms to the settlement agreement, i.e., that a trade name is the same as an internet domain name. The trial court then ordered that Act Now Plumbing take down and cease use of the domain name “garyfix.com”, and awarded fees and costs to the Fox Plumbing.

Fox Plumbing thereafter filed a motion for attorneys’ fees incurred in connection with the Motion to Enforce. The trial court granted the motion and entered an “Order and Judgment” awarding over \$6,560 in fees and costs to Fox Plumbing. The order contains findings of fact and conclusions of law and a “Judgment Summary” making it immediately enforceable.

II. ASSIGNMENTS OF ERROR

Act Now Plumbing makes the following assignments of error:

1. The trial court erred in granting Fox Plumbing's Motion for Judicial Interpretation of the CR 2A Settlement Agreement and implying new terms and obligations to the parties' agreement which Act Now Plumbing never agreed to, which allowed Fox Plumbing to pay Act Now Plumbing only \$10,000 of the \$45,000 settlement, and placing the remaining \$35,000 settlement funds into the court registry for six months, and requiring Act Now Plumbing to seek the court's approval before it is entitled to these settlement funds.

2. The trial court erred in granting Fox Plumbing's Motion to Enforce the Settlement Agreement and implying new terms to the parties' agreement that prohibit use of an internet domain name "garyfix.com" when the settlement agreement clearly only prohibits use of the trade name "Gary Fox."

3. The trial court erred in granting Fox Plumbing's Motion for Attorneys' Fees and Costs and entering findings of fact and a "Judgment" awarding Fox Plumbing over \$6,560 in fees and costs on the Motion to Enforce the Settlement Agreement.

III. STATEMENT OF THE CASE

A. *Origins of Gary Fox Plumbing.*

Gary Fox was an employee of *VIRGIL FOX PLUMBING AND HEATING* (which would later become *FOX PLUMBING*) from 1980 to 1981. (CP 17.) In October 1982, Gary Fox began operating a plumbing business in Kent under the mark *FOX DELUX PLUMBING*. (CP 17.) Similar to the Fox Plumbing mark, the *FOX DELUX PLUMBING* mark also included a fox logo. (CP 17.)

On October 29, 1984, Fox Plumbing filed suit against Gary Fox's legal entities for trademark and trade name infringement, seeking to enjoin Gary Fox from advertising under or using the trade name *FOX DELUX* or using an image of a fox in its mark. (CP 17.) Thereafter, Fox Plumbing and Gary Fox "reached agreement as to the terms and conditions of [a] permanent injunction," which was entered by the court on or about May 24, 1985. (CP 17.) The Agreed Permanent Injunction enjoined Gary Fox, his entities, "and their officers, agent, employees, representatives and all persons acting in concert or participating with them," from both (a) using a trademark containing an image of a fox, and (b) "using the trade name 'FOX DELUX' in any form of display or advertising whatsoever anywhere in King County." (CP 17.) As part of the agreed injunction,

Gary Fox was allowed to use the name *GARY FOX PLUMBING*, so long as it did not include an image of a fox in the mark. (CP 17-18.)

In accordance with the Agreed Permanent Injunction, for the next 23 years (1985-2008) Gary Fox continued to operate his business under the name *GARY FOX PLUMBING* (or slight variations thereof) with a mark containing the company name next to the company logo – an image of a burly plumber rather than a fox – and the company slogan. (CP 17-18.)

B. *Appellant/Defendant Act Now Plumbing LLC.*

Igor Ivanchuk (the Appellant/Defendant’s principal and sole member, hereinafter “Igor”) is a Ukrainian immigrant who cannot read or write English. (CP 21-22.) In 2007, Gary Fox hired his friend Igor to work for *GARY FOX PLUMBING* as a plumber’s helper. (CP 18.) In the Spring of 2008, Gary Fox informed Igor that he had lung cancer, and that he would be willing to sell Igor his company *GARY FOX PLUMBING*. (CP 18-19.) In anticipation, Igor began purchasing some of *GARY FOX PLUMBING*’s assets, including several of the company vans/trucks. (CP 19-20.)

In Fall 2008, Gary Fox and Igor reached an agreement on terms for the purchase and sale of *GARY FOX PLUMBING*. (CP 19.) On or about October 27, 2008, Gary Fox and Igor executed a Purchase and Sale Agreement (“October PSA”) and a Bill of Sale for the transfer of *GARY FOX*

PLUMBING to Igor. (CP 19.) In April 2009, Gary Fox moved to California and never used the mark. (CP 20.) Gary Fox admitted that he abandoned the Gary Fox Plumbing mark in October 2008 with no intention of resuming the mark in the foreseeable future. (CP 20.)

C. *Fox Plumbing Files First Lawsuit against Act Now Plumbing.*

On October 15, 2009, Fox Plumbing filed its first lawsuit against Act Now Plumbing, asserting causes of action for:

- (1) statutory trademark imitation and statutory trademark dilution under RCW 19.77 (collectively referred to hereinafter as “statutory trademark infringement”),
- (2) unfair competition and consumer protection act violations (RCW 19.86) (referred to hereinafter as “CPA”), and
- (3) tortious interference with business expectations and relations (referred to hereinafter as “TI”).

Fox Plumbing later amended its Complaint to add a claim for common-law trademark infringement. (CP 20-21.) In January 2011, Act Now Plumbing filed a motion for summary judgment of Plaintiff’s statutory infringement claims. Fox Plumbing argued that Act Now Plumbing never owned the Gary Fox Plumbing trade name or trade mark and that it had acquired the Gary Fox Plumbing mark under a January 2011 Agreement. (CP 22.) On March 24, 2011, the trial court granted Act Now Plumbing’s motion for summary judgment dismissing Fox Plumbing’s claims with prejudice. (CP 23.)

On April 15, 2011, Fox Plumbing appealed the trial court's decision arguing that the October 27, 2008 Purchase and Sale Agreement and Bill of Sale were never concluded and that it was the owner of the Gary Fox Plumbing trade name and trademark under a January 2, 2009 Agreement. (CP 23.) On September 24, 2012, the Court of Appeals, Division I, affirmed the trial court's order dismissing Fox Plumbing's claims and issued a mandate. (CP 24.)

D. *Fox Plumbing Files Second Lawsuit against Act Now Plumbing.*

Within two weeks of the Court of Appeals' decision, on November 28, 2012, Fox Plumbing filed a second lawsuit against Act Now Plumbing and Igor Ivanchuk for declaratory judgment and injunctive relief based on the same facts and issues it raised and litigated in the first lawsuit. (CP 1-8.) The Complaint seeks a declaratory judgment and injunctive relief declaring that Fox Plumbing is the rightful owner of the Gary Fox Plumbing mark under the terms of the January 2011 Purchase and Sale Agreement and Trademark Assignment. (CP 1-8.)

E. *The Trial Court's Erroneous Decision on Act Now Plumbing's Motion for Summary Judgment.*

On February 10, 2014, Act Now Plumbing filed a motion for summary judgment of Fox Plumbing's claims alleging in part that Fox Plumbing has no rights to the Gary Fox Plumbing trade mark because the

mark was abandoned by Gary Fox in October 2008, prior to the alleged assignment of the Mark to Fox Plumbing in January 2011, that Fox Plumbing has no rights to the Mark because the Mark was abandoned by Fox Plumbing through non-use for three consecutive years, and that the alleged assignment of the Mark in January 2011 was an invalid assignment-in-gross. (CP 10-30.) Fox Plumbing argued that Act Now Plumbing is equitably estopped from arguing abandonment and an invalid assignment-in-gross, and that abandonment does not apply to one's surname even if it is a trade name. (CP 398-403.) The trial court erroneously ruled "that a living person does not abandon his or her given name through disuse, such that another may use that given name commercially" and that "Act Now Plumbing cannot prevail on summary judgment simply by showing that Gary Fox discontinued using his name as part of a plumbing business, even if Gary Fox did not evidence any intent to continue using his name commercially." (CP 409-414 and CP 444-446.) The trial court's ruling is contrary to established case law finding that once a person uses his surname as a trade name or trademark, the mark is subject to the same principles surrounding abandonment as any other mark and forecloses the argument that a person cannot abandon his surname. (CP 417-426.)

F. *The Parties' CR 2A Settlement.*

Within weeks of the court's denial of Act Now Plumbing's motion for summary judgment, the case was placed on standby for trial, which was originally scheduled on March 24, 2014. Fox Plumbing argued that the trial court's order denying Act Now Plumbing's motion for summary judgment precluded Act Now Plumbing from raising its affirmative defenses of abandonment and assignment in gross. On March 31, 2014, the parties agreed on a CR 2A settlement whereby Fox Plumbing agreed to pay Act Now Plumbing \$45,000 in exchange for Act Now Plumbing agreeing to cease using the name "Gary Fox Plumbing & Heating" in perpetuity. (CP 544-546 and CP 551-554.) The Agreement was that Act Now Plumbing would retain their logo and use the trade name "Gary's Fix-It Plumbing & Heating" or "Gary's Plumbing & Heating," and that Act Now Plumbing would have six months to transition their trade name. (CP 544-546 and CP 551-554.)

Two weeks later, Fox Plumbing's counsel proposed a formal Settlement Agreement that contained numerous terms and conditions that were never negotiated or agreed to Act Now Plumbing. (CP 545-557.) Over the next two months, Fox Plumbing's counsel added even more new terms and conditions to the parties' settlement agreement, including changing the agreement of a lump sum settlement payment of \$45,000 to

now require that the settlement be paid in installments with \$10,000 being paid within five days and the remaining \$35,000 being deposited into Fox Plumbing's counsel's trust account which would not be paid to Act Now Plumbing until after the 6 month transition period. (CP 473-478; 498-520.) After numerous discussions, on May 22, 2014, almost two months after the parties' CR 2A settlement, the parties finally reached an agreement on the terms of the formal settlement agreement, with the exception of the timing of the \$45,000 settlement payment to Act Now Plumbing. (CP 514-520.)

G. The Trial Court's Erroneous Decision on Fox Plumbing's Motion for Judicial Interpretation of CR 2A Settlement Agreement.

Fox Plumbing subsequently filed a Motion for Judicial Interpretation of CR 2A Settlement Agreement requesting that the trial court rule that the CR 2A Settlement Agreement is ambiguous concerning when the settlement payment of the \$45,000 was supposed to be paid to Act Now Plumbing, and requested that the trial court supply the payment terms to require it to make only an installment payment of \$10,000, and pay the remaining \$35,000 upon Act Now Plumbing's six month completion of the transition to the new trade name. (CP 447-457; CP 460-520; CP 521-524). Act Now Plumbing argued that the court cannot rewrite the clear and unambiguous provisions of the parties' CR 2A

Agreement, or impose obligations that the parties did not assume for themselves. (CP 529-541; CP 544-568.) The CR 2A Agreement clearly requires Fox Plumbing to pay Act Now Plumbing a lump sum settlement of \$45,000, in exchange for Act Now Plumbing agreeing to cease using the name “Gary Fox Plumbing & Hearing” in their business. Fox Plumbing’s new terms and conditions which now require payment of only \$10,000 with the remaining \$35,000 deposited into Fox Plumbing’s counsel’s trust account, and only payable after Fox Plumbing approves Act Now Plumbing transition to the new trade name in six months, are new terms and conditions that were clearly never part of the parties’ CR 2A Agreement. (CP 529-541; CP 544-568.)

The trial court erroneously ruled that the parties’ settlement should include the following court supplied terms and conditions:

The Court supplies the following terms to the CR 2A Settlement Agreement with respect to the timing of payment:

Brown shall pay the Defendants the total sum of forty-five thousand dollars (\$45,000). Payment shall be made as follows: ten thousand dollars (\$10,000) is to be paid immediately.¹ The remaining thirty-five thousand dollars (\$35,000) shall be deposited into the Court registry, pending further order of the Court. Upon completion of performance, Defendants’ counsel may apply for disbursement of funds, supported by a declaration of counsel and supporting evidence of full performance. Such application shall be submitted in accordance with KCLR 7.

The Parties shall prepare and execute a written Settlement and Release Agreement consistent with their CR 2A and with this Order.

Footnote 1 Plaintiff offered to pay \$10,000 immediately as part of the parties' communications through counsel during the parties' efforts to finalize their settlement agreement.

(CP 577-580).

H. *The Trial Court's Erroneous Decision on Fox Plumbing's Motion to Enforce Settlement Agreement.*

Fox Plumbing then accused Act Now Plumbing of violating the terms of the settlement agreement by using a domain name "garyfix.com" for its new website for "Gary's Fix-It Plumbing & Heating." (CP 581-589.) Act Now Plumbing argued that the settlement agreement does not even mention the use of a domain name, and only prohibits use of certain trade names. Act Now Plumbing also argued that compliance with the settlement agreement is not required until December 24, 2014 and the motion was premature at best. (CP 624-630; CP 633-651). The trial court again erroneously entered an order granting Fox Plumbing's Motion to Enforce the Settlement Agreement ruling that although technically a trademark or trade name is not legally the same thing as a domain name, in the modern world, a business domain name is integral with that business' trade name. (CP 658-661.) The trial court improperly implied its own terms to the settlement agreement, i.e., that a trade name is the

same as an internet domain name. The trial court then ordered that Act Now Plumbing take down and cease use of the domain name “garyfix.com,” and awarded fees and costs to Fox Plumbing. (CP 658-661.)

I. *The Trial Court’s Erroneous Decision Granting Fox Plumbing’s Motion for Attorneys’ Fees and Costs on the Motion to Enforce Settlement Agreement.*

Fox Plumbing thereafter filed a motion for attorneys’ fees incurred in connection with the Motion to Enforce. (CP 662-668; CP 674-696.) Act Now Plumbing objected to the motion contending that they were justified in their position that a trade name is not the same as an internet domain name, and that the trial court’s decision improperly implied new terms to the settlement agreement to include prohibition of the use of an internet domain name “garyfix.com.” (CP 697-711.) The trial court granted the motion and entered an “Order and Judgment” awarding over \$6,560 in fees and costs to Fox Plumbing. (CP 737.) The order contains findings of fact and conclusions of law and a “Judgment Summary” making it immediately enforceable. (CP 737-740.)

IV. ARGUMENT

A. *Standard of Review*

The Court of Appeals reviews decisions enforcing a settlement agreement *de novo*, because the evidence before the trial court consists

entirely of affidavits and the proceeding is similar to a summary judgment proceeding. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000).

B. *The CR 2A Agreement Clearly Required Payment of a Lump Sum Settlement of \$45,000 to Act Now Plumbing and the Trial Court Improperly Implied New Terms and Obligations.*

Enforcement of a 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 and to avoid disputes like the one between the parties. *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954).

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. *Brinkerhoff*, 99 Wn.App. at 696, 994 P.2d 911; *Lavigne v. Green*, 106 Wn.App. 12, 16, 23 P.3d 515 (2001). The 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, 994 P.2d 911. 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, 994 P.2d 911.

Settlements are considered under the common law of contracts. *In re Marriage of Ferree*, 71 Wn.App. 35, 39, 856 P.2d 706 (1993) (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 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, 115 P.3d 262. These words are given their ordinary, usual, and popular meaning unless a contrary intent is shown from the entirety of the agreement. *Id.* Courts should not revise a clear and unambiguous agreement or contract for parties or impose obligations that the parties did not assume for themselves. *Puget Sound Power & Light Co. v. Shulman*, 84 Wn.2d 433, 439, 526 P.2d 1210 (1974). Courts should 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).

Applying the principles of contract law to this settlement agreement, it is clear that trial court erred by enforcing terms that were not implied within the agreement. Here, there is no indication in the record that the CR 2A agreement required anything other than payment of a lump sum of \$45,000 from Fox Plumbing as condition precedent to Act Now Plumbing ceasing to use the name "Gary Fox Plumbing & Hearing" in perpetuity, 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). The trial court improperly implied that the settlement payment could be paid to Act Now Plumbing

in installment payments, and then placed new obligations on the settlement which required Act Now Plumbing to now prove to the trial court that it had fully complied with the settlement terms before it was entitled to the remaining \$35,000.

Yet, there is no evidence in the record that any of these terms were even contemplated by the parties. When Act Now Plumbing agreed to the CR 2A agreement on March 31, 2014, the agreement included only a lump sum payment of \$45,000. The first time that an installment payment was even suggested was on April 15, 2014, when Fox Plumbing's counsel made a change to the payment clause in the formal agreement, making the payment of \$45,000 on an installment basis of \$10,000 with the remaining \$35,000 deposited in Fox Plumbing's counsel's trust account, payable only after Act Now Plumbing completed performance of all of the terms of the settlement.

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

counsel admitted he added these new payment terms because he “does not feel comfortable paying all the money up front to your client before they have performed.” (CP 498-499).

The trial court had no discretion to enforce a settlement agreement where disputed facts remain unresolved. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911 (2000). Even though the evidence establishes the attorneys agreed on the amount of the settlement, it also establishes they did not discuss or reach an agreement on the date when the settlement payment would be made. However, in this situation, the trial court should have implied a reasonable time period for payment of the settlement amount. A reasonable time for performance may be implied when a contract imposes a definite obligation but fails to provide a time for its performance. *Byrne v. Ackerlund*, 108 Wn.2d 445, 455, 739 P.2d 1138 (1987). A reasonable time is to be determined by the nature of the contract, the positions of the parties, their intent, and the circumstances surrounding performance. *Pepper & Tanner, Inc. v. KEDO, Inc.*, 13 Wn.App. 433, 435, 535 P.2d 857 (1975). What constitutes a reasonable time is a question of fact. *Smith v. Smith*, 4 Wn.App. 608, 612, 484 P.2d 409 (1971). Findings of fact are reviewed under the substantial evidence standard. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Substantial evidence is evidence sufficient to

persuade a fair-minded, rational person of the truth of the finding. *Id.* The trial court had the authority to order enforcement and to determine that Fox Plumbing exceeded a reasonable amount of time for payment of the settlement.

Here, the CR 2A Agreement specifically required payment of a lump sum of \$45,000, as consideration for Act Now Plumbing agreeing to cease using the trade name “Gary Fox Plumbing & Heating.” There was no indication that the settlement payment would be paid in installments, or that the remaining \$35,000 settlement funds would have to be placed in the court registry, or that Act Now Plumbing would have to prove to the trial court with supporting evidence of full performance before it would be entitled to disbursement of the remaining settlement funds. Instead, the trial court abused its discretion by not first holding an evidentiary hearing to resolve the disputed issues of fact concerning timing of the payment of the settlement. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 697, 994 P.2d 911 (2000). The trial court improperly added new terms and obligations to the settlement agreement that Act Now Plumbing never agreed to and were not part of the parties’ CR 2A Agreement. There is nothing in the CR 2A agreement that states that the payment of the \$45,000 settlement can be made in installments, or that any portion of the settlement can be paid only “upon completion of performance” or that Act Now Plumbing

must prove to the trial court that it has fully performed before it is entitled to the remaining \$35,000 settlement. All of these terms and conditions were improperly implied by the trial court.

The court should reverse the order granting Fox Plumbing's motion for judicial interpretation of the CR 2A settlement agreement and order that the remaining settlement funds in the court registry be immediately paid to Act Now Plumbing.

C. *The Trial Court Improperly Implied That the Settlement Agreement Prohibits use of a Domain Name "garyfix.com."*

The trial court also erred in granting Fox Plumbing's motion to enforce the settlement by implying that the CR 2A Agreement prohibited use of an internet domain name "garyfix.com." In its motion to enforce the settlement agreement, Fox Plumbing argued that the settlement specifically required Act Now Plumbing to cease using the trade name "Gary Fox Plumbing & Heating" and not use the word "Fox" or any variation of the word in its new trade name. (CP 581-588). Both the CR 2A settlement agreement and the formal version of settlement agreement agreed to by the parties on March 31, 2014 provides that "Defendants may retain their logo and use the name 'Gary's Fix-It Plumbing & Heating' or 'Gary's Plumbing & Heating' or any other trade name or trademark it chooses so long as the trade name or trademark does not include the word

‘Fox’ or the word Gary together with any variation of the word ‘Fox’.” (CP 465; CP 561-568). Fox Plumbing claimed that it later learned that Act Now Plumbing had launched a new website for “Gary’s Fix-It Plumbing & Heating” using a new internet domain name “garyfix.com.” Fox Plumbing argued that Fox Plumbing’s use of the internet domain name of “garyfix.com” for its new website is a clear and material breach of the Settlement Agreement.

Upon petitioning the trial court for enforcement of a settlement agreement, the moving party must show that there is no genuine dispute about the existence of material terms of the agreement. *In re Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993). When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the governing principles should be the same as those that apply in summary judgment proceedings – whether a genuine dispute of material fact exists. *In re Ferree*, 71 Wn. App. at 43, 856 P.2d 706.

Here, the settlement agreement did not even mention the use of a domain name and Act Now Plumbing could not be in violation of the settlement agreement which did not require compliance until June 23, 2014, which was over four months away. Fox Plumbing failed to cite a single authority that would support treatment or use of a domain name the same as a trade name. The settlement agreement deals only with

“Defendants’ name, logo, and trademark.” The settlement agreement does not govern use of domain names, a separate legal and practical concept. It is black letter law that domain names are not the equivalent of trade names or trademarks. *See* 15 U.S.C. § 1127; *See also* International Trademark Association (“INTA”) Fact Sheet “Differences Between Trademarks and Domain Names” (“a trademark is not the same thing as a domain name ... A domain name in and of itself is not the same thing as a trademark.” The definition section of the Lanham Act defines each of these three terms separately. *See* 15 U.S.C. § 1127. “The term ‘domain name’ means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet.” *Id.* Thus, a domain name is merely an internet address. *See e.g., Carefirst of Md., Inc., v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 394 (4th Cir. 2003) (“A ‘domain name’ is a unique Internet address that serves as the primary identifier of an Internet user.”). “[A] trademark is a designation used to ‘identify and distinguish’ the goods of a person.” J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, Vol. 1 § 3:1 (citing 15 U.S.C. § 1127). Thus, the role that a designation must play to become a “trademark” is to identify the source of one seller’s goods and distinguish that source from other

sources. MCCARTHY, Vol. 1 § 3:1. “The names of corporate, business, and professional organizations are generally labeled ‘trade names’ as opposed to ‘trademarks’ or ‘service marks.’ A ‘trade name’ symbolizes the reputation of a company or organization and the activities it engages in.” MCCARTHY, Vol. 1 § 9:3. Act Now Plumbing’s use of the domain name <http://garyfix.com/> for its new web site for “Gary’s Fix-It Plumbing & Heating” is just that, a domain name or internet address. The homepage that displayed when a user enters the domain name “garyfix.com” prominently shows the trade name “Gary Fox-It Plumbing & Heating.” Act Now Plumbing was not using the domain name “garyfix.com” in any trademark or trade name capacity. The CR 2A agreement and the March 31, 2014 settlement agreement specifically refer to both trade names and trademarks but nowhere mentions domain names.

In this case, the trial court abused its discretion by implying new terms to the agreement in an enforcement order. The trial court’s order clearly acknowledges that a domain name is not legally the same thing as a trademark or trade name. “Defendants may technically be correct that a trademark or trade name is not legally the same thing as a domain name.” Nonetheless, the trial court inserted its own subjective beliefs to add new terms to the settlement agreement. “The Court is very much aware that in the commercial world, companies commonly (indeed, almost universally)

use their trade names for their domain names, such as “Starbucks.com,” “Amazon.com,” “Microsoft.com,” “Delta.com,” etc. Indeed, in the modern world, a business’s domain name is an integral part of that business’ trade name.” The trial court’s conclusion that the settlement agreement prohibits use of the domain name “garyfix.com” is not supported by evidence and it had no authority to find that Act Now Plumbing breached the settlement agreement by using an internet domain name “garyfix.com.” The court should reverse the order granting Fox Plumbing’s motion to enforce the settlement.

For the same reasons, the court should also vacate the trial court’s order awarding attorney’s fees and costs to Fox Plumbing in bringing the motion to enforce. Because the CR 2A agreement and the March 31, 2014 settlement agreement specifically refer only to trade names and trademarks and nowhere mentions domain names, and because Act Now Plumbing raised a genuine issue of material fact that a domain name is not legally the same as a trade name or trademark, the trial court’s order granting Fox Plumbing’s motion to enforce the settlement should be reversed and the award of attorney fees should be vacated.

D. *Act Now Plumbing Should be Awarded its Attorney's Fees and Costs to Oppose the Motion to Enforce and the Motion for Attorney's Fees and Costs and on Appeal under RAP 18.1.*

Act Now Plumbing incurred attorney's fees and costs to oppose Fox Plumbing's motion to enforce the settlement agreement. Moreover, Act Now Plumbing incurred attorney's fees and costs to oppose Fox Plumbing's motion for Attorney's Fees and Costs. The settlement agreement provides for fees and costs to the prevailing party in any action to enforce the settlement agreement. If the court reverses the trial court's orders granting Fox Plumbing's motion to enforce the settlement agreement, and vacates the order awarding attorney's fees and costs to Fox Plumbing, then the court should award Act Now Plumbing its attorney fees and costs incurred in opposing the motion to enforce and the motion for attorney's fees and costs.

Moreover, Act Now Plumbing is also entitled to attorney's fees and costs under RAP 18.1(a), which permits the recovery of attorney fees on appeal if the requesting party demonstrates an entitlement under "applicable law." The court will award attorney fees to the prevailing party "only on the basis of a private agreement, a statute, or a recognized ground of equity." *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn.App. 497, 506, 761 P.2d 77 (1988). In this case, Act Now Plumbing

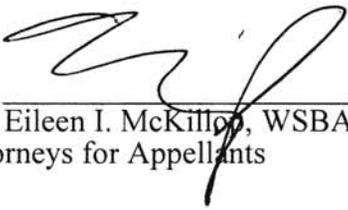
is entitled to recover its attorney fee and costs incurred on appeal pursuant to the attorney fee provisions contained in the settlement agreement.

V. CONCLUSION

For the above reasons, Appellants/Defendants Act Now Plumbing LLC and Igor Ivanchuk respectfully request that the Court reverse and vacate the trial court's rulings, and award them their attorney's fees and costs incurred in responding to Fox Plumbing's motion to enforce and motion for attorney's fees and costs, and their attorney's fees and costs incurred on appeal under RAP 18.1.

DATED this 13 day of January, 2015.

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CERTIFICATE OF SERVICE

I, Denise A. Campbell, hereby certify under the penalty of perjury of the laws of the State of Washington that on January 14, 2015, I caused to be served a copy of the foregoing **BRIEF OF APPELLANTS** to the following counsel of record in the manner indicated below at the following address:

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