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

P&M CONSTRUCTION, INC.,
Appellant,

v.

SEAN R. MATT and KIMBERLY M. TOSSMAN,
Respondents.

No. 49605-4

BRIEF OF APPELLANT

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INTRODUCTION

The parties announced during trial that they had settled their construction dispute. The two attorneys then signed a document prescribed by local rule which directed the Clerk to dismiss the case, but no sooner than 45 days after the scheduled trial date. Under the plain language of the settlement document and the local rule prescribing it, there was no duty for either party to stipulate to an earlier dismissal, no right for either party to demand an earlier dismissal, and no right to attorney's fees for any breach of the accord. Respondents, nevertheless, 29 days after the scheduled trial date, moved to dismiss the case with an award of attorney's fees. The motion itself was premature under the terms of the accord. The request for attorney's fees was tardy in relation to the final judgment and frivolous in that it failed to cite legal authority or even allege that the parties had agreed to pay attorney's fees as a remedy for breaching the accord. By implication, the order granting attorney's fees was erroneous and arbitrary. Appellant assigns error to that award and seeks relief for having to respond to a frivolous motion.

ASSIGNMENTS OF ERROR

1. The Superior Court erred when it considered an application for attorney's fees submitted after the ten-day deadline set forth at Superior Court Civil Rule 54(d)(2).

2. The Superior Court erred when it awarded attorney's fees not authorized by any statute, contractual provision, or recognized ground in equity.

3. The Superior Court erred when it decided not to consider whether the request filed by respondents on November 17, 2015 for attorney's fees was frivolous.

4. The Superior Court erred when it denied a motion to reconsider the award of attorney's fees.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the plain language of the settlement form deprive both parties of any right to demand dismissal during the first 45 days after the scheduled trial date?

2. Did appellant have a contractual right under the accord to withhold its consent to a dismissal during the first 45 days after the scheduled trial date?

3. Did the respondents waive their putative right to attorney's fees by failing to submit a fee declaration until

after the ten-day deadline imposed by Superior Court Civil Rule 54(d)(2)?

4. Did respondents fail to inform the Superior Court of any statute, contractual provision, or recognized ground in equity which supported their request for attorney's fees?

5. Did respondents make a frivolous request for attorney's fees in violation of Superior Court Civil Rule 11.

STATEMENT OF THE CASE

This case began as a dispute over a home remodeling project. Contractor P & M Construction, Inc. claimed a contract balance due in the amount of \$135,782. (CP 1-4) Homeowners Sean Matt and Kimberly Tossman denied that any balance was due and filed a counterclaim, under various theories, for "an amount exceeding \$120,000." (CP 8-16) The parties' contract did not contain an attorney's fee clause. (CP 17-65) Eventually the case settled, but a new dispute arose regarding the accord itself.

The Executory Accord

The Superior Court called the case for trial and, after making some preliminary rulings, announced it would convene the jury panel at the beginning of the morning

session on October 21, 2015. Before that session began the parties exited the courtroom, conferred in the hallway, and settled the case. Their attorneys announced the settlement for the record in open court (RP 1-5):

MR. GRANT: Good morning, Your Honor. For the record, Jeffrey Grant on behalf of Mr. Matt and Mrs. Tossman.

And thank you for giving us a few minutes to have some discussions this morning that, I am pleased to report, have turned out to be productive; that is I believe that the parties reached an agreement. And I'd like to put what I understand are at least CR 2A terms. The Matts and—Mr. Matt and Mrs. Tossman will pay to P&M Construction, Inc., by close of business today, \$45,000. P&M Construction has agreed to return to the Matt house on Lee Street and address issues with hardwood floor, electrical, and some trim on a porch.

The parties have agreed to dismiss their claims against each other with prejudice. And P&M and its attorneys have agreed to return all documents that were produced and marked as confidential, not to keep any copies, and then cooperate with the Matts if there are any documents in the court file that were designated confidential but not yet subject to a protective order. And I think we've agreed that whatever needs to be done in order to have that discreet collection of documents under seal.

THE COURT: Okay, Mr. Cline, is that your understanding as well?

MR. CLINE [attorney for the contractor]: I would add one thing. As of today, we would simply want the trial date stricken subject to renewal and, of course, if the payment is not implemented we don't want to dismiss it this very moment. But we expect that the payment would be forthcoming.

THE COURT: Right. I will not—the case won't be dismissed until I sign an order, and I won't sign an order until someone gives me one. So I trust that you will—

MR. CLINE: Of course. So with that understanding, then—I just want to make sure I get the nod from the clients.

[The parties announce their assent.]

THE COURT: Okay. So the trial date is stricken, and we'll just wait to hear from you folks about an order of dismissal.

Immediately after adjournment, the courtroom deputy clerk handed counsel a printed form entitled Notice of Settlement of All Claims Against All Parties. The attorneys signed the form and returned it to the deputy clerk for filing. The document (CP 162) reads as follows:

Notice is hereby given that all claims against all parties in this action have been resolved. Any trials or other hearings in this matter may be stricken from the court calendar. This notice is being filed with the consent of all parties.

If an Order Dismissing All Claims against all parties is not entered within 45 days after the written Notice of Settlement is filed, or within 45 days after the scheduled trial date, whichever is

earlier, and if a Certificate of Settlement Without Dismissal is not filed as provided in LCR 41(c)(3), the case may be dismissed on the Clerk's Motion pursuant to LCR 41(b)(2)(B).

/s/ Thomas Cline
Attorney for Plaintiff
Oct. 21, 2015

/s/ Jeffrey Grant
Attorney for Defendants
Oct. 21, 2015

The date scheduled for trial was October 19, 2015. This implies that if the accord had been performed in due course as agreed, the 45-day deadline for entry of the final order of dismissal would have arrived on December 3, 2015. If either party wished to extend the deadline, the cited LCR 41(b)(2)(B) would have required the filing of a motion and proof of good cause. Otherwise, the Clerk would dismiss the case on her own motion fourteen days after giving notice to the settling parties.

There was no mention in the courtroom and no mention in the Notice of Settlement of any right to demand a signature on a stipulated order of dismissal prior to the December 3rd deadline. Likewise, there was no mention of any right to attorney's fees for any putative breach of the accord.

The Motions in Limine

A pair of rulings during the previous day's session facilitated the October 21st settlement by increasing the contractor's risk of an unfavorable verdict.

On October 5th and 6th the homeowners filed and attempted to serve two motions in limine: a motion to bar evidence regarding their alleged inability to pay their contractual obligations (CP 75–89) and a motion to exclude witnesses. (CP 104-12) A recent amendment to a local rule changed a long-standing practice in King County regarding the delivery of these motions and other court documents to opposing counsel.¹ Counsel are now required to deliver documents electronically to the Clerk, who is charged with the duty of relaying them to the intended recipient. Under this newly amended rule all attorneys appearing in the King County Superior Court are required to retain the services of an Internet service provider to receive documents from the Clerk on the attorney's behalf.

After the deadline for opposing these motions had passed, the homeowners filed "replies" not only to announce they had received no response from the contractor but also

¹See King County Local General Rule 30(b)(4)(B) (effective September 1, 2015).

to provide additional argument in support of their motions.² (CP 113–17, 118–23) The contractor hastily notified court and counsel that it had never received the motions in limine and did not acquire knowledge of their existence until it received the “replies.” (CP 124–26) The contractor filed a screenshot of its attorney’s email inbox showing no entry for either of the two motions during the dates of delivery alleged by the homeowners. (CP 157) Despite this evidence, the Superior Court granted the motions in limine during the opening session of the trial on October 20th. In denying the contractor relief for nondelivery of the motions, the court impliedly found that the documents had in fact been electronically delivered on the dates in question.³

The Homeowners’ Demands

The homeowners were not content with waiting for the December 3rd deadline despite having previously agreed to it. They made demands on October 21st (the date of the settlement), October 26th, October 27th, and November 9th for a signature on a stipulation to formally

²These documents should never have been filed because a reply is properly limited to new issues raised in a response. The documents were nevertheless fortuitous in that they alerted the contractor to the nondelivery of the motions in limine.

³An additional implication of the ruling was that the attorney for the contractor tampered with evidence (the screenshot of his email inbox) to make it appear that he had not received the motions in limine. It is fortunate that Yahoo, three days later, delivered a notification admitting that there had indeed been a disruption in his email service.

dismiss the case. (CP 171-183) But the contractor had legitimate interests to protect, an investigation to undertake, and legal matters to discuss in confidence with its attorney. It wanted to act without haste but knew that decisions had to be made within 45 days.

The Effect of Federal Banking Laws

One of the contractor's legitimate interests was to delay the final dismissal until after its own bank gave irrevocable credit for the settlement check.

The record lacks suitable evidence regarding when the settlement check was delivered, whether it was a bank check or personal check, whether it was deposited into a new or an established account, and whether the depository bank gave notice of a hold with respect to the deposited funds. For the purpose of this appeal the contractor is willing to concede that the settlement check was a personal check drawn on the homeowners' account payable to the order of the contractor in the amount of \$45,000; that the check was delivered to the contractor on October 21, 2015; and that the contractor deposited that check into one of its own accounts no later than the next day. The contractor does not concede when it first opened its account nor whether its bank provided a notice of hold upon the deposit.

A regulation adopted by the Treasury Department under authority of The Expedited Funds Availability Act, 12 U.S.C. §§ 4001–4010 (2015), permitted the contractor's bank to place an extended hold of nine business days upon \$40,000 of the settlement fund if the check was deposited into an account open for fewer than 30 days. 12 C.F.R. § 229.13(a)(1)(ii) (2015). Even if the check had been deposited into an established account, the depository bank had a right to place a hold in the same amount for six business days, 12 C.F.R. § 229.13(b), (h)(1), (h)(4), or longer if the bank established reasonable cause. 12 C.F.R. § 229.13(h)(4). The ninth business day after the assumed date of deposit was November 4, 2015.

The contractor's attorney knew these banking laws and therefore also knew that it was necessarily within his client's best interests for the Superior Court to retain jurisdiction of this case until he could verify the date the deposit was made, the passage of nine business days after that date, and whether the depository bank thereafter acknowledged the deposit as a credit to the account. If the case had been dismissed without these verifications, the contractor would have assumed a risk of losing not only the full value of the settlement payment but also its right to revive its construction claim as an elective remedy for a

material breach of the accord. The loss would have occurred if the drawee bank refused to pay the check and if its refusal became apparent only after the case had been dismissed. Under this scenario, the contractor would have lost all of its remedies except for a claim against the homeowners for the delivery of a dishonored check.

New Evidence of an Email Disruption

Another of the contractor's legitimate interests was to consider its possible remedies after receiving conclusive new evidence that the motions in limine had indeed not been delivered due to a disruption in email service caused by its attorney's Internet service provider.

Soon after the accord was reached the contractor launched an investigation into why it had not received the two motions in limine. The Clerk's office verified that it received the motions from the law firm representing the homeowners, that it relayed the motions to the Internet service provider associated with the contractor's attorney, but that neither of the motions had been opened by the recipient. (CP 187-94) This cleared defense counsel and his firm of any wrongdoing, and it also proved to the satisfaction of the contractor's attorney that Yahoo.com—his own Internet service provider—had been responsible for the

breakdown. Yahoo removed all doubt when it gave notice on October 23rd that there had indeed been a disruption in its email service. (CP 193, 212)

It was now clear how the disruption occurred. The contractor's attorney had, many years ago, initiated email service with Yahoo and chose for himself the address tomcline77@yahoo.com. In response to a solicitation from Yahoo, the attorney later chose a second email address, tom@thomascline.com. Yahoo did not create a mailbox for this second address but promised, as part of its solicitation, to forward all email intended for that address to the inbox previously established for tomcline77@yahoo.com. This arrangement worked for several years. (CP 200) But when the homeowners attempted to serve their motions in limine, there was—as Yahoo admitted on October 23rd—disruption in its email service which “may have caused [the attorney's] domain email address to stop forwarding emails to [the attorney's] Yahoo ID inbox.” (CP 193, 212) Further investigation revealed that this disruption coincided with a revision of Yahoo's entire email platform. Yahoo announced the revision on October 15th (CP 206–08) but had likely been working on it for a number of days. Twitter messages confirm that other Yahoo customers also suffered outages on the very day that the homeowners attempted to serve their

first motion in limine. (CP 215) Yahoo rather infamously caused a similar disruption during a revision of its email platform in 2013. (CP 200, 210)

This breakdown in the electronic delivery system raised issues of law that were novel and complex. The harm, moreover, was substantial. The contractor had a difficult decision to make as the December 3rd deadline approached. Ultimately, it decided to accept the settlement amount and not seek relief for the disruption caused by Yahoo.

The Motion for Attorney's Fees

On November 9th the homeowners made an *in terrorem* demand. They threatened to seek attorney's fees if the contractor did not stipulate to a dismissal within two days. (CP 183) On November 17th they made good on their threat when they filed a motion to formally dismiss the case and award themselves attorney's fees. (CP 164–70) They chose the fifth judicial day before the December 3rd deadline as the date for the court to consider the motion. They did not specify what harm or prejudice would befall them if they waited five extra days for the Clerk to initiate the dismissal process.

On December 1st the Superior Court entered the final judgment of dismissal and directed the homeowners

to provide a declaration in support of their request for attorney's fees. (CP 195–96) On December 11th the contractor filed a timely motion to reconsider the court's decision to award attorney's fees. (CP 198–215) The contractor advised court and counsel that the fee declaration would be untimely by operation of court rule if it were not also filed on December 11th.⁴ (CP 204) The homeowners did not file their fee declaration until December 14th—13 days after entry of the final judgment. (CP 216–19)

On January 7, 2016 the Superior Court denied the motion to reconsider the award. (CP 220–21) On January 14th the Superior Court made the actual award. (CP 222–23) On January 15th the contractor filed a timely notice of appeal.⁵

ARGUMENT

1. THE APPLICATION FOR ATTORNEY'S FEES WAS UNTIMELY

As a threshold matter, it should be decided whether the respondents' request for attorney's fees is time barred.

⁴The pertinent rule is CR 54(d)(2).

⁵The Notice of Appeal has not been included within the Designation of Clerk's Papers because it was not yet listed on the Clerk's docket at the time the designation was due. The Court of Appeals has previously acknowledged that the Notice of Appeal was timely filed.

CR 54(d)(2) requires that “claims for attorney’s fees...be made by motion...filed no later than 10 days after the entry of judgment.” Respondents made a bare request for attorney’s fees in their November 17th motion. (CP 164–70) The Superior Court, in its December 1st order dismissing the case, directed the respondents to file a fee declaration. (CP 195–96) Respondents did so on the 13th day after the order. (CP 216–19)

A bare request for attorney’s fees cannot be considered a “claim” for attorney’s fees, particularly where the court specifically directed respondents to provide a fee declaration. In a case construing a similar federal rule, it was held that the deadline for filing the motion would be tolled only by the filing of a “properly supported application.” Logue v. Dore, 103 F.3d 1040, 1047 (1st Cir. 1997).

Although a decision to accept or reject an untimely filed document is reviewed for abuse of discretion, Clipse v. Commercial Driver Services, Inc., 189 Wn. App. 776, 786, 358 P.3d 464, 470 (2015), the Superior Court was required to enforce the ten-day deadline unless respondents had made a sufficient showing of excusable neglect. *Id.* But the respondents offered no excuse whatsoever despite the contractor having given them prior notice of the deadline. (CP 204) The outcome here should be the same as in Clipse.

It was not reasonable for respondents to infer from the court's directive to file a fee declaration that it was also extending the ten-day deadline.

2. INTERPRETING THE ACCORD IS A MATTER OF LAW SUBJECT TO REVIEW DE NOVO

A proceeding to enforce a settlement is similar to a summary judgment motion. Therefore, the decision of the Superior Court is subject to review de novo. Condon v. Condon, 177 Wn.2d 150, 162, 298 P.3d 86 (2013).

The focus of this appeal is a Notice of Settlement form prescribed by King County Local Civil Rule 41(e)(2). The source of this form does not alter the standard of review. A local court rule is interpreted in the same manner as a statute. Seek Systems, Inc. v. Scully-Walton, Inc., 55 Wn. App. 318, 319, 777 P.2d 560, 562 (1989). The interpretation of KCLR 41 is therefore an issue of law which is subject to review de novo. See Anthis v. Copland, 173 Wn.2d 752, 270 P.3d 574, 576 (2012). A court interpreting a local rule must discern and implement the intent of the promulgating authority. *Id.* Where the plain language of a local rule is unambiguous and the intent of the promulgating authority is apparent, a court will not construe the rule otherwise. *Id.*

The settlement form unambiguously omits any duty of the contractor to stipulate to a dismissal within the first

45 days after the scheduled trial date. Even if that duty is assumed merely for purposes of argument, the settlement form unambiguously omits attorney's fees as a permissible remedy for the contractor's hypothetical breach.

"Whether a party is entitled to attorney's fees is an issue of law which is reviewed de novo." Ethridge v. Hwang, 105 Wn. App. 447, 450, 20 P.3d 958, 966 (2001).

3. THE ACCORD PROVIDED NO RIGHT TO DEMAND DISMISSAL PRIOR TO THE 45-DAY DEADLINE

The settling parties agreed to accept the KCLR 41(e)(2) settlement form as the objective manifestation of their accord. The unexpressed subjective intent of the parties, or either one of them, is therefore immaterial. Condon, 177 Wn.2d at 162.

The settlement form did not grant anyone the authority to dismiss the case other than the Clerk, who was required to give notice of her intention to do so on the 45th day after the scheduled trial date. A party seeking to avoid dismissal was obliged to apply to the Superior Court and prove good cause within fourteen days of the notice. Otherwise, the Clerk's dismissal would proceed without intervention from the court. KCLR 41(b)(2)(B) (adopted by reference within the KCLR 41(e)(2) settlement form).

The homeowners must have assumed, when they filed their November 17th motion, that they had a unilateral right to dismiss the case prior to the December 3rd deadline. But the settlement form which bears their attorney's signature simply does not provide them with that right. Nor can they claim that the accord had been modified.⁶

A court should not add language that was omitted from KCLR 41(e)(2), either intentionally or inadvertently, unless the addition is "imperatively required to make [the rule] rational." See State v. Taylor, 97 Wn.2d 724, 728–30, 649 P.2d 633, 635–36 (1982) (quoting McKay v. Department of Labor & Indus., 180 Wash. 191, 194, 39 P.2d 997 (1934)). Accord Anthis v. Copland, 173 Wn.2d 752, 765, 270 P.3d 574, 581 (2012).

KCLR 41(e)(2) is rational as written. By depriving settling parties of any right to compel dismissal during the first 45 days, the rule creates a safe harbor for whatever a party has a right to do before the Superior Court loses jurisdiction, including—among other possible things—to verify that irrevocable credit has been given for a deposited settlement check and to consider whether the accord is

⁶The homeowners admitted in their November 17th motion that they received no communications from the contractor after the date of the accord. (CP 172 ¶10)

voidable due to new evidence.⁷ Although the contractor ultimately chose not to rescind the accord, the relevant question is not whether it had a right to do so, but whether it had a right to consult with counsel to consider its options before entry of the final judgment.

4. THERE WAS SIMPLY NO AUTHORITY FOR THE AWARD ATTORNEY'S FEES

An accord is a contract. Condon, 177 Wn.2d at 162. Respondents claim that the contractor breached the accord by not stipulating to a dismissal prior to the expiration of the 45-day deadline mentioned in the settlement document. Reprinted *supra* pp. 5–6. Even if the homeowners could demonstrate that a breach of the accord had occurred, they must prove more to entitle themselves to attorney's fees. A breach of an accord or any other type of contract does not automatically imply that remedy. "Washington follows the American rule 'that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.'" Panorama Village Condominium Owners Ass'n Bd. of Directors v.

⁷The starting point in this analysis was the final sentence in CR 5(b)(7) which states that "[Electronic] [s]ervice under this subsection is not effective if the party making service learns that the attempted service did not reach the person to be served."

Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910, 917 (2001) (quoting McGreevy v. Oregon Mut. Ins. Co., 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995)).

The homeowners have the contractor at a disadvantage if they possess legal authority on the issue of attorney's fees that they elected not to share with the Superior Court. The contractor cannot respond to a phantom argument, so it must reserve for its reply brief the analysis of any authorities the homeowners may cite for the first time during this appeal.

5. SANCTIONS SHOULD BE AWARDED FOR THE FILING OF A FRIVOLOUS REQUEST FOR ATTORNEY'S FEES

For the obvious reason that it granted the remedy requested by them, the Superior Court chose not to impose sanctions against respondents for making the attorney's fees request. But, as demonstrated above, that request was not "well grounded in fact [nor] warranted by existing law or a good faith argument for the extention, modification, or reversal of existing law [but is] interposed for [an] improper purpose, such as to harass." CR 11. The remedy under Rule 11 is the imposition of attorney's fees.

The harassment was the threat made by counsel to request attorney's fees if your author did not sign a

stipulation within two days. (CP 183) This threat was made to induce the contractor to do something that counsel knew or should have known it was not legally obligated to do. The result was a manufactured dispute and an imposition—not only upon the contractor but also upon its attorney, the attorney’s other clients, and the courts. Counsel’s threat was not “enthusiasm or creativity,” it was altogether “baseless.”⁸ See Condon, 177 Wn.2d at 166.

CONCLUSION

Your appellant respectfully requests that the Court of Appeals reverse the award of attorney’s fees in the Superior Court and award sanctions, under Superior Court Civil Rule 11, for its having to respond to a frivolous motion.

DATED this 11th day of July 2016.



Thomas Cline
Attorney for Appellant
WSBA 11772

⁸One of the homeowners is a partner in a prominent Seattle law firm who should also have known that the demand for attorney’s fees was baseless. This is not the first time that your author has represented a client who sought relief in the Court of Appeals due to the erroneous imposition of sanctions entered at the request of a lawyer defendant. See Lockhart v. Grieve, 66 Wn. App. 735, 743–45, 834 P.2d 64, 69 (1992).