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Court of Appeals
Division II
State of Washington
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No.: 52182-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GINA R. GREEN

Respondent

v.

THOMAS F. GREEN

Appellant

RESPONDENT'S RESPONSE BRIEF

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TABLE OF CONTENTS

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

1. Do the parties have an enforceable settlement agreement? 1

2. Should the court address issues related to assignments of error when the Appellant not addressed the assignment of error or offered any authority as to the same in Appellant's Opening Brief? 1

3. Should the court address issues raised for the first time on appeal? 1

4. Did the trial court the court's denial of Appellant's motion for reconsideration soundly within the discretion of the court? 1

5. Should Gina be awarded attorney fees and costs for defending this appeal? 1

II. STATEMENT OF THE CASE.....1

III. ISSUES RAISED WHICH SHOULD NOT BE CONSIDERED 14

IV. ARGUMENT.....14

A. Standard of Review.....14

B. The parties have an enforceable settlement agreement.....16

1. The agreement was made by the attorney in respect to the parties' divorce 17

2. The agreement is not disputed within the meaning of CR 2A 17

a. The informal writings between the attorneys establish the existence and material terms of the parties' agreement within the meaning of CR 2A 18

(i) The parties agree to the subject matter ... 20

(ii) All material terms of the agreement stated in the informal writings 21

(a) Gina has met the initial burden of proving the existence and material terms of the settlement agreement 21

(b) Tom cannot meet his burden that there is genuine dispute as to the existence and material terms of the agreement 23

(1) Mr. Fugate acknowledged the existence of an agreement its material terms 24

(2) The terms of the agreement are not ambiguous 26

(3) The Property Settlement Agreement Adopted by the court reflects the settlement agreement by way of the informal writings 32

(4) Tom admits each "disputed" fact he raises is not persuasive 33

(iii) The parties intended to be bound by the agreement prior to the time of the signing and delivery of more formal documents 33

3. Tom's subjective interpretations of the material terms is not a genuine dispute under the terms of CR 2A 36

4. The contract is not missing any material terms 37

5. The court should not consider any error related to the Motion for Reconsideration 37

C. Conclusion 37

V. ATTORNEY FEES 38

VI. CONCLUSION 39

TABLE OF AUTHORITIES

Table of Cases

Berg v. Hudesman,
115 Wn.2d 657, 804 P.2d 222 (1990) 14, 39

Brinkerhoff v. Campbell,
99 Wn. App. 692, 994 P.2d 911 (2000) 15, 16

Condon v. Condon,
177 Wn.2d 150, 298 P.3d 86 (2013) 15, 16, 32

Cruz v. Chavez,
186 Wn. App. 913, 347 P.3d 912 (2015) 34

Dickson v. United States Fid. & Guar. Co.,
77 Wn.2d 785, 466 P.2d 515 (1970) 29-30

Hollis v. Garwall, Inc.,
137 Wn.2d 683, 974 P.2d 836 (1999) 19, 25, 27

In re Marriage of Ferree,
71 Wn. App. 35, 856 P.2d 706 (1993) 1, 14-18, 23

Keystone Land & Dev. Co. v. Xerox Corp.,
152 Wash.2d 171, 94 P.3d 945 (2004) 34

Kruger v. Kruger,
37 Wn. App. 329, 679 P.2d 961 (1984) 38

Loewi v. Long,
76 Wash. 480, 136 P. 673 (1913) 19, 20

Morris v. Maks,
69 Wn. App. 865, 850 P.2d 1357 (1993) 15-21, 23, 34, 35

National Bank v. Equity Investors,
81 Wash.2d 886, 506 P.2d 20 (1973) 34

Patterson v. Taylor,
93 Wn. App. 579, 969 P.2d 1106 (1999) 14, 16, 17, 18

Plumbing Shop, Inc. v. Pitts,
67 Wn.2d 514, 408 P.2d 385 (1965) 19, 35

Riley v. Iron Gate Self Storage,
198 Wn. App. 692, 395 P.3d 1059 (2017) 33

Stottlemyre v. Reed,
35 Wash.App. 169, 665 P.2d 1383, *review denied*, 100 Wash.2d 1015 (1983) 18

Viking Bank v. Firgrove Commons 3, LLC,
183 Wn. App. 706, 183 P.3d 334 (2008) 36

Statutes

RCW 2.44.010 16

RCW 9A.72.085 14

RCW 26.09.140 38

Rules

CR 2A 16, 17, 18, 37

RAP 9.12 ..... 14, 26, 37

RAP 10.4(e) 1

RAP 18.1 38

Other Authorities

Black's Law Dictionary (6th ed. 1990) 18

Webster's Third New International Dictionary (1969) 18

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the court address issues raised for the first time on appeal?

2. Should the court address issues related to assignments of error when the Appellant not addressed the assignment of error or offered any authority as to the same in Appellant's Opening Brief?

3. Do the parties have an enforceable settlement agreement?

4. Did the trial court the court's denial of Appellant's motion for reconsideration soundly within the discretion of the court?

5. Should Gina be awarded attorney fees and costs for defending this appeal?

II. STATEMENT OF THE CASE

1. Thomas and Gina Green[1] were married on March 23, 1981 and separated on March 16, 2014. CP 24. The parties were married for 25 years. CP 27.

2. Gina filed for divorce on December 12, 2016. CP 1-5. She asked the court to divide the real, personal property and debts fairly as the court decides, award spousal support (hereinafter "support") in her favor, and order Tom to pay her lawyer's fees, other professional fees and costs. CP 2.

[1] The parties' actual names are used pursuant to RAP 10.4(e). First names of the parties are used to avoid confusion. No disrespect is intended.

3. On December 12, 2016, Gina filed a Motion for Temporary Family Law Order, wherein she requested, among other things, that Tom pay her $2,307.27 per month in support plus the health insurance premium for her coverage. CP 19-20. Gina's requested amount of support reflected an equalization of the parties' gross incomes, thus it did not account for any deductions from Tom's average monthly income, whether mandatory or voluntary. CP 22
4. On January 5, 2017, Tom filed a Response to Petition about a Marriage. CP 32-35. He agreed the court should divide the real, personal property and debts fairly as the court decides and award Gina support, although he denied the allegation because he lacked information as to the amount and duration of support Gina was seeking. CP 33-34. He denied he should have to pay Gina's fees and costs and alleged each party should be responsible for their own fees and costs. CP 33-34.
5. Tom did not file a response to Gina's Motion for Temporary Family Law Order. The parties "reached an agreement as to all issues presented to the Court in the motion," CP 37, and presented their agreement in the form of an Agreed Temporary Family Law Order to Commissioner Mitchell on January 5, 2017. CP 37-41. Finding "good reason to

approve the parties' agreement contains in [the] order, Commissioner Mitchell signed the same.[2] CP 37-41.

6. Settlement Conference was scheduled for May 9, 2017, and trial was scheduled for June 13, 2017. CP 44.
7. The parties attended settlement conference as scheduled. Gina was and remains represented by Ms. Johnson. Tom was represented by Mr. Fugate.[3] The parties were unable to reach an agreement at settlement conference. See CP 53.
8. Between May 31, 2017 and June 12, 2017, the parties engaged in written settlement negotiations through their attorneys. CP 60-73.[4]
9. The negotiations commenced with Ms. Johnson sending a comprehensive settlement offer regarding the issues in dispute in the case: division of assets and debts, support, and maintenance. CP 70-73.

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[2] Tom alleges he timely responded to the motion. See *Appellant's Opening Brief*, at 5. He actually did not respond to the motion at all. He further alleges Court Commissioner Mitchell agreed with Gina and awarded her temporary maintenance in the amount of $2307.27 a month. *Id.* This is also false. The parties reached an agreement, put it in the form of a temporary order, and submitted it to the court for approval. CP 37.

[3] Mr. Dugaw later substituted in for Mr. Fugate. The substitution was executed on June 29, 2017, but it was not filed until July 27, 2017. CP 50.

[4] The negotiations are in reverse chronological order due to email formatting and authentication preservation. Tom references the settlement negotiations as CP 160-175, which are in chronological order, but are not complete. It is missing a counter-offer sent from Mr. Fugate to Ms. Johnson by email on June 8, 2017 at 5:02 p.m., which is at CP 65.

An asset and debt chart was included in the offer. CP 73. On the chart, Tom's PERS II account is referenced as follows:

Property Description	Value/ Debt Date	FMV	Debt Owed	Net Value	Gina	Tom
PERS II Defined Benefit (Equally divide and create an Interest with Survivor Benefit) $3350.87/mo.	11/13/2016		$ -		x	X

CP 73. In pertinent part, the offer stated as follows:

> On the chart you will see several "x" markings in the parties' columns, which warrant clarification. Gina proposes the parties equally divide the PERS II in addition to the notes made in the description column. Vanessa has contacted DRS to obtain the *total* monthly benefit payment the parties would divide for each of the three survivor benefit options: 50%, 66.67% and 100%. As soon I receive the information from DRS I will forward it to you with a proposal regarding how to address Gina's interest in the account and what survivor option she proposes, if any...
>
> Spousal Maintenance
> As discussed at settlement conference statement, Gina proposes an equalization of the parties' incomes for eight years and $1000 per month to her for two additional years. At settlement conference, we discussed using the parties' adjusted gross incomes for purposes of equalization, and Gina remains willing to do this for purposes of settlement only. My calculation of the transfer payment follows:

//

//

//

Thomas' YTD gross income:	$27,996.31	
Thomas' average monthly income:	$ 6,999.08	→$6,999.08
Gina's average YTD monthly income:	$1,897.47	→$1,897.47
Combined YTD gross monthly income:		$8,896.55
Thomas' YTD monthly mandatory taxes and union dues:	$ 417.27	
	$ 97.59	
	$ 7.67	
	$ 34.03	
	$ 53.10	
	$ 609.66	→($609.66)
Gina's YTD monthly mandatory taxes:	$ 145.16	
	$ 16.76	
	$ 161.92	→($161.92)
Combined adjusted monthly gross income:		$8,126.25
Equal division of combined adjusted monthly gross income:		$4,063.13
Minus Gina's adjusted gross monthly income:		($1,735.55)
Spousal Maintenance to Gina for 8 years:		**$2,327.58**

Attorney Fees

Gina is willing to waive her request for attorney fees for purposes of this settlement offer only.

CP 70-72. The calculation for equalizing support did not include a deduction for Tom's future mandatory PERS II contributions. CP 71

10. On June 7, 2017, Mr. Fugate emailed a comprehensive counter-offer, which addressed all issues in the case. CP 67-69. It states in pertinent part:

> Mr. Green is agreeable with the proposed division of property and debts to the extent your chart and letter reflect whom [sic] is to take what...
>
> [H]e is agreeable with her creating an interest in his PERS 2 account and receiving the survivor benefit as requested as opposed to creating an account. As you are aware, under the "creating an interest" option Ms. Green would receive an increased amount of retirement pay when Mr. Green reached retirement age if he remains with the state and continues to make the mandatory contributions to his pension. Mr. Green still has years of work ahead of him and he has no intention of leaving his job. If things go as planned *Ms. Green would receive a benefit from the 20 years of post-divorce service efforts of Mr. Green, in addition to receiving the survivor benefit which Mr. Green could not then provide to any future spouse.*
>
> The most logical way to balance things out a bit while enabling Ms. Green to receive the home and the equity therein would be on the maintenance end of things. Mr. Green is agreeable with the 10 year duration proposed. However, he is proposing to pay maintenance in the amount of $1,600.00 per month for 8 years and then $1,000.00 per month for an additional two years.
>
> Finally, each party would be responsible for their own attorney fees.

CP 67-68 (*Emphasis Added.)*

11. Ms. Johnson sent a counter-offer on June 8, 2017, at 2:51 p.m., which stated in pertinent part:

> Gina [is willing] to accept $2300/month in spousal maintenance for five years, and $1800 for three years and $1000 for two years. She cannot afford to take less now. She has no ability to earn a higher income and take less maintenance until she is educated and trained. In addition, she has to start paying out of pocket for medical insurance, which is costly.
>
> As for retirement, Gina proposes a 100% survivor benefit. In the event your client returns to work and monthly retirement benefits are suspended as a result, your client will need to pay Gina spousal maintenance during the suspension time in a monthly amount equivalent to what she will be losing in maintenance[5] due to the suspension.
>
> She is willing to pay her own fees if we have an agreement.
>
> I am forwarding you by separate email the DRS survivor benefit breakdown for your review.[6]

CP 65-66.

12. On June 8, 2017, at 5:02 p.m., Mr. Fugate emailed a response as follows:

> Mr. Green is agreeable with your counter offer except that he proposes maintenance be paid at a rate of $2,000 per month for 5 years, $1,800 per month for 3 years and $1,000 per month for an additional 2 years. He has agreed to the requested disproportionate division of the property, to creating an interest in his retirement instead of creating a separate account and to the 100% survivor benefit for your client. Each of those things are [sic] a benefit only to Ms. Green while they are a detriment to Mr. Green.
> If Ms. Green is agreeable with the above proposal this matter can be settled and we can all enjoy our weekend a bit more. Let me know.

---

[5] This is a Scribner's error. It should be "retirement."

CP 65.

13. On June 9, 2017, at 10:44 a.m., Mr. Fugate emailed a "supplement" to the offer he'd sent over on June 8, 2017 at 5:02 p.m. CP 63. It states:

> I am writing to supplement the last counter-offer I sent over last night, part of the rationale in proposing the $2,000 for 5 years has to do with the mandatory contribution Mr. Green must make to his PERS 2 account. I understand the position taken at settlement conference. However, in light of my client's agreement to create an interest in his account and to allow for the 100% survivor benefit, *Ms. Green will receive just as much benefit as Mr. Green from any future contributions/withholdings.* Additional, he has no control over the deduction. As such, we feel it really should be factored into the deductions from his income...
>
> In any event I wanted to expand on the rationale submitted last night...

CP 63. (*Emphasis added.*)

14. On June 9, 2017, at 6:42 p.m., Ms. Johnson sent Mr. Fugate an acceptance of the counter-offer sent from Mr. Fugate at 10:44 a.m. that morning on three conditions, two of which are pertinent hereto as follows:

> 2. In the event Mr. Green leaves state employment for any reason within the next 60 months, he will pay Gina within 60 days of ending employment with the state the amount of $18,000, which is the amount she is foregoing in spousal maintenance ($2300 - $2000 = $300 x 60 months) in reliance on your client's assertion that he will remain an employee of the state and have a mandatory retirement contribution from which Gina will benefit and which reduces his ability to pay her $2300 per month in current maintenance for five years.

> 3. Mr. Green agrees not to take a pump sum withdrawal from his state retirement upon termination from employment for any reasons. He must agree that the parties will receive monthly benefits and not a lump sum.
>
> If your client will agree to these conditions, we have a deal.

CP 62.[7]

15. On June 12, 2017, at 9:52 a.m., Mr. Fugate responded to the three (3) conditions laid out in Ms. Johnson's June 9, 2017, 6:42 p.m. email. In pertinent part it states:

> As to Condition #2, Mr. Green does not intend to leave employment with the state anytime in the next five years but he cannot predict the future, At the same time, he understands your client's concern, To more fairly address that situation he proposes that the $18,000 be divided by 60 months which comes out to $300 and that in the event he leaves employment with the state during the next 5 years he would owe a lump sum equalizing $300 x (60 – the number of months he worked after entry of the decree). Additionally, he proposes that such a clause would kick in if he voluntarily leaves his job or is terminated doe to misconduct or the like by him, not in a situation where the state is paying people off for budget cuts or other reasons beyond Mr. Green's control.
>
> Finally, he is agreeable with #3.

CP 61-62.

16. On June 12, 2017, at 11:59 a.m., Ms. Johnson sent one last counter-offer, which addressed the Condition #2 counter-offer sent by Mr. Fugate earlier in the day as follows:

---

[7] Condition #1 involved distribution of a tax refund. This issue was resolved through the written negotiations, too, with Tom receiving the same. CP 61-62.

> Since Mr. Green will solely be in control of when he retires, if he chooses not to retire at age 65, thereby prolonging Gina's receipt of retirement, Mr. Green will pay her monthly maintenance starting when he turns age 65 in the amount equal to what she would otherwise be receiving in retirement if he chose to retire at age 65. We just want to ensure Mr. Green does not remain employed so as to prevent Gina from getting maintenance.
>
> I trust we have an agreement, and will await your confirmation of the same.

CP 61.

17. Mr. Fugate responded at 3:43 p.m. that day, as follows:

> Mr. Green is agreeable with the last proposal made (payment of maintenance in the amount Ms. Green would have received when Mr. Green reaches age 65 in the event he decides to work beyond the age of 65 and delay receipt of retirement benefits).
>
> Sincerely,
>
> Jason J. Fugate
> Attorney at Law

CP 60-61.

18. At 3:53 p.m. that day, Ms. Johnson emailed Mr. Fugate from her paralegal's computer stating, "Thank you for confirming we have a deal…" CP 60.

19. The attorneys proceeded to contact Court Administration before the close of business on June 12, 2017 to inform the trial court that the parties had an agreement and would not be proceeding to trial the

following day. CP 122. In response, the court set presentation of final orders for June 13, 2017 at 1:00 p.m. CP 122.

20. At 8:25 p.m. on June 12, 2017, Ms. Johnson sent Mr. Fugate a draft property settlement agreement for Mr. Fugate's review. CP 86-100; 175.

21. On June 13, 2017 at 10:03 a.m., Mr. Fugate sent a letter to Ms. Johnson indicating, "In reviewing the proposed PSA there is an apparent fundamental misunderstanding regarding the division of Mr. Greens PERS Plan II account…" He alleged there was no agreement as to Gina receiving a benefit of his entire career which would span another 20 years, although he confirmed his intention that she would receive the 100% survivor benefit. CP 176.

22. Ms. Johnson sent an email stating:

> There is no misunderstanding as to the PERS division. I am sending you one of the many emails you sent me indicating your client was negotiating less in maintenance payments in exchange for my client receiving benefits regarding future contributions your client makes…

CP 177.

23. Prior to the presentation hearing on June 13, 2017, Ms. Johnson sent Mr. Fugate a signed PSA, Findings and Conclusions about a Marriage, and a Final Divorce Order. CP 75-100. Mr. Fugate and his client refused to sign. CP 58.

24. The attorneys appeared for the presentation hearing on June 13, 2017. CP 58

25. On July 27, 2017, Mr. Dugaw substituted in as counsel for Tom. CP 50.

26. November 7, 2017, Gina filed a Motion for Order Adopting Settlement Provisions Agreed Upon by the Parties as confirmed on June 12, 2017 and the Findings and Conclusions about a marriage and Final Divorce Order which Memorializes Said Settlement (hereinafter "motion") on the ground that its existence and material terms are not and cannot genuinely be disputed. CP 107-109. The motion does not expressly reference adoption of the property settlement agreement sent to Mr. Fugate on June 12 and June 13, 2017, respectively, See CP 107-109; however, the sworn declarations filed in support of the motion by Gina and Ms. Johnson indicate that the agreement is memorialized in the writings between the parties and further memorialized in the PSA sent to Mr. Fugate. CP 54; 58.

27. Non-modifiability is not addressed in the settlement writings between the attorneys. See CP 60-73. The PSA included a support non-modifiability clause neither Mr. Fugate nor Tom disputed between June 12, 2017 and the time the motion was filed on November 7, 2017. See CP 95; 176.

28. In response to the motion, Tom filed an unsworn "Memorandum of Authorities by Respondent's Counsel" signed by Mr. Dugaw and the sworn Declaration of Jason Fugate, in which Mr. Fugate acknowledges that on June 12, 2017 he thought the parties had an agreement and informed the court of the same. CP 122. He also raises for the first time the issue pertaining to the non-modifiability clause in the PSA. CP 123.
29. The trial court held a hearing on the motion on November 27, 2017. CP 218; VRP 3.
30. The Order Granting Motion to Adopt CR 2A Agreement was entered on December 5, 2017. CP 218. The court held that the Property Settlement Agreement drafted by Petitioner and proposed to Respondent on June 13, 2017 reflects the agreement reach by the parties on or about June 12, 2017, with the exception of V., Paragraph D., which shall be (and was) stricken from the document. CP 218.
31. Tom filed a Motion for Reconsideration on December 14, 2017. CP 244-271. Gina filed a response on January 3, 2018. CP 278-287. Judge Toynbee entered an Order Denying Motion for Reconsideration on June 20, 2018. CP 302.
32. Tom filed his Notice of Appeal on July 19, 2018. CP 303.

III. ISSUES RAISED WHICH SHOULD NOT BE CONSIDERED

"Summary judgment procedures are applied to determine whether there is a genuine dispute regarding the existence and material terms of a settlement agreement." *In re Patterson*, 93 Wn. App. 579, 584, 969 P.2d 1106; *See also In re Marriage of Ferree*, 71 Wn. App. 35, 41-44, 856 P.2d 706 (1993). On review of an order granting or denying a summary judgment motion, the "appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12; *See also Berg v. Hudesman, 115 Wn.2d 657, 670, 804 P.2d 222 (1990)*. The following issues were raised before the trial court, and thus should not be considered by an appellate court:

1. Tom's allegation that the terms of the survivor benefit are disputed;
2. Tom's allegation that the nature of Gina's maintenance is disputed; and
3. Tom's allegation that material terms are missing from the writings.

IV. ARGUMENT

A. Standard of Review.

The trial court's decision to enforce a settlement agreement is reviewed de novo because the evidence before the trial court consisted entirely of affidavits[8] and the proceeding is similar to a summary judgment

[8] Declaration under penalty of perjury has same effect as affidavit. See RCW 9A.72.085.

proceeding. *Brinkerhoff v. Campbell, 99 Wn. App.692, 696, 994 P.2d 911 (2000)*; *Condon v. Condon*, 177 Wn.2d 150, 161-62, 298 P.3d 86 (2013). "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,* at 696-97; *In re Marriage of Ferree*, 71 Wn. App. 35, 43-44, 856 P.2d 706 (1993). The moving party can bear this burden by producing appropriate declarations. *Ferree,* at 44.

"If the moving party meets her initial burden, then the nonmoving party must produce declarations or other cognizable materials that show the presence of a genuine dispute of fact. *Id.* The nonmoving party's declaration regarding his subjective intent is not enough. "The [nonmoving party] must in addition come forth with evidence demonstrating the existence of a dispute regarding the material terms of the agreement or the intent to be bound thereby." *Morris v. Maks,* 69 Wn. App. 865, 871, 850 P.2d 1357 (1993). And, the dispute must be a genuine one. *Ferree*, at 40. "The existence and terms of an agreement are a question of fact[9], but the question is not genuinely disputed when reasonable minds could reach only one conclusion." *Ferree*, at 43. "The parties' submissions must be read in the light most favorable to the nonmoving party in order to determine

[9] Mid-sentence citations omitted.

whether reasonable minds could reach only one conclusion." *Condon*, at 162; *See also Brinkerhoff,* at 697. If reasonable minds could reach only one conclusion, then there is no genuine dispute, and the moving party is entitled to judgment as a matter of law. ***See Ferree,*** at 41.

"When a genuine dispute over the existence of the agreement or of a material term is established by the party resisting enforcement, *the moving party may prevail* either by showing the disputed agreement was made on the record or *by showing it was reduced to writing and signed by the party or attorney denying the agreement.*" *Patterson*, 93 Wn. App. 579, 589, 969 P.2d 1106 (1999). (Emphasis added.)

B. <u>The parties have an enforceable settlement agreement.</u>

"In Washington a trial court's authority to compel enforcement of a settlement agreement is governed by Civil Rule (CR) 2A and RCW 2.44.010.[10]" *Morris*, at 868. CR 2A provides as follows:

> 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 <u>unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same</u>.

[10]Respondent does not allege his attorney did not have the authority to bind him to the agreement reached between the parties. Therefore, attorney's authority is undisputed.

CR 2A. (Emphasis added.) "By its terms, CR 2A applies only to agreements that satisfy two elements." *Ferree,* at 39. First, the agreement must be made by the parties or attorneys "in respect to the proceedings in a cause." *Ferree,* at 39 (other citations omitted); CR 2A. Second, "'the purport' of the agreement must be disputed." *Id.* "When these elements are met, CR 2A supplements but does not supplant the common law of contracts." *Ferree*, at 39; *Morris*, at 868. "[CR 2A] precludes enforcement of a disputed settlement agreement *not made in writing* or put on the record, whether or not common law requirements (of contract) are met. However, *it does not affect an agreement made in writing*, or put on the record." *Patterson*, at 582-583, *citing In re Marriage of Ferree*, 71 Wn. App. at 40. (Emphasis added.)

1. The agreement was made by the attorneys in respect to the parties' divorce.

While Tom disputes there is an agreement, he Tom does not dispute the writings were made by the attorneys in respect to the proceedings in this cause, namely the parties' divorce.

2. The agreement is not disputed within the meaning of CR 2A.

Two criteria govern whether an agreement is disputed within the meaning of CR 2A. "First, there must be a dispute over the existence and material terms of the agreement, as opposed to a dispute over immaterial

terms.[11]" *Ferree*, at 40. "Second, the dispute must be a genuine one." *Id.* If reasonable minds could reach only one conclusion, then there is no genuine dispute. See *Ferree,* at 41. "The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle a cause of action." *Ferree*, at 40-41. "[CR 2A] is not served by barring enforcement of a settlement agreement that is not genuinely disputed, for a nongenuine dispute can be, and should be, summarily resolved without trial." *Ferree*, at 41; *Patterson*, at 583-84.

a. The informal writings between the attorneys establish the existence and material terms of the parties' agreement within the meaning of CR 2A.

Settlement agreements are governed by general principles of contract law. *Morris v. Maks,* 69 Wn. App. 865, 868-869, 850 P.2d 1357 (1993), *review denied* 122 Wn.2d 1020 (1993), *citing Stottlemyre v. Reed,* 35 Wn. App. 169, 171, 665 P.2d 1383, *review denied*, 100 Wash.2d 1015 (1983). In determining whether informal writings such as letters and emails are sufficient to establish a contractual agreement even though the parties

[11] CR 2A says the "purport" of the agreement must be disputed. Accordingly to Black's Law Dictionary, the "purport" of something is its meaning, import, substantial meaning, substance, legal effect. Black's at 1236 (6th ed. 1990). According to Webster's Third New International Dictionary, the "purport" of something is the meaning it conveys, professes or implies, or its substance or gist. Webster's at 1847 (1969) The substance, gist, or legal effect of an agreement if found in its existence and material terms, and it follows that the "purport" of an agreement is dusted only when its existence or material terms are disputed. *Ferree,* at 40.

contemplate signing a more formal written agreement, Washington courts consider three factors: (1) whether the subject matter has been agreed upon, (2) whether the terms are all stated in the informal writings, and (3) whether the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Morris v. Maks,* 69 Wn. App. at 869, *citing Loewi v. Long,* 76 Wash. 480, 484, 136 P. 673 (1913). As to intent:

> The Washington court has long adhered to the objective manifestation theory in construing the words and acts of alleged contractual parties. We impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the relations, if any, between two parties.

Morris, at 871-72, *citing Plumbing Shop, Inc. v. Pitts. 67 Wn.2d 514, 517, 408 P.2d 385 (1965).* "The subjective intent of the parties is irrelevant as long as [the court] can impute an intention that corresponds to the reasonable meaning of the actual words used." *Id.* "Under the 'context rule' adopted in *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990), the court may consider extrinsic evidence to discern the meaning or intent of the words used in the agreement, but this evidence will not be considered if it merely shows a party's subjective intent or if it contradicts the words used." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693-95, 974 P.2d 836 (1999).

In *Morris v. Maks, 69 Wn. App. 865, 865, 850 P.2d 1357,* the court addressed the very issue before this Court: whether letters between the attorneys were sufficient to establish a contract even though the parties contemplated signing a more formal written agreement. In *Morris*, the attorneys exchanged letters between July 29 and July 25 addressing the terms of their settlement agreement and confirming they had an agreement. On July 24, Maks represented to a bank that he had settled his case with Morris. Subsequently, Maks' attorney informed Morris his client was terminating the settlement negotiations. Morris sought to enforce the settlement agreement as outlined in the letters. Maks argued the agreement outlined in the letter should not be enforced alleging it did not contain all of the material terms of the settlement, and because he did not intend to be bound by any writing short of a formal written agreement. In analyzing the facts of the case under the *Loewi* three-part test, the court determined the letters were sufficient to establish a binding settlement agreement even though the parties contemplated a more formal written agreement and affirmed its enforcement. *Morris v. Maks*, at 872. The facts of the present case are analogous to *Morris.*

(i) <u>The parties agree to the subject matter.</u>

Tom does not dispute the subject matter of the settlement agreement, which pertains to the parties divorce and the division or assets

and debts, award of support and payment of attorney fees. *See Appellant's Opening Brief,* at 28.

(ii) All material terms of the agreement are stated in the informal writings.

(a) Gina has met the initial burden of proving the existence and material terms of the settlement agreement.

Gina has the initial burden of proving the existence and material terms of the agreement between the parties, which she has handily met. As in *Morris*, the settlement agreement in the present case is set forth in the writings exchanged between the attorneys. Here, the writings consisted of letters and emails between Mr. Fugate and Ms. Johnson dated from May 31, 2017 through June 12, 2017. In support of her motion to enforce, Gina provided the informal writings to the trial court as attachments to Ms. Johnson's sworn declaration. CP 57-106. Gina also provided her own sworn declaration in support of her motion to enforce. CP 53-56. Both sworn declarations indicated the parties had reached an agreement as to all remaining issues involved in their divorce and that the terms of the agreement were set worth in the writings exchanged between the attorneys and confirmed on June 12, 2017. CP 53-54; 57-58.

Going into settlement negotiations, the issues then remaining included the division of all real and personal property, the amount and

duration of support, and how attorney fees were to be paid. CP 1-5; 32-35; 160. It is clear from their contents that the writings addressed all material terms by which the parties settled the remaining issues. CP 60-73. The writings contain highly detailed material terms addressing all issues before the court, which include:

(i) The distribution of all assets and debts owned by the parties or either of them, including but not limited to the division of real property, automobiles and recreational vehicles, retirement and investment accounts, bank accounts, other personal property, debts encumbering assets, and other debts;

(ii) The award of a 100% PERS survivor benefit in favor of Gina;

(iii) The amount and duration of spousal maintenance payable to Gina, including maintenance during times Gina's share of retirement may be delayed or suspended due to Tom's choice not to retire or later return to work;

(iv) A lump sum payment to Gina in the event Tom leaves employment within the following five (5) years;

(v) A requirement that Gina inform Tom before she ever sells the house (awarded to her) so he can make an offer; and

(vi) A provision that each party will pay their own attorney fees.

Gina met her burden of proving that the existence and material terms of the agreement were not genuinely in dispute.

(b) Tom cannot meet his burden that there is a genuine dispute as to the existence and material terms of the agreement.

Once Gina met her burden, it became Tom's his obligation to show there was a genuine dispute as to the existence or material terms of the agreement. See *Ferree,* at 44. Like Gina, Tom could produce declarations and other evidence to meet his burden. However, the nonmoving party's (or his attorney's) declaration regarding his subjective intent is not enough. "The [nonmoving party] must in addition come forth with evidence demonstrating the existence of a dispute regarding the material terms of the agreement or the intent to be bound thereby." *Morris v. Maks,* 69. . 865, 871, 850 P.2d 1357 (1993). The issue for the court is not whether the agreement is disputed in the sense that Tom did not wish to abide by it, but rather whether the agreement was disputed in the sense that Tom has controverted its existence or material terms in such a way as to raise a genuine issue of fact. Tom did not provide his own declaration. Mr. Fugate provided a declaration to which he attached most of the informal writings.[12]

[12] He left out his offer dated June 12, 2017, sent at 5:02 p.m. It was, however, attached to Ms. Johnson's declaration. CP 65.

(1) Mr. Fugate acknowledged the existence of an agreement and its material terms.

On June 12, 2017, Ms. Johnson sent Mr. Fugate an email which ended, "I trust we have an agreement, and will await your confirmation of the same." CP 61. The same day, Mr. Fugate responded by email stating, "Mr. Green is agreeable with [sic] last proposal made," followed by a parenthetical recap of the final issue to which the parties agreed in resolution of the entire case. CP 60-61. Within 10 minutes, Ms. Johnson sent an email to Mr. Fugate, which stated, "Thank you for confirming we have a deal." CP 60. It was at that point the informal writings constituted an agreement and the material terms addressed in the informal writings were cemented.

Mr. Fugate admits he believed an agreement existed between the parties as reflected in the informal writings, which is the best evidence that the parties did, in fact, reach an agreement. Mr. Fugate stated, "Trial has been set at 9:30 a.m. on Tuesday[13] but we had informed the Court we had an agreement." CP 122. Tom's Memorandum of Authorities filed in response to the motion reiterated, "On June 12 the parties thought they had reached an agreement..." CP 112. Mr. Fugate admits the trial date was

[13] June 13, 2017.

stricken due to the attorneys' representation to the court that an agreement had been reached. CP 122.

Mr. Fugate's admissions, alone, indicate there is no genuine dispute as to the existence of the contract or its material terms. His subjective and contradictory "perspective" set forth in his declaration is not evidence that shows a material dispute.

Under the context rule, the court may consider extrinsic evidence to discern the meaning or intent of the words used in the agreement, but this evidence will not be considered if it merely shows a party's subjective intent or if it contradicts the words used." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693-95, 974 P.2d 836 (1999). Indeed, it is clear the trial court did consider extrinsic evidence to discern the meaning and intent of the words used in the agreement. The court considered the entirely of the parties' negotiations under the authority of the "context rule." VRP 25-28.

Mr. Fugate's declaration, on the other hand, while reviewed by the court, is the type of evidence not to be considered because it merely shows subjective intent and contradicts the words used. *Hollis,* at 693-95. "The subjective intent of the parties is irrelevant as long as [the court] can impute an intention that corresponds to the reasonable meaning of the actual words used." *Id.* Tom offers no valid reason why the court should give the words in the informal writings any meaning other than the meaning afforded them

by the trial court. The only reasonable conclusion is that the parties had an agreement by way of the informal writings.

(2) The terms of the agreement are not ambiguous.

Tom now alleges a contract does not exist because three aspects of the negotiation were impacted by ambiguities thus creating disputes: (1) providing Gina with one-half of his career PERS accumulation; (2) providing Gina with 100% of his PERS survivor benefit; and (3) the nature of Mr. Green's maintenance obligation. *Appellant's Opening Brief,* at 15-16, First, Tom did not assert at the trial court level that the terms of the survivor benefit or the nature of Tom's maintenance obligation were in dispute, genuinely or otherwise. See CP 112-125; VRP 3-32. Thus, the court should not consider these issues on appeal. RAP 9.12. Second, Tom provides no authority for his position that ambiguity as to a term of an agreement means the contract does not exist or the terms are not addressed.

In support of his position, Tom relies solely on Mr. Fugate's post-agreement declaration of November 7, 2017, wherein Mr. Fugate does nothing more than explain his subjective "perspective" of the discussions and interpretation of the material terms of the agreement. He suggests his "perspective," shows a genuine dispute as to the existence and material terms of an agreement; however, it merely shows his subjective intent and

contradicts the words used. Such evidence is not to be considered. *Hollis, at* 693-95. His subjective intent is irrelevant as long as [the court] can impute an intention that corresponds to the reasonable meaning of the actual words used. *Id.*

Gina submits the objective evidence viewed in the light most favorable to Tom offers no ambiguity hen read in context, as Tom desires, and shows:

(i) Gina's May 31, 2017 offer was comprehensive in nature and included a provision for PERS II division by way of creating an interest for Gina in the Respondent's account and spousal maintenance. The spousal maintenance calculation was meticulously set forth in her offer, and it is clear that Respondent's income was not reduced in the calculation with respect to mandatory PERS II contributions. The calculation adopted by the court for purposes of establishing temporary spousal maintenance also did not give Respondent a reduction in his income for mandatory PERS II contributions. It makes no sense she would agree to take less in maintenance for five years in consideration of him making future retirement contributions from which she will not receive a benefit.

(ii) In response, Respondent's counter-offer proposed a reduction of her maintenance in light of the decrease in his income due to his future

mandatory PERS II contributions. As Mr. Fugate stated, "If things go as planned Ms. Green would receive a benefit from the 20 years of post-divorce efforts of Mr. Green in addition to receiving the survivor benefit." This counter-offer acknowledged a reduction in maintenance now for an increase in future benefits by way of sharing in his 20 years of post-divorce efforts, or work.

(iii) PERS II is a defined benefit plan, not a defined contribution plan. CP 196. This means the monthly retirement benefit received by the parties is based on the number of credit service years (years of employment), not by the amount Respondent contributes to the plan. CP 202. Therefore the only way Gina receives a "benefit from the 20 years of post-divorce efforts of Mr. Green" is to give Gina an interest in Mr. Green's future service credit years.

(iv) Had Mr. Green intended for Gina to only receive 50% of the marital portion of the PERS II benefit, he would have made no reference to her receiving the benefit from his 20 future year of employment under the PERS II plan. He would have also made some mention of her only receiving the community portion.

(v) Mr. Green reiterated his position that Gina should accept less in maintenance now in exchange for "Ms. Green [receiving] just as much [retirement] benefit as Mr. Green from any future

contributions/withholdings." The only way Gina receives "just as much benefit as Mr. Green" is if she receives a benefit equal to Mr. Green's benefit, which is one-half of his career accumulation.

(vi) The parties agreed Tom would pay Gina what she is losing in maintenance over the next five years and not gaining in his future credit service years and increased retirement pay if he terminates employment within the next five years. She agreed to take less now in exchange for greater retirement later on the condition that he actually continues to accumulate credit service years for no less than five years. If he terminates in less than five years, then he has agreed to pay her what she lost in maintenance to compensate her for what she will lose in future retirement benefit accrual.

(vii) Gina relied on Mr. Green's offer in accepting less maintenance in exchange for more in retirement in the future.

(viii) There is no evidence to support Tom's position that Gina would only receive a cost-of-living adjustment if the parties' created an interest for her in Tom's account.

Mr. Green's position simply does not make sense. When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation. *Dickson v.*

United States Fid. & Guar. Co., 77 Wn.2d 785, 790, 466 P.2d 515 (1970). Gina's construction is the only reasonable and just construction. It is the only conclusion reasonable minds can reach, as confirmed by the trial court, whose analysis of this issue was spot on:

> There was an agreement reached by the parties, as evidenced by their emails, that they both indicated an agreement had been reached. It was only a matter of putting it into the prescribed forms, signing it and presenting it to a judge for signature.
>
> I also find that the material items were agreed upon in light of the negotiations between the parties contained in the letters and the emails between the parties, all of which constitute writings under CR 2A, and that the parties, when they reached the agreement on the eve of trial, intended that agreement to be binding.
>
> The early mention of the PERS II account does seem to focus on the community portion. That was when Ms. Johnson sent her letter to Commissioner Mitchell, the pre-settlement conference writings between the parties. At that point it seemed to focus on the community portion of the PERS II account, and I'm only taking that evidence as it pertains to the intent of the parties.
>
> ...
>
> So Ms. Johnson talks about the community portion in the initial settlement letter[14] to Mr. Fugate. In response, Mr. Fugate wrote a letter to Ms. Johnson on June 7th stating that Mr. Green is agreeable to a lot of the letter, the proposal by Ms. Johnson, and specifically he says:
>
>> Mr. Green is agreeable with Ms. Green creating an interest in his PERS II account as opposed to creating a separate account.
>
> And he goes on to state:

[14] Letter dated May 31, 2017.

> As you are aware under the creating-an-interest option, Ms. Green would receive an increased amount of retirement pay when Mr. Green reaches retirement age. Mr. Green still has 20 years of work ahead of him. If things go as planned, MS. Green would receive a benefit from the 20 years of post-divorce efforts of Mr. Green.

He then goes on to propose a lower amount of maintenance, but it's compelling to me that Mr. Fugate is the one that proposed creating an interest...for the reason that it would reduce – it was part of his negotiation tactic to reduce spousal maintenance.

In his letter declaration that's before the court now, he indicates he didn't mean a full half of Mr. Green's future contributions after the dissolution but the benefits of staying on the job longer, and Mr. Green through Mr. Dugaw argues that this is ambiguous and therefore doesn't constitute an agreement on the material issue.

But what's even more compelling is Mr. Fugate follows up with an email on June 9th at 10:44 in the morning explaining his rationale for offering lower spousal maintenance, and he says, quote:

> In light of my client's agreement to create an interest in his account and allow for the 100 percent survivor benefit, Ms. Green will receive just as much benefit as Mr. Green from any future contributions/withholdings."

This removes any ambiguity as to Mr. Green's intent, for good or for bad, that under the proposed agreement, it would create that future interest in his PERS II account in exchange for lower spousal maintenance. It compels me to find that this was agreed to.

There was no mention about limiting it to the community portion of the PERS II account, but there is language regarding future efforts of Mr. Green and future contributions and withholdings, which is compelling to me and convinces me that that was the agreement that was reached.

VRP 25-28.

(3) The Property Settlement Agreement adopted by the court reflects the settlement agreement set with by way of the informal writings.

Tom argues a contract does not exist because the proposed PSA sent to Mr. Fugate after the parties solidified their agreement by informal writings on June 12, 2017 contained a support non-modifiability clause, which was not addressed in the informal writings. This argument, too, must fail. The motion asked the court to adopt the agreement memorialized in the informal writings between the attorneys from May 31, 2017 through June 12, 2017. CP 107. The court determined the informal writings between the attorneys to be the agreement, not the PSA.

Gina admits the parties did not address a non-modifiability clause in the informal writings, and thus, it was not part of the written agreement. The trial court appropriately determined the non-modifiability clause, having not been addressed in the informal writings, was not part of the agreement, having been proposed after the agreement was reached, and struck if from the PSA. The court will not read additional terms into an otherwise valid settlement agreement when there is no evidence the parties intended such terms. *Condon,* at 163. However, that does not invalidate the entire contract. *See Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013). The Court simply found the PSA accurately reflected the agreement

reached through the informal writings, with the exception of the non-modifiability clause. CP 218. Perhaps most important, by Tom's own admission the non-modifiability clause is immaterial. He argues the court cannot order it at trial barring an agreement, and he is correct. The parties having not agreed to this term, and the court having no ability to order it absent agreement, there was no expectation by either party that the term would be enforced. Further, the outcome of the case does not depend on the court having struck the non-modifiability clause, thereby making it immaterial. *See Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 395 P.3d 1059 (2017).

(4) Tom admits each "disputed" fact he raises is not persuasive.

Tom admits, "Alone, each one of these disputed facts may be unpersuasive..." *Appellant's Opening Brief,* at 18. Gina submits that even viewing them collectively in the light most favorable to Tom, he has not met his burden of showing a genuine dispute as to the existence or material terms of the agreement.

(iii) The parties intended to be bound by the agreement prior to the time of the signing and delivery of more formal documents.

Tom disputes his intent to be bound based on his refusal to sign the formal PSA. He alleges "this subsequent act by the men

demonstrates Mr. Green did not assent to the essential terms of the PSA as Ms. Green Proposed it." *Appellant's Opening Brief,* at 24. An essential element to the valid formation of a contract is the parties' objective manifestation of mutual assent. Cruz *v. Chavez,* 186 Wn. App. 913, 920, 347, 347 P.3d 912 (2015), *citing Keystone Land & Dev. Co. v. Xerox Corp.,* 152 Wn.2d 171, 177, 94 P.3d 945 (2004). "'The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.'" *Cruz v. Chavez*, at 920, *citing H.D. Fowler Co. v. Warren,* 17. 178, 180, 562 P.2d 646 (1977) (quoting *National Bank v. Equity Investors,* 81 Wash.2d 886, 912–13, 506 P.2d 20 (1973)). "Thus, where a party has signed a contract, he or she is presumed to have objectively manifested assent to its contents." *Cruz*, at 920-21. Where the settlement agreement is in the form of informal writings, the "intent to be bound" factor is met by showing there is a writing signed by the party to be bound. *See Morris,* at 869.

On June 12, 2017, Ms. Johnson sent Mr. Fugate an email which ended, "I trust we have an agreement, and will await your confirmation of the same." CP 61. The same day, Mr. Fugate responded by email stating, "Mr. Green is agreeable with [sic] last proposal made," followed by a parenthetical recap of the final issue to which the parties agreed to resolve the case. CP 60-61. Within 10 minutes, Ms. Johnson sent an email to Mr.

Fugate, which stated, "Thank you for confirming we have a deal." CP 60. In his declaration in opposition of the motion to enforce the agreement dated November 14, 2017, Mr. Fugate acknowledged, "Trial has been set at 9:30 a.m. on Tuesday[15] but we had informed the Court we had an agreement prior to the time I received the property settlement agreement." CP 122. Mr. Dugaw, who replaced Mr. Fugate as Tom's counsel to address the motion to enforce, also acknowledged, "On June 12 the parties thought they had reached an agreement..." CP 112. The trial scheduled for June 13, 2017 was stricken, and the parties were ordered to appear for presentation of final orders on June 13, 2017 at 1:00 p.m. CP 122.

The objective evidence clearly shows, Mr. Fugate signed writings which showed his intention to be bound prior to the time of signing and delivery of a formal contract. Tom's intent to be bound only upon execution of the final settlement agreement is expressed nowhere in the exchange of correspondence between the attorneys. Under the objective manifestation theory, "Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between two parties." *Morris v. Maks*, at 871-72, *citing Plumbing Shop, Inc. v Pitts,* 67 Wn.2d 514, 517, 408 P.2d 382 (1965) In reviewing the submissions in the light most favorable to

[15] June 13, 2017.

Tom, reasonable minds can reach only one conclusion, which is that Tom intended to be bound according to the terms of the writings set forth in the May 31, 2017 through June 12, 2017 letters between counsel.

3. Tom's subjective interpretations of the material terms is not a genuine dispute under the terms of CR 2A.

Tom now states, "The plain and simple reason he didn't sign the PSA is because they did not agree with the interpretation of the material terms" therein. *Appellant's Opening Brief*, at 29. Again, Tom misses the point that the informal writings constitute the agreement, not the subsequently drafted PSA. His disagreement with the interpretation of the PSA does not support a conclusion that a contract and its material terms are not contained in the informal writings.

It is odd Tom states in his brief, "When a contact provision is subject to multiple reasonable interpretations, this Court will, considering extrinsic evidence where appropriate, construe it against the drafter." *Appellant's Opening Brief*, at 20, *referencing Viking Bank v. Firgrove Commons 3, LLC,*, 183 Wn. App. 706, 713, 183 P.3d 334 (2008). First, Tom's argument assumes a contract exists. Second, as to the terms he contests, Mr. Fugate was the drafter. Therefore, even if there were two reasonable interpretations, it would be construed in Gina's favor and against Mr. Fugate.

4. The contract is not missing any material terms.

Tom alleges for the first time on appeal that not all of the contract's terms were stated in the informal writings. *Appellant's Opening Brief*, at 28. This issue should not be considered by the court. RAP 9.12. Further, this new assertion is disingenuous considering Tom offers the court no evidence whatsoever as to what material terms are missing from the informal writings, not even a list of terms that are usually included in a divorce order but were missing from the agreement.

5. The court should not consider any error related to the Motion for Reconsideration.

Tom did not devote any portion of his argument to the error he assigned the court's failure to grant summary judgment. Therefore, Gina does not address it and asks the court not to consider it.

C. Conclusion

Considering the evidence in the light most favorable to Mr. Green, this court must conclude that the informal writings exchanged between the attorneys from May 31, 2017 through June 12, 2017 constitute a binding contractual agreement enforceable by CR 2A. The evidence reviewed in the light most favorable to Tom shows the parties agree to the subject matter of the agreement, there is no genuine dispute as to the existence or material terms of the agreement, and the parties intended to be bound by the

agreement prior to the time of the signing and delivery of a formal contract. Reasonable minds could reach but one conclusion: a settlement agreement was reached and its terms are set forth in the informal writings as well as the PSA adopted by the trial court. Although Mr. Green would prefer not to comply with the plan, the trial court should enforce it as a valid enforceable contract.

V. ATTORNEY FEES

Gina requests attorney fees and costs pursuant to RAP 18.1. "The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this [marital dissolution] chapter . . ." RCW 26.09.140. Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. RCW 26.09.140. An award of attorney fees under this section "rests with the sound discretion of the trial court, which must balance the needs of the spouse requesting them with the ability of the other spouse to pay." *Kruger v. Kruger,* 37 Wn. App. 329, 333, 679 P.2d 961 (1984).

Gina also seeks fees under Section VIII.A. of the Property Settlement Agreement incorporated into the Final Divorce Order be reference, which states in pertinent part (and was not disputed):

> It is agreed that neither party will claim, assert, or demand of or against the other party any relief different than is embodied in this agreement and will not assert one as against the other any claim or demand which is inconsistent or contrary to the terms hereof, except in the event of fraud or misrepresentation. Should either party do so, that party will be responsible for all reasonable attorney fees and costs incurred by the other party in enforcing this agreement…

CP 240.

VI. CONCLUSION

Gina respectfully requests this court affirm the decision of the trial court and award her fees and costs as requested.

Respectfully submitted this 31st day of January 2019.

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