

FILED

FEB 27 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31946-6

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DONALD RUSSELL,

Respondent,

vs.

JOSHUA T. AUAYAN and IDA AUAYAN,

Appellants.

THE HONORABLE ALLEN NIELSEN

REPLY BRIEF OF APPELLANTS' AUAYANS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	ii.
Table of Authorities	iii.
Russell's Argument I.-Auayan's Response	
1. CR 60 Argument	1.
2. Order not a final order in the case argument	2.
Russell's Argument II.-Auayan's Response	
1. CR 2A Argument	4.
Russell's Argument III. - Auayan's Response	
1. The agreement contains unconscionable Provisions in Paragraph 2(c)and (5) Argument	6.
Russell's Argument IV - Auayan's Response	
1. The Stipulated Settlement Agreement violates Auayan's Constitutional Rights of Privacy Argument	11.
Russell's Argument V. - Auayan's Response	
1. CR 2A does not apply to Ida Auayan	12.
Russell's Argument VI. - Auayan's Response	
1. The agreement order of April 25, 2013 was Not a final order, Complaint Issues	14.
Russell's Argument VII. - Auayan's Response	
1. The agreement was not a final order, Findings of fact issues	17.
Russell's Argument VIII. - Auayan's Response	
1. Vacate Russell's attorney's fees award	18.
Russell's Argument IX. - Auayan's Response	19.

TABLE OF AUTHORITIES P.1

<u>TABLE OF CASES</u>	<u>Page</u>
<u>Al-Safin v. Circuit City Stores, Inc.</u> , 394 F.3d 1254 (2005)	9.
<u>Adler v. Fred Lind Manor</u> , 153 Wn.2d 331, 103 P.3d 773 (2004)	10.
<u>Marriage of Hammack</u> , 114 Wn.App. 805, 60 P.3d 663 (2003)	11.
<u>Nguyen v. Sacred Heart Medical Center</u> , 97 Wn. App. 728, 987 P.2d 634 (1999)	5.
<u>Schultz v. United Airlines, Inc.</u> , 797 F.Supp.2d 1103 (2011)	12.
<u>State v. Trask</u> , 91 Wn.App. 253, 957 P.2d 781 (1998), reviewed denied, 137 Wn.2d 1020 (1999), appeal after remand 990 P.2d 976, 98 Wn.App. 690 (2000).	3., 16.
<u>State Farm Mut. Auto. Ins. v. Johnson</u> , 72 Wn.App. 580, 871 P.2d 1066 (1994)	18.
<u>Summers v. Department of Revenue</u> , 104 Wn.App. 87, 14 P.3d 902 (2001)	2.
	<u>STATUTES</u>
Wash. Const. Article 1 Paragraph 7	11.
	<u>COURT RULES</u>
CR 2A Stipulations	4.,12.,13.
CR 15	14.
CR 60(b)(1)	1., 2.
CR 60(b)(5)	1.
RAP 2.2(d)	3.
RAP 14.2	19.
RAP 18.1	19.

TABLE OF AUTHORITIES P. 2

RULES OF PROFESSIONAL CONDUCT

RPC 1.2(a) Scope of Representation and Allocation of
Authority Between Client and Lawyer

RULES OF EVIDENCE

NONE.

RUSSELL'S ARGUMENT I.

Joshua Auayan's Challenges to the substance of the Stipulated Settlement Agreement should have been appealed within thirty (30) days of the entry of the stipulated settlement agreement.

AUAYANS' RESPONSE

1.

CR 60 ARGUMENT

AUAYAN uses CR 60(b)(1) and (5) to attempt to vacate the void, illegal, and unenforceable Stipulated Settlement Agreement and Order, entered by the Court on April 25, 2013. (CP 079-094)

“CR 60(b)(1) and (5):

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(5) The judgment is void.”

CR 60(b)(1) requires evidence of mistake, to vacate an Order.

CR 60(b)(5) allows vacation of a void Order.

The Order entered by the Court on April 25, 2013, was based on a void Agreement, that violated public policy.

As such, it was void as ab initio null from the beginning, and should have been vacated, on AUAYANS' Motion to Vacate,(CP 166-175) as a void Order or as a mistake.

This void agreement, also amounts to a mistake or irregularity, under CR 60(b)(1). Summers v. Department of Revenue 104 Wn. App. 87, 14 P.3d 902(2001).

2. ORDER NOT A FINAL ORDER IN THE CASE ARGUMENT

AUAYANS could not appeal that Stipulated Settlement Agreement Order dated April 25, 2013, because all issues, before the Court were not adjudicated, in that Order.

The basic issues that were remaining, before the Court at the time the Stipulated Settlement Agreement was entered as an Order were:

1. Was the Real Estate Covenant valid?
2. What evidence existed that any annoyances of RUSSELL were annoyances to the neighborhood, under provisions of the Real Estate Covenant?
3. Were those annoyances enough of a problem to enter an Order that balanced annoyances to the neighborhood, to restrictions on AUAYANS' right of privacy and quiet

enjoyment of their property?

The Court did not address those issues in its Order of April 25, 2013. **(CP 079-094)**

Since those issues remained, the Court Order of April 25, 2013 **(CP 079-094)** was not a Final Order in the case, subject to appeal, until those issues were resolved, by the Court.

The case is not over until the Court makes Findings of Fact and Conclusions of Law concerning all of the issues in the case. **(RAP 2.2(d))**

As such, the case should be remanded to the Trial Court, so the Court can address those remaining issues.

State v. Trask, 91 Wn.App. 253, 957 P.2d 781 (1998), reviewed denied, 137 Wn.2d 1020(1999) , appeal after remand 990 P.2d 976, 98 Wn.App. 690 (2000).

RUSSELL'S ARGUMENT II.

The Stipulated Settlement Agreement is binding because Appellant Auayan entered into the agreement with informed consent.

AUAYANS' RESPONSE

1. CR 2A ARGUMENT

There is no question that **CR 2A** is a valid rule and that stipulations by attorney's can bind their clients, when put on the record, in open Court.

"CR 2A. Stipulations: 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."

That rule applies only to legal agreements and stipulations, however.

As noted, in **AUAYANS'** brief, the Stipulated Settlement Agreement dated April 25, 2013, that formed the basis for the, **CR 2A** Stipulated Order, was void, illegal, and unenforceable.

It contained terms that were one sided, or overly harsh, exceedingly calloused, shocking to the conscience, and as such was substantially

unconscionable, and a violation of public policy.

Nguyen v. Sacred Heart Medical Center, 97 Wn. App. 728, 987

P.2d 634 (1999)

RUSSELL'S ARGUMENT III.

III. The Stipulated Settlement Agreement is not unconscionable.

AUAYANS' RESPONSE

1. THE AGREEMENT CONTAINS UNCONSCIONABLE PROVISIONS IN PARAGRAPH 2(c) and (5) ARGUMENT

RUSSELL, argues all kinds of terms in the agreement, in order to prove the Stipulated Settlement Agreement, dated April 25, 2013, was not unconscionable.

RUSSELL omits arguments on the terms, of the settlement agreement, that are calloused and substantively unconscionable, however. **(Stipulated Settlement Agreement dated April 25, 2013, Paragraph 2(c)and Paragraph 5)**

Those two terms, support the argument, that the agreement is substantively unconscionable, by AUAYANS.

PARAGRAPH 2(c) OF THE AGREEMENT

“2(c) The following vehicles shall be stored in the existing portable ready made garages no later than June 30, 2013 and said garages shall be maintained or replaced in a fully functional capacity at all times:

- 1. 1994 GMC Suburban, Washington State License Plate No. 447XCN; and**
- 2. Unlicensed Gray Chevrolet Legend Van with USA-1 for License Plate.**

Any vehicles without a current license for more than six (6) months

shall be deemed abandoned and removed from the property by the 1st day of the 7th month. Auayan shall mail to Russell (P.O. Box 28837, Spokane, Washington 99228) copies of the currently renewed yearly Registration for each and every vehicle situated upon their property immediately after being renewed, if said registration results in the issuance of a new license plate number, and the registration for any new vehicles, so that Russell has the ability to verify correct registration.” (RP 2 Lines 22-28 and 3 Lines 1-18)

This provision allows **RUSSELL** to dictate **AUAYANS'** use and storage of their vehicles, on their real property.

It gives **RUSSELL**, shocking and monstrously harsh, and exceedingly calloused control over **AUAYANS'** private affairs.

It gives **RUSSELL** the ability to control **AUAYANS'** vehicle registrations, and their ability to own collector vehicles, on their property.

RUSSELL should not be given the unbridled power over **AUAYANS** to dictate which of their classic vehicles are abandoned, and removed from their own property.

Nor should **RUSSELL** have the power to require **AUAYANS** to license vehicles, where no law requires registration.

RUSSELL should not have the power to invade their privacy, in their private affairs, and verify their current vehicle registrations.

As such, the Agreement Order, Paragraph 2(c)(**CP 81**) gives **RUSSELL** shockingly harsh power over **AUAYANS**, Paragraph 2(c) of

the agreement, is substantively unconscionable.

PARAGRAPH 5 OF THE AGREEMENT

“5. Defendants, JOSHUA T. AUAYAN and IDA M. AUAYAN, husband and wife, agree to not store any more non-street legal vehicles (excluding those vehicles set forth in Paragraph 2 above.) None of the allowed vehicles shall be replaced with other non-street legal vehicles as determined by the Washington State Patrol. Non-street legal vehicles does not encompass vehicles and equipment normally used for agricultural purposes.” (RP 4 Lines 10-17)

“This term in the agreement allows **RUSSELL** to dictate how **AUAYANS’** vehicles are stored and additionally gives **RUSSELL** the shocking and overly harsh power to limit **AUAYANS’** ownership, of their off road, non-street vehicles, and their replacement.

What vehicles **AUAYANS’** own, whether they are used on or off road are all private affairs of the **AUAYANS**.

Paragraph 5 allows **RUSSELL** to use the Washington State Patrol, police power, to define **AUAYANS’** personal affairs, concerning their non-street legal vehicles, on their own property.

The Washington State Patrol would never use their police power to define which of **AUAYANS’** vehicles are street or non-street legal vehicles, or how or whether they should be replaced.

The Washington State Patrol would never use their police power to

determine whether or not **AUAYANS'** ownership of off road vehicles should be restricted. **(RP 4 Lines 10-12)**

The police power of the Washington State Patrol would extend only to **AUAYANS'** vehicles on the public roadways, when they were actually on public roadways.

To have a provision in an agreement, requiring a state agency to use its police power to force **AUAYANS** to not do something they have a legal right to do, is shocking and overly harsh.

The **AUAYANS'** vehicles exist, on their private real property, where it is legal to store off-road, and unlicensed, vehicles.

To give **RUSSELL** the power to force **AUAYANS**, to allow him to determine whether or not they can have off road vehicles, under an illicit threat of police action is shocking and overly harsh.

Paragraph 5, **(CP 82)** of the Agreement Order is therefore substantively unconscionable.”

RUSSELL, argues that **Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254 (2005)**, notes that a single unconscionable term does not void the entire agreement.

That is not the finding in that case.

The Court found, as it did in **Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004)**, that, “A single substantively unconscionable term, made the entire agreement illegal, void, and unenforceable.”

As such, **AUAYANS'** have demonstrated substantive unconscionability, of two major terms of the Stipulated Settlement Agreement dated April 25, 2013, which makes the entire agreement void and unenforceable.

RUSSELL'S ARGUMENT IV.

The Stipulated Settlement Agreement is not void against public policy.

AUAYANS' RESPONSE

1. THE STIPULATED SETTLEMENT AGREEMENT VIOLATES AUAYANS' CONSTITUTIONAL RIGHT OF PRIVACY ARGUMENT

Under the Marriage of Hammack, 114 Wn.App. 805, 60 P.3d 663 (2003), the Court noted that if an agreement is void against public policy it is void as ab initio null from the beginning.

The public policy that is involved in the case at Bar, is “**Wash. Const. Article 1 Paragraph 7 : INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.**”

AUAYANS' have a right to privacy in their private affairs and also have a right of quiet enjoyment of their property?

Agreement Paragraphs 2(c) and (5) gave RUSSELL control over AUAYANS' private affairs and their actions on their property, that are shocking, monstrously harsh, exceedingly calloused.

RUSSELL'S ARGUMENT V.

The Stipulated Settlement Agreement is not void because Ida Auayan did not personally appear at the April 25, 2013 Settlement Hearing.

AUAYANS' RESPONSE

1. CR 2A DOES NOT APPLY TO IDA AUAYAN

Under **CR 2A**, an agreement by a party, entered on the record, binds the party to that agreement.

Schultz v. United Airlines, Inc., 797 F.Supp.2d 1103 (2011)

Mutual assent is an essential element of a valid agreement.

IDA AUAYAN did not provide mutual assent to the agreement, entered on April 25, 2013, because she was not present in Court that day when the agreement was entered, as a Stipulated Order.

Since, **IDA AUAYAN** did not provide her assent to the agreement entered on the record, the Order encompassing that agreement is not binding on her.

It may be argued by **RUSSELL** that the signature of her attorney, on the Order binds, **IDA AUAYAN**,

IDA AUAYAN did not provide her permission for her attorney to

settle the case. As such the attorney's settlement of the case without her assent is a violation of **RPC 1.2**.

The Court should not have entered an Order that was obtained by an attorney in violation of **RPC 1.2**.

As such, the Agreement Order is not subject to the restrictions of **CR 2A**, and is not enforceable against her. (**CP 238**)

RUSSELL'S ARGUMENT VI.

The Stipulated Settlement Agreement is valid; Auayan failed to present legal authority that the agreement must match the precise issues raised in the Respondent's original complaint and appellant provides no legal authority holding otherwise.

AUAYANS' RESPONSE

1. THE AGREEMENT ORDER OF APRIL 25, 2013 WAS NOT A FINAL ORDER, COMPLAINT ISSUES

The basis of litigation, step one, is that Plaintiff, **RUSSELL**, makes allegations against Defendant, in a Complaint.

Step two is where Defendant, **AUAYANS** admit or deny those allegations, and provides affirmative defenses to those allegations.

The Trial proceeds to examine evidence to support those allegations and ultimately enters Findings of Fact and Conclusions of Law, concerning its analysis of the evidence as applied to the facts and laws of the case and enters a Final Order, concluding the case.

To stray from the Complaint allegations requires an Amended Complaint.

CR 15 allows a party to amend their complaint to conform to the

evidence.

AUAYANS agree with **RUSSELL** that the Final Order of the Court does not have to track exactly with the allegations in the Complaint. If the Court fails to address the basic issues, attributable to the Complaint, in its Final Order, the case is not over until it addresses those issues, however.

The Court in the case at Bar did not address the following issues into its Order of April 25, 2013 (**CP 079-094**):

1. Was the Real Estate Covenant valid?
2. What evidence existed that any annoyances of **RUSSELL** were annoyances to the neighborhood, under provisions of the Real Estate Covenant?
3. Were those annoyances enough of a problem to enter an Order that balanced annoyances to the neighborhood, to restrictions on **AUAYANS'** right of privacy and quiet enjoyment of their property?

Since those issues remained, the Court Order of April 25, 2013 (**CP 079-094**) was not a Final Order in the case, subject to appeal, until those issues were resolved, by the Court.

The case is not over until the Court makes Findings of Fact and Conclusions of Law concerning all of the issues in the case.

State v. Trask, 91 Wn.App. 253, 957 P.2d 781 (1998), reviewed denied, 137 Wn.2d 1020(1999) , appeal after remand 990 P.2d 976, 98 Wn.App. 690 (2000).

RUSSELL'S ARGUMENT VII.

The Trial Court's failure to make specific Findings of Fact regarding the validity of the Restrictive Covenants, the reasonableness of Russell's annoyances; and reasonableness of the restrictions on the Auayans did not necessitate vacation of the Stipulated Settlement Agreement.

AUAYANS' RESPONSE

1. THE AGREEMENT WAS NOT A FINAL ORDER, FINDINGS OF FACT ISSUES

AUAYANS agree with RUSSELL that the absence of Findings of Fact and Conclusions of Law on the validity of the restrictive covenant, the reasonableness of RUSSELL'S annoyances, and reasonableness of the restrictions on the AUAYANS may not necessitate vacation of the Stipulated Settlement Agreement.

Those were basic issues in the case, however, so if the Court did not address those issues, the Stipulated Settlement Agreement was not the Final Order in the case.

The Court of Appeals should remand the case to the Trial Court to address those basic issues and the Court's conclusion on those issues may supercede its opinion on validity of the Stipulated Settlement Agreement.

RUSSELL'S ARGUMENT VIII.

Russell was properly awarded attorney fees and costs.

AUAYANS' RESPONSE

1. VACATE RUSSELL'S ATTORNEY'S FEES AWARD

State Farm Mut. Auto Ins. Co. v. Johnson, 72 Wn.App. 580, 871 P.2d 1066 (1994), indicates that an adequate record is necessary to support an attorney's fee award.

Findings of Fact and Conclusions of Law are required to establish such record.

There were no Findings of Fact or Conclusions of Law in the case at Bar, to support **RUSSELL'S** attorneys fee award.

In addition, the attorney's fee award was made on the basis of **AUAYANS'** contempt of the Stipulated Settlement Agreement dated on April 25, 2013, Order which is void and unenforceable.

Said award should be vacated.

RUSSELL'S ARGUMENT IX.

Request for attorneys fees and costs.

AUAYANS' RESPONSE

AUAYANS agree with RUSSELL that RAP 18.1 and RAP 14.2 provides for attorney's fees and costs.

Dated this 26th day of February, 2014.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read "Dale L. Russell", is written over a horizontal line.

**Dale L. Russell, WSBA #07941 Attorney
For Appellants JOSHUA T. AUAYAN
And IDA M. AUAYAN**

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DONALD RUSSELL, a single man,)	
)	NO. 319466
Respondent,)	
)	
vs.)	Declaration of Mailing
)	
JOSHUA T. AUAYAN and IDA AUAYAN,)	
husband and wife,)	
Appellants.)	

The undersigned certifies under penalty of perjury that the following is true and correct:

I am now, and all times material hereinafter mentioned, more than 18 years of age and that on February 26, 2014, I mailed first class mail, postage pre-paid, Reply Brief of Appellants' Auayans, and this Declaration of Mailing, to the following individual:

Christopher Montgomery
Attorney At Law
PO Box 269
Colville, WA 99114

I make this statement under penalty of perjury under the State of Washington.


Victoria L. Micone

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