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Division III
State of Washington
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

ROD L. SMITH AND BECKY R. SMITH,

Appellant,

v.

DWIGHT GOEHNER AND CAROL GOEHNER,

Respondent

No. 360911

APPELLANT'S REPLY BRIEF

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The gravamen of Respondents Dwight and Carol Goehner's (Goehner) brief is that there is no genuine dispute that a settlement agreement was reached between Goehner and Appellant's Rod and Becky Smith (Smith). Without a genuine dispute, CR 2A and RCW 2.44.010 do not apply. However, to reach the conclusion that there is no genuine dispute, Goehner relies extensively on attacking the credibility of Smith and the declaration Smith submitted in opposition to Goehner's motion for summary judgment. *See Respondent's Brief pgs. 28-37.*

Ultimately, the fact that Goehner realizes that attacking the credibility of Smith is necessary demonstrates that the "purport" of the agreement is disputed. Where the "purport" of the agreement is disputed in the context of litigation, CR 2A requires that the court disregard the agreement unless "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." In the matter before the trial court, Smith submitted an extensive declaration with exhibits disputing that an agreement had been reached along with a supplemental declaration. *CP 195-331; 332-33.* In light of this evidence, the trial court erred in concluding that an agreement consistent with CR 2A had been reached by the parties.

A. The May 2, 2016 Correspondence Did Not Establish Or Result In A Settlement Agreement Between Goehner And Smith; CR 2A Applies

The Court should find the trial court erred in concluding that a settlement agreement complying with CR 2A had been reached between the parties. In the Respondent's Brief, Goehner relies primarily on the May 2, 2016 e-mail from Smith to Goehner as establishing the terms of the settlement between the parties. *See Respondent's Brief pgs. 31-35*. There is no question that the e-mail constituted an offer by Smith. *See CP 233; CP 205*. The problem with Goehner's reliance on the e-mail is that Goehner didn't accept this offer. The next correspondence following this offer was an e-mail from Goehner's attorney directing Smith to meet him at the *ex parte* docket that afternoon for a temporary restraining order hearing. *CP 235*. As Goehner's attorney informed the trial court:

[T]he parties had been negotiating as late as yesterday the relocation of the irrigation pipe. Mr. Dodge advised he felt he had no choice but to move for an emergency motion when the negotiations broke down yesterday.

CP 26. As is evident from the hearing, Goehner and Smith did not have an agreement before the hearing and an agreement was not made at the hearing. *See id.*

After the trial court denied the motion for a temporary restraining order, Goehner met with Keenan Bray, a contractor from whom Smith had previously sought a quote regarding excavation. *CP 89*. It is important to

note, Goehner did not meet with Smith, but instead a contractor Smith had talked with before the May 2, 2016 e-mail and the May 3, 2016 temporary restraining order hearing. The correspondence from Smith after the hearing did not reextend the offer made on May 2, 2016. *CP 239-40*. Instead, the correspondence chided Goehner for not accepting the offer, choosing to go to court, and took issue with what Smith perceived as misrepresentations made by Goehner's attorney at the hearing. *Id.* In the initial hearing on the motion for summary judgment, the trial court described this dynamic succinctly:

Okay, my [] concern is [] I just think there's too many issues of fact to grant summary judgment. I know your client is hoping to avoid a trial. [But] as I understand the theory of the summary judgment is under basically a CR2A and it looked to the Court like the discussion held in court on the day in question was sort of an evolving kind of thing and then I know that your clients took steps relying on that, but I just don't know that that gets us to summary judgment.

RP 3/28/18, pg. 6 (emphasis added). "Having once rejected the offer, [the party] could not revive it by tendering acceptance." *Pearce v. Dulien Steel Prod.*, 14 Wn.2d 132, 137, 127 P.2d 271, 273 (1942) (citing 12 Am. Jur. 530 § 36).

Based on the above record, the question is whether there was a genuine dispute the parties in-fact reached a settlement agreement. *In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706, 709 (1993). If the

“purport” of the agreement is disputed, then CR 2A applies. In seeking to avoid this result, the Respondent’s Brief argues Goehner never invoked CR 2A. *Respondent’s Brief* pgs. 15-16. Even assuming that the trial court could decline to enforce the rules of civil procedure, Smith indeed asserted CR 2A as a defense to enforcement of the purported settlement agreement. *CP 168*.

“When these elements are met, CR 2A supplements but does not supplant the common law of contracts.” *Ferree*, 71 Wn. App. at 39 (*citing Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993)). In *Ferree* and *Maks*, there was nothing preventing the underlying contract from being oral. *See Ferree*, 71 Wn. App. at 37 (settlement was in regard to payment of maintenance in a divorce with “no children and no real property.”); *Maks*, 69 Wn. App. at 870, n 1. (transfer of partnership interest and assumption of debt). Here, the underlying contract principal is the statute of frauds for real property. Once the Court concludes Smith properly challenged the “purport” of the settlement agreement, there is no conclusion that can be reached except that the trial court erred in granting Goehner’s motion for summary judgment. As a result, the Court should reverse the trial court’s order granting summary judgment.

B. The Court Should Conclude That Trial Court Improperly Excluded Evidence From Trial Based On The Improper Grant Of Summary Judgment.

The Court should conclude trial court erred when it excluded evidence from the hearing premised on the wrongful grant of partial summary judgment. In arguing against this assertion of error, Goehner cites *Ferree* for the proposition that “unsworn assertions of [a parties’] counsel did not constitute admissible evidence.” *Respondent’s Brief* pg. 42. Respectfully, Goehner misapprehends the significance of this quote in *Ferree*. In *Ferree*, the court is pointing out that unsworn statements made by counsel during oral argument does not constitute evidence in support of or in opposition to a motion. *Ferree*, 71 Wn. App. at 40. In contrast, ER 801(d)(2) defines an opposing party statement as follows:

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(emphasis added). There is no reasonable dispute that Goehner’s attorney constitutes Goehner’s agent in the context of the e-mail communication. Here, the offered exhibit states “I understand that Dwight and Carol, after consulting with the PUD, have decided to attempt to resurrect the historical

line located ‘on the hill.’” *Tr. Ex. 11; CP 222*. While Goehner is certainly entitled to argue that this communication does not mean the historical line crosses Chelan PUD’s property, that is an argument that goes to weight, not admissibility. ER 408 explicitly “does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” This is the exact circumstance that was before the trial court and the trial court unfortunately erred in excluding the evidence.

C. The Court Should Deny The Request For Attorneys Fees Under RAP 18.9 And Under The Court’s Inherent Power.

The Court should deny the request for attorneys fees under RAP 18.9 and the Court’s inherent power. “An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and there is no possibility of reversal.” *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 681, 285 P.3d 892, 901 (2012). All doubts regarding the frivolous nature of an appeal are resolved in favor of the appellant. *Id.*

In arguing that the appeal in this matter is frivolous, Goehner states that there “not a scintilla of doubt” that the parties reached an enforceable settlement agreement in 2016. Goehner does not cite any specific portion of the record in support of this assertion. *See Respondent’s Brief, pg. 45*. As is likely self-evident, Smith believes that the trial court erred as matter of law

in granting Goehner partial summary judgment. It is also worth noting that the trial court initially denied the motion for summary judgment filed by Goehner. *See RP 3/28/18, pg. 41.* Goehner filed two motions for reconsideration of the oral denial of summary judgment and an evidentiary hearing was held in regard to the form of the final order granting the relief awarded under the motion for partial summary judgment. *CP 369; CP 538; RP 6/1/2018, pg. 567.* This would seem to create a strong inference that the questions of law and factual disputes before the trial court are not as indisputable as Goehner would hope.

The Court should further decline to award sanctions under the Court's inherent power. Bad faith can take three forms: (1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131, 135 (1999). "Prelitigation misconduct refers to 'obdurate or obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right." *Id.* (quoting Jane P. Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. Rev. 613, 632–46 (1983)). Procedural bad faith is unrelated to the merits of the case and refers to "vexatious conduct during the course of litigation" such as dilatory tactics during discovery, failure to meet filing deadlines, and misusing of the discovery process. *Id.* Finally, substantive bad faith occurs where a party

intentionally brings a frivolous claim for the purpose of harassment. *Id* (citing *Matter of Pearsall-Stipek*, 136 Wn.2d 255, 266, 961 P.2d 343, 349 (1998), as amended (Oct. 17, 2000)).

In requesting attorney's fees under the Court's inherent power, Goehner appears to be relying on substantive bad faith as the basis. In doing so, Goehner argues that the improper purpose relates to the former marriage between the parties. In doing so, Goehner does not cite to any substantive basis in the record. Instead, Goehner cites to counsel's closing argument and Smith's improper comment on the credibility of a witness. *RP 5/3/18*, pg. 315; *RP 5/4/18*, pg. 570.¹ Regardless, substantive bad faith requires the requesting party do more than just impugn the motivations of the opposing party. Substantive bad faith requires both improper motive and frivolousness of the merits. *Pearsall-Stipek*, 136 Wn.2d at 267. As discussed *supra*, the appeal brought forth by Smith is not frivolous. As a result, the Court should deny the request for attorney's fees made by Goehner.

CONCLUSION

The Court should reverse the orders of the trial court and remand for trial on all issues. The trial court erred in awarding partial summary

¹ The latter being another example of where the statements of counsel made during argument does not constitute evidence. See *Ferree*, 71 Wn. App. at 40.

judgment to Goehner when the “purport” of the settlement agreement between the parties was disputed. The trial court further erred by excluding evidence from trial based on the improper grant of the motion for partial summary judgment. Finally, the Goehner’s request for an award of attorney’s fees is unwarranted under RAP 18.9 and under the Court’s inherent power.

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