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Division III
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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 BRIEF

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I. INTRODUCTION

In 2015, Appellants Rod and Becky Smith brought a claim for trespass after the neighbors, Dwight and Carol Goehner, entered Smith's property to repair and relocate a water line. Two weeks before trial, the trial court drastically limited the scope of the trial by ruling the parties had reached a partial settlement agreement two years prior during the course of litigation in regard to the continuing trespass. The basis for the ruling was that a CR 2A settlement agreement had been created because Smith offered a unilateral contract in writing which Goehner claimed it had substantially performed.

This ruling by the trial court granting partial summary judgment to Goehner constituted error. CR 2A and RCW 2.44.010 require all agreements and stipulations to be in writing. A unilateral contract where acceptance occurs by performance can never meet the requirements of CR 2A and RCW 2.44.010. And unfortunately, the trial court further compounded this error by excluding evidence at trial based on the grant of partial summary judgment. As a result, the Court should reverse the trial court's grant of summary judgment and remand for a new trial on all issues.

II. ASSIGNMENT OF ERROR

1. Whether the trial court erred in granting the partial summary judgment, concluding that a CR 2A settlement agreement had been formed as to the continuing trespass.

The issues pertaining to this error are:

a. Whether the communications between the parties formed an agreement under CR 2A and RCW 2.44.010.

b. Whether a CR 2A or RCW 2.44.010 agreement can be created unilaterally where acceptance is evidenced by substantial performance.

2. Whether the trial court erred in excluding evidence at trial on the basis that it pertained to issues relating to the grant of partial summary judgment.

III. STATEMENT OF THE CASE

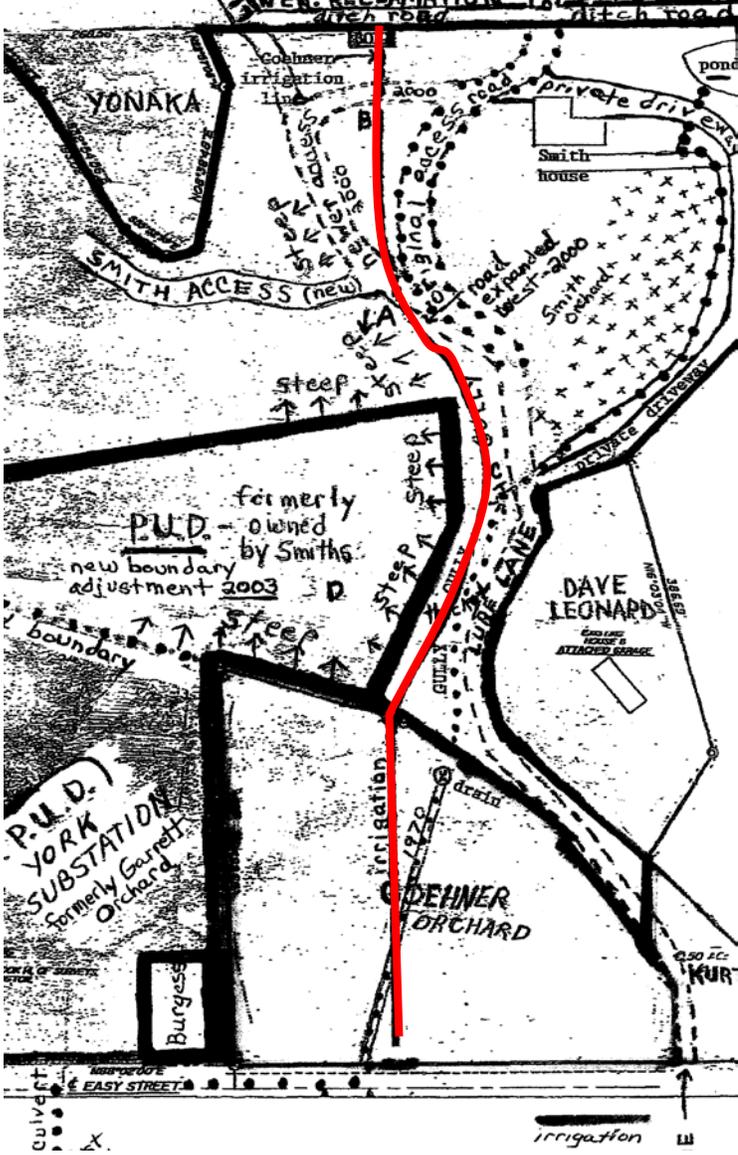
Background and Underlying Dispute

On April 14, 2015, appellants Rod Smith and Becky Smith (Smith) commenced a lawsuit against neighbors Dwight Goehner and Carol Goehner (Goehner) alleging claims for trespass and nuisance. *CP 3-11*. Smith alleged that in 2013, Goehner installed a new PVC irrigation pipe on the Smith property without Smith's permission. *CP 172*. Prior to the 2013

pipe, the Goehner's property received irrigation water from the canal north of Smith's property via a metal line that Carol Goehner testified was installed in 1970 by her father. CP 21. The primary dispute between the two parties is whether the 2013 line was installed in the same place as the 1970 line. CP 172-73 (Paragraph 3.4); CP 442 (Paragraph 3.4). The properties at issue are laid out as follows:

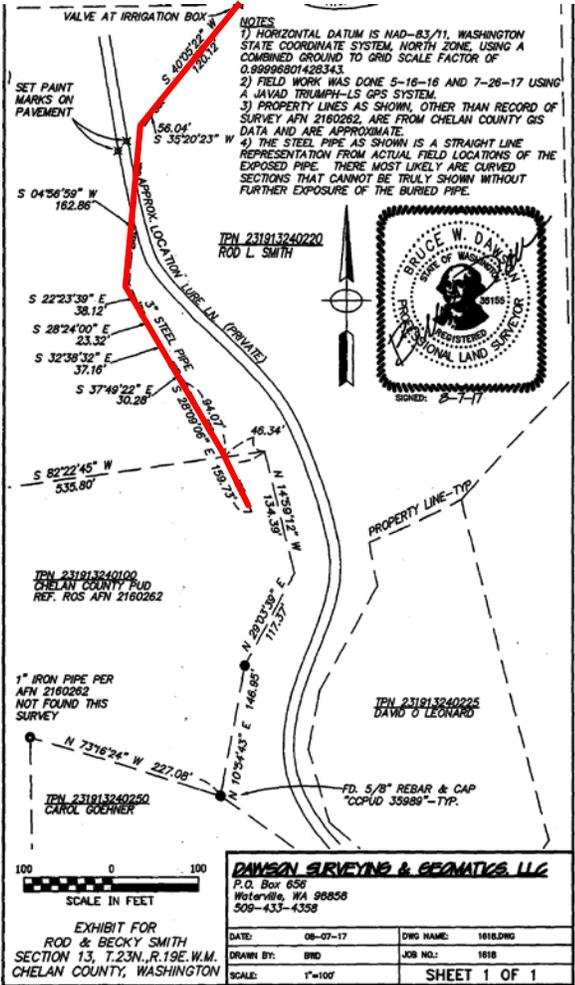


See CP 134.¹ Goehner's position was that the both the 1970 line and the 2013 line followed the gully down to the Goehner property as set forth below. CP 24.



¹ The depiction in this Brief and set forth in CP 134 are identical. However, the format of the labeling in the picture of above has been modified.

See CP 24.² In contrast, Smith's position was that the 1970 irrigation line did not follow the gully, but rather entered the property owned by Chelan County PUD shortly after crossing under Lure Lane as depicted below:



See CP 180.

The April 29, 2016 to May 2, 2016 Communications and May 3, 2016 Temporary Restraining Order Hearing.

² Red line added over the black line labelled "irrigation" for emphasis.

During the course of litigation, the 2013 irrigation line installed by Goehner broke in the 2015-2016 winter, leading to the concern that the orchard would not have water for the 2016 crop year. At 1:26pm on April 29, 2016, counsel for Goehner sent an e-mail to Smith notifying them that Goehner would be commencing work on the Chelan PUD property and that the debris from the PVC irrigation line would be cleaned out during the coming weekend. *CP 209*. Goehner also proposed that the parties execute an express easement to a location more desirable to Smith. *Id.* In responding to the e-mail at 8:29pm, Smith expressed interest in resolving the matter, but requested several conditions including recoupment of \$300.00 in relation to printing and filing costs and “\$500.00 for loss of time and income to address this matter...” *CP 215*. Smith further refused to let any workers on Smith’s property until any easement was finalized and executed. *Id.* At 11:20 am and 2:55pm on April 30, 2016, Smith e-mailed counsel for Goehner and set forth additional conditions that would be required if the parties were to agree to an express easement such as prohibiting the use of PVC pipe and requiring the irrigation pipe be buried 3 feet or deeper. *CP 217-18; 220*.

On May 2nd at 12:19pm, counsel for Goehner sent a response e-mail rejecting the terms set forth by Smith. *CP 222; 228*. Specifically, Goehner refused to pay any money to Smith and demanded that the work commence

today, prior to any surveying or execution of the express easement. *Id.* As part of the e-mail, counsel for Goehner wrote:

I understand that Dwight and Carol, after consulting with the PUD, have decided to attempt to resurrect the historical line located “on the hill.” This will require some refurbishing work where that line crosses your property and ties into the ditch box.

Id. At 2:37pm, Smith responded by expressing irritation at some of the factual assertions in the previous e-mail. *CP 228-29.* As part of the response, Smith, mentioned that they had made an appointment with a surveyor and excavation company that afternoon to get a quote for surveying the line and excavating a trench. *Id.* At 4:00pm, counsel for Goehner told Smith that his clients would refuse to accept any work done by other contractors. *CP 230.*

At 10:32pm, Smith sent an e-mail directly to Goehner in which Smith stated they had located two professional contractors who were willing to complete the work. *CP 233.* Smith wanted licensed and bonded professionals, for the work to be done at Goehner’s cost and would who contact Smith before entering the property. *Id.* Smith also said they would need to meet with an attorney before agreeing to any express easement. *Id.* At the close of the e-mail, Smith stated “[h]opefully we will also hear from the excavation guy in the morning, that you have decided to get him started

and we can conclude this mess without your new irrigation line easement at last and soon.” *Id.*

Instead of hearing from the excavator in the morning, Smith received an e-mail from Goehner’s attorney informing them that he would be seeking a temporary restraining order from the trial court at 3:00 pm in the afternoon. Goehner’s attorney did not send the pleadings to Smith, but stated the nature of the requested relief would be to “restrain you from interfering with [Goehner’s] plans to connect their irrigation line to the ditch box, and associated work.” *CP 235*. In the affidavit submitted by Carol Goehner, the defendants sought the right to dig and install a temporary PVC irrigation pipe through Smith property. *CP 22*.

At the hearing, counsel for Goehner advised the court that the negotiations had broken down the prior day and that a restraining order was needed in order to irrigate the crop. *CP 26*. The court inquired about the correspondence on May 2nd. *Id.* According to the hearing notes, the parties both indicated that settlement was a possibility, but that no agreement had been reached. *Id.* At that point, counsel for Goehner moved the court to limit the hearing to the motion rather than settlement negotiations. *Id.* The court denied the request for a temporary restraining order, but indicated that it would entertain a renewed motion in the future. *Id.*

The next day, Smith sent an e-mail to Goehner's counsel contesting the representations made by him and his clients:

The only reason we were willing to set up and open communication was because it seems that D[w]ight Goehner has got himself into a fix here. When Carol made the statement to us: To get water to the orchard, we will go ahead and put the pipe in the area marked, but this is not settled." It made us aware that her intentions were not in GOOD FAITH. But instead would continue to drag all this out and try to continue to blame us for something that she or he have brought on themselves by not obeying land use law correctly.

CP 240. The e-mail continued to discuss installing a new irrigation line.

Id. In the coming days, an unsurveyed irrigation line was laid across the Smith property for the 2016 crop year. *CP 36.* Smith hired attorney Chancy Crowell who appeared in the case on May 10, 2016. *CP 130.* At the end of the month, a survey was performed, however, the parties continued to dispute the location and nature of the line. *CP 36-38; 130.*

On August 1, 2017, Goehner moved for a temporary restraining order seeking to prevent Smith from interfering with the water line after Smith sent a letter on July 17, 2017 setting forth the continuing dispute. *CP 27-28.* The temporary restraining order was granted and Goehner moved to convert the restraining order into a preliminary injunction. *CP 96-97.* Smith opposed the motion for a preliminary injunction, arguing that they had not threatened to cut off the irrigation water supply so there was no

well-grounded fear that Goehner's rights would be infringed or likelihood of irreparable harm. *CP 119-25*. The court ultimately granted to preliminary injunction. *CP 143-44; see also 145-46*.

Pre-Trial and Motion for Summary Judgment.

On September 22, 2017, Goehner submitted an amended answer to the complaint asserting a counterclaim seeking an express easement, alleging that the parties had reached an agreement through the April 29th to May 2nd communications. *CP 149-52*. In answering the counterclaim, Smith disputed that an agreement had been reached and that the May 3, 2016 "agreement" did not comply with CR 2A. *CP 165-70*.

On March 1, 2018, Goehner moved for summary judgment on all claims and counterclaims, alleging that the e-mail communication on May 2, 2016 and the hearing notes for the May 3, 2016 temporary restraining order hearing created an offer by Smith which Goehner then substantially performed. *CP 185-90*. In moving for summary judgment, Goehner argued that the communications and labor demonstrated an objective manifestation of mutual assent by the parties. *CP 189*. Smith opposed the motion, arguing that no agreement had been reached and that even if the communications could constitute an offer, Goehner did not complete the tasks in the required manner or in a timely manner once they received what they wanted (water for the 2016 crop year). *CP 205-07*.

On March 29, 2018, the court heard argument on the motion for summary judgment. *RP 3/28/18 pg. 5*. The court acknowledged that the clerk's minutes from the May 3, 2016 temporary restraining order hearing did not constitute a CR2A agreement. *RP 3/28/18, pg. 14*. At the end of the hearing, the trial court orally ruled that genuine issues of material fact remained and denied the motion for summary judgment. *RP 3/28/18, pgs. 48-49*. The court noted there was a genuine issue of material fact as to timeliness and that the court would not require Smith to execute a written easement. *Id.* No order of denial was entered. However, on April 5, 2018, Goehner moved for reconsideration "of the Court's oral ruling on March 29, 2018..." *CP 369*. In moving for reconsideration, Goehner argued that it was unreasonable to believe that Smith thought the timing of the actions under the alleged agreement were of the essence in regarding to Goehner's performance. *CP 372*.

On April 13, 2018, the trial court unexpectedly entertained a discussion on the motion for reconsideration during the pre-trial conference. *RP 4/13/18, pgs. 54-55*. The court began the conversation as follows:

Okay, well I'll tell you what I'm --- what I'm --- what I was kinda thinking about as I went back through and looked at things and reflected on, you know, sort of how the argument went before and uh what issues were [before the court...].

So, let's say that the Court accepts your position that uh a solution was negotiated that then your clients took steps, you

know, let's view it as an oral contract and your clients took steps to carry out their end of the agreement by [] paying to have a line installed in the place where the Smith's had indicated, that the Smith's had the opportunity to view that and see that being installed and then your client paid for a surveyor to survey that and reduced it to an easement, but the easement never got signed.

RP 4/13/18, pgs. 55-56. The court continued the conversation, stating:

But, somewhere along the line, one of the provisions in the easement got dropped that buried it at three feet sort of thing that was in the initial easement. What does that do in terms of the Court like dictating that this easement should be signed as opposed to is there some issue about what exactly the easement document should look like?

RP 4/13/18, pg. 56. After discussion between the court and Goehner's counsel regarding how the court rule on the terms of the easement, the court asked Smith who would argue the motion for reconsideration on behalf of plaintiff. *RP 4/13/18, pg. 62.* Smith engaged in a narrative of the facts along with the argument that:

[Under] RCW 64 that we do have the right to sign a change of easement. In November of 2017 he sent us an email offering that they would vacate their easement. Now, how can we be wrong in 2016 or 2017 if they hadn't eve[n] asked us to vacate their easement yet, but only accused us that we were forcing them to relocate their line. They had no line. We were trying to help them.

RP 4/13/18, pg. 71. At the conclusion of the hearing, the court ruled as follows:

It appears to the Court that the parties entered into an oral contract regarding placement of a new waterline and the oral

agreement included that it was going to be in a place that was staked out by the Smiths and that the Goehners needed to get it surveyed and then that's where the easement would be.

RP 4/13/18, pg. 79. The court further clarified that it “ruled that it was an oral contract, but it was--- the parties engaged in partial performance.” *RP 4/13/18, pg. 83* (emphasis added). However, the court reserved on the issue of what the precise wording would be. *RP 4/13/18, pg. 80.* Counsel for Goehner further argued that the alleged agreement was a “global settlement” and therefore there should be no trial. *RP 4/13/18, pgs. 81-82.* The court disagreed, concluding that Smith maintained a right to a trial on the initial trespass. *RP 4/13/18, pgs. 83.* Once again, no written order granting the motion for summary judgment or the motion for reconsideration was entered. The court scheduled a hearing for presentment of a proposed written easement for April 25, 2018 and supplemental briefing on whether the form of easement was a jury trial question. *RP 4/13/18, pg. 119.*

Instead of presenting a proposed easement, on April 18, 2018, counsel for Goehner once again moved for reconsideration of the court's oral ruling. *CP 583.* The motion argued that the alleged agreement between the parties was a global agreement and therefore no trial should take place. *CP 589.* At the day of the hearing, the court was perplexed at the posture of pleadings filed after the pre-trial conference:

[T]he Court had set this hearing for a very limited purpose and that related to uh whether some remaining issues regarding the easement that the Court granted on summary judgment should be resolved by uh the Court or by a jury trial and I directed that briefing be uh submitted uh for those issues. We seem to have gone astray of where I thought we were going to be today.

Um and the issues that the Court uh believed were potentially unresolved by the record before the Court on the CR2A Agreement were the width of the easement, which the Court didn't see to have been addressed or agreed to in any location.

RP 4/25/28, pg. 123. The court rejected the arguments of Goehner arguing that the oral grant of summary judgment should have resolved the entire case. *RP 4/25/18, pg. 145.* The court further concluded that the terms of the easement were for the court, rather than the jury, to decide because: “part in [parcel] of the Court’s decision to enforce a CR2A agreement and the enforcement of a CR2A agreement is not something that would properly be determined by a jury.” *RP 4/25/18, pg. 126.* Ultimately, entry of the order on the form of easement did not occur until after the trial. *RP 6/1/18, pg. 158.*

Trial

Trial commenced on May 2, 2018. *RP 5/2/18, pg. 4.* The day of trial began with counsel for Goehner seeking to persuade the court that the alleged CR2A agreement resolved all issues of the case. *See RP 5/2/18,*

pgs. 10-20. Goehner argued at trial that the 2013 line was installed in the same place as the 1970 line:

If you determine based on the evidence that the 1970 metal irrigation line was in the gully, his precious Taj Mahal gully, on the plaintiffs' property; and that when they installed the PVC pipe in 2013, the defendants installed it as close as reasonable possible to that metal line, then there's no trespass.

RP 5/4/2018, pg. 567. In the case-in-chief, Smith attempted to admit the e-mail correspondence between Smith and counsel for Goehner spanning April 29, 2016 to May 2, 2016 which were discussed *supra.* *5/3/2018, pg. 256.* Notably, this correspondence included a statement from Goehner's counsel that Goehner was going to resurrect the 1970 line on PUD property. However, Goehner objected to the admission of the correspondence, arguing that it was irrelevant because the correspondence postdated the installation of the 2013 line by three years, contained settlement discussions and "as the Court is aware, bumping up against prior rulings of the Court as to the scope of this trial." *RP 5/3/2018, pg. 253* (emphasis added). Smith argued that portions of correspondence did not relate to settlement discussions. *RP 5/3/2018, pg. 254.* Goehner offered to stipulate as to the statements regarding the debris left in the gully, but did not mention the discussions regarding the resurrection of the 1970 line. *RP 5/3/2018, pg. 255-56.* The court accepted the concession without further input from

Smith and denied admission of the exhibit, citing ER 408. *RP 5/3/2018, pg. 255-56.*

Smith sought to admit the evidence a second time, noting that the correspondence discusses Goehner removing the 2013 irrigation line from the gully. *RP 5/3/18 pgs 312-14.* Once again, admission of the correspondence was denied. *RP 5/3/18 pg. 314.*

At the close of evidence, the jury returned a verdict concluding that Goehner was not liable for trespass onto the Smith property. *CP 706.*

Post-Trial Entry of Order on Form of Easement And Upon Jury Verdict.

On June 1, 2018, the trial court conducted a hearing regarding the final form of the easement. *RP 6/1/2018, pg. 162.* Prior to the hearing, Goehner submitted a declaration on behalf of land surveyor on the customary width and scope of express irrigation easements. *CP 727-738; RP 6/1/2018, pg. 162.* On June 8, 2018, the court for the first time entered an order regarding the granting of summary judgment and enforcement of the alleged settlement agreement. *CP 755-57.* The court further appointed attorney David Visser to execute the easement on behalf of plaintiff pursuant to RCW 6.28. *Id.* On June 15, 2018, Smith through counsel moved for reconsideration of the order granting summary judgment and requesting a new trial pursuant to CR 59. *CP 765-72.* The court denied the

motion for reconsideration and entered an order of dismissal based on the defense verdict. *CP 795-97*. This appeal followed.

IV. LEGAL ARGUMENT

The Court should reverse the trial court's order granting summary judgment regarding the argument that the parties reached an enforceable settlement agreement under CR 2A or RCW 2.44.010. CR 2A requires that an agreement or stipulation occurring in litigation be in writing or unless made in open court. In this matter, the trial court concluded that the correspondence created a unilateral contract which was then accepted by partial or substantial performance by Goehner. Because performance is improper extrinsic evidence which is neither in writing nor state in open court, and the "purport" of the agreement was in dispute, the alleged agreement does not meet the requirements of CR 2A.

Additionally, the Court should remand for a new trial because the order granting summary judgment resulted in the exclusion of otherwise admissible evidence which established that Goehner trespassed on the Smith land.

A. Standard of Review.

A trial court order granting summary judgment is reviewed de novo and all of the facts and reasonable inferences are considered in a light most favorable to the nonmoving party. *Holiday Resort Community Ass'n v.*

Echo Lake Associates, LLC, 134 Wn. App. 210, 219, 135 P.3d 499 (2006). Summary judgment is properly granted when the pleadings and affidavits show there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. *Id.*

For evidentiary rulings, the Court reviews the trial court under the abuse of discretion standard. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 213, 258 P.3d 70 (2011). Rulings on the admissibility of evidence will be overturned if the decision was manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Gorman v. Pierce County*, 176 Wn.App. 63, 84, 307 P.3d 795 (2013). A trial court abuses its discretion when a ruling is premised on an error of law. *See Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336, 340 (2012).

B. The Court Should Reverse The Trial Court's Order Granting Summary Judgment Because No Enforceable Agreement Was Reached Between Goehner And Smith Which Complied With CR 2A And RCW 2.44.010.

The Court should reverse the trial court in this matter because the parties did not reach a settlement or stipulation under CR 2A and RCW 2.44.010. Under CR 2A, the court shall disregard any disputed agreement

or stipulation between the parties, unless made in open court on the record or unless evidence thereof is in writing. Similarly, under RCW 2.44.010:

[T]he court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney.

RCW 2.44.010.

The purpose of the cited rule and statute is to avoid such disputes and to give certainty and finality to settlements and compromises, if they are made. While the compromise of litigation is to be encouraged, negotiations toward a compromise are not binding upon the negotiators. Where, as here, it is disputed that the negotiations culminated in an agreement, noncompliance with the rule and statute leaves the court with no alternative. It must disregard the conflicting evidence as they direct.

Howard v. Dimaggio, 70 Wn. App. 734, 738, 855 P.2d 335, 337 (1993) (quoting *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954)).

“This purpose is served by barring enforcement of an alleged settlement agreement that is genuinely disputed, for such a dispute adds to the issues that must be tried.” *In re Marriage of Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706, 709 (1993). Extrinsic evidence is not to be considered in determining whether a CR 2A settlement agreement was reached. *See Gaskill v. City of Mercer Island*, 19 Wn. App. 307, 316, 576 P.2d 1318, 1323 (1978)). In *Gaskill*, the court rejected the proposition that the court’s narrative of events

occurring in-chambers could supplement the discussions which occurred on the record to create an enforceable agreement. *Id.*

In *Ferree*, Ralph and Barbara Ferree were the parties to a marriage dissolution. 71 Wn. App. at 37. The parties engaged in a settlement conference before the court commissioner while represented by counsel. *Id.* The parties reached a settlement agreement before the commissioner, but Ralph Ferree shortly thereafter retained new counsel. *Id.* at 37-38. After the hearing, Barbara Ferree moved for entry of an order adopting the settlement agreement supported by the declarations of herself and counsel. *Id.* at 38. Ralph Ferree opposed the motion through a legal memorandum, but did not submit any declaration or other evidence in support of his opposition to the motion. The trial court ordered entry of the findings and decree. *Id.* at 38-39.

On appeal, the court began with the premise that CR 2A, if applicable, creates additional requirements that supplement otherwise applicable contract principles. *Id.* at 39. The rule applies when the purported agreement is in respect to litigation and the material terms of the agreement are in dispute. *Id.* at 39-40. The court thereafter applied the applicable contract rules in addition to the requirements of CR 2A. Because the court interpreted the “purport” requirement to be akin to the summary judgment standard, the court reviewed the record to determine whether

there was a genuine issue of material fact. *Id.* at 41. As the Ralph Ferree did not submit any evidence to the trial court contesting the creation of the agreement, the court affirmed. *Id.* at 45. In reaching this conclusion, the court concluded that “unsworn assertions of his new counsel” did not constitute admissible evidence. *Id.*

As applied to the case at hand, Smith properly established that there was a dispute in regard to whether the parties agreed to a settlement. Smith submitted a declaration, including the written communications as exhibits, disputing that any agreement had ultimately been reached. *CP 195-207*. Smith further declared that even if their correspondence created an offer of settlement, Goehner did not even complete portions of the purported offer including timely surveying or reduction of the proposed agreement to writing to be reviewed by Smith with the assistance of an attorney. *CP 206-07*.

Additionally, the applicable underlying contract principles in this situation were not limited to mere objective manifestation of mutual assent. Here, the purported object of the agreement was the creation and granting of an express easement. Under Washington law every conveyance of an interest in real estate must be made by deed. RCW 64.04.010. To meet the requisites of a deed, the deed must “be in writing, signed by the party bound thereby, and acknowledged by the party before” a notary. RCW 64.04.020.

It is undisputed that the alleged agreement between Smith and Goehner did not meet the requisites of a deed.

Nor did Goehner establish part performance to avoid application of the statute of frauds. Part performance requires “the contract to be established by clear unequivocal proof, leaving no doubt as the character, terms or existence of the contract.” *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 559, 608 P.2d 266 (1980). Here, the record is replete with evidence that the parties did not reach an agreement as to the character, terms or existence of an easement. Most glaringly, the trial court actually took testimony from a land surveyor as to the customary terms of an irrigation easement to conclude what the easement “agreement” should entail. *CP 727-738; RP 6/1/2018, pg. 162*. According to the court in *Ferree*, this is exactly the sort of consideration which CR 2A prohibits. *Ferree*, 71 Wn. App. at 41.

If the terms of the purported agreement are in genuine dispute, CR 2A serves as an absolute bar to seeking to establish the terms of the agreement through an evidentiary hearing. “[T]he purpose of CR 2A is to insure that negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one.” *Id.* at 41 (emphasis added). Additionally, counsel for Goehner’s repeated attempts to convince the court that the purported agreement

required dismissal of the case in its entirety further establish that parties did not reach a CR 2A compliant agreement. *See e.g. CP 589; RP 4/13/18, pgs. 81-82; See RP 5/2/18, pgs. 10-20.* Either there is a genuine dispute as to the terms of the agreement or there is not. The “purport” requirement of CR 2A does not appear to allow the court to or parties to pick which terms the agreement are genuinely disputed and then jettison the rest. As a result, the Court should reverse the trial court’s grant of summary judgment concluding that the parties reached an enforceable settlement agreement.

C. The Court Should Reverse The Trial Court And Remand For A New Trial Because The Trial Court Erred In Excluding Evidence Premised On The Wrongful 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 this action, the primary dispute between the parties was whether the irrigation line installed in 2013 was located in the same place as the 1970 implied/prescriptive irrigation easement. The parties agreed that the 2013 irrigation line followed the gully crossing Lure Lane. *Compare RP 5/2/18, pg. 77* (“a historical easement, through the gully for our previous steel line that was in there. And so, therefore, having the easement, we were just replacing what was there...”) *with RP 5/2/18, pg. 175.* Goehner believed the 1970 line remained in the gully and connected

directly to the Goehner property while Smith believed the 1970 irrigation line crossed Lure Lane and then connected with Chelan PUD's property before connecting to the Goehner property. *Demonstratively, compare CP 24 with CP 180.*

To help prove the location of the 1970 irrigation line, Smith sought to introduce correspondence from Goehner's counsel which stated:

I understand that Dwight and Carol, after consulting with the PUD, have decided to attempt to resurrect the historical line located "on the hill." This will require some refurbishing work where that line crosses your property and ties into the ditch box.

CP 222. This statement by counsel for Goehner corroborated Smith's case regarding where the 1970 line was located. Under Goehner's position, the 1970 line never would have crossed PUD property if it had remained in the gully next to the road. However, when Smith sought to admit this evidence, Goehner objected on the basis that that the correspondence was irrelevant because it postdated the installation of the 2013 line by three years, contained settlement discussions and "as the Court is aware, [is] bumping up against prior rulings of the Court as to the scope of this trial." *RP 5/3/2018, pg. 253.* Goehner offered to stipulate as to the statements regarding the debris left in the gully, but did not mention the discussions regarding the resurrection of the 1970 line. *RP 5/3/2018, pg. 255-56.* The

court accepted the concession without further input from Smith and denied admission of the exhibit, citing ER 408. *RP 5/3/2018, pg. 255-56.*

Here, the trial court erred when it failed to admit the correspondence. The communication constituted an opposing party statement under ER 801(d)(2). It constituted an important piece of evidence to support Smith's claim for trespass. However, counsel for Goehner successfully argued that the exhibit should not be admitted based on the court's prior oral ruling granting partial summary judgment. Smith properly argued on two separate occasions that the correspondence was indeed relevant and that the specific content was not settlement negotiations. *RP 5/3/2018, pg. 255-56; RP 5/3/18 pg. 314.* Had the trial court not previously erred in granting partial summary judgment to Goehner concluding that the correspondence formed a CR 2A settlement agreement, the court would not have excluded the evidence. Unfortunately, this was a critical piece of evidence showing Goehner acknowledging that the 1970 irrigation line was not in the gully but instead crossed the Chelan County PUD property up the hill. Because the trial court abused its discretion in excluding this critical evidence, the Court should reverse the trial court and remand for a new trial on the claim of trespass.

D. The Court Should Authorize The Trial Court To Award Costs And Attorney Fees Incurred On Appeal In The Event Smith Prevails At Trial Upon Remand.

Pursuant to RAP 18.1, plaintiffs request that the Court authorize the trial court to award appellate attorney fees related to this appeal when plaintiffs ultimately prevail on the merits. Under RAP 18.1, a party to an appeal must include a section requesting attorney's fees on appeal. RAP 18.1 is a procedural rule and does not provide a substantive basis for an award of attorney's fees.

Here, Smith has a substantive basis for the recovery of attorney's fees under RCW 4.24.630. This statute provides for recovery of "costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs" to a party injured by the trespass of another. *Id.* However, this provision first requires Smith to prevail on the merits upon remand before being entitled to an award of attorney's fees. *See Landis & Landis Const., LLC v. Nation*, 171 Wn. App. 157, 168, 286 P.3d 979, 984 (2012). Washington case law suggests that requests for attorney's fees incurred on appeal must be made to the appellate court. *See Thompson v. Lennox*, 151 Wn. App. 479, 212 P.3d 597 (2009). As a result, the Court should authorize the trial court to award appellate attorney's fees on remand if Smith ultimately prevails on the merits.

V. CONCLUSION

The Court should reverse the orders of the trial court and remand for trial on all issues. In a procedurally complicated case, the trial court ultimately erred when it concluded the parties entered into a settlement agreement enforceable under CR 2A. Smith properly contested that an agreement had been reached by the parties. This error led to the trial court making additional errors on evidentiary rulings within the trial. As a result, reversal of the trial court is proper.

DATED this 4th day of January, 2019.



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