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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III
No. 360911

ROD L. SMITH and BECKY R. SMITH,
Appellants,

vs.

DWIGHT GOEHNER and CAROL GOEHNER
Respondents.

ON APPEAL FROM CHELAN COUNTY SUPERIOR COURT
CAUSE NO. 15-2-00317-2

The Honorable Lesley A. Allan, Judge

RESPONDENTS' BRIEF

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I.
INTRODUCTION

The Smiths' appeal is predicated on the premise that all settlement agreements are subject to CR 2A. That premise is false. The only settlement agreements which must meet either the writing or open court stipulation requirement of CR 2A in order to be enforceable are those whose existence or material terms have been genuinely disputed. Where the existence and material terms of a settlement agreement — in the words of CR 2A, the agreement's "purport" — have not been genuinely disputed, CR 2A simply does not apply and the agreement may be enforced regardless of whether the agreement is in writing or has been stipulated to in open court. The determination of whether the purport of a settlement agreement is genuinely disputed is made, as here, using the summary judgment procedure where the scope of evidence which the trial court may properly consider is governed not by CR 2A but by CR 56(e) (generally, competence of witnesses and admissibility).

The trial court ruled, on the basis of evidence whose admissibility was not challenged below and whose sufficiency to support the ruling has not been challenged here, that neither the

existence nor material terms of the May 2016 line relocation agreement entered into between the Smiths and the Goehners had been genuinely disputed by the Smiths. Thus, the Smiths have advanced a demonstrably inapplicable legal theory: CR 2A does not apply to settlement agreements whose purport has not been genuinely disputed. With no challenge to the evidentiary basis for the trial court's ruling or to the sufficiency of that evidence to support the ruling, summary dismissal of the Smiths' appeal is warranted.

The Goehners will also address the other, equally flawed, arguments set forth in the Smiths' Opening Brief.

The Goehners also seek an award of their attorney's fees and costs on appeal on several applicable grounds.

II. STATEMENT OF THE ISSUES

1. Does CR 2A operate to bar enforcement of a settlement agreement where the admissible evidence shows that there is no genuine issue of material fact as to either the existence or the material terms of the agreement?

2. Is summary dismissal of an appeal warranted where the Appellant has advanced a demonstrably inapplicable legal theory?

3. Is a new trial based upon a claim of excluded evidence warranted where the evidence was properly excluded in the first trial?

4. Is a Respondent entitled to an award of attorney fees and expenses incurred on appeal where the appeal has no chance of success, is advanced for an improper purpose, and/or the Appellant has a demonstrated history of intransigence?

III.
STATEMENT OF THE CASE

A. Scoping.

The Smiths' narrative of the case is mostly accurate as far as it goes, but it falls far short of being a complete recitation of all material facts. The Smiths have omitted from their recitation material components of the line relocation agreement entered into between the Smiths and the Goehners in May of 2016, none of which have been disputed by the Smiths either before the trial court or here. We supplement and complete the Smiths' partial narrative with those omitted facts here.

B. Case Overview.

This case concerns a pipeline that supplies irrigation water from a Wenatchee Reclamation Ditch distribution box to Respondent

Carol Goehner's nearby orchard. CP 021 at Paragraphs 3, 4, and 5. The distribution box and a portion of the pipeline are located on the Smith property (*Id.*), property that was previously jointly owned by Rod Smith and Carol Goehner when they were married to each other. RP at Page 373, Lines 24-25.

The case has two primary components: (1) the Smiths' claim that the Goehners trespassed in 2013 when they replaced the dilapidated metal irrigation pipeline with PVC pipe and (2) the Goehners' Counterclaim that in late April – early May of 2016 the Smiths and the Goehners entered into a binding settlement agreement of the Smiths' 2016 trespass claim when the Smiths requested that the Goehners relocate a portion of the irrigation pipeline to a new location on the Smiths' property and agreed to grant the Goehners a formal, written easement for the pipeline at the new location provided the Goehners paid for the line installation work, paid for the new location to be surveyed, and paid for preparation of the formal, written easement.

The first component of the case – the Smiths' 2013 trespass claim – was the subject of a three day jury trial in May of 2018 which resulted in a verdict in favor of the Goehners. CP 706.

This appeal concerns the second component of the case, as well as the Smiths' contention that because summary judgment in favor of the Goehners on their Counterclaim should not have been granted they are entitled to a new trial on their 2013 trespass claim because evidence proffered by the Smiths during that trial was not admitted based upon the trial court's prior entry of summary judgment.

C. Statement of the Case – Omitted Material Facts.

On April 15, 2016, the Smiths told the Goehners that they (the Smiths) had “set markers for a reasonable assigned area that we will draft a proper AGREEMENT for your right to use our property to reroute your irrigation system.” CP 193. The Smiths also cautioned the Goehners against “[u]sing our property anywhere except where we have agreed and have posted markers” *Id.*

In mid- to late-April, 2016, during an altercation between the Smiths and the Goehners about the Goehners' irrigation line, Becky Smith asked Dwight Goehner to “go with her so she could show [him] the place where they wanted the line relocated.” CP 184; 84-85. The two “walked to a spot where Becky told [Dwight] the Smiths had placed wooden stakes with flagging on the ground along a course

Becky told [Dwight] was where they wanted the line moved to.” *Id.*
The Goehners were agreeable to moving their irrigation line “to the staked location Becky showed [Dwight] in the hope of saving litigation costs and putting an end to the dispute.” *Id.*

On May 2, 2016, the Smiths contacted Keegan Bray, the owner of Northwest Snow and Ice Equipment, a Cashmere area excavation contractor, requesting that he provide them with a quote to install the Goehners’ irrigation line along the new route that had been marked by them. CP 184; 89. Mr. Keegan met Rod Smith at the Smith property on May 2, 2016, and “[t]hey showed me a [sic] where they had placed stakes in the ground along the course they told me they wanted the ditch dug for the irrigation waterline.” *Id.*

As requested, Mr. Bray prepared a quote for the work and provided it to the Smiths. CP 184; 89. The quote was provided to the Goehners by the Smiths as an enclosure to the Smiths’ May 2, 2016, e-mail to the Goehners. CP 184-85; 71-73. According to the May 2, 2016, e-mail, the Smiths forwarded the Bray quote to the Goehners and promised to “share them in any future court proceedings.” *Id.*

The Smiths’ May 2, 2016, e-mail to the Goehners (CP 71-73) was, in fact, subsequently reviewed by the trial court (per Judge Alicia

Nakata) during a hearing the following day on the Goehners' Motion for Temporary Restraining Order. CP 26. That Motion was necessary because the irrigation line in the prior location was no longer serviceable, the orchard had not yet had any water that year, and the Smiths were making unreasonable demands on the Goehners relative to the sequence of the agreed line relocation work. CP 21-22. Among other things, the Smiths were insisting that "the easement be surveyed prior to any work being done . . ." (CP 63; 53), a scenario which would have left the orchard without water for an extended period of time at a critical time of year.

During the May 3, 2016, hearing on the Goehners' TRO Motion Rod Smith told Judge Nakata that "his ultimate goal" (CP 26) was what the Smiths had proposed in their May 2, 2016, e-mail to the Goehners: "to complete the Approved Easement and get the Easement document signed . . . [so that] we can conclude this mess with your new irrigation line easement at last and soon." CP 71-73. Capitalization of "Approved Easement" and of "Easement" is verbatim the Smiths' May 2, 2016, e-mail. *Id.* In prior discussions with the Goehners' attorney, the Smiths had requested that the formal, written easement include a provision that the irrigation line at the new

location be buried no less than three feet. CP 209. That provision was included in the initial draft easement provided to the Smiths. CP 212. After reviewing that initial draft, the Smiths requested that the easement also include language reflecting the agreement of the parties that the location of the new easement be surveyed and the survey attached to the final easement. CP 215. The Smiths also requested that indemnity language be added to the formal, written easement. CP 220. These requested changes were also made and a revised version of the written easement provided to the Smiths. CP 222-27. Hence, capitalization of "Approved Easement" and of "Easement" by the Smiths in their May 2, 2016, e-mail. CP 71-73.

Following her review of the Smiths' May 2, 2016, e-mail (CP 71-73) and after hearing from Rod Smith that what they had set out in that e-mail was the Smiths' "ultimate goal," (CP 26) Judge Nakata observed that the Smiths were "offer[ing] a permanent solution that appears to be able to be done by this Friday." CP 26. At that point during the May 3, 2016, hearing, the focus of the hearing shifted from the Goehners' request for a TRO to Judge Nakata urging the parties to complete their line relocation agreement. CP 185; 85.

Dwight Goehner and Keegan Bray met on the Smith property later that same day (May 3, 2016) because Dwight “wanted to make sure there was no mistake or misunderstanding about where the Smiths wanted the new line to go.” CP 185-86; 85. According to the testimony of Dwight Goehner:

Keegan and I walked up to the place where Becky Smith had previously showed me the stakes the Smiths had placed in the ground to mark the new location. The stakes were in the same location as they were when Becky walked me up there.

CP 186; 85-86. Keegan Bray’s testimony is in accord:

Dwight asked that I meet him on site to review the location so there would be no mistake about where the Smiths wanted the line to go. I met Dwight on site on May 3, 2016, and we walked to where the Smiths had placed stakes to indicate where they wanted the new irrigaiton [sic] waterline to be installed. The stakes were in the same location as the Smiths had showed me when I met them on site previously. Dwight authorized me to perform the work and stressed to me that the line needed to be installed where the Smiths said they wanted it installed, as shown by the stakes they had placed in the ground.

CP 186; 89.

Thereafter, the Goehners’ irrigation line was installed by Keegan Bray in the new location which had been identified by the Smiths. According to the testimony of Keegan Bray:

I performed the ditch and waterline installation work between May 4 and 6, 2016. Both Rod and Becky Smith were on site throughout the time I was there doing the work and observed what I was doing and where I was installing the waterline. I made sure the waterline was installed along the course the Smiths had previously told me they wanted it placed, where the Smiths had put stakes in the ground or as close to that staked course as possible given the topography and other obstacles I encountered during construction. I would say that the ditch and waterline were installed either exactly where the Smiths had placed stakes or within 1-2 feet of that staked course.

CP 186; 89.

The Smiths personally oversaw the line installation work and told Mr. Bray, both verbally at the time and later in writing, that they were happy with it. According to the testimony of Keegan Bray:

[O]ne or both of the Smiths were on site throughout the time I was on site digging the ditch and installing the waterline. Neither of them ever told me that I was putting the line in the wrong place or that there was anything else about my work they didn't like. Neither of the Smiths ever told me to stop putting the line where I was putting it or to do anything different than I was doing. To the contrary, the Smiths verbalized to me after the work was complete that they were happy with the work. In fact, Becky Smith sent me an e-mail on June 3, 2016, about one month after I had completed the job and said 'We appreciate the job you did here on our property and were thankful that you able [sic] to get this job done ASAP.'

CP 186-87; 90; 92.

The testimony of the Smiths is in accord. According to the Smiths' sworn testimony, "[t]he Goehners installed the 2016 Line in a location that was identified by us." CP 187; 130 (Line 8). The Smiths had previously defined the term "2016 Line" as the irrigation line which had been installed by the Goehners in 2016 at the new location flagged by the Smiths. CP 187; 130 (Lines 2-3). The Smiths have not disputed the authenticity of Becky Smith's June 3, 2016, e-mail to Keegan Bray. CP 92.

The Goehners paid Keegan Bray for the line relocation work. CP 187; 86-87. Further, as Dwight Goehner testified:

We also paid to have the new location of the line surveyed so the new location could be legally described and mapped for attaching to the formal easement our attorney had prepared.

CP 187; 86.

With the line surveyed and a legal description of the new location of the irrigation waterline prepared, the formal, written easement was finalized by the Goehners' attorney, with those documents attached as exhibits to the final, execution draft. CP 33 at Lines 13-15. By that time, Wenatchee Attorney Chancey Crowell

had appeared for the Smiths, so the final draft of the easement was sent to Attorney Crowell by e-mail dated May 25, 2016. CP 33; 77-83.

Between May 25, 2016, and June 30, 2017, the Goehners' attorney contacted Attorney Crowell eleven (11) times, to inquire about the status of the Smiths' review of and/or signature on the Grant of Easement that had been provided to him on May 25, 2016. CP 33. The Smiths never requested any further modifications to the written Grant of Easement and never signed it.

The form of Grant of Easement which the trial court found and concluded "accurately reflects the parties' May 2016 line relocation agreement" (CP 756) is verbatim the form which had been provided to Attorney Crowell (compare CP 78-83 with CP 758-64), with one exception. For some unknown reason (Transcript (hereinafter "TR") of April 13, 2018, hearing at Page 56, Lines 4-13), the Smiths' request that the new line be buried no less than three feet was not in the version provided to Attorney Crowell on May 25, 2016, as it had been in the prior versions which had been provided to the Smiths. CP 79; 212; 224. That inadvertent omission was corrected in the form approved for entry by the trial court. CP 759.

None of these facts have been disputed by the Smiths.

IV. ARGUMENT

A. The Smiths Have Advanced an Inapplicable Legal Theory.

Distilled, the Smiths' legal theory on this appeal is that a unilateral contract can never meet the requirements of CR 2A or RCW 2.44.010 because enforcement of such a contract requires consideration of evidence which is extrinsic to any writings between the putative contracting parties or to any stipulation entered into by the parties in open court. This theory, never articulated in one place, is gleaned from assertions made by them in different parts of the Smiths' Opening Brief.

The Smiths first assert, in the Introduction section of their Opening Brief, that "[a] unilateral contract where acceptance occurs by performance can never meet the requirements of CR 2A or RCW 2.44.010." Br. of Appellant at (unnumbered) Page 1. The purported legal authority for this assertion is found later in the Opening Brief where the Smiths cite the case of *Gaskill v. City of Mercer Island*, 19 Wn. App. 307, 576 P.2d 1318 (1978) for the proposition that "[e]xtrinsic evidence is not to be considered in determining whether a CR 2A settlement agreement was reached." Br. of Appellant at Page

19. Woven together, these two components comprise the Smiths' legal theory on this appeal: because enforcement of a unilateral contract requires consideration of extrinsic evidence (namely, evidence of whether the promisee fully performed the acts (*i.e.*, consideration) necessary to make the promisor's promise binding) "[a] unilateral contract . . . can never meet the requirements of CR 2A or RCW 2.44.010." Br. of Appellant at (unnumbered) Page 1.

The Smiths' legal theory is fatally flawed because neither CR 2A nor RCW 2.44.010 has any application to the settlement agreement reached between the Smiths and the Goehners.¹ In summary, the agreement reached between the Smiths and the Goehners was, as a purely factual matter, neither alleged by the Goehners to be nor treated by the trial court as being a CR 2A settlement agreement; that is, an agreement whose enforcement is subject to the provisions of CR 2A. Moreover, as a matter of law, the agreement reached between the Smiths and the Goehners does not satisfy the prerequisites to the application of CR 2A. Both in fact and

¹ Whether the agreement reached between the Smiths and the Goehners is bilateral (an exchange of promises) or unilateral (a promise which must be accepted, if at all, by performance) in nature may be debated, but that debate would merely perpetuate the diversion presented by the Smiths' flawed legal theory. That distraction will be discussed no further.

in law, then, the settlement agreement reached between the Smiths and the Goehners is not a “CR 2A settlement agreement.” As for the Smiths’ reliance on RCW 2.44.010, that statute simply has no application to the issues in this case.

The Goehners never refer to the line relocation agreement they reached with the Smiths as a CR 2A settlement agreement. The Goehners’ Motion for Summary Judgment (CP 182-90) seeks entry of “the relief prayed for in the Goehners’ Counterclaim [asserted in their First Amended Answer, Affirmative Defenses, and Counterclaim]” (CP 147-64). Neither the Motion nor the Counterclaim refer to the agreement reached between the Smiths and the Goehners as a CR 2A settlement agreement. At the March 29, 2018, hearing on the Goehners’ Motion for Summary Judgment the trial court did not refer to the agreement reached between the Smiths and the Goehners as a CR 2A settlement agreement. TR of March 29, 2018, hearing. In fact, in response to the Goehners’ argument at the March 29, 2018, hearing that the Clerk’s Minutes from the May 3, 2016, hearing before Judge Nakata provided additional evidence in support of entry of summary judgment, the trial court stated “they’re (the Clerk’s Minutes) not a CR 2A agreement. Clerk’s minutes are not

a CR 2A agreement.” TR of March 29, 2018, hearing at Page 14, Lines 11-12. That is the only reference to CR 2A in the proceedings below: express disavowal of its applicability.

Further, neither in the Goehners’ Motion for Reconsideration (of the trial court’s denial of summary judgment) (CP 369-73) nor during the April 13, 2018, hearing on that Motion (4/13/18 TR) do either the Goehners or the trial court refer to the agreement reached between the Smiths and the Goehners as a CR 2A settlement agreement. Finally, the June 8, 2018, Order Re: Declaration and Enforcement of Settlement Agreement (CP 755-64) does not refer to the agreement reached between the Smiths and the Goehners as a CR 2A settlement agreement.

Factually, then, the Smiths’ legal theory is unfounded.

We turn, then, to a discussion of the legal merits of the Smiths’ appeal theory: their assertion that, as a matter of law, it was improper for the trial court to consider extrinsic evidence in entering summary judgment in favor of the Goehners because settlement agreements under CR 2A must either be in writing or stipulated to in open court. The fallacy at the heart of the Smiths’ theory is the assumption that because the agreement between the Smiths and the Goehners is a

“settlement agreement” the provisions of CR 2A automatically apply. That assumption is false. So, too, is the legal conclusion urged by the Smiths which is based on that false assumption: that the trial court improperly considered extrinsic evidence in enforcing the settlement agreement reached by the Smiths and the Goehners in this case.

“Settlement agreements are governed by general principles of contract law.” *Morris v. Maks*, 69 Wn. App. 865, 868-69, 850 P.2d 1357 (1993) (citing *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383, *reviewed denied*, 100 Wn.12d 1015 (1983)). The Court of Appeals in *Morris* went on to elaborate those general principles of contract law:

In determining whether informal writings such as letters are sufficient to establish a contract even though the parties contemplate signing a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract.

Morris v. Maks, supra, 69 Wn. App. at 869 (citing *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913)).

The Smiths seem to know that their reliance on CR 2A is misplaced: nowhere in their Opening Brief do the Smiths set out the

actual text of CR 2A. They paraphrase it, but only the part about the evidentiary restriction – writings and open court stipulations – which applies only to settlement agreements which have been determined to be subject to CR 2A. Here is the full text of CR 2A:

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.

CR 2A. The evidentiary restriction set forth in the second part of CR 2A applies only to settlement agreements which have been found to satisfy the first part of CR 2A. In other words, CR 2A applies only to a subspecies of settlement agreement: those which are entered into “in respect to the proceedings in a cause” and whose “purport” is disputed. CR 2A. As the Court of Appeals in *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993), instructed:

By its terms CR 2A applies only to agreements that satisfy two elements. First, the agreement, hereafter called a settlement agreement, must be made by parties or attorneys ‘in respect to the proceedings in a cause.’ Second, ‘the purport’ of the agreement must be disputed.

Id. at 39.

Thus, CR 2A does not supplant the general principles of contract law. Rather, CR 2A supplements general contract principles, but only if and when the prerequisites to its applicability have been met. *Id.* If those prerequisites are not met, the evidentiary restriction set forth in CR 2A simply does not apply.

Typically, as in this case, there is no issue as to whether the settlement agreement was entered into “in respect to the proceedings in a cause.” CR 2A. There is no dispute that the settlement agreement in this case was.

The second prerequisite to the applicability of CR 2A – that the “purport” of the agreement is disputed – involves an inquiry into whether the agreement is “disputed within the meaning of CR 2A.” *Ferree*, 71 Wn. App. at 40.

At least two criteria govern whether an agreement is disputed within the meaning of CR 2A. First, there must be a dispute over the existence or material terms of the agreement, as opposed to a dispute over its immaterial terms. . . . The substance, gist, or legal effect of an agreement is found in its existence and material terms, and it follows that the ‘purport’ of an agreement is disputed only when its existence or material terms are disputed.

Second, the dispute must be a genuine one. The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or

narrow a cause of action; indeed, the compromise of litigation is to be encouraged. (Citations.) Rather, the 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. 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. *It is not served by barring enforcement of an alleged settlement agreement that is not genuinely disputed, for a nongenuine dispute can be, and should be, summarily resolved without trial.*

Id. at 40-41 (emphasis added). As they did in paraphrasing CR 2A only in part, the Smiths quote from *Ferree*, but they omit the italicized language in the preceding quote. Br. of Appellant at Page 19.

Again, the Smiths fallaciously argue that the trial court improperly considered extrinsic evidence because the settlement agreement reached between the Smiths and the Goehners is the type of settlement agreement which is subject to the provisions of CR 2A. The Smiths skipped a step: whether the settlement agreement reached between the Smiths and the Goehners was disputed within the meaning of CR 2A. In the summary judgment context, the scope of evidence that may properly be considered by the trial court is limited only by CR 56(e)'s mandate that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such

facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

The Smiths have not challenged the trial court’s entry of summary judgment on the ground that it considered evidence which ran afoul of the evidentiary standard set forth in CR 56(e). Rather, the Smiths’ appeal is based solely on the legal contention that the trial court improperly considered extrinsic evidence in enforcing the settlement agreement reached between the Smiths and the Goehners. The Smiths urge an evidentiary restriction which is not applicable because it only comes into play if the trial court determines, on the basis of evidence which meets the CR 56(e) standard, that the settlement agreement has been genuinely disputed within the meaning of CR 2A. The trial court below properly determined that the settlement agreement entered into between the Smiths and the Goehners had not. Again, that determination has not been challenged by the Smiths, only that the trial court considered extrinsic evidence in reaching it. As we have seen, the trial court’s consideration of all evidence presented both for and against entry of summary judgment – whether extrinsic or otherwise – was entirely proper.

The Smiths' reliance on RCW 2.44.010 is equally misplaced. To reiterate, the Smiths' legal theory rests on their assertion that "[u]nder 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." Br. of Appellant at Pages 18-19. As previously noted, the Smiths do not quote the text of CR 2A or, for that matter, even cite it as authority for that assertion. Rather, in a bit of sleight-of-hand, the Smiths cite RCW 2.44.010 as "similarly" standing for the same proposition and purport to quote Subsection (1) in its entirety. Br. of Appellant at Page 19. The Smiths, however, omit the title of the statute "Authority of attorney," omit the introductory phrase "An attorney and counselor has authority," which both identifies the context in which its provisions properly apply and qualifies everything that follows, and omit the first phrase of Subsection (1) itself – "To bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made or entered upon the minutes of the court" – which further narrows the context in which Subsection (1) properly applies: situations in which the scope of an attorney's authority is in issue. That is not the case here.

The Smiths' reliance on RCW 2.44.010 is misplaced because the statute simply does not apply to the agreement reached between the Smiths and the Goehners. As the Court of Appeals in *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993), correctly observed, "[b]y both its terms and its context, [RCW 2.44.010] applies to agreements made by attorneys, but not to agreements made by the clients themselves." *Id.* at 46.² RCW 2.44.010, then, has no application to this case and is not legal authority for the Smiths' pronouncement that "[u]nder 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." Br. of Appellant at Pages 18-19.

As we have seen, the Smiths' treatment of CR 2A and RCW 2.44.010 in their Opening Brief is highly selective and, as a result, conveys a false impression of what those authorities provide. We have previously touched on what is perhaps the clearest example of

² The Goehners' attorney's limited involvement in the negotiations with the Smiths does not convert their agreement to one "made by attorneys." Rather, during those negotiations the Goehners' attorney's role was more akin to that of a scrivener of the terms of the agreement that had been worked out between the Smiths and the Goehners. Moreover, neither the accuracy of the Goehners' attorney's written expression of the terms of the agreement nor the attorney's authority to do so have been called into question in this case.

the Smiths' dissembling – their misleading discussion of the *Ferree* decision – but it bears repeating because the decision is strikingly pertinent to this case. The Smiths accurately quote the following sentence from *Ferree*: “This (the purpose of CR 2A) 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.” Br. of Appellant at Page 19. The Smiths gloss over the important phrase “genuinely disputed” and omit the very next sentence in *Ferree* where the Court goes on to say, in language which is fatal to the Smiths' appeal, “[i]t (the purpose of CR 2A) is *not served* by barring enforcement of an alleged settlement agreement that is not genuinely disputed, for a nongenuine dispute can be, *and should be*, summarily resolved without trial.” *Ferree*, 71 Wn. App. at 41 (emphasis added). These omissions had been pointed out to the Smiths below. CP 774-76.

That (summary resolution of a nongenuine dispute) is precisely and, according to *Ferree*, properly what happened below. The trial court, finding and concluding that there was no genuine dispute on any material issue, summarily ruled that the parties had entered into

an agreement in May 2016 whereby the water line supplying irrigation water to Respondent Carol Goehner's adjacent orchard was relocated. Both the text of CR 2A (misstated by the Smiths) and the *Ferree* decision (misrepresented by the Smiths) are in accord with the trial court's decision.

In summary, the Smiths advance the erroneous legal standard that extrinsic evidence may never be considered in proceedings to enforce a settlement agreement because they (mis)read CR 2A to say that only settlement agreements which are in writing or which are stipulated to in open court may be enforced. As we have seen, CR 2A does not operate to bar enforcement of a settlement agreement where the summary judgment standard under CR 56(c) is met – “[t]he judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” – regardless of the character of the evidence presented to and relied upon by the trial court, so long as CR 56(e)'s evidentiary standard is met (not disputed by the Smiths). In the words of CR 2A, if the “purport” of the agreement is not

genuinely disputed then the fact that the agreement may not be in writing or stipulated to in open court is irrelevant and CR 2A simply does not apply.

B. Motion for Summary Dismissal of Appeal.

While Division III has elected not to use the Motion on the Merits procedure authorized by RAP 18.14 (General Order of Division III dated February 9, 2015), as discussed below, summary dismissal of the Smiths' appeal is nevertheless warranted.

The Smiths recite the summary judgment standard and also recite general standards for appellate review of "evidentiary rulings" and for "[r]ulings on admissibility of evidence." Br. of Appellant at Page 18. They do not, however, assert that any evidentiary rulings made by the trial court were improper or that the trial court considered evidence which did not meet the evidentiary standard for the summary judgment procedure set forth in CR 56(e) (admissibility and witness competence). Neither do the Smiths challenge the sufficiency of the evidence to support the trial court's conclusion that, on the evidence presented on summary judgment, no genuine issue of material fact requiring a trial had been raised by the Smiths and that the Goehners were entitled to judgment as a matter of law on their

claim for enforcement of the line relocation agreement which they had reached with the Smiths in May of 2016.

The Smiths' appeal rests not on a claim that the trial court's entry of summary judgment did not comply with the summary judgment standard set forth in CR 56(c) or that the trial court considered evidence which did not meet CR 56(e)'s evidentiary standard but, rather, solely on the legal claim that the trial court's consideration of extrinsic evidence ran afoul of CR 2A's prohibition against enforcing settlement agreements which are neither in writing nor stipulated to in open court. Because the Smiths challenge neither the character or sufficiency of the evidence to support the trial court's entry of summary judgment nor the trial court's determination that on the evidence presented the Goehners were entitled to entry of judgment as a matter of law, a determination by this Court that the trial court applied the correct legal standard and properly considered all evidence submitted by the parties should end this appeal: no other issue has been either preserved or presented by the Smiths.

In other words, the Smiths' only challenge on this appeal is that the trial court considered extrinsic evidence in granting summary judgment, not that the evidence considered by the trial court –

extrinsic and otherwise – was either improper evidence or insufficient to support the trial court’s grant of summary judgment or that the Goehers were not entitled to judgment as a matter of law. Thus, in the event this Court concludes, as it should, that the trial court properly considered extrinsic evidence this Court will have addressed and disposed of all issues raised by the Smiths and should summarily dismiss their appeal.

The Goehners hereby move for such relief.

C. The Smiths’ Factual Assertions Are Unfounded.

Having advanced a legal theory which is fatally flawed and not having challenged any of the evidence that was presented to the trial court or the sufficiency of that evidence to support the trial court’s grant of summary judgment on the Goehners’ 2016 line relocation agreement claim, the Smiths’ appeal should be summarily dismissed. Nevertheless, we touch briefly on the entirely unfounded factual assertions advanced by the Smiths below in opposing entry of summary judgment in favor of the Goehners.

1. Temporary, “Borrowed” Easement.

The Smiths asserted to the trial court in the summary judgment proceedings below that the easement they granted to the Goehners

in May of 2016 was intended by them to be only temporary. For example, during colloquy between the trial court and the Smiths during the March 29, 2018, hearing on the Goehners' Motion for Summary Judgment, Mr. Smith, in response to a question from the trial court attempting to understand the Smiths' position, argued that "[w]e were willing to put a line in there and let them borrow it in order for them to get water to their orchard" (TR of March 29, 2018, hearing at Page 21, Lines 5-8) and that they only "wanted it to be there for a while, yes" (*Id.* at Page 25, Lines 4-5). This assertion echoes an assertion made by the Smiths in their Affidavit submitted in opposition to the Goehners' successful Motion for Preliminary Injunction.³ In their failed attempt to defeat the Goehners' Motion for Preliminary Injunction, the Smiths asserted that "[w]e thought that the installation

³ The Smiths had followed up their wrongful effort to keep Carol Goehner from getting water to her orchard in 2016 with a similar effort in 2017. The trial court, concluding that the Smiths' statement in a July 17, 2017, letter to Dwight Goehner that "by next week the current line will no long [sic] be servicing your (or Carol's) orchard" (CP 38) posed an imminent threat to the Goehners' clear legal rights, entered a Temporary Restraining Order (CP 94-95) followed by a Preliminary Injunction (CP 143-44). The Preliminary Injunction was converted into a Permanent Injunction on July 3, 2018, by operation of the trial court's Final Order and Judgment. CP 795-96 at Page 2, Lines 13-14. The Smiths have not challenged the trial court's entry of the Temporary Restraining Order, the Preliminary Injunction, or the Permanent Injunction.

of the irrigation pipeline in its current location ('the 2016 line') was a temporary solution" CP 130 at Lines 2-3.

The trial court's colloquy with the Smiths on their assertion that they intended only to grant a temporary easement continued with the trial court inquiring of Mr. Smith whether "any of the e-mails you ever sent say that somewhere that you can point me to?" TR of March 29, 2018, hearing at Page 26, Lines 3-4. In his response, Mr. Smith pointed to the following language in the Smiths' May 2, 2016, 10:32 pm e-mail they sent to the Goehners:

We all know that you know that your line did not belong laid along the length of the gully, and you now have started to return it to its historical easement on the PUD property. If you wish to return it to its Historical location on our property, you have the right to do that. BUT if you hope to put your new PVC irrigation line in a different location, THIS WEEK, then you will cooperate with our terms and placement of the new given easement we are trying to provide you with.

TR of March 29, 2018, hearing at Page 26, Lines 3-25; CP 233. The trial court's colloquy with Mr. Smith then continued:

THE COURT: And the new given easement that you're trying to provide you — trying to provide them with was marking out these flags or whatever you marked —

MR. SMITH: That's right.

THE COURT: It that was where you wanted the line?
MR. SMITH: Yes.
THE COURT: Which then brings us back. Your big objection is it didn't happen this week?
MR. SMITH: It didn't happen this week.
THE COURT: Is there any other objection besides the fact that it did not happen this week?
MS. SMITH: Yes, it wasn't our intentions in the first place.
MR. DODGE: I can't hear her.
THE COURT: You have to speak up, ma'am, if you're gonna talk.
MS. SMITH: It wasn't our intention in the first place. Mr. Dodge —
THE COURT: Despite what this says?

Id. at Page 27, Lines 1-22.

The Smiths would go on to try and blame the Goehners' attorney for the language they chose to put in their May 2, 2016, e-mail. *Id.* at Page 27, Line 23 through Page 28 at Line 8. In the end, the Smiths' claim that they had intended to grant the Goehners only a temporary, "borrowed" easement simply vanished for lack of any evidentiary support. The claim, made from whole cloth, is not only directly contrary to the written evidence but is also contradicted by the Smiths' own statements:

- As for the contradictory written evidence, both drafts of the proposed form of Easement provided to the Smiths included Paragraph 2.7 entitled “Term of Easement” which provided “The term of this easement is perpetual.” CP 212; 224. The Smiths neither objected to nor, for that matter, even commented on that provision.
- As for contradictory statements made by the Smiths, the text of the Smiths’ May 2, 2016, 10:32 pm e-mail to the Goehners describes the new location of the easement as “the new given easement we are trying to provide you with.” CP 233. As noted, the trial court responded with incredulity to the notion that that text somehow supported the Smiths’ contention of a temporary easement.
- Further, the Smiths’ Declaration opposing the Goehners’ Motion for Summary Judgment contradicts their assertion that they intended to grant only a temporary easement. In that Declaration, the Smiths not only did not dispute the accuracy of the Clerk’s

Minutes of the May 3, 2016, TRO hearing (CP 26), they described in their own words Judge Nakata's observation during that hearing as "[t]he court went on to say that the plaintiffs have offered a *permanent solution* that appears to be able to be done by this Friday." CP 206 at Lines 15-16 (emphasis added); see, also, CP 26.

Finally, even if the Smiths had, in fact, actually harbored the thoughts and intents they say they harbored relative to the line relocation agreement being merely temporary – a doubtful proposition, at best – a parties' unarticulated, subjective intentions are simply irrelevant under Washington law. Washington, of course, adheres to the "objective manifestation" of contract theory. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503–04, 115 P.3d 262 (2005). Accordingly, what the Smiths may have "thought" but never expressed is legally irrelevant.

2. Timing of Completion of Work.

The Smiths asserted below and continue to assert in this Court that even if a settlement agreement had been reached the Goehners breached it by failing to complete all required work "THIS WEEK." CP

206-207; Br. of Appellant at Page 21. The Smiths accused the Goehners' attorney of being "a master of misdirect [sic]," but a tip of the hat is due to the Smiths for this bit of verbal alchemy by them. Both in the Smiths' May 2, 2016, 10:32 pm e-mail (CP 233) and during the May 3, 2016, TRO hearing (CP 26) the urgent need to get water to Carol Goehner's orchard was paramount, the entire focus of the pre-hearing communications between the parties and of the hearing itself. Indeed, it was the Smiths' insistence that "the easement be surveyed prior to any work being done . . ." (CP 63; 53) – a scenario which would have left the orchard without water for an extended period of time at a critical time of year – which created the emergency which, in turn, necessitated the TRO hearing. Hence, Judge Nakata's observation at the May 3, 2016, TRO hearing that "the plaintiffs have offered a permanent solution that *appears to be able to done by this Friday.*" CP 26 (emphasis added).

In arguing before the trial court and continuing to argue in this Court that the timing of completion of the work was of the essence of their agreement with the Goehners, the Smiths attempt to coopt a condition that was essential *to the Goehners* into one that was essential *to them*. The verbal alchemy at work in the Smiths'

argument is their disingenuous attempt to convert a thing which *could be done* by a certain time into one that *must be done* by a certain time. The trial court was initially taken in by the Smiths' dissembling, (TR of March 29, 2018, Hearing at Page 48, Lines 14-21) but after the Goehners pointed out on reconsideration that "[t]ime was decidedly of the essence, but to the [Goehners], not to the [Smiths]," (CP 372 at Line 16) the trial court saw through the Smiths' timing canard and entered partial summary judgment in favor of the Goehners.

The record is completely devoid of any rational basis for the conclusion that timely completion of the work was a legitimate concern of the Smiths. To the contrary, the record admits of only one conclusion on timing: because of the urgent need to get water to Carol Goehner's orchard, timing was decidedly of the essence, but only to her. The Smiths' assertion to the contrary in the trial court and in this Court is a complete, thoroughly disingenuous fabrication.

3. Width of Easement.

The Smiths take considerable umbrage, characterizing it as the trial court's "[m]ost glaring" error, to the trial court having taken expert testimony from a licensed land surveyor on the customary terms of an irrigation easement regarding width. Br. of Appellant at Page 22.

Once again citing (and once again mischaracterizing) *Ferree*, the Smiths argue that “this is exactly the sort of consideration which CR 2A prohibits.” *Id.* The Smiths’ argument is flawed in several respects.

First, as we have demonstrated in Section A of this part of Respondents’ Brief, consideration of evidence which is extrinsic to the parties’ writings or to their open court stipulation is prohibited only when evaluating a settlement agreement to which the provisions of CR 2A have been determined to apply. The trial court’s consideration of the land surveyor’s expert testimony was entirely proper.

Secondly, in the context of an agreement to relocate an irrigation line easement whose material terms – new location of the easement, term of the easement, required depth of the new irrigation line, completion of and payment for the line installation work, completion of and payment for a survey of the new easement, and completion of and payment for the formal, written easement agreement – are not disputed, the width of the easement (which neither party raised as an important issue during their negotiations) must unquestionably be considered to be immaterial. Once again, the Smiths have not challenged the sufficiency of the evidence to support the trial court’s grant of summary judgment to the Goehners that no

genuine issue of fact had been raised by the Smiths as to either the existence or material terms of the settlement agreement they had entered into with the Goehners.⁴

The Smiths are also wrong that it is improper for a trial court to take expert testimony to “gap-fill” an immaterial term of a settlement agreement. In *Loewi v. Long*, 76 Wash. 480, 136 P. 673 (1913), a dispute over an agreement for the purchase and sale of hops, the Court affirmed the decision of the trial court where the trial court had relied upon “the custom of the trade” to insert terms related to the time and place of delivery. *Id.* at 486. The time and place of delivery in a contract for the purchase and sale of goods would seem to be far more material than the width of a utility easement. Moreover, the Smiths did not object to the land surveyor testifying and did not challenge the substance of his testimony. And even in this Court the

⁴ The Smiths argue that settlement agreements are “all or nothing” propositions. Br. of Appellant at 23 (“CR 2A does not appear to allow the court to or parties to pick which terms [of] the agreement are genuinely disputed and then jettison the rest.”) They are wrong. *In re Ferree, supra*, 71 Wn. App. 35, 40-41 (“The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle *or narrow* a cause of action; indeed, the compromise of litigation is to be encouraged. (Citation; emphasis added).” In our case, the trial court granted summary judgment on the Goehners’ Counterclaim that a settlement agreement had been reached on a new location for the Goehners’ irrigation line easement across the Smiths’ property. The trial court also concluded that the scope of the agreement did not include settlement of the Smiths’ 2013 trespass claim. The issues for trial thus properly narrowed, the 2013 trespass claim proceeded to trial.

Smiths do not challenge either the land surveyor's qualifications or the substance of his testimony. Rather, the Smiths' sole objection on the width issue – based upon a misstatement of the rule of law established by CR 2A – is that the expert testimony was extrinsic in nature.

The trial court's reliance on expert testimony to "gap-fill" an immaterial term of the settlement agreement between the Smiths and the Goehners was proper. The width issue, then, is a nonissue.

4. Part vs. Full Performance.

The Smiths recite the evidentiary standard for proving part performance, (Br. of Appellant at 22) but do not follow that up with any discussion of how the evidence before the trial court in this case fell short of that standard. Rather, the Smiths finish their discussion of part performance with the conclusory assertion that "the record is replete with evidence that the parties did not reach an agreement as to the character, terms or existence of an easement." *Id.*

First, the Goehners did not merely partly perform their obligations under the agreement they reached with the Smiths. As the trial court observed, "the Goehners engaged in more than partial performance . . ." TR of April 13, 2018, hearing at Page 83, Lines

13-15. To reiterate, the evidence with which this record is “replete,” none of which has been disputed by the Smiths, is that:

- The Smiths offered to execute a formal, written easement in favor of the Goehners for the irrigation line serving Carol Goehner’s adjacent orchard at a new location on the Smiths’ property, a location which the Smiths had identified with flagged stakes.
- Construction of the irrigation line at the new location was overseen and approved by the Smiths and, as agreed, paid for by the Goehners.
- The Smiths have admitted that the new line was installed along the course they had flagged.
- The Goehners, as agreed, commissioned and paid for the new location of the easement to be surveyed.
- The Goehners, as agreed, commissioned and paid for preparation of a formal, written easement for the irrigation line at the new location. The final, execution draft of the easement approved by the trial court included three revisions which had been specifically requested by the Smiths following their review of drafts.

- The final draft, with attached survey map and legal description commissioned and paid for by the Goehners, was provided to the Smiths' attorney on May 25, 2016, less than three weeks after installation of the irrigation line at the new location had been completed.

The Smiths, however, did not receive a copy of the final draft for more than a year after it had been provided to their attorney. As explained by Ms. Smith during the March 29, 2018, hearing on the Goehners' Motion for Summary Judgment, "[o]n [sic] July of 2017 when our attorney, Chancey, withdrew, he forwarded everything he had that showed us that there was a grant of easement sent to him and I have his documentation saying I apologize, I didn't forward this stuff." TR of March 29, 2018, hearing at Page 35, Lines 19-24.

The failure of the Smiths to receive the final Grant of Easement until July of 2017, more than a year after all work had been completed, cannot, of course, be blamed on the Goehners. Effective May 25, 2016, everything that the Goehners were obligated to do under the terms of their agreement with the Smiths had been, as the trial court found, fully performed. There was nothing further for them to do. The Goehners' attorney's repeated, unsuccessful attempts (11

in all) to get a response to his May 25, 2016, transmittal to the Smiths' attorney actually went beyond full performance.

On the record before the trial court and before this Court, the evidence of the Goehners' full, faithful, and complete performance of all obligations on their part to be performed under the terms of their settlement agreement with the Smiths not only meets the standard of "clear unequivocal proof" under the *Pacific Cascade Corp.* case cited by the Smiths (Br. of Appellants at Page 22), it is overwhelming. As was the case with the Appellant in *Ferree*, the Smiths have not disputed the agreement "in the sense that [they] had controverted its existence or material terms in such a way as to raise a genuine issue of fact," but have only "disputed [it] in the sense that [they] did not wish to abide by it" *Ferree, supra*, 71 Wn. App. 35, 45. *Ferree* instructs that disputing an agreement in the sense that a party does "not wish to abide by it" is legally insufficient to prevent entry of summary judgment to enforce the agreement. As Division II put it in *Ferree*, "[CR 2A] is not served by barring enforcement of an alleged settlement agreement that is not genuinely disputed, for a nongenuine dispute can be, and should be, summarily resolved without a trial." *Ferree*, 71 Wn. App. at 35.

D. Mischaracterization of Excluded Evidence.

The Smiths assert that they are entitled to a new trial on their 2013 trespass claim (rejected by the jury) on the basis that evidence was excluded from the jury's consideration which would have "corroborated Smith's [sic] case regarding where the 1970 line was located." Br. of Appellant at 24. The central issue for the jury on the Smiths' 2013 trespass claim was whether the Goehners had installed the 2013 line in the same location as the 1970 line. The Smiths point to a single "important piece of evidence" (Br. of Appellant at 25) as providing sufficient grounds for a new trial.

The bombshell evidence? An unsworn statement by the Goehners' attorney of his "understanding" of something the Goehners had relayed to him during settlement discussions. *Id.* The argument is both unfounded as well as puzzling. Having just cited *Ferree* for the proposition that the "unsworn assertions of [a parties'] counsel' did not constitute admissible evidence," (Br. of Appellant at Page 21) the Smiths next argue that they are entitled to a new trial because an unsworn statement of the Goehners' counsel had been excluded at the trial of the Smiths' 2013 trespass claim. Br. of Appellant at Page 24; *see, also*, Br. of Appellant at Pages 7;15-16.

Further, the Smiths quote only part of the referenced communication by the Goehners' attorney. The balance of the communication shows that the part they quoted has no evidentiary value. After setting out his "understanding," the Goehners' attorney goes on to quote a communication he had received from the Goehners in order "[t]o be clear" about "how my clients have explained the work to me:"

We don't need to dig the new line all the way to the ditch box. It just needs to connect where our pvc line, which is currently attached to the ditch box, crosses underneath the road and appears at the other side of the road, then the new pipe would follow their flagged location that they showed me previously.

CP 222. Note the lack of any reference to "the historical line" in the Goehners' explanation. So, the Goehners' attorney's statement is not only unsworn, it is also an inaccurate rendering of what the Goehners' had told him. No wonder the Smiths only quote a portion of the communication: the unquoted portion shows that the quoted portion has no evidentiary value whatsoever and most certainly would have been ruled inadmissible regardless of the trial court's prior rulings limiting the scope of relevant evidence at trial based upon the prior grant of summary judgment.

The communication – the unsworn statement of an attorney’s “understanding” of something communicated to him by his client – is also obviously not an admission of a party opponent under ER 801(d)(2) as asserted by the Smiths. Br. of Appellant at 25. Finally, as the trial court correctly ruled, the communication contains “a lot of discussions of settlement negotiations which are inadmissible.” RP 253 at Lines 19-21. The trial court made the same ruling when the communication was offered by the Smiths again a short time later: “those two pages . . . do, in fact, contain settlement negotiations; so under ER 408, they’re not admissible.” RP 256 at 16-19. These rulings by the trial court are not in the Smiths’ recitation on this issue for a reason: they provide an independent basis for the trial court’s decision to exclude the proffered evidence and, in turn, for denying the Smiths’ request for a new trial.

V.
RESPONDENTS’ REQUEST FOR
AWARD OF FEES AND EXPENSES

RAP 18.1 and 18.9(a) provide that the Court of Appeals may award attorney fees on appeal where authorized by law, court rule, or where the appeal is frivolous. *Harrington v. Pailthorp*, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992). “An appeal is frivolous if no

debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985); citations omitted). The Court of Appeals in *Chapman* awarded fees on appeal not only on the basis that the appeal was frivolous, but also on the basis of the appellant’s “continued intransigence.” *Id.* at 456. In so ruling, the Court of Appeals noted the trial court’s denial of multiple motions filed by the appellant, including a new trial motion, as well as the appellant’s filing of “an initial and two amended notices of appeal.” *Id.* Concurring with the trial court’s observation that “this action should have ceased sometime ago,” (*Id.* at 455) the Court of Appeals found that “[t]he Chapmans have taken actions that have made litigation more difficult such that their continued intransigence warrants an appellate attorney fee award to the parents.” *Id.* at 456 (citation omitted).

The record in this case amply supports an award of attorney fees to the Goehners on both grounds for an award of their attorney fees on appeal – frivolousness and intransigence. The record before

the trial court and on appeal also supports a third basis for awarding the Goehners their attorney fees on appeal: bad faith. It is well-settled that it is within a court's inherent powers to award attorney fees on equitable grounds, including a finding of bad faith misconduct on the part of the losing party. *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67 n.6, 961 P.2d 343 (1998) (citations omitted). In that case, the Washington Supreme Court indicated that an award of attorney fees for bad faith litigation misconduct may properly be based upon a finding that a party's "persistence . . . may be motivated by spite rather than by a sincere belief in the sufficiency of [their claim]." *Id.* at 267. *Cf.* CR 11(a) (the signature of a party or of an attorney constitutes a certificate by the party or attorney that the pleading "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .")

A. Frivolous.

The Smiths have failed to raise even a scintilla of doubt about the propriety of the trial court's conclusion that a binding, enforceable agreement was entered into between these parties in May of 2016 for relocation of the irrigation waterline serving Respondent Carol

Goehner's adjacent orchard. Rather, the Smiths merely advance in this Court the same flawed arguments they made below, even repeating erroneous positions and misrepresentations of case law despite those errors and misrepresentations having been pointed out to them in the proceedings below. The Goehners, then, have now had to pay twice to correct the Smiths on the law. Moreover, the law, as corrected, shows that the Smiths' appeal lacks substantial merit.

B. Intransigence and Spite

The record shows that the Smiths had five different attorneys (from five different law firms) in the proceedings before the trial court, even one that urged them to settle,⁵ from which it reasonably may be presumed that the Smiths' previous four attorneys told them things they didn't want to hear, things that didn't advance the Smiths' evident personal vendetta against the Goehners.

The record shows that the Smiths were relentless in their refusal to accept the trial court's ruling that they had entered into a binding, enforceable agreement with the Goehners, including not only

⁵ After their first attorney, Chancey Crowell, withdrew, the Smiths consulted with Attorney Michelle Green of the Wenatchee law firm of Jeffers Danielson. According to Becky Smith, Ms. Green told the Smiths that they "should just settle." TR of April 13, 2018, Hearing at Page 74, 19-23.

their meritless Motion for Reconsideration but also their repeated oral protests during numerous subsequent proceedings before the trial court. Their obdurate conduct before the trial court, born of an evident extreme level of personal animus toward Respondent Carol Goehner, is the kind of behavior typically reserved for disputes between ex-spouses or land disputes between neighbors. In fact, Rod Smith and Carol Goehner were once married to each other. RP at Page 373, Lines 24-25. They then become neighbors. *Id.* So, Carol Goehner is not only Rod Smith's ex-wife, she is also Rod and Becky Smith's neighbor.

Only in the light of the irrationality that all too often attends disputes between ex-spouses and neighbors does the Smiths' vitriol and intransigence make sense. As the Goehners argued to the jury in their closing at the trial of the Smiths' failed trespass claim, "except for the fact that Becky Smith's husband was once married to Carol Goehner we wouldn't be here." RP 570 at Lines 21-23. The contempt expressed by the Smiths toward Carol Goehner was patent during the trial. As an example, at the conclusion of his cross-examination of his ex-wife, Rod Smith drew an admonition from the trial court after blurting out: "I can't ask anymore questions to this

witness, your Honor. I can't trust anything that she says." RP at Page 315, Lines 17-25.

The Goehners hereby move for an award of their attorney fees on appeal. Their abuse of the legal system to carry out a personal vendetta against the Goehners should not go unpunished.

VI. CONCLUSION

The Smiths' legal theory on this appeal is fatally flawed. Further, neither in the trial court nor in this Court have the Smiths controverted, in such a way as to raise a genuine issue of fact, either the existence or material terms of their May 2016 agreement with the Goehners. In fact, as shown, the Smiths failed to challenge in this Court the sufficiency of the evidence to support the trial court's summary enforcement of the May 2016 line relocation agreement, choosing rather to advance an inapplicable legal theory.

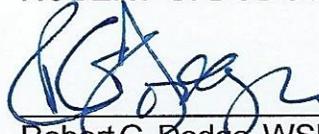
The unvarnished truth of the matter is, as Becky Smith succinctly put it during the hearing on the Goehners' Motion for Reconsideration, "[w]e don't want to give them an easement." TR of April 13, 2018, Hearing at Page 72, Line 4. This, after the Goehners had paid for installation of the pipe at the new, agreed location, paid

for the new location to be surveyed, and paid for a formal, written easement to be prepared. The Smiths' protestations, then, are of precisely the same character as those rejected by the Court of Appeals in the *Ferree* decision: the Smiths do not dispute their agreement with the Goehners in the sense of disputing its existence or material terms, but only "in the sense that [they] did not wish to abide by it." *Ferree, supra*, 71 Wn. App. at 45.

The decision of the trial court should be affirmed. The Smiths' request for a new trial should be denied. The Goehners should be awarded their attorney fee and costs incurred on this appeal.

DATED this 21st day of February, 2019.

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- kmelde@walkerheye.com

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