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No. 36630-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MOHAMMED NADEEM, an individual,

Appellant,

v.

MICHAEL MAURER and KENDRA MAUER, as individuals and as the
marital community thereof,

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

Under Washington law, no oral contract is formed where one party does not deposit, and instead returns, a check offered in settlement as part of a proposed oral contract, as there has been no acceptance. Furthermore, no enforceable oral contract is formed where the parties do not speak the same primary language, and there are disputes over each party's understanding of the inclusion or exclusion of certain subject matter, and the meaning of essential terms. Finally, the statute of frauds expressly renders void as a matter of law oral contracts between injured parties like Appellant Mohammed Nadeem, and insurers like State Farm, to "answer for the... misdoings of" Respondents.

II. ASSIGNMENT OF ERROR

1. Error is assigned to the trial court's granting of summary judgment. (CP 97-98)

2. Error is assigned to the trial court's denial of Nadeem's reconsideration motion. (CP 99-100)

III. STATEMENT OF THE CASE

A. The Collision.

On December 22, 2017, Respondent Kendra Mauer failed to stop at a stop sign and stuck Appellant Mohamed Nadeem's ("Nadeem") vehicle on the driver's side causing significant damage to the car. (CP 6) As a result

of the collision, Nadeem suffered various personal injuries, requiring, inter alia, a shoulder surgery. (CP 7; CP 29; CP 40)

B. Phone Call with State Farm.

Respondents are insured by State Farm insurance. (CP 30) After the accident, a State Farm representative called Nadeem to attempt to settle his claim against their insured. (CP 54)

Nadeem does not speak English fluently. (CP 65-66; CP 53-55) Nadeem can only understand the English language for routine, day-to-day interactions. (CP 54) Nadeem has no grasp of complex legal or medical terminology. (Id.) Ordinarily, for such conversations Nadeem requires an interpreter. (Id.) Nadeem testified he did not understand the legal term “release” to mean relinquishing legal rights to payment for injury, did not intend to settle with the State Farm adjuster, and that the State Farm agent omitted key context prior to the recorded portion of the phone call. (CP 53-55; CP 65-66)

This is, Missy Carpenter. I am interviewing
Mohammad Moh-Amood-Nadeem (sp?).
Today's date is January 15th, 2018 and the
time is now 11:25 A.M. Central Standard
Time.

Q. Mohammad will you please state your full
name and spell your last name for me?
A. Yes my first name Is Mohammad um last
name Moh-Amood-Nadeen ...

Q. And would you spell your last name for me?

A. Uh M O H, A M Q O D, N A D E E N.

Q. Okay and is this recording being made with your full knowledge and consent?

A. Yes.

Q. All right the purpose of this recording is to verify that in exchange, for 3,785 dollars and 51 cents, that is broken down into the one bill that I have for 2,771.51 for Providence Health ...

A. Um hum.

Q. 254 dollars for wage loss, and 750 dollars for pain and suffering, that you agree to release Kendra and Michael(sp?) Maurer for any and all claims known and unknown for injuries you sustained in as a result of the accident on December 22nd, 2017 In Spokane, Washington. Do you understand and agree to fully release Kendra and Michael Maurer in exchange for the 3,785.51?

A. Yes

Q. Okay, And in addition to the settlement of the 3,785.51 we further agree to enter into an agreement with this release which will allow up to 3,000 dollars for reasonable and necessary medical expenses related to injuries that you, Mohammad, sustained in this loss, not included in the paid consideration of the 3,785.51. This agreement is inclusive from the date of the accident which was December 22nd, 2017...

A. Um hum.

Q. To 180 days following the date of the agreement which is today January 15th 2.018.

A. Um hum.

Q. Do you understand the terms of the agreement and release?

A. Yes.

Q. Okay and do you agree to release Kendra and Michael Maurer for any and all claims known and unknown for the Injuries you sustained as a result of the accident on December 22nd, 2017, except as outlined in the terms of this agreement and release?

A. yes

Q. Okay and has this recording been made with your full knowledge and consent?

A. Yes.

(CP 32)

Being unfamiliar with the legal term “release,” Nadeem agreed to the release of his claims understanding the word “release” to only mean that State Farm was “releasing” a check to him. (CP 53-55; CP 65-66) Due to his lack of comprehension of the English language, Nadeem was unaware that his agreement would limit his right to seek damages from his tortfeasor.

(Id.)

C. The Tenders of Payment, And Subsequent Rejection in Writing.

State Farm sent a check in the amount of \$3,986.46 to Nadeem, for property damage, which was cashed. (CP 30)

State Farm's adjuster sent a check in the amount of \$3,785.51 to Plaintiff, which was cashed. (CP 36-37)

State Farm's adjuster sent another check in the amount of \$1,200 to Plaintiff. (CP 38-39; CP 41-42)

The \$1200 check was rejected in writing, and returned (via counsel). (CP 43)

D. Suit is Commenced; Summary Dismissal Granted.

The instant suit was commenced. (CP 5-7)

Respondents filed for summary judgment on the basis that Nadeem's phone conversation with State Farm was a binding oral contract as a matter of law and no genuine dispute of material fact existed. (CP 12-13)

The trial court granted Respondents' motion. (CP 73-74)

Nadeem moved for reconsideration of the trial court's decision, which was denied. (CP 75-81; CP 92-93)

Nadeem's appeal timely followed. (CP 94-96).

IV. ARGUMENT

A. Standards of Review.

A trial court's summary judgment decision is reviewed de novo; summary judgment is warranted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of

material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). All reasonable inferences from the evidence must be construed in favor of the nonmoving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

“A motion for reconsideration may be granted under CR 59(a)(7) where... the decision is contrary to law. Reconsideration may be granted under CR 59(a)(9) where substantial justice has not been done.” *Worden v. Smith*, 178 Wn. App. 309, 327, 314 P.3d 1125 (2013).

“Under CR 59(a)(7), a trial court may vacate its decision, on motion of the aggrieved party, on the grounds that the decision was ‘contrary to law.’” *Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 612, 175 P.3d 594 (2008) (“As discussed above, the trial court’s initial dismissal of Singleton’s CPA claim was contrary to law. Therefore, the trial court abused its discretion when it denied the motion for reconsideration of that decision.”). “A motion for reconsideration may be granted under CR 59(a)(7) where there is no evidence or reasonable inference from the evidence to justify the decision or where the decision is contrary to law. Reconsideration may be granted under CR 59(a)(9) where substantial justice has not been done.” *Worden v. Smith*, 178 Wn. App. at 327.

The time for appeal runs from the entry date of the ruling on reconsideration and not that of the initial decision. *Skinner v. Civil Serv. Comm'n of City of Medina*, 146 Wn. App. 171, 175, 188 P.3d 550 (2008), *aff'd*, 168 Wn.2d 845. "[N]ew issues may be raised for the first time in a motion for reconsideration, thereby preserving them for review, where ... they are not dependent upon new facts and are closely related to and part of the original theory." *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 158, 293 P.3d 407 (2013) Deciding issues of law on reconsideration preserves judicial economy by obviating appellate review and subsequent remand. Cf. *Nail v. Consol. Res. Health Care Fund I*, 155 Wn. App. 227,231,229 P.3d 885 (2010).

B. Formation of an Oral Contract Presents Fact Questions For the Trier of Fact.

“For a valid contract to exist, there must be mutual assent, offer, acceptance, and consideration.” *In re Marriage of Obaidi*, 154 Wn. App. 609, 616, 226 P.3d 787 (2010).

Generally, the trier of fact in a trial setting should make the final determination with respect to oral contracts; disputes about oral contracts should not be decided by summary judgment. *Duckworth v. Langland*, 95 Wn. App. 1, 7, 988 P.2d 967 (1998) (“Oral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances,

the intent of the parties, and the credibility of witnesses.” (quoting *Howarth v. First Nat. Bank of Anchorage*, 540 P.2d 486, 490 (Alaska 1975))).

C. Rejection of the Settlement Check Means No Oral Contract Has Been Formed.

As a matter of Washington law, no oral contract is formed until the settlement check is deposited. It is only “by the acceptance and cashing of the check” that an oral contract is formed which can be enforced against the recipient of the offered check. *Katich v. Evich*, 161 Wn. 581, 583-84, 297 P. 762 (1931). By refusing to cash the offered check, the recipient declines to accept that amount, and the same cannot be enforced against him. *Id.* at 582-84. It is only “by the acceptance and cashing of the check” that the offer is accepted. *Bottorff v. A. E. Page Machinery Co.*, 174 Wn 438, 442, 24 P.2d 1059 (1933).

“Whether or not a check... is accepted as a payment, under the circumstances here shown or under other similar circumstances, depends upon the intention of the parties, and, in deciding such a question, the court or jury should consider the actions of the parties in connection with the transaction.” *Maryatt v. Hubbard*, 33 Wn.2d 325, 331, 205 P.2d 623 (1949). Indeed, even where a party accepts and cashes a check, “...the question of whether the plaintiff accepted the check as part payment was one of fact, to

be determined by the jury.” *Id.* at 331 (citing *Coffman v. Fleming*, 301 Mo. 313, 259 S.W. 731 (1923)).

Mr. Nadeem’s rejection of the (part) payment of the proposed personal injury settlement and commencement of the instant suit establishes, at minimum, that questions of fact exist as to the oral contract’s existence, formation, and terms, and that summary dismissal was not warranted. *See Maryatt v. Hubbard*, 33 Wn.2d 325, 331, 205 P.2d 623 (1949). (“...the question of whether the plaintiff accepted the check as part payment was one of fact, to be determined by the jury.”).

D. Contract Formation Requires Mutual Assent of All Parties, a Question of Fact

For a contract to exist, there must be a mutual intention or “meeting of the minds” on the essential terms of the agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266 (1984). Mutual assent is the modern expression for the concept of a “meeting of the minds.” *Yakima County (West Valley) Fire Protection Dist. v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). The burden of proving a contract is on the party asserting it and he or she must prove each essential fact including the existence of a mutual intention. *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42 (1983).

“Mutual assent generally takes the form of an offer and an acceptance.” *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, 608 P.2d 266 (1980). “Whether there was mutual assent is normally a question of fact for the jury.” *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178 n.10, 94 P.3d 945 (2004); *Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

E. Nadeem’s Language Deficiency Creates a Question Of Fact As To Mutual Assent, Precluding Summary Judgment.

Mr. Nadeem’s lack of fluency in the English language, coupled with his affidavit concerning his level of understanding, demonstrated the existence of fact questions and that the trial court erred in granting summary dismissal. *See In re Marriage of Obaidi*, 154 Wn. App. at 617. In *In re Marriage of Obaidi*, a party was pressured into signing a “mahr” on his wedding day.¹ *Id.* at 612. The marriage ceremony, along with the mahr, was in Farsi; the party did not speak, read, or write Farsi. *Id.* The party was not told about the mahr until 15 minutes before he was required to sign it and was not afforded the opportunity to consult with counsel. *Id.* at 616–17. “Because Mr. Qayoum could not speak, write, or read Farsi, there was no meeting of the minds as to the terms of the mahr agreement.” *Id.* Ultimately, the Court held that “[t]he trial court’s finding that the mahr was a valid

¹ A “mahr” is an agreement based on Islamic law under which a husband agrees to pay a dowry to his wife upon divorce.

contract was not supported by substantial evidence... no valid contract was formed.” *Id.*

Here, Plaintiff’s declaration has created a material question of fact, which must ultimately be decided by the trier of fact, as to what level of understanding he possesses of the English language and consequently what level of understanding he could possess of the settlement given by an experienced claim settlement agent of non-party State Farm. Given the analogous case of *Marriage of Obaidi*, Washington Courts will find that a contract is void if the party who agrees to it suffers a deficiency in understanding the language of the agreement. 154 Wn. App. at 617. Plaintiff’s lack of understanding of the legal significance of what otherwise is a common English verb (“release”), along with a limited span of time to consider the offer without opportunity to speak with counsel, presents factual questions for the trier of fact as to whether there was a meeting of the minds sufficient for an enforceable contract to have been formed.

F. Out of State Case Law Supports That A Language Deficiency Creates a Material Question Of Fact, Precluding Summary Judgment.

Although *In re Marriage of Obaidi*, offers helpful guidance to this Court regarding mutual assent, when one party has a serious language deficiency, no Washington Court has specifically addressed the issue in the context of a summary judgment standard. “Because this is an issue of first

impression in Washington, [courts] may look to guidance from cases from other jurisdictions.” *In re Dependency of M.J.L.*, 124 Wn. App. 36, 40, 96 P.3d 996 (2004).

A federal district court in California addressed a similar set of facts in *Dang Quang Nguyen v. STATS ChipPAC, Inc.*, 2010 WL 11639806, at *1 (N.D. Cal. Apr. 15, 2010). The court in *Dang Quang* dealt with the enforceability of a “Separation Agreement and General Release of All Claims.” *Id.* The release agreement stated in part that Dang would receive “\$10,368.36 in consideration for a release of all claims against Defendants, known or unknown, relating to Plaintiff’s employment.” *Id.* As a result of the signed release agreement, Defendants moved to dismiss all of Plaintiff’s causes of action on the ground that the release agreement expressly barred any claims by Plaintiff against Defendants relating to Plaintiff’s employment. *Id.* at *2. Defendants also pointed to the fact that the Plaintiff had accepted the severance pay outlined in the release agreement. *Id.*

In response, plaintiff argued, similar to Nadeem, that the release was not knowing or voluntary based on Plaintiff’s limited understanding of the English language. *Id.* at *3. The court considered the plaintiff’s “extremely limited command and understanding of the English language” in

determining that the “Plaintiff did not knowingly and voluntarily execute the Release Agreement.” *Id.* at *4.

A state court in Louisiana has also held that mutual assent to a contact, where there has been evidence of a deficiency in language, is a question of fact for a jury. *Duong v. Salas*, 877 So. 2d 269, 270 (La. Ct. App. 2004), *writ denied*, 885 So. 2d 590 (La. 2004). In *Duong*, the plaintiffs were injured in a car accident caused by an uninsured motorist. *Id.* Plaintiff’s insurance company, USAgencies, denied coverage based on the fact that the plaintiff had opted out of UMI coverage on their insurance application. *Id.* at 271. USAgencies presented evidence of the completed application which contained plaintiff Duong’s initials next to the option which read:

I do not want UMBI Coverage. I understand that **I will not be compensated through UMBI coverage** for losses arising from an accident caused by an uninsured/under insured motorist.

Id. “Duong testified, however, that he did not understand any of the documents which he signed as he was unable to read in English.” *Id.* Plaintiff Duong also relied on his “U.S. sponsor” to help him understand the application, yet his sponsor also had difficulties understanding English. *Id.* at 271–72. The trial court concluded that Duong “did not sufficiently understand the English language so as to have effectively waived under

insured motorist coverage.” Similar to the case at hand, there was evidence presented at trial that Duong had even spoken English to one of the USAgencies representatives. *Id.* at 274.

The Court of Appeals upheld the trial court’s determination, and in doing so stated “[t]he factfinder’s determination as to whether Duong was sufficiently proficient in basic English so as to understand the nature of the UM rejection form is a factual determination not to be disturbed on review unless clearly wrong or absent a showing of manifest error.” *Id.* at 273. The Court also noted that “[o]ur conclusion that a signatory’s inability to read, write, or speak the English language, and thus, inability to understand the nature of that which he signs, is sufficient to warrant the rescinding of an agreement is not without precedent.” *Id.*

The Utah Supreme Court has also addressed this issue in *Semenov v. Hill*, 982 P.2d 578 (Utah 1999). Plaintiff Semenov filed an action to “rescind a real estate purchase contract that he entered with defendant,” Hill. *Id.* at 579. Both parties moved for summary judgment and the trial court granted the defendant’s motion. *Id.* Similar to Nadeem, the plaintiff argued that “the district court’s decision should be reversed and this matter remanded for trial because the question of whether he had adequate English language and reading skills to permit an understanding of the contract with

Hill is a disputed question of material fact.” *Id.* The Utah Supreme Court agreed. *Id.*

The Court noted that the plaintiff was “a Russian immigrant who came to the United States” just three years prior to the real estate transaction. *Id.* Further, the Court held that “Semenov’s English proficiency or the lack thereof is a material fact” in considering whether the contract is valid. *Id.* at 581. Therefore, “[b]ecause Semenov and Hill disagree on the state of Semenov’s English proficiency at the time of the closing, a factual dispute exists which must be resolved by a jury or a judge after an evidentiary hearing.” *Id.*

G. Statute of Frauds Renders Oral Contract Unenforceable.

As the Court will recall, non-party State Farm claims to have an oral contract to pay Plaintiff for the damage caused by Defendants; and there is no dispute that payments under said oral contract are ‘incomplete’ as the terms are alleged by State Farm (*i.e.*, there has been no accepted \$3000 payment for “reasonable medical expenses for treatment incurred”).

RCW 19.36.010 provides, in pertinent part:

...[A]ny agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith,

or by some person thereunto by him or her lawfully authorized, that is to say... every special promise to answer for the debt, default, or misdoings of another person[.]

This section of the statute applies to oral promises of agents for insurers, as to agreements with third party claimants. *See, e.g., Ford v. Aetna Life Ins. Co. of Hartford, Conn.*, 70 Wn. 29, 126 P. 69 (1912).

Here, notwithstanding lack of acceptance and mutual intent, the oral contract between Nadeem and non-party State Farm for State Farm to answer for the misdoings of Respondents is void as a matter of law. Therefore, summary dismissal on the basis of the oral contract should not have been granted.

V. CONCLUSION

The trial court erred in granting summary judgment in favor of Respondents, as genuine issues of material fact were presented. Appellant Nadeem requests that the Court reverse the trial court's summary dismissal of his claims.

Dated this 20 day of May, 2019

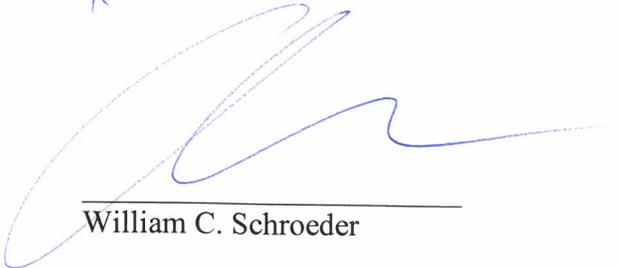
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