

FILED
Court of Appeals
Division III
State of Washington
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COA No. 36852-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MARK WILLIAMS and MARIAN NUNER, husband and wife,

Respondents,

v.

PAUL and SUSAN DANA, husband and wife, and DANA LIVING
TRUST,

Appellants,

and

KENNETH L. WERNER, et ux, et al.,

Defendants.

REPLY BRIEF OF APPELLANTS

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I. STATEMENT OF THE CASE

Appellants Dana rely on their statement of the case in the opening brief. Further facts will be referred to as the discussion necessitates.

II. ARGUMENT

Respondents Williams argue they were simply enforcing the terms of the mediated agreement, which the Danas had repudiated. (Resp. brief at 12). That claim fails because Williams did not present a mutual release and settlement agreement to the Danas reflecting what they agreed to in the mediated agreement. (CP 244). Moreover, the Danas did not dispute they had signed the December 21, 2018 mediated agreement so they did not repudiate it. (CP 273, 380). The trial court was fully aware and understood the Danas refused to sign the settlement agreement drafted by Williams' attorney because it contained changes to the provisions of the mediated agreement they had not agreed to. (CP 244).

The court stated it understood the Danas had certain objections to "some of the matters that may not have been agreed upon at the mediation." (RP 90). The court noted Williams' attorney stated he would forego any of those changes and just simply stick with whatever the agreement was. (*Id.*). Williams is

thus bound by counsel's representations to the court that the settlement agreement he drafted contained changes not agreed upon by the Danas in the mediated agreement. CR 2A. And those changes were material. *Estate of Carter v. Carden*, 11 Wn. App.2d 573, 586, 455 P.3d 197 (2019).

Williams' counsel acknowledged the full extent of the substantive changes he had made differing from the mediated agreement:

In the tentative agreement, which is Exhibit B to my declaration, amended declaration, it says, "All" – yeah, yes, my amended declaration, it says, "One, the parties agree to a 15-foot easement on each side of the property line." If I go to Exhibit C, which is what I presented to Mr. Dana, Exhibit C to my amended declaration, it says, "Danas and Williams will sign a recordable document in sufficient form to confirm the existence of a boundary line easement." I'm using more words. And it says, "Counsel for Williams will prepare a draft in accordance with this agreement." And No. 2, it says that that easement will be 15 feet on either side of the center line. And one other sentence, which is only – makes sense but is for clarification, "Any road constructed on the easement shall be constructed to lie equally on the Williams and Dana properties." So none of that is anything different than just extrapolation or more clarification that I felt was necessary from that one point. Number 2 on the tentative agreement says, "Paul and Susan will remove or move the fence within one year onto the parties' property outside the easement." I did suggest that that

would be six months' instead of a year, and that's the only change. There was an issue about his – the driveway that went across the easement, Mr. Williams' driveway. That wasn't addressed. And that was, again, for clarification so that that driveway wouldn't be blocked, the things that basically you're putting in on there so there won't be an injunction later on down the line.

Number 3 on the tentative agreement, "Mark and Marian will not cause the trees within the easement to be cut." And No. 4 on Exhibit C, "Williams will not cut the trees within the Border-line Easement on the Dana property." And there is some elaboration on that for clarification, that their successors would not be restrained and that it – basically it runs with the land, the easement, but there's a sort of in persona restriction.

A mutual non-disturbance and disparagement agreement is No. 5 on the tentative agreement. No. 5 on Exhibit C is the same thing; and we – we talk about the – the anti – or the protective order that's in place right now that expires in March, that this part of the agreement will take the place of that.

It does say that "Mark will remove the slash pile." That's something that is on his property that I don't think that's a deal-breaker. It's – it's something that was wholly on Mark's property but at one point Mr. Dana had offered to remove it, so he wanted to clarify that.

It says on No. 6 of the Exhibit B, "Neither party will block, restrain, or affect the boundary line easement in any manner incompatible with its full use for ingress or egress." That's – that's a matter of common-law, case law, the law of

easements. It's simply for clarification.

And then we agreed to dismiss the action and all claims with prejudice and – and the court will release the *lis pendens* on the Dana property.

I don't see how any of the changes that I suggested blindsided him or flabbergasted him or blew him out of the water. I'm doing – I was doing what attorneys do, which is to create documents. And frankly, I was very surprised to get basically flamed by email and then a whole list of demands that were totally different from what we had agreed to in mediation.

So I think this contention that something happened that was unexpected, we sat there for an hour and talked this all out and I frankly have no idea what it is that's going through Mr. Dana's mind. But the documents that I created was not adverse to the agreement that we reached. And like I said, I'd be happy to agree to that agreement verbatim if that will solve the problem. Thank you. (RP 83-86).

Despite the Williams' argument to the contrary, the words of counsel admit the settlement agreement he presented to the Danas for signature was different and extrapolated from the provisions of the mediated agreement. The settlement agreement counsel drafted unilaterally (1) changed the time for removal of the fence by the Danas, (2) added verbiage and provisions other than what were agreed to, (3) extrapolated or clarified agreed-to provisions in the mediated agreement that were clear by their very terms and

needed no extrapolation or clarification, (4) inserted a provision that the tree-cutting prohibition on the borderline easement on the Dana property against Williams would not bind his successors, and (5) added the provision about blocking ingress/egress that was not in the mediated agreement at all.

None of these added provisions or changes were agreed to by the Danas in the mediated agreement. Unilateral extrapolation and/or clarification of a contract's terms, unilateral changes to the time for performance, and the unilateral addition of a provision regarding ingress/egress to the boundary line easement that was not reflected in the mediation agreement agreed to by the Danas constituted material changes which they were not bound to accept. *United Fin. Cas. Co. v. Coleman*, 173 Wn. App. 463, 473, 295 P.3d 763 (2012).

The court found the mediated agreement valid. (RP 93). Attempting to enforce a settlement agreement that had not been agreed to by the Danas, Williams was nonetheless awarded attorney fees for enforcing the mediated agreement. (RP 93-94, CP 382). The court erred by awarding those fees because Williams did not try to enforce the mediated agreement. The fee provision

thus did not apply to Williams' attempt to enforce the settlement agreement drafted by counsel rather than the mediated agreement.

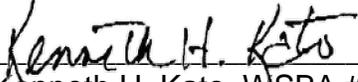
Williams' counsel abandoned trying to enforce his settlement agreement that admittedly failed to comport with the mediated agreement. (RP 86). Williams is bound by counsel's actions as represented to the court. CR 2A. The Danas expected what they had agreed to in the mediated agreement. By agreeing in open court to forego any changes made in the settlement agreement he drafted, counsel stipulated that the mediated agreement controlled. The Danas tried to enforce that mediated agreement, not Williams who tried to enforce the settlement agreement that did not reflect what had been agreed to. Since the court found the mediated agreement valid, the Danas were the party trying to enforce it. Williams should not have been awarded attorney fees below nor should he be awarded fees on appeal. Rather, the Danas are entitled to fees and costs on appeal pursuant to the attorney fee provision under item 6 of the December 21, 2018 mediated agreement.

III. CONCLUSION

Based on the foregoing facts and authorities, the Danas respectfully urge this court to reverse the Order Awarding Fees and

Costs and to award them attorney fees on appeal under the mediated agreement.

DATED this 13th day of April, 2020.



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CERTIFICATE OF SERVICE

I certify that on April 13, 2020, I served the reply brief of appellants through the eFiling portal on Steven Schneider at his email address.



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Transmittal Information

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