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Court of Appeals  
Division III  
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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III  
CASE NO. 36852-1-III**

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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.

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**BRIEF OF RESPONDENTS**

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## STANDARD OF REVIEW

Although Danas disputed the existence of an enforceable Mediated Agreement in the trial court; on appeal, Danas do not dispute that there was an enforceable attorney fee clause that Agreement. Rather, Appellants argue that the Court should not have enforced the Mediated Agreement because of allegations of changes proposed by Counsel for Respondents. Specifically, it is argued that Counsel withdrew alleged changes at the subject hearing and conceded to Appellants' arguments. This is factually false. The facts on which this argument is based are wholly disputed by the Respondents.

Such findings must be examined under a substantial evidence standard. "(T)he standard of review of these questions of fact is whether there is substantial evidence to support the finding. *Waid v. Department of Licensing*, 43 Wn.App. 32, 714 P.2d 681, (1986)

. . .substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved. *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174, (2003)

Substantial evidence is defined as the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Marriage of Rockwell*, 141 Wn.App. 235, 170 P.3d 572 (2007). The Court of Appeals reviews de novo whether the findings of fact support the conclusions of law. *Id.*, *In re Marriage of Chua*, 149 Wn.App. 147, 154, 202 P.3d 367 (2009).

The award of attorney fees itself is subject to an abuse of discretion standard of review:

Thus, we apply a two-part review to awards or denials of attorney fees: (1) we review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) we review a discretionary decision to award or deny attorney fees and the reasonableness of any attorney fee award

for an abuse of discretion. *Gander v. Yeager*, 167 Wn.App. 638, 282 P.3d 1100, (2012)

" A trial court abuses its discretion if its decision to award or deny attorney fees under RCW 11.96A.150 is manifestly unreasonable or based on untenable grounds or reasons." *Wash. Builders*, 173 Wn.App. at 85. *Kitsap Bank v. Denley*, 177 Wn.App. 559, 312 P.3d 711, (2013)

In this case, because Appellants do not dispute the existence of an enforceable Mediated Agreement on appeal, the only issue regarding the award itself would be the reasonableness of the fees awarded. Danas have not however, disputed the reasonableness of the attorney fees in the trial court or on appeal. Matters not raised in the trial court cannot be argued on appeal because "it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration." *Harris v. Kuhn*, 80 Wn.2d 630, 497 P.2d 164, (1972)

## **STATEMENT OF THE CASE**

1. Appellants (Danas) and Respondents (Williams) participated in a court ordered mediation. Another party, Werners, were present and also participated, resulting in a separate mediated agreement which is not at issue here. (VRP page 2 ll 12-23)
2. According to Danas, they were not included in the Warner negotiation, a fact unknown to the Williams because all parties were in separate rooms. Williams had to leave in the afternoon to fly to Mississippi for the holidays. They were available by telephone except when in the air. The Mediator suggested that Counsel for Williams should meet with Danas and the Mediator in the same room to expedite. (CP 265)
3. The Mediator typed up the Mediated Agreement as approved by Danas and Counsel for Williams. Counsel, as attorney, was empowered to agree for Williams and signed on their behalf. (CP 362) Counsel for Williams was tasked with drafting a formal Release and

Settlement Agreement and a recordable document confirming the agreement regarding the subject easement. (VRP)

4. The Draft Settlement Agreement was not an offer or an acceptance but an attempt to formalize the Mediated Agreement, *as required by that agreement*. (CP 273) As the Court noted, the main material term of the Mediated Agreement was the establishment of an easement which extended 15 feet on either side of a centerline which was the boundary between the properties of the Appellants and Respondents. (CP 273) This was material because Danas had previously argued that they had extinguished the easement on their own property. (CP 283)

5. When the draft statement was sent to Danas by email, Counsel stated his intentions in a conciliatory fashion:

Paul and Susan

I have edited the prior draft settlement to include the points in the mediation memorandum that we signed. There is some additional language for clarity and some details requested by Mr. Williams. Sincerely, I am trying to walk the line here so nobody feels they are being treated unfairly. If you feel you are being treated unfairly, assume it is my mistake and make a suggestion. (CP 358)

6. The Mediated Agreement stated:

The parties agree to a 15 foot easement on each side of the property line. (CP 273)

7. On the same issue, the Draft Settlement Agreement states:

The recordable document shall also reduce the width of the Boundary Line Easement to fifteen feet on either side of the centerline, for an easement that is a total of thirty feet in width. Any road constructed on the easement shall be constructed to lie equally on the Williams and Dana Properties regardless of width. (CP 349)

8. The last sentence was added because Danas had argued that the full width of the easement was on Williams property, based on an erroneous survey map (CP 283)

9. The Mediated Agreement stated:  
Paul and Susan will move or remove the fence within one year onto the parties' property outside of the easement. (CP 273)
10. On the same issue, the Draft Settlement Agreement stated:  
Within six months of the date of this document, Danas will remove the fence currently constructed between their properties and may reinstall it outside of the 15 foot portion of the Borderline Easement on the Dana Property. The fence will leave at least 24 feet of the Access Easement open and unobstructed.  
(CP 350)
11. The change here was a reduction of the time to move the fence from one year to 6 months. Also, it was added that the fence would leave at least 24 feet of the easement unobstructed.
12. Counsel explained this to Danas:  
Here is what Mr. Williams is concerned about (Bear in mind I have no direct knowledge of these facts.)
  1. Your current fence posts restrict his driveway to around 12 feet. There is some County requirement for wider access (20-24 feet) but I don't want to debate that point. We would like 24 feet unobstructed. Technically, we could ask for the full width of the easement but this is a compromise. (CP 358)
13. Next, the Mediated Agreement stated:  
Mark and Marian will not cause the trees within the easement to be cut. (CP 273)
14. On the same issue, the Draft Settlement Agreement stated:  
Williams will not cut trees within the Borderline Easement on the Dana Property. This restriction does not apply to any other party that has a right to use the Borderline Easement. This restriction does not apply to any other party who buys the Williams property and does not apply after the Dana Property is sold to any party. (CP 350)
15. This addition simply confirmed that the restriction on Williams does not apply to any other party who has a right to use the easement unobstructed by trees.

16. The Mediated Agreement states:

Mutual non-disturbance agreement-not verbally or physically harass each other (no harassment as defined in statutory harassment orders). (CP 273)

17. On the same issue, the draft Settlement Agreement states:

Mutual non-disturbance and non-disparagement. Neither party will disturb the other with any physical or verbal action that constitutes harassment or stalking under applicable statutes. Neither party shall make disparaging statements about the other in a public setting including on the internet. These restrictions are to take the place of the existing restraining order when it expires. (CP 350)

18. Counsel explained this section as follows:

I understand that the harassment Order expires in March. The enforceable non-disturbance, non disparagement, based on statutory definitions of harassment, should alleviate some concern. As long as there have been no further altercations, the current order should be allowed to expire. Of course, if something specific happens, you have your rights to obtain another protective order in addition to rights to enforce the non-disturbance provision. (CP 283)

19. Finally, Counsel states:

Other than those additions, I think the other provisions are in this draft. I did not mention moving the slash pile as that would be between Williams and Taylor; the general release would release any claim that you should move it. Please review and respond (CP 283)

20. This is a good faith respectful interaction of an attorney with a pro se party, not an imposition of wholesale changes to a signed agreement.

21. In a hyperbolic response, Danas restate all of their arguments in the underlying action, none of which were included in the Mediated Agreement:

Thank you, Steve, for yet another "modified settlement agreement" that I am receiving even after attending court ordered mediation. It seems to me that since your clients didn't stay for mediation and they did not give you the power to finalize a mediation agreement, that a ruse has been played on the Danas and your clients are in contempt; but, as you so enthusiastically pointed out, I am not an attorney. I will say that I am distressed by your clients' continued

unwillingness to cooperate and act in good faith. In short, let me make it VERY clear that I am absolutely done with this cat and mouse game. It is now a matter of principle and dignity with me.

You have forced me to retain an attorney that will litigate for the maximum settlement possible that is due us, the Defendants. As predicted, this is finally going to get real messy but I am prepared to do what ever it takes to prevail, regardless of cost. I, of course, realize that Mr. Williams' income is protected and Marian is also a Plaintiff but their property holdings will also be subject to the settlement if only as liens.

I would ask you to strongly consider your clients' position as recent consultations with an attorney make it clear that your clients' position and complaints against us may not be as stable as they currently believe they are. It has been suggested that damages awarded to the Defendants as a direct result of the Plaintiffs' actions could easily reach 6 figures. Please consider encouraging your clients to consider the following offer. This offer is good only until Friday, December 28, 2018 at 5:00pm, at which point, the offer will be revoked and a full-scale lawsuit/countersuit will ensue.

1. Danas and Williams will sign a recordable document in sufficient form to confirm that there is no Boundary Line Easement on the west boundary of Parcel D and said recordable document will be created and recorded at the Williams' expense.

2. In the recordable document, the parties will confirm that the easement document recorded in 2002 and known as Document #4782102 effectively vacates the portion of the easement established in 1994 by Document #9412290358, and creates an easement of approximately the same area on the northwest corner of Parcel D, effectively providing, in purpose, intent, and application, access to Parcel C and beyond from the County Road known as Coulee Hite for the public good and benefit of all current and future property owners of Parcels A through H.

3. In the recordable document, the parties will confirm that the survey created by Robert Nielson PLS and recorded under Spokane County Auditors file number 6602528 on May 11, 2017, accurately depicts the easement placement as it pertains to Parcels C and D and as it is currently recorded as of the date of this settlement agreement. A true and correct copy of the Neilson Survey will be attached hereto as Exhibit C.

4. In the recordable document, the Plaintiffs will confirm that Parcel C is neither dominant nor servient to the vacated boundary easement on the west portion of Parcel D and, therefore, is not affected by its disposition. That portion of property does not provide ingress, egress, utilities nor can it be used

for any other purpose that will benefit Parcel C. As a result, Parcel C does not possess the right to challenge the validity or intent of said easement.

5. The Plaintiffs and any future owners of Parcel C shall agree to comply with the provisions of the recorded easements 9412290358 and 4782102 in intent and application.

6. The Plaintiffs will reimburse the Danas \$5,000 for out of pocket expenses incurred as a direct result of the Plaintiffs unwillingness to accept evidence to the fact that the Danas have not caused the Plaintiffs harm in any way nor are they guilty of a single cause of action stated in the lawsuit.” (CP 282-283)

22. As the court noted, this is a complete and utter repudiation of the Mediated Agreement that the court held was the true meeting of the minds of the parties.

The nature of this motion requires the court to look at the specific documents that were signed and to make judgments as to whether the --whether it's a valid meeting of the minds and what the material nature of what the parties agreed on was. (VRP page 4 ll 20-24)

Now, to me, this is a clear meeting of the minds, it's an agreement, and it's an agreement that all parties will be bound by it. So my ruling today is that it is a valid agreement that was mediated for. (VRP page 5 ll 1-12)”

It's clear to me that the parties signed this mediation agreement. And by the terms of the agreement that was signed that set out the terms of the mediation, the -- the parties agreed to be bound by whatever they negotiated. It's not totally unheard of that a party will leave mediation and have some buyer's remorse. I won't say that happens all the time, but it happens enough. And that's one of the reasons why the court then gets involved: It has to make these determinations. (VRP page 5 ll 1-8)

23. Further:

And the agreement that they signed is called the "Tentative Agreement," and it contains nine different points, the most material, I believe, being the parties agree to a 15-foot easement on each side of the property line. (VRP page 3 ll 16-19)

24. The importance of this point is emphasized by Danas' reference to the survey of Robert Neilsen (CP 85) which shows the entire easement on Williams' side of the boundary line. Mr.

Neilsen was also a Defendant in the trial court alleged to have falsified the survey. He filed for bankruptcy and avoided any liability for his false survey. (United States Bankruptcy Court, Eastern District of Washington Case No.19-01396.)

25. Clearly, Danas' intent in this email was to repudiate the material terms of the Mediated Agreement.

26. Based on this e-mail, and contrary to Danas' arguments on appeal, the trial court expressly found that the enforcement of the mediated agreement was required *because of the acts of the Danas*. Specifically, the Court stated:

Contrary to the claims of the Dana's (sic) in response to the motion, their refusal to honor the negotiation was not solely because of disagreement with the Mutual Release and Settlement Agreement drafted by Mr. Schneider. The Dana's (sic), by their e-mail on December 24, 2018, specifically rejected the mediated settlement and vowed to seek damages that 'could easily reach 6 figures.' The threat was conditioned upon the acceptance by the plaintiffs of modified terms that were completely contrary to the settlement negotiated at mediation (CP 381)

27. The Court found that the preparation of the draft Settlement Agreement in no way constituted an offer which the Danas could reject on general contract principles. As the Court commented:

And usually the mediation documents that are signed in the presence of the mediator are generally fairly bare-bones, because you then have to translate them into legalese, particularly when you're dealing with property. And so that was what was anticipated. Certainly, this tentative agreement, this document entitled "Tentative Agreement" is not something that you're going to just be able to file and then go about your business. It's not going to have any legal effect on ownership and that sort of a thing. (VRP page 3 ll 2-11)

Now, the tentative nature of this mediation is the fact that Williams and Nuner, who were not present, needed to be informed as to what the agreement was. And it spells that out clearly. "Paul and Susan Dana, and on behalf of the Dana Living Trust, and Mark Williams and Marion Nuner by their attorney, Steve Schneider, have tentatively agreed as follows, subject to direct approval by Mark Williams and Marion Nuner." So the -- the only tentative nature of this is

the phone call or the approval that this -- that this deal was good to go. It's not tentative, and nowhere does it say that Paul and Susan Dana have to go home and think about it. (VRP page 3 line 16 to page 4 line 5)

## ARGUMENT

“Settlement agreements are governed by general principles of contract law.” *Morris v. Maks*, 69 Wn.App. 865, 868, 850 P.2d 1357 (1993). The Court found that the Mediated Agreement was not rejected by the acts of Williams and was enforceable according to its terms. (CP 380)

As set forth above, the trial court did have before it substantial evidence that could convince a reasonable mind that Danas had repudiated the Mediated Agreement and that Williams had a right to enforce the terms of the Mediated Agreement, terms which included the drafting of a recordable document by Counsel for Williams. (CP 273)

Repudiation of a contract Before there has been a breach by nonperformance is called an anticipatory breach or (the more precise form) anticipatory repudiation. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.20, at 467 (1990). Such repudiation is an express or implied assertion of intent not to perform a party's obligations under the contract prior to the time for performance. *CKP, Inc., v. GRS Constr. Co.*, 63 Wash.App. 601, 620, 821 P.2d 63 (1991), review denied, 120 Wash.2d 1010, 841 P.2d 47 (1992). *Wallace v. Kuehner*, 111 Wn.App. 809, 46 P.3d 823, (2002)

In this case, full performance by Danas comprised their good faith participation in reviewing, finalizing and signing the Settlement Agreement required by the Mediated Agreement. The performance was expressly repudiated by Danas' actions. In such a case, Williams is not required to perform further. *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 881 P.2d 1010, (1994)

There was, therefore, substantial evidence that:

- a. The Draft Settlement Agreement was Williams' good faith performance under the Mediated Agreement in which any changes were not material to that Agreement.

- b. The Draft Settlement Agreement was not a new offer which rejected the Mediated Agreement.
- c. The actions of Danas were not justified in light of Williams' good faith performance and constituted an anticipatory repudiation which relieved Williams of further performance.
- d. Based on the above, Williams was entitled to have the Mediated Agreement enforced according to its terms.
- e. Williams was the prevailing party regarding the Motion and therefore, contractually entitled to attorney fees.

Appellants also argue that the Draft Settlement Agreement constitutes a failed attempt at modification. If it were such an attempt:

Modification of a bilateral contract requires a meeting of the minds as well as consideration separate from that of the original contract. *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.App. 52, 199 P.3d 991, (2008)

Danas argue that there was no meeting of the minds regarding the Draft Settlement Agreement. This is not relevant or material because the trial court found there was a meeting of the minds regarding the Mediated Agreement. The Court of Appeals should not set aside such findings:

Whether there actually was a meeting of the minds for such a modification involves credibility determinations that cannot be made here. *Pacific Northwest Group A v. Pizza Blends, Inc.*, 90 Wn.App. 273, 951 P.2d 826, (1998)

The trial court however, found that the Draft Settlement Agreement was the performance required by the Mediated Agreement it was not an acceptance of an offer.

Only a unilateral contract can be accepted by performance, which must be identical to the performance requested.

In a unilateral contract, however, only one party makes a promise. The second party may accept that promise and establish a unilateral contract only through performance of her end of the bargain. *Storti v. University of Washington*, 181 Wn.2d 28, 330 P.3d 159, (2014)

The Draft Settlement Agreement is rather, a good faith attempt to perform the Mediated Agreement.

If a contract requires performances by both parties, one who would assert non-performance by the other must establish his own performance. 17 Am.Jur.2d Contracts § 355 (1964). Performance is a question of fact. *Terry v. United States Fidelity & Guar. Co.*, 196 Wash. 206, 82 P.2d 532 (1938). *Reynolds Metals Co. v. Electric Smith Const. & Equipment Co.*, 4 Wn.App. 695, 483 P.2d 880, (1971)

Here, the Court found, as a matter of fact, that the Draft Settlement Agreement proffered complied, in its material terms, with the Mediated Agreement. This is not a finding that can be overturned on appeal except for lack of substantial evidence.

If there is anything lacking in the meeting of the minds, it is only the final wording of the Draft Settlement Agreement. At worst, this creates an enforceable ‘agreement with open terms.’

In an agreement with open terms, the parties "intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source." *Keystone Land and Development Company v. Xerox*, 152 Wn.2d 171 (2004)

The intent of the parties to a contract is again, a question of fact.

Determining a contractual term's meaning involves a question of fact and examination of objective manifestations of the parties' intent. *Martinez v. Miller Industries, Inc.*, 94 Wn.App. 935, 974 P.2d 1261, (Div. 2 1999)

In addition, every contract includes the implied duty of good faith and fair dealing. *Haley v. Hume*, 448 P.3d 803, (Div. 1 2019). A party satisfies this duty by performing specific contract terms in good faith.

"[T]here is an implied duty of good faith and fair dealing imposed on the parties to a contract." *Betchard-Clayton v. King*, 41 Wash.App. 887, 890, 707 P.2d 1361, review den'd, 104 Wash.2d 1027 (1985). However, a party's duty to act in good faith exists only in relation to the performance of specific contract terms *Miller v. U.S. Bank of Washington, N.A.*, 72 Wn.App. 416, 865 P.2d 536, (1994)

Here, the contract term to be performed was the drafting of the Settlement Agreement.

Good faith toward the performance of that term requires:

... the parties to cooperate with each other so that each may obtain the full benefit of performance." *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn.App. 66, 248 P.3d 1067, (Div. 3 2011)

As set forth above, Danas were presented with a Draft Settlement Agreement which necessarily contained some additional settlement and release terms which Danas were obligated to review in good faith. Danas had an affirmative duty to facilitate the performance of the Mediated Agreement and were, in fact, requested to review the document and request any changes. (CP 283-284)

Instead of acting in good faith however, Danas repudiated the Mediated Agreement and set out their threats and intention not to perform. Danas acted in every way to *not perform* the Mediated Agreement in good faith. This is made clear by the fact that Danas insisted on terms that were not in the Mediated Agreement at all, trying to obtain the relief that was sought in the lawsuit and ignoring the Mediated Agreement altogether. This constituted a material breach of the Mediated Agreement. The trial court's decision is predicated expressly on this breach. (CP 282-283)

## **ATTORNEY FEES**

The trial court awarded attorney fees based on the enforceable Mediated Agreement, which states in pertinent part as follows:

1. If either party must (sic) enforcement of this settlement agreement, prevailing party gets attorney fees. (CP 273)

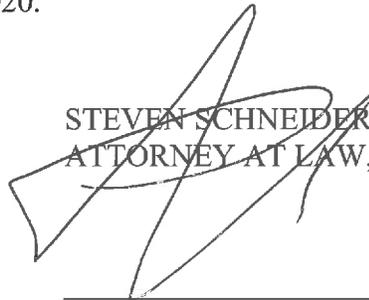
If a settlement agreement contains such an attorney fee clause, the prevailing party on appeal is entitled to an award of such fees. *Kwiatkowski v. Drews*, 142 Wn.App. 463, 176 P.3d 510, (2008). Respondents therefore, request an award of attorney fees and costs on appeal pursuant to the mediated agreement and RAP 18.1.

## **CONCLUSION**

Appellants' case is based on the erroneous argument that the Draft Settlement Agreement was an Offer that rejected the terms of the Mediated Agreement. On the contrary, the Court found that any changes to the Mediated Agreement terms were either immaterial, anticipated by the Mediated Agreement or good faith suggestions inviting a good faith response. The one certain material term of the Mediated Agreement was the easement extending 15 feet on either side of the boundary line between the property of the parties. This term, and the rest of the Mediated Agreement, were repudiated by Danas' unmistakable action to insert all of their arguments from the underlying action into a settlement demand and rewind the matter to its unresolved state prior to the Mediated Agreement. This was perhaps due to what the Court described as "Buyer's Remorse." However, Danas had no right to simply throw out the Mediated Agreement in bad faith on their own whims and limited understanding of legal principles. The Appeal should therefore, be denied and the trial court decisions affirmed.

DATED this 31<sup>st</sup> day of January, 2020.

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### **CERTIFICATE OF SERVICE**

I certify that on January 31<sup>st</sup>, 2020, I served a copy of the Brief of Respondents through the eFiling portal on Kenneth Kato at his email address.



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Ashley Hoban  
Registered Paralegal No. 407

**STEVEN SCHNEIDER, ATTORNEY AT LAW, P.S.**

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**Transmittal Information**

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