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Court of Appeals
Division III
State of Washington
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NO. 371298

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONFEDERATED TRIBES AND BANDS

OF THE YAKAMA NATION,

Appellant,

v.

OKANOGAN COUNTY,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The Superior Court erred in entering the order of August 12, 2019, denying the Yakama Nation’s Motion to Vacate Order of Dismissal, entered on March 21, 2017 (“Order Denying Motion to Vacate”).

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The Superior Court issued an Order of Dismissal incorporating the material terms of a stipulated settlement agreement between the Yakama Nation and Okanogan County. Okanogan County violated the terms of the Order of Dismissal and the associated settlement agreement. Does a court retain jurisdiction to enforce its own orders after dismissal when the terms of the order are unquestionably violated? (Assignment of Error 1)

III. STATEMENT OF THE CASE

On March 21, 2017, the Superior Court issued an Order of Dismissal following several weeks of complex negotiations between the two governmental parties. CP 241-247. In memorializing the settlement agreement within the Order of Dismissal, the Court ordered Okanogan County to:

within sixty (60) days from the date of the execution of this Order of Dismissal, the County shall take all necessary action(s) to initiate review of:

- (1) Okanogan County's Comprehensive Plan;
- (2) Okanogan County Code Title 17A; and
- (3) An "ab initio" environmental review of each under Washington's State Environmental Policy Act and applicable County ordinances; and

... that, no later than December 31, 2018, the County shall take final legislative action(s) to (a) repeal, in their entirety, the current Comprehensive Plan ... and Zoning Ordinance ... and (b) adopt a new Comprehensive Plan and new Zoning Ordinance ...

CP 245. The Order of Dismissal incorporates a stipulated settlement agreement between the parties ("Stipulation"). The Stipulation includes the requirements outlined by the Superior Court listed above, but further requires Okanogan County to "promptly implement an online, public permit tracking system identifying all land use applications as received, and any associated decisions or scheduled hearings." CP 242.

Okanogan County failed to comply with the Order of Dismissal, it failed to initiate review of Title 17A ("Zoning Ordinance"), and failed to repeal and adopt a new Comprehensive Plan and a new Zoning Ordinance. CP 260-261. Okanogan County also failed to implement a public permit tracking system. *Id.* Okanogan County has been and remains in violation of the Superior Court's Order of Dismissal. These material facts are not in dispute. RP 28-29.

On July 10, 2019, based on Okanogan County's continuing failure to comply with the Order of Dismissal and its refusal to engage in

meaningful negotiations to avoid further litigation, the Yakama Nation filed a Motion to Vacate Order of Dismissal. CP 258-272. On August 12, 2019, the Superior Court denied the Yakama Nation's Motion to Vacate Order of Dismissal. CP 239-240.

On August 22, 2019, the Yakama Nation filed a Motion for Reconsideration. CP 143-159. On September 18, 2019, the Superior Court denied the Yakama Nation's Motion for Reconsideration. CP 237-238.

IV. ARGUMENT

A. Standard of Review

A superior court's disposition on a motion to vacate is reviewed for abuse of discretion. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Lane v. Brown & Haley*, 81 Wn. App. 102, 105, 912 P.2d 1040 (1996). Here, the Superior Court abused its discretion when it issued its Order Denying Motion to Vacate, as the order is contrary to binding precedent, inequitable, and contrary to public policy.

B. The Superior Court's Order is Contrary to Binding Precedent.

The Superior Court's Order Denying Motion to Vacate relies on inapplicable case law and is contrary to binding precedent from the Washington State Supreme Court. The Superior Court erroneously

concluded that a court does not retain the requisite jurisdiction to enforce its own orders after dismissal without prejudice. Ironically, the Superior Court relied on cases, as detailed below, that dealt with whether or not a dismissal constitutes a “final judgment,” and the Superior Court relied on language in those cases to conclude that once a settlement agreement is reduced to a court order, the case disappears into the ether as if it never existed and the court no longer retains jurisdiction to enforce its own order. Transforming the dicta the Superior Court relied on to permit Okanogan County to violate a court order with impunity into a binding rule makes dismissal of any litigation resolved by settlement unlikely. No party would agree to a settlement and dismissal requiring additional action protected by court order if that order was rendered meaningless once entered.

1. The Superior Court’s Order Relied on Inapplicable Case Law.

The Order Denying Motion to Vacate does not outline the Court’s reasoning in support of its decision. CP 239-240. However, during the hearing, the Court stated that its decision was based on *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (Wash. S. Ct. 2009). RP 28.

Kraft holds, in relevant part, that a voluntary dismissal cannot result in a “final judgment” and therefore, insofar as final judgments are

concerned, the dismissal leaves the parties without one “as if the action had never been brought.” 165 Wn.2d at 492. But *Kraft* and its *dicta* do not support the Superior Court’s decision to deny the Yakama Nation’s Motion to Vacate. Unlike the present matter, the court in *Kraft* analyzed a specific statute—RCW 4.84.330—to determine whether a dismissal order results in a final judgment to trigger relief available under that statute. *Id.* at 494. The court held that because “a voluntary dismissal is not a final judgment as contemplated under RCW 4.84.330,” *Kraft* was not entitled to attorney fees. *Id.*

The Yakama Nation is not claiming relief under RCW 4.84.330. Nor is the Yakama Nation claiming that it is a prevailing party or that the instant litigation resulted in a final judgment. Furthermore, when post-dismissal claims to attorney fees do not turn on whether there has been a prevailing party or a final judgment, Washington courts have asserted jurisdiction to make such post-dismissal awards. *See Hawk v. Branjes*, 97 Wn. App. 776, 782–83, 986 P.2d 841, 844 (1999) (court retains jurisdiction to issue order on statutory award of attorney fees after voluntary dismissal). Hence, there is no rule in Washington State depriving a court of continuing post-dismissal jurisdiction to enforce its orders. As noted *infra* at 14-19, the rule in Washington is the opposite.

Even if *dicta* in *Kraft* that every voluntary dismissal leaves “the parties as if the action had never been brought” furnishes a rule that nullifies ongoing obligations of courts’ orders in underlying dismissed actions, and deprives courts of jurisdiction to enforce their orders post-dismissal, the Supreme Court of the State of Washington expressly repudiated such a rule four years after *Kraft* was decided, as discussed in detail *infra* at 14. See *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (Wash. S. Ct. 2013).

The Order of Dismissal undeniably left Okanogan County with ongoing, court-ordered obligations that Okanogan County did not have before the Yakama Nation filed its lawsuit. CP 245-46. Under well-established case law dating back 100 years in Washington, court orders do not become a nullity after termination of litigation, whether the termination was voluntary or otherwise. See *Yoder v. Yoder*, 105 Wn. 491, 498–99, 178 P. 474, 476 (1919) (after termination of divorce action via reconciliation (i.e., voluntary dismissal), order awarding attorney’s fees was still enforceable); see also *Kane v. Smith*, 56 Wn.2d 799, 805, 355 P.2d 827, 833 (1960) (“in dismissing the bankruptcy proceeding, [the district court] did not regard the proceedings prior to the dismissal as a nullity”).

The Superior Court also relied on *State v. Taylor*. RP 28. *State v. Taylor* is wholly distinguishable along the same lines as *Kraft*. In *Taylor*, involving a criminal defendant and a dismissal of criminal charges against

him, the court held that: “an order of dismissal without prejudice does not fit within this court's definition of ‘final judgment,’ Because the legal and substantive issues are generally not resolved when a dismissal without prejudice is ordered, there is a lack of finality.” *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (Wash. S. Ct. 2003). *Taylor* further states: “[a]n order of dismissal without prejudice ‘leaves the matter in the same condition in which it was before the commencement of the prosecution.’” *Id.* (internal citations omitted). The Superior Court held that because the parties had entered a Stipulation, the Order of Dismissal was a voluntary dismissal, and the effect was to leave the parties as if the litigation had never been filed. RP 28-31. But, *Taylor* is inapposite in almost every material respect.

The Court in *Taylor* was determining a former criminal defendant's rights of appeal in a criminal case that had been dismissed. The case had nothing to do with whether the trial court had jurisdiction to vacate a dismissal in a civil dispute in order to vindicate its authority and enforce the unequivocal terms of its binding order. In *Taylor*, the Court held that when the state dismisses *criminal charges* against a defendant without prejudice, the defendant may not appeal the dismissal because there has been no “final judgment.” *Id.* at 602-03. As with *Kraft*, the dismissal in *Taylor* left the matter “in the same condition in which it was before the commencement” of the action. *Id.* at 602. Unlike both *Kraft* and *Taylor*, however, the

Stipulation and Order of Dismissal at issue here cannot be said to have left Okanogan County in the same condition before the Yakama Nation filed the instant lawsuit against it. For *Kraft* and *Taylor* to be in any way analogous, the Yakama Nation would need to have voluntarily dismissed its complaint with no settlement, truly leaving the Yakama Nation and Okanogan County in the same position they were in before any suit was filed. But that's not at all what happened. In fact, as noted above, as a result of this litigation, Okanogan County has undeniably agreed to undertake several specific obligations in exchange for an agreement to dismiss the Yakama Nation's lawsuit. Those obligations were directly outlined in the Order of Dismissal. Okanogan County is flouting those obligations and violating the mandatory, unambiguous terms of the Superior Court's Order of Dismissal.

The cases the Superior Court relies on do not stand for the proposition that court orders issued in cases that are dismissed without prejudice become a nullity *per se* upon dismissal, and therefore cannot be enforced, or must be enforced by virtue of some collateral action. The cases the Superior Court cites are not concerned with vacating dismissals to enforce court orders and settlement terms. Instead, the cases the Superior Court relied upon concern prevailing party status for purposes of attorney fee awards or for purposes of appealing dismissal of criminal charges. It is true there is no prevailing party in a case that was voluntarily dismissed and

a criminal defendant in Washington State cannot appeal charges voluntarily dismissed by the State. But, these are not the issues that were brought before the Superior Court in the Yakama Nation's Motion to Vacate and the Superior Court's reliance on these inapposite cases was an abuse of discretion. The Superior Court's ruling prejudiced the interests of a party the court had obligated itself to protect by including terms of a settlement within a binding, stipulated court order.

2. The Superior Court's Order Defies Binding Washington State Supreme Court Precedent.

The Supreme Court of the State of Washington has undeniably held that superior courts retain jurisdiction to enforce settlement terms and the terms of court orders following dismissal. *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (Wash. S. Ct. 2013). Like this case, *Condon* involved a dispute in which the parties settled and, pursuant to the settlement, the superior court entered a stipulation and order of dismissal. *Id.* at 155. These material facts were not present in any of the cases the Superior Court relied on. After dismissal in *Condon*, the defendant demanded the plaintiff sign a receipt and release before payment of settlement funds would be issued. *Id.* The parties found themselves at an impasse after plaintiff refused to sign the release and, consequently, defendant refused to release the settlement funds. *Id.* Defendant brought a post-dismissal motion to enforce the

settlement agreement. *Id.* The Supreme Court held that a court retains jurisdiction to enforce a settlement agreement even after a case has been dismissed:

if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision “retaining jurisdiction” over the settlement agreement) **or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.**

Condon, 298 P.3d at 90 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380–81, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)) (emphasis added).

The Court in *Condon* based its decision, in part, on the United States Supreme Court’s decision in *Kokkonen v. Guardian Life Insurance Company of America*. The Supreme Court in *Kokkonen* held that a trial court retains ancillary jurisdiction “following dismissal of a settlement in order to protect its proceedings and vindicate its authority” when the trial court specifically incorporates the terms of the settlement agreement in its order of dismissal. *Id.* That is exactly what happened in this matter—the Superior Court incorporated the terms of a settlement agreement and stipulation between the parties to this litigation in a specific and detailed order requiring actions by Okanogan County by dates certain. CP 245.

Because there is no question Okanogan County has failed to comply with its obligations and is in violation of the Order of Dismissal, the Superior Court should have exercised its jurisdiction to vindicate its authority and require compliance with its lawful order. The Superior Court’s reliance on an error of law—i.e., its assertion that courts do not have ancillary jurisdiction to enforce orders post-dismissal—is an abuse of its discretion. *Lopez-Stayer ex rel. Stayer v. Pitts*, 122 Wn. App. 45, 51, 93 P.3d 904 (2004); quoting *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (“a discretionary ruling based on error of law is an abuse of discretion”).

In *Condon*, the Court noted that in Washington State “a party wishing to enforce a settlement could commence a new action for breach but that a motion to enforce under the original cause number **is preferred**” and that in order to file a motion to enforce, it is “necessary” to “move to vacate under CR 60.” *Id.* at 91 (emphasis added). The Supreme Court of Washington added “a court may reopen a matter following dismissal on the basis of its inherent authority, the interests of justice and because a breach of settlement would be misconduct . . . or would be ‘any other reason justifying relief’” thereby justifying vacation under Civil Rule 60. *Id.*

Further, any distinction the Superior Court made between dismissal orders with prejudice versus dismissals without prejudice highlights a

distinction without a difference that does not change the analysis of the central legal issues in dispute here. There is no precedent indicating that a dismissal without prejudice divests the court of jurisdiction to vacate said order. However, there is precedent holding that courts retain jurisdiction to vacate dismissal orders without prejudice for want of prosecution under Civil Rule 41(b)(2). *Vaughn v. Chung*, 119 Wn.2d 273, 283, 830 P.2d 668 (Wash. S. Ct. 1992) (“We agree with the Court of Appeals' conclusion that trial courts may exercise their discretion under CR 60(b) to vacate a dismissal entered [without prejudice] pursuant to CR 41(b)(2)”).

Therefore, while voluntary dismissals may result in a lack of final judgment – divesting courts of jurisdiction to issue fee awards to prevailing parties – voluntary dismissals do not deprive a court of continuing jurisdiction when a statutory fee award does not require a prevailing party. *See Beckman v. Wilcox*, 96 Wn.App. 355, 359 (1999) (a court may award attorneys’ fees following voluntary dismissal without prejudice depending upon the language of the statute authorizing attorney fees). In *Condon*, the Supreme Court drew an analogy between courts interpreting statutes to award attorneys’ fees following dismissals and courts retaining jurisdiction to enforce settlement agreements after dismissals. *Condon*, 177 Wn.2d at 158 (“Although enforcement of a settlement is different from an award of attorney fees or costs provided by a contract or statute, there are similar

concerns regarding subjecting courts to separate actions to enforce the very settlements upon which the dismissals are based”).

Courts have vacated dismissals for failure to adhere to settlement agreements. *See Blair v. Chalich*, 135 Wn. App. 1034 (2006) (unpublished) (court found that defendant’s failure to transfer property to plaintiff as stipulated to in order of dismissal represented extraordinary conditions that permitted plaintiff to vacate dismissal)¹; *In re Marriage of Thurston*, 92 Wn. App. 494, 496, 963 P.2d 947 (1998) (same). *See also Keeling v. Sheet Metal Workers Int’l Ass’n, Local Union 162*, 937 F.2d 408, 410 (9th Cir. 1991) (party’s repudiation of a settlement agreement was an exceptional circumstance justifying vacation of an order of dismissal).²

In this matter, the parties did not merely have a settlement agreement. To ensure compliance, the Yakama Nation negotiated and requested that the Superior Court incorporate the terms of the parties’ settlement into the Order of Dismissal, which the United States Supreme Court has found vests even federal courts with limited jurisdiction with continuing or ancillary jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380–81, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). The Superior Court expressly ordered Okanogan County to take certain

¹ *See* Appendix 1.

² In determining whether to vacate a dismissal, courts in Washington often look to federal courts for analogous cases. *See Vaughn*, 119 Wn.2d at 283; *Condon*, 298 P.3d at 91.

actions, within a certain amount of time. CP 245-46. Okanogan County has, in turn, violated this unambiguous court order and remains in violation to this day. RP 28-29. In agreeing to dismiss the case without prejudice in exchange for Okanogan County's stipulated commitments, the Yakama Nation did not "move to the sidelines" as the Superior Court presumed. RP 29. Rather, the Yakama Nation dismissed the action in good faith, based upon a stipulated settlement. The Superior Court acknowledged at the hearing on the Yakama Nation's Motion to Vacate that *as a matter of fact* Okanogan County is presently in violation of the court's Order of Dismissal. RP 28-29. Therefore, the Order of Dismissal was not an impediment to the Superior Court's jurisdiction and the Superior Court's refusal to vacate the dismissal, or to at least order compliance with the settlement terms, is contrary to law.

This Court may reverse the Superior Court's order where the Superior Court abused its discretion. Here, the Superior Court abused its discretion in denying the motion to vacate, as the Superior Court's order was based on untenable grounds, i.e., on inapplicable case law and reasoning that ignored binding precedent.

C. The Superior Court's Order is Inequitable.

Proceedings to vacate a judgment are “equitable in character and relief is to be afforded in accordance with equitable principles.” *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). “In considering whether to grant a motion to vacate, a trial court ‘should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.’” *Vaughn v. Chung*, 119 Wn.2d 273, 278-79, 830 P.2d 668 (Wash. S. Ct. 1992).

Here, the Order Denying Motion to Vacate failed to hold Okanogan County to its promises, as committed to by Okanogan County in a stipulated settlement. By failing to recognize it retained jurisdiction, the Superior Court has not only perpetuated an unfair result, it is, in effect, punishing the Yakama Nation for entering into the Stipulation in good faith, trusting Okanogan County to comply with a court orders, and agreeing to any dismissal of its actions. The equities on this issue tip sharply in holding Okanogan County to its obligations and enforcing the Superior Court's Order of Dismissal. Thus, the Court should vacate the Superior Court's Order Denying Motion to Vacate.

D. The Superior Court's Order is Contrary to Public Policy.

There is no authority that holds that a court is divested of jurisdiction

and unable to enforce its own orders in dismissed actions. A rule of this type would be contrary to public policy as it would render court orders in dismissed actions meaningless, un-enforceable nullities and allow parties to violate court orders in dismissed actions with virtual impunity. This novel rule is unprecedented in the State of Washington where a party is unquestionably violating this a court order. Establishing this precedent not only undermines confidence in state courts' authority and the durability of court orders, it discourages parties from settling and dismissing actions, as any settlement could effectively become unenforceable upon dismissal.

While it is true the Yakama Nation could commence a separate action under a theory of breach of contract, that action would not incorporate the underlying substantive claims in the dismissed lawsuit. Complex issues of jurisdiction, remedies, and statutes of limitations would inevitably cast a shadow over the new litigation and require significant and unnecessary expenditure of government and court resources. The clear, simple, and preferred solution here—according to Washington State's Supreme Court—is to grant the relief the Yakama Nation sought, vacate the order of dismissal, and therefore vindicate the court's authority. Any other result is an injustice that discourages resolution by settlement and sows seeds of doubt in the efficacy of court orders memorializing clear, unambiguous, and agreed-upon ongoing obligations.

Here, as recognized by the Superior Court during the August 12, 2019 hearing, Okanogan County has directly violated an order of this Court. RP 28-29. This Court should reverse the Superior Court's Order Denying Motion to Vacate, in order to vindicate court authority and the parties' faith in the settlement process.

V. CONCLUSION

The Yakama Nation respectfully requests that this Court reverse the Superior Court's Order Denying Motion to Vacate, and remand the case with instructions to the Superior Court to vacate the Order of Dismissal, entered on March 21, 2017.

DATED this 11th day of February, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wendy Foster, declare as follows:

1. I am now, and at all times herein mentioned, a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Avenue NE, Suite L1, Seattle, Washington 98115.

3. Today, I filed the foregoing document with the Court of Appeals, Division III via its e-filing system.

4. Today, I served the foregoing document, via U.S. Mail and electronic mail, on the following parties:

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The foregoing statement is made under penalty of perjury and under
the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 11th day of February, 2020.

/s/ Wendy Foster

Wendy Foster

APPENDIX 1

135 Wash.App. 1034

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

Lawrence R. BLAIR, a single man, Respondent,

v.

Stanley CHALICH, and Leslie B.
Chalich, Husband and wife, Appellants.

Nos. 24683–3–III, 24684–1–III.

|
Oct. 31, 2006.

UNPUBLISHED OPINION

BROWN, J.

*1 Under CR 60(b)(11), Lawrence Blair received an order vacating dismissal of a suit against his sister, Leslie Chalich, and her husband Stanley, involving a continuing dispute over certain property in Liberty Lake, Washington. On appeal, the Chaliches contend Mr. Blair's dismissal motion was untimely; extraordinary circumstances do not exist; and release bars the claim. We disagree, and like the trial court, we deny attorney fees. Accordingly, we affirm.

FACTS

Helen and Robert Blair were the parents of Leslie Chalich and Lawrence Blair.¹ Helen died on March 19, 1986. Helen's will naming Robert as her sole beneficiary was admitted in probate. In 1987, Leslie sued in Spokane County Superior Court² disputing the validity of Helen's will.

In July 1988, Robert and Leslie signed a Memorandum Agreement resolving the estate dispute. This agreement provides that property in Liberty Lake, Washington, conveyed to Leslie prior to Helen's death, was to be held by Leslie for her benefit and Lawrence's benefit equally if sold, and if not sold by July 1, 1988, Leslie was required to deed one-half of her interest in the property to Lawrence.

The property did not sell by July 1, 1988. In 1999, Lawrence sued Leslie in Spokane County Superior Court³ after Leslie failed to convey the Liberty Lake property interest to him. The parties reached a tentative agreement and the case was dismissed with prejudice in March 2002. No formalized settlement agreement was entered at the time as the parties intended to negotiate the final details. The parties agreed Lawrence was to receive an interest in the Liberty Lake property, but they could not agree as to development costs allocation and negotiations stalled.

In January 2003, Leslie sued Lawrence in Spokane County Superior Court⁴ to enforce the "settlement agreement" regarding the Liberty Lake property. Lawrence answered denying any settlement and Leslie entered an order of dismissal.

Robert died later in 2003. Leslie and Lawrence litigated the disposition of Robert's estate.⁵ This dispute was settled in 2004 by a statutory "Nonjudicial Agreement" addressing the disposition of certain Whitman County real property and cash comprising Robert's estate. Clerk's Papers (CP) at 163. The agreement did not mention the Liberty Lake property or the lingering dispute related to the transfer of that property to Lawrence.

In addition to distributing Robert's estate property, the agreement contained a general release from each party to the other. Lawrence's release of Leslie stated:

Lawrence R. Blair, for and on behalf of himself and his legal and personal representatives, dependents, beneficiaries, legatees, heirs, and assigns, hereby releases and discharges Leslie Chalich personally and in her capacity as Personal Representative of Decedent's Estate, and her legal and personal representatives, dependents, beneficiaries, legatees, heirs and assigns, from any and all claims, demands, actions, suits, causes of action, obligations, debts, expenses, damages, judgments,

orders and liabilities of whatever kind or nature, in law, equity or otherwise, whether known or unknown and existing at the time of this agreement. The foregoing Release shall not apply to any breach of any warranty, representation or term of this Agreement.

*2 CP at 168–69.

In 2005, Lawrence sued Leslie and Stanley in Spokane County Superior Court to compel the Liberty Lake property conveyance envisioned in 1988. Leslie moved to dismiss the action, alleging *res judicata* barred revisiting the suit dismissed with prejudice in 2002. She alleged Lawrence waived any claim to the Liberty Lake property by consenting to the general release language in the 2004 nonjudicial settlement agreement and was also estopped from asserting his claim. She asked for attorney fees under RCW 4.84.185 and CR 11 sanctions. Lawrence successfully moved to vacate the dismissal of the 1999 suit under CR 60(b)(11).

The trial court decided equity required resolution of the unresolved 1988 agreement obligations. The court reasoned no evidence showed the 2004 nonjudicial agreement included the Liberty Lake property but Leslie's bare assertions. The 2004 agreement did not mention the Liberty Lake property. No contemporaneous writing mentioned the Liberty Lake property. Thus, the court reasoned it would be required to impermissibly read language into the agreement or resort to extrinsic evidence of intent to include disputes outside of Robert's estate. Additionally, nothing in the 2004 settlement agreement so favored Lawrence that one would expect Leslie to receive all the Liberty Lake property.

The trial court decided the parties' failure to finalize the settlement details prior to the 2002 dismissal should not preclude Lawrence from asserting his rights, if any, under the 1988 agreement because it was clear the 2002 settlement contemplated Lawrence would receive some interest in the Liberty Lake property. Citing *In re Marriage of Thurston*, 92 Wn.App. 494, 963 P.2d 947 (1998), the trial court ruled the vacation motion was not time barred. Finally, the court agreed the 2005 lawsuit was

duplicative of the vacated suit and granted dismissal of the 2005 suit. The court denied the parties' motions for attorney fees and costs. The Chaliches appealed.

ANALYSIS

A. Release

The issue is whether the trial court erred in vacating the 2002 dismissal of Lawrence's 1999 suit and concluding the 2004 general release contained in the nonjudicial settlement agreement did not include the Liberty Lake property dispute.

Initially, we address Leslie's procedural arguments. First, she argues Lawrence failed to provide an objective statement of the facts and procedures. She claims he made several references in his brief that are not supported by the record. To the extent that she is correct, those “facts” are disregarded.

Second, Leslie claims Lawrence raised several issues for the first time on appeal. However, an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

Finally, Leslie asserts Lawrence assigns error without referring to any legal authority. But, we note Lawrence is not assigning any error to the trial court's findings or conclusions. And, while Lawrence's citations may not be directly on point, his analogies to relevant legal precedent are proper. We turn now to the merits.

*3 A release is a contract construed according to contract principles and interpreted in light of the language used. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). Contract interpretation questions are matters of law reviewed *de novo*. *Schwab v. Seattle*, 64 Wn.App. 742, 751, 826 P.2d 1089 (1992). Extrinsic evidence and surrounding circumstances can be considered to “give[] meaning to words used in the contract” but not to “show an intention independent of the instrument” or “vary, contradict or modify the written word.” *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999) (citations omitted).

Our primary interpretation goal is to ascertain the parties' intent. We focus on the objective manifestation of the parties in the written contract rather than the unexpressed subjective intent of either party when deciding intent. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *Berg v. Hudesman*, 115 Wn.2d 657, 667–68, 801 P.2d 222 (1990). We consider “ ‘the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.’ ” *Berg*, 115 Wn.2d at 667 (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Generally, equity will limit a general release to matters contemplated by the parties at the time of its execution. *Finch v. Carlton*, 84 Wn.2d 140, 142–43, 524 P.2d 898 (1974). Although the release refers to a waiver of all claims, the release was tendered pursuant to RCW 11.96A.220 in settlement of the dispute in Robert's estate. The overall agreement discusses solely disputed probate assets and the ownership of certain trust property disposed of prior to Robert's death. The Liberty Lake property is not mentioned. Given all, the parties' objective manifestation was to dispose solely of the will contest and trust property disputes, not the Liberty Lake property. The sole contradictory view is the subjective, coming from Leslie.

In sum, the trial court did not err in holding the general release did not dispose of the Liberty Lake property dispute.

B. CR 60(b)(11) Extraordinary Circumstances

The issue is whether the trial court erred in concluding extraordinary circumstances existed to support Lawrence's motion to vacate under CR 60(b)(11).

CR 60(b)(11) allows relief from a judgment for “[a]ny other reason justifying relief from the operation of the judgment.” “The use of CR 60(b)(11) ‘should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.’ ” *Gustafson v. Gustafson*, 54 Wn.App. 66, 75, 772 P.2d 1031 (1989) (quoting *In re Marriage of Flannagan*, 42 Wn.App. 214, at 221, 709 P.2d 1247 (1985)). CR 60(b) decisions are

reviewed for abuse of discretion. *Luckett v. Boeing Co.*, 98 Wn.App. 307, 309, 989 P.2d 1144 (1999). A court abuses its discretion when its decision is based on untenable grounds or reasoning. *Id.* at 309–10.

*4 Here, the trial court granted Lawrence's motion to vacate after finding a final resolution of the dispute over the Liberty Lake property was needed. The trial court observed the 1999 suit was dismissed prematurely because negotiations over settlement details failed after the dismissal was entered. Nevertheless, the parties intended settlement. The record showed an agreement to convey some interest in the Liberty Lake property to Lawrence drove the dismissal, but the agreement was frustrated when detailed negotiations subsequently failed. Regardless of fault, the conveyance never occurred.

In *In re Marriage of Thurston*, 92 Wn.App. 494, 963 P.2d 947 (1998), the parties agreed to convey property as a term of their property settlement agreement. When the conveyance did not occur, a CR 60 motion resulted. The court held the nonoccurrence of a material condition in the property settlement agreement constituted an extraordinary circumstance warranting relief under CR 60(b)(11).

Here, our facts are similar to those found in *Thurston*. The conveyance of the Liberty Lake property interest was a material condition that did not occur. Thus, an extraordinary and unforeseen circumstance existed frustrating the moving cause to dismiss the 1999 suit. Until the parties' respective interests in the Liberty Lake property are resolved, title to the property remains clouded and given the parties' contentious history no resolution will occur without court intervention. Therefore, the court did not abuse its equitable discretion in vacating the stipulated order of dismissal so that this dispute can finally be resolved.

Next, Leslie contends the motion to vacate was untimely. CR 60(b)(11) motions must be brought in a “reasonable time.” *Thurston*, 92 Wn.App. at 499–500. What constitutes a reasonable time depends on the facts. *Id.* at 500. The mere passage of time between the entry of the judgment and the motion to set it aside is not controlling. *Id.* Rather, a triggering event for the motion may arise well after entry of the judgment that the moving party seeks to vacate. *Id.*; see also *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir.1986)

(in determining what constitutes a reasonable time, the court should consider the facts of each case, the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties).

Here, the record shows the stipulated dismissal order was entered because Leslie had agreed to convey an interest in the Liberty Lake property to Lawrence, but the details were not yet negotiated. The CR 60(b)(11) motion to vacate was brought shortly after Leslie asserted the release barred Lawrence from enforcing his claimed interest in the property. Under these facts, the trial court did not err in deciding the vacation motion was timely.

C. Attorney Fees and Sanctions

Leslie contends the court should have awarded attorney fees and CR 11 sanctions because Lawrence's 2005 action was frivolous, raising identical claims to his 1999 action dismissed with prejudice. In light of our conclusions this far upholding the trial court decisions, we do not reach her contentions. The decision to award attorney fees as a sanction for a frivolous action is left to the discretion of the trial court, and the court's decision will not be disturbed absent a showing of abuse of discretion. *Clarke v. Equinox*

Holdings, Ltd., 56 Wn.App. 125, 132, 783 P.2d 82 (1989). None has been shown.

*5 Lawrence requests attorney fees and expenses on appeal pursuant to RAP 18.1. But, RAP 18.1(b) requires a separate section of the appellate brief devoted to the fee issue and supporting argument and authority. *Thweatt v. Hommel*, 67 Wn.App. 135, 148, 834 P.2d 1058 (1992). While Lawrence cites RAP 18.1 in his brief, he did not provide authority or supporting argument for his attorney fee claim. Argument and citation to authority are required to advise us of the grounds for an award of attorney fees and costs. *Austin v. U.S. Bank*, 73 Wn.App. 293, 313, 869 P.2d 404 (1994). Therefore, we deny Lawrence's attorney fee request.

Affirmed.

A majority of the panel has determined this question will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: SWEENEY, C.J., and KULIK, J.

All Citations

Not Reported in P.3d, 135 Wash.App. 1034, 2006 WL 3077640

Footnotes

- 1 We use first names for clarity. We use "Leslie" generally to include "Stanley" for ease of reference as apparently their interests are the same.
- 2 Spokane County Superior Court No. 87-2-01452-0.
- 3 Spokane County Superior Court No. 99-2-02950-4.
- 4 Spokane County Superior Court No. 03-2-00669-1.
- 5 Spokane County Superior Court Nos. 03-4-01053-9 and 04-4-00046-9.

GALANDA BROADMAN

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