

NO. 86130-7

SUPREME COURT OF THE STATE OF WASHINGTON

VANESSA CONDON, PETITIONER

Vs.

FELY CONDON, RESPONDENT.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
PETITION FOR DISCRETIONARY REVIEW

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2011 OCT 12 AM 8:04
STATE OF WASHINGTON
SUPREME COURT
CLERK
D.R. CONNERTEN

This Brief is submitted in accordance with the Order, dated September 23, 2011. The Order deals with two issues:

1. Was the Order Enforcing Settlement a final order?
2. Did Plaintiff waive her right to appeal by accepting the benefits of the settlement?

1. The Court's Order Below was final, and not subject to discretionary Review.

This is a personal injury case that was resolved by settlement. The only action that was required of the Trial Court was to preside over a CR2A conference and sign a stipulation and Order of Dismissal. The only dispute to be resolved was whether Plaintiff agreed, either expressly or by implication, to sign a release in exchange for settlement funds. The Court was required to sign the Order Enforcing Judgment because Plaintiff refused to sign a release and Defendant refused to pay the settlement without a release. The Court's decision resolved the impasse. Upon entry of this Order, the settlement was paid by Respondent and accepted by Appellant. This was the last action required of the trial court. Since this was a final order, a Motion for Discretionary Review is not the proper remedy. A notice of Appeal should have been filed in the Superior Court, pursuant to RAP 2.2. There is no basis for an appeal to the Supreme Court. This case meets none of the criteria of RAP 4.2. Respondent

submits that the Appeal should be dismissed and sanctions should be imposed on Appellant for incorrect procedure and for citing unpublished opinions.

3. Plaintiff has accepted the benefits of the settlement and therefor waived the right to appeal, pursuant to RAP 2.5(b).

This case deals with a settlement. Plaintiff has accepted the funds of the settlement. She was not entitled to the settlement funds under any other scenario. When the trial court ordered that a release was required, Plaintiff had the option to file a Notice of Appeal, but instead decided to accept the settlement funds.

The general rule is that acceptance of the benefits of a trial court decision is a waiver of the right to appeal. *Buckleby by Belcher v. Snapper Power Equipment Co.*, 61 Wn. App. 932, 813 P.2d 125 (1991). RAP 2.5 (b) provides four possible exceptions to this rule, none of which apply to this case. Appellant was not going to receive this money unless a receipt and release was signed. Appellant has not posted security, as required by RAP 2.5 (b). The rule states:

(1) *Generally*. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision **only** (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party

will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship. [Emphasis supplied]

This case meets none of these exceptions. By taking the settlement funds, Appellant waived the right to appeal.

Appellant has attempted to confuse the Court by discussing a different matter, the underinsured motorist claim involving Appellant. That case was resolved by arbitration, in which the gross award was \$108,000. Appellant was only entitled to receive the amount of the award that exceeded the underlying policy limits, which was \$100,000. Appellant acknowledges this in her Supplemental Brief.

Ms. Condon was not going to receive a settlement in this case unless she signed a release. This case is not like *Sherry v. Financial Indem. Co.*, 132 Wash.App. 355, 131 P.3d 922 (2006) or *Scott v. Cascade Structures*, 100 Wn.2d 537, 541, 673 P.2d 179 (1983)” in which there were undisputed jury awards. If the settlement in this case fell through because of Appellant’s refusal to sign a release, it would have proceeded to trial. “The primary purpose of RAP 2.5(b) is ‘to ensure that a party seeking review will be able to make restitution if a decision is reversed or modified on appeal.’ *Scott v. Cascade Structures*, 100 Wn.2d 537, 541,

673 P.2d 179 (1983)” *Kruse v. Hemp*, 121 Wn.2d 715, 720, 853 P.2d 1373 (1996). The Appellant would be required to repay the settlement funds if it became necessary to try this case. She cannot accept the benefit of a settlement and reject a crucial condition of the settlement. Whether a party intends to waive her right of appeal is generally not relevant. See: *Buckley, Supra* at 941. By accepting the settlement funds, after the Court’s order that she sign a release, Appellant waived her right to appeal.

Appellant acknowledges that she would not have received the funds had this case not settled. By accepting the benefits of the award, Appellant waived the right to appeal. Appellant’s reliance on *Scott v. Cascade Structures*, 100 Wn.2d 537, 541, 673 P.2d 179 (1983) is erroneous. *Scott* involved a jury verdict, not a settlement. The only basis for Appellant to receive funds in this case was a settlement. A key feature of the settlement was the signing of a release. If Appellant disagreed with the trial court’s ruling in that regard, her remedy was to file an appeal. She cannot accept the benefits of the ruling and then appeal. This appeal is barred by RAP 2.5(b).

This appeal should be dismissed and sanctions should be imposed on Appellant.

Respectfully submitted October 8, 2011.

WALL LIEBERT & LUND P.S.

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I certify that I mailed a copy of the RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW to Gordon Woodley, Attorney for Appellant, at 14929 SE Allen Road, Bellevue, WA 98006, and to the Supreme Court, with proper postage affixed, on October 8, 2011.

WALL LIEBERT & LUND P.S.

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