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65409-8

NO. 65409-8-I

King County Superior Court Cause No.09-2-44171-5 SEA

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

WILLIAM OSERAN,  
Plaintiff/Appellant

v.

AARDVARK ENGINEERING SERVICES, INC. d/b/a A.E.S. Inc.,  
Defendant/Respondent

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APPELLANT'S REPLY BRIEF

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ORIGINAL

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## I. INTRODUCTION

Respondent Aardvark claims this appeal is about petitioner Oseran having second thoughts and wishing to rescind or reform the settlement agreement. Aardvark mischaracterizes this appeal.

Aardvark, not Oseran, is the party seeking to reform the settlement agreement. This appeal addresses Aardvark's attempt to overreach by transforming and expanding a narrow settlement agreement reached by an exchange of e-mails and voice messages to settle the claims at issue in the lawsuit at the time of settlement into a broad, global-type settlement that sweeps-up a litany of Oseran's rights never discussed or agreed. Even more egregious, Aardvark memorialized this fantasy settlement into a broad written release agreement, which it kept secreted away and slipped-in as an exhibit to a declaration in its motion to enforce. Even more astounding, Aardvark claims the parties agreed to these phantom settlement terms and astonishingly implies that this claim is not disputed.

Ironically, the very case upon which Aardvark depends foundationally, *McGuire v. Bates*, 169 Wn.2d 185, 234 P.3d 205 (2010), not only addresses a very narrow question and but also supports Oseran's position, to wit, "all claims" refers to all claims at issue in the lawsuit at the time of settlement. The claims at issue in the instant case at the time

of the settlement were only those related to Aardvark's admitted negligence in designing the elevator and stairwell pressurization systems, nothing more.

## II. STATEMENT OF ISSUES

Oseran relies on his opening brief in reply to this section.

## III. STATEMENT OF THE CASE

Aardvark's Statement of the Case casts bright light upon the fundamental contradiction underlying its position. This position being that a settlement based upon correspondence dealing only with the present and known claims at issue in the lawsuit additionally covers claims not discussed, unknown, and arising in the future.

Oseran's complaint involved only the admitted negligence of Aardvark in defectively designing the elevator and stairwell pressurization system. CP 1 (App. A) at 2, ¶ 6. Thus, "this matter" includes "all claims" related to Aardvark's defective design of the elevator and stairwell pressurization system. Oseran's direct cost to repair this error was \$11,390. All correspondence leading up to Aardvark's February 16, 2010, e-mail dealt only with settling these present and known claims for \$8,000. It is simply a *non-sequitur* to conclude, as Aardvark insists, that the clause "we have reached a settlement in this matter for the sum of \$8,000"

includes claims other than those at issue at the time of the settlement. To the contrary, the term “all claims,” under *McGuire*, refers to those claims at issue in the lawsuit at the time of settlement. So, to the extent Aardvark stubbornly maintains that “all claims” is unambiguous, *McGuire* supports the meaning Oseran ascribes the term, to wit, the claims at issue in the lawsuit at the time settlement was reached.

Lastly and in keeping with Aardvark’s propensity to mischaracterize Oseran’s position, Oseran has never claimed that his counsel lacked authority to settle “all claims.” Oseran admits that his counsel was authorized to settle “all claims” in “this matter.” Again, under *McGuire*, all claims means the claims at issue in the lawsuit at the time of settlement.

#### IV. ARGUMENT

For the Court’s convenience, Oseran replies using the same organizational scheme as that used by Aardvark in its Respondent’s Brief. Oseran disagrees with the arguments Aardvark asserts in its headings and, accordingly, restates them as needed.

##### A. The Superior Court *Improperly* Ordered that the Parties’ Settlement Agreement be Enforced.

**1. Standard of Review.**

Oseran relies upon his arguments in his opening brief in reply.

**2. Enforcement of Settlement Agreement.**

a. Context Surrounding Settlement Agreement.

Aardvark attempts to focus the court myopically with its citation to *Brogan v. Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 776, 202 P.3d 960.

Not only does Washington follow the “objective theory” of contract interpretation but also Washington follows the *Berg* “context rule” in determining the objective manifestation of the parties.

But more importantly, the court is to determine the intent of the parties. Oseran’s lawsuit involved only damages caused by Aardvark’s admitted negligent design of the elevator shaft and stairwell pressurization system. All the documents and correspondence leading up to the settlement of “all claims” in this “this matter” for \$8,000 dealt only with those claims. The context surrounding the making of the settlement agreement makes luminescent the disingenuousness of Aardvark’s claim that the parties intended to settle future and unknown claims and agree to the additional terms that Aardvark secreted into the Release of All Claims and Settlement Agreement and chose to reveal only when it moved for enforcement of its strained version of the settlement.

What may come to Aardvark's chagrin, *McGuire v. Bates*, 169 Wn.2d 185, 234 P.3d 205 (2010), supports Oseran's admitted and ongoing position that the term "all claims" refers to all claims at issue in the lawsuit at the time of settlement. The *McGuire* court interpreted whether the term, "all claims" "pursuant to RCW 4.84.250-.280," included the plaintiff's claim for attorney fees. Ms. McGuire filed a lawsuit in which she sought, *inter alia*, recovery of her attorney fees. *Id.* at 188. Before the case was arbitrated, Ms. McGuire accepted an offer to settle "all claims" for \$2,180 pursuant to RCW 4.84.250-.280. *Id.* The court reasoned, quite logically, that because the settlement offer settled "all claims" and one of the claims "that McGuire had against" the defendant was for attorney fees, the settlement agreement included her claim for attorney fees. *Id.* at 190-91. Put another way, the term "all claims" refers to all claims at issue in the lawsuit at the time of the settlement.

Aardvark's attempt to expand the scope of the settlement flies in the face of *McGuire* and the circumstances surrounding the settlement in this case.

b. Lack of New Consideration

Paradoxically for Aardvark, its entire claim rests upon the proposition that the parties had reached a prior agreement. This

proposition was objectively manifested by Aardvark's counsel in his February 16, 2010, e-mail sent to Oseran's counsel where Aardvark's counsel stated, "Pursuant to our exchange of e-mails and your voice-mail of this morning, I write to confirm that we have reached a settlement in this matter . . ." CP 14 (App. D), Ex. B (emphasis added.) Obviously, Aardvark incorporates by reference the prior correspondence. This prior correspondence dealt only with the claims at issue in the lawsuit at the time of settlement. These claims were only for Aardvark's admitted negligence in defectively designing the elevator and stairwell pressurization system. The parties bargained to exchange a release of these claims, which were known and admitted, for \$8,000. They did not bargain for the release of future, unknown, and un-admitted claims unrelated to the elevator and stairwell pressurization design, as Aardvark insists the settlement encompasses.

c. Lack of Authority to Settle

Not surprisingly, Aardvark continues to misstate Oseran's points on appeal. Oseran has never asserted his attorney lacked authority to settle or "do what they did." To the contrary, Oseran professes that his attorney was authorized to settle "all claims" he brought in "this matter" and that the parties objectively manifested this intent. The term "all

claims” meaning the claims at issue (damages due to elevator and stairwell pressurization design defects) in the underlying lawsuit at the time of settlement. This position accords perfectly with *McGuire* and contradicts Aardvark’s wishful reading of *McGuire* that “all claims” means any and all claims in addition to those at issue in the case at the time of settlement; i.e., all claims *ad infinitum*.

d. Lack of Material Terms to the Settlement.

i. Properly Raised Below.

First, that Oseran disputes the formation and enforceability of the settlement agreement as propounded by Aardvark and enforced by the trial court should be obvious. There is no need to rescind or reform the settlement agreement if it is found to encompass the scope claimed by Oseran, not that claimed by Aardvark and enforced by the trial court. The proper scope being all claims related to Aardvark’s admitted defective design of the elevator and stairwell pressurization system for \$8,000; i.e., “all claims” in “this matter.”

Second, Oseran objected to Aardvark’s entire motion to enforce in his response thereto. Aardvark’s motion included the newly revealed Release of All Claims and Settlement Agreement as an attachment to a declaration. Therefore, Oseran raised this objection within the context of

Aardvark's motion to enforce. Third, Oseran did not base his motion for reconsideration entirely on the underlying contract. To the contrary, Oseran began his motion by discussing the outrageous differences between the release and the correspondence forming the settlement.

ii. Material Terms Were Missing.

Aardvark's argument presupposes that the Release of All Claims and Release Agreement contains immaterial refinements to an otherwise binding agreement. By doing so, Aardvark ignores the applicable case law and the contents of Oseran's brief.

*Lavigne v. Green*, 106 Wn. App. 12, 21-22, 23 P.3d 515 (2001), makes it clear that release, indemnity, and hold harmless terms are ordinarily material, and where one party adds such language to a formal written agreement meant to memorialize a prior informal agreement wherein those additional terms were not discussed, the enforceability of the prior informal agreement is called into question, at least as to those terms. In his opening brief at page 17 -18, Oseran specifically objected to the fact that Aardvark included in the release agreement a requirement that Oseran "defend, indemnify, and hold [Aardvark] harmless . . ."

While apparently too straightforward and fair for Aardvark, Oseran is more than happy to abide by the true settlement agreement reached, to

wit, the release of “all claims” in “this matter” or “this file” for \$8,000 where, under *McGuire*, “all claims” refers to all claims at issue in the lawsuit at the time of settlement; i.e., Aardvark’s admitted negligent design of the elevator and stairwell pressurization system.

iii. Specific Performance Is Applicable Here.

Here, it is Aardvark that attempts to misdirect this Court and confuse the issue because specific performance has everything to do with this case. Quite simply, Aardvark moved the trial court to enforce the settlement agreement(s) and to order Oseran to sign the Release of All Claims and Settlement Agreement. In other words, it seeks specific performance of the agreement(s) it claims exists between the parties.

Aardvark has not claimed damages, other than attorneys’ fees and costs, as a result of Oseran’s refusal to sign the release or abide by the settlement Aardvark claims exists.

e. CR 2A and RCW 2.44.010.

The record and briefs before this Court in this matter make obvious that there is a genuine dispute as to the existence and material terms of the subject agreement(s). Aardvark’s claim otherwise is perplexing, at best, and deceptive, at worst. Among other things, the release form contains a broad definition of claims ostensibly released. Vis-à-vis the term “all

claims” as defined under *McGuire*, to wit, all claims at issue in the lawsuit at the time of settlement (which is the same meaning which Oseran ascribes to the term), the terms of the release agreement are certainly not mere “refinements” of the preceding informal e-mail agreement.

Unlike in *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357 (1993), the material terms (as contained in the release) were not stated in the informal writings (e-mails in the instant case) and Oseran signed neither the release nor the e-mails. The purpose of the *Morris* “test”<sup>1</sup> is to determine whether an informal agreement is sufficient to form an enforceable contract per se where the parties contemplate signing a more formal agreement later. If the subsequent agreement is not signed, like in the instant case, then no enforceable contract will exist unless the elements of the *Morris* “test” are met as to the preceding informal agreement. At the very least, the second element is not met in the instant case because the informal agreement lacked the vast and far reaching material terms contained in the subsequent release agreement, which Aardvark hid until moving the trial court to enforce both the informal e-mail agreement and the formal written agreement itself.

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<sup>1</sup> Respondent’s Brief at 18.

**B. The Superior Court *Improperly* Awarded Attorney Fees and Costs.**

**1. Properly Raised Below**

Oseran objected to Aardvark's entire motion to enforce in his response thereto. Aardvark's motion included its request for attorney fees and costs and the newly revealed Release of All Claims and Settlement Agreement as an attachment to a declaration. Therefore, Oseran raised this objection within the context of Aardvark's motion to enforce.

Furthermore, the trial court's order did not specify that equity was the basis for the award of attorney fees and cost. As a result, the basis for the trial court's finding was unclear to Oseran. This confusion is demonstrated in his motion for reconsideration by his comment, "Apparently, the trial court awarded attorneys' fees based upon a 'Settlement and Release Agreement' that was proffered by Aardvark but has never been agreed to or executed by Oseran." CP 19 (App. G) at 2, "Attorney's fee award – ." Oseran's discussion of the underlying contract was prompted by his utter bewilderment as to the order of the trial court with respect to attorney fees and costs. Regardless, even without reference to the underlying contract, there is still no basis for the award of attorney fees and costs in this case.

## **2. Equity**

### **a. Washington Law**

The trial court found “the defendant’s request for attorney fees and costs in its Motion to Enforce Settlement Agreement was based on a recognized ground in equity.” CP 23. The term “bad faith” appears nowhere in this finding, and other equitable exceptions to the no-attorney-fees rule exist at common law.

### **b. Persuasive Precedent**

Aardvark acts as if factual differences do not matter when applying “analogous cases.” Yet, it was Aardvark that cited to *Sanson v. Brandywine*, 599 S.E.2d 730, 215 W.Va. 307 (2004), as “highly analogous.” CP 22 at 6, 1.7. Whether a valid settlement exists depends upon the facts. The breadth of any such settlement depends upon the facts. And whether the party denying the settlement acts in bad faith depends upon the facts. Facts matter immensely, and *Sanson* is factually not on point.

## **3. CR 11**

Oseran’s position, contrary to Aardvark’s, is consistent with *McGuire*. Under *McGuire*, “all claims” refers to all claims at issue in the lawsuit at the time of settlement. Here, all claims are those related to

Aardvark's admitted negligent design of the elevator and stairwell pressurization system.

**C. Request for Attorney Fees and Expenses on Appeal**

Oseran objects to Aardvark's request for attorney fees and cost under RAP 18.1 and RAP 18.9 and requests this Court deny that request. With respect to RAP 18.1, this rule is strictly procedural and does not address the threshold question of whether a party is entitled to recover attorney fees. 3 WAPRAC RAP 18.1, Author's Comments, 1. In General—Scope of Rule. There is no basis for the award of attorneys' fees and costs in the instant case.

With respect to a request under RAP 18.9 (a) for bringing a frivolous claim, a claim is not frivolous unless there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. 3 WAPRAC RAP 18.9, Author's Comments, 3. Sanctions — Frivolous Appeal, Generally (citing *Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986)).

More specifically, courts consider (1) that a civil appellant has a right to appeal under RAP 2.2, (2) that all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant, (3) that the record

should be considered as a whole, (4) that an appeal that is affirmed simply because the arguments are rejected is not frivolous, and (5) that an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Id.* (citing *Public Employees Mut. Ins. Co. v. Rash*, 48 Wn. App. 701, 740 P.2d 370 (1987)).

Courts usually find that an appeal has some arguable basis and will deny a request for attorney fees on appeal. *Id.* (citations omitted.) This Court should follow suit and deny Aardvark's petty request because Oseran meets each element of the *Rash* test. And with respect to Aardvark's substantive arguments in support of its request, Oseran's position with respect to the meaning of "all claims" is consistent with *McGuire*, as discussed *supra*. Oseran never asserted "all claims" does not mean "all claims." Oseran has consistently asserted that "all claims" means all the claims at issue in the underlying lawsuit, to wit, Aardvark's negligent design of the elevator and stairwell pressurization systems. Accordingly, Oseran agreed to release these claims in exchange for \$8,000.

With respect to a request under RAP 18.9 (a) for refusing to comply with these rules to pay terms or compensatory damages to any

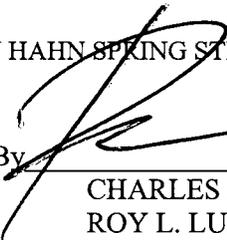
other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court, this portion of the rule does not apply to the instant case. Oseran has not failed to comply with the Rules of Appellate Procedure, i.e., “these rules.”

V. CONCLUSION

For the reasons set forth above and in Appellant’s Opening Brief, Appellant Oseran respectfully requests that this Court (1) reverse the trial court’s granting Aardvark’s Motion to Enforce Settlement Agreement; (2) reverse the trial court’s awarding Aardvark its attorneys’ fees and costs; and (3) deny Aardvark’s request for attorneys’ fees and expenses on appeal as contained in its Respondent’s Brief.

DATED: October 12, 2010.

OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.

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CERTIFICATE OF MAILING/SERVICE

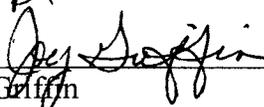
The undersigned, Joy Griffin, certifies that on the 12 day  
October, 2010, she caused to be served via e-mail and U.S. Mail, postage  
prepaid, a copy of the foregoing Appellant's Reply Brief to the Court of  
Appeals/ Division I, Cause No. 65409-8-I and to the following:

VIA US MAIL

John Zehnder, Jr.  
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I certify under penalty of perjury under the laws of the State of  
Washington the foregoing is true and correct.

Dated at Bellevue, WA this 12<sup>th</sup> day of October, 2010.

  
\_\_\_\_\_  
Joy Griffin