

65409-8

65409-8

No. 65409-8-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

WILLIAM OSERAN
Plaintiff/Appellant

v.

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

ON APPEAL FROM
KING COUNTY SUPERIOR COURT
CAUSE NO. 09-2-44171-5 SEA
HONORABLE JUDGE JULIE SPECTOR

RESPONDENT'S BRIEF

Counsel for Defendant/Respondent Aardvark

SCHEER & ZEHNDER LLP
John E. Zehnder, Jr., WSBA No. 29440
Gregory P. Thatcher, WSBA No. 40902

2010 SEP 17 PM 2:57
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

ORIGINAL

TABLE OF CONTENTS

DESCRIPTION	PAGE
I. INTRODUCTION.....	1
II. STATEMENT OF ISSUES.....	2
III. STATEMENT OF THE CASE.....	2
A. <u>Substantive History</u>	2
B. <u>Procedural History</u>	4
1. Motion to Enforce Settlement Agreement ...	4
2. Motion for Reconsideration.....	4
IV. ARGUMENT.....	6
A. <u>The Superior Court Properly Ordered that the Parties’ Settlement Agreement be Enforced</u>	5
1. Standard of Review	6
2. Enforcement of Settlement Agreement	6
a. <u>Context Surrounding Settlement Agreement</u>	6
b. <u>Lack of New Consideration</u>	9
c. <u>Lack of Authority to Settle</u>	10
d. <u>Lack of Material Terms to Settlement</u> ..	14
<i>i. Not Properly Raised Below</i>	14
<i>ii. Material Terms</i>	16

	iii.	<i>Specific Performance</i> <i>Inapplicable Here</i>	16
	e.	<u>CR 2A and RCW 2.44.010</u>	17
B.		<u>The Superior Court Properly Awarded Fees and Costs</u> ..	19
	1.	Not Properly Raised Below.....	19
	2.	Equity.....	20
		a. <u>Washington Law</u>	20
		b. <u>Persuasive Precedent</u>	21
	3.	CR 11.....	23
C.		<u>Request for Attorney Fees and Expenses</u>	24
V.		CONCLUSION.....	25

TABLE OF AUTHORITIES

CASE LAW	PAGE
<u>Brogan v. Anensen LLC v Lamphiear</u> , 165 Wash.2d 773, 202 P.3d 960 (2009).....	7,9
<u>State v. Chenoweth</u> , 160 Wn.2d 454, 158 P.3d 595 (2007).....	21
<u>Graves v. Taggares Company</u> , 94 Wash.2d 298, 616 P.2d 1223 (1980)	10,11,12,13,25
<u>Haller v. Wallis</u> , 89 Wash.2d 539, 573 P.2d 1302 (1978).....	10,11
<u>Herberg v. Swartz</u> , 89 Wash.2d 916, 578 P.2d 17 (1978).....	8,14
<u>Kruse v. Hemp</u> , 121 Wn.2d 715, 853 P.2d 1373 (1993).....	16,17
<u>KVI, Inc. v. Doernbecher</u> , 24 Wash.2d 943, 167 P.2d 1002 (1946).....	16,17
<u>Klebes v. Forest Lake Corp.</u> , 607 N.E.2d 978 (1993).....	21
<u>Landberg v. Carlson</u> , 108 Wash.App 749, 33 P.3d 406 (2001).....	24
<u>Lavigne v. Green</u> , 106 Wash.App 12, 23 P.3d 515 (2001).....	6
<u>McGuire v. Bates</u> , 169 Wash.2d 185, 234 P.3d 205 (2010)	7,8,9,16,19,24
<u>Morgan v. Burks</u> , 17 Wn.App 193, 563 P.2d 1260 (1977).....	10,12,13
<u>Morris v. Maks</u> , 69 Wash.App 865, 850 P.2d 1357 (1993).....	16,18
<u>Newcomer v. Masini</u> , 45 Wash.App 284, 724 P.2d 1122 (1986).....	15,19
<u>In Re Patterson</u> , 93 Wash.App 579, 969 P.2d 1106 (1999).....	17
<u>Matter of Pearsall-Stipek</u> , 136 Wash.2d 255, 267 n 6, 961 P.2d 343 (1998).....	20
<u>Sanson v. Brandywine</u> , 215 W. Va. 307, 599 S.E. 2d 730 (2004).....	21,22
<u>Shristiano v. Spokane Co Health Dept.</u> , 93 Wash.App 90, 969 P.2d 1078 (1998).....	9

<u>Stottlemire v. Reed</u> , 35 Wash.App 169, 665 P.2d 1383 (1983).....	9
<u>Suarez v. Newquist</u> , 70 Wash.App 827, 855 P.2d 1200 (1993).....	23
<u>Union Elevator v. State</u> , 152 Wash.App 199, 215 P.3d 257.....	20,21
<u>Wilcox v. Lexington Eye Institute</u> , 130 Wash.App 234, 122 P.3d 729 (2005).....	6,14,15,19

STATUTES	PAGE
-----------------	-------------

RCW 2.44.010.....	18
-------------------	----

COURT RULES	PAGE
--------------------	-------------

CR 2A	11,17,18
CR 11.....	23
CR 59.....	15

PROFESSIONAL CONDUCT RULES	PAGE
-----------------------------------	-------------

RPC 4.2.....	10
--------------	----

RULES OF APPELLATE PROCEDURE	PAGE
-------------------------------------	-------------

RAP 2.5(a).....	8,14,19
RAP 18.1.....	24
RAP 18.9.....	24

APPENDIX

- A. Sanson v. Brandywine, 215 W. Va. 307, 599 S.E. 2d 730 (2004)

I. INTRODUCTION

This Appeal addresses whether a party may rescind or reform a settlement agreement after authorizing its attorneys to settle a claim but where the party later has second thoughts on terms negotiated by its counsel. That is, there is no dispute that a settlement agreement was reached or that the parties' attorneys had authority to settle. Instead, plaintiff/appellant William Oseran ("Oseran") brings this appeal asserting that he is unhappy with the settlement terms reached by his legal counsel. Acceptance of this proposition would call into doubt all settlement arrangements reached by litigants' legal counsel. However, the law is already resolved that an attorney's authority to settle need not be verified by an opposing party. The law is also clear that a settlement agreement for "all claims" means "all claims" and is not ambiguous. Where a party must move to enforce a legal right, e.g., where an opposing party disclaims his attorney's authority to settle after a settlement has been reached, the trial court is vested with the power to impose sanctions, including attorney fees and costs, in equity and under the Court Rules.

Therefore, respondent Aardvark Engineering Services, Inc., d/b/a A.E.S., Inc. ("Aardavark") respectfully request that this Court affirm the Superior Court's Orders granting Aardvark's Motion to Enforce Settlement Agreement and denying Oseran's Motion for Reconsideration.

II. STATEMENT OF ISSUES

- A. Whether the Superior Court erred when it granted Aardvark's Motion to Enforce Settlement Agreement and awarded attorney fees and costs?
- B. Whether the Superior Court erred when it denied Oseran's Motion for Reconsideration?
- C. Whether the term "all claims" in a settlement agreement means all claims?
- D. Whether the trial court may award fees and costs as sanction for bad faith where a party must incur fees and costs to enforce a valid claim or right?

III. STATEMENT OF THE CASE

A. Substantive History

Oseran filed his action against Aardvark on December 8, 2009. CP

1. The Complaint alleged breach of an August 17, 2006, contract for engineering services between Oseran and Aardvark. Settlement negotiations – through the parties' respective legal counsel – began soon afterwards. Following email and telephone exchanges, Aardvark's counsel sent an email with the subject line "Confirmation of Settlement" to Oseran's counsel on February 16, 2010. That email stated, in its entirety (with bold emphasis):

Roy:

Pursuant to our exchange of e-mails and your voicemail of this morning, **I write to confirm that we have reached a settlement** in this matter for the sum of

\$8,000.00 (Eight Thousand Dollars) to be paid to your client, Oseran, on behalf of Aardvark in exchange **for a complete release and dismissal of all claims relating to Aardvark's work** (and its employees, agents, insurers...etc., per standard settlement agreement language) on the project that is the subject of Oseran's complaint in this matter (i.e. **a complete pay money and close file forever deal**). **Please respond to this e-mail with an "agreed"** and, per my offer, we will handle preparation of the settlement documents and dismissal pleading. Please also send me payee information and your and Oseran's tax ID number. Thanks!

CP 11. The above Confirmation of Settlement was sent at 1:38 p.m. An email receipt shows that plaintiff's counsel opened (and presumably read) the settlement for "all claims relating to Aardvark's work" two minutes later at 1:40 p.m. Per the instructions in the February 16, 2010, email settlement offer, the next day, February 17, 2010, counsel for Oseran responded: "Agreed." At 8:50 a.m. on February 18, 2010, he emailed Oseran's tax information for the settlement check. However, by 11:34 a.m. on February 18, 2010, Oseran's counsel sought to revisit and limit the parties' settlement agreement. Aardvark's counsel declined the invitation to void the unambiguous February 17, 2010, settlement agreement. CP 11.

B. Procedural History

1. Motion to Enforce Settlement Agreement

Aardvark filed its Motion to Enforce Settlement on March 10, 2010. CP 10. This Motion requested that the Superior Court find that: (1) the parties entered into an enforceable settlement agreement; (2) Oseran could not seek to modify the terms of the February 17, 2010, settlement agreement with extrinsic evidence of subjective intent (i.e., the parole evidence rule); and (3) Aardvark was entitled to attorneys' fee and costs for bringing its Motion. Oseran filed his Response on March 16, 2010. CP 14. His chief argument was that his attorneys did not have the authority to settle "all claims." The Response made no comment on the parole evidence rule and was silent regarding Aardvark's request for attorneys' fees and cost. That is, nowhere in his Response did Oseran contend that an award of attorneys' fees and costs was unwarranted. Aardvark filed its Reply on March 17, 2010, and the Superior Court issued its Order granting Aardvark's Motion to Enforce Settlement Agreement and for attorneys' fees and costs on March 19, 2010. CP 16, 17.

2. Motion for Reconsideration

Oseran filed his Motion for Reconsideration on March 24, 2010. CP 19. Importantly, he did not contest the Superior Court's finding that a settlement agreement had been reached. Rather, for the first time, he

argued that the Release and Settlement Agreement – which had been presented to the Superior Court with Aardvark’s Motion to Enforce Settlement Agreement – included terms which should not be part of the parties’ settlement. He also, and again for the first time, challenged Aardvark’s request for attorney’s fees and costs. In both instances he referenced the engineering contract between the parties, which was not part of the evidence presented to the Superior Court when it granted the Motion to Enforce Settlement Agreement. CP 20. Aardvark filed its Response to the Motion for Reconsideration on March 31, 2010, highlighting, among other things, that Oseran was raising new theories which could have been raised before entry of Order granting the Motion to Enforce Settlement Agreement. CP 22. Aardvark further noted that the Superior Court’s award of attorneys’ fees and cost was supported by case law and the Court Rules. Oseran submitted a Reply on April 2, 2010, and the Superior Court issued it Order denying the Motion for Reconsideration on April 16, 2010. CP 23, 26.

IV. ARGUMENT

A. The Superior Court Properly Ordered that the Parties' Settlement Agreement be Enforced

1. Standard of Review

The standard of review for an order enforcing a settlement agreement is de novo. Lavigne v. Green, 106 Wash.App 12, 16, 23 P.3d 515 (2001). However, the standard of review on a motion for reconsideration is “addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion.” Wilcox v. Lexington Eye Institute, 130 Wash.App 234, 241, 122 P.3d 729 (2005).

2. Enforcement of Settlement Agreement

Oseran’s Brief suggests five reasons why the Superior Court erred: (1) the context surrounding the settlement agreement hints at a different intended scope; (2) lack of new consideration; (3) Oseran’s counsel lack of authority to settle; (4) lack of material terms to the settlement agreement; and (5) that the agreement is not enforceable under CR 2A or RCW 2.44.010. (Oseran Brief, p 12) Each of these will be addressed.

a. Context Surrounding Settlement Agreement

Essentially, Oseran is asserting that the Superior Court erred by precluding his extrinsic evidence to show a different intent of the parties;

that is, that the intent was not for “all claims” but only claims made in this lawsuit. This is unpersuasive for two reasons.

Firstly, the Superior Court found that (1) the terms “all claims” and “close file forever deal” were unambiguous and that (2) the objective manifestations of the parties could be determined from the words used in the February 17, 2010, settlement agreement. CP 17. Put another way, extrinsic evidence was unnecessary where a party responded “Agreed” to a settlement offer for a release of “all claims” and “close file forever deal.” The Superior Court’s ruling was firmly supported in law. Brogan v. Anensen LLC v Lamphiear, 165 Wash.2d 773, 776, 202 P.3d 960 (2009)(“Washington courts focus on the objective manifestations of the contract rather than the subjective intent of the parties; thus, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.”)

Indeed, recently the Washington Supreme Court was called upon to consider whether an offer to settle “all claims” “pursuant to RCW 4.84.250-[,]280” included attorney’s fees. In McGuire v. Bates, 169 Wash.2d 185, 234 P.3d 205 (2010), the trial court held that this language did not encompass attorney fees, and granted the plaintiff an award of attorney’s fees in addition to the offer of settlement. The Court of Appeals affirmed the trial court, and the Supreme Court reversed. In doing so, the

Supreme Court instructed: “The plain fact is that [plaintiff and defendant] agreed to settle all claims that [plaintiff had against defendant]. There is only one reasonable meaning that can be ascribed to the words in their agreement to settle “all claims” “pursuant to RCW 4.84.250-.280.” That meaning, we believe, is that all claims encompasses all claims.” *Id.* at 190(Emphasis added.) Oseran’s counsel had time to read, contemplate, and reject Aardvark’s offer to settle “all claims.” “[A]ll claims encompasses all claims.” *Id.* He did not reject it but responded “Agreed.” CP 11. Hence, there is no need for extrinsic evidence to interpret the term “all claims.”

Secondly, Aardvark raised the parole evidence rule in its Motion to Enforce Settlement Agreement. Oseran’s Response did not contest application of the parole evidence rule to exclude extrinsic evidence. CP 14. Thus, his assertion that the Superior Court erred by not considering extrinsic evidence should be not be entertained because it was not raised below. RAP 2.5(a); Herberg v. Swartz, 89 Wash.2d 916, 925, 578 P.2d 17 (1978)(“An issue, theory or argument not presented at trial will not be considered on appeal.”)

Thirdly, “[i]f the intention of the parties is plain and the terms of a contract are agreed upon, then a contract exists, even though one or both of the parties may have contemplated a later execution in writing.”

Stottlemyre v. Reed, 35 Wash.App 169, 171, 665 P.2d 1383 (1983). Washington courts focus on the objective, rather than subjective, manifestations of the parties to determine whether a contract exists. Brogan at 776. That is, “All claims” means all claims. McGuire at 190.

b. Lack of New Consideration

This argument is based on a faulty premise, i.e., that the parties had already agreed to a settlement for “elevator shaft and stairwell pressurization design error” before the February 17, 2010, settlement for “all claims” and “close file forever deal.” Had this been the case, Oseran might have been expected to have moved for enforcement of this first settlement agreement. He did not; presumably because there was no earlier agreement. The bargain accepted by Oseran’s counsel on February 17, 2010, (i.e., “Agreed”) was as stated in Aardvark’s counsel’s February 16, 2010, email after he had a day to reflect upon it: \$8,000 for release of “all claims” (i.e. “[A]ll claims encompasses all claims”) and “close file forever deal.” CP 11. Thus, there was an offer, acceptance, and consideration to form the parties’ February 17, 2010, settlement agreement. Shristiano v. Spokane Co Health Dept, 93 Wash.App 90, 95, 969 P.2d 1078 (1998).

c. Lack of Authority to Settle

This, it appears, is the main reason for Oseran's appeal. The term "all claims" is unambiguous, something obvious to the Superior Court below and the Supreme Court in *McGuire*. To get around this, Oseran seeks to rescind or reform the February 17, 2010, settlement agreement by pleading that his attorneys were not authorized to do what they did. Oseran's Brief cites no case authority obligating an opposing party (or opposing counsel) to verify the extent of an attorney's authority to settle. Such an imposition would run afoul of the professional rules of conduct against communicating with a person known to be represented by an attorney. RPC 4.2 As would be expected, the Washington Supreme Court has held to the contrary: "[O]nce a party has designated an attorney to represent him in regard to a particular matter, the court and other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention." Haller v. Wallis, 89 Wash.2d 539, 547, 573 P.2d 1302 (1978); RCW 2.44.010.

Oseran's Brief cites two cases which discuss when the Court may void a settlement, Graves v. Taggares Company, 94 Wash.2d 298, 616 P.2d 1223 (1980), and Morgan v. Burks, 17 Wn.App 193, 563 P.2d 1260 (1977). While Aardvark agrees that the settlement of claims is a substantial right, this principle is inapplicable here. A review of Graves

and Morgan demonstrates that two things must be shown before the Court will consider voiding a settlement: (1) unequivocal statements from the client/party to the Court stating that its attorneys lacked authority and (2) overwhelming evidence supporting the claim that the attorney lacked authority to settle. If this were not the law, then no settlement agreement would be deemed final and binding, i.e., a party having second thoughts could always charge that his attorneys were not authorized to settle. The purpose of CR 2A is to lock in the parties' agreement. Oseran's counsel had authorization to settle; his Brief says so. (Oseran's Brief, p 12) "[C]onsent by an attorney [waving a substantial right] contrary to his client's instructions may be ground for vacating such a judgment [approving settlement], but as a general rule courts are loathe to act upon this ground alone unless fraud appears." Haller at 545 (Emphasis added.). Oseran's Brief contains no discussion of fraud nor was the possibility of fraud raised below.

In Graves, supra, the defendants' attorney kept his clients entirely in the dark and engaged in egregious behavior. He did not inform his clients of the plaintiff's summary judgment motions, did not file a response, and did not advise his clients that the summary judgment motion had been granted. Moreover, he did not advise his clients of the trial date and agreed to stipulate to vicarious liability, among other things. Id. at

300-302. Once the defendant-insurer learned of judgment against it, it retained new counsel and moved to vacate the judgment. *Id.* at 300. Regarding the facts of Graves, the Supreme Court commented: “Such a course of events is extraordinary to say the least. To do all of that without knowledge, authority or acquiescence is even more startling.” *Id.* at 301.

In Morgan, parents brought a claim on behalf of their 16-year old son, and for themselves, after their son was shot on the defendant’s property and suffered serious injuries. Their counsel sued the owner and his marital community, but not the corporation which owned the land. The factual recitation makes clear that the parties had concluded their settlement negotiations and were set for trial. At trial, counsel for both parties announced to the Court that a settlement had been reached and the defendant gave testimony on his assets. The plaintiffs later refused to sign the settlement agreement and the defendant moved for an order that money deposited with the trial court amounted to satisfaction of plaintiffs’ claims. Plaintiffs opposed this motion, and the father explained to the trial court that, “We felt all along that they [plaintiffs’ attorneys] were suing the [defendant’s] corporation and [defendant individually].” *Id.* at 196. The trial court granted the defendant’s order.

Though the trial court in Morgan entered the order requested by the defendant, it later vacated it. Importantly, the trial court found that

settlement negotiations had concluded and the parties expected to go to trial; plaintiffs believed their action was against defendant and against the corporation which owned the land; and, critically, by the time of the trial the minor had turned 18. Authority to settle had passed from the father to the son. *Id.* at 198-199. “When taken together these facts provide a more than sufficient showing that the dismissal order resulted from serious misunderstandings between attorney and client.” *Id.* 199 (Emphasis added).

Again, in both Graves and Morgan the parties themselves made unequivocal statements to the Court – either by firing prior counsel as in Graves or speaking to the judge in open court as in Morgan – that their attorneys’ lacked authority. Also in Graves and Morgan, there are extraordinary facts that “when taken together” support that the attorneys lacked authority (e.g., the egregious conduct of the attorney in Graves and that the minor reached the age of majority in Morgan). Graves and Morgan are thus inapplicable to Oseran’s Appeal. Not only is there is no direct evidence that his attorneys lacked authority (i.e., no declaration or other testimony from William Oseran was provided to the Superior Court below), there are absolutely no facts to support that his attorneys lacked authority to settle.

d. Lack of Material Terms to the Settlement

i. *Not Raised Properly Below*

Oseran's argument in this regard appears to be that the parties' February 17, 2010, settlement agreement should be rescinded or reformed because the terms of the Release and Settlement Agreement, enforced by the Superior Court, were not discussed. As an initial matter, Oseran made no objection to the terms of the Release and Settlement Agreement while the Superior Court was considering Aardvark's Motion to Enforce Settlement Agreement. CP 14. The Release and Settlement Agreement was attached to the Declaration of Gregory P. Thatcher and Aardvark's Proposed Order. CP 11, 17. Thus, this contention was not raised properly below and should not be a matter for review on appeal. RAP 2.5(a); Herberg at 925. However, Oseran did comment on the terms of the Release and Settlement Agreement in his Motion for Reconsideration. CP 19. He therefore must show a "manifest abuse of discretion" by the Superior Court in not accepting this as a basis to rescind or reform the parties' settlement agreement. Wilcox at 241.

Among other things, the Superior Court denied Oseran's Motion for Reconsideration because he did not raise his objections to the terms of the Release and Settlement Agreement in his Response to Aardvark's Motion to Enforce Settlement Agreement. CP 26. The Superior Court's

Order follows established precedent, i.e., on a motion for reconsideration under CR 59, a party “may not propose new theories of the case that could have been raised before entry of an adverse decision.” Wilcox at 241. Additionally, Oseran’s Motion for Reconsideration did not state on which of the nine enumerated grounds for relief his motion was premised. CR 59(a)(1-9).

Moreover, while a party may present new issues or theories on a motion for reconsideration which are not dependent on new facts to be preserved for appellate review, that is not what happened here. Newcomer v. Masini, 45 Wash.App 284, 287, 724 P.2d 1122 (1986). Oseran’s Motion for Reconsideration was premised on the parties’ August 17, 2006, contract for mechanical services. CP 19, 20. The parties’ August 17, 2006, mechanical services contract was not part of the Superior Court’s record when it decided Aardvark’s Motion to Enforce Settlement Agreement. CP 10, 11, 12, 13, 14, 16, 17. Neither Aardvark nor Oseran included the mechanical services contract in their submissions to the Superior Court. Also, while the existence of the August 17, 2006, mechanical services contract was referenced in the parties’ respective statements of fact, it was not a basis of argument for either party. Thus, when Oseran for the first time contended in his Motion for Reconsideration that the terms of the Release and Settlement Agreement

should not apply, he did so with new facts, i.e., the mechanical services contract. The Superior Court's denial of his Motion for Reconsideration was therefore proper.

ii. Material Terms

As a further point, material terms were agreed to, i.e., \$8,000 in exchange for release of "all claims." CP 11. "[A]ll claims encompasses all claims." McGuire at 190. "[S]ubsequent refinements of the parties' respective liabilities [in a later formal agreement] [does] not materially alter [the parties' settlement agreement]." Morris v. Maks, 69 Wash.App 865, 870, 850 P.2d 1357 (1993). Incidentally, Oseran's Brief makes no effort to specify the material terms in the Release and Settlement Agreement that were not identified in the parties' February 17, 2010, settlement agreement. Rather, his argument revisits whether "all claims" means all claims. Therefore, Oseran's citation to the Morris test does not help his position.

iii. Specific Performance Inapplicable Here

Specific performance has nothing to with the parties' settlement agreement or this Appeal. It is apparently presented to misdirect this Court and confuse the issues. For example, Oseran cites Kruse v. Hemp, 121 Wn.2d 715, 853 P.2d 1373 (1993), and KVI, Inc. v. Doernbecher, 24 Wash.2d 943, 167 P.2d 1002 (1946). In Kruse the Supreme Court stated:

“A contract to enter into a future contract (i.e., an option contract) must specify all of the material and essential terms of the future contract before a court may order specific performance.” Id. 722. This Appeal is not about an option contract. In Doernbecher, the parties drafted a memorandum with explicitly noted that that their agreement was preliminary and that the parties had a right to insert conditions later. The parties in Doernbecher also engaged in negotiations after the memorandum was prepared. Id. at 945-947. The facts in Doernbecher are not in any way analogous to the facts of this Appeal.

e. CR 2A and RCW 2.44.010

Within the meaning of CR 2A, a settlement agreement is disputed only if there is a genuine dispute over the existence of the agreement or its material terms. In Re Patterson, 93 Wash.App 579, 583, 969 P.2d 1106 (1999). A misunderstanding as to the effect of a CR 2A provision is not equivalent to a material dispute. Id. at 589. Here, there is no genuine dispute that an agreement was made. There is also no genuine dispute concerning its material terms. The parties agreed to settlement of “all claims” for \$8,000. Those are the material terms. Again, Oseran has not identified material terms in the Release and Settlement Agreement which were not part of the February 17, 2010, settlement agreement.

In Morris, supra, the Court of Appeals discussed the application of both CR 2A and RCW 2.44.010. The question posed was whether letters exchanged between the parties' attorneys could establish a binding settlement. The Court of Appeals determined that it could:

In determining whether informal writings such as letters are sufficient to establish a contract even though the parties contemplate signing a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon, (2) the terms are stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of signing and delivery of a formal contract.

Id. at 869. Moreover, "subsequent refinements" to the parties' liabilities does not materially alter the terms of the informal agreement. Id. at 870. The Court of Appeals in Morris found that the above factors were satisfied because the subject matter was agreed upon and the (material) terms stated in the informal writings. For the last factor, intent to be bound, the Court of Appeals looked to the language used in the letters. Specifically, the offer letter stated "this will confirm your assurance" of settlement. The acceptance letter affirmed the terms of the offer letter. "The Washington court has long adhered to the objective manifestation theory in construing the words and acts of alleged contractual parties." Id. at 871.

Similar to Morris, the subject matter of the parties' settlement was agreed upon and the material terms set, i.e., \$8,000 in exchange for release

of all claims. The analysis then goes to the objective manifestation of the parties and the Washington Supreme Court has already held that “all claims” means all claims. McGuire at 190.

B. The Superior Court Properly Awarded of Fees and Costs

1. Not Raised Properly Below

Like many of the other arguments contained in Oseran’s Brief, he did not object to Aardvark’s requests for fees and costs while the Superior Court was deciding the Motion to Enforce Settlement. CP 14. RAP 2.5(a) His objection was first raised in his Motion for Reconsideration. CP 19. A party “may not propose new theories of the case that could have been raised before entry of an adverse decision.” Wilcox at 241. The standard of review is therefore a “manifest abuse of discretion” by the Superior Court. Wilcox at 241.

Also similar his other appellate arguments his objection to fees and costs was based on new facts. Newcomer at 45. In particular, he contended that the parties’ August 17, 2006, mechanical services contract did not speak to an award of fees. CP 19. As the mechanical services contract was not part of the Superior Court’s record when it decided the Motion to Enforce Settlement, Oseran’s objection to an award of fees and costs was not properly preserved for appeal. Id.

2. Equity

a. Washington Law

The Superior Court has inherent equitable powers to award attorneys fees for bad faith. Union Elevator v. State, 152 Wash.App 199, 211, 215 P.3d 257. The courts “are at liberty to set the boundaries of the exercise of that power.” Matter of Pearsall-Stipek, 136 Wash.2d 255, 267 n 6, 961 P.2d 343 (1998). Though “bad faith” is narrowly defined, that definition nonetheless includes: “obstinate conduct that necessitates legal action to enforce claim or right, ‘vexatious’ conduct during litigation, or the intentional the intentional bringing of a frivolous claim or defense with improper motive.” Union Elevator at 211. It follows that by finding the parties here entered into a settlement agreement on February 17, 2010, the Superior Court determined that Aardvark had an enforceable claim or right (i.e., the contact). That Aardvark had to bring a motion to enforce its rights evidences bad faith.

Oseran’s Brief instructs, wrongly, that the Superior Court did not find that he had acted in bad faith. (Oseran Brief, p 41) The Superior Court’s Order Denying Plaintiff’s Motion for Reconsideration stated: “This Court finding that defendant’s request for attorney fees and costs in its Motion to Enforce Settlement Agreement was based on a recognized ground in equity, and in particular fees and costs incurred to enforce a

valid settlement agreement.” CP 19. Obstinate conduct that forces legal action to enforce a claim or right is one of the recognized “bad faith” scenarios in Washington. Id. It is emphasized again that Oseran did not challenge the request for fees and costs while when the Superior Court first awarded them. CP 14. He waited until his Motion for Reconsideration, and the presentation of new facts, to assert that the award was unwarranted. CP 19, 24.

b. Persuasive Precedent

While case authority from sister states is considered persuasive authority, many legal positions, such as on equity, are shared. State v. Chenoweth, 160 Wn.2d 454, 471, 158 P.3d 595 (2007). For example, the discretion of the trial court to award of fees and costs for bad faith is almost universally acknowledged. Sanson v. Brandywine, 215 W. Va. 307, 312, 599 S.E. 2d 730 (2004); Klebes v. Forest Lake Corp, 607 N.E.2d 978, 983 (1993).

In Sanson, the plaintiffs’ attorney accepted a settlement offer from the defendant’s attorney. The plaintiffs later tried to avoid the settlement by claiming their attorney did not have authority to settle. The trial court granted the defendant’s motion to enforce settlement and awarded attorney fees and costs. The trial court’s order was upheld by the Supreme Court of Appeals of West Virginia. In affirming the award of fees and costs, the

Court noted that equity allowed for an award of fees and costs where an opposing party has acted bad faith. Specifically, the defendant was forced to file a motion to enforce the settlement agreement and incurred fees and costs. These fees and costs should be borne by party acting in bad faith. Id. at 312.

Oseran's Brief attempts to distinguish Sanson on three points. First, that the trial court held an evidentiary hearing. As a preliminary point, Oseran cites no Washington case authority that an evidentiary hearing is necessary before an award of fees and costs. Nonetheless, in Sanson the trial court did not hold an evidentiary hearing on the issue of attorney fees and costs. Id. at 735. Second, Oseran finds it relevant that the Sanson plaintiff disputed the amount of the settlement but "Oseran does not dispute the amount" here (i.e., there is no genuine dispute regarding the existence of the parties' February 17, 2010, settlement agreement). (Oseran Brief, p 46). However, Oseran did dispute that the phrase "all claims" means all claims. Third, the defendant in Sanson sent the plaintiffs a settlement agreement and release after they had accepted the settlement offer. While this did not occur here, like the defendant in Sanson, Aardvark too had to move to enforce the settlement agreement after Oseran sought to disclaim his attorney's authority to settle. The key

is that a valid settlement exists but a party is forced to accumulate fees and costs to enforce it.

3. CR 11

CR 11 vests the trial court with authority to sanction a party for violation of the court rules, either upon motion of a party or own its own initiative. Among other things, the trial court may sanction a party – on its own initiative – where the party or its attorney presents a pleading, motion, or legal memorandum that is: (1) not well grounded in fact; (2) not warranted by existing law or a good faith argument for extension of existing law; and (3) interposed for an improper purpose such as to needlessly increase the cost of litigation. The trial court’s decision on CR 11 violations is reviewed only for abuse of discretion. Suarez v. Newquist, 70 Wash.App 827, 835, 855 P.2d 1200 (1993)

The Superior Court’s order of CR 11 sanctions here was based on a finding that Oseran’s Response to Aardvark’s Motion to Enforce Settlement “was not well grounded in fact, was not warranted by existing law, and needlessly increased the costs of litigation.” CP 26. Again, Oseran position that “all claims” does not mean all claims is not well grounded in fact, warranted by existing law, and needlessly increased the costs of litigation. The Superior Court therefore did not abuse its discretion.

C. Request for Attorney Fees and Expenses

Aardvark requests attorney fees and expenses incurred in defending against Oseran's Appeal. RAP 18.1. The basis for fees and expenses on appeal are similar to fees allowable at trial, e.g., by statute, equity, or agreement. Landberg v. Carlson, 108 Wash.App 749, 758, 33 P.3d 406 (2001). Moreover, this Court, upon motion of a party or on its own initiative, may order a party who files a frivolous appeal or fails to comply with the appellate rules to pay terms or compensatory damages to another party. RAP 18.9.

As conceded in his Brief, Oseran does not disagree that a settlement was reached on February 17, 2010. He "does not dispute the amount." (Oseran Brief, p 46) Oseran's position that "all claims" does not mean all claims cannot be considered a meritorious argument. Apart from the complete lack of ambiguity of the term "all claims," the Supreme Court issued its opinion in McGuire, supra, on July 1, 2010. Oseran mailed his Brief his brief on August 6, 2010. (Oseran Brief, p 51) Hence, on the day he filed his Brief his arguments were not warranted by existing law. Furthermore, though Oseran's attorneys claimed below and on this Appeal that their authority to settle was limited, Oseran has never presented evidence (e.g., a declaration or other testimony) that this was the

case. All that has been put forth are conclusatory statements by his attorneys. Thus, this Appeal is not well grounded in fact and lacks merit.

Additionally, in Graves, supra, the Supreme Court affirmed the Court of Appeals' award of terms against the defendant "to place the plaintiff in the same position he would be in had the efforts at litigation which have been nullified never occurred."¹ Id. at 306.

V. CONCLUSION

Oseran contends on appeal that his attorneys' authority to settle was limited (though no evidence of this was ever provided to the Superior Court), that the term "all claims" means something other than all claims, and that an award of fees and costs was improper though his conduct necessitated that Aardvark incur attorneys fees and cost to enforce a valid settlement agreement. He has asserted numerous issues that were not properly raised below, including issues that were based on new evidence in his Motion for Reconsideration. Therefore, Aardvark respectfully requests this Court affirm the Superior Court's Orders below.

SCHEER & ZEHNDER LLP

John E. Zehnder, Jr., WSBA No. 29440
Gregory P. Thatcher, WSBA No. 40902
Attorneys for Aardvark Engineering

¹ That is, irrespective of the outcome of this Appeal, Oseran should be ordered to pay all of Aardvark's fees and costs since the parties' February 17, 2010, settlement agreement.

APPENDIX A

Westlaw

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 1

Supreme Court of Appeals of
 West Virginia.

Lisa SANSON and Monica Sanson, Plaintiffs Below,
 Appellants

v.

BRANDYWINE HOMES, INC., a Domestic Corporation; Skyline Corporation, a Foreign Corporation; and Conesco Finance Corporation, a Foreign Corporation, Defendants Below, Appellees.

No. 31269.

Submitted Jan. 14, 2004.
 Decided March 2, 2004.

Background: Contractor filed motion to enforce agreement settling action by purchasers of manufactured home which alleged fraud, breach of express and implied warranties, and breach of contract. The Circuit Court, Kanawha County, Irene C. Berger, J., granted contractor's motion, and denied purchasers' subsequent motion to alter or amend the judgment. Purchasers appealed.

Holdings: The Supreme Court of Appeals held that:
 (1) purchasers were given sufficient opportunity to be heard before trial court ruled that settlement agreement was enforceable;
 (2) trial court did not abuse its discretion by enforcing settlement agreement;
 (3) trial court did not abuse its discretion by awarding contractor attorney fees and costs it incurred to enforce settlement agreement.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚡863

30 Appeal and Error
 30XVI Review
 30XVI(A) Scope, Standards, and Extent, in

General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In General. Most Cited Cases
 The standard of review applicable to an appeal from a motion to alter or amend a judgment is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to Supreme Court of Appeals is filed. Rules Civ.Proc., Rule 59(e).

[2] Appeal and Error 30 ⚡949

30 Appeal and Error
 30XVI Review

30XVI(H) Discretion of Lower Court
 30k949 k. Allowance of Remedy and Matters of Procedure in General. Most Cited Cases
 Supreme Court of Appeals employs an abuse of discretion standard when reviewing a circuit court order enforcing a settlement agreement.

[3] Appeal and Error 30 ⚡984(5)

30 Appeal and Error
 30XVI Review

30XVI(H) Discretion of Lower Court
 30k984 Costs and Allowances
 30k984(5) k. Attorney Fees. Most Cited Cases
 Supreme Court of Appeals applies the abuse of discretion standard of review to an award of attorney fees.

[4] Compromise and Settlement 89 ⚡11

89 Compromise and Settlement
 89I In General

89k10 Construction of Agreement
 89k11 k. In General. Most Cited Cases
 Settlement agreements are contracts and, therefore, are to be construed as any other contract.

[5] Compromise and Settlement 89 ⚡5(1)

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 2

89 Compromise and Settlement

89I In General

89k1 Nature and Requisites

89k5 Making and Form of Agreement

89k5(1) k. In General. Most Cited Cases

Since a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement can not be predicated on equivocal actions of the parties.

[6] Contracts 95 ⚡15

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k15 k. Necessity of Assent. Most Cited

Cases

A meeting of the minds of the parties is a sine qua non of all contracts.

[7] Compromise and Settlement 89 ⚡2

89 Compromise and Settlement

89I In General

89k1 Nature and Requisites

89k2 k. In General. Most Cited Cases

Compromise and Settlement 89 ⚡7.1

89 Compromise and Settlement

89I In General

89k7 Validity

89k7.1 k. In General. Most Cited Cases

The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.

[8] Compromise and Settlement 89 ⚡17(1)

89 Compromise and Settlement

89I In General

89k14 Operation and Effect

89k17 Conclusiveness

89k17(1) k. In General. Most Cited

Cases

Where parties have made a settlement, such settlement is conclusive upon the parties thereto as to the correctness thereof in the absence of accident, mistake, or fraud in making the same.

[9] Compromise and Settlement 89 ⚡21

89 Compromise and Settlement

89I In General

89k21 k. Enforcement. Most Cited Cases

Purchasers were given sufficient opportunity to be heard before trial court ruled that agreement settling purchasers' action against contractor was enforceable, even though no actual testimony was presented, where purchasers' attorney proffered that purchasers would testify that they did not authorize settlement, and that their attorney agreed to settlement without their consent; trial court was certainly made aware of purchasers' contention that no settlement was reached.

[10] Attorney and Client 45 ⚡101(1)

45 Attorney and Client

45II Retainer and Authority

45k101 Settlements, Compromises, and Releases

45k101(1) k. In General. Most Cited Cases

The mere relation of attorney and client does not clothe the attorney with implied authority to compromise a claim of the client.

[11] Attorney and Client 45 ⚡70

45 Attorney and Client

45II Retainer and Authority

45k68 Proof of Authority

45k70 k. Presumptions. Most Cited Cases

Attorney and Client 45 ⚡72

45 Attorney and Client

45II Retainer and Authority

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 3

45k68 Proof of Authority

45k72 k. Evidence of Authority. Most Cited Cases

When an attorney appears in court representing clients there is a strong presumption of his authority to represent such clients, and the burden is upon the party denying the authority to clearly show the want of authority.

[12] Attorney and Client 45 ↪72

45 Attorney and Client

45II Retainer and Authority

45k68 Proof of Authority

45k72 k. Evidence of Authority. Most Cited Cases

Evidence was sufficient to support finding that purchasers' attorney had authority to settle purchasers' claim against contractor, even though purchasers' proffered testimony was that they did not authorize settlement and that their attorney agreed to settlement without their consent; affidavit of purchasers' attorney stated that he had never accepted an offer of settlement without authorization from his clients.

[13] Costs 102 ↪194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

As a general rule, each litigant bears his or her own attorney fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.

[14] Costs 102 ↪194.44

102 Costs

102VIII Attorney Fees

102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases

There is authority in equity to award to the prevailing litigant his or her reasonable attorney fees as "costs," without express statutory authorization,

when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

[15] Costs 102 ↪194.32

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited Cases

Trial court did not abuse its discretion by awarding contractor attorney fees and costs it incurred to enforce agreement settling purchasers' action, where trial court determined that purchasers attempted to rescind a valid settlement agreement.

****731 *308 Syllabus by the Court**

1. " ' "The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus point 1, *Wickland v. American Travellers Life Insurance Co.*, 204 W.Va. 430, 513 S.E.2d 657 (1998).' Syllabus point 2, *Bowers v. Wurzburg*, 205 W.Va. 450, 519 S.E.2d 148 (1999)." Syllabus Point 1, *Alden v. Harpers Ferry Police Civil Serv. Comm'n*, 209 W.Va. 83, 543 S.E.2d 364 (2001).

2. " 'A meeting of the minds of the parties is a *sine qua non* of all contracts.' Syl. pt. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932)." Syllabus Point 1, *Burdette v. Burdette Realty Improvement, Inc.*, 214 W.Va. 448, 590 S.E.2d 641 (2003).

3. " '[T]he law favors and encourages the resolution of controversies by contracts **732 *309 of compromise and settlement rather than litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, *Sanders v. Roselawn Memorial Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968)." Syllabus Point

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 4

1, *Moreland v. Suttmiller*, 183 W.Va. 621, 397 S.E.2d 910 (1990).

4. “ ‘Where parties have made a settlement ..., such settlement is conclusive upon the parties thereto as to the correctness thereof in the absence of accident, mistake or fraud in making the same.’ Syllabus point 1, in part, *Calwell v. Caperton's Adm'rs*, 27 W.Va. 397 (1886).” Syllabus Point 7, *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (1999).

5. “When an attorney appears in court representing clients there is a strong presumption of his authority to represent such clients, and the burden is upon the party denying the authority to clearly show the want of authority.” Syllabus Point 1, *Miranosky v. Parson*, 152 W.Va. 241, 161 S.E.2d 665 (1968).

6. “There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as ‘costs,’ without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” Syllabus Point 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).
 David L. Grubb, The Grubb Law Group, Charleston, for the Sansons.

John R. Teare, Jr., David E. Potters, Bowles Rice McDavid Graff & Love P.L.L.C., Charleston, for Skyline Corporation.

PER CURIAM:

The appellants, Lisa Sanson and Monica Sanson, appeal the August 15, 2002 order of the Circuit Court of Kanawha County which denied their motion to alter or amend the judgment entered on June 7, 2002, enforcing a settlement agreement reached with the appellee, Skyline Corporation. The Sansons contend that they did not authorize their attorney to settle their claim against Skyline, and, as a result, the settlement agreement cannot be enforced and the circuit court's order should be reversed. We find no error.

I.

FACTS

On December 15, 1999, Lisa and Monica Sanson, mother and daughter (“the Sansons”), contracted with Brandywine Homes, Inc. (“Brandywine”) for the purchase, financing, and installation of a double-wide manufactured home which was constructed by Skyline Corporation (“Skyline”). The price of the manufactured home was \$57,020.00. Of that amount, the Sansons paid Brandywine \$25,000.00 down and were credited with \$8,000.00 for a trade-in. The Sansons obtained a loan for the balance from Brandywine which was later assigned to Conseco Finance Corporation (“Conseco”).^{FN1}

FN1. In its brief filed on appeal, Skyline relates that Conseco filed a voluntary bankruptcy petition with the United States Bankruptcy Court for the Northern District of Illinois on December 17, 2002, and, consequently, proceedings concerning Conseco are stayed pursuant to 11 U.S.C. § 362(a) and § 1301. The bankruptcy proceeding is of no consequence in this appeal, however, as the settlement agreement which the Sansons seek to set aside involves only Skyline.

During installation, a dispute arose between the Sansons and Brandywine regarding the number of blocks that would be used to set the home. In addition, the Sansons claimed that Brandywine's bulldozer operator damaged their property. Greg Lord, the attorney who represented the Sansons at the time,^{FN2} directed Brandywine to temporarily discontinue installation. In its brief filed in this Court, Skyline represents that installation remains unfinished, and the Sansons have not yet occupied the home.

FN2. The Sansons have had three different attorneys representing them at various times during the course of this litigation.

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 5

Initially, they hired Greg Lord to represent them before the civil action was filed. Next, David White filed suit on their behalf and represented them until the time that he believed a settlement agreement was reached with Skyline. When David White withdrew as counsel, the Sansons hired their current counsel, David Grubb, to represent them.

****733 *310** The Sansons' original trial counsel, David White, filed a lawsuit against Brandywine, Skyline, and Conesco alleging fraud, breach of express and implied warranties, and breach of contract on June 26, 2000. The Sansons sought rescission of the sales contract, compensatory and punitive damages, and attorney's fees. Following limited discovery, in an effort to avoid incurring the additional costs of continued litigation, Skyline's counsel approached Mr. White with a settlement proposal. Mr. White stated that he would discuss the offer with his clients and subsequently called Skyline's counsel to report that the offer was accepted. At that time, Mr. White provided the details regarding the manner in which the settlement check should be handled.

Three months later, on October 12, 2001, Mr. White returned the settlement check to Skyline's counsel with a letter stating that:

My client has declined to accept said sum as settlement and has indicated that she did not authorize me to accept it on her behalf. Accordingly, I have advised Ms. Sanson to obtain other counsel and indicated to her that I intend to withdraw from further handling of this matter.

On November 27, 2001, Skyline filed a motion to enforce the settlement.

The circuit court held a hearing on the motion on April 24, 2002. In addition to the evidence and arguments presented at the hearing, the court asked Skyline to seek an affidavit from Mr. White regarding his authorization of the settlement. In his affi-

davit which was presented to the circuit court, Mr. White explained that he "contacted counsel for Skyline Corporation and informed counsel that Plaintiffs would accept Skyline's settlement proposal of \$5,000.00, in exchange for execution of a release and dismissal of all claims against Skyline with prejudice." He further explained that the attorney client privilege had not been waived regarding this matter. However, he also stated that, "I have never, and would never, in any case, accept an offer without authorization from my client."

After reviewing the entire record and considering the arguments presented by counsel, the circuit court entered an order on June 7, 2002, which granted Skyline's motion to enforce the settlement and awarded attorney's fees and costs. On June 21, 2002, the Sansons filed a motion to alter or amend the judgment.^{FN3} The circuit court entered its final order denying the motion on August 15, 2002. It is from this order that the Sansons appeal.

FN3. West Virginia Rule of Civil Procedure 59(e) states that "[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment."

II.

STANDARD OF REVIEW

[1][2][3] In Syllabus Point 1 of *Alden v. Harpers Ferry Police Civil Serv. Comm'n*, 209 W.Va. 83, 543 S.E.2d 364 (2001), this Court held that:

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.' Syllabus point 1, *Wickland v. American Travellers Life Insurance Co.*, 204 W.Va. 430, 513 S.E.2d

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 6

657 (1998).” Syllabus point 2, *Bowers v. Wurzburg*, 205 W.Va. 450, 519 S.E.2d 148 (1999).

The underlying judgment upon which the motion to alter or amend judgment is based in this case is the circuit court's order enforcing the settlement between the Sansons and Skyline and awarding attorney's fees and costs to Skyline. We recently noted in *Burdette v. Burdette Realty Improvement, Inc.*, 214 W.Va. 448, 452, 590 S.E.2d 641, 645 (2003), that, “[T]his Court employs an abuse of discretion standard when reviewing a circuit court order enforcing a settlement agreement.” We also apply the abuse of discretion standard of review to an award of attorney's fees. See *Beto v. Stewart*, 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003) (“The decision to award or not to award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal **734 *311 except in cases of abuse.”). With this standard in mind, we now consider the parties' arguments.

III.

DISCUSSION

On appeal, the Sansons contend that the circuit court erred by granting Skyline's motion to enforce the settlement agreement absent clear evidence of a meeting of the minds. The Sansons further assert that the court erred by refusing to conduct an evidentiary hearing to determine whether there was a meeting of the minds sufficient to enforce the settlement agreement and by granting Skyline's motion for an award of attorney's fees and costs without any evidence or allegation of bad faith.^{FN4} Conversely, Skyline avers that the circuit court held a public hearing on the motion in open court and the record supports the court's factual determination that a settlement agreement was indeed reached by the parties.^{FN5} As a result, says Skyline, the circuit court correctly concluded the Sansons agreed to

settle their claims and later changed their minds which caused Skyline to incur fees and costs after the company fully performed its obligations under the agreement. Skyline contends that it should not have to bear this financial burden.

FN4. In support of their argument, the Sansons rely upon *Hensley v. Alcon Laboratories, Inc.*, 277 F.3d 535 (4th Cir.2002). While this Court sometimes considers and even adopts persuasive authority from other jurisdictions, we need not do so in this case because our own prior decisions resolve the issues raised herein.

FN5. Skyline bolsters its case by stating that no injustice exists in this case nor was public policy violated, especially in light of the fact that Skyline did not participate in the events which caused the appellants' dissatisfaction and Brandywine is still in the case for trial.

[4][5][6] It is well-established that settlement agreements are contracts and therefore, “are to be construed ‘as any other contract.’ ” *Burdette*, 214 W.Va. at 452, 590 S.E.2d at 645, quoting *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979). Likewise, “[i]t is well-understood that ‘[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties.’ 15A C.J.S. *Compromise & Settlement* § 7(1) (1967).” *O'Connor v. GCC Beverages, Inc.*, 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990). As this Court observed in Syllabus Point 1 of *Burdette*, “ ‘A meeting of the minds of the parties is a *sine qua non* of all contracts.’ Syl. pt. 1, *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932).”

[7][8] Historically, this Court has enforced settlement agreements which were fairly made and which were not in violation of the law or public policy. As we explained in Syllabus Point 1 of *Moreland v.*

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
 (Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 7

Suttmiller, 183 W.Va. 621, 397 S.E.2d 910 (1990), “ [T]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.’ Syl. Pt. 1, *Sanders v. Roselawn Memorial Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968).” Consequently, “ [w]here parties have made a settlement ..., such settlement is conclusive upon the parties thereto as to the correctness thereof in the absence of accident, mistake or fraud in making the same.’ Syllabus point 1, in part, *Calwell v. Caperton’s Adm’rs*, 27 W.Va. 397 (1886).” Syllabus Point 7, *DeVane v. Kennedy*, 205 W.Va. 519, 519 S.E.2d 622 (1999).

In this case, the circuit court determined that the parties “did, in fact, reach an enforceable agreement to settle the Plaintiff’s claims against Skyline Corporation.” Contrary to the Sansons’ contention, the court held an evidentiary hearing on this matter on April 24, 2002. Although the Sansons did not provide testimony, their attorney proffered that they would testify that they did not authorize a settlement; that they told Mr. White they did not want to settle for the amount proposed by Skyline; and that Mr. White agreed to the settlement without their consent. Skyline waived its opportunity to cross-examine the Sansons, stating that it *312 **735 “fully anticipate [d] that the testimony would match ... the proffer.” Thereafter, the circuit court expressed its concern regarding whether or not there was a “real meeting of the minds of the actual parties.” The court then gave Skyline the opportunity to obtain an affidavit from Mr. White before ruling on the matter. Subsequent to the submission of Mr. White’s affidavit, the circuit court ruled that the settlement agreement was enforceable.^{FN6}

FN6. Skyline indicates in its brief that it also submitted a tape recording of Mr. White confirming the settlement.

[9] In light of the above, we find no merit to the Sansons’ argument that the circuit court failed to

hold an evidentiary hearing. While no actual testimony was presented, the court was certainly made aware of the Sansons’ contention that no settlement was reached. In fact, the court stated that, “I’m going to accept that her testimony would be that she did not authorize [the settlement].” Having thoroughly reviewed the record, we find that the Sansons, as well as Skyline, were given sufficient opportunity to be heard before the court rendered its decision. Moreover, we believe the circuit court was fully aware of the circumstances under which the settlement was made.

[10][11] We further find no error with regard to the circuit court’s decision to enforce the settlement agreement. While this Court has recognized that “[t]he mere relation of attorney and client does not clothe the attorney with implied authority to compromise a claim of the client,” Syllabus Point 5, *Dwight v. Hazlett*, 107 W.Va. 192, 147 S.E. 877 (1929), we have also held that “[w]hen an attorney appears in court representing clients there is a strong presumption of his authority to represent such clients, and the burden is upon the party denying the authority to clearly show the want of authority.” Syllabus Point 1, *Miranosky v. Parson*, 152 W.Va. 241, 161 S.E.2d 665 (1968).

[12] As set forth above, the Sansons proffered testimony that they did not authorize their attorney, Mr. White, to settle their claim against Skyline. In response, Skyline submitted an affidavit from Mr. White. After considering this evidence and the oral arguments of counsel, the circuit court concluded that an enforceable settlement agreement had been made by the parties. In reaching this decision, the court obviously found the evidence submitted by Skyline to be more credible. Based on our review of that evidence, as well as the entire record, we cannot say the court abused its discretion by enforcing the settlement agreement. *See Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 377, 175 S.E.2d 452, 457 (1970) (“Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should

599 S.E.2d 730
 215 W.Va. 307, 599 S.E.2d 730
(Cite as: 215 W.Va. 307, 599 S.E.2d 730)

Page 8

not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.” (citation omitted)).

W.Va.,2004.
 Sanson v. Brandywine Homes, Inc.
 215 W.Va. 307, 599 S.E.2d 730

END OF DOCUMENT

[13][14] Finally, we find no abuse of discretion with regard to the circuit court's decision to award attorney's fees and costs to Skyline. “As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.” Syllabus Point 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). However, “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as ‘costs,’ without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” Syllabus Point 3, *Sally-Mike Properties*.

[15] In this case, Skyline fully performed its obligations by tendering the settlement agreement and release after it was notified that the Sansons accepted the settlement. Three months later, the Sansons returned the settlement check, claiming that no agreement had ever been reached. As a result, Skyline was forced to file the motion to enforce the settlement agreement. The circuit court concluded that Skyline should not have to bear the financial burden caused by the Sansons' attempt to rescind a valid and enforceable settlement agreement. We agree. **736 *313 Having determined that a valid settlement agreement was made, we do not believe the circuit court abused its discretion by ordering the Sansons to pay Skyline's attorney's fees and costs incurred to enforce the settlement.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Kanawha County entered on August 15, 2002, is affirmed.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<u>CO/ for William Oseran</u> Charles E. Watts Roy L. Lundin Oseran Hahn Spring Straight & Watts PS 850 Skyline Tower 10900 NE 4th St. Bellevue, WA 98004-5873	<input type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-Mail <input type="checkbox"/> Via Overnight Mail

DATED this 17th day of September, 2010, at Seattle, Washington.



Vanessa Acierto
Legal Secretary