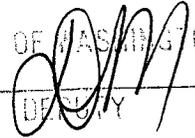


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DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

No. 42109-7-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ALLEN METTLER AND MAY METTLER, D/B/A
ARM CONSTRUCTION,

Appellant,

vs.

GRAY LUMBER COMPANY,

Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This court should reverse the trial court's summary judgment dismissal of ARM's claim because Mac Gray expressly waived any disclaimers and exclusions by declaring that Gray would be responsible for the consequences of its breach and would make ARM whole. Gray has failed to offer any authority for its argument against waiver and has failed to offer any plausible alternative meaning for Mr. Gray's uncontroverted statements. Mr. Gray's statements expressly waived Gray's right to rely on disclaimers or exclusions of consequential damages. Gray was not entitled to judgment as a matter of law. At the very least, Mr. Gray's statements created an issue of material fact as to whether there was a waiver.

Even if Mr. Gray's statements were not a waiver, this court should reverse summary judgment dismissal of ARM's claim because Gray failed to meet its burden of showing undisputed facts on which it would be entitled to judgment as a matter of law. Gray failed to present admissible evidence of the contract terms on which its motion relied. Gray did not authenticate its documents under ER 901, so they were inadmissible. Gray had the burden of proof, so ARM had no obligation to produce alternative documents. Gray's documents should have been stricken. Without any supporting evidence, Gray's motion for summary judgment should have

been denied.

Even if Gray's evidence could be considered, there remained issues of fact as to the terms of the contract, which made summary judgment improper. Without any supporting or explanatory evidence, the documents had to speak for themselves. The purported credit agreement was ambiguous on its face as to whether its terms applied to the May, 2006, lumber purchase. ARM never admitted the alleged terms applied, and the trial court should not have inferred such an admission. ARM's assertion that issues of fact remain is not speculative, but is based on the specific facts contained in Gray's documents. There were questions of material fact that could not be answered from the evidence before the court, making summary judgment improper. This court should reverse the erroneous summary judgment dismissal of ARM's claim.

II. ARGUMENT

This court should reverse the trial court's erroneous summary judgment dismissal of ARM's claim. At the work site after the accident, Mac Gray expressly waived any disclaimers and exclusions that may have been in the contract. Even if this was not waiver, summary judgment was improper because Gray failed to meet its burden of showing undisputed facts on which it would be entitled to judgment as a matter of law. Gray

failed to present admissible evidence of the contract terms on which its motion relied. Even if Gray's evidence could be considered, there remained genuine issues of fact as to the terms of the contract, which made summary judgment improper.

A. Mac Gray's Uncontroverted Statements Were an Express Waiver of Disclaimers and Exclusions.

There are two types of waiver: express waiver and waiver implied by conduct. *Reynolds Metals Co. v. Elec. Smith Const. & Equip. Co.*, 4 Wn. App. 695, 700-01, 483 P.2d 880 (1971). Express waiver is found through statements expressly declared by the waiving party. *Id.* There are no magic words required. The party does not have to expressly refer to the contract or to any clause therein. The party does not have to use the word "waive" or "waiver" for a waiver to be effective. If the party's express declaration is inconsistent with later assertion of a known contractual right, the declaration is an express waiver of that right. *See Sherman v. Lunsford*, 44 Wn. App. 858, 862, 723 P.2d 1176 (1986) (holding that Lunsford had orally waived his right to full payment at the contract date).

Mac Gray certainly knew the rights Gray asserted in its credit agreements and on its invoices. Under those terms, if they applied, Gray could only be liable for the cost of the lumber. Mr. Gray inspected ARM's

work site. He knew about the injuries to ARM's workers. He knew the consequences of the failed lumber would be far-reaching. With all of this knowledge he expressly declared that Gray would not only replace the failed lumber (cost of the lumber) but would also "be responsible for the consequences" and "make ARM whole."¹ These uncontested² statements are entirely inconsistent with the purported contract rights Gray now asserts. The statements were an intentional relinquishment of those rights.

In its response, Gray makes a number of unsupported and untenable arguments in an attempt to escape from this waiver. These arguments are nothing but hot air. This court should not let itself be blown astray by these false winds.

Gray tries to blur the line between express waiver and implied

¹ Gray claims, in a footnote, that Mac Gray's statement as related in Allen Mettler's declaration is inconsistent with ARM's previous discovery responses. Allen Mettler's declaration stated: "Mr. Gray accepted my rejection and said, 'We sent the wrong stuff. We'll be responsible for the consequences.' He told us that Gray Lumber would replace the goods and would make ARM whole." (CP at 74.) ARM's previous discovery responses stated: "Mac Gray came to the site, admitted liability, promised to make ARM whole." (CP at 30.) "Gray accepted the rejection of the acceptance, promised to replace the material with proper grade lumber, and to make ARM whole." (CP at 35, repeated at 36.) These statements are entirely consistent, all evidencing an intent to be responsible for more than just the value of the lumber. Even if they were inconsistent, that could only raise a question of credibility that the court may not determine on summary judgment. *See Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006). This court would have to reverse dismissal.

² Gray asserts that it disputes the alleged statements. It did not do so before the trial court. It could have offered rebuttal testimony disputing the statements in its reply, but it did not. The statements were uncontested for purposes of summary judgment and this appeal.

waiver. ARM has been clear in its opening brief and in this reply that Gray's waiver was express. Mac Gray's statements alone were sufficient to establish the waiver. Only an implied waiver requires proof of unequivocal acts, from which the waiver could be implied. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003). Even if the statements were not an express waiver, they were an unequivocal act by Mr. Gray, unambiguously evidencing his intent to waive any disclaimers and exclusions of consequential damages.

Mr. Gray's statements were clearly inconsistent with any intent to later assert the disclaimers and exclusions. Gray attempts to cast the statements as ambiguous, claiming that they could mean curing the non-conforming tender or "something entirely different in scope and effect." (Respondent's Brief at 13.) Yet Gray is unable to suggest even one plausible alternative meaning.

The notion that being responsible for the consequences could mean simply curing the non-conforming tender strains all credulity. Curing the tender has absolutely nothing to do with being responsible for the consequences of Gray's breach. Cure merely corrects an error—it does not correct, nor take responsibility for, the *consequences* that follow from that error. If, as here, consequential damages have already occurred, cure

cannot make the injured party whole. Mr. Gray's made his statements immediately after viewing the work site and the far-reaching consequences of Gray's delivery of inferior lumber. In that context, "be[ing] responsible for the consequences" and "mak[ing] ARM whole" could not possibly mean only providing the correct lumber.

Gray attempts to separate the consequences of its breach from the consequences of the accident that was proximately caused by that breach. In doing so, Gray raises allegations related to issues of causation, contributory fault, and foreseeability—issues that Gray specifically declined to raise in its motion for summary judgment. (CP at 9.) These issues were not before the trial court and cannot support summary judgment in Gray's favor. What is clear is that Mac Gray knew that the consequences of Gray's breach extended far beyond the purchase price of the lumber. By declaring that Gray would be responsible for the consequences, he opened the door to greater liability. The full extent of Gray's liability for consequential damages can be properly determined at trial.

Gray argues, without any supporting authority, that a lack of detailed conversation or response from ARM regarding the waiver is "fatal." But waiver, unlike modification of a contract, is unilateral.

Cornerstone Equip. Leasing, Inc. v. MacLeod, 159 Wn. App. 899, 909,

247 P.3d 790 (2011) (citing *Panorama Residential Protective Ass'n v. Panorama Corp.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982)). Only the express declaration of the waiving party is required. There are no requirements of offer and acceptance, consideration, or meeting of the minds. *Id.*; *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 335, 493 P.2d 782 (1972); 25 Wash. Prac., *Contract Law And Practice* § 10:10. While ARM asserted a modification before the trial court, it has not raised that issue on appeal.³ Mr. Gray's statements were a unilateral, express waiver of any disclaimers or exclusions, fully effective without any stated acceptance, confirmation, or discussion by ARM.

Mr. Gray's statements were entirely and unambiguously inconsistent with an intent to later assert disclaimers or exclusions of consequential damages. Thus Gray could not be entitled to judgment as a matter of law on the basis of those waived terms, even if they were proven to have been a part of the original contract. At the very least, there was an issue of material fact as to whether there was a waiver. This court should reverse the trial court's erroneous summary judgment dismissal of ARM's claim.

³ Since ARM has not raised the issue of contract modification on appeal, the court need not consider Gray's arguments on that issue, which consume pages 10-12 of Respondent's Brief.

B. Gray Failed to Prove the Disclaimers and Exclusions Applied to the Lumber Purchase.

“The moving party has the burden of showing that there is no genuine issue as to any material fact.” *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). “If the moving party does not sustain its burden, summary judgment should not be granted.” *Hash by Hash v. Children’s Orthopedic Hospital*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The burden does not shift to the nonmoving party unless the moving party first meets its own burden.

Gray’s motion for summary judgment relied entirely upon written disclaimers of warranties and exclusions of remedies, but Gray failed to present admissible evidence that the disclaimers and exclusions were part of the contract that governed the May, 2006, lumber purchase. Without undisputed evidence of the material terms urged by Gray, the trial court should not have granted Gray’s motion. This court should reverse.

Gray’s only evidence was presented through the declaration of its attorney, who had no personal knowledge and was incompetent to authenticate or otherwise testify regarding the documents and photos presented. Gray’s evidence was inadmissible and should have been stricken. Even if Gray’s evidence could be considered, there remained

issues of fact as to the terms of the contract, which made summary judgment improper.

1. Gray never authenticated the documents on which its motion relied.

Documents offered to support summary judgment must be authenticated in accordance with ER 901 in order to be admissible. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004). “A court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *King County Fire Prot. Districts No. 16, No. 36 & No. 40 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

Gray argues that *Int'l Ultimate* supports its position, but considers only a portion of the court’s reasoning in that case. The court indicated that the evidence rules require some evidence sufficient to support a finding that the document is what it purports to be. *Id.* at 746. If a document has already been authenticated by evidence, an attorney may rely on that authentication when presenting the document by way of the attorney’s declaration. *Id.* One form of authentication by evidence is testimony of a witness with personal knowledge of the document. *Id.* at 747; ER 901(b)(1). Gray did not present testimony from a single witness

(other than Mr. Hauschild, who has no personal knowledge of the documents). The documents were not authenticated by evidence.

The *Int'l Ultimate* court went on further to adopt an alternative rule for authenticating documents for purposes of summary judgment:

We adopt the federal interpretation of ER 901, and hold that authentication may be satisfied *when the party challenging the document originally provided it through discovery.*

Id. at 748 (emphasis added). It is clear that this rule extends only to documents produced in discovery by the party *challenging* admissibility, not to documents produced in discovery by the same party that is offering them as evidence. The federal cases cited by the *Int'l Ultimate* court all had this same limitation. *Id.* at 747-48. The rule is, in effect, one of estoppel: A party that produces a document in discovery cannot later object that the document is not authentic. As the party that produced the documents at issue here, Gray is not entitled to take advantage of this rule. If the rule operated to the benefit of the proponent of a document, a party could circumvent ER 901 and authenticate any document it wished by simply producing the document in discovery prior to a hearing on summary judgment.

Gray also complains that ARM did not offer alternative documents

or some other evidence to contest the authenticity of Gray's documents. Gray's argument improperly and prematurely shifts the burden onto ARM. As the moving party, Gray has the initial burden of producing admissible evidence. This includes the burden of authenticating that evidence. Gray failed to authenticate its documents. Thus the documents were inadmissible and should not have been considered by the trial court. Without admissible evidence of the terms of the contract, Gray failed to meet its initial burden on summary judgment. In this situation, the burden does not shift to ARM—there was no admissible evidence for ARM to refute. Gray's motion for summary judgment should have been denied.

2. Even if Gray's evidence was admissible, Gray failed to meet its burden and there remained genuine issues of material fact.

Gray improperly attempts to shift the burden of proof to ARM, arguing that ARM failed to show it was entitled to go forward on its claims. While ARM would have the burden of proof at trial, Gray had the burden of proving, on its motion for summary judgment, undisputed facts on which it was entitled to judgment as a matter of law. In order to sustain its burden, Gray had to show undisputed facts establishing the terms of the contract governing the lumber purchase, particularly the waivers and exclusions upon which its argument for summary judgment relied. Gray

failed to meet that burden.

The purported credit agreement, even if admissible, was ambiguous on its face as to whether its terms even applied to the May, 2006, lumber purchase. Gray offered no evidence supporting or explaining the documents. Contrary to Gray's assertion that it established that the terms of the purported credit agreement applied, neither the Complaint nor Mr. Mettler's Declaration admit that the terms in the document offered by Gray applied to the lumber purchase. The Complaint stated: "Arm placed an order with Gray, with whom Arm has had a written purchase/credit agreement for years..." (CP at 2.) Mr. Mettler stated: "Arm had a credit agreement with Gray Lumber." (CP at 73.) These statements admit the existence of an agreement, but do not admit the existence or applicability of any particular document or terms. In fact, ARM's entire argument in response to the motion for summary judgment was premised on ARM's assertion that the purported terms did not apply to the lumber purchase.

The trial court erroneously accepted Gray's reasoning, improperly inferring from the Complaint and Mr. Mettler's Declaration that the terms of Gray's document applied. (*See* RP at 24.) There was no direct evidence from either party that those terms applied. The trial court could only arrive at its conclusion by inference, but on summary judgment all inferences

must be drawn in a light favorable to the nonmoving party, in this case ARM. A reasonable fact-finder could have inferred from the Complaint and Mr. Mettler's declaration, together with Gray's document, that the lumber purchase was governed by a different set of terms than those in the purported credit agreement. Because this reasonable inference could have been drawn favorable to ARM, it was entirely improper for the trial court to infer, against ARM, that the terms applied. This court should not allow this improper inference to stand. This court should reverse the trial court's erroneous summary judgment dismissal of ARM's claims.

Gray acknowledges that there is no evidence in the record to explain what the handwritten notations "exp 7/05" and "renew" mean. (Respondent's Brief at 9.) Gray argues that this lack of supporting evidence makes the notations irrelevant, but in fact it is this lack of supporting evidence that should have made the notations fatal to Gray's motion for summary judgment. Summary judgment is improper if there are any genuine issues of material fact. This principle includes not only contradicting facts, but also unanswerable questions. *See Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 916, 757 P.2d 507 (1988) ("We find it impossible to uphold a ruling that there is no genuine issue as to any material fact when the record contains all questions

and no facts.”); accord, *Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 297-98, 914 P.2d 119 (1996).

From the evidence that was before the trial court, it was impossible to determine the meaning of the notations. The notations, though not explained by evidence, gave rise to a reasonable inference that the purported credit agreement had expired and did not apply to the lumber purchase. If true, this would defeat Gray’s defense of disclaimers and exclusions, making the meaning of the notations a material fact. There was a genuine issue of material fact because the meaning of the notations could not be determined from the evidence. The trial court erred in granting Gray’s motion in the face of this genuine issue of material fact.

Gray complains that ARM’s argument that the credit agreement expired was speculative and not supported by admissible evidence. This is simply untrue. ARM’s argument was based on the specific facts of the notations themselves. The notations appeared on the face of Gray’s document. They must have had some meaning. They could reasonably have meant that the terms of the document did not apply. In the absence of contrary evidence, summary judgment was improper.

Gray complains that ARM should have provided some explanatory evidence, but this ignores the fact that the document was always in Gray’s

possession and control. The notations were made by Gray. Only Gray knew what the notations meant. ARM could not have presented any explanatory evidence, so it did the only thing it could: it pointed the trial court's attention to the notations, the unanswered question of their meaning, and the reasonable inferences that should be drawn. Gray, not ARM, had the burden of proving the terms upon which its motion relied. Gray failed to do so. The burden never shifted to ARM to produce contradictory evidence.

Summary judgment was improper because there were genuine issues of material fact. This court should reverse and remand for further proceedings.

III. CONCLUSION

The trial court erred in dismissing ARM's claim on summary judgment. Gray expressly waived any disclaimers and exclusions by declaring that Gray would be responsible for the consequences of its breach and would make ARM whole. Even if there was no waiver, Gray failed to meet its burden on summary judgment. Gray's only evidence was inadmissible for lack of authentication. Even if admissible, there were genuine issues of material fact as to the terms of the contract.

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This court should reverse the trial court's erroneous summary judgment dismissal of ARM's claims and remand for further proceedings.

STATE OF WASHINGTON
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Respectfully Submitted this 8th day of September, 2011.

CUSHMAN LAW OFFICES, P.S.



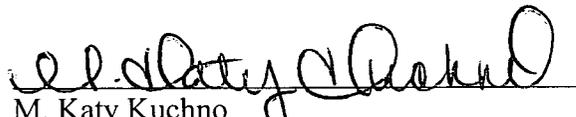
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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 8, 2011, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	Gordon G. Hauschild Wood Smith Henning & Berman, LLP 520 Pike Street, Suite 1205 Seattle, WA 98101-4001	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 8th day of September, 2011 in Olympia, Washington.



M. Katy Kuchno
Paralegal to Kevin Hochhalter