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Court of Appeals
Division III
State of Washington

No. 31946-6

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

DONALD R. RUSSELL

Respondent

vs.

JOSHUA T. AUAYAN and IDA AUAYAN

Appellants

RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Respondents do not assign error the Decisions and Orders of the Trial Court.

- 1) The Stipulated Settlement Agreement is a valid, enforceable agreement.
- 2) The Trial Court properly denied the motion to vacate the Stipulated Settlement Agreement.
- 3) The Trial Court properly found the Defendant/Appellant to be in contempt for intentionally violating the Stipulated Settlement Agreement.
- 4) The Trial Court Properly Awarded Plaintiff/Respondent attorney fees and costs as losses for bringing the Motion for Contempt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can Appellant appeal the substantive content of stipulated settlement agreement more than 30 days after the entry of the Agreement?
2. Did the Trial Court err in denying Appellant's motion to vacate a stipulated settlement agreement where no abuse of discretion was alleged or shown?
3. Did the Trial Court abuse its discretion in refusing to vacate a stipulated settlement agreement where Appellant entered into the agreement pursuant to CR 2A, in open court, with knowing consent and written signature, and with the advice of counsel?
4. Did the Trial Court abuse its discretion in refusing to vacate a stipulated settlement agreement where it expressly found that the settlement agreement was not unconscionable?
5. Did the Trial Court abuse its discretion when it refused to vacate the stipulated settlement agreement where only one of the two defendants actually attended court to review the agreement with court and confirm assent, and the other defendant appeared only through counsel, and was the agreement nonetheless valid as to the defendant who participated in the CR 2A hearing?

6. Did the Trial Court abuse its discretion when it refused to vacate a stipulated settlement agreement between private parties in a civil action pursuant to Wash. Const. Art. 1, § 7 where no government action was involved?
7. Did the Trial Court abuse its discretion in refusing to vacate a stipulated settlement agreement where the agreement contained terms that were different than those in the original complaint?
8. Did the Trial Court abuse its discretion in refusing to vacate a stipulated settlement agreement where it expressly found that the stipulated settlement agreement did not require findings of fact?
9. Did the Trial Court err as a matter of law in entering an order of contempt where it found that the Defendant/Appellant had willfully violated the terms of a valid stipulated settlement agreement?
10. Where Appellant contends that certain restrictive covenants are invalid, does his reliance on the attorney's fee provision in those covenants provide sufficient legal authority to award him attorney fees on appeal pursuant to RAP 18.1?
11. Where a court awards a party attorney's fees for bringing an action in contempt of court, should that award be vacated in the absence of findings of fact and conclusions of law?

12. Where Respondent is required to defend an order of contempt on appeal, is Respondent entitled to attorney fees for defending that appeal?

STATEMENT OF THE CASE

This dispute began when Donald R. Russell, Respondent (Russell), filed a Complaint for Declaratory Relief and Injunction on March 23, 2012 (CP 1-56), seeking to enforce certain restrictive covenants of record (Covenants) pertaining to parcels of land owned by Russell and his neighbors, Joshua Auayan and Ida Auayan, Appellants (Auayan). Russell sought to enjoin the Auayans, and others in active concert with them, from maintaining a nuisance on their property (pursuant to RCW 7.48.010 and 7.48.120 and under the Covenants' prohibition against temporary structures, noxious and offensive activities, as well as the provisions of the Covenants prohibiting the accumulation of refuse, garbage or abandoned vehicles or the storage of materials not used in connection the operation of a household) (*Id.*). Russell also sought to enjoin the Auayans from using the easement road adjacent to the Auayan property but leading to the Russell property, due to the Auayans' (and others acting in concert with them), intentional abuse and misuse of the easement road improved and maintained solely by Russell (*Id.*). Service was made upon the Auayans at their place of residence on March 27, 2012 (CP 252-253). On April 13, 2012 Joshua Auayan entered a pro se notice of appearance (CP 254). On May 2, 2012, a Notice of Appearance for **both** Joshua and Ida Auayan was

filed by Eowen S. Rosentrater and Kelsey L. Kittleson of the Law Office of Eowen S. Rosentrater, PLLC, Spokane, Washington (CP 255-256).

After negotiations leading up to the trial date and a postponement of a few hours on the date of trial so that negotiations could continue throughout the morning on the day set for trial, April 25, 2013, the parties, represented by counsel, entered into a Stipulated Settlement Agreement later in the afternoon (CP 79-94: Transcript of Hearing April 25, 2013, CP 176-211). At the April 25, 2013 afternoon hearing, Judge Patrick A. Monasmith, reviewed each provision of the Stipulated Settlement Agreement in extensive detail with the parties' attorneys, Chris A. Montgomery for Russell, and Kelsey L. Kittleson for the Auayans. Joshua Auayan and Donald Russell were present for the negotiations and at the hearing; Ida Auayan was not. (Transcript of Hearing, April 25, 2013, filed August 13, 2013, CP 176-211). Nonetheless, in her Declaration dated August 17, 2013, Ida M. Auayan, stated "I had an attorney, as evidenced by the Notice of Appearance executed by Kelsey L. Kittleson, filed on May 2, 2012" (CP 238). Judge Monasmith carefully questioned Mr. Auayan directly about his ability to follow his printed copy of the agreement as it was discussed in court, Auayan's affirmation that he had read it and that he, Auayan, had no trouble understanding or reading the English language, and that he understood it was a binding, final

agreement. (CP 176-211, April 25, 2013 TR at 26 & 27). With Joshua Auayan's and Counsels' consent, Judge Monasmith appointed Terry L. Williams as Commissioner of Deeds pursuant to RCW 6.28.010 et. seq. for Defendant Ida M. Auayan (CP 77-78), who signed the Stipulated Settlement Agreement (CP 79-94) and the Termination of Easement (CP 344-346) on behalf of Ida Auayan. The Stipulated Settlement Agreement (CP 79-94), the Stipulation and Order Appointing a Commissioner of Deeds (CP 77-78) were filed April 25, 2013; the Stipulation to Entry of an Order of Dismissal with Prejudice (CP 95-96) and the Order of Dismissal with Prejudice (CP 97-98) were entered on April 26, 2013. The Termination of Easement was recorded on July 17, 2013 under Stevens County Auditor's File No. 20130005797 (CP 344-346). *Neither* Joshua Auayan nor Ida Auayan appealed any of these Orders.

On July 1, 2013, Respondent Russell filed a Motion and Affidavit for a Finding of Contempt Against Defendants Joshua and Ida Auayan for violation of the Stipulated Settlement Agreement (CP 99-135). On July 23, 2013, Attorney Dale Russell (no relation to Respondent Donald Russell) filed a Limited Notice of Appearance for the Hearing on the Motion and Affidavit for a Finding of Contempt against Defendant, on behalf of Joshua Auayan (CP 266). On August 2, 2013, Auayan filed a Response to Motion and Affidavit For a Finding of Contempt Against

Defendant (CP 156-165) and a Motion to Vacate the Stipulated Settlement Agreement Order Entered April 25, 2013 (CP 166-175). In the Affidavits attached to each document, Joshua Auayan, claimed, among other things, that his “attorney never allowed me or any member of my family to read the settlement agreement or have any input as to whether or not the settlement arrangements, I was agreeing to, were even possible, especially since I have very limited financial ability and no credit ability.” (CP 158, Ins. 9-13). He recognized the existence of the Restrictive Covenant (CP 157 at Ins 19-20), but basically stated he could not afford to, nor did he want to, comply with the Stipulated Settlement Agreement, and that being required to do so is a violation of his right to privacy and quiet enjoyment of his property. He demanded that Respondent Russell prove the allegations that were asserted in the original Complaint (that was dismissed as part of the Stipulated Settlement Agreement) and asked the court to vacate the Stipulated Settlement Agreement Order (CP 156-175).

Joshua Auayan’s Motion to Vacate and Russell’s Motion for Contempt were heard before the Honorable Allen C. Nielson on August 20, 2013 (Transcript of August 20, 2013 Hearing, CP 274-309). Judge Nielson denied Joshua Auayan’s Motion to Vacate by Order entered August 20, 2013 (CP 241-242) and entered an Order Finding Defendants in Contempt of the Stipulated Settlement Agreement Dated April 25, 2013

(CP 267-272) on August 21, 2013. This Order applied to both Joshua and Ida Auayan.

Joshua Auayan, through his attorney, filed Notice of Appeal on September 17, 2013 of the denial of his motion to vacate the Stipulated Settlement Agreement and of the order finding him in contempt. Ida Auayan did not appeal, nor does Dale Russell, counsel for Joshua Auayan, represent her in this matter. (Limited Notice of Appearance, CP 266; Notice of Appeal to the Court of Appeals, CP 273).

ARGUMENT

I. Joshua Auayan's Challenges To The Substance Of The Stipulated Settlement Agreement Should Have Been Appealed Within Thirty (30) Days Of The Entry Of The Stipulated Settlement Agreement.

In his Motion to Vacate the Stipulated Settlement Agreement Order Entered April 25, 2013, Joshua Auayan stated that it was made pursuant to CR 60 (b) (1) and his attached Declaration. CR 60(b) (1) states: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order."

A trial court's ruling on a motion to vacate a trial court's disposition under subsection (b) will not be disturbed on appeal unless the

trial court denying the motion has abused its discretion. A court abuses its discretion only where it can be said no reasonable person would take the view adopted by the trial court. *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 722, 934 P.2d 715 (1997). Rule 60 (b) governing relief from judgments and orders in both civil and criminal cases does not authorize the vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. *Burlingame v. Consolidated Mines & Smelting Co.*, 106 Wn.2d 328, 722 P.2d 67 (1986).

Joshua Auayan claims the Trial Court erred in refusing to vacate the Stipulated Settlement Agreement and in entering the Contempt Order because the Agreement was void due to 1) substantive unconscionability, 2) violation of public policy protecting his privacy and quiet enjoyment of his property interests, and 3) the fact that Ida Auayan did not sign or assent to the Agreement. He also claims that the Trial Court erred in refusing to vacate the Stipulated Settlement Agreement because the Agreement contained terms not prayed for in Respondent Russell's original complaint and because that the Court did not make specific findings of fact regarding the validity of the restrictive covenants and reasonableness of Russell's annoyances. Each of these claims in nothing

more than an attempt to re-litigate the substance of the parties' Stipulated Settlement Agreement.

An appeal from the denial of a CR 60(b) motion is not a substitute for an appeal and is limited to the propriety of the denial, *not* the impropriety of the underlying order. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). Again, neither Joshua Auayan nor Ida Auayan appealed the April 25, 2013 Stipulated Agreement and Orders pertaining thereto. Ida Auayan has not appealed the Trial Court's refusal to vacate the Stipulated Settlement Agreement or Contempt Order. Any issues related to the substantive content of the Stipulated Settlement Agreement are barred by the failure to appeal. Auayan has failed to assert, much less demonstrate, that Judge Nielson abused his discretion by denying the Motion to Vacate the Stipulated Settlement Agreement.

Nonetheless, without waiving this argument, Russell will address each of the individual errors alleged by Auayan.

II. The Stipulated Settlement Agreement Is Binding Because Appellant Auayan Entered Into The Agreement With Informed Consent.

CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in

open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

Stipulations conforming to this rule are binding unless fraud, mistake, misunderstanding or lack of jurisdiction are involved. *De Lisle v. FMC Corp.*, 41 Wn. App. 596, 705 P.2d 283 (1985). Stipulation by attorneys in open court, or in writing, are binding on their clients. *Smyth Worldwide Movers, Inc. v. Whitney*, 6 Wn. App. 176, 491 P.2d 1356 (1971).

RCW 2.44.010(1) gives an attorney authority

[to bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him or her, or signed by the party against whom the same is alleged, or his or her attorney].

To support his Motion to Vacate, Joshua Auayan claimed, in his Affidavit, that his “attorney never allowed me or any member of my family to read the settlement agreement or have any input as to whether or not the settlement arrangements, I was agreeing to, were even possible, especially since I have very limited financial ability and no credit ability.”

A review of the April 25, 2013 Transcript of Hearing (CP 176-211), shows that Judge Monasmith not only carefully reviewed each

provision of the proposed Stipulated Settlement Agreement with the parties' attorneys in open court, but that Joshua Auayan was present at that hearing and engaged in the following exchange with the court:

THE COURT: Let me turn first to Mr. Auayan. Mr. Auayan, it sounds like there might be a few modifications to the document as it was printed out. Did you follow with the printed documents...

MR. AUAYAN: Yes.

THE COURT: And you heard the discussions between your attorney and Mr. Montgomery that were clarifying some of these points?

MR. AUAYAN: Yes, Your Honor.

THE COURT: Well the nature of a Stipulated Settlement Agreement, or Stipulation, is such that it's a binding agreement of the parties. And when you do it in Court like this, binding means that it's final. There's no walking away from it. It's a final binding resolution of the case. A full, permanent resolution of the case. So I know this case has been going on for some period of time, but did you review each of the provisions of the document with your attorney, Ms. Kittleson?

MR. AUAYAN: Yes, Your Honor.

THE COURT: Do you have any problem understanding or reading the English language?

MR. AUAYAN: No.

THE COURT: So you feel comfortable, then, that you fully understand this agreement and agree to be bound by it?

MR. AUAYAN: Yes, Your Honor.

THE COURT: And you will agree to sign this document, I guess when it's presented to you for your signature?

MR. AUAYAN: Yes.

(Transcript of Hearing April 25, 2013, p. 26, ln. 8 to p. 27, ln. 7; CP 175-211.) Auayan personally signed the Agreement along with his attorney (CP 79-94, at 85). Clearly, there was no mistake.

Further, following arguments of the parties' counsel regarding the Motion to Vacate, Judge Nielson, on August 20, 2013, made the following ruling:

THE COURT: All right. Well the Court will deny the motion to vacate the agreement. The first thing I did was read the transcript of the hearing and when I did that, I found out that first off, Judge Monasmith had viewed the property. Had conferred with counsel representing both sides in this matter and so I had a full understanding of the lay of the land. And then *at the hearing itself where the agreement is put on the record, he goes through each of the provisions in the agreement in some detail*, even making suggestions here and there about improvement and sharpening, understanding by all parties, both sides, as to what they were agreeing to. And, he took some 34, 35, 36 pages of transcript to do all this. *So it was not cursory or superficial. It was in-depth, careful and well-meant.*

And he, in the course of this hearing, he talked carefully to both sides and then brought out, on the record, that both sides agreed fully with what had been worked out here. And what I had an eye for was, well is it truly one-sided? Is this taking advantage? Nothing of the kind. This was an agreement that had consideration flowing both ways. Mr. Russell was doing certain things, buying certain things to put on the property. Working together with his neighbors to resolve a long-standing dispute. And the

agreement itself served that purpose. It was put upon the record in a sensible, straightforward manner and I don't see anything at that juncture, at that hearing back on April 25, 2013, but a willingness to cooperate and work together at that point. And it looked like it was a win-win for both sides.

The Court finds that there's nothing at all unconscionable or there's no discrimination here that I can discern whatsoever. And I see no basis to vacate the -- absence of findings. I don't see any authority for that, that there has to be findings when you have a joined [sic.] agreement that resolves a lawsuit the morning of trial. So I will deny that Motion to Vacate.

(Transcript of August 20, 2013 hearing -- Hon. Allen C. Nielson, p. 14 ln. 4 to p. 15, ln. 2; CP 274-309). The Order of August 20, 2013 stated that "the Court having reviewed the file and pleadings herein and being fully advised under the premises, and no good cause appearing," ordered that the Defendants' Motion To Vacate The Stipulated Settlement Agreement Order "entered on April 25, 2013 in Open Court, which was read, approved and signed by the Defendant JOSHUA T. AUAYAN" be denied. (CP 241-242).

Appellant Auayan entered into the Stipulated Settlement Agreement voluntarily and knowingly, he has not shown any grounds to vacate under CR 60(b), he actively engaged in the decision to enter into the Stipulated Settlement Agreement and had sufficient opportunity to discuss the decision with his attorney. The Agreement is binding and the Trial Court did not abuse its discretion in refusing to vacate the Stipulated

Settlement Agreement and in entering the Order Finding Defendants In Contempt Of The Stipulated Settlement Agreement.

III. The Stipulated Settlement Agreement Is Not Unconscionable.

Whether a contract is unconscionable is a question of law. In *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 103 P.3d 773 (2004), a labor law and arbitration agreement dispute, the court defined both substantive and procedural unconscionability in a contract:

In Washington, we have recognized two categories of unconscionability, substantive and procedural. *Id.* (citing *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). "Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh . . ." *Schroeder*, 86 Wn.2d at 260. "'Shocking to the conscience', 'monstrously harsh', and 'exceedingly calloused' are terms sometimes used to define substantive unconscionability." *Nelson [v. McGoldrick]*, 127 Wn.2d at 131 (quoting *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn. App. 439, 444, 556 P.2d 552 (1976)). Procedural unconscionability is "the lack of a meaningful choice, considering all the circumstances surrounding the transaction including "[t]he manner in which the contract was entered," whether each party had "a reasonable opportunity to understand the terms of the contract," and whether "the important terms [were] hidden in a maze of fine print." *Id.* at 131 (alterations in original) (quoting *Schroeder*, 86 Wn.2d at 260 (quoting *Williams v. Walker-Thomas Furniture Co.*, 121 U.S. App. D.C. 315, 350 F.2d 445, 449 (D.C. Cir. 1965))). We have cautioned that "these three factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed." *Id.*

153 Wn. 2d at 344-45. In *Adler*, the court concluded that the attorney fees and limitations provisions of the arbitration agreement were substantively unconscionable but severed these provisions from the agreement thus preserving the parties' intent to arbitrate their disputes. It remanded to the trial court for determination of Adler's claims of procedural unconscionability, including whether Adler implicitly waived his right to a jury trial and the substantive conscionability of the fee-splitting provision. *Id.* at 364. Auayan misstates the court's conclusion in his Brief at p. 5 by representing that "a single, substantively unconscionable term, made the entire agreement illegal, void, and unenforceable, in that case."

During the August 20, 2013, hearing on the Motion to Vacate the Stipulated Settlement Agreement Order Entered April 25, 2013, Judge Nielson expressly found that the Stipulated Settlement Agreement was not unconscionable. In his bench ruling, as quoted *supra*, Judge Nielson stated that he specifically considered whether the Agreement was "truly one-sided" or was the Agreement "taking advantage? Nothing of the kind." He noted that the Agreement had "consideration flowing both ways."

Mr. Russell was doing certain things, buying certain things to put on the property. Working together with his neighbors to resolve a long-standing dispute. And the agreement itself served that purpose. It was put upon the

record in a sensible, straightforward manner and I don't see anything at that juncture, at that hearing back on April 25, 2013, but a willingness to cooperate and work together at that point. And it looked like it was a win-win for both sides.

The Court finds that there's nothing at all unconscionable[.]

(Transcript of August 20, 2013 hearing -- Hon. Allen C. Nielson, p. 14 lns15 - 24; CP 274-309).

This Agreement contained a quid pro quo. For example, Russell agreed to drop the Complaint for Declaratory Relief and Injunction alleging breach of restrictive covenants and nuisance; provide seven (7) 4' x 4' x 48' treated fence posts (at his cost); provide 12 Blue Spruce trees, eight (8) to twelve (12) feet in height; provide replacement trees for one (1) year; pay the application fee for and install a new driveway approach and culvert, if required, as a secondary access to the Auayan property, at a location selected by the Auayans in order to provide them access to the Eastern portion of their property; trim the trees along the fence once a year so that the branches do not touch the fence; give the Auayans twenty-four (24) hours' notice of any intended spraying in the easement roadway and/or along the Auayans' property line. In exchange, the Auayans agreed to terminate the easement; relocate or remove certain vehicles from their property; refrain from storing abandoned vehicles defined as vehicles that have been unlicensed for six (6) months; provide Russell proof of licenses

for vehicles on the property; construct a garage to store all non-lawn ornamental or maintenance materials, old tires, pallets, building materials or, in the alternative, store those materials in a specified location on the property; refrain from adding any more non-street legal vehicles (excepting vehicles and equipment normally used for agricultural purposes); pick up and plant the Blue Spruce trees provided by Russell. The agreement also provided that Auayans could erect buildings or structures so long as they are constructed in compliance with State and County Building and Planning Code Standards. (CP 79-94).

Appellant Auayan has not demonstrated substantive unconscionability, other than to make rash, incorrect and inflammatory claims that Russell controls the lives of the Auayans, and the activities on their real property, in a manner that is “monstrously harsh,” “exceeding calloused” and “shocking to the conscience.” At the time of the Stipulated Settlement Agreement there were at least eleven (11) vehicles, numerous tires, pallets, and other building materials strewn about the Auayan property. Respondent Russell’s Complaint for Declaratory Relief and Injunction alleged that Auayans were violating the Restrictive Covenants and maintaining a nuisance on their property. (CP 1-56). That suit was dismissed in consideration for the Stipulated Settlement Agreement (CP

95-96 & 97-98) on the first day of the scheduled trial. (Transcript of April 25, 2013 Hearing, CP 176 -- 211).

The offending paragraphs in the Stipulated Settlement Agreement in fact require Auayans to store two (2) specific vehicles in an existing garage, and remove abandoned vehicles defined as any vehicles without a license for six (6) months, and it provides for means of verification that the vehicles on the property are licensed. In light of the LONG history of disputes in this case, as noted by both Judge Monasmith and Judge Nielson, and in light of Joshua Auayan's *false* affidavit and opinions expressed therein (CP 156-165, & 166-175) that 1) his attorney never allowed him to read the settlement agreement, (refuted by the Transcript of the April 25, 2013 Hearing, CP 166-175); 2) that there was "no evidence that the pump house was ever used for living quarters, and I should be able to use my pump house as I please" (refuted by Ex. M¹ of Plaintiff's Complaint for Declaratory Relief And Injunction, (CP 1-56, at 55-56); and 3) that named vehicles had been removed from the property (recanted in the August 16, 2013 Declaration of Joshua T. Auayan Regarding Vehicles for Sale, CP 231-232), it was not unreasonable for the

¹ Ex. M was the August 10, 2000 letter addressed to Francisco Olalia, Auayan's predecessor in title, from the Stevens Building Department, Re: Pump House Used as Sleeping Quarters, stating that the pump house building "does appear to be used as sleeping and living quarters. [The inspector] observed bunk beds, a couch, television, and clothing piles in the building.... *No occupied use of the pump house of any kind is allowed.*" (Italics added.)

Stipulated Settlement Agreement to include a non-intrusive means to verify that the vehicles on the property had not been abandoned as defined by the agreement, nor that any more non-street legal vehicles were added to the property (excepting vehicles named in ¶ 2 and vehicles and equipment normally used for agricultural purposes) (Stipulated Settlement Agreement at ¶¶ 2c and 5, CP 81 & 82). The Agreement does not require the Washington State Patrol to enforce the non-street legal vehicle requirement, but merely uses their standards as a reference point to determine whether a vehicle is non-street legal.

Although Auayan asserts broadly that other terms in paragraphs 1 – 14 were likewise substantively unconscionable (Appellants' Brief at 8), he provides no legal authority or argument to support such a statement. This Court need not consider those claims. *Seattle v. Love*, 61 Wn. 2d 113, 114, 377 P.2d 255 (1962); *Farmer v. Davis*, 161 Wn. App. 420, 432, 250 P.3d 138 (2011) (citing RAP 10.3(a)(6)).

The Stipulated Settlement Agreement, including ¶¶ 2 and 5, is not substantively unconscionable, and Judge Neilson expressly so ruled. The Agreement is not void, no error of law or abuse of discretion has been shown.

IV. The Stipulated Settlement Agreement Is Not Void Against Public Policy.

Auayan broadly asserts that the Stipulated Settlement Agreement is void against public policy because it violates the Auayans' right to privacy and right of quiet enjoyment of their property, citing Wash. Const. Art. I, § 7. As noted in *State v. Johnson*, 119 Wn.2d 167, 829 P.2d 1082 (1992):

Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: "*naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.*" *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

119 Wn.2d at 171 (allegation of due process violation in criminal case (italics added)). In the case relied upon by Auayan, *Marriage of Hammack*, 114 Wn. App. 805, 60 P.3d 663 (2003), the court recognized the well settled policy that parents cannot agree to waive child support. It does not address disturbance of private affairs or home invasion without authority of the law.

Wash. Const. Art.1, § 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of the law." Generally, this provision has been construed to prohibit illegal searches and seizures. Auayan asserts that the Order Denying Defendant's Motion to Vacate The Stipulated Settlement Agreement and the Order

Appointing a Commissioner of Deeds violated public policy because it gave “*Russell* control over Auayans’ private affairs and their actions on their property, that were shocking, monstrously harsh and exceedingly calloused.” (Appellants Brief at 10.) That is the extent of their constitutional argument.

City of Seattle v. McCready, 123 Wn. 2d 260, 868 P.2d 134 (1994) involved the city’s nonconsensual inspections of landowner’s residential apartments for building and housing code violations through the use of invalid warrants (the city had obtained search warrants from the superior court on less than probable cause). In *McCready*, the court noted that Wash. Const. Art.1, § 7 breaks down into two basic components: the “disturbance” of a persons’ “private affairs” or the invasion of his home, which triggers the protection of the section, and the requirement that “authority of the law” justify the governmental disturbance or invasion.

A disturbance of a person's private affairs generally occurs when the government intrudes upon "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass". *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990) (quoting *State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984)). The assessment of whether a cognizable privacy interest exists under Const. art. 1, § 7 is thus not merely an inquiry into a person's subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold. Many of the cases which comprise our Const. art. 1, § 7 jurisprudence have involved consideration

of whether a particular governmental activity disturbed or intruded upon legitimate entitlements of privacy under Washington law. *See, e.g., State v. Salinas*, 119 Wn.2d 192, 197-98, 829 Wn.2d 1068 (1992) (private conversations where one party consents to electronic recording of the conversation); *State v. Boland, supra* (garbage placed curbside for collection); *State v. Gumvall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986) (information derived from a pen register); *State v. Myrick, supra* (aerial surveillance of property).

123 Wn.2d at 270-71.

The Stipulated Settlement Agreement terms were the result of extended, voluntary negotiations between private parties, represented by counsel, in a civil suit. There is no government action or invasion of the Auayan's private affairs or home under the terms of that Agreement. The terms of the Agreement do not violate public policy.

V. The Stipulated Settlement Agreement Is Not Void Because Ida Auayan Did Not Personally Appear At The April 25, 2013 Settlement Hearing.

When Russell instituted the initial lawsuit against the Auayans, which was ultimately settled by the Stipulated Settlement Agreement herein, service of process was made on both Ida Auayan and Joshua Auayan by personally serving the two copies of the Summons (one each for Joshua and Ida) and two copies of the Complaint (one each for Joshua and Ida) to Joshua Auayan at the parties' last known residence address on

March 27, 2012 (CP 252-253). *See* CR 5(b); RCW 4.28.080(15). On April 13, 2012 Joshua Auayan entered a pro se notice of appearance (CP 254). On May 2, 2012, a Notice of Appearance for both Joshua and Ida Auayan was filed by Eowen S. Rosentrater and Kelsey L. Kittleson of the Law Office of Eowen S. Rosentrater, PLLC, Spokane, Washington (CP 255-256).

With reference to the appointment of a Commissioner of Deeds, Ms. Kittleson, Auayans' counsel, on April 25, 2013, told Judge Monasmith that "basically Mr. Auayan and Mrs. Auayan have been separated for five -- eight years now but they're still technically married. Mr. Auayan obtained the property prior to the marriage so it is his separate property, and if Ms. Auayan [sic.] has any interest in it, it would be in the marital property thereof. So it's just basically to clarify that as being signed off on because we don't know where she is." It is not clear whether counsel and Joshua Auayan did not know where Ida Auayan was at any time since the original complaint was filed, or whether at the time of the hearing, they did not know Ms. Auayan's whereabouts.

Interestingly, Ms. Auayan, as a Pro Se Defendant, provided a Declaration for the August 20, 2013 hearing on the motion to vacate, in which she asserted that she never saw or agreed to the Settlement Agreement; that the Agreement violated her "civil rights under (Civil

Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964)², RCW 49.60.010 and RCW 49.60.030”); that she did not know, nor ask Terry Williams (Commissioner of Deeds) to represent her.³ Significantly, she also stated: “I had an attorney, as evidenced by the Notice of Appearance executed by Kelsey L. Kittleson, filed on May 2, 2012.” Finally, Ida Auayan stated that she supported “the vacation of the said Order as a Pro Se Defendant, because Kelsey L. Kittleson withdrew on June 3, 2013.” This declaration was signed and dated August 17, 2013 and printed on the official lined and numbered paper of Dale L. Russell, Attorney at Law (CP 238), and submitted to the court at the August 20, 2013 Rule 60 hearing.

This Declaration does not render the Stipulated Settlement Agreement unconscionable, nor does it render the Agreement void as to Joshua Auayan. He fully consented to each and every term of the Agreement in open court where he was represented by counsel. *Smyth Worldwide Movers, Inc. v. Whitney, supra*, 6 Wn. App. 176.

Ida Auayan clearly asserts she was represented by counsel at the April 25, 2013 hearing. Moreover, Ida Auayan did not appeal the April, 2013 Orders and Stipulation of Settlement Agreement nor did she appeal

² The Civil Rights Act of 1964 has no application to this case as it only deals with discrimination in public accommodations, public facilities, public education, federally assisted programs: employment and several miscellaneous provisions, none of which apply

³ Apparently there is some confusion as to whether a Commissioner of Deeds “represents” a party. S/he does not. See RCW 6.28.101 et seq.

the Superior Court's refusal to vacate the Stipulated Settlement Agreement or the Order Finding Defendants in Contempt. That she actually knew of the August 20, 2013 hearing and chose to participate only by the submission of her Declaration is clear. Ida Auayan might have asserted a question of fact that could have been litigated at the hearing on the motion to vacate, but she chose not to. Nor has she appealed the Order Finding Defendants in Contempt of the Stipulated Settlement Agreement. *See Bergen v. Adams County*, 8 Wn. App. 853, 956-57, 509 P. 2d 661 (1973). Although Joshua Auayan cites RPC 1.2(a) for the proposition that an attorney cannot settle a case for a client without the client's consent, that issue is irrelevant to this, *his* appeal. He was represented by counsel and he did specifically consent, orally in court and in writing by his signature, to the Stipulated Settlement Agreement. Ida Auayan has not raised an RPC 1.2(1) issue.

Joshua Auayan's assertion that the Stipulated Settlement Agreement was entered into under mistake as evidenced by Ida Auayan's Declaration or the fact that she failed to sign the Agreement abjectly lacks merit. He is bound by the Stipulated Settlement Agreement and the Order Finding Defendants in Contempt (CP 267-272) is valid. Likewise, his assertion that the Agreement is void against Ida Auayan because Ida

Auayan was not present in Court (Appellant's Brief at 23) is irrelevant.

Ida Auayan did not appeal that decision nor is she a party to this appeal.

VI. The Stipulated Settlement Agreement Is Valid; Auayan Failed To Present Legal Authority That The Agreement Must Match The Precise Issues Raised In The Respondent's Original Complaint And Appellant Provides No Legal Authority Holding Otherwise.

RAP 10.3(a) (6) requires that a brief of an appellant or petitioner contain "The argument in support of the issues presented for review, *together with citations to legal authority* and references to relevant parts of the record." In his Brief at Argument IV, (Appellant's Brief at 14 – 18), Auayan argues that the Trial Court should have vacated the Agreement and Order (CP 079-094) on the basis that the Order contained terms that were not prayed for in Plaintiff's Complaint. He cites *no* legal authority to support this argument and therefore this Court need not consider this issue. *Seattle v. Love*, 61 Wn. 2d 113, 114, 377 P.2d 255 (1962); *Farmer v. Davis*, 161 Wn. App. 420, 432, 250 P.3d 138 (2011) (citing RAP 10.3(a)(6).

VII. The Trial Court's Failure To Make Specific Findings Of Fact Regarding The Validity Of The Restrictive Covenants, The Reasonableness Of Russell's Annoyances; And Reasonableness Of The Restrictions On The Auayans Did Not Necessitate Vacation Of The Stipulated Settlement Agreement.

Joshua Auayan basically seeks to retry the issues presented in Russell's Complaint for Declaratory Relief and Injunction. That Complaint was dismissed by Order of the trial court dated April 26, 2013 (CP 95-98). The *only* reason the Complaint was dismissed was because the parties had entered into the Stipulated Settlement Agreement.

The Agreements and Orders herein are not based on the Restrictive Covenants or the court's interpretation of the reasonableness of Russell's annoyances or the restrictions placed on Auayan. The Stipulated Settlement Agreement (CP 79-94) cites that the existing Covenants, Conditions, and Restrictions affecting the property are valid as of the date of the Agreement. The Agreement is a voluntarily and knowingly negotiated settlement of the dispute between the parties. This argument that certain findings of fact regarding the Restrictive Covenants and reasonableness was required was rejected during the August 20, 2013 hearing on the Motion to Vacate. Judge Nielson expressly stated:

The Court finds that there's nothing at all unconscionable or there's no discrimination here that I can discern whatsoever. And I see no basis to vacate the – absence of findings. *I don't see any authority for that, that there has to be findings when you have a joined [sic.] agreement that resolves a lawsuit the morning of trial.* So I will deny that Motion to Vacate.

(Transcript of August 20, 2013 hearing Hon. Allen C. Nielson, p. 14 ln. 23 to p. 15, ln. 2; CP 274-309).

The only case cited and misquoted by Joshua Auayan, *Pacesetter Real Estate v. Fasules*, 53 Wn. App. 463, 767 P.2d 961 (1989) actually states: "If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof." 53 Wn. App. at 475. That case involved litigation over usurious loans that actually went to trial. Once again, Joshua Auayan has provided no legal authority supporting his argument that findings of fact are required in this Stipulated Settlement Agreement.

In fact, Joshua Auayan's argument should be barred by judicial estoppel. Whether the trial judge shall apply judicial estoppel turns on three core factors: (1) inconsistent positions (2) that misled a court and (3) resulted in an unfair advantage or detriment to the opposing party. *McFarling v. Evanski*, 141 Wn. App. 400, 404, 171 P. 3d 497 (2007) (court dismissed personal injury action because plaintiff did not list his personal injury claim in a bankruptcy case where that court discharged his debts because he had no assets).

In this appeal, Joshua Auayan sets forth the enforcement provisions of the Restrictive Covenants pertaining to attorney fees. He expressly states "[t]he covenant is applicable to Joshua T. Auayan and Russell because of the conveyances, noted in the title histories of the real properties, on (CP 005, Paragraph 3.1)" It is misleading to this Court to

assert the validity of one restrictive covenant in order to benefit Joshua Auayan in his attempt to recover attorney fees, while at the same time claiming that the Trial Court erred in failing to make findings of fact regarding the validity of the Restrictive Covenants when denying the Motion to Vacate.

VIII. Russell Was Properly Awarded Attorney Fees And Costs.

RCW 7.21.010(b) defines contempt of court as the intentional disobedience of any lawful judgment, decree, order, or process of the court. In addition to remedial sanctions, the court may order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees. RCW 7.21.030 (3). *See Ramstead v. Hauge*, 73 Wn. 2d 162, 437 P.2d 402 (1968).

In its Order Finding Defendants in Contempt of the Stipulated Settlement Agreement Dated April 25, 2013, the Trial Court found that Joshua Auayan had *willfully* failed to comply with the reviewed, approved and signed Stipulated Settlement Agreement. It also found that there was no basis to justify setting aside the Stipulated Settlement Agreement. In that Order, the Court provided that the Plaintiff, DONALD R. RUSSELL,

“is awarded Judgment in the sum of \$3,690.00 representing attorney fees and costs for bringing this Motion before the Court.” (CP 267-272)[Contempt Order]. The Judgment was entered in that amount (CP 247-247). Arguably, these fees are the losses suffered under the contempt statute. The record shows that Russell’s attorney submitted to the court an Affidavit of Chris A. Montgomery Re: Fees and Costs, which were “incurred as a result of Defendant’s intentional failure to comply with the Stipulated Settlement Agreement.” This Affidavit included a detailed, itemized accounting of his fees and costs (CP 233-237).

Respondent asserts that this record is sufficient to sustain the award of attorney fees. Nonetheless, the decision cited by Joshua Auayan to justify vacation of the attorney’s fee award to Russell, *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1993), illustrates that remanding, rather than vacating, the award, would be an appropriate remedy. *Mahler* provides:

Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Smith v. Dalton*, 58 Wn. App. 876, 795 P.2d 706 (1990); *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 798 P.2d 1155 (1990); *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P.2d 1015 (1993); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wn. App. 580, 871 P.2d 1066, review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994). Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, we hold

findings of fact and conclusions of law are required to establish such a record.

* * *

Fee decisions are entrusted to the discretion of the trial court, *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987), but we will exercise our supervisory role to ensure that discretion is exercised on articulable grounds.

135 Wn.2d at 435. Accordingly, the Washington Supreme Court remanded the fee award for entry of proper findings of fact and conclusions of law.

If this Court does not find sufficient grounds to uphold the award of attorney fees and costs as losses under the contempt statute, it should award them pursuant to the Restrictive Covenants or remand to the Trial Court for entry of findings of fact and conclusions of law regarding those fees.

IX. Request For Attorney Fees and Costs

RCW 7.21.010(b) defines contempt of court as the intentional disobedience of any lawful judgment, decree, order, or process of the court. In addition to remedial sanctions, the court may order a person found in contempt of court to pay a party for *any* losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, *including reasonable attorney's fees*. RCW 7.21.030 (3). The Trial Court found Joshua Auayan in contempt for

willfully violating the Stipulated Settlement Agreement. (Order Finding Defendants in Contempt of the Stipulated Settlement Agreement Dated April 25, 2013, CP 267-272). The trial court awarded Russell attorney fees as a result of having to bring the Motion for Contempt. Russell is also entitled to attorney fees for defending an appeal of the Trial Court's Contempt Order. *R/L Assoc. v. Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989). The Restrictive Covenant also provide for the recovery of reasonable attorney's fees to the prevailing party.

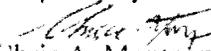
Pursuant to RAP 18.1. and RAP 14.2 Respondent Russell respectfully requests the he be awarded attorney fees and costs for defending this appeal.

CONCLUSION

Pursuant to the foregoing arguments and authority, Respondent Russell respectfully requests that Joshua Auayan's appeal be dismissed with prejudice and that pursuant to RAP 18.1. and RAP 14.2, Russell be awarded his attorneys fees and costs for defending this appeal.

Dated this 3rd day of February, 2014.

Respectfully submitted,

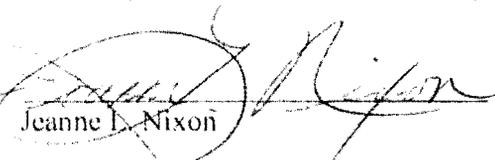

Chris A. Montgomery
WSBA #12377
Attorney for Respondent
Donald R. Russell

I certify that I served a copy of the Plaintiff's/Respondent's Brief on all parties or their counsel of record on February 3, 2014, as follows:

Party	Method of Service	
Dale L. Russell 206 W. 1 st Street, #E Deer Park, WA 99006	<input checked="" type="checkbox"/> US Mail <input type="checkbox"/> Postage Prepaid <input type="checkbox"/> Certified Mail <input type="checkbox"/> Postage Prepaid <input type="checkbox"/> Federal Express	<input type="checkbox"/> UPS Next Day Air <input type="checkbox"/> By Fax to: 509-276-7161 <input type="checkbox"/> Hand delivered by: <input checked="" type="checkbox"/> Email to: daleRusselllawfirm@yahoo.com

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

DATED this 3rd day of February, 2014, at Colville, Washington.


 Jeanne D. Nixon