

NO. 86130-7

SUPREME COURT OF THE STATE OF WASHINGTON

VANESSA CONDON, PETITIONER

Vs.

FELY CONDON, RESPONDENT.

RESPONDENT'S BRIEF

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I.
INTRODUCTION

This case concerns the issue of whether a trial court retains jurisdiction in equity, after a dismissal is entered, to enforce the terms of a settlement. This is a personal injury case that settled on the eve of trial. The settlement of Appellant's claim was put on the record, and Appellant's counsel made no representation that his client would refuse to sign a release in return for the payment of settlement funds. The parties reached an impasse, because Appellant would not sign a release and Respondent would not release the settlement funds without a signed release. In order to break the impasse, Respondent brought a Motion to Enforce Settlement Agreement. Both parties submitted briefing and the Court held a hearing. Appellant raised no challenges to the Court's jurisdiction. Appellant's counsel misrepresented to the Court that his clients never signed releases in cases in litigation. The Court found that the use of a release is customary in the settlement of claims, and that the release submitted by Respondent was reasonable and customary. The Court ordered Appellant to sign the release or it would be deemed signed. Upon entry of the Court's Order, Respondent tendered the settlement check and Plaintiff accepted the funds.

II.

RESPONSE TO ASSIGNMENTS OF ERROR

1. The Superior Court has inherent equity jurisdiction to enforce its orders to achieve a just result. Jurisdiction was not raised at the trial court level.
2. The Court did not err in granting Respondent's Motion to Enforce the Settlement. Farmers Insurance Company was never a party to this case.
3. The decision of the Superior Court did not impose additional obligations on Appellant.
4. The Court correctly deemed the release to be signed, thereby enforcing the settlement agreed to by Appellant.
5. There is no basis for awarding CR 11 sanctions against Respondent.

III.

ISSUES PRESENTED

1. Do the facts of this case form a basis for direct review by the Supreme Court, pursuant to RAP 4.2?
2. Has Appellant waived the right to review by accepting the benefits of the settlement?
3. Was the Trial Court correct in ordering Appellant to sign a release?
4. Should Appellant be subject to sanctions for citing unpublished authority?
5. Should Respondent be awarded attorney fees pursuant to RAP 18.1?
6. Does Appellant have standing to raise issues related to Respondent's liability insurance?

IV.
RESPONDENT'S STATEMENT OF THE CASE

This case involves a personal injury claim arising out of an automobile accident on August 24, 1996. (CP 1-4) There are only two parties, Vanessa Condon and Fely Condon. (CP 1-4) Vanessa Condon, a minor, was a passenger in a car driven by her mother, Fely Condon. Farmers Insurance Company has never been a party to this case. Appellant seems confused about that fact. (CP 1-4) Vanessa Condon did make a UIM claim that was eventually resolved through arbitration, but that has nothing to do with the case at bar.

This case was filed on December 5, 2005, 10 days prior to Vanessa Condon's 21st birthday, and a few days before the running of the statute of limitations. (CP 1-4) Fely Condon accepted service of process. (CP 5) The Acceptance of Service, dated March 3, 2006, barely within the 90 days allowed for service, was not filed until August 10, 2006. Plaintiff did very little to move the case forward. Eventually, Defendant noted the case for trial. On the eve of trial, March 29, 2011, the case was resolved. (CP 18) A CR2A telephone conference was held, with Vanessa Condon and her counsel appearing by telephone and defense counsel present in court, before the Honorable Theodore Spearman, Kitsap County Superior Court

Judge. (RP 2, March 29, 2011) It was agreed that the case would settle and the claims of Ms. Condon would be dismissed. (RP2-4, March 29, 2011) Neither Ms. Condon nor her counsel stated that they would not sign a release in return for settlement funds. When presented with a standard receipt and release, to be signed in exchange for the settlement check, Ms. Condon's counsel refused to sign a release. Defendant refused to tender the settlement funds without a release. (CP 38)

In order to break the deadlock, Defendant brought a motion to enforce the judgment, relying on the trial court's general equity jurisdiction to resolve disputes. (CP 37) The Court, after hearing argument, ruled that the signing of a release was the customary way of settling claims and granted Defendant's Motion. At oral argument on the motion, Appellant's counsel represented to the Court that he never allowed his clients to sign a receipt and release once litigation had commenced. (RP 3-4, April 22, 2011) Appellant's counsel stated: "We only do a release when the case is not filed." This was a misrepresentation. A supplemental declaration submitted to the Court by Defendant's counsel included a release from a different action in which Appellant's counsel represented the plaintiff, in which the client signed a receipt and release. (CP 75-76) The trial court stated that the release was deemed signed by his order. (RP 13-14, April 22, 2011) The check was

given to Appellant's counsel, who cashed it. The Appellant has retained the settlement funds. Appellant then made a Motion for Discretionary Review to the Supreme Court, solely on the issue of whether Vanessa Condon should be required to sign a standard Receipt and Release as part of her settlement of her claim against Fely Condon.

**V.
ARGUMENT**

A. This case does not meet the criteria for direct review by this Court.

Appellant, rather than filing a Notice of Appeal to the Court of Appeals, filed this matter as a Motion for Discretionary Review, pursuant to RAP 4.2. This case fits none of the criteria stated in RAP 4.2. Appellant has not cited any specific portion of the rule. RAP 4.2(a)(3) does not apply, because Appellant cites no conflicting decisions from the divisions of the Court of Appeals. The only part of this rule that could possibly apply would be RAP 4.2(a)(4), which states:

(a) Type of Cases Reviewed Directly.

A party may seek review in the Supreme Court of a decision of a superior court which is subject to review as provided in Title 2 only in the following types of cases:

(4) Public Issues.

A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.

It is difficult to see how this case raises a “fundamental and urgent issue of broad public import.” It is simply a ruling by a trial court that requires Appellant to sign a receipt and release in return for a settlement check, something that is done in virtually every personal injury settlement.

Vanessa Condon was paid the agreed amount of the settlement. She has taken no steps to secure repayment of the funds. While the terms of releases are sometimes a source of conflict, there is basically no authority regarding the signing of releases. This is because it is the custom in virtually every case. Appellant's counsel not only misrepresented to the Court that he never has clients sign releases, he also failed to state he would not sign a release in the CR2A hearing. Whether this was an attempt to be devious, or that Appellant's counsel was planning to have Ms. Condon sign a release, is unknown. Had Appellant's counsel stated that he would not sign a release, there would have been no settlement. The trial court, in the exercise of its equity jurisdiction, determined that the agreement to sign a release was implied in the settlement agreement, and found the release in question to be reasonable. This is an unusual, fact specific, application of the trial court's equity jurisdiction. The rarity of the case is evidenced by the dearth of any cases on this question. The trial court found only an unpublished California case, *A. El-Fady v. Northridge Townhome Owners Association*, 2005 WL 1503857 on point, and found this persuasive, although not binding. That case basically says that the trial court may enforce the implied terms of an agreement to settle. In any case, the facts of this case, and the trial court's ruling, do not present a fundamental and urgent issue that requires resolution by the Supreme

Court. This appeal should be dismissed or remanded to the Court of Appeals.

B. Appellant has waived the right to an appeal by accepting the benefits of the settlement.

It is undisputed that the Appellant accepted and cashed the \$100,000.00 settlement check in this matter. The general rule is that acceptance of the benefits of a trial court decision is a waiver of the right to appeal. *Buckley by Belcher v. Snapper Power Equipment Co.*, 61 Wn. App. 932, 813 P.2d 125 (1991). RAP 2.5 (b) provides four possible exceptions to this rule, none of which apply to this case. These are primarily designed for use in family law cases. The money accepted by Appellant was a settlement, not the result of a jury award. Appellant was not going to receive this money unless a receipt and release was signed. Appellant has not posted security, as required by RAP 2.5 (b). The rule states:

(1) *Generally*. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision **only** (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or

the dissolution of a meretricious relationship. [Emphasis supplied]

This case meets none of these exceptions. By taking the settlement funds, Appellant waived the right to appeal. By retaining those funds, Appellant has essentially ratified the decision of the trial court.

C. The trial court's decision was correct.

Appellant has cited no authority that demonstrates the trial court's decision was incorrect. As discussed above, personal injury settlements routinely involve exchanging a check for a signed receipt and release. Despite the misrepresentation by Appellant's counsel to the trial court, his clients have signed releases as part of the settlement of litigated cases. Signing of a release in exchange for settlement funds is all but universal. If Appellant wanted to make the absence of a release part of the settlement agreement, she had an obligation to make that clear in the CR2A hearing. She and her counsel did not, and the court merely enforced the implied terms of the settlement.

D. The trial court had jurisdiction to enforce the settlement.

Appellant raises the issue of the Court's jurisdiction for the first time on appeal. In fact, even after a case is dismissed, the Superior Court retains equity jurisdiction to settle post settlement disputes. The Superior Court is a court of equity. In *Angelo v. Angelo*, 142 Wn. App. 622, 640,

175 P.3d 1096 (2008), the trial court retained jurisdiction to resolve issues relating to a dissolution action after the decree of dissolution has been entered. The Court states, at 640:

The superior court unquestionably has authority to enforce property settlements. RCW 26.12.010. It further has the authority to use “any suitable process or mode of proceeding” to settle disputes over which it has jurisdiction, provided no specific procedure is set forth by statute and the chosen procedure best conforms to the spirit of the law. RCW 2.28.150. Indeed, “ ‘[w]hen the equitable jurisdiction of the court is invoked ... whatever relief the facts warrant will be granted.’ ” *Ronken v. Bd. of County Comm'rs*, 89 Wash.2d 304, 313, 572 P.2d 1 (1977) (alteration in original) (quoting *Kreger v. Hall*, 70 Wash.2d 1002, 1008, 425 P.2d 638 (1967)).

The trial court had jurisdiction over the subject matter and the parties via the equitable action to enforce the decree.

In *In Re Marriage of Langham and Kolde*, 153 Wn.2d 553, 559, 106 P.3d 212 (2005), the trial court again entered orders after a Decree of Dissolution had been filed, in order to ensure that the disposition ordered by the Court was accomplished. The Court held that this was within the general equity power of the Court. The Court states at 559:

The trial court had jurisdiction over the subject matter and the parties via the equitable action to enforce the decree, and it properly entered judgment against Velle when he admitted the facts relevant to the tort of conversion.

The trial court in this case was merely enforcing the implied terms of the agreement. It was not necessary for Respondent to start another lawsuit to enforce the obvious terms of the settlement.

The cases cited by Appellant are not on point. Appellant relies on Dicta from *Cork Insulation Sales Co., Inc. v. Torgeson*, 54 Wn. App. 702, 775 P.2d 970 (1989). That case dealt with the issue of whether Torgeson was entitled to fees and costs pursuant to RCW 4.84.250. The conclusion was that he was not, because the plaintiff took a voluntary dismissal prior to the hearing on the defendant's Motion for Summary Judgment. The trial court entered an order finding the plaintiff to be the prevailing party, and awarding costs, three months after the plaintiff voluntarily dismissed its action and two weeks after the defendant filed a notice of appeal. The Court of Appeals, *Id.* at 705, found this to be invited error. This case was terminated by a voluntary dismissal. This is not considered a final judgment. *Wachovia SBA Lending, Inc., v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009). It is also unclear whether the decision in *Cork Insulation* was that the Superior Court lost jurisdiction because the case was dismissed or because a Notice of Appeal had been filed. The portion of the opinion cited by Appellant is not central to the courts decision and may be considered dicta.

Clearly, the trial court retains jurisdiction in equity to see that the terms of the settlement are clarified and that the actions of the parties conform to the express and implied agreement made in open court. This is not a case in which a party is attempting to have the settlement set aside,

as in *Snyder v. Tompkins*, 20 Wn. App. 167, 579 P.2d 994 (1978). Here, Respondent wants to enforce the settlement agreement. Its payment of the settlement funds, and Appellants acceptance of those funds, make this obvious. Contrary to the statements by Appellant, the receipt and release does not name Farmers Insurance Company as the party being released. Farmers Insurance Company has never been a party to the case. The release also does not impose any new obligations on the party executing the release. It merely states that the releasing party is responsible for paying off her own medical liens. Appellant's assertions regarding jurisdiction are unsupported by the law applicable to the facts of this case.

E. Appellant's arguments regarding CR 11 are groundless.

As discussed above, the trial court possessed jurisdiction to enforce the implied agreement of the parties. Appellant made no objection to the trial court's jurisdiction at the hearing on Respondent's Motion. It is also clear that the assertion of Appellant's counsel that his clients never signed releases once litigation began was an intentional misrepresentation. The trial court could, and did, take judicial notice, that releases are a part of almost every settlement of a personal injury action. Appellant did not state she would not sign a release.

The receipt and release does not impose any new obligations on Appellant. It merely requires the Appellant, as the party receiving

settlement funds, to pay her own medical bills. There is also nothing in the record to show if there were any liens for medical treatment or how this puts an extra burden on Appellant. Her medical bills were an element of her case against her mother, and the settlement in this case was for those claims.

F. Appellants arguments for an award of fees from a non-party should be disregarded.

Appellant's references to "Farmers" and "Farmer's Counsel" are improper and inaccurate. Farmers Insurance Company, although the insurer of Fely Condon, was never a party to this case. The Collateral Source Rule prevents any mention of Farmers in this action. *Ciminski v. SCI Corp.*, 90 Wn2d 802, 585 P.2d 1182 (1978). Appellant was making a claim against her mother, Fely Condon, not against her mother's insurance company. She has no rights, as a third party claimant against her mother's insurance company. *Tank v. State Farm Insurance*, 105 Wn.2d 381, 715 P.2d 1133 (1986). Bad faith claims and claims of violations of the insurance law can only be brought by an insured or the State Insurance Commissioner. *Neigel v. Harrell*, 82 Wn. App. 782, 919 P.2d 630 (1996). The Appellant has no standing to make such a claim.

As a result of the accident in this case, Appellant also made an underinsured motorist claim. That claim was resolved through arbitration.

The arbitrator found that Appellant's total damages were \$108,000. This was subject to offsets for Respondent's liability limits of \$100,000, *Hamilton v. Farmers Insurance*, 107 Wn.2d 721, 733 P.2d 213 (1987), and PIP payments of \$10,000. None of that is part of this case. Appellant seems confused about this, and is attempting to style herself as a "third party beneficiary" of Respondent's liability insurance. This concept is not recognized in Washington. Appellant, as a third party claimant, has no standing to bring a claim directly against Respondent's liability insurance carrier. *Tank v. State Farm Insurance*, *Supra*. The Court should give no consideration to Appellant's claim for fees.

G. Appellant should be sanctioned for citing unpublished authority and for including matters not in the record.

Appellant cited two cases in her Motion for Discretionary Review. Neither case is on point. *Thurston v Godsil*, 117 Wn. App. 1070 (2003) is an unpublished case. General Rule 14(a) prohibits the citing of unpublished opinions.

GR 14.1. Citation to Unpublished Opinions

(a) Washington Court of Appeals.

A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

Unpublished opinions have no precedential value and are not to be cited or relied upon. *Skamania County v. Woodell*, 104 Wn. App. 525, 536 n.11, 16 P.3d 701, *review denied* 144 Wn.2d 1021 (2001). The Court in *Skamania County, Supra* sanctioned the party making the improper citation. Such a sanction is appropriate in this case. Appellant's repeated injection of matters outside the record, such as Mrs. Condon's insurance coverage and Appellant's UIM claim, are improper and should also result in sanctions.

H. Appellant should be required to pay Respondent's attorney fees, pursuant to RAP 18.1.

Appellant filed a Motion for Discretionary Review to the Supreme Court, apparently for the sole purpose of keeping this case alive. She relied on unpublished authority and has repeatedly cited matters which are not part of the trial court's record and which have no relevance to this case. This case satisfies none of the criteria for direct review by the Supreme Court. Vanessa Condon accepted and retained the benefits of the settlement in this matter, thereby waiving her right to appeal the Superior Court's order requiring her to sign a release to complete the settlement agreement. This appeal is not based on facts and law. Respondent should be awarded fees and costs.

**VI.
CONCLUSION**

This case meets none of the criteria for discretionary review pursuant to RAP 4.2. It appears that the appeal was filed primarily to delay final resolution of the case. Appellant has also waived the right to appeal the trial court's decision by accepting the benefits of the settlement. The trial court, in recognizing that Appellant implicitly agreed to sign a release was correct. The Court should not consider the unpublished authority cited by Appellant and should sanction Appellant for the improper citation and for including matters that are outside the record. The Petition for Discretionary Review should be denied. The appeal should be dismissed and attorney fees and costs should be awarded to Respondent.

Respectfully submitted this 24th day of April, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of March 2012, she caused a copy of the following documents:

1. Respondent's Brief;
2. Certificate of Service

to be served on the parties listed below by the method(s) indicated:

Party/Counsel	Additional Information	Method of Service
Supreme Court of the State of Washington Attn: Susan L. Carlson, Supreme Court Deputy Clerk TEMPLE OF JUSTICE P.O. Box 40929 Olympia, WA 98504-0929	Presiding Court	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile
Gordon Woodley Attorney at Law Woodley Law Offices 14929 SE Allen Road Bellevue, WA 98006	Counsel for Plaintiff WSBA #7783 Ph: 425-747-0202 Fax: 425-747-3073	<input checked="" type="checkbox"/> regular first-class U.S. Mail <input type="checkbox"/> personal delivery <input type="checkbox"/> fed-ex/overnight delivery <input type="checkbox"/> facsimile

1 I certify under penalty of perjury of the laws of the State of Washington that the
2 foregoing statements are true and correct.

3 Dated at Port Orchard, Washington.

4 

5 SANDRA RIVAS
6 Legal Assistant