

No. 66211-2-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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JUANITA COUNTRY CLUB CONDOMINIUM OWNERS  
ASSOCIATION,

Appellants/Defendants,

v.

LUCIENNE FIRTH,

Respondent/Plaintiff.

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APPELLANTS' REPLY BRIEF

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**I. THE PLAINTIFF CHOSE TO CONTINUE LITIGATION  
RATHER THAN TO ACCEPT FINAL RESOLUTION.**

In the prior two cases in which the COA's counsel needed to satisfy Medicare requirements to finalize a settlement, it took over three months and five months to gather the necessary information and complete the paperwork.<sup>1</sup> In this case, the COA had the settlement money in hand on September 27, 2010, (two days shy of the three-month mark for this settlement, reached on June 29) and was ready to deliver the check to the plaintiff's office upon her approval (but not signature) of the release language.<sup>2</sup> Rather than approve or further revise the release language and rather than accept the settlement funds and resolve this matter, the plaintiff chose to file a "motion to enforce settlement" on September 27 to obtain additional relief not available in the agreed terms of the settlement.<sup>3</sup>

The plaintiff seeks two new and changed terms of the agreement. First, the plaintiff does not want to place the settlement funds that will pay for future surgery (roughly \$30,000) in a Medicare set-aside fund and she does not want to indemnify the defendants for this amount. Thus, according to Medicare rules, if the plaintiff has surgery and does not reimburse Medicare, Medicare can recover the costs, plus double recovery and fees,

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<sup>1</sup> CP 96.

<sup>2</sup> CP 101.

<sup>3</sup> CP 30-35.

from the COA.<sup>4</sup> This is a potential additional cost to the defendant of well over \$60,000 and bears no reasonable relationship to the alleged “harm” to the plaintiff by a three-month delay in finalizing settlement. Indeed, the defendants defined a key and material term of the settlement agreement as “satisfaction” of all Medicare requirements for the very reason that it did not want to “settle” a claim that left the potential for additional liability to Medicare. The terms of the settlement agreement demonstrate that the COA would not have agreed to settlement without the required protections from Medicare liens.

Second, the plaintiff wants interest on the settlement amount from the date of settlement. The plaintiff admits that the parties’ agreement does not include interest. Instead, she relies on a mish-mash of cases applying usury laws<sup>5</sup> and an overruled court of appeals opinion<sup>6</sup> to claim that settlement agreements contain, by implication, a requirement that interest be paid on the settlement amount from the date a CR 2A agreement is reached.

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<sup>4</sup> 42 C.F.R. §411.24(i).

<sup>5</sup> Resp. Br. at 21-22, *citing* RCW 19.52.010 (defining rates above 12% as usury); *and Topline Equip., Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 91 (1981) (defining usurious rates for a conditional sales contract that included interest terms).

<sup>6</sup> Resp. Br. at 22, *citing In re Bachmeier*, 106 Wn. App. 862 (2001). The court of appeals decision was overruled in 147 Wn.2d 60, 52 P.3d 22 (2002) and the Supreme Court held that a termination clause would not be implied by the court when there was no evidence it was contemplated by the parties. In other words, the decision was reversed on the very point on which the plaintiff attempts to rely.

There is no legal or contractual basis to apply interest to the parties' settlement agreement.

The plaintiff bases the entirety of her argument that she is entitled to rewrite the settlement agreement between the parties on her claim that that the defendants took too long to finalize the settlement documents. Because of this delay, the plaintiff contends that the court should cancel one term and add another. The plaintiff unilaterally defined "three months" as too long. The only evidence on which the plaintiff relies is the record of correspondence between counsel; from this factual record, the plaintiff assumes that the defendant was "sluggish" by taking days or weeks to perform certain acts and suggests that the defendants delayed deliberately for some undefined advantage. The record is simply insufficient to support such a speculative conclusion. More fundamentally, the plaintiff cites to no authority which holds that three months is "too long" as a matter of law to finalize a settlement—specifically when the settlement is contingent upon Medicare.

The defendants settled with the plaintiffs to end litigation. The parties agreed to specific terms in the June 29 settlement—including that the defendants required control over Medicare issues. The plaintiff entered into this agreement voluntarily and with legal representation. She should not now be allowed to alter fundamentally the terms of the agreement because it

is her personal belief that three months is “too long” to wait. The trial court’s order should be reversed and the original agreement fulfilled.

**II. THE PLAINTIFF HAS NOT DEMONSTRATED ANY LEGAL BASIS TO SUPPORT HER CLAIMS FOR NEW, UNILATERALLY IMPOSED SETTLEMENT TERMS.**

**A. The standard of review is *de novo* because the question before the Court is how to interpret the parties’ agreement and whether to imply terms in the contract.**

The plaintiff relies on *In re Patterson* to support her contention that the standard of review should be an abuse of discretion.<sup>7</sup> In *Patterson*, however, the court applied a *de novo* standard of review to “determine whether there is a genuine dispute regarding the existence and material terms of a settlement agreement.”<sup>8</sup> In contrast, *Morris v. Maks* applies an abuse of discretion standard when the parties disputed whether an enforceable agreement was ever reached.<sup>9</sup>

Here, the dispute concerns implied terms to the contract—whether there is an implied term that the settlement will be finalized in three months; whether there is an implied term of interest; and whether there is an implied term that the Medicare set-aside fund can be waived by delay. A *de novo* standard should apply to these questions. The plaintiff attempts to classify these questions as reaching the “purport” of the agreement as defined in

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<sup>7</sup> Resp. Br. at 8, citing *In re Patterson*, 93 Wn. App. 579, 969 P.2d 1106 (1999).

<sup>8</sup> *In re Patterson* at 584.

<sup>9</sup> See Open. Br. at 12, n. 23 (citing *Morris*, 69 Wn. App. 865, 850 P.2d 1357 (1993)).

*Patterson*. But there is no dispute here that the express terms of the settlement agreement are as stated in the mediator's June 29 email.<sup>10</sup> The central question is whether the interpretation of the June 29 agreement should include the implied terms proposed by the plaintiff. As in all questions of contract interpretation, the standard of review should be *de novo*.

The plaintiff attempts to avoid a *de novo* review by retrospectively claiming that the relief she seeks is a "sanction" for bad faith in fulfilling the terms of the settlement contract.<sup>11</sup> All contracts contain a duty of good faith and fair dealing. Failure to fulfill this duty is a breach of contract. The plaintiff argued this point to the trial court. The plaintiff did not once refer to or state she was seeking "sanctions" under CR 11, 26, 37, or any other rule or authority of the court.<sup>12</sup>

In contrast, the plaintiff relies in her appeal brief for the first time on the "litigation bad faith" identified by the court in *State v. S.H.*<sup>13</sup> She now claims that the trial court's order was actually predicated on "litigation bad faith," which is defined in the context of CR 11.<sup>14</sup> Based on litigation bad

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<sup>10</sup> CP 99.

<sup>11</sup> Resp. Br. at 9-10.

<sup>12</sup> CP 30-35.

<sup>13</sup> Resp. Br. at 10, *citing State v. S.H.*, 102 Wn. App. 468, 8 P.3d 1058 (2000).

<sup>14</sup> *See State v. S.H.*, 102 Wn. App. 468 (holding that sanctions for bad faith in litigation could not be awarded unless the trial court made an express finding of "bad faith," not just the implication of such).

faith, she claims review should be under the abuse of discretion standard. Litigation bad faith was not at issue in the trial court and was not argued by either party. If it were to apply, however, *State v. S.H.* holds that the court of appeals will not affirm a trial court award of sanctions unless there is an express finding of bad faith, even if the “record supports the inference that the judge deemed [the defendant’s] conduct to be inappropriate and improper, which is tantamount to bad faith.”<sup>15</sup> Here, the trial court did not make an express finding of bad faith.<sup>16</sup> Accordingly, if this is a “litigation bad faith” case, the trial court cannot be affirmed.

**B. The plaintiff’s claim of bad faith is based solely on her subjective belief as to how long the defendant should take for each step of the settlement process.**

The plaintiff argues that the defendant took too long to ask for necessary information from her; waited too long to request information from Medicare; and should have accepted as true the plaintiff’s unsworn statements regarding Medicare payments. She bases her subjective beliefs solely on some standard within her own understanding; she does not cite to a single authority which defines the length of time at which an action becomes “unreasonable.”

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<sup>15</sup> *State v. S.H.* at 479.

<sup>16</sup> *See* CP 110-111 (trial court order).

While the plaintiff casts her complaints as part of the duty of good faith in fulfilling a contract, she is actually attempting to apply her subjective intent to the express written terms of a contract. The June 29 settlement agreement contained the terms under which the parties agreed to settle, including the payment amount; the type of release required; the plaintiff's promise to hold the defendants harmless from Medicare claims; and an agreement to reach Medicare terms "satisfactory" to the defense.<sup>17</sup> Had she wanted to include any time limits in the agreement, the plaintiff had the opportunity to do so. Certainly, a CR 2A agreement can (and often does) contain terms that specify the date by which a settlement should be finalized or call for interest if payment is not made by a certain date. It is not the role of the Court to write the agreement that the plaintiff now subjectively wishes she had entered. The plaintiff has simply provided absolutely no reason why she could not or did not include in the agreement the terms that were material to her.<sup>18</sup>

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<sup>17</sup> CP 99.

<sup>18</sup> The plaintiff also argues that contract interpretation was not an issue raised to the trial court. The defendants' opposition to the motion to enforce expressly asked the trial court not to rewrite the contract and add terms, which raises the issues of contract interpretation. The citation to additional authority and argument on these points is well within the scope of appeal. CP 88-89.

Even if analyzed through the prism of bad faith or of reasonableness, the plaintiff does not explain why three months is “bad faith” or unreasonable. She does not provide evidence of what prejudice was caused to her by the delay. The plaintiff states without authority or analysis that it is “appropriate” to cancel a material term of the settlement agreement—the Medicare set aside fund—because the defendant allegedly caused a two month delay.<sup>19</sup> Why? One does not relate to the other. Further, the result of cancelling the set aside requirement is to expose the defendant to more than \$60,000 in liability to Medicare. This is a punishment to the COA far in excess of its alleged wrongdoing.<sup>20</sup>

The plaintiff also does not explain why she believes the delay in reaching a final settlement was solely within the control of the defendant. For instance, the plaintiff presumes that the defendant should draft the release agreement, although that obligation is not assigned in the CR 2A agreement. When the defendant does draft a settlement agreement, the plaintiff rejected, twice, the proposed language and thus herself caused or contributed to delay. In addition, the plaintiff has never responded to the last release draft proposed by the defendants.

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<sup>19</sup> Resp. Br. at 16.

<sup>20</sup> See *Washington State Physicians Insurance Exchange and Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993) (requiring that any penalty for wrongdoing be in proportion to the wrong and not excessive).

The plaintiff has not cited to a single case which imposes a time for performance onto a settlement agreement. Instead, she relies on cases such as *Taylor v. Shigaki*, in which a lawyer sued his former client for recovery of a contingent fee. Time of performance is not even an issue in the case.<sup>21</sup> The plaintiff also cites to the dissent in *Randall v. Tradewell Stores*, although the majority opinion in this Supreme Court case **refused** to impose an implied term for time of performance.<sup>22</sup> Neither of these cases support her claim.

Similarly, in *Byrne v. Ackerlund*, on which the plaintiff also relies, the Supreme Court **refused** to impose a time of performance onto a property settlement that provided one partner with a lien on property, but did not specify if or when the other partner must sell the property.<sup>23</sup> Finally, in *Pepper & Tanner, Inc. v. Kedo, Inc.*, the court relied on other time-limited terms in a written contract to hold that performance of one of the promises in the contract should also occur in the same time frame as the other terms.<sup>24</sup>

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<sup>21</sup> *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997) (allowing an attorney to recover a contingent fee on substantial performance and prohibiting a client from firing counsel immediately prior to settlement to avoid paying the contingent fee). See Resp. Br. at 18.

<sup>22</sup> *Randall v. Tradewell Stores*, 21 Wn.2d 742, 153 P.2d 286 (1944). Although the plaintiff does not identify it as such, her quote from *Randall* in her Brief at p. 21 is actually to the dissent.

<sup>23</sup> *Byrne v. Ackerlund*, 108 Wn.2d 445, 455 (1987). See Resp. Br. at 19.

<sup>24</sup> *Pepper & Tanner, Inc. v. Kedo, Inc.*, 13 Wn. App. 433, 435-36, 535 P.2d 857 (1975).

In contrast, neither the plaintiff nor the COA has introduced any evidence that the parties contemplated performance within three months of June 29. The COA's counsel expected the process could take as long as five months, given his past experiences. In any event, the COA was willing to pay the settlement amount on September 27 and thus the settlement could have been finalized. The plaintiff chose not to complete the settlement and refused performance, which contradicts the very cases on which the plaintiff relies, and which undercuts her claim of "bad faith."

The plaintiff now wants to define the defendants' actions as "litigation bad faith," not just violation of the contractual duty of good faith. The plaintiff provides no legal authority for this proposition. There is no evidence to support the plaintiff's contentions that the defendants delayed intentionally or "benefitted" from any delay.<sup>25</sup> For instance, the plaintiff suggests that the defendants delayed "8 days" or "two weeks" without responding to correspondence. The plaintiff has not defined the length of time that is appropriate to respond to such requests. Rather, she assumes that actions not within her own timetable are deliberate delays.<sup>26</sup> Thus even if the plaintiff could rely on the trial court's findings, she has not demonstrated that is substantial evidence to support them.

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<sup>25</sup> CP 111.

<sup>26</sup> Resp. Br. at 4-6.

The plaintiff also ignores the specific findings that must be made before a court may impose litigation sanctions:

First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purposes of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.<sup>27</sup>

The Court also cautioned that sanctions are not a "fee-shifting" rule. Thus, both factually and legally, the plaintiff has not established a basis for sanctions or that the "sanctions" imposed by the trial court fulfill the purposes of such awards. The plaintiff's belated claim for "sanctions" should be denied.

**C. The plaintiff relies on the usury statute and an overruled case to support her argument that interest can be implied in the terms of a settlement agreement.**

The plaintiff claims that interest can be implied into the settlement agreement by relying on usury and an overruled case. First, the plaintiff relies on RCW 19.52.010, which is the usury statute that sets the rate for the maximum allowable interest for any "loan or forbearance." In *Topline*, the case cited by the plaintiff, the court applied the usury statute to determine if the terms of a conditional sales contract were enforceable. The court held

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<sup>27</sup> *Fisons* at 355-56.

that although the amount owing under the contract was \$41,000, it was based on a usurious rate of interest and thus reduced the amount owing to \$30,000.<sup>28</sup> Neither the usury statute nor *Topline* hold that a court can impose an interest rate onto a contract when the parties had not expressly agreed to one. While the statute would prohibit enforcement if two parties agreed to an interest rate above 12%, it does not create the basis to imply a term of interest was not expressed.<sup>29</sup> The plaintiff plainly misinterprets that statute and *Topline* to suggest that they support an implied interest term.

The plaintiff also relies on the overruled court of appeals decision *In re Bachmeier*.<sup>30</sup> In *Bachmeier*, the court of appeals imposed an implied-in-law term to a community property agreement to hold that when a marriage was defunct, the community property agreement was automatically revoked.<sup>31</sup> The plaintiff relies on the court of appeals holding to support an implied interest term. The Supreme Court, however, **reversed** *In re Bachmeier* and held that a community property agreement **does not contain**

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<sup>28</sup> *Topline Equipment, Inc. v. Stan Witty Land, Inc.*, 31 Wn. App. 86, 89-91, 639 P.2d 825 (1981), cited at Resp. Br. at 22. The plaintiff's interpretation of the case simply ignores the holding and analysis of the case.

<sup>29</sup> Similarly, the plaintiff cites to two cases awarding prejudgment interest. Resp. Br. at 22-23. The award of prejudgment interest is not comparable to implying a term of interest into a settlement agreement.

<sup>30</sup> Resp Br. at 22, citing *In re Bachmeier*, 106 Wn App. 862, 25 P.3d 498 (2001).

<sup>31</sup> The court of appeals relied on public policy. Thus even if the decision had not been overruled, it does not apply here, because there is no established public policy basis to impose interest on a private contract.

**an implied term** of revocation if the marriage is defunct.<sup>32</sup> The Court relied on contract interpretation principles to find that implying a revocation term “would be to rewrite [the agreement] after its formation without consideration for the parties’ intentions.”<sup>33</sup> The exact same reasoning applies here. The defendants would not have agreed to settlement without protection from Medicare, and they would not have agreed to an interest term when they could not predict when settlement could be finalized. Thus, the plaintiff’s own citations support reversal of the trial court’s decision imposing interest.

The plaintiff has also not established harm to justify the award of interest. From the parties’ June 29 agreement, the plaintiff knew that the defendants sought confirmation from Medicare regarding lack of prior medical payments. The evidentiary record in this case is undisputed that this process does not take less than three months, and could take considerably longer. At the three month mark, no answer had yet been received from Medicare. The plaintiff argues that the defendant delayed in sending the forms to Medicare. Any potential harm from this delay, however, was mitigated by the defendants’ willingness to pay the settlement money on September 27, despite the lack of confirmation from Medicare. Thus, the

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<sup>32</sup> *In re Bachmeier*, 147 Wn.2d 60, 52 P.3d 22 (2002).

<sup>33</sup> *Id.* at 68.

plaintiff was not harmed. She could have received her money at the three month mark regardless of the defendants' alleged delay. She chose instead to prolong litigation. She should not be rewarded for this decision.

### III. CONCLUSION

The parties reached a settlement agreement on June 29, 2010 based on express terms to which the plaintiff agreed. Any other terms that the plaintiff might now contemplate are not part of the agreement. This court should **reverse** the trial court's order on the Motion to Enforce and **require** the parties to fulfill the original agreement.

Respectfully submitted this 11<sup>th</sup> day of March, 2011.

WILSON SMITH COCHRAN DICKERSON

By



Shilpa Bhatia, WSBA no. 28012

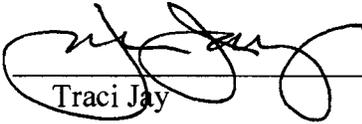
Attorneys for Appellant Juanita Country  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document by ABC Legal Messenger:

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**SIGNED** this 11<sup>th</sup> day of March, 2011 at Seattle, Washington.

  
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Traci Jay