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S.D.

NO. 66211-2-I

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

JUANITA COUNTRY CLUB CONDOMINIUM OWNERS
ASSOCIATION
Appellant-Defendant,

v.

LUCIENNE FIRTH,
Respondent-Plaintiff.

RESPONSE BRIEF

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I. Introduction

Lucienne Firth settled her personal injury claims against the Juanita Country Club Condominium Owners Association and property manager The CWD Group, Inc. (collectively, the “property owners”) on June 29, 2010, for \$100,000. The property owners were to fashion a release where part of this award was to be set aside in an “arrangement satisfactory to the defense” to reimburse Medicare for any future medical expenses arising from her injury. They were also to produce a satisfactory arrangement regarding the remote possibility that Medicare had already paid any of Ms. Firth’s medical expenses prior to the settlement.

Ms. Firth turned 65 on April 24, 2010, just 61 days before the settlement was reached. The property owners already possessed all of Ms. Firth’s medical bills, and had ample evidence that Medicare had made no prior payments for her treatment, yet they delayed taking action for weeks. Five weeks after the settlement, the property owners finally sought Ms. Firth’s release for Medicare documents. Yet, although they controlled the drafting of a “satisfactory” release regarding the Medicare set-aside, the first draft release was not offered until August 26, nearly two months after settlement. This draft was factually inaccurate and contained no information that was unavailable to the property owners the day of settlement. The property owners did not respond to Ms. Firth’s

September 3 request for correction of the document until September 23 and never tendered a factually correct, satisfactory release for her signature.

The property owners' failure to expedite the drafting of the settlement agreement prompted Ms. Firth to file a Motion to Enforce Settlement on September 27. That motion sought an order recognizing the implied terms in the settlement agreement that the order was to be executed within a reasonable time, and that the bad faith failure to meet this requirement constituted a waiver of certain rights and caused interest to accrue. Over the property owners' objections¹ that the conditions of settlement had not been satisfied and that they were potentially liable as Medicare "secondary payers," the superior court granted the motion in full. This order is consistent with principles of contract law and the inherent powers of trial courts; Ms. Firth therefore requests that the court of appeals affirm the decision of the trial court.

II. Counterstatement of Issues

1. Under RAP 2.5(a), should this court consider arguments regarding accrual of interest, contract formation and contract interpretation

¹ The property owners raised no argument as to the propriety of implying terms such as interest before the trial court.

where these arguments were not presented to the trial court and appear for the first time on appeal?

2. Under contract principles as they relate to settlement agreements, may a reasonable time for performance of an obligation be implied where the agreement imposes a definite obligation but fails to provide a time for its performance?
3. Under the facts of this case, was it within the trial court's discretion to find that three months was a reasonable time for performance, that the nonperforming party had acted in bad faith, and that therefore the accrual of interest and the waiver of set-aside was an appropriate remedy?

III. Statement of the Case

A. The parties settled Ms. Firth's claims.

Lucienne Firth was injured on property owned by Juanita Country Club Condominium Owners Association and managed by The CWD Group (collectively, the "property owners"). CP 3-4, 8-9. She sued on theories of negligence and premises liability. *Id.* The parties mediated beginning on June 25, and reached an agreement on June 29, 2010. CP 92. The express terms of that agreement are undisputed. The property owners were to pay Ms. Firth \$100,000 after Ms. Firth had signed (1) a release of claims against COA, (2) a hold harmless agreement regarding

liens, subrogation interests, and unpaid bills; (3) an arrangement satisfactory to the defense regarding Medicare payments; and after her counsel (4) promised to hold sufficient funds to resolve any known liens, subrogation interests, and unpaid bills. CP 99. The parties' dispute now centers on the second and third provisions.

B. The property owners delayed despite plaintiff's diligent efforts to mobilize them.

No action was taken by the property owners in the seven days immediately following settlement. CP 106. Eight days after the settlement, Ms. Firth's attorney e-mailed defense counsel, inquiring as to when they would produce the release agreement paperwork they found satisfactory.² CP 41. They indicated that production could be expected late the following week. CP 41. Two weeks later, after no further communications from the property owners, Ms. Firth's counsel repeated his inquiry. CP 43. Five days later, the defense sent a two-page letter asking for a signed release for Medicare information. CP 45-46. This letter mentioned a set-aside, but no draft was attached. CP 45-46. Even though Ms. Firth promptly pointed out that she was expecting defense counsel to draft the set-aside, no action was taken for two more weeks, at

² A full table setting forth the inactivity of the Defendants in this action can be found in Appendix A to this brief.

which time plaintiff *again* initiated contact. CP 48, 52. Defense counsel again indicated that they were not ready to send paperwork or to take any action. CP 54.

Two days later, counsel for the insurance company³ contacted Ms. Firth's counsel inquiring as to whether Medicare had paid any of her medical bills. CP 56. As Ms. Firth was not eligible for Medicare at the time of the accident, and had not undergone treatment for injuries caused by the accident since she had turned 65 in April, she confirmed that Medicare had not made any payments to her treatment providers, so Medicare had no subrogated interest, provisional payments, or right to reimbursement in the settlement. CP 60. Defense counsel made no contact for another eight days, after which time plaintiff's counsel again initiated contact, seeking to complete the paperwork. CP 62. The property owners replied the next day, again indicating that they were not yet ready to offer a draft of any of the paperwork contemplated in the settlement agreement. CP 64.

³ On recommendation of their insurer, defense relied upon an out-of-state lawyer for advice as to the set-aside. See CP 56-58. This lawyer was not admitted *pro hac vice* and was not counsel-of-record for this proceeding.

C. The initial settlement agreement produced by the property owners took 58 days to draft and was factually inaccurate.

The first draft of the settlement agreement was sent by defense counsel on August 26, nearly two months after the settlement. CP 66. Despite all the written assurances, confirmed by medical records, that no Medicare payments existed to be reimbursed, the draft agreement inaccurately assumed the existence of these payments. CP 69-70. Plaintiff's counsel drafted language to fix this inaccuracy by September 3, but the property owners made no response. CP 70, 107. After ten more days of waiting, Ms. Firth *again* initiated contact, asking for an update. CP 72. Defense counsel did not respond for seven days, so plaintiff's counsel e-mailed them once more, seeking assurances that the release as drafted was acceptable to the defense so that Ms. Firth could sign it. CP 74. Three days later, the property owners replied, saying that the language of the draft would "have to be tweaked a bit," but not offering any alternative language. CP 78. On September 27, after three months of patience – patience that was met with delay and neglect – Ms. Firth filed her motion to enforce the settlement. CP 30.

D. The trial court agreed with Ms. Firth as to the implied terms of the settlement agreement.

The trial court, over the property owners' objections that conditions to the agreement had not yet been satisfied and that they might still be held

liable as secondary payers, granted the motion in full. CP 116-18. The property owners made no argument before the trial court as to the appropriateness of implying terms into a settlement agreement or of considering extrinsic evidence of a party's behavior as it affects performance under the agreement.

The order enforcing settlement specifically found that the property owners had sufficient information to verify that no Medicare payments had been received by Ms. Firth. CP 117. The court further found that the property owners had not acted in good faith and had intentionally and unnecessarily delayed fulfilling their obligations under the settlement agreement. CP 117. This bad faith resulted in waiver of the duty to property owners to include a set-aside clause in the release agreement,⁴ where Ms. Firth would promise to defend and indemnify the property owners should Medicare sue them under the Secondary Payer laws. CP 117. Finally, the court found that the property owners' unjustified delay was contrary to the intention of the parties, and that, as a result of the delay, they owed 12% compound interest since the date of settlement. CP 117.

⁴ The order also allowed for the fact that Ms. Firth "may owe this duty in law," and thus did not exempt Ms. Firth from establishing the set-aside in accordance with federal law. CP 117.

IV. Argument

A. The standard of review is abuse of discretion.

A trial court's decision to enforce a settlement agreement under CR 2A⁵ is reviewed under the abuse of discretion standard. Morris v. Maks, 69 Wn. App. 865, 868 (1993). Civil Rule 2A establishes the circumstances under which a court may enforce a settlement agreement, and provides that only where (1) the settlement agreement was made in respect to a pending legal action, (2) the parties assent to the existence of the agreement on the record, and (3) the parties are in dispute as to the purport of the agreement, may a court consider the terms of that agreement. In re Patterson, 93 Wn. App. 579, 582 (1999). Here, the agreement was made while a civil action was pending and there is no dispute as to the existence of the agreement⁶. The purport of "[a]n agreement is disputed within the meaning of CR 2A only if there is a genuine dispute over the existence or material terms of the agreement."

⁵ CR 2A provides that

"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."

⁶ Despite COA's Assignment of Error #2, the existence of the settlement is not in dispute. COA does not offer any argument that the existence of settlement is disputed.

Id. at 583. *Black's Law Dictionary* defines "material terms" as "[c]ontractual provisions dealing with significant issues such as ... payment terms ... [or] duration." *Black's Law Dictionary* 991-92 (7th ed. 1999). Because this dispute centers on whether there was an implied term of time for performance and whether interest might apply, the parties are in dispute as to the purport of the agreement. Therefore, the decision to enforce is made under CR 2A. The proper standard is abuse of discretion.

Furthermore, a trial court's decision to sanction a litigating party is also reviewed under the abuse of discretion standard. See, e.g., Amy v. Kmart of Washington LLC, 153 Wn. App. 846, 855 (2009). The trial court here made specific findings of fact that the property owners had enough evidence to know that there were no Medicare payments, and that the property owners acted in bad faith. CP 110-12. Findings of fact are reviewed under the "substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879 (2003). Under this standard, all reasonable inferences from the evidence should be viewed in the light most favorable to the prevailing party. Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 788 (1995). When a court's decision to sanction a party is premised on a finding of bad faith, that decision is made within the court's inherent

powers to conduct litigation. State v. S.H., 102 Wn. App. 468, 475 (2000). A decision to sanction on this basis is therefore reviewed for abuse of discretion, with the choice of sanctions subject to review under the “arbitrary, capricious, or contrary to law standard of review.” *Id.* at 473 (citing Butler v. Lamont School Dist., 479 Wn. App. 709, 712 (1987)). On several grounds and for sound policy, the court should affirm the order absent any abuse of discretion.

B. Property owners did not preserve their arguments for appeal.

This court should “refuse to review any claim of error which was not raised in the trial court.” RAP 2.5. In the property owners’ one-and-a-half pages of legal argument in response to Ms. Firth’s motion to enforce the settlement, they made only the arguments that (1) the settlement agreement was contingent upon an as yet unfulfilled “arrangement satisfactory to the defense,” and that (2) if the nonexistence of conditional payments is not assured, Medicare can hold the property owners and their insurers liable for those payments. CP 88-89.

In their opening brief, the property owners argue that the terms implied by the trial court are contrary to the parties’ objective manifestations of intent, that a party’s duty of good faith cannot change the terms of a settlement agreement, that extrinsic evidence cannot be used to imply additional terms in this case, and that the court improperly imposed a term

of interest on the agreement. These arguments were not presented to the trial court, and that court was not asked to consider when good faith and fair dealing may be implied in a contract, or for what purposes extrinsic evidence can be considered in interpreting the manifestations of intent. CP 81-89. It is a “well recognized rule that courts will not inquire into issues presented for the first time on appeal.” Wojt v. Chimacum School Dist. No. 49, 9 Wn. App. 857, 862 n.4 (1973); see also Brundridge v. Fluor Federal Services, Inc., 164 Wn.2d 432, 441 (2008) (“A party who fails to raise an issue at trial normally waives the right to raise that issue on appeal.”) Because the issues of contract formation, modification, and interest are raised for the first time on this appeal, these arguments should not be considered.

C. The trial court properly found bad faith.

1. Property owners delayed for an unjustified amount of time.

Ms. Firth was made to wait unnecessarily for the execution of her settlement against the property owners. Property owners maintain that they did not withhold their approval for Medicare issues arbitrarily, but rather required direct confirmation from Medicare before they would be satisfied. If this direct confirmation was in fact so important to the execution of the agreement, they would have sought Ms. Firth’s release for Medicare information shortly after the settlement took place, and not

after six weeks had elapsed following the settlement. They would also have promptly responded to Ms. Firth's persistent e-mails about the Medicare agreements, rather than ignoring them for unjustified amounts of time, going as long as two weeks and multiple e-mails before responding. Ms. Firth filed the Motion to Enforce on September 27, exactly ninety days after the settlement. The property owners maintain that, because they waited until August 2 to obtain Ms. Firth's signed release, she should have to wait until November 2 before they were satisfied – an additional 36 days. Once all conditions of the agreement were satisfied, Ms. Firth would have to wait up to an additional 21 days, pursuant to the terms of the agreement, before the property owners performed their contractual duties. CP 99. Ms. Firth would therefore not have received her settlement payment until November 23 – nearly five months after the parties agreed to settle.

Beyond the issue of the conditional payments Medicare had not made in relation to this lawsuit, the property owners were equally sluggish in drafting a release containing a set-aside agreement that they found satisfactory. Despite multiple inquiries by Ms. Firth, reminding them that she was expecting a draft release establishing the set-aside, the property owners made no efforts to produce a single draft for 58 days. The draft they eventually produced was based on the same information they had on

the date of settlement, and it contained material inaccuracies, to which Ms. Firth's counsel promptly proposed changes. CP 69-70. Those changes were met with sixteen days of silence, after which defense counsel replied that the language would have to be "tweaked," but offered no proposals as to what needed to be changed to satisfy them.

2. The duty of good faith applies to the settlement agreement.

There is an implied duty of good faith and fair dealing in every contract. Badgett v. Sec. State Bank, 116 Wn.2d 563, 569 (1991). This duty obligates the parties to cooperate with one another so that each may obtain the full benefit of performance. Metro Park Dist. v. Griffith, 106 Wn.2d 425, 437 (1986). It thus acts as an implied restriction on a promisor's freedom of action; that is, in every contract, the parties will be deemed to have agreed to perform the contract in good faith.

Here, the trial court made specific factual findings, based on substantial evidence, concerning the property owners' breach of their implied duties under the settlement agreement. It found that, at the time of settlement, "the defendants had sufficient information to verify that Ms. Firth had not received payments or benefits from Medicare," and that they "had no just reason for the delay" in tendering a final release with satisfactory terms. CP 117. As a direct result of finding that the property owners breached their duty of good faith performance, the court ordered

that the property owners had waived their right to the term establishing the set-aside in the release agreement.⁷

The breach of this duty further inheres in the fact that, while the settlement payment is contingent on the satisfaction of the property owners, and therefore they were in the best position to effectuate a satisfactory release and set-aside, no action was taken for two months despite repeated requests for their cooperation. The common law rule that a contract with a personal satisfaction clause was illusory because the promisor failed to make a definite commitment to be bound has been obviated and replaced by the duty of good faith as applied to all contracts. See, e.g., Joseph Perillo and Helen Bender, 2 Corbin on Contracts § 5.28 (“An implied obligation to use good faith is enough to avoid the finding of an illusory promise.”) Here, the property owners had the assurances of Ms. Firth and her counsel that Medicare had not made any payments for medical treatment. These assurances were confirmed by complete and

⁷ It is important to note that withholding this term from the release agreement will not in fact prevent Ms. Firth from creating the set-aside consistent with federal law. Ms. Firth is not asking this court to hold that a state court can find that a party before it does not have to abide by federal law. Rather, she is asking for recognition that a party cannot unnecessarily and in bad faith delay its performance under a valid settlement agreement. Ms. Firth stated her intent to set aside that portion of this settlement that is appropriate to provide for her future medical expenses stemming from this incident.

tangible evidence in the form of medical records identifying the sources of payment for Ms. Firth's bills⁸.

3. Property owners failed to perform.

The property owners had ample opportunity to draft a release incorporating a set-aside they found satisfactory. The release they finally offered on August 26th contained no information that was unavailable to them at the time of settlement. They claim to have withheld performance⁹ because they had not yet been satisfied as to the existence of Medicare payments and the language of the set-aside, yet nothing kept the property owners from being satisfied besides their own self-serving delay. They breached the duty of good faith and fair dealing by not cooperating with Ms. Firth, and by denying her the full benefit of their performance. See S.H., 102 Wn. App. at 475 (“A party may demonstrate bad faith by, *inter alia*, delaying or disrupting litigation.”) This breach also flows from the characterization of their obligations as contingent upon their subjective,

⁸ Counsel for property owners was also allowed to interview Ms. Firth as part of the mediation process, and asked her directly about her treatment. Ms. Firth confirmed the absence of Medicare involvement in her treatment.

⁹ In fact, the property owners have not, to this date, performed their obligations to draft and produce a release that they find satisfactory. No such document has been presented to Ms. Firth for signature.

and therefore illusory, satisfaction in contravention of the intent of the parties.

D. Waiver of the set-aside was an appropriate sanction for the property owners' bad faith.

“[A] trial court’s inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith.” *Id.* This inherent power to sanction is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991)). Sanctions are appropriate “if an act affects ‘the integrity of the court and, [if] left unchecked, would encourage future abuses.’” S.H., 102 Wn. App. at 475 (quoting Gonzales v. Surgidev Corp., 121 N.M. 151, 157, 899 P.2d 594, 600 (N.M. 1995)). Thus, upon a finding of bad faith, a trial court may impose those sanctions it considers necessary to deter future misconduct.

Waiver of the set-aside as a term in the release agreement was an appropriate sanction for the breach of the duty of good faith, and within the discretion of the trial court. The property owners did not take their obligations under the settlement agreement seriously and did not negotiate in good faith. Ms. Firth was made to wait for an inordinate and unjustified amount of time to receive her settlement check, and was waiting without

any indication that the award was forthcoming. It was both parties' expectation, as evidenced in the communications between counsel, that the property owners would draft the release to their satisfaction. Ms. Firth's obligation under the settlement, to sign this release, was dependent on the property owners' performance of their obligations. They did not provide a factually accurate release containing a Medicare set-aside for Ms. Firth's signature within a reasonable time. When a release was finally proposed, their calculations of the amount for set-aside were based on information available to them at the time of settlement, meaning that there was no justification for the delay.

E. Medicare costs are not at issue in this controversy.

One more issue needs to be clarified. The existence of a set-aside for future Medicare costs is not at issue in this controversy. The trial court made no ruling as to the appropriateness of Ms. Firth maintaining such a set-aside; instead, the order waived the creation of a set-aside as a *term of the release agreement*. At this moment, Ms. Firth's intentions to establish a set-aside would be prudent, given her potential future medical expenses. If she indeed sets a portion of her settlement aside it will be as a result of her understanding of her legal or moral obligations, and not out of an obligation to the property owners. Similarly, the property owners waived any right to be defended or indemnified for Medicare payments as a result

of their bad faith. Their delays resulted in their forfeiture of their rights under the original agreement; Ms. Firth's general obligation to establish a set-aside is not at issue. It is only her obligation to do so *for the property owners* that is disputed.

Considerations of fairness and equity, premised on an explicit finding of bad faith, moved the trial court to strike the set-aside clause from the settlement agreement. When fashioning an equitable remedy such as forfeiture or waiver, a trial court "has broad discretion to fashion a remedy to do substantial justice and end litigation." Cogdell v. 1999 O'Ravez Family, LLC, 153 Wn. App. 384, 390 (2009). The court here applied equity in a meaningful manner and did not abuse its inherent discretion.

F. The trial court properly read implied terms into the settlement agreement.

1. Three months was a reasonable time to perform under the contract.

Generally, courts repugn arguments that an agreement between parties is illusory or indefinite, and thus they interpret contracts in a manner favoring a finding of binding agreement. See, e.g., Taylor v Shigaki, 84 Wn. App. 723, 730 (1997). A meeting of the minds on all essential terms is crucial to any contract. Richards v. Kuppinger, 46 Wn.2d 62, 66 (1955). However, if the parties have adequately manifested an intent to create a specific contract, courts will supply missing terms or clarify

ambiguous terms, including time for performance. See Pepper & Tanner, Inc. v. KEDO, Inc., 13 Wn. App. 433, 535 (1975). Under contract principles, a court may imply a reasonable time for performance of an obligation where a contract imposes a definite obligation, but fails to provide a time for its performance. Byrne v. Ackerlund, 108 Wn.2d 445, 455 (1987) (citing Foelkner v. Perkins, 197 Wash. 462 (1938)).

Here the parties, by agreeing to mediation and by accepting settlement through the mediator, manifested an intent to create a contract. Specific obligations were imposed on the parties, as articulated in the settlement agreement. These obligations contained conditional language, but embedded within this language was the implied duty of good faith. Part of the duty of good faith is the duty to perform one's obligation. See, e.g., Morris v. Swedish Health Services, 148 Wn. App. 771, 777-78 (2009) (defining "good faith" to include "(1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."); see also Birkenwald Distributing Co. v. Heublein, Inc., 55 Wn. App. 1, 6 (1989) ("Parties contracting in good faith ... presumably intend a reasonable time if they do not discuss duration.").

Construing the settlement agreement as a “contingent estate” cannot free the property owners from the imposition of a reasonable time to perform. Where performance under a contract is conditioned on one party’s subjective evaluation of the consideration offered by the other, that party can delay its approval or satisfaction indefinitely and thereby avoid satisfying the condition. Such action would transform the contract into an illusory promise and deny Ms. Firth the award to which she is entitled. Courts “will not give effect to interpretations that would render contract obligations illusory.” Shigaki, 84 Wn. App. at 730. Here, the property owners needlessly delayed execution of their duties. They were not responsive to Ms. Firth’s requests for cooperation and did not take affirmative steps to execute an agreement within a reasonable time.

The ninety day waiting period for Medicare’s response is a distraction; property owners did not even seek Ms. Firth’s signed release for Medicare information until after an unjustified and unexplained six-week delay. The property owners contend that Medicare can take months to confirm the nonexistence of payments, yet it delayed taking any action until late July; nearly one month after the settlement had been reached. It is bad faith to make Ms. Firth wait for her settlement on the basis of waiting for a response from Medicare, when that response was not seasonably sought

and when the property owners had ample assurances that Medicare had made no payment for Ms. Firth's treatment.

Furthermore, extrinsic evidence of property owners' bad faith is essential in determining the "reasonable time" for performance. "Where there is nothing in the transaction of the parties contracting ... to indicate that any definite time for completing it was in their minds, the law implies that completion was to be made without needless delay and within a reasonable time." Randall v. Tradewell Stores, 21 Wn.2d 742, 762 (1944). The determination of what is a "reasonable time" depends on "the subject matter of the contract, the situation of the parties, and the circumstances attending the performance." Id. Because the settlement agreement itself implies that actions must be performed within a reasonable time, extrinsic evidence of the parties' situations and the circumstances attending the performance were properly considered by the trial court in fashioning its remedy.

2. Accrual of interest was properly implied in law.

The trial court also did not abuse its discretion in awarding Ms. Firth 12% interest on the settlement due to the unnecessary delay. Such award is consistent with Washington statutory law. For example, RCW 19.52.010 provides that "[e]very loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per

annum where no different rate is agreed to in writing.” This definition clearly contemplates contracts, and by extension, settlement agreements. See, e.g., Topline Equip., Inc. v. Stan Witty Land, Inc., 31 Wn. App. 86, 91 (1981) (RCW 19.52.010 applies to contracts in the absence of a written agreement regarding interest).

The award of a 12% interest rate is also consistent with the common law of contracts. Quoting Lord Watson from a Nineteenth Century English court, when the “parties to a ... contract ... have not expressed their intentions ... the meaning of the contract must be ... not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon.” In re Bachmeier, 106 Wn. App. 862, 870-71 (2001) (citing Dahl v. Nelson, Donkin & Co., 6 App. Cas. 38, 59 (1881) (rev’d on other grounds)). Here, implying a due date for payment is indispensable to effectuate the intention of the parties.

While a court will not imply terms based on a party’s subjective understanding or expectation, see, e.g., Parker v. United Airlines, Inc., 32 Wn. App. 722, 725 (1982), the court has had no compunction in implying interest pursuant to RCW 19.52.010 where one party is owed money by another party and the principal owed is not in dispute. See, e.g., Mehlenbacher v. DeMont, 103 Wn. App. 240, 251 (2000); Shigaki, 84

Wn. App. at 731-32. Here, there was a valid settlement agreement with clear terms for performance. The property owners did not perform their obligations in good faith, resulting in an unreasonable delay. It was well within the court's discretion to find an implied term of 12% interest in the settlement agreement, particularly in light of the property owners' bad faith.

Finally, the property owners did not oppose the imposition of interest in its briefing at the trial court below. No arguments were presented regarding the trial court's inherent authority to infer a 12% interest rate in a settlement agreement where the property owners unjustifiably failed to perform within a reasonable time. Because this issue was not presented to the trial court for consideration, it should not be considered by this Court. See Wojt, 9 Wn. App. at 862 n.4.

V. Conclusion

The trial court properly exercised its authority under CR 2A and RCW 2.44.010 and enforced this settlement agreement. It made specific findings that a valid settlement agreement existed; that the property owners intentionally, voluntarily, and without just cause delayed the performance of their obligations under the settlement agreement; and that interest and a reasonable time for performance of the contract, as basic principles, were implied. These findings were supported by substantial

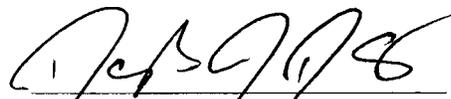
evidence. The property owners failed to fulfill their obligations. The property owners did not act in good faith.

Furthermore, the property owners did not preserve arguments as to whether it was appropriate to modify the terms of the settlement agreement as result of its bad faith. The questions of whether a court can imply a reasonable time for performance of an agreement, of whether it can imply interest in an agreement, and of whether waiver is an appropriate remedy for bad faith were not presented to the trial court, and therefore should not be considered by this court. Finally, even if this court does consider such arguments, the trial court acted within its discretion when it addressed these issues.

This court should affirm the trial court's order on the Motion to Enforce and require the property owners to abide by the order.

Respectfully submitted this 11 day of February, 2011

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Attorneys for Respondent

Declaration of Service

I caused a copy of the foregoing Appellant's Opening Brief to be served on the following in the manner indicated below:

Via US Mail to

Shilpa Bhatia
Wilson Smith Cochran Dickerson
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161

on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 11th day of February, 2011, at Seattle, Washington.



Lauren Rock, Legal Assistant

Appendix A

Date	Action	Days since settlement	CP#
6/29/2010	Settlement agreement finalized with mediator	0	99
7/7/2010	Ms. Firth inquires as to winding up settlement; property owners indicate a set-aside will be prepared "later next week".	8	41
7/21/2010	Ms. Firth inquires as to the status of the set-aside	22	43
7/26/2010	Property owners send 2-page letter outlining set-aside and asking for Ms. Firth's release, saying that an answer will take up to 90 days.	27	45-46
7/27/2010	Plaintiff's counsel indicates he has forwarded the release for Ms. Firth's signature and asks about a draft settlement agreement	28	48
8/2/2010	Ms. Firth returns her signed Medicare Release	34	50
8/9/2010	Plaintiff writes to property owners inquiring as to the set-aside; they indicate that a draft should be available by the end of the week	41	52, 54
8/11/2010	The property owners inquire as to existence of any Medicare payments; Ms. Firth indicates that none had yet been made.	43	56-60
8/19/2010	Ms. Firth inquires as to status of settlement and release	51	62
8/20/2010	Defense responds that he is in Oregon; nothing is yet ready.	52	64
8/26/2010	First draft of release is tendered to Ms. Firth; this draft inaccurately presumes the payment of medical bills by Medicare.	58	66
9/3/2010	Ms. Firth's attorney submits amended draft, attached to letter explaining that no Medicare payments could have taken place, as evidenced by all medical records.	66	69-70
9/13/2010	Ms. Firth inquires as to status of release agreement, pointing out that she had agreed to set aside an additional \$2000 to cover any conditional payments, and asks to expedite process	76	72
9/20/2010	Plaintiff's counsel asks for property owners' approval of his draft release, hoping to submit it to Ms. Firth, and inquires as to interest.	83	74, 76
9/23/2010	Property owners indicate that "language will have to be tweaked" but do not address how; Mr. Rocke expresses desire for finality.	86	78
9/27/2010	Ms. Firth files her motion to enforce the settlement	90	30