

No. 68494-9-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

RANJIV HAYRE and SUKHJIWAN HAYRE,

Respondents,

v.

DEAN STREET and JANIS L. STREET, husband and wife,
individually and their marital community,

Appellants,

EVERGREEN MONEYSOURCE MORTGAGE CORPORATION, a
Washington corporation; MORTGAGE ELECTRONIC
REGISTRATION, INC. ("MERS"), a Delaware corporation; and SAXON
MORTGAGE SERVICES, INC., a Texas corporation,

Defendants.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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A. INTRODUCTION

Washington law and public policy favors enforcement of settlement agreements. When parties agree to be bound, even in informal writings, courts will hold them to those agreements.

Having experienced second thoughts about a settlement agreement *he proposed* and expressly agreed to, Dean Street tried to avoid the agreement claiming that he did not agree to be bound and that the agreement did not address all material terms.

A settlement agreement was reached here, and the trial court enforced it according to the terms proposed by Street. This case should have long since been concluded. This Court should uphold the agreement.

B. COUNTERSTATEMENT OF ISSUES RELATING TO ASSIGNMENTS OF ERROR

The Hayres acknowledge Street's assignments of error but believe the issues are more appropriately formulated as follows:

(1) Is a clear settlement agreement made between two attorneys authorized to settle, the terms of which were proposed by the party later wishing to avoid the agreement, enforceable pursuant to RCW 2.44.010 and CR 2A?

(2) Is it a manifest abuse of discretion and reversible error for a trial court to require that a CR 2A motion be heard under the timelines provided in CR 56?

(3) May a trial court award attorney fees to party forced to bring a motion to enforce a settlement agreement under CR 2A when the statute governing partition actions provides discretion to do so, and when there is no reasonable basis for avoiding the agreement?

(4) Are the Hayres entitled to their attorney fees on appeal pursuant to RAP 18.9?

C. COUNTERSTATEMENT OF THE CASE

Street spends seven pages of his opening brief describing the history between the parties and the events leading to the settlement agreement he wishes to avoid. Br. of Appellant at 3-10. The Hayres disagree with much of Street's characterization of events, and their perspective is amply described in the record. CP 4-5, 15-18.

However, the only facts pertinent to this appeal are recited by Street on pages 10-12, and are largely undisputed. Street, through his counsel, proposed settlement of this matter, telling the Hayres he was willing to settle on the following terms: (1) a \$50,000 payment from the Hayres to Street, (2) conveyance of the real property in question to Street, and (3) a mutual release of claims. CP 189. The Hayres, through counsel,

accepted that offer, and stated that if the release of claims included all claims between the parties related to the acquisition and ownership of property, past, present, and future, known and unknown, they would strike their motion and draft the formal documents. Street's counsel responded "Agreed. Please prepare the paper work." *Id.*

Shortly thereafter, Street began attempting to amend and modify his own proposal, claiming the offer was contingent, and that he had failed to include material terms. Br. of Appellant at 13-19. The Hayres, faced with Street's apparent discomfort with his own proposed settlement terms, moved to enforce the agreement under CR 2A. CP 178. Street resisted the motion, claiming that he did not intend to be bound, and that the agreement omitted material terms. CP 242. The trial court entered an order enforcing the agreement. CP 371.

After the trial court entered the order enforcing the agreement, Street continued to resist compliance. CP 391-406. Street filed an unauthorized "memorandum" regarding the order claiming: "The events that have transpired since the entry of the order demonstrate why it should not have been entered in the first place." CP 381-86. The "memorandum" was filed outside the time for a motion for reconsideration, and cited no legal authority for vacating the order. *Id.* After filing his notice of appeal, Street attempted, under the auspices of the Hayre-Street matter, to

subpoena loan documents under CR 45 “to determine whether the absence of the Hayres’ signatures on most of the Evergreen loan documents was caused by actionable misconduct by a third party....” Supplemental Clerk’s Papers Dkt. 80. The Hayres were forced to file a motion to quash the improper subpoena, which was granted. Supplemental Clerk’s Papers Dkt. 73, 85.

Street appealed from the order enforcing the agreement. CP 496.

D. SUMMARY OF ARGUMENT

Washington law favors settlement of disputes. When a party proposes settlement, and both parties clearly agree to the terms, that agreement should be enforced.

Street’s proposal contained those terms which he presumably believed were all of the material terms of settlement. He expressly agreed to it, as did the Hayres. The terms Street claims ex post facto are material are merely refinements, or were not in fact imposed by the trial court, leaving the parties as they were under the law. The trial court’s order enforcing the agreement should be upheld.

Having witnessed Street’s desperate attempts to conjure frivolous reasons to avoid settlement, the trial court imposed a modest \$500 in attorney fees to compensate the Hayres for the cost of bringing their motion. That order should likewise be upheld.

Street's appeal is frivolous and taken for purposes of delay. RAP 18.9(a). Fees on appeal should be awarded to the Hayres.

E. ARGUMENT

(1) Public Policy and Washington Law Favor Enforcement of Settlement Agreements, Including Those Reached in Informal Writings

There is a strong public policy favoring the compromise of litigation. *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729, 730 (1954); *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110, 1111 (1992); *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994, 998 (1978). In fact, encouraging settlement is the express public policy of this state. *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997). Washington law "strongly favors" settlement. *Seafirst Ctr. Ltd. Partnership v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (quoting *Seafirst Ctr. Ltd. Partnership v. Kargianis, Austin & Erickson*, 73 Wn. App. 471, 476, 866 P.2d 60 (1994)).

Enforcement of settlement agreements is governed by CR 2A and RCW 2.44.010. Under the court rules, where there is written evidence of a settlement agreement between attorneys for the parties, such an agreement is enforceable:

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.

CR 2A. Likewise, statutory law provides attorneys with authority to bind their clients to a settlement agreement:

An attorney and counselor have authority:

(1) To bind his client in any of the proceedings in an action or special proceeding by his 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 signed by the party against whom the same is alleged, or his attorney[.]

RCW 2.44.010.

The purpose of these provisions is to encourage the enforcement of agreements intended to settle or narrow a cause of action. *In re Marriage of Ferree*, 71 Wn. App. 35, 40-41, 856 P.2d 706, 709 (1993). CR 2A ensures that negotiations undertaken to avert or simplify trial do not propagate additional disputes that then must be tried along with the original one. *Id.*

For a century, Washington courts have recognized that a settlement agreement need not be memorialized in a formal settlement document to be enforceable. *Morris v. Maks*, 69 Wn. App. 865, 869, 850 P.2d 1357,

1359 (1993); *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673, 674 (1913). Washington courts enforce settlement agreements based on informal writings between attorneys. *Id.*; *McKennon v. Anderson*, 49 Wn.2d 55, 60, 298 P.2d 492, 495 (1956); *Fuller v. Ostruske*, 48 Wn.2d 802, 807, 296 P.2d 996, 999 (1956); *Washington Dehydrated Food Co. v. Triton Co.*, 151 Wash. 613, 618, 276 P. 562, 563 (1929). Our courts acknowledge that even when parties plan to make a final written instrument the expression of their contract, they often discuss the proposed terms of the contract before they enter into it. *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 520-21, 408 P.2d 382, 386 (1965). Before the final writing is made, they may agree upon all the terms which they plan to incorporate by exchange of several writings. *Id.* at 521. It is possible thus to make a contract to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then fulfilled all the requisites for the formation of a contract. *Id.*

Settlement agreements are governed by general principles of contract law. *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383, *review denied*, 100 Wn.2d 1015 (1983). In determining whether informal writings are sufficient to establish a contract, even though the parties contemplate signing a more formal written agreement, Washington courts

consider whether (1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913).

A contract is created when the parties manifest to each other their mutual assent to the same bargain at the same time. *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266, *review denied*, 93 Wn.2d 1030 (1980). Washington adheres to the objective manifestation theory of contracts, which imputes an intention that corresponds to the reasonable meaning of a person's words and acts. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005); *Hadley v. Cowan*, 60 Wn. App. 433, 438 n. 4, 804 P.2d 1271 (1991); see also *Morris*, 69 Wn. App. at 871-72. The court does not look to unexpressed intentions. *Hearst*, 154 Wn.2d at 504.

Here, the parties were litigating over their tenancy in common of real property, ownership of which imposed rights and liabilities on each. CP 15-18. Each had made claims and counterclaims regarding who should take possession of the property, and who should possess any rights or liabilities concerning the property going forward. CP 1-7, 58-70. One counterclaim Street asserted was a responsibility for the promissory note in favor of Saxon Mortgage. CP 68-69. These claims and counterclaims

were the material issues between them. *Id.* Street proposed a settlement in which he would be paid \$50,000 in exchange for free and clear title to the property, and a release of the Hayres' claims against him. He agreed to release all of his claims against the Hayres. CP 185, 189. These were the material terms Street's counsel accepted when he stated "Agreed. Please prepare the paper work." CP 189. These material terms encompassed the material legal issues that existed between the parties, and that the trial court imposed. CP 500. It is notable that Street proposed the settlement terms to which the parties ultimately agreed. He was thus in a position to formulate what he considered to be the material terms.

Thus, under basic principles of contract law, the settlement agreement is enforceable. The parties expressly manifested their mutual intent to form a contract. Street now wants to avoid the agreement that *Street himself proposed*. CP 189-90. This Court should not allow him to do so. Under contract law, the offeror is master of the offer. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 590, 998 P.2d 305 (2000). Street may not, after the fact, claim that he had an unexpressed intention to include other terms. *Hearst*, 154 Wn.2d at 504.

- (2) The Terms Street Claims Were Omitted From His Own Settlement Offer Are Not Material, Are Moot, or Expressly Contradict the Writings

Apparently Street had second thoughts about his settlement agreement, and began insisting that he had actually contemplated, or forgot to include, a number of “material” terms that were not expressed in the writings between the parties. Thus, Street’s substantive argument against enforcement of the settlement agreement he proposed is that it does not address all the “material terms.” Br. of Appellant at 29-36. Street claims that the allegedly omitted material terms are: the “scope of the release” of claims, liability for excise taxes on the transfer, payment of the partition referee’s fees, and the “form of deed” in which the Hayres would convey the property. *Id.* at 35.

As a threshold matter, it is critical to note the misleading nature of Street’s argument, which claims that the trial court imposed an agreement that the parties did not reach. *Id.* at 30, 36. He points out terms included or omitted from a draft formal settlement agreement that was never signed, such as dividing the referee’s fees, which might lead one to believe the trial court ordered Street to agree to those terms. *Id.* at 14-15, 17, 18-19 (e.g. “the proposed Settlement said nothing about who would pay the excise tax”). But *the trial court did not impose the complained-of terms in its order.* CP 500. It imposed only those terms agreed upon in the parties’ written communications. CP 189, 500. Thus, the trial court did not

“impose upon the parties an agreement that they did not reach,” as Street claims. Br. of Appellant at 30, 36.

A term is “material” if it “confers rights upon the parties’ rights they would not otherwise have under the law.” *Morris*, 69 Wn. App. at 870 n.2.¹ In *Morris*, the parties exchanged letters setting forth the terms of their agreement. *Id.* at 871. The defendant later claimed he did not intend to be bound by his letter until a formal settlement agreement was executed. Compelling evidence contradicted his claim, including his representation to a bank that he had settled the case. This Court enforced the agreement, observing that the defendant’s subjective intent not to be bound was not expressed in any documents, and that he failed to “come forth with evidence demonstrating the existence of a dispute regarding the material terms of the agreement or the intent to be bound thereby.” *Id.* This Court noted that the purportedly “material” terms that the defendant claimed were omitted were either addressed in the agreement or were mere “refinements” of rights and liabilities, rather than material alterations. *Id.*

¹ Street relies heavily on *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 474, 149 P.3d 691, 692 (2006) for guidance on whether particular terms are material. Br. of Appellant at 31-32, 34. *Evans* contains no analysis and makes no mention of what constitutes material terms. It focuses solely on whether parties have expressed intent to be bound. *Evans*, 136 Wn. App. at 477. Street also cites *Evans* for this proposition in section V.B.2. of his argument. Br. of Appellant at 36-37. That analysis is addressed *infra*.

Morris is dispositive here. The specific items that Street claims are material to the CR 2A agreement are not, in fact, terms that convey or alter rights. They are refinements and minor details. The immateriality of each claim is discussed in turn below.²

(a) Release of Claims

Street alleges that his agreement to a “full and complete release of all claims and causes of action related to the acquisition and ownership of the property whether past, present, future, known or unknown” does not include a release of one of Street’s counterclaims in the present action. Br. of Appellant at 30. He claims that he never intended to release his counterclaim for any deficiency judgment resulting from a short sale. Br. of Appellant at 34.

The suggestion that a release of “all claims” does not include one of Street’s counterclaims in the very action he is purporting to settle is absurd. Street’s unexpressed intention to exclude one counterclaim among many cannot be considered. *Hearst*, 154 Wn.2d at 504. A settlement and release of “all claims” is not ambiguous, nor can it be interpreted to exclude certain claims one party wants to cherry-pick. If Street wanted to

² Street suggests that the trial court erred in enforcing the agreement because the Hayres “made no argument” below that Street’s additional terms were not material. Br. of Appellant at 36. In the event Street attempts to suggest that the Hayres are not permitted to respond to Street’s arguments regarding materiality on appeal, the Hayres point out that they are permitted to respond to issues raised by Street, and also that this Court may affirm on any basis sufficiently developed in the record. RAP 2.5(a).

exempt his counterclaims from the settlement, he should have so expressed that intention before agreeing to release “all claims.”

Street’s argument that his secret intention to exclude one counterclaim from a release of “all claims” should be rejected.

(b) Form of Deed

Street avers that all material terms were not agreed to because the settlement agreement did not enumerate the thirteen terms that must be included in real estate contracts. Street cites cases standing for the proposition that real estate contracts must contain these thirteen items “in order to be enforceable under the statute of frauds.” Br. of Appellant at 35-36, citing *Sea-Van Investment Associates v. Hamilton*, 125 Wn.2d 120, 129, 881 P.2d 1035 (1994) and *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

This argument fails because the contract at issue is not a real estate contract. Street improperly conflates material terms of a settlement agreement and material terms of a real estate contract, as if any settlement agreement with respect to a dispute over real estate constitutes a real estate contract. Br. of Appellant at 35. There is simply no authority for this proposition.

In fact, the theory that Street advances – that a CR 2A agreement regarding real property must comply with the statute of frauds and other

laws governing real estate contracts – has been *specifically rejected* by Washington courts. In *Snyder v. Tompkins*, 20 Wn. App. 167, 172, 579 P.2d 994, 998 (1978), a dispute arose over the disposition of real property in probate. The parties reached an oral settlement agreement in court regarding the property. One party tried to avoid the settlement agreement under CR 2A, arguing that an oral agreement to transfer property was invalid under the statute of frauds. *Id.* at 173. Division II of this Court held that the statute of frauds had no applicability, because the enforceability of settlement agreements is governed by CR 2A. *See also, Deer v. Deer*, 29 Wn.2d 202, 212, 186 P.2d 619, 624 (1947) (CR 2A agreements “are clearly beyond the purview or reason of the statute [of frauds] requiring contracts relating to real property to be in writing and signed by the parties”). This Court in *Morris* rejected the similar argument that in a CR 2A agreement, the form of lease was material. 69 Wn. App. at 869-70.

Street’s case law on the issue of whether the form of deed is material is inapposite. Those cases discuss the materiality of earnest money agreements and real estate contracts, not CR 2A agreements. *Sea-Van*, 125 Wn.2d at 129; *Kruse*, 121 Wn.2d at 722. They do not stand for the proposition that the form of deed is a “material term” of a CR 2A agreement.

The form of deed in which the Hayres convey the property to Street is immaterial to the settlement at issue. It does not alter the legal rights of either party.

(c) Excise Tax Responsibility

Street argues that the issue of who is responsible to pay excise taxes of approximately \$2,000 is an omitted material term. Br. of Appellant at 36.

This term is immaterial because there is no excise tax liability on this transfer.³ The trial court ordered the partition referee to convey the Hayres' interest to Street. CP 372. Court-ordered transfers are exempt from excise tax liability. WAC 458-61A-208(2). Also, in a short sale situation where a third party purchases the property and the lender either forgives the remaining debt or requires a new note from the seller, there is no excise tax liability because the debt arrangements with the lender are not "paid or delivered in return for the sale of the property." RCW 82.45.030. <http://dor.wa.gov/Docs/Pubs/Misc/REETShortSales.pdf>.

³ Street notes in his brief that the partition referee planned to seek a ruling from the Department of Revenue regarding the issue of the excise tax. Br. of Appellant at 22. That ruling has now been received by both parties from the referee. Because it was issued on May 18, 2012, it was not part of the record below and Street was unaware of it when his brief was filed. If Street in his reply continues to deny that no excise tax is due on the transaction, the Hayres will move to include the ruling in the record on appeal under RAP 9.11.

There is no excise tax liability here, either for the transfer of the property or its subsequent short sale. The term is not material.

(d) Referee's Fees

Street claims that dividing the referee's fee between the parties is a material term that was not agreed to. Again, a "material term" is one which alters the rights of the parties under law. *Morris*, 69 Wn. App. at 870 n.2.

Responsibility for the referee's fees is governed by statute. RCW 7.52.150, 7.52.480. The trial court did not impose responsibility for the referee's fees on either party as part of the settlement agreement, thus leaving the legal rights of the parties as they were. Omitting responsibility for the referee's fees does not alter the legal status of any party, and is immaterial.

(3) Street Clearly Expressed Intent to Be Bound

Street claims that the correspondence between counsel for the parties constitutes nothing more than an agreement to agree, and does not reflect the parties' intent to be bound. Br. of Appellant at 36-38.

Again, the intent of parties to be bound is gleaned from their objective manifestations, not from subsequent subjective expressions. *Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). To determine whether a party has manifested intent to enter into a

contract, courts impute intention corresponding to the reasonable meaning of a person's words and acts. *Id.* If a party, judged by a reasonable standard, manifests the intention to agree to the arrangements in question, that agreement is established regardless of that party's real, but unexpressed, intent. *Id.* at 855-56.

Street relies almost exclusively on *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 474, 149 P.3d 691, 692 (2006) to support the proposition that he did not express an intent to be bound. In *Evans*, building contractor Evans sued the City of Yakima regarding the development of certain property, Kissel Park. The city proposed a \$40,000 settlement, but *twice cautioned*: "Settlement is contingent on execution of a Settlement Agreement that I will draft." *Id.* at 474. Evans' attorney accepted the \$40,000 figure to resolve all issues "pertaining to the Kissel Park construction contract." No other terms were proposed. The city's draft settlement agreement included a release of "all claims" not just claims regarding Kissel Park, the subject of the litigation between the parties. *Id.* Evans refused to sign the agreement, and the city tried to enforce it. Division III of this Court said the question of intent to be bound was a question of fact inappropriate to summary judgment. *Id.* at 479. The court specifically cited the city's contingency language and

Evans' expression that the settlement was only of claims regarding Kissel Park, to which point the city apparently did not agree. *Id.*

Again, *Morris* is instructive here. In *Morris*, the writings indicated express authority and intent to be bound, with no conditions or contingencies. The parties in *Morris* clearly intended to be bound by the correspondence: "This will confirm your assurance to me that Tom Maks has agreed to this settlement and I have confirmed Evan Morris' approval." *Morris*, 69 Wn. App at 871. Another letter written by Maks' attorney stated that the July 19 letter accurately reflected the terms of the agreement. Third, Maks signed and acknowledged a letter from his bank that he had settled the case with Morris. The intention to be bound by the settlement was clear in the letters in *Morris*. *Id.*

Here, there was a clear expression by both parties of intent to be bound. The undisputed evidence shows Street's offer was clear: "Dean...renews his offer to accept payment of \$50,000 and transfer title to the property to him and his wife, with mutual releases." CP 189. The Hayres' acceptance was equally clear: "I am authorized to accept the offer of \$50k and conveyance of the property to Dean Street in exchange for a full and complete release of all claims and causes of action related to the acquisition and ownership of the property whether past, present, future,

known, or unknown.” *Id.* Street’s final acceptance was unequivocal: “Agreed. Please prepare the paper work.” *Id.*

The most critical evidence that the parties intended to be bound in advance of the formal agreement is the fact that the Hayres pledged, and Street agreed, to strike the Hayres’ pending motion before the trial court in advance of any formal contract. CP 189. Street cannot explain why, if the exchange of correspondence were no more than an “agreement to agree,” the Hayres would make this commitment.

Even assuming that there were other terms the parties knew must be supplied by the court, that is not the same as an agreement to agree. It more closely resembles an agreement with open terms, which is enforceable. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945, 948 (2004). Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source, such as the Uniform Commercial Code. *Id.*

Nothing in the exchange between the parties resembles the equivocal and contingent language of the “agreement to agree” in *Evans*. This agreement is as clear and unequivocal as the agreement in *Morris*, and should be enforced.

(4) The 28-Day Summary Judgment Motion Calendar Does Not Apply to CR 2A Motions, and Even If It Did Street Demonstrated No Prejudice

Street also raises the procedural argument that he did not have adequate time to respond to the CR 2A motion. Br. of Appellant at 39-40. He claims that CR 2A motions based upon affidavits must be noted on the CR 56 summary judgment 28-day calendar, rather than the six day regular motions calendar that applies to other motions. *Id.* He cites *Feree* and *Brinkerhoff* for this proposition. *Id.* He suggests that the trial court committed reversible error in refusing to grant his motion for continuance. *Id.*

A ruling on a motion for continuance is reviewed for abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554, 557-58 (1990). The ruling is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989); *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988).

Feree and *Brinkerhoff* do not hold that CR 2A motions to enforce must be noted 28 days in advance. They merely state that a trial court should treat the burdens of proof and evidence in the same way as the court would treat a summary judgment motion. *Feree*, 71 Wn. App. at 44; *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000).

There is no authority for the proposition that proceeding with a CR 2A motion on the normal six-day calendar is reversible error.

Even if there were legal authority for Street's argument, the error is not reversible if it is harmless, that is, there no showing of prejudice. *Hanson Indus. Inc. v. Kutschkau*, 158 Wn. App. 278, 291, 239 P.3d 367, 374 (2010), *as amended on reconsideration* (Nov. 18, 2010), *review denied*, 171 Wn. 2d 1011, 249 P.3d 1028 (2011) (rejecting argument that summary judgment motion filed untimely under CR 56 denied opposing party opportunity to respond and was reversible error).

Street does not explain how a hearing on the six-day calendar adversely affected his rights. In his motion to continue, which was not supported by a declaration, he claimed he needed a week to consult with outside counsel about disclosure of attorney-client privileged material, claiming it would support his claims about a "misunderstand regarding the scope of the releases." CP 227. However, any attorney-client communications between Street and his counsel have no bearing on whether the communications between *counsel* were clear and expressed an intent to be bound. At most, this would be extrinsic evidence of Street's subjective intent, which is inadmissible.⁴ *Everett*, 95 Wn.2d at 855.

⁴ If Street's counsel exceeded his authority in agreeing to settlement, that matter is between Street and his counsel. It is not a valid basis to avoid the settlement agreement. RCW 2.44.010.

Street does not allege total lack of notice or opportunity to be heard or other due process violation, or any prejudice from the six-day calendar consideration. He simply claims he needed more time. But he was able to submit a responsive motion and affidavits, which confirmed the material facts regarding the exchange of correspondence on settlement that the Hayres had described. CP 242-341.

After full and fair consideration of the arguments and evidence of both parties, and in light of the undisputed facts, the trial court did not manifestly abuse its discretion in refusing to grant Street a continuance.

(5) The Trial Court Properly Awarded \$500 in Attorney Fees to the Hayres

Street claims that there is no basis in statute, contract, or equity to award the Hayres \$500 in attorney fees for being forced to bring the CR 2A motion. Br. of Appellant at 39-40.

A partition action is both a right and a flexible equitable remedy subject to judicial discretion. *See Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wn.2d 862, 873, 929 P.2d 379 (1996) (citing *Hamilton v. Johnson*, 137 Wash. 92, 100, 241 P. 672 (1925)); *Cummings v. Anderson*, 94 Wn.2d 135, 143, 614 P.2d 1283 (1980). The trial court is accorded great flexibility in fashioning relief under its equitable powers.

Cummings, 94 Wn.2d at 143, 614 P.2d 1283 (citing *Leinweber v. Leinweber*, 63 Wn.2d 54, 56, 385 P.2d 556 (1963)).

Attorney fees are available to a party forced to respond to a claim or defense advanced without reasonable cause. CR 11, RCW 4.84.185. Attorney fees are also available under the bad faith exception to the American rule. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342, 344 (1976). This exception applies when the opposing party's actions amount to wanton misconduct, fraud, or malice. *Id.*; *State ex rel. Macri v. City of Bremerton*, 8 Wn.2d 93, 113, 111 P.2d 612, 621 (1941).

Here, the trial court found that the Hayres were entitled to a modest \$500 fee award as partial compensation for having to seek the court's assistance to end Street's baseless attempts to avoid his own agreement. The trial court *did not* order Street to pay all of the Hayres' fees in the partition action. The court ordered \$500 to the Hayres because Street's baseless actions compelled them to bring a motion to enforce settlement. CP 501. Street's attempts to avoid his agreement were frivolous and contrived. CP 409-412. Even after the trial court ruled, Street continued to attempt to avoid the order using improper tactic, going so far as to file a meritless subpoena that had to be quashed. Under the trial court's equitable powers, the modest \$500 attorney fee award to the Hayres was appropriate.

The trial court could have required Street to pay far more than \$500 under its equitable partition powers. It did not. The \$500 attorney fee award is appropriate and should be upheld.

(6) This Court Should Award the Hayres Fees on Appeal

RAP 18.1 provides for attorney fees to the prevailing party if there is a statutory, contractual, or equitable basis for doing so. Sanctions in the form of attorney fees may also be imposed under RAP 18.9(a) if an appeal is frivolous.

RAP 18.9(a) is the appellate counterpart to CR 11. *See generally Streater v. White*, 26 Wn. App. 430, 613 P.2d 187 (1980), *rev. denied*, 94 Wn.2d 1014 (1980). In determining whether an appeal is brought for delay under this rule, the primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Id.* at 434.

Street's appeal has no basis in fact. He proposed settlement and then reneged after that proposal was accepted. To avoid his own agreement, he conjured additional "material terms" that he himself did not think material at the time he proposed settlement. Although the trial court limited the terms to those he proposed in writing, he suggests on appeal

that the trial court rewrote the settlement and imposed additional terms, when it did nothing of the sort.

Street's appeal also has no basis in law. He ignores clear authority on what constitutes a material term, and relies upon easily distinguishable cases that do not even arguably support his position.

The Hayres should be awarded their attorney fees on appeal for being forced once again to respond to meritless contentions regarding omitted "material terms" concocted by Street in an attempt to avoid his own settlement proposal.

Moreover, this frivolous appeal undermines the very grounds for Washington's public policy in favor of settlement: to avoid needless and endless litigation. Street should pay the Hayres' attorney fees on appeal under RAP 18.9.

F. CONCLUSION

Street's settlement proposal was agreed to by both parties. Street's attempt to renege by conjuring additional material terms should be rejected. The trial court's order should be upheld, and costs, including reasonable attorney fees, should be awarded to the Hayres on appeal.

DATED this 13 day of July, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the Brief of Respondent in Court of Appeals Cause No. 68494-9-I to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 13, 2012, at Tukwila, Washington.


Paula Chapler, Legal Assistant
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