

No. 74774-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

CAMBRIDGE DECISION SCIENCE,

Plaintiff/Respondent,

v.

JON MARKMAN and ELLEN MARKMAN, husband and wife, and the
marital community comprised thereof; and MARKMAN CAPITAL
INSIGHT LLC,

Defendants/Appellants.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

STATEMENT OF THE ISSUE..... 3

STATEMENT OF THE CASE..... 3

 I. The parties entered into a Settlement Agreement
 and a Mutual Release. 3

 II. Plaintiff filed suit in Washington when Markman
 did not perform pursuant to the settlement. 6

ARGUMENT 11

 I. The trial court correctly ruled that the parties have
 settled. 11

 A. The Mutual Release and the Settlement
 Agreement are independently enforceable
 and together establish a complete settlement..... 11

 B. Markman fails to raise a question of fact..... 13

 II. Markman waived any right to an evidentiary
 hearing, and one was not required regardless. 16

 III. Any error in the identification of plaintiff is
 harmless. 17

 IV. It was correct of the trial court to: enter judgment
 against Markman’s marital community, bar
 Markman’s claims under the mutual release, award
 interest, and award statutory costs. 18

CONCLUSION..... 21

CERTIFICATE OF SERVICE 22

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>E.E.O.C. v. Waffle House, Inc.</i> , 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).....	19
<i>Johnson Enterprises of Jacksonville. Inc. v. FPL Group, Inc.</i> , 162 F.3d 1290 (11th Cir. 1998)	13
State Cases	
<i>Brinkerhoff v. Campbell</i> , 99 Wn. App. 692, 994 P.2d 911 (2000).....	2, 4, 13, 16
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	16
<i>Cruz v. Chavez</i> , 186 Wn. App. 913, 347 P.3d 912 (2015)	14
<i>Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton</i> , 158 Wn.2d 506, 145 P.3d 371 (2006).....	20
<i>Duncan v. Alaska USA Fed. Credit Union, Inc.</i> , 148 Wn. App. 52, 199 P.3d 991 (2008)	12
<i>Envtl. Servs., Inc. v. Carter</i> , 9 So. 3d 1258 (Fla. Dist. Ct. App. 2009)	13
<i>In re Ferree</i> , 71 Wn. App. 35, 856 P.2d 706 (1993).....	11, 16
<i>Kwiatkowski v. Drews</i> , 142 Wn. App. 463, 176 P.3d 510 (2008)	14, 15, 17
<i>Laliberte v. Wilkins</i> , 30 Wn. App. 782, 638 P.2d 596 (1981).....	18

<i>Morris v. Maks,</i> 69 Wn. App. 865, 850 P.2d 1357 (1993).....	11
<i>Professional Marine Co. v. Underwriters at Lloyd's,</i> 118 Wn. App. 694, 77 P.3d 658 (2003).....	18
<i>Prostov v. State, Dep't of Licensing,</i> 186 Wn. App. 795, 349 P.3d 874 (2015).....	17
<i>Sunkidd Venture, Inc. v. Snyder-Entel,</i> 87 Wn. App. 211, 941 P.2d 16 (1997).....	19
<i>White v. Dvorak,</i> 78 Wn. App. 105, 896 P.2d 85 (1995).....	18
State Statutes	
RCW 4.84.010, 4.84.080	20

INTRODUCTION AND SUMMARY

Plaintiff/Respondent Cambridge Decision Science (CDS) brought this action to enforce a settlement agreement winding up a former joint venture with Defendants/Respondents Jon Markman and his business Markman Capital Insight LLC (Markman). Plaintiff asserted one claim only, for breach of a final, complete, and signed settlement agreement. CP 208–09, 210. The trial court found that the parties had reached a final, complete, and signed settlement agreement and entered judgment in favor of plaintiff for \$95,000, the settlement amount.

Markman makes four arguments on appeal, each of which is incorrect.

First, Markman argues based on extrinsic evidence that there is a genuine issue of material fact about whether the parties reached a settlement. But the parties signed and initialed a settlement agreement providing, “[t]his document, together with the attached Mutual Release, is the entire Agreement of the Parties relating to the termination of the Gemini business.” CP 209. This is a final and binding settlement. And, independently, the parties exchanged mutual promises to release each other, each of which is sufficient consideration for the other. CP 210. Markman’s reliance on extrinsic emails does not defeat an integrated settlement agreement.

Second, for the first time on appeal, Markman complains that it was error for the trial court to enforce the settlement without holding an evidentiary hearing. But Markman never requested an evidentiary hearing in the trial court. Because Markman “failed to raise [this issue] in the trial court, [this Court] will not consider [it] on appeal.” *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 700, 994 P.2d 911 (2000). And regardless, because there was no material factual dispute, an evidentiary hearing was not required.

Third, Markman argues that the trial court should have delayed the settlement to allow Markman to investigate the capacity of CDS to sue on the settlement agreement. But any error in the identification of the plaintiff is harmless error where, as here, the parties’ course of dealing establishes that they were known to each other and the plaintiff is prepared to provide a satisfaction of judgment once the judgment is paid.

Fourth, Markman asserts a miscellany of other errors. None have merit: (a) Markman’s obligation is presumptively a community obligation and, again, Markman never contested in the trial court that his spouse Ellen Markman was a proper defendant for this reason; (b) Markman’s claims were all released by the mutual release that he signed, CP 210, and only the parties’ settlement agreement, CP 208–09, remains to be performed; (c) prejudgment interest is properly awarded on a liquidated

sum from the date of settlement; and (d) a prevailing party is properly awarded statutory fees and costs.

This Court should affirm the trial court and uphold the settlement to which Markman agreed.

STATEMENT OF THE ISSUE

1. Did the trial court correctly enforce the parties' final, complete, and signed settlement agreement by entering judgment for the unpaid settlement amount with statutory interest from the date of settlement?

STATEMENT OF THE CASE

I. The parties entered into a Settlement Agreement and a Mutual Release.

Plaintiff and Markman were engaged in a joint venture relating to futures trading. Markman is a resident of Seattle, Washington. It is undisputed that Markman terminated the parties' joint venture. Plaintiff alleges that at the time Markman terminated the joint venture, Markman was in control of accounts receivable due to the joint venture. CP 3.

During the summer and fall of 2015, the parties sought to wind up their relationship. The parties exchanged a series of emails on October 15 & 16, 2015. Plaintiff provided a proposed settlement agreement and a mutual release. Markman returned both on October 15, 2015, signed, with one initialed change. CP 182. Markman struck language that he would provide subsequent revisions to the parties' customer list. CP 35–36.

Defendant otherwise accepted the settlement, including agreement to paying \$95,000. Defendant made no changes to the mutual release. CP 37.

The following day, among other emails, plaintiff sent Markman a fully executed settlement co-initialing the strikeout change that Markman had requested. CP 185–86, 206. The settlement provided: “[t]his document, together with the attached Mutual Release, is the entire Agreement of the Parties relating to the termination of the Gemini business. All prior negotiations are merged into this Agreement.” CP 209. The settlement is governed by Florida law. *Ibid.*

In the separate Mutual Release, the parties agreed that “[f]or valuable consideration, including the mutual understandings set forth herein, Jon Markman, for himself and on behalf of Markman Capital Insight, L.L.C. and all other entities owned or controlled by him (collectively, ‘Markman’), on the one hand, and T.L. Thomas, individually and d/b/a Treadstone and Cambridge Decision Science (collectively, ‘Thomas’), on the other hand ... hereby release, and by signing this document hereby discharge, each other from any and all claims ... which either Party has against the other as of the date hereof or arising in the future based upon, arising out of, or related to the Gemini business.” CP 210. The only claims excepted from the mutual release were claims based on breach of the settlement agreement. *Ibid.*

Markman relies on two theories to argue that there is a question of fact about whether the parties settled.

First, Markman relies on emails in which plaintiff requested that he verify emails on the parties' customer list for typographical errors. *See* CP 179–83, 185–86. When Markman returned the signed settlement with the strikeout change, he addressed the email issue, saying, “[t]he information came straight out of my database. If there are any errors, the same errors are still in my records.” CP 182. Plaintiff asked him to confirm his understanding that the customer emails were still being used by Markman’s company and agree to correct any “inadvertent typos,” stating: “[t]hen I will also initial the strikeout and send back the document. . . .” CP 181. Markman confirmed the emails were the ones he was using and stated: “[i]f there are inadvertent typos in the email addresses, your guess as to what’s wrong will be as good as mine so there’s no point to asking me for help.” CP 180. Plaintiff returned the fully executed settlement that stated it was the parties’ entire agreement. CP 186, 209. In the accompanying email plaintiff asked that Markman cross-check the two emails, CP 186, and later stated “[w]e are going to conclude this on this end at 4:30 Eastern Standard Time,” CP 185.

These emails do not create a question of fact about settlement. The parties’ correspondence is extrinsic evidence that does not undermine a

fully executed and integrated agreement stating that it is “the entire Agreement of the Parties.” CP 209. Further, any issue over typographical error in two customer email addresses is not material. Markman stated, “[i]f there are any errors, the same errors are still in my records,” CP 182, and again, “[i]f there are inadvertent typos in the email addresses, your guess as to what’s wrong will be as good as mine so there’s no point to asking me for help,” CP 180. Plaintiff’s initialing and accepting Markman’s one change to the settlement agreement concluded the matter.

Second, Markman relies on later emails about arbitration. But the parties never reached an agreement to arbitrate. There is nothing in the record establishing an agreement to arbitrate, a specification of the scope of any arbitration, a specification of what would be arbitrated, by whom it would be arbitrated, or when or where it would be arbitrated.

II. Plaintiff filed suit in Washington when Markman did not perform pursuant to the settlement.

Under the settlement, Markman was to pay \$95,000. CP 208. Markman did not do so.

Plaintiff retained local counsel in Washington, Markman’s state of residence, and on November 23, 2015, filed suit to enforce the settlement. CP 1. Plaintiff asserted one claim for damages in the liquidated amount of \$95,000 based on Markman’s breach of the settlement. CP 3.

On December 7, 2015, Markman’s counsel emailed a document purporting to be an affidavit of counsel from a North Carolina case. CP 42, 43–47. The affidavit of counsel ostensibly accuses plaintiff’s principal of “hiding from numerous creditors and federal authorities” and having “stole[n] or otherwise misappropriated large sums of money.” CP 43, 44. Thirty-seven minutes later, Markman’s counsel sent another email, copying Markman’s New York counsel, asking to “follow up with a deposition of Tray Thomas in Seattle during the first week of January.” CP 41.

The plain implication was that if plaintiff did not drop this action to enforce the settlement agreement, Markman and his counsel planned to help the North Carolina lawyer locate plaintiff’s principal by noting his deposition in this case. In addition, Markman’s counsel signaled an intent to file an answer “which will include counterclaims,” CP 41, even though such claims would be barred by the parties’ mutual release.

In response to Markman’s threat to start discovery and pursue claims barred by the mutual release, plaintiff moved to enforce the settlement and bar discovery. CP 25–29. Plaintiff’s Chicago counsel testified:

2. In July 2015, I was retained to assist Cambridge Decision Science and its principal with respect to the wind-up of the affairs of a joint venture by the name

of Gemini. That joint venture was memorialized by a written agreement, which I reviewed. The other joint venture partner was Jon Markman.

3. During the course of my representation, I drafted a Settlement Agreement and a Mutual Release to be signed by the joint venture partners should they reach an agreement on the terms of the termination of the joint venture.

4. On October 16, 2015, I received and reviewed an October 15, 2015 email transmission identified as being sent by Jon Markman to Cambridge's principal, which attached a signed copy of the Settlement Agreement and the Mutual Release which I had originally drafted. A copy of this email and its attachments is attached hereto as Exhibit A.

5. The Settlement Agreement stipulated that Jon Markman was to pay \$95,000 by wire transfer to my firm's clients' funds account upon execution of the Settlement Agreement, which took place on October 16, 2015 when Jon Markman's one deletion to the Settlement Agreement was initialed and sent back to Jon Markman via email.

6. To date, no wire transfer from Jon Markman has been received.

CP 31. In the motion to enforce, plaintiff noticed: "[a]llowing a party to unilaterally back out of a mutual release, conduct expensive discovery, and assert the very claims he released would undermine Washington's policy of promoting settlement." CP 27.

Markman's counsel responded to the motion by emailing Judge Ramsdell's bailiff. Markman's counsel argued that the motion should have been noted as a summary judgment motion, rather than a 6-day motion,

notwithstanding that the motion was necessitated because of his own threat to start discovery. CP 270. Counsel complained that it would be “extremely difficult” to file a response by the following Friday, stated that Markman planned to insist on the deposition of Mr. Thomas, and asked the court to set a telephone conference to address his complaints. CP 271. Judge Ramsdell’s bailiff responded that it was inappropriate to seek relief from the court by email, but outlined the procedure counsel should follow if he had objections to the procedural setting of the motion:

Please understand that the Court cannot give guidance to the parties in an informal email, off the record. All counsel will need to follow any rules that apply to a form of relief they may request of the Court, including motions to rule on another motion in shortened time.

CP 270.

Markman did not further object to the procedural setting of the motion or the Court’s consideration of it. Markman did not pursue relief as outlined by the bailiff, such as filing a motion to shorten time.

Rather, the following Friday, Markman submitted a 19-page opposition to the motion, arguing based on the handful of emails noted above that there was no settlement, and asking for dispositive relief dismissing plaintiff’s claim to enforce the settlement. CP 59–81 (response brief), CP 83–84 (proposed order seeking a ruling that “Plaintiff’s claim is dismissed ...”). Markman requested oral argument, CP 59, but did not

argue that the court was required to hear oral argument, and did not request an evidentiary hearing. Plaintiff replied in support of the motion, CP 199–203, Markman filed an “objection” to the reply, CP 211–13, and plaintiff filed a response to the objection, CP 215–16.

The court issued two orders. First, on January 5, 2016, the court entered an order reserving ruling on the motion to enforce the settlement until after a previously scheduled summary judgment hearing. CP 222–23. Plaintiff had originally scheduled a summary judgment hearing to present the settlement, before plaintiff was forced to move to enforce because of Markman’s effort to start discovery and pursue counterclaims barred by the settlement. On January 20, 2016, Judge Ramsdell’s bailiff emailed the parties that the hearing was stricken and informed the parties that “[t]he Court will consider Plaintiff’s Motion to Enforce Settlement Agreement, and rule by the end of this week.” CP 303. Markman made no objection. Then, on January 21, 2016, the Court entered an order granting the motion to enforce, finding: “[t]he parties entered into a final, complete and signed settlement agreement on October 15, 2015.” CP 236.

Markman moved for reconsideration, arguing for the first time that the court was required to hear oral argument and had erred by not doing so. CP 249–258. Markman did not assert that the court should have held an evidentiary hearing nor that his spouse and marital community were

improper defendants. The court denied reconsideration, CP 327, and, on plaintiff's motion, entered judgment for the settlement amount, prejudgment interest, and statutory fees and costs, CP 328–29.

Markman appeals.

ARGUMENT

I. The trial court correctly ruled that the parties have settled.

A motion to enforce a settlement agreement that is not subject to genuine dispute “can be, and should be, summarily resolved without trial.” *In re Ferree*, 71 Wn. App. 35, 41, 856 P.2d 706 (1993). “Settlement agreements are governed by general principles of contract law.” *Morris v. Moks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). “If the subject-matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them ...” *Id.* at 872 (quoting *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913)) (enforcing settlement established in informal letters exchanged between counsel even though final agreement had not been drafted).

A. The Mutual Release and the Settlement Agreement are independently enforceable and together establish a complete settlement.

It is undisputed that defendant signed two documents: a “Settlement Agreement” and a “Mutual Release.” Defendant made one change to the Settlement agreement, striking out language that he would

provide subsequent revisions to the parties' customer list. Plaintiff accepted, initialed, and returned that change. Defendant made no changes to the Mutual Release.

The Mutual Release set forth independent promises by the parties to release claims against each other. In the Mutual Release, each party signed a promise to discharge the other from claims arising out of their business. Each of these promises was sufficient consideration for the other. "A traditional bilateral contract is formed by the exchange of reciprocal promises. The promise of each party is consideration supporting the promise of the other." *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 74, 199 P.3d 991 (2008) (quotation omitted). Plaintiff has strictly abided by his promise to refrain from making claim against defendant arising out of their business. Defendant's similar promise is binding and is supported by plaintiff's promise as consideration.

The parties also signed a Settlement Agreement. The parties agreed: "[t]his document, together with the attached Mutual Release, is the entire Agreement of the Parties relating to the termination of the Gemini business. All prior negotiations are merged into this Agreement." CP 209. Under Florida law, which governs the agreement, a merger clause, while not necessarily "conclusive," is "a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works

to prevent a party from introducing parol evidence to vary or contradict the written terms.” *Envil. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1265 (Fla. Dist. Ct. App. 2009). The merger clause supersedes contemporaneous extrinsic evidence. *See Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1309 (11th Cir. 1998) (applying Florida law).

Accordingly, the parties reached a final, complete, and signed settlement, setting forth agreement on all material terms of settlement.

B. Markman fails to raise a question of fact.

Markman’s authorities only confirm the conclusion that the parties have settled this case.

In *Brinkerhoff v. Campbell*, the plaintiff settled a personal injury claim for \$90,000, believing the defendant’s coverage to be \$100,000 when it was in truth \$1.25 million. 99 Wn. App. at 694. The parties’ attorneys offered conflicting versions of mediation, where plaintiff’s counsel testified that defense counsel impliedly misrepresented the amount of the defendant’s insurance but defense counsel “denie[d] that these conversations took place.” *Id.* at 699. Accordingly, the court remanded for an evidentiary hearing to resolve this factual dispute about whether such an oral conversation occurred and whether defense counsel misrepresented the coverage as asserted. *Ibid.*

In *Cruz v. Chavez*, 186 Wn. App. 913, 921–22, 347 P.3d 912 (2015), the defendant tried to enforce a settlement where defense counsel approached a plaintiff on an ex-parte basis, gave the plaintiff false legal advice about wisdom and effect of a settlement, and induced the plaintiff to sign without the benefit of the plaintiff’s own lawyer’s advice. Both the trial court and this Court found a question of fact “as to the validity of [the plaintiff’s] assent.” *Id.* at 922.

In contrast, Markman has shown no such question of fact as to the settlement in this case. Markman does not assert a disputed oral representation, nor does he assert any irregularity in the exchange of the negotiated, initialed, and signed settlement agreement. Rather, Markman attempts to construct a question of fact from the string of emails in which the parties completed the final, complete, and signed settlement agreement. The parties’ agreement forecloses this effort.

In *Kwiatkowski v. Drews*, 142 Wn. App. 463, 472, 176 P.3d 510 (2008), after Kwiatkowski signed a settlement agreement, but before the filing of the stipulated order of dismissal of the lawsuit, he purported to discover “‘new’ information,” which he asserted the opposing parties had wrongfully withheld from him and the court, and which he asserted was a basis for avoiding the settlement. At Kwiatkowski’s request, the trial court held an evidentiary hearing “apparently to evaluate whether the

information ... demonstrated that [the opposing parties] had withheld or misrepresented facts.” *Id.* at 478.

In enforcing the settlement the Court looked to the agreement that Kwiatkowski signed. According to the parties’ settlement, each party agreed “that it has had the opportunity to conduct an investigation into the facts and evidence relating to the Released Claims and that it has made an independent decision to enter this AGREEMENT, without relying on representations of any other party.” *Id.* at 473 (quoting settlement). Based on the parties’ agreement, the Court rejected the claim that Kwiatkowski could avoid the settlement by saying that he relied on the record produced by the defendants when he had agreed that he had not done so.

The Court should do the same here. Markman agreed in the settlement: “[t]his document, together with the attached Mutual Release, is the entire Agreement of the Parties relating to the termination of the Gemini business. All prior negotiations are merged into this Agreement.” CP 209. Markman cannot now argue that this is not the case. Markman does not address the merger clause in his brief, and did not dispute its effect under Florida law in the trial court. If Markman plans to argue in his reply brief in this Court that the merger clause means something other than what it says—presumably so that plaintiff does not get a chance to respond—such an argument would be too late and should be disregarded

by this Court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”).

In the end, Markman rests his hopes on the rule that the party seeking to enforce a settlement bears the initial burden to show that there is no genuine dispute over the existence and material terms of the agreement. *See Brinkerhoff*, 99 Wn. App. at 696–97 (citing *Ferree*, 71 Wn. App. at 41). But just as in summary judgment proceedings, “if the moving party does this, the nonmoving party must produce affidavits, declarations or other cognizable materials that show, internally or by comparison, the *presence* of a genuine dispute of fact.” *Ferree*, 71 Wn. App. at 44 (emphasis in original). Plaintiff has shown a final, complete, and signed settlement agreement, which included an enforceable merger clause. Markman fails to raise any question as to the settlement terms on which the parties did agree. These terms included that the parties would release each other and that Markman would pay \$95,000.

This Court should enforce the settlement and affirm.

II. Markman waived any right to an evidentiary hearing, and one was not required regardless.

Markman never requested an evidentiary hearing in the trial court. He has waived any error on this basis. *Brinkerhoff*, 99 Wn. App. at 700

(“Because Brinkerhoff failed to raise these issues in the trial court, we will not consider them on appeal.”); *Prostov v. State, Dep't of Licensing*, 186 Wn. App. 795, 821, 349 P.3d 874 (2015) (“Generally, an appellate court will not consider issues raised for the first time on appeal.”). Markman did not ask the trial court to hold an evidentiary hearing in his response to the motion to enforce the settlement, CP 59–87, in his response to the motion for entry of judgment, CP 240–44, nor in his motion for reconsideration, CP 249–58. This forecloses his claim of error in this Court.

An evidentiary hearing was not required in any event. It is only “if there are disputed facts” that a trial court may need to hold an evidentiary hearing. *Kwiatkowski*, 142 Wn. App. at 479. Since there are no disputed facts that are material here, an evidentiary hearing was not required.

III. Any error in the identification of plaintiff is harmless.

Markman has not been prejudiced by any incorrect designation of the plaintiff in this action. It is clear both from the emails Markman relies on and Markman’s own proffered counter-claims and third-party claims that Markman understands who he was doing business with when he engaged in the joint venture, terminated the relationship, and agreed to the settlement winding up the parties’ affairs.

“In Washington, when a party is incorrectly named in a lawsuit, dismissal is not the automatic remedy; rather the primary consideration is

whether the party has been prejudiced.” *Professional Marine Co. v. Underwriters at Lloyd’s*, 118 Wn. App. 694, 705, 77 P.3d 658 (2003) (citing *In re Marriage of Morrison*, 26 Wn. App. 571, 573–74, 613 P.2d 557 (1980)). Similarly, standing and capacity defenses have been rejected in the absence of prejudice where “[d]efendants were completely aware with whom they were doing business.” *Laliberte v. Wilkins*, 30 Wn. App. 782, 785, 638 P.2d 596 (1981). And even if there were a defect in the form of CDS, CDS’s principal could still maintain an action to enforce Markman’s obligations. *White v. Dvorak*, 78 Wn. App. 105, 107–08, 896 P.2d 85 (1995) (“absent unfair prejudice, an individual purporting to act as a corporation is a party to a contract signed in the name of a nonexistent corporation” and “can sue for breach of contract”).

Markman has not ever identified any prejudice in the trial court nor in this Court arising from any error in the identification of plaintiff. It is undisputed that plaintiff and plaintiff’s counsel can and will provide an appropriate satisfaction of judgment once the judgment is paid. Markman is not entitled to avoid his obligations based on a capacity defense.

IV. It was correct of the trial court to: enter judgment against Markman’s marital community, bar Markman’s claims under the mutual release, award interest, and award statutory costs.

Markman’s miscellaneous assignments of error lack merit.

(a) *Community obligation.* For the first time on appeal, Markman argues that the trial court should not have entered judgment against his spouse. Markman relies solely on *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 298, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002), which held that the E.E.O.C. could pursue victim-specific relief against an employer in court and was not bound by a contract between the employer and the employee requiring arbitration. What Markman ignores is that the trial court entered judgment against the Markmans and their marital community because Markman's obligation is a community obligation. In Washington, "the general presumption" is that "a debt incurred by either spouse during marriage is a community debt." *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 215, 941 P.2d 16 (1997). It would have been up to the defendants, had they raised this issue in the trial court, to rebut this presumption "by clear and convincing evidence." *Ibid.* Because defendants failed to raise the issue and failed to rebut the presumption of community liability, the trial court properly entered judgment against both spouses and the marital community. *See id.* at 216 (enforcing contractual obligation against marital community).

(b) *Markman's claims.* Markman purported to assert a breach of contract claim as a counterclaim and third-party claim. CP 56. But this claim is barred by the mutual release. There, "Jon Markman, for himself

and on behalf of Markman Capital Insight, L.L.C., and all other entities owned or controlled by him” agreed to “release” “T.L. Thomas, individually and d/b/a Treadstone and Cambridge Decision Science” from “any and all claims, demands, and causes of action, whether at law or in equity, known or unknown.” CP 210. This bars Markman’s claims.

(c) Prejudgment interest. The trial court properly awarded prejudgment interest from the date of settlement because the amount of the settlement was a liquidated sum from that date. “Prejudgment interest may be awarded when the claim is liquidated.” *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). “A claim is liquidated where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Ibid.* (quotation omitted). An award of prejudgment interest is reviewed for abuse of discretion. *Ibid.* Prejudgment interest was properly awarded here.

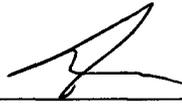
(d) Statutory costs and attorney fees. A prevailing party is entitled to statutory costs and attorney fees. RCW 4.84.010, 4.84.080. The trial court correctly awarded these amounts.

CONCLUSION

The parties have settled this case. The trial court correctly so found, and this Court should affirm. The Court should further award statutory costs on appeal.

RESPECTFULLY SUBMITTED this 8th day of August, 2016.

KELLER ROHRBACK L.L.P.

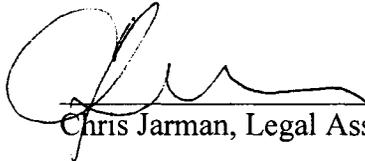
By  _____
Ian S. Birk, WSBA #31431
Attorneys for Respondent

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on August 8, 2016, I filed the forgoing document with the Court of Appeals Division One and served true and correct copies of the forgoing document, including this certificate of service, to the following counsel of record via the manner specified below:

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