

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 08/07/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

EXECUTIVE TRUSTEE SERVICES, LLC, ) 1 CA-CV 11-0720  
)  
Third Party Plaintiff/ ) DEPARTMENT E  
Appellee, )  
) **MEMORANDUM DECISION**  
v. )  
) (Not for Publication -  
RAE HEIMER and DUANE VARBEL, ) Rule 28, Arizona Rules of  
husband and wife, ) Civil Appellate Procedure)  
)  
Third Party Defendants/ )  
Appellants. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-028495

The Honorable Mark Brain, Judge

**AFFIRMED**

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Ryley Carlock & Applewhite, PA Phoenix  
by Kara A. Ricupero  
Kevin R. Heaphy  
Attorneys for Third Party Plaintiff/Appellee

Rae Heimer Phoenix  
Duane Varbel  
Pro Se Third Party Defendants/Appellants

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**P O R T L E Y**, Judge

¶1 Rae Heimer and Duane Varbel ("Appellants") appeal the  
judgment entered against them pursuant to their settlement

agreement with Executive Trustee Services, LLC ("ETS"). For the reasons that follow, we affirm.

#### BACKGROUND

¶2 Derek Sullivan filed a complaint in September 2009 against ETS and Mortgage Electronic Registration Services, Inc., challenging the pending foreclosure of his home. Heimer's name and certified legal document preparer number appeared under Sullivan's address in the caption. See ACJA § 7-208(F)(3). After filing an answer, ETS filed a third-party complaint against Heimer for preparing Sullivan's complaint.<sup>1</sup> Although only Heimer was named in the third-party complaint, both Varbel and Heimer filed an answer, and subsequently moved for summary judgment.<sup>2</sup>

¶3 The court denied the motion for summary judgment, and ordered the parties to participate in a settlement conference. A judge *pro tempore* conducted the April 19, 2011 settlement conference. At the conclusion of the conference, ETS and Appellants executed a written settlement agreement ("Settlement Agreement") in accordance with Arizona Rule of Civil Procedure 80(d). Appellants, in relevant part, consented to a judgment of

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<sup>1</sup> ETS alleged that the Sullivan complaint was substantively similar to other complaints Heimer had prepared that were dismissed for failure to state a claim. ETS further alleged that Heimer gave Sullivan unauthorized legal advice in connection with her preparation of the complaint.

<sup>2</sup> By stipulation, the court dismissed Sullivan's claims against ETS.

\$18,000.00 against them, and agreed "to the filing of an amended third-party complaint naming Duane Varbel as a party prior to consenting to entry of judgment against them . . . ."

¶4 After the conference, ETS lodged a proposed amended complaint, which alleged that Varbel had engaged in the unauthorized practice of law and was "directly responsible for supervising Heimer in her preparation of legal documents." Appellants subsequently filed a "Notice of No Settlement Agreement" and argued that the Settlement Agreement was unenforceable because there was no "meeting of the minds" between the parties. Specifically, they argued that they had only agreed to the entry of judgment against their community property, not their separate property. They further asserted that the amended complaint contained numerous "false" allegations.<sup>3</sup> After a hearing and argument, the court found that the Settlement Agreement was binding under Rule 80(d) and that it did not give Appellants a veto right over the amended complaint. The court further found that nothing in the Settlement Agreement suggested that it was intended to bind Appellants' community property only. Consequently, the court denied their motion, allowed ETS to file its amended third-party

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<sup>3</sup> Appellants were troubled that the amended third-party complaint alleged that Varbel assisted and supervised Heimer when she drafted the Sullivan complaint. Varbel, a disbarred attorney, was concerned that he could be further disciplined for his unauthorized practice of law.

complaint, and entered a judgment pursuant to the Settlement Agreement. This appeal followed.

#### DISCUSSION

¶15 Appellants argue that the court erred when it entered a judgment that was not "based upon the Agreement of the Parties at Mediation." They assert that the Settlement Agreement contemplated entry of judgment against their community property, not their separate property, and that the amended complaint upon which the judgment was entered "contained allegations which were not presented in the mediation."<sup>4</sup>

¶16 Whether the Settlement Agreement is reasonably susceptible to the meaning proffered by Appellants is a matter of law. *Long v. City of Glendale*, 208 Ariz. 319, 329, ¶ 31, 93 P.3d 519, 529 (App. 2004). Accordingly, our review is de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593-94, ¶ 9, 218 P.3d 1045, 1050-51 (App. 2009) (citations omitted) (we independently review whether contract language is reasonably susceptible to more than one interpretation). The purpose of contract interpretation is to determine and enforce the parties'

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<sup>4</sup> We exercise our discretion and address these issues even though Appellants did not support their arguments with references to the record or legal authority. See ARCAP 13(a)(6); *State v. Moody*, 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004) (citation omitted); *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62, 211 P.3d 1272, 1289 (App. 2009) (citation omitted) (failure to support argument with legal authority may constitute abandonment and waiver of that claim).

intent. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993) (citations omitted).

¶17 Rule 80(d) provides that "[n]o agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes." "The policy behind Rule 80(d) is to relieve the trial court from having to resolve factual disputes as to the existence and terms of an alleged settlement agreement." *Canyon Contracting Co. v. Tohono O'Odham Hous. Auth.*, 172 Ariz. 389, 393, 837 P.2d 750, 754 (App. 1992) (citations omitted).

¶18 The substantive portion of the Settlement Agreement states, in full:

The parties have settled this case pursuant to Rule 80(D) [sic], Arizona Rules of Civil Procedure, as follows:

The defendants will consent to a judgment of \$18,000.00 against them in the above action. The third party plaintiff [sic] will not execute on the judgment unless the defendants have assets in excess of \$5,000.00 in addition to exempt property under Arizona [l]aw. Defendants agree to submit to a [d]ebtors' examination and asset search by an asset search firm selected by third-party plaintiff. If non-exempt assets are found in excess of \$5,000.00, third-party plaintiff may execute on the consent judgment at its option.

Defendants agree to submit to additional debtors['] exams and assets searches within a period of ten (10) months from the date of

entry of this judgment. Third-[p]arty [p]laintiff also reserves the right to compel future [d]ebtors' examinations as allowed by Arizona law.

Defendants further agree to the filing of an amended third-party complaint naming Duane Varbel as a party prior to consenting to entry of judgment against them and to not ever do business as a document preparer in any form.

The counter-claim and all other claims will be dismissed and each party releases all other claims against the other party.

¶9 The Settlement Agreement does not give Appellants the right to approve the amended third-party complaint. Similarly, it is silent as to whether ETS can execute against community or separate property to satisfy the judgment. The agreement only expressly states that Appellants agree to a judgment "against them." As a result, we conclude that the Settlement Agreement is not reasonably susceptible to their interpretation.

¶10 The *post hoc* "hidden intention" arguments that the judgment could only be satisfied from Appellants' community property and that they had the right to approve the terms in the amended third-party complaint cannot controvert their mutual assent and the clear language of the Settlement Agreement. See *Hartford v. Indus. Comm'n of Ariz.*, 178 Ariz. 106, 112, 870 P.2d 1202, 1208 (App. 1994) (citation omitted) ("Mutual assent is based on objective evidence, not on the hidden intent of the parties."); *J.D. Land Co. v. Killian*, 158 Ariz. 210, 212, 762

P.2d 124, 126 (App. 1988) (citations omitted) ("A contract is not ambiguous merely because the parties disagree [about] its meaning. [Rather, a]n agreement is ambiguous only if the language can reasonably be construed in more than one sense and the construction cannot be determined within the four corners of the instrument.").

¶11 ETS requests its attorneys' fees on appeal pursuant to Arizona Revised Statutes sections 12-341.01(C) and -349 (West 2012). In the exercise of our discretion, we deny the request, and its request for double damages. We, however, award ETS its costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

**CONCLUSION**

¶12 The judgment is affirmed.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

\_\_\_\_\_  
PHILIP HALL, Judge

/s/

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DIANE M. JOHNSEN, Judge