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

ALLEN METTLER and MAY METTLER, husband and wife, d/b/a ARM CONSTRUCTION, Appellants, v. GRAY LUMBER COMPANY, a Washington corporation, Respondent.	)	No. 30506-6-III UNPUBLISHED OPINION

Siddoway, J. — Allen and May Mettler, doing business as Arm Construction, appeal the summary judgment dismissal of their breach of warranty and related claims against Gray Lumber Company. The trial court correctly concluded that the disclaimers and damage limitations in the parties' 2003 credit agreement controlled and, as a matter of law, that statements by Gray Lumber's president when agreeing to cure a nonconforming delivery were too ambiguous to constitute a waiver. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In May 2006, Arm Construction placed an order by telephone with Gray Lumber for #2 or better grade Douglas fir 4x4s needed to build scaffolding for a bridge project. According to Arm's complaint, Gray Lumber accepted telephone orders from Arm in accordance with "a written purchase/credit agreement" that had existed "for years." Clerk's Papers (CP) at 2.

Instead of delivering the #2 or better 4x4s ordered by Arm, Gray delivered standard lumber, a lower grade. Although the bill of lading reflected the "#2 Btr" grade ordered and the lumber delivered was stamped "standard," Arm's foreman did not notice the discrepancy upon accepting delivery. Unaware of the defect, Arm's work crew used the lumber to build the scaffolding. Within hours, the 4x4s used as load-bearing timbers failed. Two of Arm's employees, who were not wearing fall prevention gear, fell 20 feet and were injured. Arm revoked its acceptance of the nonconforming lumber promptly upon discovering the defect. The workers sued the general contractor and Gray Lumber. Gray Lumber settled the claims against it, without admitting liability.

In August 2010, Arm brought the action below against Gray Lumber. In bringing suit over four years after its purchase, it based its claims on its written purchase/credit agreement with Gray Lumber, although it did not attach a copy. It alleged "breaches of warranty of merchantability, warranty of fitness for particular contract, breach of contract, and failure to deliver conforming goods." CP at 2. Among damages Arm

sought to recover were for lost management and workforce time, penalties and increased premiums imposed by the Department of Labor and Industries, engineering expenses, its insurance deductible, and legal fees. The complaint was verified by Mr. Mettler.

Six months later, Gray Lumber moved for summary judgment dismissal of Arm's claims. It relied on what it submitted to the court as the credit agreement between the parties. The agreement it offered, entitled "Commercial Account Application and Agreement" had been completed and signed in September 2003 and contained the following pertinent provision (with "GLC" referring to Gray Lumber), although in all capital letters:

> Notwithstanding anything in any sales slip or other document to which goods or materials are subsequently purchased from GLC on this account, GLC makes no express or implied warranties concerning such goods or materials and expressly disclaims each and every implied warranty of merchantability and/or fitness for a particular purpose which might otherwise be implied in law with respect to the sale of such goods or materials.

CP at 52. It further provided:

> Due to unknown use, application and ultimate destination of all such goods and materials, and the difficulties of proving any losses and damages which may result if such goods or materials prove to be defective in any way, the damages which the undersigned or any other party may recover from GLC for any defect in such goods or materials shall be limited to the purchase price of the defective goods and materials. *In no event shall GLC be liable for any other direct, indirect or consequential damages, economic, commercial or otherwise.*

Id. (emphasis added). The credit agreement was offered by the declaration of Gray Lumber's lawyer, who sought to authenticate it by the following testimony:

> Attached as *Exhibit 6* hereto is a true copy of the Commercial Account Application and Agreement between Gray Lumber Company and ARM Construction which was in effect at the time of the purchase/sale depicted in the invoice and bill of lading described above. This document, among others has been verified and produced in response to plaintiffs' Request for Production #3.

CP at 20.

In originally responding to the motion for summary judgment, Arm argued that Mr. Mettler personally placed the telephone order and told the Gray Lumber salesperson of his intended use for the lumber. Treating the telephone conversation as the controlling contract, it argued that Gray Lumber verbally warranted #2 or better lumber and that terms on invoices and bills of lading delivered after the telephonic order were ineffectual in light of the express warranty.

Responding to Gray Lumber's reliance on the 2003 credit agreement, Mr. Mettler testified by declaration:

> Arm had a credit agreement with Gray Lumber. At the time of entering into that agreement, Arm and Gray Lumber did not discuss the terms and conditions, including the waiver of future warranties and consequential damages. The agreement was a take-it-or-leave-it deal. I had no choice but to accept the terms if I wanted to do business with Gray Lumber.

CP at 73. Arm conceded that its credit agreement with Gray Lumber "purports to

disclaim any and all warranties for future goods purchased under the agreement. It also purports to exclude consequential damages arising from any future purchases." CP at 58.

Elsewhere, however, Arm argued that "[d]efendant's assertion that there are no disputed issues of material fact relies entirely upon the disclaimers and exclusions, *which it has not even shown are a part of the contract between ARM and Defendant*." CP at 61 (emphasis added). It did not disclose why it contended that Gray Lumber's proof of the credit agreement terms failed. Its materials submitted in opposition to the motion for summary judgment did not dispute its entry into the credit agreement offered by Gray Lumber, did not offer a different version of the written purchase/credit agreement, and did not challenge the sufficiency of the lawyer's declaration to authenticate the credit agreement.

Finally, Arm argued that even if the parties' credit agreement included disclaimers and damage limitations that would otherwise bar its claims, those contract rights were waived by the president of Gray Lumber, Neil M. "Mac" Gray, who had traveled to the accident site at Mr. Mettler's request. Recounting a conversation not mentioned in Arm's complaint, Mr. Mettler's declaration stated:

> Mr. Gray saw the results of the accident. We all recognized after inspecting the lumber that it was not #2 Btr. We found some boards stamped as "standard". I rejected the whole delivery as non-conforming goods. Mr. Gray accepted my rejection and said, "We sent the wrong stuff. We'll be responsible for the consequences." He told us that Gray Lumber would replace the goods and would make ARM whole.

CP at 74.

Almost a month after filing its response to the motion for summary judgment and eight days before the hearing,[1] Arm filed a motion to strike the invoice, bill of lading, and agreement copies attached as exhibits to Gray Lumber's lawyer's declaration, arguing that the lawyer's familiarity with the files maintained by his office was an insufficient foundation under CR 56(e). Upon receipt of the motion to strike, Gray Lumber immediately served a supplemental response to Arm's written discovery, signed by Mr. Gray, that attached and identified the 2003 credit agreement as the controlling contract. For purposes of the summary judgment motion, Gray Lumber submitted this supplemental discovery response through a second supplemental declaration of its lawyer.

At the time of hearing, the trial court denied Arm's motion to strike, concluding that any infirmity with the initial declaration was cured by the second supplemental declaration of Gray Lumber's lawyer and its appended discovery response. It found that the terms of the credit agreement presented by Gray Lumber controlled. It concluded that the statements that Mr. Mettler claimed were made by Mr. Gray (statements that Gray Lumber treated as made for purposes of the summary judgment motion, but has otherwise denied) could not be understood as an unequivocal modification or waiver of the contract

[1] Hearing on the motion for summary judgment had been continued twice.

terms. It therefore granted Gray Lumber's motion and dismissed Arm's claims. Arm timely appealed.

ANALYSIS

Arm challenges the trial court's denial of its motion to strike. It argues that it presented evidence raising genuine issues of material fact as to the terms of the parties' business dealings in May 2006 and, at a minimum, presented a genuine issue whether Mr. Gray's statements constituted a waiver of any disclaimers or limitations on recovery. We address its assignments of error in turn.

I

Arm assigns error first to the trial court's denial of its motion to strike the credit agreement and other business records offered by the declaration of Gray Lumber's lawyer. It challenges both the timeliness and sufficiency of the lawyer's second supplemental declaration, offered to cure the shortcoming of his first declaration. Gray Lumber does not contest the insufficiency of the first declaration, which was not based on personal knowledge as required by summary judgment rules. CR 56(e).

Timeliness of the second supplemental declaration. CR 56(c) provides that the moving party must file any supporting affidavits not later than 28 calendar days before the summary judgment hearing and may file rebuttal documents not later than 5 days before the hearing. The deadline for rebuttal materials imposed by the rule implicitly

recognizes that a summary judgment response might identify shortcomings with a moving party's initial showing that it should have an opportunity to supplement or cure. The purpose of the summary judgment is, after all, to avoid a useless trial. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). Here, Arm did not dispute the sufficiency of Gray Lumber's authentication of the credit agreement in its response to the motion for summary judgment, thereby depriving Gray Lumber the opportunity to submit a curative declaration by the deadline for rebuttal materials. It is fair to say that the sufficiency of the authentication was called into question only by the motion to strike (not the motion for summary judgment) to which Gray Lumber's response and curative declaration was unquestionably timely.

In any event, the requirements of CR 56(c) are read in conjunction with CR 6(d), which authorizes the trial court to permit affidavits "to be served at some other time." *See Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). Whether to accept or reject an untimely affidavit is within the trial court's discretion. *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521-22, 125 P.3d 134 (2004); *Brown*, 48 Wn. App. at 559. A ruling on a motion to strike is likewise discretionary with the trial court. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998) (citing *King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994)).

While Gray Lumber's initial authentication of the credit agreement and other documents was deficient, it might reasonably have assumed that the validity of the key agreements and business records was not in dispute. Given the late date on which Arm raised the insufficiency of the authentication, the trial court did not abuse its discretion in admitting the promptly-filed curative declaration.

Sufficiency of the second supplemental declaration. A trial court's decision to admit or exclude evidence lies within its sound discretion. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004). This court will not overturn evidentiary rulings unless the trial court manifestly abused its discretion. *Id.* A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Documents offered as evidence through a declaration must be authenticated in accordance with ER 901 in order to be admissible. *Int'l Ultimate*, 122 Wn. App. at 745-46. This requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). Here, Gray Lumber's supplemental discovery response stated, in pertinent part, that

> Exhibit D hereto is a true copy of the September 2003 Commercial Account Application and Agreement between Gray Lumber and Allen R. Mettler of ARM Construction. This agreement remained in effect at the time of the lumber sale described in plaintiff's Complaint.

CP at 146. The credit agreement earlier filed with the court was attached as exhibit D. The supplemental response was signed by Mr. Gray in the form required by RCW 9A.72.085 and GR 13, as follows:

> I, Neil M. "Mac" Gray, declare under penalty of perjury under the laws of the State of Washington that I have reviewed the foregoing supplemental answers of Gray Lumber Company to plaintiff's requests for production, and that they are true and correct.
>
> Dated at Tacoma, WA, on this 21st day of April, 2011.

Id.

Mr. Gray's declaration within the supplemental discovery response, being the testimony of a witness with knowledge that the credit agreement copy is what it is claimed to be, was sufficient authentication of the credit agreement. ER 901(b)(1). Gray Lumber's lawyer's declaration merely authenticated the supplemental discovery response. While a lawyer's declaration cannot authenticate a document by merely presenting certification with no personal knowledge about authenticity or contents of the document, *see Burmeister*, 92 Wn. App. at 366-67, it was clear that the lawyer had personal knowledge of the supplemental discovery response; he was counsel of record in the case and had signed the response, along with his client.

Arm argues that *International Ultimate*, which holds that authentication is deemed satisfied when the party *challenging* a document originally produced it in discovery, does not apply where, as here, the party *offering* the document produced it in discovery. But

International Ultimate's holding on *deemed* authentication has no application here. With the second supplemental declaration, Gray Lumber's lawyer did not merely produce the credit agreement, attest that it was produced in discovery, and ask the court to deem it authenticated, as he had with his first declaration. Rather, with the second, he provided the court with his client's signed discovery response, the content of which actually satisfied the requirement of authentication. The curative declaration was sufficient under CR 56(e) and the trial court did not abuse its discretion in accepting it as a basis for deciding the summary judgment motion.

II

Arm next argues that marginal notations on the credit agreement and its evidence of the telephonic order give rise to genuine issues of fact requiring trial.

Two handwritten marginal notations on the application portion of the credit agreement—reading "renew" and "exp. 7/05"—were first raised by Arm at the time the motion was argued to the court. CP at 51. Arm had developed no evidence as to who made the notations or what they meant. It nonetheless argued that the notations on the application implied that the agreement had expired and required renewal, and that "[t]he allegation that this was a continuous contract is belied by the face of this agreement. If you accept this document into evidence today, you have to draw every inferences from it favorable to my client." Report of Proceedings at 8. Arm also argues that Mr. Mettler's

affidavit asserting that his contract for the purchase of the lumber was made over the phone in May 2006, with no discussion of warranty disclaimers or limitations on remedies, demonstrates a dispute of material fact.

We review an order granting summary judgment de novo and perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). Summary judgment will be upheld if the pleadings, affidavits, answers to interrogatories, admissions, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002); CR 56(c). We review all facts and reasonable inferences from the facts in a light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300.

On summary judgment, the moving party bears the initial burden of proving that there is no genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets its initial burden, the nonmoving party must present evidence that material facts are in dispute. *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1*, 164 Wn. App. 641, 654, 266 P.3d 229 (2011). It cannot rely on mere allegations, speculation, or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1

(1986). If the nonmoving party fails to do so, then summary judgment is proper. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In moving for summary judgment, Gray Lumber demonstrated that Arm alleged the existence of a purchase/credit agreement in its complaint. It offered the credit agreement, authenticated by Mr. Gray, as one that "remained in effect at the time of the lumber sale described in plaintiff's Complaint." CP at 146. By its printed terms, the credit agreement did not have a limited term or require renewal.

In responding to the motion for summary judgment, Allen Mettler testified by declaration that "Arm had a credit agreement with Gray Lumber" and that "I had no choice but to accept the terms if I wanted to do business with Gray Lumber." CP at 73. He did not dispute that the credit agreement offered by Gray Lumber bore his signature and did not claim that it had expired. He testified that "[i]t was my normal practice in dealing with Gray Lumber and all other lumber suppliers to place orders over the phone." CP at 74. Arm offered invoices for two unrelated purchases that it asserted contained terms that varied from the credit agreement, but the copies he offered were indecipherable; it did not present any evidence that its invoice for the purchase at issue varied from the credit agreement, let alone in a respect that was material to the parties' dispute.

This summary judgment showing satisfied Gray Lumber's burden of demonstrating that the credit agreement was in effect. Arm did not offer *evidence* otherwise. It offered only argument and speculation from the marginal notations. As Gray Lumber points out on appeal, the "exp. 7/05" notation on the application appears adjacent to Arm's Washington contractor license number. Since nothing in the credit agreement terms supports a conclusion that the agreement would expire or require renewal and Arm offers no explanation for a peculiar 22-month term, Gray Lumber's suggestion that the marginal notation reflects concern about when Arm's contractor registration and bond would expire is the most logical explanation—particularly given the handwritten notation in approving the application that "looks like a slow pay, concrete contractor, [therefore] watch." CP at 155. In any event, Arm's speculation about the meaning of the notations does not meet its burden of setting forth "specific facts showing that there is a genuine issue for trial." CR 56(e).

Mr. Mettler's testimony by declaration that he personally ordered the lumber in this case and that the Gray Lumber salesman said nothing about warranties or waiver of warranties also fails to present a genuine issue of fact. Modification of a contract requires mutual assent; "one party may not unilaterally modify a contract." *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 28, 111 P.3d 1192 (2005) (citing *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998)). "'Without a mutual change of obligations or rights,

a subsequent agreement lacks consideration and cannot serve as modification of an existing contract.'" *Id.* at 27-28 (quoting *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 499, 663 P.2d 132 (1983)). The parties' credit agreement unambiguously and conspicuously disclaims warranties and limits remedies to the extent permitted by the Uniform Commercial Code. *See* RCW 62A.2-316(2), (3). Even viewed in a light most favorable to Arm, it presented no evidence that would support a finding that the Gray Lumber salesman was authorized to modify, or agreed to modify, the terms of the parties' credit agreement.

III

Finally, Arm argues that Mr. Mettler's testimony that Mr. Gray stated, "We sent the wrong stuff. We'll be responsible for the consequences" and said Gray Lumber "would make ARM whole" raises a genuine issue of waiver of the disclaimers and damage limitations included in the credit agreement. For purposes of summary judgment, we accept Mr. Mettler's characterization of Mr. Gray's statements as true.[2]

Waiver is the voluntary and intentional relinquishment of a known right. *Best*, 134 Wn.2d at 241. The person against whom a waiver is claimed must have intended to

[2] Arm also argued below that Gray Lumber's defense and payment of legal claims asserted by the injured employees was further evidence of waiver but without disclosing—as Gray Lumber demonstrated in response—that Gray Lumber was sued directly, and only defended and settled claims asserted against it. This is no evidence of waiver.

relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive it. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 409-10, 259 P.3d 190 (2011) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)); *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.2d 635 (1958). Waiver will not be inferred from doubtful or ambiguous factors. *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980); *White Pass Co. v. St. John*, 71 Wn.2d 156, 163, 427 P.2d 398 (1967).

Whether a waiver has occurred is generally a question of fact. *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989). However, when reasonable minds could reach but one conclusion from the evidence presented, the existence of a waiver may be determined as a matter of law, and summary judgment is appropriate. *Id.*

Gray Lumber honored Arm's revocation of acceptance of the lumber. Because Arm's employees' exclusive remedy for their injuries vis-à-vis Arm was workers' compensation, they could not and did not assert a claim against Arm for which it seeks to recover. Rather, Arm's identification of what Mr. Gray assertedly agreed to "make whole" is the following damages, identified in its response to Gray Lumber's discovery:

[Labor and Industries] penalty	$8,100
Lost time for workforce	$9,800
[Labor and Industries] increased premium	$5,000
Mettler lost time	$6,000
John Smith lost time	$6,000

Engineering drawings	$654
Insurance deductible	$5,000
Legal fees and costs	$25,000
Total	$65,554

CP at 31 (boldface omitted).

The summary judgment issue presented by Arm's evidence of Mr. Gray's statements at the accident site is whether any jury could reasonably conclude that Mr. Gray "doubtless" intended to waive Gray Lumber's right to disclaim responsibility for these damages. All were attributable in part, and some were attributable in full, to Arm's own violation of its obligation to provide fall protection to its employees.

Arm's burden at trial would not be merely to prove that Mr. Gray more likely than not meant to cover these expenses. It would be to prove that Mr. Gray's intention *must* have been to relinquish Gray Lumber's right to disclaim responsibility for these damages, that his statements are *inconsistent with any other intention*, and that the inference can be drawn *without doubt or concern that his intent was ambiguous*. No reasonable jury could make that finding from the evidence presented to the trial court.

Summary judgment was appropriate. We affirm the dismissal of Arm's claims.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_____
Siddoway, J.

WE CONCUR:

_____
Korsmo, C.J.

_____
Sweeney, J.