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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHANNON CUNNINGHAM, an unmarried individual, Respondent, v. JON R. KARWOSKI and ELIZABETH ANNE COLLINS a/k/a ELIZABETH ANNE KARWOSKI, husband and wife and the marital community comprised thereof, Appellants.	No. 79753-1-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — The Karwoskis appeal the enforcement of a settlement agreement between them and Cunningham. They argue that the trial court erred in failing to hold an evidentiary hearing because a genuine dispute existed as to the agreement's terms. They further contend that CR 2A required their attorney to sign the agreement. Last, they assert that the agreement is unenforceable because it lacks consideration. We affirm.

FACTS

This appeal arises out of a dispute over a boundary line between neighbors Shannon Cunningham and Jon and Elizabeth Karwoski. In 1991, Cunningham's predecessor in interest granted Jon[1] a "Single Family Side Yard Easement."

[1] For clarity, we refer to Jon and Elizabeth individually by their first names. We refer to them collectively as "the Karwoskis."

Cunningham's garage is located within a portion of the easement area. It has stood in that location for over 10 years. Cunningham also has a fence and rock wall located within the easement area.

In October 2017, Cunningham filed a petition for an order of protection against Jon. She alleged in part that Jon had threatened to kill her and her domestic partner, Thomas Brelinski, had surveilled her as she was leaving her home, and had parked his vehicles in a way that blocked her vehicle and delayed construction work on her home. The district court granted Cunningham's petition in November 2017. It restrained Jon from contacting her, surveilling her, entering her property, or interfering with signs related to construction outside her home for one year.[2]

A few months later, in February 2018, Cunningham sued the Karwoskis, asserting claims for trespass, outrage, assault, declaratory relief, adverse possession, estoppel, and quiet title. She alleged in part that, despite the order for protection, Jon had continued to harass her, dismantled portions of her fence, entered her property without permission, and nailed material to the side of her garage. She further alleged that Jon had asserted his ownership over the easement on her property and had threatened to cause further damage to her fence and garage. In her prayer for relief, she sought a declaratory judgment that the Karwoskis had abandoned the easement and had no further right, title, or interest with respect to the easement. She also sought an injunction restricting the

[2] Brelinski also sought and was granted an order of protection against Jon.

Karwoskis' actions with respect to the trial court's ruling on the parties' rights under the easement, damages, and attorney fees and costs.

The day after she filed her complaint, Cunningham filed a motion for a temporary restraining order and an order to show cause. She specifically asked the trial court to enjoin the Karwoskis from entering her property, including the easement area, while the matter was being litigated. The trial court granted her motion the same day. Two days later, attorney Ryan Yoke filed a notice of appearance on behalf of the Karwoskis.[3]

In early March 2018, the parties stipulated to an agreed order for a preliminary injunction. The injunction restrained the Karwoskis from entering Cunningham's property, including the easement area, during the pendency of the action. The Karwoskis also agreed not to damage, move, or alter Cunningham's fence or any other personal property located on Cunningham's property or belonging to her.

On May 3, 2018, the parties participated in mediation. Counsel for Cunningham, Samuel Meyler, and counsel for the Karwoskis, Yoke, were both present. After several hours of mediation, the parties reached a settlement and executed a "CR 2A Settlement Agreement." The agreement included the following provisions:

> 1) Permanent Injunction/No Contact Order to be entered preventing Karwoskis from, direct or indirect, contact/ harassment/surveillance of Cunningham and her guests, invitees and tenants.

[3] The City of Seattle filed criminal charges against Jon based on his alleged continuing harassment and violation of the order protecting Brelinski.

2) All claims and counterclaims by all parties asserted in [this case] to be dismissed with prejudice, subject to entry of Order specified above.

3) Full mutual release for all claims and causes of action between all parties to the pending litigation up to the date of this CR 2A Agreement, including claims of adverse possession.

4) Cunningham and Brelinski to advise prosecutor in criminal prosecution of Karowski that they are no longer interested in pursuing the matter. Cunningham and Brelinski shall not be restricted from responding to any lawfully served subpoenas and shall not be liable to Karwoskis in any way for responding to subpoenas.

5) Karwoskis release/extinguish Single Family Side Yard Easement – to be recorded with King County Recorder's Office.

6) Karwoskis release/extinguish Accessory Structure Agreement.

7) Karwoskis acknowledge surveyed lines of Cunningham property as the boundary lines, that Cunningham owns the rock wall bordering properties, laurel hedge bordering properties and fence.

8) Karwoskis shall not enter Cunningham's property at any time in the future for any reason without prior express consent.

9) Cunningham shall not enter Karwoskis' property at any time in the future for any reason without express prior consent.

10) Both parties release and waive any present or future claim of adverse possession.

11) Cunningham's fence to remain in place in perpetuity with the right to repair and replace as necessary.

12) Karwoskis to pay Cunningham $12,500 with[in] thirty 30 days from the date of this CR 2A Agreement secured by a Confession of Judgment executed by Karwoskis to be held by Cunningham's counsel and filed in the event that payment is not made. The Confession of Judgment shall provide for interest at 12% and attorney's fees for enforcement and collection.

. . . .

16) Cunningham and Brelinski shall stipulate to vacating antiharassment protection orders currently in place, noting that it is stipulated as part of the resolution of their civil case.

17) Karwoskis waive[ ] any claims for malicious prosecution against Cunningham and/or Brelinski.

Cunningham, Brelinski, and the Karwoskis all signed their names at the bottom of the agreement.

In late May 2018, Meyler inquired with Yoke as to the status of the Karwoskis' $12,500.00 payment to Cunningham under the CR 2A settlement agreement. Yoke advised Meyler that the Karwoskis would deliver the check to his office the week of June 4, 2018. On June 4, Meyler again inquired as to the status of the payment. On June 8, Yoke advised Meyler that the Karwoskis were mailing a check to his office that same day. The Karwoskis failed to mail the check. On June 15, Meyler inquired a third time as to the payment's status. On June 19, Yoke advised Meyler that Jon was working on getting the payment together, and that he would let him know once that was done. This never occurred.

On July 30, 2018, Yoke sent Jon an e-mail asking him to confirm that he was okay with Yoke agreeing to the entry of a notice of settlement. On August 1, before Yoke received a response from Jon, the parties filed a notice of settlement of all claims against all parties, signed by their attorneys. The notice acknowledged the CR 2A settlement agreement. It stated that "all claims against all parties in this action have been resolved, subject to finalizing the settlement documents and carrying out the terms of the settlement." It also stated that the trial court could dismiss the case under King County Local Civil Rule 41(b)(2)(B) if the parties failed to file an order dismissing all claims within 45 days and failed to

file a certificate of settlement without dismissal. On August 6, Yoke sent Jon another e-mail explaining that when he did not hear back from him, he agreed to the entry of the notice of settlement. In response, Jon told Yoke that he could have called or texted him. He also stated, "This is extortion."

On October 1, 2018, Meyler sent Yoke an e-mail regarding the Karwoskis' failure to adhere to the terms of the CR 2A settlement agreement. He stated that if Yoke did not make progress in contacting the Karwoskis and getting them to cooperate, Cunningham would be forced to file a motion to enforce the agreement. On October 9, Meyler sent Yoke a letter stating that if the Karwoskis did not return the fully executed settlement documents by October 19, Cunningham would file a motion to enforce the agreement and seek attorney fees and costs.[4] Two days later, Yoke filed a notice of intent to withdraw as counsel for the Karwoskis effective October 18, 2018. On October 22, Yoke informed Meyler that he had exchanged several e-mails with Jon, but that Jon never signed the settlement documents.

On November 13, 2018, Cunningham filed a motion to enforce the CR 2A settlement agreement. In doing so, she offered a copy of the agreement signed by all the parties. She explained that, in accordance with the agreement, she had stopped cooperating with the prosecutor pursuing criminal charges against Jon, and that those charges had been dismissed. Despite her satisfaction of that term,

[4] The settlement documents included (1) the "Confession of Judgment, Agreed Permanent Injunction/No Contact Order and Final Order Releasing Bond and Terminating Case," (2) the "Easement Agreement and Notice of Termination and Release," and (3) the "Stipulated Orders Vacating Protection Orders." (Formatting omitted.)

she stated that the Karwoskis had failed to pay her the agreed $12,500.00 and refused to execute the settlement documents required by the agreement.

A hearing on the motion to enforce the agreement initially took place on December 14, 2018. At the hearing, Jon appeared pro se and moved for a continuance. He presented copies of several e-mails from October and December 2018 between Meyler, Yoke, and the trial court regarding the motion and a hearing date. Jon was not a party to any of the e-mails, except for a December 10 e-mail from Meyler sending him a proposed copy of a judgment and order for the December 14 hearing. Handwritten notes on the e-mails indicated that the Karwoskis lacked notice of the hearing. Jon failed to identify who wrote the notes on the e-mails. However, notes such as "Mr. Meyler knows Mr. Yoke is withdrawn and I am not represented" indicate that one of the Karwoskis wrote the notes. Jon also presented copies of several e-mails from July and August 2018 between him and Yoke. In those e-mails, Jon took issue with Yoke's decision to agree to the entry of the notice of settlement. One of the e-mails included a handwritten note that stated, "I never agreed to an agreement."[5] The trial court granted Jon's motion and continued the hearing to February 2019.[6]

At the second hearing, the trial court granted Cunningham's motion and enforced the CR 2A settlement agreement. It awarded Cunningham a total

[5] Last, Jon presented copies of e-mails from March 2018 between him and Yoke, and a copy of a June 2018 e-mail from an attorney named Brooks de Peyster. The e-mails between Jon and Yoke involved scheduling for the May 2018 mediation. The e-mail from de Peyster addressed a June 2018 court date. It is unclear from the e-mail what that court date was for.

[6] The trial court subsequently continued the hearing to a later date in February due to inclement weather.

judgment of $13,784.17. This amount included the $12,500.00 provided for in the agreement, $1,113.70 in prejudgment interest, and $170.47 in costs.

Cunningham then filed a motion seeking $6,138.00 in attorney fees. She specifically sought fees under the CR 2A settlement agreement, the settlement and mutual release agreement, and the easement agreement. She also sought fees under RCW 4.84.185, arguing that Jon raised only frivolous arguments as to why he should not be held to the terms of the settlement agreement. The trial court granted Cunningham's motion and awarded her $6,138.00 in attorney fees. It explained,

> [T]he arguments and defenses presented by [the Karwoskis] were frivolous, not supported by any rational argument and advanced without reasonable cause. Attorney's fees are therefore owing pursuant to RCW 4.84.185. The Court further finds that the CR 2A agreement contains the following attorney's fees provision: "The Confession of Judgment shall provide for interest at 12% and attorney's fees for enforcement and collection." The confession of judgment was not entered solely because [the Karwoskis] violated the terms of a valid CR 2A agreement. Had they signed the confession, [the Karwoskis] would have been liable for the fees now sought for entry of certain additional orders ancillary to the judgment in this matter (to extinguish a side yard easement and an accessory structure agreement). Instead, those orders were entered by the Court pursuant to contested motion to enforce the CR 2A agreement.

The Karwoskis appeal.

DISCUSSION

The Karwoskis assert that the trial court erred in enforcing the CR 2A settlement agreement. First, they argue that the trial court erred in failing to hold an evidentiary hearing because they "established that serious disputes existed relative to the terms" of the agreement. Second, they argue that CR 2A required

their attorney to sign the agreement. Last, they argue that the agreement is unenforceable because it lacks "any reference to consideration."

CR 2A governs the enforcement of stipulations in court proceedings. It provides,

> 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 evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A.

Under RCW 2.44.010, an attorney and counselor has authority:

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

The Washington Supreme Court has noted that "[t]he purpose of the cited rule and statute is to . . . give certainty and finality to settlements and compromises, if they are made." Eddleman v. McGhan, 45 Wn.2d 430, 432, 275 P.2d 729 (1954) (discussing the predecessor of CR 2A, former Rule of the Superior Courts 10 (1951), which used substantively identical language).

CR 2A applies when (1) a settlement agreement is made by parties or attorneys in respect to the proceedings in a cause and (2) the purport of the agreement is disputed. In re Marriage of Ferree, 71 Wn. App. 35, 39, 856 P.2d 706 (1993). An agreement is disputed within the meaning of CR 2A if there is a

genuine dispute over the existence or material terms of the agreement. In re Patterson, 93 Wn. App. 579, 583-84, 969 P.2d 1106 (1999). The party moving to enforce a settlement agreement carries the burden of proving there is no genuine dispute as to the agreement's existence or material terms. Brinkerhoff v. Campbell, 99 Wn. App. 692, 696-97, 994 P.2d 911 (2000). If the moving party meets its burden, "the nonmoving party must respond with affidavits, declarations, or other evidence to show there is a genuine issue of material fact." Patterson, 93 Wn. App. at 584.

We review a decision regarding the enforcement of a settlement agreement de novo. Lavigne v. Green, 106 Wn. App. 12, 16, 23 P.3d 515 (2001). "The trial court follows summary judgment procedures when a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed." Condon v. Condon, 177 Wn.2d 150, 161-62, 298 P.3d 86 (2013). The trial court must view the evidence in the light most favorable to the nonmoving party and determine whether reasonable minds could reach but one conclusion. Cruz v. Chavez, 186 Wn. App. 913, 920, 347 P.3d 912 (2015).

We apply general principles of contract law to settlement agreements. Id. A valid contract requires a meeting of the minds on the essential terms. Evans & Son, Inc. v. City of Yakima, 136 Wn. App. 471, 477, 149 P.3d 691 (2006). Washington follows the objective manifestation test for contracts. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177, 94 P.3d 945 (2004). Thus, for a contract to form, the parties must objectively manifest their mutual assent. Id. at 177-78. To determine whether a party has manifested an intent to enter into a

contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts. Multicare Med. Ctr. v. Dep't of Soc. & Health Servs., 114 Wn.2d 572, 587, 790 P.2d 124 (1990), overruled in part on other grounds by Neah Bay Chamber of Commerce v. Dep't of Fisheries, 119 Wn.2d 464, 832 P.2d 1319 (1992). "Acceptance" is an expression, communicated by word, sign, or writing to the offeror, of the intention to be bound by the offer's terms. Veith v. Xterra Wetsuits, LLC, 144 Wn. App. 362, 366, 183 P.3d 334 (2008).

I. Waiver

As an initial matter, Cunningham argues that the Karwoskis waived all of their arguments on appeal "due to their failure to proffer any admissible evidence or any legally supported arguments to the trial court." She relies on RAP 2.5(a).

Under RAP 2.5(a), we may refuse to review any claim of error not raised in the trial court. But, a party may raise the following claimed errors for the first time on appeal: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a).

The only documents that the Karwoskis filed in response to Cunningham's motion to enforce the settlement agreement were the e-mail copies discussed above.[7] One of the printed copies of the e-mails between Jon and Yoke included

[7] Cunningham argues that these e-mails were not admissible because they were not attached to a declaration or otherwise authenticated. But, she failed to raise this argument below. In its order granting Cunningham's motion, the trial court included these e-mails in the list of "papers and pleadings" it reviewed in reaching its decision. Cunningham does not appeal any portion of that order. Therefore, we decline to reach her admissibility argument.

a handwritten note that stated, "I never agreed to an agreement." We liberally construe this handwritten statement as the Karwoskis' evidence disputing the existence of an agreement. This evidence alone is not enough to overcome the fact that he and his wife both signed the mediated settlement agreement.

The Karwoskis did not raise in the trial court the arguments they make here regarding (1) a requirement that their attorney sign the agreement and (2) a lack of consideration in the agreement. The Karwoskis fail to demonstrate that these arguments fall under one of the exceptions in RAP 2.5(a). As a result, they have waived both arguments on appeal.

Even if they had not waived both arguments, the Karwoskis' attorney did not need to sign the agreement in order to bind them under CR 2A. We have previously held that when a party "undertakes a settlement directly with the other party, reduces it to writing, and signs it . . . the requirements of CR 2A are met just as if the attorney had participated." Patterson, 93 Wn. App. at 585. And, the agreement was clearly supported by consideration. Both parties made a number of promises in the agreement, including a promise to waive any present or future claims of adverse possession. "[F]orbearance to prosecute a valid claim or assert a legal right constitutes sufficient consideration for a contract." State v. Brown, 92 Wn. App. 586, 594, 965 P.2d 1102 (1998). Accordingly, both of the Karwoskis' arguments would fail.

II. Failure to Hold an Evidentiary Hearing

The Karwoskis argue that the trial court erred in failing to hold an evidentiary hearing because they "established that serious disputes existed relative to the

terms" of the settlement agreement. They do not detail what those disputes were. Instead, they imply that they generally disputed the existence of an agreement.

In moving to enforce the settlement agreement, Cunningham had the initial burden of proving there was no genuine dispute as to the existence of an agreement or its material terms. See Brinkerhoff, 99 Wn. App. at 696-97. She met that burden when she filed a copy of the agreement signed by all of the parties, including the Karwoskis. At that point, the burden shifted to the Karwoskis to disprove the existence of the agreement or to show there was a genuine dispute of a material term. See Patterson, 93 Wn. App. at 584. All that the Karwoskis provided in response were the e-mail copies discussed above. The only relevant information in those e-mails was a handwritten note that stated, "I never agreed to an agreement." That self-serving after the fact annotation of an e-mail was insufficient to show a genuine dispute as to the agreement's existence. Accordingly, the trial court did not err in granting Cunningham's motion to enforce the agreement.[8]

III. Attorney Fees

Cunningham and the Karwoskis both request attorney fees on appeal under the settlement agreement. Cunningham also requests attorney fees on the basis that the Karwoskis' appeal is frivolous.

[8] The Karwoskis also argue that if this court vacates the order enforcing the agreement, it should vacate the judgment awarding attorney fees to Cunningham. Because we affirm the order, we decline to vacate the attorney fee judgment below.

To support their attorney fee requests under the settlement agreement, Cunningham and the Karwoskis cite RAP 18.1, RCW 4.84.330, and a fee provision in the agreement.

RAP 18.1(a) allows a reviewing court to award a party reasonable attorney fees if applicable law grants a party the right to recover them and the party requests them in compliance with RAP 18.1. Under RCW 4.84.330,

> where [a] contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

The settlement agreement includes the following fee provision:

> Karwoskis pay Cunningham $12,500 with[in] thirty 30 days from the date of this CR 2A Agreement secured by a Confession of Judgment executed by Karwoskis to be held by Cunningham's counsel and filed in the event that payment is not made. <u>The Confession of Judgment shall provide for interest at 12% and attorney's fees for enforcement and collection.</u>

(Emphasis added.) The confession of judgment was never entered because the Karwoskis violated the terms of the settlement agreement. However, the agreement clearly contemplates an attorney fee award in the event that Cunningham has to enforce collection of the $12,500.00. And, Cunningham and the Karwoskis agree that the provision applies to the prevailing party on appeal. Because Cunningham prevails on appeal, we award her attorney fees under the

fee provision in the settlement agreement, subject to her compliance with RAP 18.1.[9]

We affirm.

Appelwick, J.

WE CONCUR:

Leach, J.

Dwyer, J.

[9] Thus, we decline to consider Cunningham's alternate request for fees based on a frivolous appeal. We also deny each party's motion to impose sanctions for citation to unpublished opinions in violation of GR 14.1(a).