Filed
Washington State
Court of Appeals
Division Two

July 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK OLLA, an individual, Appellant, v. ROBERT H. WAGNER, as an individual and as Trustee of THE ROBERT H. WAGNER MONEY PURCHASE PENSION PLAN (a/k/a "THE ROBERT H. WAGNER PENSION PLAN"), and DOES 3 through 50, Inclusive, Respondents.	No. 48784-5-II (Consolidated with No. 48910-4-II) UNPUBLISHED OPINION

BJORGEN, J. — In this consolidated appeal, Mark Olla appeals the superior court decisions (1) dismissing his consolidated 2015 complaint against Robert H. Wagner under CR 12(b)(6), (2) granting summary judgment to Wagner on Wagner's counterclaims, and (3) denying Olla's motions to vacate the 2010 and 2011 orders and judgments in prior, related litigation. We hold that Olla's arguments fail and affirm the superior court.

FACTS

A. First Litigation

From 2007 to 2008, Wagner, acting on behalf of The Robert H. Wagner Money Purchase Pension Plan (Pension Plan), made three loans to Olla so that Olla could purchase and move to a home in Washington while he waited to sell his home in California. The first loan was for $1,700,000, the second loan was for $150,000, and the third loan was for $160,000. The first

loan was secured by a deed of trust on Olla's California residence and his Washington residence, although the deed of trust on the California residence was secondary to a prior deed of trust held by Washington Mutual. The second loan was secured by a third deed of trust on the California residence. The third loan was secured by a fourth deed of trust on the California residence. All three loans became collectable in September 2008.

By September 2008, Olla was experiencing financial difficulties and Wagner became concerned that Olla would not be able to pay off the loans as Olla had made no interest payments on any of the loans. Wagner and Olla disagreed about how best to resolve the loan obligations and the two began negotiating a settlement of their obligations through third parties. On October 18, Olla and Wagner completed a settlement agreement under which Olla would transfer the deeds for his California and Washington properties to Wagner in exchange for $165,000 and Wagner would extinguish the loans and agree to not sue Olla for any liability that may have arisen as a consequence of the three loans. The settlement also contained release language pertaining to possible claims by Olla against Wagner:

> [I]n consideration for the terms of the settlement agreement, Olla "hereby releases and forever discharges Buyer [i.e., Wagner], Buyer's agents, attorneys, successors and assigns from all damage, loss, claims, demands, liabilities, obligations, actions and causes of actions whatsoever which Seller [i.e., Olla] might now have or claim to have against Buyer, whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way concerning, arising out of or founded on the [Wagner] Loan Documents or the [Wagner] Loans.

Clerk's Papers (CP) at 1259-60.[1]

On February 4, 2009, Olla recorded a lis pendens against the Washington property that he had deeded to Wagner. On June 25, Olla filed a complaint against Wagner and the Pension Plan

[1] This is the settlement agreement that is disputed by the parties and referred to in the facts and analysis below.

alleging numerous causes of action, including violations of the federal Truth in Lending Act (TLA), chapter 19.86 RCW, and the Washington's Mortgage Broker Practices Act (MBPA), chapter 19.146 RCW, fraud and intentional deceit, breach of implied covenant of good faith and fair dealing, breach of oral contract, undue influence, economic duress, unjust enrichment, intentional infliction of emotional distress, and intentional interference with prospective economic gain. In part, Olla argued that because the loans violated the TLA and MBPA, the court should rescind the three loan transactions. The complaint listed Wagner as a defendant both individually and in his capacity as trustee of the Pension Plan and was assigned cause number 09-2-01654-4. On June 29, Olla recorded a second lis pendens against the Washington property, and on July 16, Wagner expunged the first lis pendens. On November 17, Olla's complaint went to a bench trial.

On January 15, 2010, the superior court dismissed all of Olla's claims with prejudice and entered findings of fact and conclusions of law. The superior court determined that Olla had failed to prove fraud, misrepresentation or intentional deceit, undue influence, duress or coercion, as well as "all of his remaining claims and causes of action seeking the rescission of the settlement agreement." CP at 1261-65. The superior court further concluded that "[t]he settlement agreement is . . . valid and fully enforceable in its entirety." CP at 1264. Finally, the superior court held that "Olla is [equitably] estopped from advancing any and all of his claims against Wagner," because "it was Olla's plan to initiate litigation against Wagner when he entered into the settlement agreement despite his knowledge that the settlement agreement contained full mutual releases." CP at 1264. The superior court also expunged Olla's second lis pendens on the Washington property. On February 10, Olla filed a notice of appeal with our court.

On March 30, Olla recorded a third lis pendens against the Washington property. On April 2, Wagner expunged the third lis pendens. On March 28, 2011, a second trial under the same cause number was held to resolve Wagner's counterclaims against Olla for breach of contract and violation of RCW 4.28.328(3).[2] On May 23, the superior court ruled in Wagner's favor, entered findings of fact and conclusions of law, and awarded Wagner $107,683.64 in damages, attorney fees, and costs.

On September 13, our court filed an unpublished opinion resolving Olla's appeal. *Olla v. Wagner*, noted at 163 Wn. App. 1028 (2011). We rejected Olla's argument that the superior court lacked subject matter jurisdiction over the case and held that the superior court properly determined that dismissal of Olla's causes of actions was warranted based on equitable estoppel. *Olla*, noted at 163 Wn. App. 1028, 2011 WL 4062244, at *6-7.

B. Second Litigation

1. Complaint and Counterclaims (Cause Nos. 15-2-01441-1 and 15-2-01985-8)

On July 21, 2015, Olla filed another complaint in superior court based on the 2007-2008 loans and property transfer. The complaint was assigned cause number 15-2-01441-4. Olla requested a declaratory judgment that the three Wagner loans and subsequent acquisition of the California and Washington properties were illegal, along with restitution, compensatory and punitive damages, and vacation of the January 15, 2010 and May 23, 2011 orders and judgments

[2] RCW 4.28.328(3) states,

> Unless the claimant [in a lis pendens action] establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

under CR 60(c).[3] Olla claimed that Wagner had committed 21 violations of the MBPA related to the three loan transactions. On October 5, Olla filed an amended complaint under this cause number.

On September 28, Olla filed an additional complaint under cause number 15-2-01985-8 based on the 2007-2008 loans, settlement, and property transfer. In this complaint, Olla alleged that the 2008 settlement agreement violated the TLA and was therefore illegal and against public policy. Olla requested vacation of the January 15, 2010 and May 23, 2011 orders and judgments under CR 60(c), a declaratory judgment that the 2008 property transfer was fraudulent and against public policy, rescission of the three Wagner loans, and damages as equitable relief. On December 4, the superior court consolidated Olla's complaints (15-2-01441-4 and 15-2-01985-8) under cause number 15-2-01985-8.

On January 29, 2016, Wagner filed a motion to dismiss Olla's complaint under CR 12(b)(6), for failure to state a claim upon which relief can be granted. On February 4, Wagner filed an answer, affirmative defenses, and counterclaims against Olla under consolidated cause number 15-2-01985-8. Wagner raised release, waiver, estoppel, payment, collateral estoppel, res judicata, and accord and satisfaction as affirmative defenses, and alleged that Olla's complaint violated the settlement agreement between Olla and Wagner. On February 5, the superior court granted Wagner's CR 12(b)(6) motion and dismissed Olla's consolidated complaints. At the hearing, the superior court explained that it granted the CR 12(b)(6) motion on the basis of res judicata and collateral estoppel. On February 16, Olla filed a motion for reconsideration of the superior court's order dismissing his complaint under CR 12(b)(6). On February 17, the superior

[3] CR 60(c) states, "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding."

court denied reconsideration. On March 18, Olla filed his first notice of appeal with our court, appealing the superior court's February 5 dismissal of his consolidated complaint. On February 18, 2016, Wagner filed a motion for summary judgment with regard to his counterclaims under cause number 15-2-01985-8. On March 24, the superior court granted Wagner summary judgment and entered findings of fact and conclusions of law. The record indicates that Olla did not file a response to Wagner's motion for summary judgment and did not attend the hearing on summary judgment. The same day, Olla filed his second notice of appeal with our court, appealing the superior court's grant of summary judgment to Wagner.

2. Motion to Vacate Under CR 60(b)(5), (11) (Cause No. 09-2-01654-4)

On December 22, 2015, Olla filed a separate motion to vacate the January 15, 2010 and May 23, 2011 orders and judgments pursuant to CR 60(b)(5) and (11) under cause number 09-2-01654-4. On March 7, 2016, the superior court denied Olla's motion to vacate the January 15, 2010 and May 23, 2011 orders and judgments and imposed sanctions on Olla for engaging in frivolous litigation under CR 11.[4] On March 24, Olla filed his third notice of appeal with our court, appealing the superior court's denial of his motion to vacate.

[4] CR 11(a) states, in part:

> The signature of a party . . . constitutes a certificate by the party . . . that the party . . . has read the pleading, motion, or legal memorandum, and that to the best of the party's . . . knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Olla appeals the dismissal of his consolidated 2015 complaint under CR 12(b)(6), the grant of summary judgment to Wagner on Wagner's 2016 counterclaims, and the superior court's denial of Olla's motions to vacate the 2010 and 2011 orders and judgments.

ANALYSIS

I. SCOPE AND STANDARDS OF REVIEW

A. Scope of Review

This consolidated appeal raises two primary issues: (1) whether the superior court properly denied Olla's motion under CR 60(b)(5) and (11) to vacate the superior court's January 15, 2010 and May 23, 2011 orders and judgments, and (2) whether the superior court properly dismissed Olla's consolidated 2015 complaint pursuant to CR 12(b)(6) under the doctrines of res judicata and collateral estoppel. Although Olla also appealed the superior court's grant of summary judgment to Wagner, he addresses Wagner's counterclaims for the first time in his reply brief. We have previously held that issues and arguments raised for the first time in a reply brief are untimely and waived. *Ives v. Ramsden*, 142 Wn. App. 369, 396, 174 P.3d 1231 (2008). Therefore, Olla has waived any arguments regarding Wagner's counterclaims.

B. Standards of Review

1. CR 60(b)

We review a trial court's ruling under CR 60(b) for an abuse of discretion. *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn. App. 366, 370, 203 P.3d 1069 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id.* A decision

is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id*.

2. CR 12(b)(6)

We review a dismissal under CR 12(b)(6) de novo. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014), *aff'd*, 413 P.3d 1 (2018). Our Supreme Court has explained that "'[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.'" *FutureSelect*, 180 Wn.2d at 962 (internal quotation marks omitted) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007)). On review of a CR 12(b)(6) motion, we consider all of the alleged facts in a complaint as true and will deny the motion if it appears that any set of facts could exist that would justify recovery. *FutureSelect*, 180 Wn.2d at 962-63. However, "'[i]f a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.'" *FutureSelect*, 180 Wn.2d at 963 (alteration in original) (quoting *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005)).

II. MOTION TO VACATE UNDER CR 60(b)

A. CR 60(b)(5)—Voidness

Olla argues that because the three Wagner loans and the settlement agreement were illegal and contrary to public policy, the superior court should have determined that its January 15, 2010 and May 23, 2011 orders and judgments were also void. We disagree.

Under CR 60(b)(5), a party may obtain relief from a judgment and order if "[t]he judgment is void." Division One of our court has held that a judgment is void "[w]here a court

lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order." *Chai v. Kong*, 122 Wn. App. 247, 254, 93 P.3d 936 (2004). Olla does not argue that the superior court in 2010 or 2011 lacked jurisdiction over the parties or subject matter or lacked the inherent power to issue the judgments and orders that he seeks to vacate. Therefore, Olla's argument fails.

B. CR 60(b)(11)—Manifest Injustice

Olla contends that the superior court erred by not vacating the January 15, 2010 and May 23, 2011 orders and judgments on the grounds of manifest injustice. We disagree.

Under CR 60(b)(11), a party may obtain relief from a judgment and order for "[a]ny other reason justifying relief from the operation of the judgment." Division One has explained that "the use of CR 60(b)(11) should be reserved for situations involving extraordinary circumstances not covered by any other section of CR 60(b)." *In re Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). Additionally, "those circumstances must relate to 'irregularities extraneous to the action of the courts or questions concerning the regularity of the court's proceedings.'" *In re Furrow*, 115 Wn. App. at 673-74 (quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)). Finally,

> "irregularities justify vacation [under CR 60(b)(11)] *whereas errors of law do not*. For the latter the only remedy is by appeal from the judgment. The power to vacate for irregularity is not to be used by a court as a means to review or revise its judgments or to correct mere errors of law into which it may have fallen."

In re Furrow, 115 Wn. App. at 674 (emphasis added) (quoting Philip A. Trautman, *Vacation and Correction of Judgments in Washington*, 35 WASH. L. REV. 505, 515 (1960)).

Olla maintains that his argument that the loans and settlement are illegal and against public policy are factual and therefore appropriate under CR 60(b)(11). However, whether a

contract is legal presents a question of law. *Fallahzadeh v. Ghorbanian*, 119 Wn. App. 596, 601, 82 P.3d 684 (2004). Similarly, "whether a contractual provision contravenes public policy [is a] question[] of law." *Hanks v. Grace*, 167 Wn. App. 542, 548, 273 P.3d 1029 (2012). Therefore, we hold that the superior court properly determined that Olla was not entitled to relief under CR 60(b)(11) because his motion was predicated on alleged errors of law and not on irregularities extraneous to the court's actions or on questions concerning the regularity of court proceedings.

III. CR 12(b)(6)

Olla argues that the superior court improperly applied the doctrine of res judicata in dismissing his consolidated 2015 complaint under CR 12(b)(6). We disagree.

A. Res Judicata

Res judicata is a doctrine of claim preclusion that bars relitigation of a claim that has been determined by a final judgment. *Emeson v. Dep't of Corrs.*, 194 Wn. App. 617, 626, 376 P.3d 430 (2016). We review whether the doctrine of res judicata applies de novo as a question of law. *Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co.*, 175 Wn. App. 222, 227, 308 P.3d 681 (2013). We have previously held that "[f]iling two separate lawsuits based on the same event is precluded under Washington law." *Emeson*, 194 Wn. App. at 626. Res judicata applies to matters that were actually litigated and those that could and should have been raised in the previous proceeding through the exercise of reasonable diligence. *Emeson*, 194 Wn. App. at 626.

As a threshold matter, the party seeking to assert res judicata must show that it obtained a final judgment on the merits in a prior suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004). A dismissal with prejudice is considered a final judgment on the merits for the purpose of res judicata. *Krikava v. Webber*, 43 Wn. App. 217, 219, 716 P.2d 916 (1986).

In addition, our Supreme Court has identified four requirements for res judicata to apply: identity of (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011).

1. Final Judgment

On January 15, 2010, the superior court entered an order and judgment dismissing Olla's 2009 claims with prejudice. This is a final judgment on the merits in a prior litigation that may serve as the basis for res judicata.

2. Subject Matter

Olla's 2009 action claimed in part that the superior court should rescind the three Wagner loan agreements and the settlement agreement because of violations of the TLA and MBPA. Olla also argued in his 2009 action that he was entitled to statutory, actual, and punitive damages arising out of the loan and settlement transaction. Olla's 2015 consolidated complaint similarly maintained that the superior court should rescind the loan agreements and settlement because they violate the TLA and MBPA. Olla's consolidated complaint also requested compensatory and punitive damages arising out of the loan and settlement transaction. Therefore, identity of subject matter is met.

3. Cause of Action

We use a four-factor test to determine whether there is identity of cause of action under res judicata. *Emeson*, 194 Wn. App. at 628. The factors are:

> "(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Emeson, 194 Wn. App. at 628 (quoting *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000)).

i. Rights or Interests Destroyed or Impaired

In Olla's 2009 case, the superior court determined that "[t]he settlement agreement [between Olla and Wagner] is . . . valid and fully enforceable in its entirety." CP at 1264. The superior court also held that "Olla is estopped from advancing any and all of his claims [arising out of or founded on the Wagner Loan Documents or the Wagner Loans] against Wagner." CP at 1259-60, 1264. Olla's attempt to relitigate the legality of the three loans and the effect of the settlement agreement in his 2015 consolidated complaint would destroy or impair Wagner's right to rely on the superior court's earlier judgment upholding the enforceability of the settlement agreement. As such, this factor favors Wagner.

ii. Substantially Similar Evidence

Olla argues that the evidence in the 2015 case is not substantially similar to the evidence in his 2009 case because he intends to show that Wagner did not have a Washington mortgage broker license at the time he made the three loans. Although Wagner's lack of a license was not an issue in the 2009 litigation, both the 2009 and 2015 litigation would call for examination of the circumstances surrounding the formation of the three loans and settlement agreement and interpretation of those documents. Furthermore, to the extent that Olla argues that the superior court erred in its adjudication of his 2009 complaint and that the 2010 and 2011 judgments and orders should be vacated, his 2015 claim necessarily presented substantially the same evidence

as his 2009 claim. Therefore, although the 2015 case may involve some evidence that was not presented in the 2009 case, this factor favors Wagner.

iii. Infringement of the Same Right

Olla argues that his 2009 litigation concerned different rights because it sought to rescind the three loan agreements based on violations of the TLA and the MBPA. He argues that different rights are implicated by his 2015 action alleging that the three loans and settlement are illegal and against public policy.

Although Olla attempts to distinguish the right at issue in this case, the 2009 and 2015 litigation involved violations of the same statutory schemes. In his 2009 case, Olla argued that the three loan agreements should be rescinded because of violations of the TLA and MBPA. In his 2015 case, Olla argued that the three loans were illegal because of various violations of the MBPA. Olla also maintained that the settlement agreement was illegal and against public policy because it attempted to waive a violation of the same provisions of the TLA that Olla argued the three loans violated in his 2009 case. Although Olla focused his TLA argument on the settlement agreement in the 2015 case, his argument arises out of the same error he raised in his 2009 case, that the loans violated the TLA, which in turn, cannot be waived by a settlement agreement, thereby making the settlement illegal and against public policy. Because Olla's 2009 and 2015 litigation concerned violations of the same statutory schemes and rights, this factor favors Wagner.

iv. Same Transactional Nucleus of Fact

Olla's 2009 and 2015 litigation concerned the negotiation and execution of the three Wagner loans and the settlement agreement. Therefore, this factor favors Wagner.

Based on the above analysis, the identity of the cause of action element of res judicata is satisfied because all four factors favor Wagner.

4. Persons and Parties

Olla's 2009 case listed Olla as the plaintiff and Wagner as an individual and trustee of the Pension Plan and Does 3-50 as defendants. In the 2015 case, Olla was the plaintiff and Wagner was named as an individual, trustee, and member of the Pension Plan. Dianne Wagner and Does 3-50 were also named as defendants. Our Supreme Court has explained that for the purpose of res judicata, parties will be considered identical if the parties are "qualitatively" the same. *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). Olla does not appear to make any arguments specifically regarding Dianne Wagner or the Does that are not related to actions by Wagner. Therefore, the identity of party element is met because the 2009 and 2015 litigation involved the same qualitative parties: Olla as plaintiff and Wagner as an individual, a trustee, and a member of the Pension Plan.

5. Quality of the Persons

As explained above, the identity of persons element is satisfied because the parties in this case are qualitatively the same. Therefore, the quality of the persons element is satisfied.

6. Claims Raised or Could Have Been Raised

Olla maintains that res judicata does not apply because his 2015 claims are sufficiently distinct from the claims he raised in his 2009 complaint. However, the doctrine of res judicata applies to matters that were actually litigated and those that could and should have been raised in the previous proceeding through the exercise of reasonable diligence. *Emeson*, 194 Wn. App. at

626. Therefore, even if Olla's 2015 claims regarding the TLA were different from those raised in the 2009 complaint, the similarity of the claims suggests that Olla could have raised his 2015 claims in his 2009 complaint through the exercise of reasonable diligence. Furthermore, Olla acknowledged at oral argument that he knew at the time he filed his 2009 complaint that Wagner did not have a Washington mortgage brokers license. Wash. Court of Appeals, *Olla v. Wagner, et. al*, No. 48784-5-II (Consolidated with No. 48910-4-II), oral argument (Jan. 12, 2018), at 8 min., 24 sec. (on file with the court). Because Olla raised claims under the MBPA in his 2009 complaint and knew at that time that Wagner did not have a Washington mortgage brokers license, Olla could have brought his 2015 MBPA claims in 2009 through the exercise of reasonable diligence.

We hold that Olla's claims are precluded under the doctrine of res judicata. As such, we hold that the superior court properly dismissed Olla's 2015 case under CR 12(b)(6) because his claims were barred under that doctrine.[5]

III. FRAUD ON THE COURT

Olla argues that Wagner and the superior court have committed a "fraud upon the court." Br. of Appellant at 34, 41. Olla does not cite to any authority for this claim and does not offer any explanation or analysis. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Therefore, we decline to consider this argument.

[5] Because we hold that res judicata precludes Olla's claims, we do not reach the issue of whether collateral estoppel bars relitigation of the claims raised by Olla.

IV. ATTORNEY FEES AND COSTS

Wagner argues that he is entitled to attorney fees and costs on appeal based on the settlement agreement between him and Olla and RCW 4.84.185. We agree that Wagner is entitled to attorney fees and costs on appeal based on the settlement agreement.

Where a statute or contract allows an award of attorney fees at trial, an appellate court has authority to award fees on appeal. *Bloor v. Fritz*, 143 Wn. App. 718, 753, 180 P.3d 805 (2008). RCW 4.84.185 authorizes a court to award attorney fees and costs on appeal to a party that has defended a lawsuit that was "frivolous and . . . without reasonable cause." Wagner does not offer any explanation as to why Olla's complaint is frivolous. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *Mason*, 170 Wn. App. at 384. Therefore, we decline to award attorney fees and costs to Wagner on this basis.

However, the settlement agreement between Wagner and Olla stated, in part, "If legal action is required to enforce the provisions of this agreement, the prevailing party shall be entitled to recover its [attorney fees] and costs from the nonprevailing party." CP at 768. Our Supreme Court has explained that "[a] 'prevailing party' is any party that receives some judgment in its favor." *Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010) (quoting *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)). The court further reasoned that "[i]f neither party completely prevails, the court must decide which, if either, substantially prevailed," based on "'the extent of the relief afforded [to] the parties'" *Id.* (quoting *Riss*, 131 Wn.2d at 633-34). Wagner is the prevailing party in this appeal because he prevailed on the motion to vacate and motion to dismiss issues. Therefore, we award attorney fees and costs on appeal to Wagner based on the settlement agreement.

CONCLUSION

We affirm the superior court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.

We concur:

Johanson, P.J.

Sutton, J.