IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THOMAS L. RAGLIN and CECELIA M. RAGLIN, husband and wife, Appellants, v. STATE OF WASHINGTON, Respondent.	No. 41400-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Thomas and Cecelia Raglin appeal the trial court's summary dismissal of their wrongful adoption complaint. The Raglins assert that issues of fact and law remain because the 2005 agreement they signed, which released the State from liability for wrongful adoption, was not supported by consideration under the preexisting duty rule; their subsequent adoption support agreement did not relate back to the 2005 release agreement; the 2005 agreement was unconscionable; the 2005 agreement violated public policy; the 2005 agreement was the product of unilateral mistake; and the doctrine of laches prevents the State from arguing that the 2008 adoption support agreement released their claim for wrongful adoption. The State responds that almost none of these claims have been preserved for review because the Raglins did not raise them in responding to its motion for summary judgment.

Finding no merit in the issues that have been preserved on appeal, we affirm.

FACTS

J.R. was born on March 30, 1992. His father was Cecelia Raglin's younger brother. The birth records revealed no problems with J.R.'s birth or with his condition at birth, but they disclosed that his mother's risk factors included prior drug abuse and postpartum depression. The Department of Social and Health Services (DSHS) placed J.R. with the Raglins at their request in May 1993.

When the Raglins expressed a desire to adopt J.R., DSHS sent them the necessary forms, including information about adoption support, in 1994. In an attempt to expedite the proceedings, the Raglins signed a waiver of adoption support payments. With this waiver, they expressly acknowledged that they were giving up any right to apply for services after the adoption, including legal expense reimbursements, medical and psychological services, and/or monthly maintenance payments. According to DSHS, the Raglins believed they had the resources and insurance adequate to take care of J.R.'s needs.

The Raglins formally adopted J.R. on May 31, 1997. Although DSHS did not provide them with J.R.'s birth records before the adoption, it did disclose other records concerning his medical and family background. Those records revealed that J.R. had been neglected and severely abused before his placement with the Raglins, resulting in skull and arm fractures; that he had a learning disability; that his father had used drugs; and that his maternal grandmother had epilepsy.

As J.R. approached adolescence, he began having behavioral problems. In 2004, the Raglins applied for adoption support, seeking reconsideration of their waiver. DSHS denied their request, explaining that J.R.'s preadoption placement with relatives made the Raglins ineligible for

the state reconsideration program and that an absence of extenuating circumstances made them ineligible for federal support:

> The files show that, prior to finalization, you knew of the risks faced by [J.R.]; you were advised that he could be eligible for participation in the adoption support program; and you decided that you did not want to apply for adoption support on his behalf prior to your adoption of him, and in[ ]fact signed a waiver of right to apply for adoption support services.

Clerk's Papers (CP) at 237. DSHS also explained that the Raglins were entitled to appeal this denial of support.

The Raglins filed an administrative appeal of the decision denying their request for adoption support. Before their appeal was heard, DSHS offered to stipulate to an order before the administrative law judge (ALJ) providing that extenuating circumstances existed that would guarantee the Raglins' entitlement to adoption support. In exchange, the Raglins would release all claims concerning J.R.'s placement and adoption. The Raglins signed this agreement on April 15, 2005, and DSHS signed it on April 19, 2005. Pursuant to this agreement (referred to hereafter as the 2005 Agreement), the ALJ signed an agreed order dismissing the Raglins' administrative appeal and establishing their entitlement to adoption support. The Raglins and DSHS then exchanged adoption support proposals but were unable to negotiate terms that satisfied both parties. One source of disagreement was the term in the Raglins' proposal stating that it did not preclude further legal action. DSHS refused to accept that term because of the 2005 Agreement: "In settling the administrative proceeding in this case, the Raglins agreed that 'this settlement constitutes a settlement of all claims or damages arising out of [DSHS's] placement of [J.R.] and his subsequent adoption.'" CP at 211.

In June 2006, the Raglins filed an action for wrongful adoption against DSHS, alleging

that, although DSHS had made "minimal disclosures" about J.R. before his adoption, it had failed to provide information about his mother's pregnancy and health history. CP at 4. The State moved for summary judgment, arguing that the 2005 Agreement released it from all claims arising from J.R.'s adoption. The trial court granted the State's motion and dismissed the Raglins' complaint. In a motion for reconsideration, the Raglins attacked the validity of the 2005 Agreement on several grounds. They argued that the agreement was (1) an exculpatory agreement that violated public policy, (2) unconscionable, (3) the product of a unilateral mistake, (4) invalid under the preexisting duty rule, and (5) unsupported by adequate consideration. When the trial court denied reconsideration, the Raglins filed a notice of appeal.

A few days later, they entered into an adoption support agreement with DSHS (the 2008 Agreement). This acceptance was due in part to Michael Raglin's back injury, unemployment, and the family's loss of insurance. The 2008 Agreement was on the same form previously exchanged between DSHS and the Raglins' attorney and, as with the previous exchanges, contained a signature line for the Raglins and two DSHS representatives but none for either party's counsel. With this agreement, the Raglins received a lump sum payment of $33,062.40 (equivalent to two years back support),[1] monthly payments of $1,377.60, and full medical coverage and psychiatric care. This support would continue until J.R. turned 18 or, under certain conditions, 21. This agreement did not preserve or refer to the Raglins' right to future legal action.

We considered the validity of the 2005 Agreement alone and held that the former

[1] *See* WAC 388-27-0320 ("Under no circumstances may [DSHS] back date an adoption support agreement more than two years from the date of an order of an [ALJ] or review judge authorizing [DSHS] to enter an adoption support agreement after finalization of the adoption.").

agreement was unenforceable because it was an "agreement to agree." *Raglin v. State*, noted at 152 Wn. App. 1047, 2009 WL 3360091, at *3. "The State did not guarantee that post-adoption support would be provided if the Raglins signed the agreement and it does not discuss dollar figures." *Raglin*, 2009 WL 3360091, at *3. We also noted that an agreement to do what one was obligated to do was not valid consideration under the preexisting duty rule, and reasoned that after the ALJ entered its agreed order, the State was legally obligated to consider the Raglins' adoption support request. *Raglin*, 2009 3360091, at *2-3.

On remand, the State provided evidence of the 2008 Agreement to the trial court and argued that because the Raglins had agreed to specific terms that entitled them to specific payments, the 2005 Agreement's release of liability was valid and entitled the State to a second dismissal of the Raglins' wrongful adoption complaint. In responding to this second summary judgment motion, the Raglins asked the trial court to consider the pleadings related to the State's first summary judgment motion and argued that summary dismissal was again inappropriate.

In granting the State's motion for summary judgment, the trial court included the "[p]leadings and record in the courts' file in this case" in the list of documents it had considered. CP at 171. The Raglins now appeal this second dismissal of their complaint, and in doing so rely largely on theories raised in challenging the initial dismissal.

ANALYSIS

Standard and Scope of Review

We review summary judgment rulings de novo, engaging in the same inquiry into the evidence and issues called to the trial court's attention. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Summary judgment is appropriate if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Judgment as a matter of law is appropriate if there is no reasonable basis for a reasonable jury to find for a party with respect to the issue. *Dowler*, 172 Wn.2d at 484. All facts and inferences are reviewed in the light most favorable to the nonmoving party. *Dowler*, 172 Wn.2d at 484.

As stated, review of a summary judgment ruling is limited to the issues raised below. RAP 9.12; *see also Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995) (issues not raised in a summary judgment proceeding should not be considered on review). The State correctly asserts that the Raglins raised almost none of the issues discussed in their appellant's brief in responding to the State's second summary judgment motion. Interpreted generously, however, the Raglins' response and sur response did refer to the preexisting duty rule and to the continuing inadequacy of consideration supporting the 2005 Agreement. Without citing authority, their response stated that the release "is still unenforceable" and "of no weight precisely because the Raglins were always entitled to post-adoption support." CP at 143. Their sur response cited our *Raglin* opinion in stating that the 2008 payment was not consideration because "under the pre-existing rule [sic], an agreement to do that which one is already legally obligated to do is not valid consideration." CP at 163.

But the Raglins also asked the trial court to consider their earlier pleadings, and the trial court's summary judgment order stated that it did so. Their motion for reconsideration of the trial court's first dismissal ruling challenged the 2005 Agreement on several grounds, including public policy, unconscionability, and unilateral mistake. Nowhere below, however, did the Raglins argue

that summary dismissal was inappropriate because the 2008 Agreement did not relate back to the 2005 Agreement. Nor did they assert that the doctrine of laches entitled them to relief. Consequently, we discuss the defenses mentioned in the Raglins' responses to the State's second motion for summary judgment as well as those raised in their earlier motion for reconsideration, but we do not discuss the relation back or laches issues raised for the first time on appeal. *See* RAP 9.12 (on review of summary judgment, appellate court will consider only evidence and issues called to trial court's attention); *Thomas v. Grange Ins. Ass'n*, 5 Wn. App. 820, 826, 490 P.2d 1316 (1971) (laches issue not considered because not presented to trial court).

Consideration and the Preexisting Duty Rule

The Raglins assert that despite the 2008 Agreement, the 2005 Agreement remains invalid because of a lack of consideration and the preexisting duty rule.

An enforceable contract requires offer, acceptance, and consideration. *Yakima County Fire Prot. Dist. No. 12 (W. Valley) v. City of Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Although a promise may suffice as consideration, it is insufficient for consideration if it is so indefinite that it cannot be enforced or if its performance is optional or discretionary. 25 David K. DeWolf, Keller W. Allen, & Darlene Barrier Caruso, Washington Practice: Contract Law and Practice, § 2:26, at 70-71 (2d ed. 2007). We cited these principles when we rejected the 2005 Agreement in our initial opinion, adding that an agreement to do that which one is already obligated to do is not valid consideration under the preexisting duty rule. *Raglin*, 2009 WL 3360091, at *2; 25 Wash. Practice, *supra*, § 2:24, at 68.

We then reasoned that with entry of the agreed ALJ order dismissing the Raglins' appeal, the State was legally obligated to consider the Raglins' adoption support request. The 2005

Agreement did not guarantee such support, however, and it did not discuss dollar figures. "The actual provision of support remains optional or discretionary under the terms." *Raglin*, 2009 WL 3360091, at *3. Because the 2005 Agreement was essentially an agreement to agree, it was unenforceable as a contract. *Raglin*, 2009 WL 3360091, at *3.

In reaching our decision, we did not consider the 2008 Agreement that the parties signed shortly after the Raglins filed their notice of appeal.[2] On remand to the trial court, the State argued that this agreement, and the Raglins' receipt of back support and future monthly support thereunder, provided the necessary consideration to render the 2005 Agreement and the release it contained a valid and enforceable contract.

In support of this argument, the State relied primarily on *Platts v. Arney*, 46 Wn.2d 122, 278 P.2d 657 (1955). In *Platts*, the Supreme Court held that an initial exchange contract was merely a contract to enter into future contracts and, thus, was indefinite, uncertain, and unenforceable. 46 Wn.2d at 126. After the execution of this preliminary agreement, however, the parties entered into every contract necessary to complete the transaction described in the exchange contract, thereby making it definite and certain in all material matters. *Platts*, 46 Wn.2d at 126. In language the State cited below and in its respondent's brief, the *Platts* court stated as follows:

> The defense of uncertainty in the terms of a contract is not applicable in an action based upon the contract when performance has made it certain in every respect in which it might have been regarded as uncertain.

Br. of Resp't at 11 (citing *Platts*, 46 Wn.2d at 126); *see also* 1 Joseph M. Perillo, Corbin on Contracts: Formation of Contracts § 4.7, at 606-08 (1993) (if the parties have used language

[2] The 2008 Agreement was reached after the trial court granted summary judgment so was not properly before us in the first appeal. RAP 9.12.

making it uncertain whether they intend to close the deal and make a contract, subsequently proceeding with or accepting performance under it may remove the uncertainty). The State argues here, as it did below, that by agreeing in 2008 to the adoption support contemplated in the 2005 Agreement, the Raglins entered into a binding contract that mandated the release of all additional claims against the State based on J.R.'s adoption. *See McDougall v. McDonald*, 86 Wash. 334, 337, 150 P. 628 (1915) (appellants cannot be permitted to accept the benefits of a contract and then refuse to bear its burdens).

The Raglins maintain, however, that the preexisting duty rule renders any additional consideration offered in the form of adoption support simply part of what the State was already obligated to do. In a statement unsupported by legal authority, the Raglins assert that their eligibility for adoption support benefits is established by state and federal statute and administrative rule, and that by agreeing to specific support terms in 2008, the State was simply agreeing to do its preexisting duty under the law.

As the State's citations to the applicable statutes and regulations reveal, however, any such duty was not automatic under the law. DSHS administers two adoption support programs. One is governed by state statutes and regulations, and the other is authorized by federal law and governed by state regulations and federal policy guidelines. *See* former RCW 74.13.100 (1985) (recodified as RCW 74.13A.005, effective July 26, 2009); 42 U.S.C. § 673 et seq.; WAC 388-27-0120. Both the state and federal programs require that a prospective parent apply for adoption support and be approved therefor, with an agreement in place, at the time the adoption is finalized. RCW 26.33.320(1); WAC 388-27-0305; 42 U.S.C. § 673(c); 45 C.F.R. § 1356.40(b)(1). The Raglins signed a waiver of such support in 1997 before they adopted J.R. A

state-funded reconsideration program provides limited support for eligible persons who apply for services after an adoption has been finalized, but J.R. did not qualify because he was not in a department-funded placement or department-funded foster care before he was adopted. Former RCW 74.13.150(2)(a) (1997) (recodified as RCW 74.13A.085, effective July 26, 2009); WAC 388-27-0335.

DSHS also may consider a post-adoption request for support if a child qualifies for federal adoption assistance and if extenuating circumstances justify a post-adoption determination of eligibility. WAC 388-27-0305, -0310. The extenuating circumstances finding must be made by an ALJ or a review judge. WAC 388-27-0310. Such circumstances may include a placement agency's failure to provide adoptive parents with relevant facts about the child before the adoption is final. WAC 388-27-0315(1).

Here, the Raglins' administrative appeal of DSHS's denial of their request for support would have addressed the extenuating circumstances issue. But no hearing on the issue was held because the 2005 Agreement provided that the parties would present an extenuating circumstances stipulation to the ALJ. Pursuant to that stipulation, the ALJ ruled that extenuating circumstances entitled the Raglins to federally-subsidized adoption support benefits and dismissed their appeal.

The State argues persuasively that following the Raglins' waiver of adoption support benefits, it had no duty to provide such support until the parties reached the 2005 Agreement. *See Harris v. Morgensen*, 31 Wn.2d 228, 240, 196 P.2d 317 (1948) (performance of, or promise to perform, an existing legal obligation is not valid consideration, except where the very existence of the duty is the subject of honest and reasonable dispute). This reasoning comports with our

earlier holding that the State was obligated to consider the Raglins' adoption support request only after the ALJ entered its dismissal order pursuant to the 2005 Agreement. *Raglin*, 2009 WL 3360091, at *3. Once the terms of support became definite with the 2008 Agreement, the State provided sufficient consideration for the 2005 Agreement. We hold that the 2008 Agreement completed the 2005 Agreement and that the preexisting duty doctrine does not entitle the Raglins to relief.

Unconscionability

The Raglins argued in their motion for reconsideration that the 2005 Agreement was unconscionable because "the actual release part [was] tucked away" and deliberately disguised inside a larger document dealing with adoption support. CP at 305. On appeal, they again assert that the release portion of the 2005 Agreement was appended as an afterthought.

Washington law recognizes two classifications of unconscionability: (1) substantive unconscionability, involving cases where a clause or term in the contract is allegedly one-sided or overly harsh; and (2) procedural unconscionability, relating to impropriety during the process of forming a contract. *Nelson*, 127 Wn.2d at 131 (quoting *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). The Raglins' charge appears to be one of procedural unconscionability. *See Nelson*, 127 Wn.2d at 131 (procedural unconscionability has been described as the lack of meaningful choice, which may be demonstrated where important contract terms are hidden in fine print).

In the 2005 Agreement, the release language is included on both pages of the two-page document and in the same size type as the remaining text. The first page of the document describes the scope of the agreement and states in a separate paragraph that "[DSHS] also asks

that you agree that this settlement resolves all claims that may exist with respect to [J.R.'s] placement with you and his adoption by you." CP at 297. The second page summarizes the agreement in a bulleted list, with the final item stating, "You agree that this settlement constitutes a settlement of all claims or damages arising out of [DSHS's] placement of [J.R.] with you and his subsequent adoption by you." CP at 298. The agreement then states in bold type, directly above the signature lines, that "[w]e, Thomas and Cecelia Raglin, agree to and accept the terms of the settlement offer set forth in the foregoing letter." CP at 298. The preceding release term is not tucked away or disguised, and the Raglins' claim of unconscionability fails.

Exculpatory Agreement

In both its motion for reconsideration and its appellate brief, the Raglins argue that the 2005 Agreement is an invalid exculpatory agreement under the factors set forth in *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 110 Wn.2d 845, 758 P.2d 968 (1988). The *Wagenblast* court set forth six characteristics for courts to examine in determining whether exculpatory agreements violate public policy. 110 Wn.2d at 851-52.

As the State points out, however, the 2005 Agreement is not an exculpatory agreement. Such an agreement is a bargain for exemption from liability for the consequences of future negligence. *Wagenblast*, 110 Wn.2d at 850; *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 447, 486 P.2d 1093 (1971); 15 Grace McLane Giesel, Corbin on Contracts: Contracts Contrary to Public Policy § 85.18, at 455 (2003). As a leading treatise explains,

> It is quite possible for the parties expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent. There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself.

Wagenblast, 110 Wn.2d at 848-49 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keaton on Torts § 68, at 482 (5th ed. 1984)). Washington appellate decisions have upheld exculpatory agreements where the subject was a toboggan slide, a scuba diving class, mountain climbing instruction, an automobile demolition derby, and ski jumping. *Wagenblast*, 110 Wn.2d at 849.

In *Wagenblast*, the agreement at issue was a standardized form releasing the school district from liability for negligence occurring during a student's participation in interscholastic athletics. 110 Wn.2d at 846-47. One of the factors used to determine whether the agreement violated public policy was whether it was a standardized adhesion contract of exculpation. *Wagenblast*, 110 Wn.2d at 851. The court found a public policy violation partly because prior attempts to modify the release had failed; students had to sign it as written or be barred from the program. *Wagenblast*, 110 Wn.2d at 855.

The 2005 Agreement was not an exculpatory agreement subject to the *Wagenblast* test. Rather, it was an individually negotiated document in which DSHS agreed to the extenuating circumstances that would justify adoption support in exchange for the Raglins' release of future claims against the State based on J.R.'s adoption. The State was attempting to resolve a dispute rather than escape its obligation to use reasonable care. *See Wagenblast*, 110 Wn.2d at 848. Furthermore, rather than simply relieving DSHS from further liability, the 2005 Agreement contained several provisions outlining the steps both parties would take in agreeing on adoption support, including the Raglins' acceptance of the release provision. The inclusion of such a provision did not render the 2005 Agreement an exculpatory agreement subject to analysis under

the *Wagenblast* factors.

Unilateral Mistake

In their motion for reconsideration, the Raglins argued that they mistakenly signed the 2005 Agreement after being "kept in the dark by DSHS" on other potential claims they might have had, the potential money they would receive, and DSHS's duty to provide the withheld records. CP at 306. They amplify this argument on appeal, asserting that in agreeing to waive all future claims, they were unaware of J.R.'s medical history; unaware that they could apply for post-adoption support without the agreement including the waiver; and unaware that the State had lied to them about the availability of J.R.'s medical history.

Reformation of a contract based on one party's unilateral mistake is possible only if the other party engaged in inequitable conduct. *Oliver v. Flow Int'l Corp.*, 137 Wn. App. 655, 664, 155 P.3d 140 (2006). A party acts inequitably if it knowingly conceals a material fact from the other party and has a duty to disclose that knowledge to the other party. *Associated Petroleum Prods., Inc. v. Nw. Cascade, Inc.*, 149 Wn. App. 429, 437-38, 203 P.3d 1077, *review denied*, 166 Wn.2d 1034 (2009); *Oliver*, 137 Wn. App. at 664.

The 2005 Agreement addressed the Raglins' claim that the State had not adequately disclosed J.R.'s medical and family history: "You have said that when you adopted [J.R.], you did not have the information about [J.R.'s] and his birth family's medical history needed to understand that he was at risk of developing mental health or behavioral problems." CP at 297. Thus, contrary to their current claims, they had already alleged that the State had not fully divulged J.R.'s records. As the State asserts, the allegedly improper disclosure of information was the reason for the settlement. Consequently, the Raglins cannot now argue that the 2005

Agreement was based on their mistake in not knowing about the State's failure to disclose information.

The contention that the Raglins did not know they could have recovered post-adoption support without the 2005 Agreement is contradicted by the fact that their administrative appeal of DSHS's denial of such support was pending at the time of the agreement. Moreover, this claim involves a question of law rather than fact that does not support a claim of unilateral mistake. The amount of money they could receive became a matter of negotiation after the Raglins signed the 2005 Agreement and was not a fact that the State fraudulently failed to disclose at the time of the agreement. The Raglins do not succeed in showing that when they entered the 2005 Agreement, the State was knowingly concealing material facts. Accordingly, they do not show that the doctrine of unilateral mistake entitles them to relief.

We hold that the 2008 Agreement supplied the consideration needed to complete the 2005 Agreement and make it a viable contract. As a consequence, we affirm the trial court's order granting the State's motion for summary judgment and dismissing the Raglins' wrongful adoption complaint.

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.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

PENOYAR, C.J.