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. 38459-1-II ORDER AMENDING OPINION AND DENYING MOTION FOR RECONSIDERATION

Respondent State of Washington moves this court to reconsider the opinion filed on October 20, 2009. After consideration, this Court hereby amends the opinion as follows: On page 5-6 of the slip opinion, the following paragraph is deleted:

> The March 28, 2005 letter does not contain a clear statement of the State's consideration. Disregarding the waiver of post-adoption support signed by the Raglins is insufficient because the State is already legally obligated to reconsider adoption support under its reconsideration program. *See* RCW 74.13.150. 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. It only provides that after the Raglins submit an application, Josiah would be eligible for federally-subsidized support. The actual provision of support remains optional or discretionary under the terms. This contrasts with the Raglins' consideration, which was to settle all claims for damages arising out of the State's placement of Josiah with them for no money aside from the potential of post-adoption support.

and the following paragraph inserted:

> The March 28, 2005 letter does not contain a clear statement of the State's consideration. Disregarding the waiver of post-adoption support signed by the Raglins is insufficient because the State is already legally obligated to consider an adoption support request after an administrative law judge finds that "extenuating circumstances" led the adoptive parents not to seek adoption support before the adoption was finalized. *See* WAC 388-027-0305 to -0320. 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. It only provides that after the Raglins submit an application, Josiah would be eligible for federally-subsidized support. The actual provision of support remains optional or discretionary under

> the terms. This contrasts with the Raglins' consideration, which was to settle all claims for damages arising out of the State's placement of Josiah with them for no money aside from the potential of post-adoption support.

This Court further denies the motion for reconsideration.

IT IS SO ORDERED.

DATED this _____ day of _____, 20___.

_____
Houghton, J.

_____
Bridgewater, J.

_____
Van Deren, C.J.

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. 38459-1-II UNPUBLISHED OPINION

Houghton, J. — Cecilia and Thomas Raglin appeal a summary judgment order dismissing their claims against the State of Washington (State) for wrongful adoption. Because the trial court based its decision on an unenforceable agreement between the Raglins and the State, we reverse and remand for further proceedings.

FACTS[1]

The Raglins took Josiah into their home in 1993 and adopted him in 1997. The State, through its Department of Social and Health Services (DSHS), facilitated the adoption. When the Raglins signed adoption documents, they waived their right to apply for post-adoption financial support.

Before the Raglins adopted him, Josiah suffered abuse, including a fractured skull, a broken arm, cuts, and bruises. Josiah's birth mother also consumed alcohol during the pregnancy.

[1] The State disputes the Raglins' level of knowledge about Josiah's and his birth mother's conditions before Josiah's adoption. Because the trial court decided this case on summary judgment, we take the evidence in the light most favorable to the Raglins. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

When the Raglins adopted Josiah, the State designated his health history and his birth mother's health history as "'unavailable.'" Clerk's Papers (CP) at 114. The State did not provide this information to the Raglins despite their pre-adoption requests. At one point, Cecelia Raglin wrote a letter to the social worker assigned to Josiah's case saying that she had received no more than two letters from DSHS between May 1993 and December 1996 and was again requesting health information. Nonetheless, the State had collected health history information on Josiah and his birth parents. In 2005, the Raglins first learned about Josiah's birth mother's health history and health reports regarding her pregnancy.

As he grew older, Josiah exhibited dangerous and disturbing behavior, prompting the Raglins to seek post-adoption benefits or assistance from the State. Because the Raglins had not requested assistance at the time of the adoption, they had to undertake administrative proceedings challenging the State's denial of adoption support for Josiah.

Before concluding the administrative proceedings, the Raglins and the State reached an agreement that would allow an administrative law judge to enter an agreed order regarding the existence of extenuating circumstances. An Assistant Attorney General wrote a letter on March 28, 2005, memorializing the agreement that the Raglins signed and an adoption support program manager signed on behalf of DSHS.

In pertinent part, the letter states:

> You will need to fill out an application for adoption support and then negotiate an agreement with the Department. The agreement will be effective July 2004, the month that you requested adoption support.
>
> The Department also asks that you agree that this settlement resolves all claims that may exist with respect to Josiah's placement with you and his adoption by you.
>
> . . . .

> To summarize:
> - The Department will disregard your signed waiver of adoption support.
> - The Department will prepare an Order Regarding Extenuating Circumstances and will present that Order to [the administrative law judge] for her signature.
> - The Department has determined that, after the Order is signed and after an application for adoption support is submitted by you, Josiah would be eligible for federally subsidized adoption support benefits.
> - You will complete the adoption support application and submit it to [an] Adoption Support Program Manager.
> - You agree that your administrative hearing challenging the denial of adoption support will be continued until an adoption support agreement is negotiated and signed, and that you will then withdraw your request for hearing.
> - You agree that this settlement constitutes a settlement of all claims for damages arising out of the Department's placement of Josiah with you and his subsequent adoption by you.

CP at 170-71.

About a year later, on March 3, 2006, after the Raglins retained counsel, the State proposed adoption support of $1,300 a month until Josiah's 21st birthday. This offer resulted from negotiations between the State and the Raglins' counsel. In June 2006, without agreeing to any support offer, the Raglins sued the State for wrongful adoption.[2] They claimed that while they were prospective parents, the State failed to make reasonable disclosures of Josiah's family background and other information as RCW 26.33.380 requires. The Raglins moved for summary judgment on their claims.

The State cross-moved for summary judgment. It argued it had a binding agreement with

[2] The State may be liable in a civil action for wrongful adoption for failing to "make a reasonable investigation of their records, and to make reasonable efforts to reveal fully and accurately all non-identifying information in their possession to the [prospective] adopting parents." *McKinney v. State*, 134 Wn.2d 388, 400, 950 P.2d 461 (1998). In determining the State's liability, the jury may find that if not for its failure to disclose, the prospective parents would not have adopted the child. *McKinney*, 134 Wn.2d at 406.

the Raglins that precluded them from suing it for wrongful adoption.

The trial court granted the State's motion.[3] The Raglins moved for reconsideration arguing that the agreement was (1) void on public policy grounds, (2) unconscionable, (3) the product of unilateral mistake, (4) invalid under the pre-existing duty rule, and (5) not supported by sufficient consideration. The trial court heard argument on the matter, considered the additional materials submitted, and denied the motion for reconsideration. The Raglins appeal.

ANALYSIS

Summary Judgment

The trial court based its summary judgment decision in favor of the State on the fully executed March 28, 2005 letter. Thus, we must decide whether the settlement agreement letter is a valid enforceable contract.[4]

We review decisions on summary judgment de novo. In doing so, we engage in the same inquiry as the trial court and view the facts, as well as reasonable inferences from those facts, in the light most favorable to the nonmoving party. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). We review questions of law, such as whether an enforceable contract exists, de novo. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993).

[3] On a later date, the trial court denied the Raglins' motion for summary judgment. The Raglins did not move for discretionary review of this order and it is not before us on appeal.

[4] Here, we review arguments raised below initially and on reconsideration. *See August v. U.S. Bancorp*, 146 Wn. App. 328, 190 P.3d 86 (2008) (appellate court considered issues presented at trial and new issues raised on a motion for reconsideration of summary judgment), *review denied*, 165 Wn.2d 1034 (2009).

An enforceable contract requires offer, acceptance, and consideration. *Yakima County Fire Protection Dist. No. 12 (West Valley) v. City of Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993). Offer and acceptance are not issues before us. As for consideration, a promise suffices as consideration under Washington contract law. 25 David K. DeWolf, Keller W. Allen, & Darlene Barrier Caruso, Washington Practice: Contract Law and Practice § 2:26, at 70 (1970) (citing *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994)). But a promise is considered illusory and insufficient for consideration if it is so indefinite that it cannot be enforced or if its performance is optional or discretionary. Wash. Practice § 2:26, at 70-71 (citing *Metro. Park Dist. v. Griffith*, 106 Wn.2d 425, 723 P.2d 1093 (1986)). Additionally, under the pre-existing duty rule, an agreement to do that which one is already legally obligated to do is not valid consideration. 25 Wash. Practice § 2:24, at 68.

Washington courts will also not enforce "agreements to agree." *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004). Such an agreement is one that requires a further meeting of the minds of the parties and without which it would not be complete. *Keystone*, 152 Wn.2d at 175-76.

The March 28, 2005 letter does not contain a clear statement of the State's consideration. Disregarding the waiver of post-adoption support signed by the Raglins is insufficient because the State is already legally obligated to reconsider adoption support under its reconsideration program. *See* RCW 74.13.150. 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. It only provides that after the Raglins submit an application, Josiah would be eligible for federally-

subsidized support. The actual provision of support remains optional or discretionary under the terms. This contrasts with the Raglins' consideration, which was to settle all claims for damages arising out of the State's placement of Josiah with them for no money aside from the potential of post-adoption support.

At oral argument, the State contended that the consideration was a stipulation to agree to a specific amount at a later date. This is alluded to in the summary section of the letter, which states in part, "You agree that your administrative hearing challenging the denial of adoption support will be continued until an adoption support agreement is negotiated and signed, and that you will then withdraw your request for a hearing." CP at 171.

But in so stating, the State really suggests that the letter was essentially an agreement to agree. As a further meeting of the parties' minds was clearly required here, the settlement agreement was unenforceable as a contract.

In sum, the settlement agreement lacks sufficient consideration rendering it an invalid and unenforceable contract. For that reason, we reverse summary judgment and remand for further proceedings.

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 pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, J.

We concur:

_____
Bridgewater, J.

_____
Van Deren, C.J.