

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 16, 2025 Session

FILED

10/26/2026

Clerk of the
Appellate Courts

DERRY M. THOMPSON ET AL. v. TIMOTHY A. GRAHAM ET AL.

Appeal from the Chancery Court for Knox County
No. 186057-2 Deborah C. Stevens, Judge

No. E2024-00568-COA-R3-CV

After years of litigation, the parties reached a settlement agreement in a case. One of the parties attempted to avoid the settlement agreement, and the other party filed a motion to enforce. Following an evidentiary hearing, the trial court granted the motion, finding that the parties had entered into an enforceable settlement agreement. The trial court then taxed the court costs to the non-moving party, despite the parties agreeing that they would equally divide the court costs between them. We affirm the trial court's judgment granting the motion to enforce the settlement agreement. We reverse the trial court's taxing of court costs and remand to the trial court on that issue. Because the appellants prevailed on the issues regarding the assessment of costs, we decline to find that this was a frivolous appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed
in Part, Reversed in Part; Case Remanded**

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY, P.J., E.S., joined. D. MICHAEL SWINEY, J., not participating.

Christopher T. Cain, Knoxville, Tennessee, for the appellants, Timothy A. Graham and Graham Corporation.

Thomas M. Hale and Nathaniel D. Moore, Knoxville, Tennessee, for the appellees, Derry M. Thompson and South Grove, G.P.

OPINION

BACKGROUND

Derry Thompson and Timothy Graham were longtime business partners who formed three general partnerships, which they used to acquire real estate and construct

shopping centers. Mr. Thompson filed the instant lawsuit on September 10, 2013, in the Chancery Court for Knox County (the “trial court”) to obtain records related to the partnerships from Graham Corporation, which Mr. Graham owns and controls, and Mr. Graham (together with Graham Corporation, “Appellants”). Mr. Graham countersued. This matter has been before this Court and the Tennessee Supreme Court on appeal once before. As this Court explained in *Thompson v. Graham*, No. E2024-00568-COA-R3-CV, 2025 WL 1591386 (Tenn. Ct. App. June 5, 2025) (“*Thompson I*”):

. . . Over the years as this case was pending, various disputes between the parties arose, and numerous amended complaints and countercomplaints were filed. Ultimately, however, this appeal arises out of the trial court’s enforcement of a settlement agreement purportedly reached by the parties in 2021.

As relevant to this appeal, one of the parties’ disputes involved one of their partnerships, South Grove, G.P. (“South Grove”). The partners of South Grove were Mr. Graham, Graham Corporation, and Mr. Thompson. Mr. Thompson was the majority partner in South Grove and appointed himself as its managing partner. In 2018 and 2019, Mr. Thompson began liquidating and dissolving South Grove. Mr. Thompson found a buyer [(“Broad Reach”) to purchase certain real property owned by South Grove], but [Broad Reach] conditioned its purchase upon South Grove executing a Restriction, Easement and Right of First Refusal Agreement (“ROFR”), which restricted the future uses of an adjacent 12.53-acre tract of land that was being retained by South Grove [(the “Encumbered Property”)]. The sale closed in July of 2018. Approximately a year later, in July of 2019, Mr. Thompson made various dissolution distributions from South Grove and distributed the [E]ncumbered [P]roperty to Mr. Graham. Mr. Graham viewed this as an unlawful distribution and immediately began filing motions in the parties’ ongoing litigation seeking to undo the distribution.

By agreement of the parties, all pending issues were set for a jury trial by special setting beginning October 25, 2021, with the trial expected to last more than a week. However, on September 7, 2021, counsel for both parties had a conference call with the trial court’s judicial assistant, wherein they advised the court that the case was resolved and could be removed from the trial calendar. Also on September 7, Mr. Graham’s counsel [(“Mr. Cain”)] sent Mr. Thompson’s counsel [(“Mr. Hale”)] an email with a document attached titled “Terms of Settlement Agreement and Joint Mutual Releases” [(the “Written Terms”)]. The email said: “Attached is the document that I intend to have Tim [Graham] sign. Please review and let me know if everything is in order with it before I send it to him to sign . . .” In response,

Mr. Thompson and [Mr. Hale] signed the [Written Terms], and [Mr. Hale] emailed it back to [Mr. Cain]. The next morning, [Mr. Cain] responded: “Got it. Sent to Tim [Graham] for his signature.”

Mr. Graham did not sign the agreement; instead, [Mr. Cain] next emailed [Mr. Hale] on September 14 to let him know that Mr. Graham wanted revisions to the settlement agreement. Part of the agreement was that the parties would retain their respective dissolution distributions made by South Grove in 2019. Mr. Graham wanted to revise the agreement to make his acceptance of the [E]ncumbered [P]roperty contingent upon his “obtaining an acceptable estoppel, clarification and modification, if needed,” from the buyer related to the ROFR.

On October 20, 2021, Mr. Thompson and South Grove ([together, “Appellees”]) filed a Motion to Enforce Settlement Agreement and Request for an Expedited Hearing, and the trial court set the matter for an evidentiary hearing on March 2, 2022.

2025 WL 1591386, at *1–2.

Thereafter, as the Tennessee Supreme Court explained by order entered July 2, 2026, the trial court

held an evidentiary hearing and granted [Appellees’] motion to enforce the settlement agreement. The judge signed the order on March 18, 2024, and the trial court clerk stamped the order as “ENTERED” on the same day. The trial court clerk, however, did not sign the certificate of service stamped at the end of the order indicating that the clerk had served the parties until March 20, 2024.

On March 22, 2024, the [trial court judge] signed another order taxing court costs to [Appellants], and the trial court clerk stamped the order as “ENTERED” on the same day. But again, the clerk did not sign the certificate of service stamped at the end of the order until March 25, 2024.

[Appellants] filed a notice of appeal on April 18, 2024. The notice expressly sought appellate review of the [trial court’s] order enforcing the settlement agreement and its subsequent order awarding costs.

The Court of Appeals dismissed [Appellants’] appeal as untimely without reaching the merits. The court concluded that the [trial court’s] order enforcing the settlement agreement was entered on March 18, 2024, the date

when the trial judge signed the order and the trial court clerk stamped the order as “ENTERED.” In the Court of Appeals’ view, [Appellants] had thirty days from that date (i.e., until April 17, 2024) to file [their] notice of appeal. Because [Appellants] did not file the notice of appeal until April 18, 2024, the Court of Appeals held that it was untimely.

[Appellants] sought permission to appeal, arguing that the Court of Appeals incorrectly determined that [their] appeal was untimely. We granted review and asked the parties to address whether the appeal was timely for a reason not expressly addressed by the parties or the Court of Appeals—namely, because the trial court clerk did not sign the March 18, 2024 order’s certificate of service until two days later. . . .

* * *

[The trial court] did not effectively enter judgment in this case on March 18, 2024, as the Court of Appeals determined. At the earliest, judgment was entered on March 20, 2024, when the trial court clerk signed the order’s certificate of service. . . .

Thompson v. Graham, No. E2024-00568-SC-R11-CV (Tenn. July 2, 2026) (“*Thompson II*”). Because Appellants filed their notice of appeal within thirty days of March 20, 2024, the Supreme Court reversed this Court’s dismissal of the appeal and remanded it to this Court for further consideration. *Id.*

ISSUES

We consolidate and restate Appellants’ issues raised on appeal as follows:

1. Whether the trial court erred by finding that the parties entered into a settlement agreement.
2. Whether the trial court erred in enforcing the settlement agreement despite the existence of the ROFR.
3. Whether the trial court abused its discretion by taxing all costs to Appellants. Appellees raise a single additional issue: whether this is a frivolous appeal.

STANDARD OF REVIEW

“A compromise and settlement agreement is merely a contract between parties to litigation and, as such, issues of enforceability of a settlement agreement are governed by

contract law.” *White v. Hayes*, 715 S.W.3d 657, 669 (Tenn. Ct. App. 2024) (quoting *Envtl. Abatement, Inc. v. Astrum R.E. Corp.*, 27 S.W.3d 530, 539 (Tenn. Ct. App. 2000)). Whether a valid contract exists, issues of contract interpretation, and determinations of the parties’ intentions related to contracts are all issues of law. *Pharma Conf. Educ., Inc. v. State*, 703 S.W.3d 305, 311 (Tenn. 2024) (citing *German v. Ford*, 300 S.W.3d 692, 701 (Tenn. Ct. App. 2009); *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). Accordingly, we review a trial court’s decisions as to such issues de novo without a presumption of correctness. *Id.* (citing *German*, 300 S.W.3d at 702).

DISCUSSION

a.

Appellants argue that the trial court erred in finding that the parties reached a settlement agreement because Mr. Cain’s September 7 email to Mr. Hale was not an offer and no meeting of the minds existed. It is well-settled Tennessee law that

[a] contract may be either express or implied. It may be written or oral. It must result from a meeting of the minds of the parties in mutual assent to its terms. It must be founded on a sufficient consideration. It must be mutual, free from fraud or undue influence, not against public policy, and sufficiently definite.

Wilt v. ESPACES Franklin, LLC, No. M2022-00978-COA-R3-CV, 2023 WL 5094055, at *7 (Tenn. Ct. App. Aug. 8, 2023) (collecting cases) (original bracketing omitted). As such, the courts of this state “retain the inherent power to enforce agreements entered into in settlement of litigation pending before them . . . even if the parties’ agreement has not been reduced to writing.” *Hayes v. Extreme Excavation, LLC*, No. E2023-01435-COA-R3-CV, 2024 WL 4375003, at *3 (Tenn. Ct. App. Oct. 2, 2024), *perm. appeal denied* (Tenn. Mar. 13, 2025) (quoting *Anglo-Danish Fibre Inds., Ltd. v. Columbian Rope Co.*, No. 01–2133 GV, 2002 WL 1784490, at *3 (W.D. Tenn. June 21, 2002)).

Appellants insist that Mr. Cain’s email was not an offer to settle “but instead, merely part of continuing negotiations that could not be finalized until [Appellants] had assented.” However, although

the manifestation of mutual assent to an exchange ordinarily takes the form of an offer or proposal by one party followed by an acceptance by the other party or parties . . . a manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.

Wilt, 2023 WL 5094055, at *7 (quoting Restatement (Second) of Contracts § 22 (1981)) (bracketing omitted; emphasis added). Courts determine the mutuality of parties’ assent by examining their “objective manifestations, not their secret intentions[.]” *Am. Bd. of Craniofacial Pain v. Am. Bd. of Orofacial Pain*, 633 S.W.3d 598, 602 (Tenn. Ct. App. 2020) (quoting 1 Williston on Contracts § 3:4 (4th ed.)); see *Moody Realty Co. v. Huestis*, 237 S.W.3d 666, 674 (Tenn. Ct. App. 2007) (“In other words, we must determine whether a reasonable onlooker, based upon the parties’ outward manifestations, would conclude that the [parties] agreed to be bound[.]”). These manifestations of assent include not only the parties’ spoken words but also their actions or inactions and the attendant circumstances. *Moody Realty Co.*, 237 S.W.3d at 674–75.

At the hearing on Appellees’ motion to enforce the settlement agreement, Mr. Graham testified that between May 2021 and September 2021, he worked with Mr. Cain to formulate offers and counteroffers that were extended to Appellees, through Mr. Hale, as part of settlement negotiations. Mr. Graham conceded that Mr. Cain forwarded the various communications to him and that he—Mr. Graham—“made the substantive terms of the offers and counteroffers” that were sent by Mr. Cain to Mr. Hale.¹ Appellants suggest that the trial court erred by finding that Mr. Cain was acting as Mr. Graham’s agent during the parties’ settlement negotiations.² However, because Appellants did not argue at

¹ The trial court interpreted Mr. Graham’s testimony similarly. Appellants argue that this is a significant mistake. We disagree and note the following exchange:

Q. Let me ask you this: Between May 2021 and September 2021, did you participate with [your counsel] in formulating the substantive terms of the offers and counteroffers of settlement that were extended to me on behalf of my client, Mr. Thompson?

* * *

A. I participated.

* * *

Q. But you’re the one that provided the offers. Who made the substantive terms of the offers and counteroffers that went back and forth between the parties?

A. I assume it was Derry [Thompson] and I.

Q. I’m asking, from your side, you would have been the one?

A. Sure.

² Appellants argue that it “simply can’t be the case [] that every email sent by an attorney can somehow be deemed to bind his or her client[.]” However, we remind counsel that:

As a general rule, the acts and omissions of a lawyer undertaken during the course and in the scope of his or her representation of a particular client are attributed to that client. This is because the lawyer is the agent of the client. The doctrine of agent-principal attribution holds a special place in the context of the lawyer-client relationship not only because the most basic rights of individuals are often at issue, but also because our adversarial system of justice would quickly grind to a halt without it.

the trial court level that Mr. Cain was not Mr. Graham's agent for settlement negotiation purposes, they have waived that argument on appeal. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived."). Moreover, even while suggesting that the trial court erred, Appellants do not actually deny or dispute that Mr. Cain lacked the necessary authority to extend or accept settlement offers on their behalf, nor do they argue that he in any way exceeded his authority.

Instead, Appellants argue that by sending the September 7 email, Mr. Cain simply "wanted to make certain that both he and [Mr.] Hale were on the same page . . . before he took the next step and put the proposed agreement in front of" Mr. Graham. However, this is clearly refuted by Mr. Cain's other actions on September 7. Crucially—prior to sending the September 7 email—Mr. Cain and Mr. Hale jointly called the trial court judge's judicial assistant and informed her that the case could be removed from the court's trial docket because they had reached an agreement. Specifically, Mr. Hale alleges, and Appellants do not dispute, that Mr. Cain said during this call, "We have a deal." Moreover, Mr. Cain's September 7 email stated that the attached PDF document, bearing a file name of "Settlement Agreement with Exhibit A-Estoppel-FINAL," was the "document [he] intend[ed] to have [Mr. Graham] sign." Mr. Hale responded that the document "appears to be in order[.]" and Mr. Cain replied, "Thanks. I will get it signed." Later that day, Mr. Hale emailed Mr. Cain a copy of Written Terms signed by Mr. Thompson and Mr. Hale. Mr. Cain responded the following morning, September 8: "Got it. Sent to [Mr. Graham] for his signature."

Mr. Cain's actions on September 7 and 8 were unequivocal. He did not indicate in any of his communications with the trial court or with Mr. Hale that Appellants had not approved the settlement agreement or that he was sending the Written Terms to Mr. Graham for his consideration. Instead, he made clear, after telling the trial court that the matter had been resolved, that he was sending the Written Terms to Mr. Graham for him to sign. A reasonable onlooker would conclude that the parties had reached an agreement, as do we. Therefore, we affirm the trial court's finding that the parties reached an enforceable settlement agreement.

b.

Appellants further attempt to avoid the agreement by arguing that it violates Tennessee's Statute of Frauds, which provides that:

No action shall be brought: . . . [u]pon any contract for the sale of lands . . . unless the promise or agreement, upon which such action shall be brought,

2198199, at *5 (Tenn. Ct. App. July 26, 2007) (citations omitted).

or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

Tenn. Code Ann. § 29-2-101(a)(4). The Tennessee Supreme Court has clarified that this means that “any settlement agreement requiring a transfer of an interest in real property” must be evidenced by “a written memorandum or note[;]” however, such writing “need not be in a single document. *Waddle v. Elrod*, 367 S.W.3d 217, 225–26 (Tenn. 2012) (citations omitted). “The general rule is that the memorandum, . . . must contain the essential terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence.” *Id.* (quoting *Lambert v. Home Fed. Sav. & Loan Ass’n*, 481 S.W.2d 770, 773 (Tenn. 1972)). The settlement agreement requires Mr. Thompson to transfer to Mr. Graham, South Grove, or another entity designated by Mr. Graham certain real properties that were not included in the 2019 distribution. Therefore, the settlement agreement requires a transfer of an interest in real property and must satisfy Tennessee’s Statute of Frauds.

Similarly, the litigants in *Waddle* reached a settlement agreement that required one of the parties to transfer a one-half interest in certain real property to another of the parties. 367 S.W.3d at 220. The mechanics by which the parties reached that settlement agreement, and the Tennessee Supreme Court’s decision as to the enforceability of that agreement, are instructive in this case. The day before trial was to begin on Ms. Waddle’s cross-claim against Ms. Elrod:

Ms. Elrod’s attorney, Mr. Gregory Reed, advised Ms. Hagan, counsel for Ms. Waddle, that Ms. Elrod was willing to return her one-half interest in the Prim Lane property to avoid going to trial if Ms. Waddle would settle the case and release all other claims against her. Through her attorney, Ms. Waddle agreed to settle the case on the condition that she would not be responsible for any of the court costs. Around 4:00 p.m., Mr. Reed advised Ms. Hagan that Ms. Elrod had agreed to settle the case with Ms. Waddle’s condition. At 4:34 p.m., Ms. Hagan sent the following email to Mr. Reed:

Greg,

This confirms that we have settled this case on the following terms:

Elrod deeds property interest back to Waddle, Both [sic] parties sign full release, Waddle bears no court costs.
Let me know if I have correctly stated our agreement.

Thanks,
Mary Beth

At 5:02 p.m., Mr. Reed responded:

That is the agreement. I understand that you will draft the deed and take a shot at the court's order. No admission of guilt is to be included.

Greg Reed

The attorneys thereafter advised the trial court of the terms of the agreement. Believing that a settlement had been reached and that a written order memorializing the settlement would be entered later, the trial court cancelled the jury trial and excused prospective jurors. Counsel for Ms. Waddle prepared and forwarded the settlement documents to counsel for Ms. Elrod. . . . Approximately three weeks later, however, Ms. Elrod advised her attorney that she had changed her mind and no longer wanted to settle the case.

Id. at 220–21. Ms. Elrod argued that the *Waddle* parties' settlement agreement was not enforceable because it violated the Statute of Frauds. The Supreme Court concluded that the transaction was governed by the Uniform Electronic Transactions Act ("UETA"), Tennessee Code Annotated section 47-10-101 *et seq.*, because the *Waddle* parties, "through their attorneys, evidenced an intent to finalize the settlement by electronic means[.]" *Id.* at 228. Therefore, the Supreme Court held, "although Ms. Elrod did not sign the email, there is no dispute that Mr. Reed was acting as her agent when he negotiated the settlement" and "[a]s the agent of Ms. Elrod, Mr. Reed's electronic signature on the email confirming the terms of the settlement agreement satisfies the signature requirement of the Statute of Frauds." *Id.* at 228–29 (citations omitted).

Appellants attempt to distinguish this case by arguing that in *Waddle*, "the settlement was memorialized within the text of the emails, rather than in a separate document which required the signatures of the attorneys and parties." However, as the *Waddle* Court explained, "a writing is sufficient if the terms of the agreement may be understood either from the writing itself or from some other writing connected with it." *Id.* at 228. Therefore, the fact that the terms of the parties' settlement agreement were memorialized in an attachment to Mr. Cain's September 7 email, rather than typed into the body of the email, is of no effect.

Appellants also argue that the *Waddle* parties manifested an intent to conduct their transaction by electronic means whereas the parties in this case did not. *See* Tenn. Code

Ann. § 47-10-105(b) (The UETA “applies only to transactions between parties each of which has agreed to conduct transactions by electronic means.”). “Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.” *Id.* Appellants note that Mr. Cain was not going to sign the Written Terms on Mr. Graham’s behalf but would instead forward it to Mr. Graham for his signature, and they insist that this demonstrates that the parties did not agree to conduct the transaction by electronic means. However, we fail to see how this differs from the facts in *Waddle*. Notably, in that case, the parties’ attorneys agreed by email that they would draft written documents memorializing the parties’ agreement, including a deed to be signed by Ms. Elrod, and Ms. Elrod later “refused to sign the settlement documents[.]” *Waddle*, 367 S.W.3d at 221. Despite this, the Supreme Court concluded that the *Waddle* parties agreed to conduct their transaction by electronic means. As in this case, there were additional documents to be signed by the *Waddle* parties; and, as in this case, the attorneys were not signing the additional documents on behalf of their clients. It is undisputed that the parties in this case were exchanging settlement offers and counteroffers through their respective counsel by electronic means, and Appellants’ argument that the UETA does not apply to this transaction fails.

The Statute of Frauds was not enacted to permit a person to avoid a contract or to refuse to perform what he has agreed to do, nor is it to be used “as a shield[.]” *Waddle*, 367 S.W.3d at 223–24 (quoting *Cobble v. Langford*, 230 S.W.2d 194, 196 (Tenn. 1950)). As in *Waddle*, although Mr. Graham did not sign Mr. Cain’s September 7 email or the Written Terms attached thereto, there is no legitimate dispute that Mr. Cain was acting as Mr. Graham’s agent when he negotiated the settlement. As the agent of Mr. Graham, Mr. Cain’s electronic signature on the September 7 email satisfies the signature requirements of the Statute of Frauds. Therefore, we affirm the trial court’s ruling in that regard.

c.

Appellants further argue that the settlement agreement is unenforceable and must be rescinded because they allege that Mr. Thompson and Mr. Hale deliberately concealed the ROFR from Mr. Graham until after the settlement agreement was reached. Citing *Lee v. Beach One Props., LLC*, No. M2021-00042-COA-R3-CV, 2022 WL 1017233 (Tenn. Ct. App. Apr. 5, 2022), the trial court found that Appellees had no duty to disclose the ROFR because Appellants could have discovered it through the exercise of ordinary diligence.

Appellants argue that the trial court erred by citing *Lee* and should have instead relied upon *Simmons v. Evans*, 206 S.W.2d 295, 296 (Tenn. 1947)). In *Lee*, the parties contracted for the purchase and sale of certain real property that was encumbered by a utility easement. 2022 WL 1017233, at *1. The intended purchaser sued the intended seller and sought to rescind the contract, alleging that the seller failed to disclose the

easement. *Id.* The trial court granted summary judgment in favor of the seller. *Id.* On appeal, this Court affirmed the trial court, determining that the seller had no obligation to disclose the existence of the easement, which was “properly recorded and discoverable through the exercise of ordinary due diligence.” *Id.* Because the intended seller had no duty to disclose the easily discoverable easement, this Court concluded that the intended purchaser was not entitled to rescind the sales contract. *Id.* at *4.

Simmons involved the purchase and sale of real property, which the purchasers intended to use as their residence. In that case, the sellers told the purchasers prior to the sale that they “would have all the water they wanted or could use[.]” 206 S.W.2d at 296 (internal quotations omitted). However, after closing, the purchasers discovered that the water to the property was unavailable nightly from 7:00 p.m. to 7:00 a.m. *Id.* When confronted, the sellers admitted that they did not tell the purchasers about the water availability issue because the sellers knew they would not purchase the property if they had been informed. *Id.* The purchasers sued the sellers and sought to rescind the sale due to the sellers’ fraudulent concealment of the water issue. *Id.* The trial court ruled in favor of the sellers, and the purchasers appealed to this Court. *Id.* This Court reversed the trial court, concluding that the sellers had a duty to disclose the intermittent water availability to the sellers when they knew the purchasers were unaware of the issue, the issue impacted the “desirability and value” of the property, and the issue was not one that the purchasers should have been expected to discover through the exercise of ordinary diligence. *Id.* at 296–97. Because the sales contract resulted from the sellers’ “studied suppression or concealment of material facts[.]” this Court further concluded that the contract was voidable and that the purchasers were entitled to rescind the contract. *Id.* at 297–98.

Appellants insist that this case is more like *Simmons* than *Lee* because they claim that Mr. Thompson and Mr. Hale “engaged in a years-long effort to conceal and deceive [Mr.] Graham into believing title to the [Encumbered Property] was clear and marketable.” However, Appellants never detail how they were purportedly deceived, and the facts in the record directly contradict their claim. In fact, as the trial court found, the executed ROFR was recorded with the Knox County Register of Deeds on July 16, 2018; Mr. Thompson emailed Mr. Graham an unexecuted and unrecorded copy of the ROFR on July 23, 2018, in response to a request by Mr. Graham for a copy of the purchase agreement between South Grove and Broad Reach; and Broad Reach’s counsel provided a copy of the executed and recorded ROFR to Mr. Cain on December 23, 2019, during the discovery process in this case.

Despite this, Appellants ask this Court to excuse their failure to discover the ROFR prior to the parties’ settling this matter because after Mr. Thompson distributed the Encumbered Property to Mr. Graham in July 2019, Mr. Graham “vigorously challenged the lawfulness of the distribution[.]” and “[f]rom [Mr.] Graham’s perspective, he had no reason to be concerned about encumbrances until the parties neared a settlement, at which

point he sought a title commitment.” However, Appellants fail to mention that the parties began settlement negotiations in mid-May 2021; reached a settlement agreement during business hours on September 7, 2021; and Mr. Graham did not order a title commitment on the Encumbered Property until 7:15 p.m. on September 7, 2021, after the settlement agreement was reached. Mr. Graham was certainly on notice as to the ROFR’s existence and could have discovered it through ordinary diligence prior to reaching a settlement agreement on September 7, 2021. Appellees had no duty to disclose the ROFR, and there is no evidence to suggest that they acted to fraudulently conceal the ROFR. Therefore, Appellants are not entitled to rescind the settlement agreement due to this alleged concealment.

Appellants also argue that they are entitled to rescind the settlement agreement because “[o]bviously implicit in the proposed bargain was the fact that the property was clear and marketable for [Mr.] Graham’s purposes.” In support, Appellants point to a section of the Written Terms regarding a separate parcel of real property to be conveyed to Mr. Graham, referred to as the “Jimmy John’s property.” Specifically, the Written Terms provide that Mr. Graham will receive “good and marketable fee simple title to the Jimmy John’s property free and clear of all liens, financing statements, mortgages and deeds of trust, and subject only to the two leases [Mr.] Graham has been previously provided copies of and any matters of record, other than the types of encumbrances noted herein above.” Conversely, that section of the Written Terms regarding the Encumbered Property simply states that the parties will “retain what they received from the distribution on July 5, 2019.” Appellants urge that the “good and marketable fee simple title” condition regarding the Jimmy John’s property “unquestionably demonstrate[s]” that Mr. Graham also expected to receive marketable title to the Encumbered Property. We disagree. In fact, this instead demonstrates that had Mr. Graham wished to make the settlement contingent upon receiving marketable title to the Encumbered Property, he knew how to do so.

“Tennessee has rejected firmly any notion that courts are a fallback mechanism for parties to use to ‘make a new contract’ if their written contract purportedly fails to serve their ‘true’ intentions.” *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 694 (Tenn. 2019) (citing *Petty v. Sloan*, 277 S.W.2d 355, 359 (Tenn. 1955); *Smithart v. John Hancock Mut. Life Ins. Co.*, 71 S.W.2d 1059, 1063 (Tenn. 1934)). Appellees had no duty to disclose to Appellants the ROFR, which Appellants could have easily discovered through ordinary diligence, and Appellants cannot use the courts to rewrite their settlement agreement for them. Therefore, we affirm the trial court’s ruling that Appellees are not entitled to rescind the settlement agreement.

d.

Finally, Appellants argue that the trial court erred by taxing them with all the trial court costs when the Written Terms provide that Appellants will pay half the court costs,

Appellees will pay half the court costs, and all parties will bear their own discretionary costs. In this instance, we agree with Appellants. *Waddle* is instructive here once more. The *Waddle* parties agreed that all court costs would be taxed to Ms. Elrod, but the trial court instead taxed them to Ms. Waddle. 367 S.W.3d at 221. This Court reversed the trial court's taxing of costs and instead instructed that costs should be taxed to Ms. Elrod, consistent with the parties' agreement; the Tennessee Supreme Court specifically affirmed this Court's reversal of the trial court in this regard. *Id.* at 222 n.5, 229.

"In the absence of fraud or mistake, a contract must be interpreted and enforced as written even though it contains terms which may be thought to be harsh or unjust." *Brock v. Brock*, 661 S.W.3d 133, 138–39 (Tenn. Ct. App. 2022) (quoting *Quebecor Printing Corp. v. L & B Mfg. Co.*, 209 S.W.3d 565, 581 (Tenn. Ct. App. 2006)). Accordingly, the parties' settlement agreement must be enforced in accordance with the Written Terms. We reverse the trial court's taxing of court costs to Appellants and remand this matter to the trial court for assessment of court costs one-half to Appellants and one-half to Appellees.

e.

Appellees request their attorney's fees incurred on appeal, arguing that this appeal is frivolous.

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include, but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122. "A frivolous appeal is one that is devoid of merit, *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978), or one that has no reasonable chance of succeeding." *Young v. Barrow*, 130 S.W.3d 59, 67 (Tenn. Ct. App. 2003) (citing *Davis v. Gulf Ins. Grp.*, 546 S.W.2d 583, 586 (Tenn. 1977)). On one hand, section 27-1-122 "must be interpreted and applied strictly so as not to discourage legitimate appeals[.]" *Davis*, 546 S.W.2d at 586. On the other hand, "[s]uccessful litigants should not have to bear the expense and vexation of groundless appeals." *Id.* Given the competing considerations, whether to award damages under section 27-1-122 rests soundly within the reviewing court's discretion. *Chiozza v. Chiozza*, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009) (citing *Whalum v. Marshall*, 224 S.W.3d 169, 180–81 (Tenn. Ct. App. 2006)).

Although Appellants are largely unsuccessful on appeal, we note that Appellants succeed on the issue regarding the taxing of court costs. Given that Appellants are not entirely unsuccessful, we decline to award attorney's fees in this case.

CONCLUSION

The judgment of the Chancery Court for Knox County is reversed with regard to the taxing of court costs and affirmed in all other respects. This case is remanded for the proper taxing of trial court costs consistent with this Opinion. One half of the costs on appeal are assessed jointly and severally to the appellants, Timothy A. Graham and Graham Corporation, for which execution may issue if necessary. One half of the costs on appeal are assessed jointly and severally to the appellees, Derry M. Thompson and South Grove, G.P., for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE