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No. 56441-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Herbert L. Whitehead, III, Jennifer L. Whitehead, Southwest Enterprises, LLC, Mt. View Enterprises, LLC, Whitehead Consulting, LLC and Whitehead Enterprises, LLC,

Petitioner

vs.

Kenneth Wren and Alice Wren, et al.

Respondents.

PETITION FOR REVIEW

William A. Kinsel, WSBA #18077
Attorney for Respondents Wren
Kinsel Law Offices, PLLC
2401 Fourth Avenue, Suite 850
Seattle, WA 98121
(206) 706-8148

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1. May 9, 2023 Unpublished Opinion

2. July 19, 2023 Order Denying Motion for Reconsideration

3. RCW 62A.3-104

A. Identity of Petitioners

The Petitioners are Kenneth and Alice Wren, plaintiffs in Pierce County Superior Court and Respondents on the appeal filed by the "Defendant Makers" of a 2010 Line of Credit ("2010 LOC").

The "Makers" are Herbert and Jennifer Whitehead, plus certain LLCs owned by them: Southwest Enterprises, Mt. View Enterprises, and Whitehead Consulting. Whitehead Enterprises is not a Maker of that note. CP 1524-1528, at CP 1524.

B. Decision

The Petitioners seek review of the May 9, 2023 opinion of Division II in Wren v. Stanford and Sons, LLC, Herbert L. Whitehead III, et al., No. 56441-6-II ("5/9/23 Opinion"). Petitioners also seek review of the July 19, 2023 Order Denying Motion for Reconsideration ("7/9/23 Order").

C. Issues Presented for Review

Issue 1. Is a check an "instrument" for purposes of the objective manifestation theory of contracts explained in

Hearst Commc'ns v. Seattle Times Co., 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005)?

Answer: The Court of Appeals thinks this is an issue of first impression. (5/9/23 Opinion, p. 16.) By contrast, Petitioners conclude that it explicitly falls within the scope of Hearst, at p. 503, and In re Est. of Larson, 71 Wn.2d 349, 353, 428 P.2d 558 (1967). Either way, the answer is Yes, a check is an instrument for purposes of the objective manifestation theory of contracts. RCW 62A.3-104. Checks stating in the "memo" line that they are either loan repayments, or loans themselves, leave no room for interpretation and must be enforced as such under Larson, Hearst and Berg. The Court of Appeals accordingly erred by holding the contrary. (5/9/23 Opinion, pp. 15-17.) Review should be granted under RAP 13.4(b)(1) & (4).

Issue 2. Does the objective manifestation theory of Hearst, paired with the "context rule" of Berg v. Hudesman, 115 Wash.2d 657, 801 P.2d 222 (1990), prevent the use of

extrinsic evidence, e.g., the subjective intent of Whitehead, to vary or contradict the written words of the loan payments at issue?

Answer: Yes, Hearst and Berg, as explained in Hearst at p. 503, prohibit the use of extrinsic evidence to "show an intention independent of the instrument," or to "vary, contradict or modify the written word[s]" contained within those instruments. Here, the Court of Appeals erred by agreeing that Whitehead should be permitted to present at trial his alleged subjective intent that the word "loan" really means "wages" for the express purpose of contradicting and rewriting the words appearing on the instruments at issue. (5/9/23 Opinion, p. 16.) Review should be granted under RAP 13.4(b)(1) & (4).

Issue 3. Can extrinsic evidence, including Whitehead's tax returns that reported no income, be properly used as evidence under the Berg context rule to confirm that the only reasonable interpretation of "loan" is loan?

Answer: Yes. Superior Court Judge Michael Schwartz properly used this type of extrinsic evidence, e.g., the failure of Whitehead to report any taxable income on his IRS tax returns for the relevant years, to assess the reasonableness of the respective interpretations urged by the parties. The Court of Appeals holding to the contrary, at 5/9/23 Opinion p. 10, is in error and should be reviewed under RAP 13.4(b)(1) and (4).

Issue 4. Is a party prohibited from alleging an unlawful intent, e.g., here the intent to hinder, delay or defraud the Whiteheads' judgment creditors known as LeClercq, and to avoid the payment of federal income taxes, when the actual 2010 LOC and checks as written and performed were entirely lawful and proper loan transactions?

Answer: Yes. A loan contract, legal in its presentation and performance, is not subject to a "reasonable" alternative interpretation, as required by Hearst and Berg, when that alternative interpretation admits to an intent to

defraud both private parties and the US government. The Court of Appeals erred by holding to the contrary and permitting Defendant Makers to assert this argument to a fact finder. Review should be granted under RAP 13.4(b)(1) & (4).

Issue 5. Does the equitable doctrine of judicial estoppel apply when a party (Whitehead) asserts contradictory factual positions in two different lawsuits pending before Pierce County Superior Court at different times, once personally in his own sworn declaration and the other through the declaration of another individual, whose declaration Whitehead actively sought and participated in preparing?

Answer: Yes. In 2013 Whitehead caused Pierce County Superior Court to be misled, to his own advantage and to the disadvantage of his judgment creditors LeClercqs, by soliciting and helping to prepare a declaration from Kenneth Brautigan swearing under oath that Whitehead owed Stanford and Sons significant sums under the 2010 LOC. Whitehead

now claims in this lawsuit that that 2013 declaration was a farce and, in effect, admits that its submission was designed to prevent the LeClercqs from collecting on their judgment. Under these circumstances, the equitable factors relevant to judicial estoppel are satisfied. That doctrine should be applied to prevent Whitehead from denying that the payments he received were, in fact, loans under the 2010 LOC. Accordingly, the 5/9/23 Opinion errs at p. 13 when it holds to the contrary. Review should be granted under RAP 13.4(b)(4).

Issue 6. Should the default interest rate of 36% in the CR 54(b) Judgment be affirmed?

Answer: Yes. While the Court of Appeals did not reach this issue, as a matter of judicial efficiency this Court should affirm that default interest rate under Hearst and Berg, rather than remanding for further consideration.

D. Statement of the Case

1. This Appeal Arose from a CR 54(b) Final Judgment Following Summary Judgment

On December 3, 2021, the Pierce County Superior Court entered in favor of Petitioners the CR 54(b) Final Judgment found at CP 1072-1077. The judgment holds in part that the Defendant Makers are liable for failing to repay the March 13, 2010 Line of Credit to the note's holders, Kenneth and Alice Wren, when that note matured on March 13, 2020. (CP 1520-1523.)

On May 9, 2023, Division II entered its opinion reversing the CR 54(b) Judgment. On July 19, 2023, after requesting briefing from appellants in response to the Wrens' Motion for Reconsideration, the Court of Appeals denied said motion.

The Supreme Court's review of the appellate court's decision on a motion for summary judgment is de novo. Hearst, 154 Wash.2d at 501. Because there are no material issues of fact in dispute, but only the proper

application of Hearst and Berg to a review of the evidence, the trial court's CR 54(b) Judgment was properly entered. Id. Accordingly, the opinion of the Court of Appeals should be reversed, while the CR 54(b) Judgment of the Honorable Michael E. Schwartz should be affirmed and reinstated.

2. Scope of Appeal

Defendant Makers identified two Assignments of Error to the Court of Appeals. The limited scope of those assignments help focus this Petition for Review. The first assignment reads:

> A. The trial court erred when it granted summary judgment, because there are issues of material fact as to whether any money was ever lent under the line of credit, as well as accounting issues.

(Brief of Appellants, p. 6, emphasis added.) The Defendant Makers' argument is that there are material issues of fact supporting the conclusion that no money was ever loaned under the 2010 LOC. Despite the implication of the last clause of that assignment of error,

Defendant Makers did not argue on appeal that any particular check was improperly identified as a loan, or as a loan repayment, but rather that the evidence creates a material issue of fact permitting a jury to conclude that no loan, or loan repayment, ever occurred. The limited nature of this assignment of error has a significant impact on the analysis of this Petition, and helps lead to the conclusion that Judge Schwartz's CR 54(b) Judgment should be reinstated in full.

The second assignment of error asserts that "B. The trial court erred when it rendered the default interest at 36% per annum." (Brief of Appellants, p. 6.) While the appellate did not address this assignment in its opinion because of its reversal of the CR 54(b) Judgment, this issue too is controlled by Hearst and the state statutes governing interest rates for contracts that serve a business purpose.

3. Background

On July 16, 2019, Stanford and Sons, LLC defaulted on its loan obligations to the Wrens on two notes with the original principal balances of $1,200,000 and $500,000. (CP 1171, 1536, 1618-19, 1644.) After that default, Stanford and Sons assigned its various assets to Petitioners. Among those assets were the 2010 LOC and deed of trust that are subject to the CR 54(b) Judgment. (CP 1517-1528.) As the trial court determined in the same summary judgment ruling that resulted in the CR 54(b) Judgment, the debt owed by Stanford and Sons was $1,187,872.89. (CP 819.)

Significantly, no party disputed on summary judgment the accuracy of the calculation by Petitioners' expert witness Nicola Bley Asquith of the $1,187,872.89 debt owed by Stanford and Sons to the Wrens, as set forth in CP 589-591, 601-608, ¶¶7-14, Exhibits A and B. If Defendant Makers had any basis to dispute the

accuracy of Asquith's calculations, or the basis of her expert opinions on the same, they were obligated to have presented that evidence below. They did not do so.

4. The Wrens Execute on Their Security

Following the July 2019 default, the Commercial Security Agreement imposed on Stanford and Sons as Grantor, and on the Brautigans as the sole member and Guarantors of the debt, the duty to assemble and deliver all assets available to them to repay the debts owed to the Wrens. (Wren Dec., ¶¶7, 11, Ex D., p. 6 ¶ "Assemble Collateral", Ex H., p. 6 ¶ "Assemble Collateral", at CP 1535, 1536, 1550 & 1565.) Consistent with those contractual rights and obligations, the Wrens exercised their secured-party rights and entered into a Bill of Conveyance in Lieu of Foreclosure and a First Amendment to Bill of Conveyance in Lieu of Foreclosure with Stanford and Sons and Brautigan.

(Wren Dec., ¶¶7-8, 15-16, Exs D, E, K & L at CP 1534-1580.)

The 2010 LOC and Deed to Trust between Stanford and Sons and the Whiteheads were among the assets subject to delivery to Petitioners. That conveyance was subsequently recorded on October 29, 2019. (CP 1517-1528.)

5. Defendant Makers Owed $886,432.17, plus Late Charges, Fees, and Costs on the 2010 LOC Through Maturity on March 13, 2020

The only asserted "facts" presented in opposition to the motion for summary judgment were in a 9/20/21 Declaration of Butch Whitehead. (CP 683-804.) None succeeds in creating a dispute over a material fact.

Paragraphs 9-33 of Whitehead's declaration, at CP 687-693, do purport to address the Defendant Makers' liability under the 2010 LOC. However, only three of those paragraphs arguably address the issue of the accuracy of Asquith's calculations, or of her attributions

of payments as loans to the 2010 LOC balance. The first is ¶9, CP 687, where in the first sentence Whitehead states that "Neither Wren, nor Nicola Bley Asquith, were involved in any of the day-to-day activities of Stanford and Sons at any time." Whitehead misses the point, though, that Asquith is an expert testifying as to the amount owed under the 2010 LOC based on her review of the documents (e.g., loan checks). Therefore, the "fact" that Asquith was not involved in the day-to-day activities of Stanford and Sons is neither relevant nor material.

Next, in ¶20 of his declaration, CP 690, Whitehead challenges the accuracy of Asquith's calculation of the amounts owed under the 2010 LOC by claiming that her calculation did not match the calculation he helped prepare for a declaration signed by Brautigan in August 2013.

In terms of a challenge, ¶20 falls flat. First, in the preceding ¶¶16-19 of his declaration (CP 689-690), Whitehead describes what he and Brautigan did in August 2013 to use the 2010 LOC to fend off Whitehead's judgment creditor First Nicholas LeClercq and Susan LeClercq Family LLC ("LeClercq"). That admission includes Whitehead's assertion that Brautigan's declaration was knowingly inaccurate. So, if Brautigan's declaration was inaccurate, why would Asquith's summary judgment calculations match it?

Next, in what appears to have convinced the Court of Appeals that material issues of fact exist, Whitehead claims that even though "Brautigan would write 'loan' on the checks", id., ¶25, l.19, CP 691, those checks were really compensation. Id., CP 691, ¶22, l.5. The legal issues related to this belated about-face are dealt with below. As a matter of fact, the key issues are this: First, Whitehead admits knowing that each check contained a

memo indicating the money was a loan, yet he voluntarily deposited each check in his bank account. Second, Whitehead failed to identify a single check that was included in Asquith's calculation in Exhibit C to her declaration, at CP 609-613, that was not properly identified as a "loan" check. Thus, there is no factual dispute that she accurately identified and included in her Exhibit C only checks that were stated to be loans, and just as importantly, that she *excluded* checks, such as those after March 2016, that did *not* state they were loans.

6. Whitehead Enterprises Loans of $160,000

Petitioners moved for reconsideration of the 5/9/23 Opinion, which reversed the portion of the CR 54(b) Final Judgment at CP 1075, ¶3 dismissing the Defendant Makers' Counterclaim No. 1 that alleged Stanford and Sons owes Whitehead Enterprises $160,000. Those notes were debt obligations running from Stanford and Sons to Whitehead

Enterprises, the latter of which was not a "Maker" of the 2010 LOC. (CP 1524.) On appeal, Whitehead never explained how Whitehead Enterprises had any rights under the 2010 LOC. Thus, it is impossible for the Wrens to owe anything to Defendant Makers under the 2010 LOC for those six Whitehead Enterprise notes.

In addition to the lack of any legal obligation running from the Wrens to Whitehead Enterprises, the 5/9/23 Opinion permits Whitehead to use his alleged subjective intent about the purpose of a loan <u>repayment</u> received *from* Stanford and Sons between 2010 and 2013 to question the subjective intent of *Stanford and Sons* while writing the checks for those repayments. (CP 687-693; Defendant Makers' Response to Motion for Reconsideration at p. 2.) Defendant Makers do so while ignoring the proof of repayment that was presented to the trial court, which established that those six separate loans were repaid by 2013. CP 1297, 1299, 1301, 1309, 1312, 1314, 1315, 1317, 1319, 1321, 1323 and 1325. Those checks bear

handwritten notations "Loan Repayment" and "Whitehead Ent. Loan Repayment."

E. Argument Why Review Should Be Accepted

1. The Supreme Court Should Accept Review Either to Clarify or Decide that Checks are Subject to Hearst

RAP 13.4(b)(1) and (4) apply and support acceptance of review because either Petitioners are correct and the Court of Appeals erred by holding that Hearst does not apply to checks (e.g., negotiable instruments under RCW 62A.3-104), or the Court of Appeals is correct, and this is a matter of first impression requiring the Supreme Court to determine an issue of substantial public interest impacting the near-daily personal and commercial financial transactions of virtually all of the State's adult residents.

a. Hearst States That the Objective Manifestation Theory of Contracts Applies to Instruments, and Checks are Instruments

The need for this Court's review of the 5/9/23 Opinion is derived directly from that Opinion:

> We interpret written instruments as a matter of law. *In re Est. of Larson*, 71 Wn.2d 349, 354, 428 P.2d 558 (1967). Courts "generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent," and "[w]e impute an intention corresponding to the reasonable meaning of the words used." *Hearst Commc'ns, v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). The Washington Supreme Court has "explained that surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of *specific words and terms used'* and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Id.* At 503 (quoting *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)). But Wren has pointed us to no authority, and we have found none, that applies *Hearst* to checks, and specifically something written on the memo line on a check.
>
> 3. <u>Application to the present case</u>
>
> The trial court concluded that there was no genuine dispute of material fact that S&S loaned Whitehead money under the line of credit, about the amount of money owed, or that Whitehead defaulted on repaying the loans. Because there was a genuine question of material fact about whether the funds were loans, we reverse.

(5/9/23 Opinion, pp. 14-15.) The final sentence of that quotation highlights what Division II found to be the material issue of fact preventing entry, and thus resulted in the reversal of, the CR 54(b) Judgment. Namely, were the funds loans? As

specified by the Defendant Makers, that issue is a generic one, rather than a check-by-check analysis, as the error assigned below was "whether any money was ever lent under the line of credit". (Brief of Appellants, p. 6, emphasis added.)

The Supreme Court should accept review under RAP 13.4(b)(1) because both Larson, 71 Wn.2d at 354, and Hearst, 154 Wn.2d at 503-04, explicitly state that Washington's courts are to interpret written instruments as a matter of law, not fact, and as pointed out in the Motion for Reconsideration, checks are instruments. RCW 62A.3-104. Larson itself confirms that at 353-54.

The Supreme Court should also accept review under RAP 13.4(b)(4) because it is a matter of urgent public importance given that the simple check is one of the most common forms of written contract in use in our society, with checks being used in conjunction with other contracts between the parties thereto, e.g., like the use of checks to repay the loans here made by Whitehead Enterprises to Stanford and Sons, the

use of checks to deliver to Defendant Makers the loans from Stanford and Sons, and even the use of checks by Whitehead to partially repay the 2010 LOC. (CP 1328, CP 1279.) Further, since unpublished cases can be cited under GR 14.1(a), and since the 5/9/23 Opinion already appears in Westlaw as a case citing Larson, that 5/9/23 Opinion is likely to have a substantial impact on other cases pending before Washington's superior and appellate courts, now and in the future.

By contrast, the Court of Appeals twice concluded that this issue is a matter of first impression because it found no Washington authority "that has extended *Hearst* in precisely the manner requested by the Wrens." (5/9/23 Opinion, pp. 16, 17.) A careful review of the appellate decision at pp. 15-17 leads Petitioners to conclude that the legal authority selected by that court to support its conclusions is either an example of a remarkable coincidence, or instead a deliberate, careful identification of an issue that court thinks that this Supreme Court should accept on review and under RAP 13.4(b)(4).

Given Petitioners' inherent respect for the capabilities of the appellate panel, Petitioners conclude that the latter is the case.

To explain, the inclusion of Hearst in the analysis at 5/9/23 Opinion, pp. 15-16 was to be expected. By contrast, the citation to Larson, 71 Wn.2d 349 (1967), which involved a check for $8,500 with a memo line reading "As Loan", was not obvious and unlikely to be fortuitous. Indeed, the facts and holding of Larson are key, both for acceptance of review here and for understanding the 5/9/23 Opinion.

For instance, there are significant similarities in the facts of the 1967 Larson decision and the facts of this case, and the legal holdings of the Supreme Court in Larson are the same as the holdings that properly apply here. Larson was, however, decided well before the 2005 decision in Hearst. That temporal sequence appears to explain the statements in the 5/9/23 Opinion at p. 16 that no authority was found "that applies *Hearst* to checks", and at p. 17, "that has extended *Hearst* in precisely the manner requested by the Wrens." (Emphasis

added.) Perhaps to state the obvious, then, the Supreme Court could not "apply" Hearst to Larson because Hearst had not been decided in 1967. So, does Larson remain good law or not? That is one of the questions to be answered on review.

As for Larson, the dispute focused on $8,500 that was received by Clifford from his father Henry Larson via a check that bore on its face the words "As Loan." Larson, pp. 349-350. Later, with his father near death, Clifford wrote his father a note to ask if he should pay back that loan. Henry returned his son's note to him, writing on the back "Keep it No Return." Id., pp. 350-351.

After a hearing, the trial court found and held that the check was a loan, that the loan was not repaid, that the father's note was ambiguous, and that son Clifford had failed to meet his burden of proving an effective gift. Clifford as a result owed the estate $8,500 plus interest at the statutory rate. Id., pp. 351-352.

The issues presented in Larson dealt first with whether the check as written was actually a loan, and second, whether the deceased father's note was an effective gift:

> In essence, the question presented on this appeal is whether the note from Henry L. Larson to his son Clifford constituted a valid forgiveness of the loan he had previously made to his son. The contention of appellant that the transaction did not constitute a loan in the first instance is without merit. The words 'As Loan' on the face of the check in the handwriting of decedent is unequivocal and supports the finding of the trial court in that regard.

Id., at p. 353. This first holding of Larson applies with equal force here, especially given Hearst's confirmation that extrinsic evidence cannot be used to show an intention independent of the instrument, or to vary, contradict or modify the specific words and terms used. Hearst, at p. 503. In other words, Whitehead cannot use extrinsic evidence to change the word "loan", or the words "loan repayment" as they appear on the checks at issue, into the opposite word "wages."

Second, Larson examined the trial court's finding of fact that the father's "gift note" was ambiguous and ineffective. On

this issue the Estate, which had prevailed based on the trial court's finding of fact, relied upon "the rule that this court will not substitute its judgment for that of the trial court on disputed issues of fact". Id. The Supreme Court disagreed:

> The rule, however, is not applicable in the present case. We are confronted, not with a disputed issue of fact, but with the interpretation of a written instrument. The instrument itself is the only evidence directly bearing on the intent of the decedent when he wrote the note. This court held, in *State v. Comer*, 176 Wash. 257, 28 P.2d 1027 (1934), that:
>
> > The interpretation to be given written instruments, whether the procedure be civil or criminal is a matter of law for the court, and not a question of fact * * *. *State v. Richards*, 97 Wash. 587, 167 P. 47. (p. 266, 28 P.2d p. 1031)

Id., p. 354, note omitted. The Supreme Court then determined that the standard of review is what we now refer to as de novo, and further, reversed the trial court on the grounds that there could be "[n]o clearer expression" of the father's intention to make a gift than the words "Keep it No Return." Id. In light of the above, the 5/9/23 Opinion errs by turning the decision over

a matter of law—i.e., whether the word "loan" can be read as "wages"—to a future fact finder.

As to whether Larson remains good law in light of Hearst, there is little basis to question its continuing validity. Rather, Larson is strengthened by the decision in Hearst, at p. 503, that extrinsic evidence cannot be used to "vary, contradict or modify the written word" within the "instrument", which necessarily includes checks in light of the facts of Larson and RCW 62A.3-104.

The appellate panel appears concerned that the Wrens' summary judgment motion placed too much emphasis on the words that appeared in the "memo" line of the checks. Under Larson and Hearst, it is the words on the instrument that must be construed, and the words appearing on a check are usually limited in number. Thus, the words appearing on a check are if anything more, not less, important, which logically makes their intent easily understood. The remedy for Whitehead, if he had failed to understand or agree with the word "loan" on a check

he received, was to refuse to endorse and deposit that check and, instead, insist upon the issuance of a new check without that notation, and with income taxes properly withheld, if those funds were truly wages. Of course, a contracting party is bound by the terms of his contract, even if he has not read the instrument or fails to understand the word "loan". Washington Federal Sav. & Loan Ass'n v. Alsager, 165 Wash.App. 10, 14, 266 P.3d 905 (2011). Whitehead's endorsement and deposit of those checks therefore makes them binding as loans.

Another example relates to accord and satisfaction, where the creditor will be bound by the memo line of a check reading "payment in full," even if that depositing creditor indicates his disagreement with the same. State Department of Fisheries v J-Z Sales Corporation, 25 Wash.App. 671, 680-681, 610 P.2d 390 (1980). Accepting the logic of the 5/9/23 Opinion, however, leads to exactly the opposite result in J-Z Sales, as the creditor could continue to dispute the same.

The 5/9/23 Opinion throws into doubt not only Larson, but also Hearst, J-Z Sales and all of the other decisions like them finding that the construction and interpretation of words on an instrument are determined as a matter of law. There is, in short, every reason to extend Hearst to checks "precisely in the manner requested by the Wrens", 5/9/23 Opinion, because to not do so will create widespread uncertainty in numerous areas of the law, while seriously prejudicing the opposite contracting party, e.g., Stanford and Sons, who could face substantial tax liabilities after relying on the word "loan" to mean precisely that, instead of taxable wages. The 5/9/23 Opinion accordingly requires and needs review under RAP 13.4(b)(1) and (4).

2. Judge Schwartz Properly Applied the Context Rule

Page 10 of the 5/9/23 Opinion reads:

> The trial court acknowledged that "the standard for summary judgment is taking the evidence in the light most favorable to the non-moving party," Whitehead. Verbatim Rep. of Proc. at 31. But the trial court also appeared to weigh the evidence, stating "[Whitehead's] argument is that these weren't really loans. This was compensation. The

> evidence . . . points in the exact opposite direction here." *Id.*

What the trial court did was to apply properly the "context rule" of Berg, as further clarified in Hearst at pp. 502-504, to assess the circumstances surrounding the making of the contracts, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations of the parties.

Here, a key part of applying the context rule was an examination of Whitehead's tax returns, which from 2013 through 2017 reflected no personal income. (5/9/23 Opinion, pp. 5, 16.) As a matter of law, the proper application of Berg and Hearst results in the conclusion that Whitehead's interpretation of the word "loan" as meaning "wages" is not reasonable given his failure to report income, and it must be rejected.

This legal conclusion is driven home by the fact that the opposite conclusion would permit Whitehead to rewrite a clear and lawful contract for the purpose of engaging in an unlawful contract intended to defraud the US government of income

taxes, and to prevent the LeClercqs from executing on their judgment. That, as a matter of public policy, is an impermissible result. Hearst, p. 511 ("There is ample case law making it clear that generalized public policy concerns cannot be used to rewrite a clear and lawful contract.") Instead, Judge Schwartz reached the proper legal conclusion and granted summary judgment.

3. The Supreme Court Should Accept Review of the Judicial Estoppel Issue

Judicial estoppel should apply to prevent Whitehead from denying receipt of loans under the 2010 LOC.

> There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time. *Id.* "[A] trial court's determination of whether to apply the judicial estoppel doctrine" is guided by three core factors: (1) whether the party's later position is " 'clearly inconsistent with its earlier position,' " (2) whether acceptance of the later inconsistent position " 'would create the perception that either the first or the second court was misled," ' and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wash. 2d 851, 861, 281 P.3d 289 (2012)

The only reason the Court of Appeals denied judicial estoppel as to Whitehead's receipt of loan payments was the fact that "Brautigan filed the declaration in the LeClerq case on his own behalf as an interested party, so we cannot bind *Whitehead* to the assertions that *Brautigan* made in that document." (5/9/23 Opinion, p. 13.) However, Whitehead admits to actively participating in the creation of "Brautigan's" declaration. (CP 689-90, ¶¶16-20.) Those actions undermine, rather than preserve, respect for judicial proceedings and reward Whitehead's duplicity. The 5/9/23 Opinion therefore errs in its holding. Review should be granted under RAP 13.4(b)(4).

F. Conclusion

Petitioners ask the Supreme Court to accept review and to reinstate the CR 54(b) Judgment entered by Pierce County Superior Court.

I hereby certify that this Petition contains 4,999 words in compliance with RAP 18.17.

DATED this 18th day of August, 2023.

KINSEL LAW OFFICES, PLLC

By: s/William A. Kinsel
William A. Kinsel, WSBA #18077
Attorneys for Petitioners Wren

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 2023, I caused to be delivered the foregoing PETITION FOR REVIEW to the following parties via the Washington Appellate Portal electronic email service system:

Thomas L. Dashiell
Davies Pearson, P.C.
1498 Pacific Avenue, Suite 520
Tacoma, WA 98402
PO Box 1657
Tacoma, WA 98401
tdashiell@dpearson.com

Appeal Attorneys for Respondents

Russell A. Knight
Gabriel Hinman
Smith Alling PS
1501 Dock Street
Tacoma, WA 98402
rknight@smithalling.com
andrea@smithalling.com
mamici@smithalling.com

Trial Attorneys for Russell/J&N

Nathan Arnold
Emanuel Jacobowitz
Cloutier Arnold Jacobowitz, PLLC

2701 First Avenue, Suite 200
Seattle, WA 98121
nathan@cajlawyers.com
manny@cajlawyers.com
korri@cajlawyers.com
officeadmin@cajlawyers.com

Scott Gifford
325 South 108th Place
Seattle, WA 98168
Scott@sgiffordlaw.com

Appeal Attorneys for Respondent Stanford and Sons

Robert A. Bailey
Anglin Flewelling & Rasmussen LLP
701 Pike Street, Suite 1560
Seattle, WA 98003
rbailey@lagerlof.com
kblevins@lagerlof.com

Trial Attorneys for First Horizon

Eric D. Gilman
James W. Beck
Janelle E. Chase Fazio
Beck Chase Gilman PLLC
711 Court A, Suite 202
Tacoma, WA 98402
eric@bcglawyers.com
james@bcglawyers.com
janellle@bcglawyers.com
serve@bcglawyers.com

Trial Attorneys for Defendant Frame

Justin D. Balser
Troutman Pepper Hamilton Sanders LLP
5 Park Plaza, Suite 1400
Irvine, CA 92614-2545
justin.balser@troutman.com
Trial Attorneys for Nationstar Mortgage LLC dba Mr. Cooper

Dated this 18th day of August, 2023, at Seattle, Washington.

/s/ William A. Kinsel
William A. Kinsel

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

May 9, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENNETH WREN and ALICE WREN, husband and wife;

Respondents,

v.

STANFORD AND SONS, LLC, a Washington limited liability company; DAVID G. WHITEHEAD, individually; J & N INVESTMENTS INC., a Washington corporation; HENRY L. RUSSELL II, individually; and the marital community of HENRY L. and VICTORIA L. RUSSELL; DUWARD WILLIAM FRAME, IV, individually; FIRST HORIZON BANK, successor by conversion to FIRST TENNESSEE BANK NATIONAL ASSOCIATION d/b/a FIRST HORIZON HOME LOANS; NATIONSTAR MORTGAGE LLC, d/b/a, MR. COOPER, a Delaware limited liability company; and FIRST NICHOLAS D. LECLERQ AND SUSAN L. LECLERQ FAMILY LLC, a Washington limited liability company;

Defendants,

HERBERT L. WHITEHEAD III, individually; the marital community of HERBERT L. WHITEHEAD III and JENNIFER L. WHITEHEAD; SOUTHWEST ENTERPRISES, LLC, a Washington limited liability company; MT. VIEW ENTERPRISES, LLC, a Washington limited liability company; WHITEHEAD CONSULTING, LLC., a Washington limited

No. 56441-6-II

UNPUBLISHED OPINION

liability company; and WHITEHEAD ENTERPRISES, LLC. a Washington limited liability company;

Appellants.

GLASGOW, C.J.— In 2009, Herbert L. Whitehead helped his friend Kenneth Brautigan start a car dealership, Stanford & Sons (S&S). Whitehead then worked at S&S. In 2010, S&S extended a line of credit to Whitehead, his wife, and several companies the couple owned. Brautigan wrote Whitehead numerous checks over the next few years with "loan" in the memo line. Whitehead endorsed and deposited the checks.

In the meantime, Ken and Alice Wren loaned significant amounts to S&S. S&S later defaulted on that debt and it assigned the Wrens most of its and Brautigan's assets, including Whitehead's line of credit. Whitehead then failed to make payments as required by the promissory note and the Wrens sued to collect on the debt. Whitehead filed several counterclaims, alleging in part that the Wrens owed him money because he had a credit balance on the line of credit.

The Wrens moved for partial summary judgment to dismiss some of Whitehead's counterclaims, including the ones addressing the line of credit. The trial court granted partial summary judgment and denied reconsideration. The trial court entered final judgment against Whitehead on the debt for the line of credit, eventually imposing a 36 percent interest rate, the default rate set by the promissory note.

Whitehead appeals. He argues the trial court erred by granting partial summary judgment because there are genuine issues of material fact as to whether the payments S&S made to him were loans under the line of credit or payment for work he performed for S&S. He also argues the trial court erred by imposing a 36 percent interest rate. Both parties seek appellate attorney fees.

We agree that there are genuine issues of fact as to the nature of the payments S&S made to Whitehead. We reverse and remand for the trial court to vacate the Wrens' judgment against Whitehead and engage in further proceedings consistent with this opinion. If another judgment is entered in the future, the parties may raise the issue of the correct interest rate before the trial court. Neither party is entitled to attorney fees at this time.

FACTS

I. BACKGROUND

In 2009, Brautigan founded S&S, a limited liability corporation (LLC), operating the company as a car dealership. Brautigan was the sole owner and member. Whitehead was friends with Brautigan and consulted with him about starting the company, but Whitehead had no ownership interest in S&S.

A. Whitehead Promissory Note for Line of Credit

In March 2010, S&S extended a $250,000 line of credit to Whitehead, his wife, and several LLCs the Whiteheads owned. Whitehead used several vehicles and pieces of real property, including a house in Lake Tapps, as collateral.

The parties signed and executed the promissory note, security agreements, and deed of trust on the same day in March 2010. They also filed public record financing statements in March 2010. The promissory note stated that the makers, the Whiteheads and their LLCs (the Whiteheads), would pay an annual interest rate of 12 percent on the principal balance. If the Whiteheads had a credit balance, or negative debt, interest would accrue on the balance at a 3 percent annual rate. There was also an initial loan fee of 10 percent of the total line of credit, or $25,000, and an annual

renewal fee of 5 percent of the total line of credit, or $12,500. The full amount of the principal debt and interest matured and became due in March 2020.

If the Whiteheads were more than five days late in making a payment, a late charge of 10 percent of the overdue payment applied to the balance due and the Whiteheads would be in default. In the event of default, the holder of the note could call in the entire principal debt, interest, "and any other amounts owing under th[e] Note." Clerk's Papers (CP) at 8. If the Whiteheads defaulted, including failure to make the balloon payment at maturity, the note stated that it would "bear interest at the lesser of the rate of thirty-six percent (36%) per annum or the maximum interest rate allowed by law." *Id.*

The note also required the Whiteheads "to pay all costs, expenses[,] and attorney's fees incurred by Holder in the exercise of any remedy (with or without litigation) under this Note . . . in any proceeding for the collection of the debt evidenced by th[e] Note" where the holder of the note prevailed. CP at 10. The note stated that it contained the parties' "entire agreement" and that "[n]o prior agreement, statement, or promise written or oral made by any party to this Note that is not contained herein shall be binding or valid, save each Deed of Trust speaks for itself." CP at 10-11.

B. <u>LeClerq Judgment Against Whitehead</u>

The LeClerqs, a couple who had bought a separate business from Whitehead, sued him for breach of contract and obtained a judgment against him in May 2010 for approximately $245,000. In the summer of 2013, they sought to collect that judgment. Whitehead e-mailed Brautigan in July 2013, telling him, "You need to start getting info together [as soon as possible] to protect your

interest." CP at 1605. Whitehead then sent Brautigan spreadsheets that Whitehead described as "what I think the accounting is for my Line of Credit." *Id.*

Brautigan filed a declaration as an interested party in the LeClerq lawsuit. He stated that since March 2010, S&S had loaned approximately $239,000 to the Whiteheads under the line of credit. Due to partial repayments, Brautigan stated that the Whiteheads owed S&S a remaining balance of roughly $63,000. Brautigan asserted that the line of credit was executed in March 2010 and gave S&S superior secured interests in most of Whitehead's assets, including his Lake Tapps house, limiting what could be taken to satisfy the LeClerqs' May 2010 judgment.[1]

C. S&S Payments to Whitehead 2013 to 2017

Whitehead did not report any earned income on his taxes from at least 2013 until 2017. During that time period, he endorsed and cashed numerous checks from S&S where Brautigan handwrote "loan" in the memo line on the face of the check. S&S also paid for Whitehead's medical insurance during some of the time that he performed work for the company.

II. Wren Loans and This Lawsuit

A. Loans and Default

In 2016, the Wrens loaned S&S $1.2 million. In 2017, they loaned S&S an additional $500,000. In 2019, Brautigan closed the car dealership. S&S then defaulted on these loans and began conveying its assets to the Wrens to avoid foreclosure. This included "[a]ll claims and causes of action" S&S had "against third parties in contract, tort, equity, or otherwise," such as Whitehead's line of credit. CP at 150.

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[1] Whitehead asserts that he settled the lawsuit, but our record does not show whether the LeClerq judgment was satisfied. *See* CP at 810-11.

In January 2020, the Wrens sued numerous defendants, including S&S, the Whiteheads as individuals, and all of the Whiteheads' LLCs that were makers in the line of credit promissory note.

B. Complaint, Answer, and Counterclaims in this Case

The statement of facts in the Wrens' complaint addressed the line of credit:

> 110. On March 14, 2010, Stanford and Sons, LLC, as Lender and Holder, agreed to extend a $250,000 Line of Credit to [Whitehead, his wife, and three of their LLCs], all of whom were referred to and defined as the "Makers". This loan is hereinafter referred to as the "S&S Line of Credit".
>
> 111. Also on March 14, 2010, and to secure the S&S Line of Credit, Herbert L. Whitehead and Jennifer L. Whitehead executed a deed of trust on the Lake Tapps Real Property . . . [that] was recorded in Pierce County.

CP at 1466.

The complaint listed 10 causes of action. In part, the Wrens alleged that Whitehead had failed to make payments on the line of credit, constituting a breach of contract. Among other damages, the Wrens sought approximately $756,000 that they argued was owed under the line of credit, and they sought to quiet title in Whitehead's Lake Tapps house. Because they thought Whitehead was moving or disposing of assets, the Wrens also brought a replevin action seeking to safeguard certain property.

In February 2020, Whitehead filed a declaration in response to the Wrens' replevin claim, stating that "On March 14, 2010, my wife and I, along with several entities we owned, executed a promissory note wherein Stanford and Sons offered us a line of credit of up to $250,000." CP at 1084. Whitehead attached a signed copy of the promissory note, which was dated March 14, 2010.

In March 2020, in his answer to the complaint, Whitehead admitted paragraphs 110 and 111. Whitehead then asserted, "On or about March 14, 2010, Butch, his wife, [and three of their

LLCs] executed a Promissory Note/Line of Credit as the 'Makers' whereby Stanford and Sons would loan Makers money under a line of credit of up to $250,000." CP at 1186-87. But Whitehead denied that S&S had ever loaned him "any money under the line of credit," asserting that S&S "did not have any money to do so." CP at 1187. "Instead, over the years, [the] Makers loaned Stanford and Sons at least, but likely more than, $160,000." *Id.* Whitehead asserted this money had never been paid back.

Whitehead raised six counterclaims. One counterclaim alleged that as holders of the line of credit, the Wrens owed Whitehead for money that he had loaned S&S. Whitehead also sought to quiet title in his Lake Tapps house.

C. Partial Summary Judgment

In August 2021, the Wrens moved for partial summary judgment. They asked the trial court to grant their claims regarding S&S's failure to repay its loans and Whitehead's default on the line of credit, and they asked the court to quiet title in Whitehead's Lake Tapps house in their favor. They also sought to dismiss Whitehead's counterclaims that S&S or the Wrens owed him money under the line of credit and to quiet title for the house in his favor.

1. Facts and arguments presented below

The Wrens argued that there was no genuine dispute of material fact that Whitehead and S&S executed the line of credit or that S&S loaned Whitehead money under the line of credit. They contended that under contract interpretation principles, the trial court could consider only the language in the promissory note and the checks, not Whitehead's assertions about what the documents represented.

The Wrens submitted excerpts of a December 2020 deposition where Brautigan declared that when Whitehead worked for S&S, the company would loan Whitehead money instead of compensating him. "He wanted to be borrowing money. He did not want to get compensation." CP at 652. Brautigan stated that any payment made to Whitehead between 2010 and early 2016 was a draw under the line of credit. Brautigan did not recall why Whitehead wanted to be loaned money instead of being paid outright, but he was certain he and Whitehead had discussed the loans when they started the company.

The Wrens designated expert witnesses including the office manager for the Wrens' car dealerships, who had 23 years of experience in the industry and extensive experience managing the financial operations of dealerships, and a forensic accountant. The office manager submitted calculations demonstrating the amount Whitehead owed under the line of credit. The Wrens provided the trial court with the office manager's spreadsheets, which showed that when the line of credit matured in March 2020, Whitehead owed roughly $886,000. The forensic accountant vetted and approved the office manager's calculations. Whitehead's failure to pay the amount due upon maturity of the note constituted a default under the note's terms.

The Wrens also submitted the source documents that the office manager used to create her spreadsheets. These included images of checks from S&S to Whitehead with "loan" in the memo line that Whitehead had endorsed and deposited. Between 2013 and 2016, Whitehead cashed at least 39 checks that were identified as loans on the face of the check, plus one additional check Brautigan identified as a loan in his deposition testimony.

Whitehead opposed partial summary judgment, contending that there was a dispute of material fact about whether he owed money under the line of credit. In a declaration filed in 2021,

he insisted that the checks were all compensation for work performed and that he never received any loans under the line of credit. In support, Whitehead submitted text messages from Brautigan in 2012 and 2013 that asked Whitehead for his medical insurance bills and referred to one check as a paycheck. He also submitted an e-mail from Brautigan in 2015 that described the business's expenses "other than our income." CP at 743. Whitehead alleged these documents showed he was being treated as an employee, rather than the recipient of a loan. He stated that "Brautigan never even asked Whitehead to make a payment on the 2010 Line of Credit." CP at 674.

In direct contradiction to his earlier 2020 declaration addressing replevin, where he swore that he and his wife executed the promissory note in March 2010, Whitehead stated in his 2021 declaration, that although a deed of trust "was executed and recorded in March 2010 . . . the 2010 Line of Credit [promissory note] was not even written or executed until August 2013." CP at 687. Whitehead explained that he and Brautigan executed the 2010 promissory note for the line of credit, as well as other backdated promissory notes, in August 2013 to make it look like Whitehead owed S&S a great deal of money to reduce the amount the LeClerqs could collect under their 2013 judgment against Whitehead. Whitehead stated, "Brautigan apparently executed a declaration [in the 2013 lawsuit] stating that Stanford and Sons had loaned me approximately $239,000 over the years, and that at the time of the declaration, I owed $63,435.47. This was not true. Mr. Brautigan knows it was not true either." CP at 690. "Brautigan would write 'loan' on the checks, but he knew they were not loans." CP at 691. As a result, Whitehead claimed he did not owe anything for the line of credit before August 2013. Whitehead's 2021 declaration does not mention the security agreements or financing statements that were signed and dated the same day as the deed of trust and promissory note, in March 2010.

Whitehead's 2021 declaration emphasized that S&S had never issued him tax forms to reflect income or loan borrowing or repayment. He also asserted that it was unreasonable to believe that he owed money under the line of credit because "there is not a single communication that exists where Brautigan is asking me to pay him money owing on the 2010 Line of Credit." CP at 693.

In reply, the Wrens argued that "Whitehead has failed to identify a single check" included in the debt calculation "that was not properly identified as a 'loan' check." CP at 809. Thus, the Wrens asserted there was "no factual dispute" about the accuracy of the calculation or the proper inclusion of checks used in that calculation beyond Whitehead's bald assertions. *Id.*

The Wrens also argued that Whitehead was judicially estopped from saying that he had executed the promissory note in August 2013, rather than in 2010, because his 2020 declaration stated that he executed the promissory note in March 2010. Further, the associated deed of trust was recorded and notarized in March 2010, and it referred to a promissory note executed the same day.

2. <u>Trial court ruling</u>

The trial court acknowledged that "the standard for summary judgment is taking the evidence in the light most favorable to the non-moving party," Whitehead. Verbatim Rep. of Proc. at 31. But the trial court also appeared to weigh the evidence, stating "[Whitehead's] argument is that these weren't really loans. This was compensation. The evidence . . . points in the exact opposite direction here." *Id.*

The trial court granted the Wrens' motion for partial summary judgment on causes of action related to the line of credit and repayment of the Wrens' loan to S&S. The trial court ruled that

there was no genuine dispute that Whitehead executed the line of credit in 2010, accrued roughly $886,000 in debt under the line of credit, and failed to repay that debt when the line of credit matured in March 2020. And the trial court dismissed Whitehead's counterclaims alleging that S&S owed him money under the line of credit and also dismissed Whitehead's counterclaim to quiet title in the Lake Tapps house. The trial court ruled that Whitehead's interest in the house was judicially foreclosed and that Whitehead owed the Wrens approximately $886,000 under the line of credit, plus a 10 percent late charge, for a total of roughly $975,000. Finally, the trial court applied the promissory note's default interest rate of 36 percent to the amount due. The trial court did not make any conclusions regarding judicial estoppel.

Whitehead moved for reconsideration, arguing the trial court had made factual findings and credibility determinations. He also argued the trial court should have applied a 12 percent interest rate to the judgment because that was the maximum interest rate allowed by law. The trial court denied reconsideration.

D. Entry of Judgment

The Wrens moved for entry of final judgment regarding the line of credit. The trial court entered final judgment against Whitehead on the claims resolved by the partial summary judgment. After fees, costs, and prejudgment interest, the trial court ruled that Whitehead owed the Wrens roughly $1.6 million. The trial court imposed the postjudgment interest rate of 36 percent.

Whitehead appeals the order granting summary judgment, the order denying his motion for reconsideration, and the order entering final judgment.

ANALYSIS

I. PARTIAL SUMMARY JUDGMENT

Whitehead argues that there are genuine disputes of material fact about when the promissory note was executed and whether he was ever loaned money under the line of credit. The Wrens respond that we should judicially estop Whitehead from denying that the payments were loans because he provided Brautigan with calculations of his debt for the 2013 lawsuit and Brautigan filed a declaration in that case asserting a superior claim against Whitehead based on the line of credit, thereby reducing Whitehead's liability to the LeClerqs. S&S and Brautigan argue that Whitehead conceded the existence of the line of credit and admitted to taking out loans under the line of credit by endorsing and cashing the checks that said "loan" in the memo line. We judicially estop Whitehead from arguing that the promissory note for the line of credit was executed after 2010, but we agree with Whitehead that there is a genuine dispute of material fact as to whether the payments were loans.

A. Judicial Estoppel

We cannot apply judicial estoppel as requested by the Wrens, but Whitehead is nevertheless bound by the 2020 declaration where he swore that he executed the promissory note in 2010.

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). "Judicial estoppel was not designed as a trap for the unwary." *Mercer Island Sch. Dist. v. Office of Superintendent of Pub.*

Instruction, 186 Wn. App. 939, 973 n.25, 347 P.3d 924 (2015). The doctrine serves to preserve respect for judicial proceedings and avoid "inconsistency, duplicity, and waste of time." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012). The fact that two assertions were made within the same trial does not preclude us from applying judicial estoppel. *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000) ("Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."); *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974), *rejected on other grounds*, *Anfinson*, 174 Wn.2d at 866.

In deciding whether to apply judicial estoppel, courts consider three main factors. We examine (1) "whether the party's later position is 'clearly inconsistent with its earlier position,'" (2) whether accepting the inconsistent position would "'create the perception'" that a court was misled, and (3) whether accepting the inconsistent position "would create an unfair advantage for the asserting party or an unfair detriment to the opposing party." *Anfinson*, 174 Wn.2d at 861 (internal quotation marks omitted) (quoting *Arkison*, 160 Wn.2d at 538-39).

Here, Brautigan filed the declaration in the LeClerq case on his own behalf as an interested party, so we cannot bind *Whitehead* to the assertions that *Brautigan* made in that document. The Wrens offer no case that applies judicial estoppel against one party based on sworn statements made by another party.

However, Whitehead did take directly opposite factual positions before the trial court in this case. His 2020 sworn declaration addressing replevin stated that he and his wife executed the promissory note in 2010. Whitehead also admitted in his answer to the complaint that the line of credit began in 2010, including affirmatively stating that he executed the promissory note in March

2010. In 2021, he began asserting that he and Brautigan executed the promissory note for the line of credit in August 2013 but backdated it to March 2010. He has maintained this second position ever since. The trial court apparently accepted the first position when it concluded that there was no dispute that Whitehead executed the line of credit ten years before its maturity in 2020.

Whitehead's two positions are clearly inconsistent. *Arkison*, 160 Wn.2d at 538. Further, accepting the later inconsistent position would create the perception that either this court (believing Whitehead's current assertion that the promissory note was not executed until 2013) or the trial court (believing his prior assertion that the promissory note was executed in 2010) has been misled. *Anfinson*, 174 Wn.2d at 861. And accepting the assertion that the line of credit did not exist until 2013 would substantially reduce Whitehead's liability to the Wrens in the present case, creating an unfair advantage for Whitehead and detriment to the Wrens. *Id.* Barring Whitehead from that position enforces the principle that sworn declarations carry significant weight. *See id.*

We hold that Whitehead is judicially estopped from asserting that the line of credit did not exist, or that the promissory note for the line of credit was not executed until 2013.

B. Partial Summary Judgment

The Wrens argue that under contract principles, we must interpret the promissory note creating the line of credit and the subsequent checks written to Whitehead based solely on the language in the note and checks, not later assertions by the parties about what they meant. But the evidence that Whitehead presented created a genuine dispute of material fact, so we disagree.

1. Standard of review and summary judgment principles

We review a grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 204, 263 P.3d 1251 (2011).

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

As the moving party, the Wrens had the burden to show that there was no genuine issue of material fact. CR 56(c). After this initial showing, "the nonmoving party must set forth specific facts rebutting the moving party's contentions." *Elcon Constr., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 169, 273 P.3d 965 (2012). We must view the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 164. "An issue of material fact is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819 (2018).

2. Principles governing promissory notes and written instruments

The failure to repay a promissory note for a line of credit can be the foundation for a breach of contract claim. *See First Citizens Bank & Tr. Co. v. Harrison*, 181 Wn. App. 595, 598, 326 P.3d 808 (2014). Courts focus on a contract's "objective manifestations to ascertain the parties' intent" in making the contract. *Martin v. Smith*, 192 Wn. App. 527, 532, 368 P.3d 227 (2016).

We interpret written instruments as a matter of law. *In re Est. of Larson*, 71 Wn.2d 349, 354, 428 P.2d 558 (1967). Courts "generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent," and "[w]e impute an intention corresponding to the reasonable meaning of the words used." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). The Washington Supreme Court has "explained that surrounding circumstances and other extrinsic

evidence are to be used 'to determine the meaning of *specific words and terms used*' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Id.* at 503 (quoting *Hollis v. Garwall, Inc.,* 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)). But Wren has pointed us to no authority, and we have found none, that applies *Hearst* to checks, and specifically something written on the memo line on a check.

3. Application to the present case

The trial court concluded that there was no genuine dispute of material fact that S&S loaned Whitehead money under the line of credit, about the amount of money owed, or that Whitehead defaulted on repaying the loans. Because there was a genuine question of material fact about whether the funds were loans, we reverse.

The promissory note for the line of credit has an effective date of March 2010, with payments set to begin in March 2011. The note matured in March 2020.

After the date of execution in 2010, Whitehead endorsed and deposited dozens of checks from S&S that had "loan" written in the memo line. During the time that he was receiving checks, Whitehead reported on his federal taxes that he was not earning any income. Brautigan testified in his deposition that those checks were intended as loans under the line of credit. This evidence met the initial burden imposed on a party moving for summary judgment to show there is no genuine issue of material fact. CR 56(c).

Whitehead then had the burden to set forth specific facts showing that there was a genuine issue for trial. *Elcon Constr.*, 174 Wn.2d at 169. Whitehead asserted that there was a genuine issue of fact as to whether the checks were compensation for work performed, rather than loans, relying on his own declaration saying he and Brautigan intended the checks to be compensation, as well

as e-mails and texts from Brautigan referring to Whitehead's "income" and "paychecks," and asking for his medical insurance bills. CP at 674. In his declaration, Whitehead also stated it was inconceivable to suggest that he would have worked for free. He emphasized that Brautigan never asked for a payment on the alleged debt and that S&S never issued him tax forms regarding the loan.

The Wrens assume that we can extend the *Hearst* principle that extrinsic evidence cannot be used to contradict the written words of a contract to the memo line of checks. *See Hearst Commc'ns*, 154 Wn.2d at 503. As discussed above, we judicially estop Whitehead from denying that he executed the promissory note for the line of credit in 2010. But the Wrens have provided no Washington authority, nor have we found any, that has extended *Hearst* in precisely the manner requested by the Wrens. In the absence of authority provided by the Wrens to support extending *Hearst*, we consider Whitehead's declaration, and the texts and emails he provided in response to the partial summary judgment motion.

Viewing this evidence in the light most favorable to Whitehead, we conclude that Brautigan's texts and e-mails suggest that the checks could have been payment for work Whitehead performed for S&S. In combination with Whitehead's sworn declaration on the same point, a reasonable jury could have returned a verdict for Whitehead. *Reyes*, 191 Wn.2d at 86. Thus, there is a genuine issue of material fact as to whether the funds were loans and we must remand for a trial on that issue.

We reverse. On remand, the trial court must vacate the judgment and should engage in further proceedings to resolve whether the checks were loans or compensation for work performed. But Whitehead cannot deny that he executed the promissory note for the line of credit in 2010.

II. Interest Rate

Whitehead also argues that the trial court erred by imposing a 36 percent interest rate on the judgment for the line of credit debt. Because we remand for the trial court to vacate the judgment, we decline to address the interest rate argument at this time. The parties may raise this issue again if another judgment is entered in the future.

ATTORNEY FEES

Whitehead and the Wrens each argue that they are entitled to appellate attorney fees under the promissory note for the line of credit. RAP 18.1(a) allows us to award a party appellate attorney fees where "applicable law" permits. RCW 4.84.330 provides that actions on a contract where the contract "specifically provides that attorneys' fees and costs" incurred to enforce the contract "shall be awarded to one of the parties, the prevailing party . . . shall be entitled to reasonable attorneys' fees." Here, the promissory note requires Whitehead "to pay all costs, expenses and attorney's fees incurred by Holder . . . in any proceeding for the collection of the debt evidenced by this Note" where the holder of the note prevails. CP at 10. But RCW 4.84.330 also defines the "prevailing party" as "the party in whose favor final judgment is rendered." Because there has not been final judgment, neither party is entitled to attorney fees at this time.

CONCLUSION

We reverse and remand for the trial court to vacate the Wrens' judgment against Whitehead. On remand, Whitehead is judicially estopped from asserting that the line of credit did not exist, or that the promissory note for the line of credit was not executed until 2013. If another judgment is entered in the future, the parties may raise the issue of the correct interest rate before the trial court. Neither party is entitled to attorney fees at this time.

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.

Glasgow, C.J.

We concur:

Maxa, J.

Che, J.

Filed
Washington State
Court of Appeals
Division Two

July 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENNETH WREN and ALICE WREN, husband and wife,

Respondents,

v.

STANFORD AND SONS, LLC, a Washington limited liability company; DAVID G. WHITEHEAD, individually; J & N INVESTMENTS INC., a Washington corporation; HENRY L. RUSSELL II, individually; and the marital community of HENRY L. and VICTORIA L. RUSSELL; DUWARD WILLIAM FRAME, IV, individually; FIRST HORIZON BANK, successor by conversion to FIRST TENNESSEE BANK NATIONAL ASSOCIATION d/b/a FIRST HORIZON HOME LOANS; NATIONSTAR MORTGAGE LLC, d/b/a, MR. COOPER, a Delaware limited liability company; and FIRST NICHOLAS D. LECLERQ AND SUSAN L. LECLERQ FAMILY LLC, a Washington limited liability company;

Defendants,

HERBERT L. WHITEHEAD III, individually; the marital community of HERBERT L. WHITEHEAD III and JENNIFER L. WHITEHEAD; SOUTHWEST ENTERPRISES, LLC, a Washington limited liability company; MT. VIEW ENTERPRISES, LLC, a Washington limited liability company; WHITEHEAD CONSULTING, LLC., a Washington limited

No. 56441-6-II

ORDER DENYING MOTION FOR RECONSIDERATION

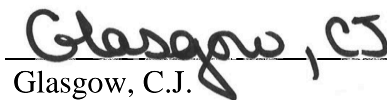
liability company; and WHITEHEAD ENTERPRISES, LLC. a Washington limited liability company;

Appellants.

The opinion in this matter was filed on May 9, 2023. On May 30, 2023, respondents filed a motion for reconsideration. This court ordered an answer to the motion, which appellants filed. Respondents then filed a reply. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied. The counterclaim issue discussed in the motion for reconsideration must also be resolved on remand.

FOR THE COURT: Jj. Maxa, Glasgow, Che



Glasgow, C.J.

PDF **RCW 62A.3-104**

Negotiable instrument.

*** CHANGE IN 2023 *** (SEE 5077-S.SL) ***

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except subsection (a)(1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank, or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

[**1993 c 229 § 6**; 1965 ex.s. c 157 § 3-104. Cf. former RCW sections: RCW **62.01.001**, **62.01.005**, **62.01.010**, **62.01.126**, **62.01.184**, and **62.01.185**; 1955 c 35 §§ 62.01.001, **62.01.005**, **62.01.010**, **62.01.126**, **62.01.184**, and **62.01.185**; prior: 1899 c 149 §§ 1, 5, 10, 126, 184, and 185; RRS §§ 3392, 3396, 3401, 3516, 3574, and 3575.]

NOTES:

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW **62A.11-111** and **62A.11-112**.

KINSEL LAW OFFICES, PLLC

August 18, 2023 - 10:57 AM

Transmittal Information

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Appellate Court Case Number:	56441-6
Appellate Court Case Title:	Kenneth & Alice Wren, Respondents v. Stanford and Sons and Whitehead, et al., Appellants
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