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No. 55247-3-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NEIL J. ARNTZ and MARIAN ARNTZ, husband and wife,  
dba ARNTZ FAMILY LIMITED PARTNERSHIP, NEIL J.  
ARNTZ, General Partner,

Respondents,

v.

LUZ O. VALDEZ n/k/a LUZ O. ZABKA,

Appellant.

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REPLY BRIEF OF APPELLANT

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Luz O. Zabka  
Pro Se

18515 Chief Road  
Charleston, IL 61920  
(918) 810-9675

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COURT OF APPEALS  
DIVISION I  
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## I. UNDISPUTED FACTS

Plaintiffs devoted their entire Statement of Facts in their Brief of Respondent to reiterations of the trial court's Summary Judgment. Resp. Br. 1-3. The essential facts in Mrs. Zabka's Brief of Appellant remain undisputed.

**A. Reasonable minds reached different conclusions as to Mrs. Zabkas' capacity based on the note on its face.**

Plaintiffs do not dispute that the Commissioner of this Court and the trial court judge ruled differently as to whether Mrs. Zabka signed in capacity on behalf of Seattle Capital Group, LLC as Chief Portfolio Manager or if she signed personally—*both ruling based on the note on its face*. Further, Plaintiffs did not dispute that the Commissioner of this Court and the trial court judge both have reasonable minds.

On February 2, 2009, the Commissioner of this Court, citing to applicable Washington authority ruled:

Some of Arntz's arguments are not compelling. It is the form of signature that is critical and when an individual signs a promissory note naming the principal with an indication of their representative capacity, then only the principal is bound. RCW 62A.3-402(b)(1), 1A KELLY KUNSCH, WASHINGTON PRACTICE: METHODS OF PRACTICE §38.27, AT 136 (1997). To the extent that Arntz is contending that the form of signature does not unambiguously indicate that Zabka was signing in a representative capacity, I do

not see any ambiguity in her individual signature followed by the recitation of her representative capacity. Additionally, co-makers of a note are generally jointly and severally liable on the note so the references to joint and several liability in the note are not especially compelling. RCW 62A.3-116(a)(unless otherwise provided in the note, two or more makers are jointly and severally liable “in the capacity in which they sign.”

CP 2943. However, on December 4, 2009, the trial court citing no authority ruled:

I am going to grant summary judgment. We have to look at a document and see whether it's clear on its face before we go outside the document.

I looked at the promissory note. The promissory note consistently says jointly and severally liable. The fact that people that signed it – that would be both Ms. Valdez and Mr. Pak – put their titles from Seattle Capital Group after it does not defeat the idea that this was a note that was signed on which they were personally and severally liable.

It would make no sense for there to be a note that says the makers are jointly and severally liable and then say, but there's only one maker, which would be Seattle Capital Group. That doesn't make any sense.

So I think the note is clear that it was intended, and the language in the note is clear, that the parties – Mr. Pak is not before me, obviously but Ms. Valdez is personally liable on the note.

RP 24-25. Thus, two reasonable minds reached different conclusions as to the contract on its face, this fact was conceded by Plaintiffs, and summary judgment is improper.

**B. The trial court's ruling on consideration was solely based on the note's recitation "For value received"**

Plaintiffs do not dispute Mrs. Zabka's contention that consideration is a required element of a valid contract. Nor do Plaintiffs dispute that Luz O. Zabka's boss testified in an affidavit (*attached to Plaintiffs' Motion for Summary Judgment*) that Mrs. Zabka f/k/a Ms. Valdez did not receive any consideration or compensation on or after the signing of the note at issue. Mr. Pak attested:

Ms. Valdez received no consideration for signing the note. Moreover, Ms. Valdez thereafter received no salary or other consideration for signing the note.

CP 353, ll. 16-18.

Moreover, Plaintiffs' only testimony regarding the matter was:

"It is hard to believe that she would sign the note if she were to get no consideration from it."

CP 331, ll. 9-10. No other testimony or evidence was addressed by Plaintiffs in their Brief of Respondent. Resp. Br. 30-31.

Further, during the summary judgment hearing, the trial court addressed the declaration filed by Plaintiffs showing that Mrs. Zabka

signed in her capacity and did not receive compensation. The dialogue was:

THE COURT: Okay. Tell me about the declaration you filed.

MR. ROUTT: I'm sorry?

THE COURT: The declaration that you filed of Mr. Pak that says that Ms. Valdez, now Zabka signed the note in her capacity as chief portfolio manager, and received no compensation for it. You provided that declaration.

RP 15. To date, Plaintiffs have failed to provide any evidence or testimony to counter Mr. Pak's declaration.

Thus, Plaintiffs only argument for consideration on summary judgment motion was a recitation in their alleged note "For value received . . ." (CP 1708). Plaintiffs do not dispute that when asked for clarification as to what the consideration was, the trial court judge admitted immediately following her oral ruling at the Summary Judgment Hearing:

I don't know what consideration you received ma'am. I don't know what it is. All I know is that you stated [on the note] that you did get it. . . . I don't know what it is. I don't know. I can guess. And I have theories about why you guys did this, . . . So, no. I don't know what it was.

RP 30, l. 25 thru 31, l. 1.; RP 31, ll. 2-4.; and RP 31, l. 15.

**C. Plaintiffs conceded that there was no mutual assent**

Plaintiffs conceded that there was no mutual assent as follows:

Also, perhaps there was no mutual assent because, as Mrs. Zabka admitted in her Brief at 42, she “did not communicate regarding the contract with Plaintiffs prior to signing....”

Resp. Br. 39.

**D. Plaintiffs conceded that Zabka did not solicit Arntz**

Mrs. Zabka was never a member or director of Seattle Capital Group, LLC (“SCG”). Nor did she form SCG. Moreover, Plaintiffs conceded that Mrs. Zabka did not solicit Arntz as follows:

It is irrelevant that she did not solicit the Arntzes.

Resp. Br. 29. Of course it is relevant that Mrs. Zabka did not solicit the Arntzes because it defeats all of Plaintiffs’ arguments regarding Promoter Liability.

SCG was formed by Jae Ho Pak who believed in good faith (as did Mrs. Zabka) that it was a valid and existing entity. CP 349-387. The trial Court essentially ruled that SCG was a company *de jure*. The trial court ruled:

There is evidence that Mr. Pak believed Seattle Capital Group was registered with the State.

CP 3283. Moreover, the trial court ruled during the hearing on Plaintiffs’ motion for summary judgment:

Okay. First, let me just tell you when there’s a debt owed by a corporation that’s not paid, that’s not sufficient to pierce the corporate veil. There has to be something way beyond that.

Of course this defeats Plaintiffs' entire premise for piercing the corporate veil that Mrs. Zabka somehow "participated in the wrong of not making restitution." Resp. Br. 21.

**E. Plaintiffs' note was not a negotiable instrument and thus not subject to a six year statute of limitations.**

Plaintiffs did not contest Mrs. Zabka's argument that their note was not a negotiable instrument. Thus, Plaintiffs' claim that a six year statute of limitations afforded negotiable instruments under RCW 62A.3-118 has been abandoned.

**F. Plaintiffs' note was for \$462,000 whereas Plaintiffs concede that the account balance was only \$362,907.**

Plaintiffs now concede that the actual balance of the ProTrader Securities account # 34011432 was only \$362,907 on June 11, 2002 (the date the note was signed). Resp. Br. 11-12. Further, in their Brief of Respondent, Plaintiffs did not dispute that Mrs. Zabka did not author the note. Resp. Br. 14.

**G. Plaintiffs' *unwithdrawn* admissions raise material issues of fact.**

Plaintiffs do not dispute that ABC Legal Services served Mrs. Zabka's requested admissions (CP 2953-2960) on Plaintiffs on September 18, 2009. Nor do Plaintiffs dispute that they failed to answer or object to Zabka's requested admissions (CP 2953-2960) within 30 days of service (CP 2961). Further, Plaintiffs do not dispute that they failed to motion to

have their admissions withdrawn. Luz Zabka's requested admissions were in effect under Superior Court Civil Rule 36(b) at the time of Plaintiffs' Summary Judgment hearing.

Nor do Plaintiffs dispute that their admissions were material. Plaintiffs admitted that they: "had *not* intended to have Luz Zabka sign the note, did not ask Luz Zabka to sign the Note, did not discuss the Promissory Note with Luz Zabka before it was signed, did not witness the signing of the Promissory Note, and during Plaintiffs' first conversation with Luz Zabka following the signing of the Promissory Note, *agreed that Luz Zabka would not be held individually liable on said Promissory Note.*" (emphasis added) CP 2958-9. Further, the facts and evidence presented in this case support these admissions.

**H. Mrs. Zabkas' Response to Plaintiffs' Motion for Summary Judgment addressed material facts in dispute.**

Plaintiffs do not dispute that Zabka's response (CP 2171): i) pointed out material issues of fact not addressed by Plaintiffs' evidence, ii) the issue that Plaintiffs' contract is *unconscionable*, and iii) addressed newly discovered evidence that raised issues of material fact. However, Plaintiffs surreptitiously list "unconscionability" as a "New Defense Brought up on Appeal"—subsequently admitting that Mrs. Zabka raised the issue of unconscionability at "the summary judgment hearing." Resp. Br. 40.

**I. The trial court struck Mrs. Zabka's Response without notice of Plaintiffs' Motion to Strike**

Plaintiffs do not dispute that they never provided Mrs. Zabka notice that they filed the Motion to Strike. On December 1, 2009 (just three days before their Motion for Summary Judgment was scheduled for oral hearing), Plaintiffs filed a Motion to Strike Mrs. Zabka's Response to Plaintiffs' Motion for Summary Judgment. CP 2828-2832.

Plaintiffs never contacted Mrs. Zabka by phone, fax, email or any other means alerting her that their Motion to Strike had been filed. Moreover, Plaintiffs never filed a motion or declaration to shorten time to hear their Motion to Strike as required under KCLR 7(b)(10).

Luz Zabka learned of Plaintiffs' Motion to Strike for the first time at Plaintiffs' Summary Judgment hearing. At the hearing, the trial court waived King County Superior Court Local Rule 7(b)(10) for Plaintiffs and struck Mrs. Zabka's Response to Plaintiffs' Motion for Summary without any notice that a Motion to Strike had even been filed. Then, the trial court informed Mrs. Zabka that she would not be able to raise any argument from her Response to Plaintiffs' Motion for Summary Judgment.

**J. Plaintiffs never produced the original note**

Plaintiffs do not dispute that the trial court granted judgment absent an original note from Plaintiffs. Further, Plaintiffs do not deny that KCLR 58(c) states:

The court will sign no judgment upon a promissory note until the original note has been reviewed by the court.

Plaintiffs do not dispute that “[t]he original Promissory Note (“the Note”) in this action cannot be located . . .” See Authentication Brief, p. 1, sentence 1. (CP 3241)

## **II. PLAINTIFFS’ MISSTATEMENT OF THE RECORD**

### **A. Plaintiffs’ misrepresentations relating to the location of Mrs. Zabka’s newly discovered evidence**

Plaintiffs repeatedly stated in error that the documents discovered by Luz Zabka were “in the home of her parents-in-law.” Resp. Br. 1, 6, 9, etc. Plaintiffs later misrepresented that the evidence was “picked up from nearby storage.” Resp. Br. 42. In reality, the newly discovered evidence was in her in-laws long term storage, not previously accessible by Mrs. Zabka. CP 2891-2, Declaration of Luz Zabka Regarding Discovery of Plaintiffs’ NASD Arbitration Submission and Amended NASD Complaint.

Plaintiffs are up to their same old tricks. Misleading comments from opposing counsel during the hearing of Defendant’s Motion for Continuance confused the trial court. Opposing counsel, Mr. Paul W. Routt, implied repeatedly that the new evidence (Plaintiffs’ NASD Complaint and Amended NASD Complaint) presented by Luz Zabka had been previously provided by Plaintiffs. For example, opposing counsel stated:

. . . I think the only reason she has that document is because it was an exhibit that I provided, attached to the motion for summary judgment.

RP 5. Of course, opposing counsel is well aware that he did not attach a copy of Plaintiffs' NASD Complaint or Amended NASD Complaint to Plaintiffs' motion for summary judgment or any prior pleading.

Shortly thereafter, opposing counsel again attempted to mislead the trial court. His second attempt went as follows:

I believe – and I can't remember exactly, but I believe that she attached these same papers to a previous pleading. I can't remember which one. But I'm sure that we have dealt with this before.

RP 5. Of course, opposing counsel is well aware that Luz Zabka had never before presented these documents because they were not previously in her possession. The fact is, the evidence had never before been presented, and needed to be considered because it was material to the outcome of the action.

**B. Plaintiffs' misrepresentation regarding delays in the trial court**

Plaintiffs implied that Mrs. Zabka's Motion for Continuance somehow caused a delay in the trial court. Resp. Br. 6. However, Zabka's Motion for Continuance was filed on a Motion to Shorten Time and heard on the scheduled hearing date of Plaintiffs' Motion for Summary

Judgment. Thus, Mrs. Zabka's Motion for Continuance caused no delay and Plaintiffs' argument was superfluous.

Moreover, the discovery cutoff and trial date were actually changed by order of the trial court. CP 1597. Plaintiffs misrepresented that "Mrs. Zabka had plenty of reasonable opportunity to make the record complete." In reality, Plaintiffs Motion for Summary Judgment cut discovery short by nearly two months (CP 1597) and preceded the trial date by nearly six months (CP 1597).

**C. Plaintiffs' misrepresentation that their action was on an account receivable—an argument raised for the first time by Plaintiffs on appeal**

Plaintiffs argue for the first time on appeal that "RCW 4.16.040(2), a six year statute of limitations, applies to an action on an account receivable, which it is." Resp. Br. 33. This argument by Plaintiffs is false. Plaintiffs never alleged in their Complaint, or in the trial court that their action was on an account receivable. Plaintiffs' action was actually based on a promissory note that Mrs. Zabka argued was partly oral under RCW 4.16.080(3).

**D. Plaintiffs' FRAUDULENT misrepresentation regarding this Court's ruling on a prior action and judgment against Mrs. Zabka on the same note**

Plaintiffs' FRAUDULENTLY misrepresented that: "[T]his summary judgment was not reversed on error or appeal. Ms. Zabka was

excluded from its effect, but the whole judgment has never been reversed.” Resp. Br. 34. A blatant lie. The truth is that this Court did reverse and dismiss *without prejudice* Plaintiffs’ judgment against Luz Valdez n/k/a Luz Zabka in a prior action. This Court ruled:

The order of default and order on summary judgment regarding Valdez are reversed on appeal and the action against her is dismissed for lack of personal jurisdiction.

Arntz v. Valdez, 2005 Wash. App. Lexis 2585 (Div. 1, Oct. 3, 2005)—on appeal from Plaintiffs prior action against under Case No. 03-2-09230-4KNT.

Plaintiffs’ counsel clearly seeks to aid his client in the fraudulent avoidance of the one-year statute of limitations under RCW 4.16.240 that states:

If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he dies and the cause of action survives, his heirs or representatives may commence a new action within one year after reversal.

To do so, Plaintiffs clearly misrepresented this Court’s ruling and sanctions are warranted.

### III. ARGUMENT

- A. **The Washington Supreme Court has ruled that “Summary Judgment is improper if reasonable minds can reach different conclusions”**

The Washington Supreme Court has ruled: “If reasonable minds can reach different conclusions, summary judgment is improper.” DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 30 (1998). Summary judgment was improper in this action because plaintiffs did not dispute in their Brief of Respondent that: “the Commissioner of this Court reached a different conclusion than the trial court as to the interpretation of Plaintiffs’ note *on its face*”. (*The rulings—originally cited in Mrs. Zabka’s Brief of Appellant at p. 23-25—are also cited in the Undisputed Facts under Paragraph A supra for this Court’s convenience*) Thus, two reasonable minds have undisputedly reached different conclusions as to Mrs. Zabka’s capacity and summary judgment is improper.

**B. The Washington Supreme Court has ruled that “Recitals of consideration in a written instrument are not conclusive.”**

Plaintiffs do not dispute that the only evidence of consideration is a recitation “For value received . . .” on the face of the note. Moreover, in Crow v. Crow, 66 Wn.2d 108 (1965), the Washington Supreme Court ruled:

Recitals of consideration in a written instrument are not conclusive.

Thus, Plaintiffs argument that Mrs. Zabka “admitted” to having received consideration because of the recitation “For value received . . .” Resp. Br.

31. contradicts the clear language of the Washington Supreme Court in Crow. Recitals of consideration are not conclusive.

**C. The Washington Supreme Court has ruled that “It is competent to inquire into the consideration and show, by parole evidence, the real or true consideration.”**

Plaintiffs concede that the trial court did not inquire into consideration and Plaintiffs failed to show by parole evidence any real or true consideration as detailed under Undisputed Fact B Supra. Further, all of the evidence and testimony presented in this case shows that Luz Zabka did not receive any consideration. Moreover, the trial court admitted immediately after granting summary judgment to plaintiffs that:

I don't know what consideration you received ma'am. I don't know what it is. All I know is that you stated [on the note] that you did get it. . . . I don't know what it is. I don't know. I can guess. And I have theories about why you guys did this, . . . So, no. I don't know what it was.

RP 30, l. 25 thru 31, l. 1.; RP 31, ll. 2-4.; and RP 31, l. 15. The Washington Supreme Court has ruled:

It is competent to inquire into the consideration and show, by parole evidence, the real or true consideration. (emphasis added)

Kinne v. Lampson, 58 Wn.2d 563, 567, 364 P.2d 510 (1961). Because the trial court admitted that it did not know what the consideration was and

only knew that the note had a recital of consideration, the trial court erred in granting summary judgment.

**D. Plaintiffs' failed to meet their burden of proving a contract**

Plaintiffs concede that the Court reviews a summary judgment de novo. Resp. Br. 39. Plaintiffs further conceded that there was no mutual assent as follows:

Also, perhaps there was no mutual assent because, as Mrs. Zabka admitted in her Brief at 42, she “did not communicate regarding the contract with Plaintiffs prior to signing....”

Resp. Br. 39. **“The burden of proving a contract, whether express or implied is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.”** (emphasis added) Bogle & Gates, P.L.L.C. v. Zapel, 121 Wn. App. 444, (Div. 1, 2004).

Thus, Plaintiffs failed to meet their burden of proving a contract. Id.

**E. Plaintiffs' contract is partly oral and a three year statute of limitations bars Plaintiffs' claims**

Plaintiffs argue in error that their contract is written and that a 6 year statute of limitations applies under RCW 4.16.040(2). Two factual elements necessary for an action for breach of a written contract are missing: (1) Luz Zabka is not expressly named as an individual party to the note and (2) she did not receive any consideration for signing the note. Luz Zabka signed the note at issue in her capacity as “Chief Portfolio Manager” on behalf of “Seattle Capital Group” and received no

consideration in return. Thus, two of the five elements necessary for an action based on a written contract are not met and the three-year limitations period for oral contracts under RCW 4.16.080(3) bars Plaintiffs' claims. Id.

**F. The trial court abused its discretion by refusing to evaluate Zabka's new evidence.**

The trial court abused its discretion in denying Luz O. Zabka's motion for continuance where it refused to evaluate the new evidence. The trial court should have reviewed Zabka's newly discovered evidence, because when viewed in the light most favorable to Zabka, it did raise a material issue of fact. As this Court previously ruled: "If the court, after failing to grant the continuance, also refused to evaluate the [new evidence] and their impact on the motion for summary judgment, then this was an abuse of discretion flowing from the court's initial denial of the motion for a continuance." Coggle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (Div. 1, 1990).

Plaintiffs received a \$212,500 settlement from ProTrader Securities under a National Association of Securities Dealers ("NASD") arbitration. CP 2142-44. Prior to Mrs. Zabka's discovery, Plaintiffs misrepresented to the lower Court that the amount they received from the NASD arbitration (\$212,500.00 CP 286) was separate and not related to Seattle Capital Group. CP 259. Mrs. Zabka's newly discovered evidence—the NASD Complaint (CP 2022-40) and Amended NASD Complaint

(CP 2086-2120)—shows that Plaintiffs’ ProTrader settlement involved the same promissory note with Seattle Capital Group.

It is evident by the trial court’s ruling that the trial court did not evaluate the newly discovered evidence. The trial court was completely unaware that the NASD arbitration (which the trial court repeatedly referenced as the NSDA arbitration—RP 3283 and 3284) involved the same parties and issues. Thus, the trial court ruled in error that “the NSDA arbitration involved separate parties and issues.” RP 3284. In reality, the allegations in Plaintiffs’ Complaint in this action are nearly identical to the allegations in Plaintiffs’ Amended NASD Complaint:

On February 12, 2001, Arntz on behalf of the Family LP , and Pak, on behalf of SCG, entered into a contract authorizing SCG to engage in transaction in securities on behalf of the Family LP in a joint investment account. (*Amended NASD Complaint*—CP 2091)

Plaintiffs had contracted on February 12, 2001 with an investment firm called Seattle Capital Group (“SGC”) to invest in securities for them. (*KCSC Complaint*—CP 4)

. . . on June 11, 2002 Pak and Valdez executed a promissory note in favor of the Family LP for \$462,000, payable if the account suffered two consecutive weeks of equity losses. (*Amended NASD Complaint*—CP 2094)

. . . the note was signed on June 11, 2002 by Defendant and Mr. Pak as Chief Portfolio Manager and Chief Executive Manager respectively. . . . Under this note, Defendant and Mr. Pak Promised that, “upon two weeks of consecutive downturn in” Plaintiffs’ account, they would pay to Plaintiffs the principal sum of \$462,000. (*KCSC Complaint*—CP 4, 5)

On December 4, 2002, the Family LP received \$239,910.65.  
(*Amended NASD Complaint*—CP 2094)

SCG . . . refund[ed] the balance left in it, which was  
\$239,910.65. (*KCSC Complaint*—CP 5)

Plaintiffs misrepresented that the “newly discovered evidence” referred to  
an entirely different “deal.” Resp. Br. 9. Plaintiffs’ Amended NASD

Complaint States:

**How was Protrader tied to The Seattle Capital Group?**

**Protrader operated a trading center at 1000 Dexter Avenue North, Suite 202, and allowed SCG to share the same suite.. Protrader and SCG shared a receptionist and telephone number. Pak’s business card represented SCG as “The Seattle Capital Group @ Protrader Securities Corporation”. . . . THE ENTRANCE TO THE JOINTLY OCCUPIED SUITE HAN A SIGN READING;**

**PROTRADER  
THE SEATTLE CAPITAL GROUP**

**THE ENTRANCE DOOR LED TO A RECEPTION OFFICE OCCUPIED BY A RECEPTIONIST/SECRETARY WHO REPRESENTED BOTH PROTRADER AND THE SEATTLE CAPITAL GROUP. . . . THE SEATTLE CAPITAL GROUP AND THE SEATTLE OFFICE OF PROTRADER WERE A INTEGRATED TEAM OF PEOPLE WITH COMMON OBJECTECTIVES WHO WORKED TOGETHER . . .**

COHABITATION ADVERTISEMENTS PEOPLE SHARING COMMON PHONES COMMON ADDRESS TEAM EFFORTS JOINT PROJECTS MUTUAL BENEFITS	<b>THEY LOOKED AND ACTED LIKE ONE</b>
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(Plaintiffs' Amended NASD Complaint, CP 2099-2101). Plaintiffs' NASD arbitration against Protrader clearly involved Seattle Capital Group and the note at issue.

Further, Plaintiffs' Amended NASD Complaint showed a breakdown of money lost of which they requested reimbursement from ProTrader. CP 2119-2120.

ARNTZ LOSE AND EXPENSE TO COLLECT, TO DATE:

\$700,000 LESS \$239,900.65 = **\$460,099.35[\*]**

**\$262,681[\*\*]** LESS \$47,879.00 = **\$214,802.00[\*\*\*]**

ATTORNEY COST TO DATE = \$50,320.00

NASD FEES AND EXPENSE = \$1580.00

ARNTZ AND DAUGHTER TIME = \$64300.00

643 HOURS

TOTAL = \$726,801.35

CP 2119-2120. In Plaintiffs' Amended NASD Complaint, they stated:

ARNTZ GAVE JAE PAK AND LUZ ZABKA A DEMAND TO PAY PROMISSORY NOTE ORDER ON NOVEMBER 22, 2002

ARNTZ RECEIVED THE ACCOUNT CLOSE OUT VALUE OF \$239,900.65 ON DECEMBER 7, 2007.

**NET LOSE IN THIS ACCOUNT WAS \$460,099.35[\*]**

CP 2137. Thus, it is clear that the reimbursement received under the NASD arbitration directly involved Plaintiffs' note at issue.

Plaintiffs surreptitiously imply that their NASD arbitration only involved Mr. Arntz's \$262,681[\*\*] self-directed account also listed above. (Resp. Br. 9-10). However, Plaintiffs fail to point out that the net losses on that account were only \$214,802.00[\*\*\*]. Moreover, Plaintiffs attempted to deceive this Court regarding the \$460,099.35[\*] in net losses on the note with Seattle Capital Group. The same note at issue in this present action.

Bottom line, Plaintiffs' NASD settlement *primarily* involved their investment and note with Seattle Capital Group. CP 2091. Moreover, Plaintiffs only claimed in their complaint in this action that \$57,182.30 was still due on the note. CP 260. Thus, Plaintiffs' \$212,500 NASD settlement more than offsets the amount they claimed remains due under the note.

On November 6, 2008, the trial court judge signed an order stating:

**The following issues remain for trial . . . iii. What amount remains unpaid in principal and interest on the Note if any, after consideration of payments made and monies received by Plaintiffs on the note.** (emphasis added)

Mrs. Zabka raised this material issue of monies received in her motion for Continuance when she presented the new evidence (Plaintiffs NASD Complaint and Amended NASD Complaint) detailed above. Plaintiffs do not dispute that the material issue of monies received was raised in Mrs.

Zabka's Motion for Continuance. Thus, the trial court erred by refusing to consider the newly discovered evidence.

**G. The Primary Consideration For Continuance Should Have Been "Justice"**

Plaintiffs argued that "[T]he trial court may deny a motion for continuance when . . . the moving party does not offer a good reason for the delay in obtaining the evidence...." (emphasis added) Citing Coggle at 507. However, Plaintiffs failed to point out that Coggle also stated "The primary consideration in the trial court's decision on the motion for a continuance should have been justice. . . . We fail to see how justice is served by a draconian application of time limitations." In this present action, the evidence was clearly material and the trial court clearly abused its discretion by imposing draconian time limitations.

Further, this Court ruled in Coggle: "The ruling on the motions for a continuance . . . [are] reversible by an appellate court for a manifest abuse of discretion." Id. Thus, the trial court's decision should be reversed as an abuse of discretion. In her motion for continuance, Luz O. Zabka addressed the time barred nature of Plaintiffs' action under RCW 4.16.240—a material issue. Mrs. Zabka also introduced newly discovered evidence (Plaintiffs' NASD Complaint (CP 2022-40) and Amended NASD Complaint (CP 2086-2120)) showing that Plaintiffs were

attempting to collect amounts already received under a prior NASD arbitration against ProTrader Securities—a material issue. Thus, the trial court abused its discretion by denying Mrs. Zabka’s continuance.

**H. Plaintiffs conceded that there was no mutual assent, thus Plaintiffs judgment must be reversed.**

Plaintiffs conceded that: “The Court reviews a summary judgment de novo.” Citing Fell v. Spokane Transit Auth., 128 Wn.2d 618, 625, 911 P.2d 1319 (1996). Resp. Br. 39. Plaintiffs further conceded that there was no mutual assent as follows:

Also, perhaps there was no mutual assent because, as Mrs. Zabka admitted in her Brief at 42, she “did not communicate regarding the contract with Plaintiffs prior to signing....”

Resp. Br. 39. Thus, Plaintiffs plainly concede that summary judgment was entered in error and the judgment must be reversed.

**I. Judgment absent review of the original note was prohibited.**

The trial court had a duty to review Plaintiffs’ original note.

KCLR 58(c) that states:

The court will sign no judgment upon a promissory note until the original note has been reviewed by the court.

Plaintiffs concede that “The location of the original Note is unknown.” Thus, Plaintiffs should not have been granted summary judgment under KCLR 58(c) because they failed to produce the original note.

Nevertheless, Plaintiffs argue a copy—*not the original*—on file with the Washington Department of Financial Institutions (“DFI”) submitted with their Authentication Brief should satisfy KCLR 58(c). Resp. Br. 35. Plaintiffs further argue that their copy of the DFI’s copy stamped by the DFI was self-authenticating under RCW 5.44.040 because “[t]he copy of the Note provided [wa]s an official record kept in the file of the DFI.” Resp. Br. 38. Plaintiffs’ argument fails.

**1. Not all authenticated public records are automatically admissible.**

RCW 5.44.040 provides for admissibility of certified copies of public records as an exception to the hearsay rule. **However, the Washington Supreme Court has ruled that “not every public record is automatically admissible.”** State v. Monson, 113 Wn.2d 833, 839 (Wash. 1989). Citing Monson at 839, the Court of Appeals, Division 3 ruled, **“not all self-authenticating documents are admissible under the statute.”** State v. Chapman, 98 Wn. App. 888, 891 (Div. 3, 2000)

In order to be admissible, a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts which are of a public nature, it must be retained for the benefit of the public and there must be express statutory authority to compile the report.

Monson citing its prior ruling in Steel v. Johnson, 9 Wn.2d 347, 358, 115 P.2d 145 (1941).

The Court in Monson allowed the introduction of a driving record because it was prepared by a public official, related to facts of a public nature, and was retained for the benefit of the public. Plaintiffs note is easily distinguished from the driving record in Monsoon.

Plaintiffs' note, though certified as a copy of the DFI's copy of a note, was not prepared (or authored) by a public official. Moreover, Plaintiffs' note was not retained for the public benefit—the public receives no benefit from its retention. Finally, Plaintiffs' note does not relate to facts of a public nature—it strictly involves Plaintiffs and Seattle Capital Group. Thus, Plaintiffs' note was not admissible and the trial court erred in waiving KCLR 58(c).

**J. Plaintiffs' Action is Time Barred Under RCW 4.16.240.**

The trial court erred in refusing to hear Luz Zabka's cross-motion to dismiss *with prejudice* and instead entering an order granting summary judgment where Plaintiffs' present action was time barred under RCW 4.16.240 which states:

If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he dies and the cause of action survives, his heirs or representatives may commence a new action within one year after reversal.

Plaintiffs concede that they commenced this present action more than one year after a reversal on appeal of their judgment from their prior action on the same promissory note. Resp. Br. 32. Plaintiffs' first action

against Luz O. Valdez n/k/a Luz O. Zabka was reversed on appeal on **October 3, 2005**. Arntz v. Valdez, 2005 Wash. App. LEXIS 2585 (Div.1. Oct. 3, 2005). However, Plaintiffs waited until **May 14, 2008**, over two and 1/2 years to serve this present action. Because Plaintiffs waited more than one year to commence their new action, the action is time barred and should have been dismissed *with prejudice*.

#### IV. CONCLUSION

For the foregoing reasons, as well as those in Zabka's initial brief on appeal: Reasonable minds ruled differently on the issue of Zabka's capacity on the note *on its face*—thus, summary judgment is improper. Also, material facts remain at issue—such as Zabka received no consideration under Plaintiffs' note. In addition, Plaintiffs have conceded that there was no mutual assent—thus, there can be no contract. Further, the trial court abused its discretion by: 1) refusing to evaluate Zabka's new "material" evidence that shows that Plaintiffs are attempting to "double-dip and 2) substituting an inadmissible copy for the original note. Moreover, Plaintiffs' action is time barred. WHEREFORE, this Court should reverse Plaintiffs' summary judgment and dismiss the claims against Mrs. Zabka with prejudice.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of December, 2010.

By   
Luz O. Zabka  
Pro Se