

No. 71158-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LARASCO, INC.,

Respondent,

v.

ELLIOTT SEVERSON AND SR DEVELOPMENT LLC,

Appellants.

REPLY BRIEF OF APPELLANTS

Kevin P. Hanchett, WSBA #16553
Tyler J. Moore, WSBA #39598
Attorneys for Appellants
LASHER HOLZAPFEL
SPERRY & EBBERSON, P.L.L.C.
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

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I. INTRODUCTION

This appeal centers on three issues: (1) whether the award of reasonable attorney fees against Elliott Severson (“Severson”) personally under the guaranty of the March 28, 2008 Promissory Note (hereinafter “Original Note”) from SR Development to Larasco was proper; (2) whether the Addendum To Promissory Note (Additional Security) (hereinafter “Security Addendum”) to the Original Note was a valid and enforceable agreement to encumber the Lakemont Building owned by I-90 Lakemont LLC; and (3) whether Larasco had substantial justification to file a *lis pendens* against the Lakemont Building. These are all questions of law subject to *de novo* review rather than questions of fact.¹

The briefs of Larasco and Roberts brothers deliberately misrepresent the nature of the appeal. Both briefs erroneously claim that the appeal focuses on the trial court’s findings of fact, rather than disputed legal principles. Brief of Respondent (“Larasco Br.”), p.15; Brief of Respondents Mark Roberts and Edward Roberts (“Roberts’ Br.”), p.7. The purpose of

¹ *Boules v. Gull Indus., Inc.*, 133 Wn. App. 85, 88, 134 P.23d 195 (2006) (“a trial court decision awarding or refusing to award attorneys’ fees is an issue of law which is reviewed *de novo*”); *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002) (applicability of the statute of frauds to an agreement is a question of law); *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewitt Constr. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013) (contract interpretation is a question of law when there are no extrinsic fact disputes); *Lane v. Skamania Cnty.*, 164 Wn. App. 490, 497, 265 P.3d 156 (2011) (interpretation of *lis pendens* statute is a question of law reviewed *de novo*).

this distortion is to convince the Court to defer to the trial court under the substantial evidence test, rather than review the trial court's decisions *de novo*. The Court should not be deceived. There are no material factual disputes relevant to the above legal questions – all three are purely questions of law to be reviewed *de novo*.²

II. ARGUMENT

A. Severson's Personal Guaranty Of The Original Note Did Not Guaranty Payment Of Larasco's Attorneys' Fees.

In the Original Note given to Larasco, SR Development LLC bound itself to timely make monthly payments of \$12,000 in payment of principal and interest on the underlying loan. *See* Ex.58 (First sentence of Original Note). Separately, and “in addition” to its obligation to pay principal and interest on the loan, SR Development promised to pay reasonable attorney fees in an action to collect the Original Note. Ex.58 (Seventh sentence of Original Note). In the Addendum to Promissory Note (Unconditional Guarantee) (“Guarantee Addendum”), Severson and the Roberts brothers personally guaranteed SR Development's obligation to pay principal and interest under the Original Note, but they made no guaranty of SR

² The only argument that Severson raises that concerns questions of fact is the equitable estoppel argument. Brief of Appellants, p.22-26. That argument entails missed issues of fact and law. The factual findings underlying the trial court's rejection of the argument are reviewed under the substantial evidence test, but the legal conclusions to be drawn from the facts are questions of law reviewed *de novo*.

Development's additional obligation to pay reasonable attorney fees in a collection action. Ex. 59. Nor does the Guarantee Addendum impose attorney fees on the guarantors for enforcing the guaranty itself. *Id.* The only attorney fee provision in either the Original Note or the Guarantee Addendum is SR Development's obligation in the Original Note, and that obligation is not guaranteed.

Contrary to Larasco and Roberts' persistent misrepresentations, Severson guaranteed "the prompt payment of principal and interest" and nothing more.

A guaranty is a separate, collateral contract from the underlying primary obligation. *Sauter v. Houston Cas. Co.*, 168 Wn. App. 348, 356, 276 P.3d 358 (2012). Guarantors are not liable beyond the express terms of their agreement. *Kenney v. Read*, 100 Wn. App. 467, 474, 997 P.2d 455 (2000). Severson did not guaranty the Original Note, all amounts due under the Note, the maker's obligations under the Original Note, or any similarly comprehensive articulation that would encompass SR Development's obligation to pay reasonable attorney fees. The stark contrast between SR Development's express agreement in the Original Note to pay reasonable attorneys' fees, and the guarantors' language limited their guaranty to

principal and interest due under the Original Note cannot be ignored.³ If the parties had intended the Guarantee Addendum to cover all obligations in the Original Note, it could easily have been drafted to say so. It was not.

Larasco drafted the Original Note and the Guarantee Addendum. RP Vol.3, p.151. Even if the Guarantee Addendum were ambiguous, that ambiguity would be construed *against* the drafter – Larasco. *Seattle-First Nat'l Bank v. Hawk*, 17 Wn. App. 251, 256, 562 P.2d 260 (1977) (“[T]he party selecting, drafting, and presenting the contract of guaranty containing such misleading language should suffer any consequences [from its ambiguity]”); *Old Nat'l Bank v. Seattle Smashers Corp.*, 36 Wn. App. 688, 691, 676 P.2d 1034 (1984) (ambiguous language in contract construed against drafter). The trial court erred in disregarding the express language of the Original Note and Guarantee Addendum to hold the guarantors liable for Larasco’s attorneys’ fees.

³ Suppose, for example, that the Guarantee Addendum had guaranteed “full payment of the principal amount of the loan.” Would that guaranty cover interest or attorneys’ fees? Obviously not. It would only guaranty the obligation expressly guaranteed – the principal of the loan. *Chevron Chemical Co. v. Mecham*, 536 F. Supp. 1036, 1041-1042 (1982) (“This Court will not hold Mecham liable for interest obligations that he never expressly contracted to guaranty.”). The same principle restricts the guarantors’ liability here to principal and interest.

1. Response To Roberts' Arguments On The Guarantee Addendum.

Roberts argues that Severson should be held liable for attorney fees because the Guarantee Addendum was “unconditional.” Roberts’ Br. p.11-17. But that argument confuses “unconditional” with “unlimited scope.” The question is not whether the guaranty is absolute or conditional. The question is: “*What was guaranteed?*” The guarantors unconditionally guaranteed “the prompt payment of principal and interest.” Ex.59. The guarantors did not guaranty SR Development’s separate and additional obligation to pay reasonable attorneys’ fees in a collection action. *Id.* Nor did the Guarantee Addendum separately provide for attorneys’ fees in enforcing the Guarantee Addendum. *Id.* It is black letter law that a guarantor is not liable for attorney fees in such circumstances:

[I]n the case of an absolute guaranty of payment or performance the guarantor is not liable for the costs and expenses of such a suit [for collection], or for attorney’s fees, unless such costs and expenses are covered by the terms of the guaranty.

....

Generally, even though the guarantor expressly agrees to become bound for costs for collection or performance, he or she is not liable for costs of a suit on the guaranty, unless the terms of the guaranty expressly cover such costs or attorney’s fees, or unless there is statutory authority for awarding attorney’s fees outside the guaranty agreement.

38A CJS Guaranty § 69, § 70 at 668-671 (2008). Washington law is fully consistent with this rule – a guarantor’s obligation in Washington does not

extend beyond the express terms of the Guarantee Addendum. *Seattle-First*, 17 Wn. App. at 256; *Kenney*, 100 Wn. App. at 474.

Roberts' shamelessly misrepresents the evidence, the Guarantee Addendum and the law of guaranty. Roberts claims that "Severson had knowledge that the Unconditional Guarantees he and the Roberts signed would cover liability for attorneys' fees." Roberts' Br. p.11. But Roberts offers nothing to support this baseless and false assertion of fact.⁴ The only evidence at trial relative to the meaning of the Guarantee Addendum is brief testimony by Severson and Louis Secord. Severson testified:⁵

A. [W]hat I was guaranteeing speaks for itself. Whatever the terms were in the guarantee is what I was guaranteeing.

Q. All right. Did you understand you were guaranteeing the promissory note?

A. Principal and interest on promissory note, I think, is what we were guaranteeing.

RP Vol.2, p.132-133. Louis Secord testified "I believe they owe the balance on the note, which would include the costs of collecting it. In other words, attorney's fees." RP Vol.3, p.155. When asked why he believed that, he stated: "I believe it's in the note, and I am saying that the note covers that."

Id. When asked where within the guarantee it says that the guarantors

⁴ Roberts' argument also violates RAP 10.3(5) which requires a record citation for any fact statement in the brief.

⁵ The testimony regarding the language of the Guarantee Addendum was in connection with an identical Guarantee Addendum for a different note, i.e., the Guarantee Addendum for the Del Norte Note.

guaranteed attorney fees or performance on the note, Mr. Secord confessed, “I don’t see that in the guarantee.” RP Vol.3, p.156-157 (emphasis added).⁶ This fully refutes Roberts’ baseless assertion.

Roberts claims that the guarantors promised to “make ‘prompt payment’ of the Note.” Roberts’ Br., p.12. This too is false. The Guarantee Addendum promises prompt payment of “*principal and interest*”, not “prompt payment of the Note.” Ex.59.

Roberts claims that “an unconditional guarantee is a promise to pay or otherwise perform *all* obligations of the principal...” and will therefore guaranty payment of attorney fees even if attorney fees are not expressly referenced in the guaranty. Roberts’ Br., p.11-12. This grossly misstates the law. *See* Brief of Appellants (“Opening Br.”), p.15-16, and *supra*, p.5-6. An unconditional guarantee only guarantees the obligation that is expressly guaranteed, and Roberts presents no authority holding otherwise.

Roberts asserts that “Severson is liable to pay all obligations covered by the Note” because the validity of the note is “totally undisputed.” Roberts’ Br. p.14. That is a striking *non sequitur*. The Original Note’s validity does not expand the Guarantee Addendum to include attorney fees if only principal and interest are guaranteed. Roberts follows that *non-*

⁶ These excerpts were the only testimony at trial regarding the meaning of the Guarantee Addendum.

sequitur with another, arguing that because the maker (SR Development) promised to pay attorney fees to collect the Note, “Severson thus gave an ‘Unconditional Guarantee’ of payment [of the Note, including attorney fees].” Roberts’ Br., p.14-15. That is nonsense. Severson’s guaranty of principal and interest is not extended to attorney fees just because SR Development agreed to pay attorneys’ fees.

All of the cases that Roberts cites both from Washington and from other jurisdictions are consistent with the black letter law from CORPUS JURIS SECUNDUM that is cited above. None supports Roberts’ argument.

Roberts’ claim that *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 135 P.2d 95 (1943) supports Larasco’s attorney fee claim is particularly egregious. Roberts’ Br. p.13-14. The very opposite is true. *Robey*, like this case, involved an unconditional guaranty of “principal and interest”, but it did not expressly guaranty attorney fees. 17 Wn.2d at 255. The judgment in *Robey* held the guarantors liable for principal and interest, but it contained no award of attorney fees. *Id.* at 248-249 (Finding of Fact VIII and Conclusion of Law III). That was the correct result in *Robey*, and it is the correct result here, as well. Neither Larasco nor the Roberts have cited any authority that actually supports their claim that an absolute guaranty of principal and interest implicitly obligates the guarantor to pay reasonable attorney fees. The argument fails as a matter of law.

2. Response To Larasco's Arguments On The Guarantee Addendum.

Citing *N. Pac. Fin. Corp. v. Howell Thompson Motors*, 162 Wash. 387, 298 P.424 (1931), and *Bank of Cal. v. Pac. Packing Co.*, 60 Wash. 456, 111 P. 573 (1910), Larasco argues that Washington case law supports the award of attorney fees. Larasco Br., p.32. But these cases, too, are consistent with black letter law from CORPUS JURIS SECUNDUM and of no help to Larasco's argument. In both case, the Court held that the obligation guaranteed included the obligation to pay attorney fees. See *N. Pac.*, 162 Wash. at 393 (obligation guaranteed included agreement to pay all costs of default); *Bank of Cal.*, 60 Wash. at 457 (guarantee of "whatever balance may remain due" held to include attorney fee obligation under the note). Here, the obligation guaranteed extends only to the maker's obligation to timely pay principal and interest. See Ex.59. That express obligation cannot be extended by judicial construction to create liability for Larasco's attorneys' fees.

Larasco argues that the Guarantee Addendum should be interpreted to cover Larasco's attorney fees because the co-guarantors (the Roberts brothers) stipulated that was the parties' subjective intent. See Larasco Br., p.30-31. But the Roberts brothers have no power to decide the meaning of the contract or to stipulate away Severson's rights. *Rusan's, Inc. v. State*,

78 Wn.2d 601, 606, 478 P.2d 724 (1970); *State v. Drum*, 168 W.2d 23, 33, 225 P.3d 237 (2010). The fact that the Roberts brothers have found it more advantageous to cast overboard their relationship with Severson in favor of their long-time friends and business associates Louis and Richard Secord has no bearing on the proper interpretation of the unambiguous language of the Guarantee Addendum.⁷

Larasco argues that the meaning of the Guarantee Addendum is a mixed question of law and fact, and that under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), extrinsic evidence is properly admitted to interpret its meaning because “the loan documents in this case did not constitute a fully integrated contract.” Larasco Br., p.31. But under *Berg*, “extrinsic evidence is admissible *only* as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.” [emphasis added] 115 Wn.2d at 667. Larasco's argument fails because the Original Note, the Guarantee Addendum and the Security Addendum are all fully integrated and because no relevant extrinsic evidence regarding the

⁷ It is curious that the Roberts brothers, who purported to stipulate to judgment against themselves to *avoid* further costs and attorneys' fees, CP 2753, have now funded a substantial appellate brief to support Larasco, even though the outcome of this appeal does not impact their own stipulated liability. Before looking to the Roberts brothers for guidance in resolving this case, the Court should consider what be the Roberts' motive for taking the positions they are espousing. *See* discussion of the Roberts other machinations *infra* at p. 22-23.

meaning of the Guarantee Addendum or Security Addendum was presented at trial.

Berg does not allow a court to substitute extrinsic evidence of intent for the language of a written contract. Rather, “since *Berg*, we have 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.’ *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005); *see also Wilkinson v. Chiwawa Cmty. Ass’n*, 180 Wn.2d 241, 251-252, 327 P.3d 614 (2014); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 693, 974 P.2d 836 (1999). There was no extrinsic evidence presented at trial to clarify or explain the meaning of the specific words used in any of the contract documents. The only evidence regarding the meaning of the language in the addenda was the testimony quoted above in which each party stated his subjective understanding of the contract language. Under *Berg* and its progeny, those statements from Severson and Louis Secord are utterly irrelevant to the construction or interpretation of the contract language.

Larasco offered no evidence of the contemporaneous negotiations between the parties as required under *Berg*. 115 Wn.2d at 667. In fact, Louis and Richard Secord testified there were no contemporaneous

discussion or negotiations as to the scope of the guarantee. RP Vol.1, p.36-39; Vol.3, p.123-124. Larasco drafted all the documents and gave them to Mark Roberts to be signed. *Id.* Nor was there any evidence that either party discussed its understanding of the Guarantee Addendum with the other party. The testimony was nothing more than each party's statement of its subjective understanding of the contract language. That is irrelevant because the Court is to determine "the parties' intent by focusing on the objective manifestations of the agreement, rather than the unexpressed subjective intent of the parties." *Hearst*, 154 Wn.2d at 503; *see also Seattle-First*, 17 Wn. App. at 256.⁸ The interpretation of written contract language is a question of law for the court. *Wash. State Major League*, 176 Wn.2d at 517. *Berg* does not hold otherwise. 115 Wn.2d at 678-79.

A guarantee of the prompt payment of principal and interest guarantees prompt payment of principal and interest not payment of reasonable attorney fees.⁹ Under the American Rule, each party bears its

⁸ Even if the Court were to consider the parties' testimony regarding the meaning of the Guarantee Addendum, that evidence supports Severson, not Larasco. Louis Secord confessed that there is no language in the Guarantee Addendum that makes the guarantors liable for attorneys' fees. Severson, in contrast, testified that this understanding was that the language means what it says: it guarantees payment of principal and interest.

⁹ Larasco is compensated for the delay in receiving payment by the interest it receives. *Cf. Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 166, 240 P.3d 790 (2010).

own attorney fees unless the contract provides otherwise. Larasco's argument is invalid because it directly contradicts this rule.¹⁰

¹⁰ The rule urged by Larasco would – in effect – impose strict liability for attorneys' fees on private guarantors, regardless of whether the obligation guaranteed of the Guarantee Addendum call for attorneys' fees. That rule of strict liability would all but abolish the American Rule on attorneys' fees in litigation involving private guaranties. It would expand the attorneys' fee liability of private guarantors far beyond even that of commercial guarantors under *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991). Public policy does not support such a radical change in the law. Here, Severson never disputed this personal guaranty of principal and interest under the Original Note. However, both he and SR Development disputed the primary obligation, *i.e.* whether the Original Note had been discharged when the loan was refinanced. *See* CP 707-08. The strict liability urged by Larasco would impose attorneys' fees on any guarantor who unsuccessfully either the primary obligation or the guaranty. That is unprecedented. Even under *Olympic Steamship*, the insurer is subject to attorneys' fees only for contesting coverage. *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 497-98, 946 P.2d 388 (1997). Larasco offers no authority and no policy justification for such a radical departure from the American Rule.

The policy underlying *Olympic S.S.* is that insurance companies are commercial entities in the business of insuring risks in exchange for premiums. They are thus intimately familiar with the terms of the coverage they provide, and in the coverage context they face a "minimal incentive to perform on their contracts" unless doing so carries a cost. *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 601, 167 P.3d 1125 (2007). But that rationale does not apply to private guarantors. In the private party guarantee context, the obligees generally have the stronger bargaining position and are the ones who prepare the guaranty documents. Imposing attorneys' fees liability on the private guarantor when that liability is not expressly included in the obligation guaranteed or in the Guarantee Addendum itself will promote deceptive and oppressive practices by obligees, not fair business practices by guarantors. The risk of liability for attorneys' fees will undermine the ability of borrowers and guarantors to resist questionable or invalid claims by lenders because doing so will expose them to potentially huge attorney fee liability. The public policy underlying *Olympic S.S.* does not support the unwarranted abandonment of the American Rule that is urged by Larasco.

B. The Security Addendum Is Invalid And Unenforceable.

1. The Security Addendum Cannot Be Specifically Enforced Because It Violates The Statute Of Frauds.

Larasco admits that “with respect to an agreement to create an encumbrance on real estate, the statute of frauds requires only that the agreement ‘specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.’” Larasco Br., p.24. Larasco claims that these requirements were satisfied here. *Id.* Larasco is wrong – as a matter of law.

The material and essential terms for an agreement to encumber real property include an adequate description of the property and “terms relating to forfeiture, default, risk of loss, liens by third parties, insurance, taxes, acceleration or due-on-sale clauses.” *Ecolite Mfg. Co. v. R.A. Hanson Co.*, 43 Wn. App. 267, 270-72, 716 P.2d 937 (1986). The Security Addendum drafted by Larasco contains none of these. The street address of the Lakemont Building is not a sufficient description. *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 881-882, 983 P.2d 653 (1999). Nor does, the Security Addendum contain any of the other essential terms for an enforceable agreement identified in *Ecolite*. 43 Wn. App. at 270-72. Just as in *Ecolite*, the agreement here is unenforceable, because the terms of the deed of trust are not included in the contract documents.

1. Response To Larasco's Arguments On The Statute Of Frauds.

Larasco argues that the cases that Severson relies upon for its statute of frauds argument are distinguishable, but all of the alleged distinctions it presents are invalid. Larasco claims that the earnest money agreement in *Ecolite* was unenforceable only because the agreement contained “only an approximate description of the property.” Larasco Br., p.25. But as recently as *Key Design* the Court reaffirmed the rule in *Martin v. Seigel*, 35 Wn.2d 223, 212 P.2d 107 (1949) that a mere street address is not a sufficient legal description, as a matter of law. 138 Wn.2d at 888. The street address of the Lakemont Building in the Security Addendum is inadequate as a matter of law, and Larasco's attempt to dance around that inadequacy is disingenuous. *See Id.* at 887.

Larasco argues that *Setterlund v. Firestone*, 104 Wn.2d 24, 27, 700 P.2d 745 (1985) is distinguishable because the agreement there did not adequately describe the terms of the note and deed of trust, and referred to form documents that were not attached to the agreement or offered as evidence at trial. Larasco Br., p.25. But the Security Addendum here is unenforceable for those very same reasons: it does not contain an adequate description of the real property or include the essential terms of a deed of trust. Under *Setterlund*, the agreement “must be definite enough on material

terms to allow enforcement without the court supplying those terms.” 104 Wn.2d at 25. The Security Addendum fails this test. The Security Addendum cannot be specifically enforced without adding additional terms not mutually agreed to by the parties.

Next, Larasco argues that lack of agreement on the terms of the deed of trust does not bar specific enforcement the Security Addendum because *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952) allowed specific enforcement of an agreement that contemplated a future sales contract containing additional terms. Larasco Br., p.25. But Larasco grossly misrepresents *Hubbell*. See 40 Wn.2d at 787. The same applies here with respect to the contemplated future deed of trust. The *Hubbell* court held that that portion of the agreement that contemplated a future sales contract was unenforceable. *Id.* All other terms of the contract were not specifically enforceable. *Id.* Larasco, in contrast, seeks to enforce exactly what *Hubbell* held to be unenforceable – the agreement to enter into a future contract on unspecified terms. The Security Addendum is unenforceable because it specifies no terms for the deed of trust, just like the unenforceable future contract in *Hubbell*. *Id.* The decision in *Hubbell* does not support Larasco’s argument.

Finally, Larasco argues that its presentation of a “simple deed of trust” at trial somehow retroactively satisfied the requirement for agreement

on the material terms of the contract. Larasco Br, p.26. That is absurd. The requirement for agreement on the essential terms of the contract is not satisfied by the court dictating the terms at trial. That is exactly what is prohibited by *Hubbell*. The Security Addendum was draft by Larasco, and it is not the Court's function to correct Larasco's drafting or to impose terms on Severson that he never agreed to.

2. Response To Roberts' Arguments On The Statute Of Frauds.

Roberts' argue that Severson failed to preserve his objection to the adequacy of the property description in the Security Addendum because that argument was not raised at the trial court. Roberts' Br., p.9. But the lack of an adequate property description for the Lakemont Building is not an independent issue or argument. It is simply an undisputed fact that further supports Severson's statute of frauds argument. That argument was raised and rejected by the trial court. FOF 20-22, CL 6.

The rule against raising new issues on appeal does not preclude a party from revising its appellate argument or citing additional evidence from the record in support of an argument that was raised in the trial court. *See In re Jeffries*, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). Severson argued at trial that, to be effective, the Security Addendum must comply with the requirements of the statute of frauds under RCW 64.04.010, *Hubbell*, *Ecolite*, and *Setterlund*. CP 710-12. Specifically, the Court's

denial of specific performance in *Ecolite* is based upon the approximate description of the real property in agreement. 43 Wn. App. at 270. This is not a new argument.

Moreover, even if the legal description question were considered a new issue, the appellate court may properly exercise its discretion to consider it where it is “‘arguably related’ to issues raised in the trial court.” *Mavis v. King Cnty. Pub. Hosp. Dist. No. 2*, 159 Wn. App. 639, 651, 248 P.3d 558 (2011). The statute of frauds and the ineffectiveness of the Security Addendum were central issues argued at trial. *See, e.g.*, CP 710-12. Giving consideration on appeal to whether the security Addendum contains an adequate property description work no unfairness to Larasco. Indeed, Larasco has raised no objection to doing so.

3. The Signatories To The Security Addendum Did Not Own The Lakemont Building And Could Not Encumber It With A Deed of Trust.

At the time the Original Note and Security Addendum were signed, the Lakemont Building was owned by I-90 Lakemont, LLC (“I-90 Lakemont”), a limited liability company owned in equal shares by Sevro LLC and Larasco. Larasco Br., p.27, n.12. I-90 Lakemont was not a maker of the Note, not a guarantor of the Note, and not a signatory to the Security Addendum. Ex.58-60. Nor did SR Development have any direct or indirect ownership interest in I-90 Lakemont. The cosigners of the Security

Addendum signed as individuals and were merely shareholders of entities that did hold ownership interests in I-90 Lakemont. RP Vol.1, p.56-57. That status did not give them any property rights to the Lakemont Building itself and did not give them the power, in their own names, to encumber or convey the real property.

a. *Response To Larasco's Arguments Regarding Authority Of Cosigners.*

Larasco argues that “the parties to the Security Addendum may not have held title in their own names, but they own the Lakemont Building through their limited liability companies.” Larasco Br., p.27.¹¹ That, however, did not give them authority to convey or encumber the Lakemont Building. It is axiomatic that “an individual shareholder has no property interest in physical assets of a corporation.” *Christensen v. Skagit Cnty.*, 66 Wn.2d 95, 97, 401 P.2d 335 (1965); *Peterson v. Paulson*, 24 Wn.2d 166, 178, 163 P.2d 830 (1945); *see also, Cady v. Kerr*, 11 Wn.2d 1, 13, 118 P.2d 182 (1941); *Fountain Pointe, LLC v. Calpitano*, 76 A.3d 636, 643 (Conn. App. Ct. 2013). They had no power to convey or encumber title to the real property through a deed of trust. Larasco knew this because it was an equal owner of I-90 Lakemont and it knew or should have known that I-90 Lakemont needed to sign the Security Addendum to create an enforceable

¹¹ In fact, the cosigners only owned on-half of I-90 Lakemont.

deed of trust on the Lakemont Building. Without making the owner of the real property a party, the Security Addendum was ineffective as a matter of law. *Firth*, 146 Wn.2d at 615.

The Security Addendum was Larasco's attempt to "have its cake and eat it, too" – by encumbering the Lakemont Building without encumbering it. Larasco did not want I-90 Lakemont to encumber the Lakemont Building because doing so would place it in default on its mortgage to U.S. Bank. RP Vol.4, p. 9. On the other hand, Larasco did not want to limit its security claim to Sevro's ownership interest in I-90 Lakemont (which was the legal option open to Larasco to avoid default or subjecting its own financial interest to potential liability), because it would not provide as certain and reliable security as real property. It would only have given Larasco a security interest in Sevro's intangible property interest in I-90 Lakemont.

Corporate form and ownership must be respected unless it is misused to perpetuate a fraud or manifest injustice on an innocent third party. *Frigidaire Sales Corp. v. Union Properties*, 88 Wn.2d 400, 405, 562 P.2d 244 (1977). Larasco has asserted no theory and provided no evidence that would justify piercing I-90 Lakemont's corporate veil. The corporate ownership structure did not deceive or defraud Larasco or the Secords: they were fully aware of the ownership status of the Lakemont Building. Rather, Larasco simply ignored the legal ownership structure, claiming that it can

do so because the cosigners of the Security Addendum are the ultimate owners of the entities that own I-90 Lakemont that owns the Lakemont Building. This, according to Larasco, is enough to treat them as the direct owners of the real property itself. Larasco cites no authority for this remarkable proposition, and there was no legal basis for the trial court to accept it.¹²

b. *Response To Roberts' Arguments Regarding Authority Of Cosigners.*

Roberts argues that Severson is taking contradictory positions as to whether he and I-90 Lakemont should be treated as the same entity in this and a contribution action Severson has filed against the Roberts.¹³ The very opposite is true. In the reference contributions action, the Roberts are attempting to foist liability for the very attorneys' fees and interest that – in this action – they purportedly confess to owe Larasco onto Severson. CP

¹² There is no evidence that the signatories to the Security Addendum were acting in anything other than their individual capacities. See RP Vol.1, p.97. Larasco knew full well how to designate the capacity of signatories to documents. Compare Ex.58 (the Original Note signed by Severson and the Roberts expressly on behalf of SR Development) with Ex.59-60 (Guarantee Addendum and Security Addendum signed in individual capacities). Here, as in *Seattle-First*, there is no relevant evidence to show that the parties signed the Security Addendum in any capacity other than that indicated in the written document. 17 Wn. App. at 255-57.

¹³ Roberts Br., p.3: "Severson argues herein that I-90 Lakemont LLC –the entity that owned the Lakemont Building, which served as the security (via the deed of trust at issue herein) and whose sale fully paid off the Note at issue – is separate from him. Yet he contradictorily contends in his latest-filed action for equitable contribution that he and I-90 Lakemont are the same."

2747-2755, 2763-2765. They want Severson to pay it all! Severson's position in the contribution case is that paying the judgment in this case from the Lakemont Building sale proceeds was a distribution to his ownership interest in I-90 Lakemont, not a payment of the judgment by I-90 Lakemont. Severson has respected I-90 Lakemont's corporate form. It is the Roberts who are talking out of both sides of their mouths.

C. Larasco Had No Substantial Justification For Filing A *Lis Pendens* Against The Lakemont Building And, Therefore, It Should Be Released With An Award Of Attorneys' fees To Severson Under RCW 4.28.328(3).

Larasco claims it had substantial justification for filing its *lis pendens* against the Lakemont Building, but gives no clue what that justification was. Larasco Br., p.34-35. Its argument is mere *ipse dixit*.

When Larasco filed its *lis pendens* on August 28, 2012, it knew that the real property was owned by I-90 Lakemont and that it had no claim against I-90 Lakemont or the real property. It knew that its claim under the Original Note was against SR Development – which had no ownership interest in the real property. It knew that its claim under the Guarantee Addendum was against Severson and Roberts – who had no ownership interest in the real property.¹⁴ It knew or should have known that the

¹⁴ The ownership interests in I-90 Lakemont are not interests in the real property owned by I-90 Lakemont. *Firth v. Lu*, 146 Wn.2d 608, 615, 49 P.3d 117(2002).

Security Addendum was utterly ineffective to create a security interest in the real property itself because it did not adequately describe the real property and, at best, was an ineffective agreement to agree executed by signatories (Severson and Roberts) who had no power to convey or encumber real property they did not own. Larasco also knew or should have known that the *lis pendens* was ineffective because it failed to name the property owner. *Woodman v. Fitzsimmons*, 120 Wash. 136, 138-139, 206 P. 963 (1922). Nevertheless, heedless of the total absence of any legitimate claim against title to the Lakemont Building itself, Larasco filed its *lis pendens*. That filing was not substantially justified.

A *lis pendens* filed merely in anticipation of recovering a money judgment is improper. *See Bramall v. Wales*, 29 Wn. App. 390, 395, 628 P.2d 511 (1981). A *lis pendens* may not be used to cloud title of real property to secure payment of a personal judgment. *Id.* That was the wrongful purpose of Larasco's *lis pendens*.

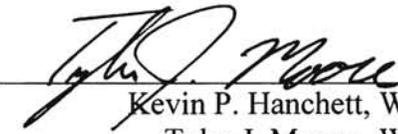
The "substantial justification" requirement in RCW 4.28.320(3) is not satisfied by turning a blind eye to clear, controlling statutory and case law. The filer must have a reasonable, good faith basis in fact or law for believing it has an interest in the real property. *S. Kitsap Family Worship Center v. Weir*, 135 Wn. App. 900, 911-12, 146 P.3d 935 (2006). Larasco's breezy disregard of the law and the actual owner the Lakemont Building is

not a reasonable, good faith justification for the *lis pendens*. Therefore, the *lis pendens* should be cancelled and Severson should be awarded his attorney fees under RCW 4.28.320(3).

III. CONCLUSION

There are not genuine material questions of fact with respect to the legal questions raised by this appeal. All three questions raised are questions of law subject to *de novo* review. As a matter of law, the Guarantee Addendum did not guaranty Larasco's attorneys' fees. As a matter of law, the Security Addendum was ineffective and could not be specifically enforced. As a matter of law, this *lis pendens* was not substantially justified. Therefore, Elliott Severson respectfully requests that the Court reverse the trial court and grant the relief requested in the Opening Brief.

Respectfully submitted this 3rd day of September, 2014.


Kevin P. Hanchett, WSBA #16553
Tyler J. Moore, WSBA #39598
Attorneys for Appellants
LASHER HOLZAPFEL
SPERRY & EBBERSON, P.L.L.C.
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

CERTIFICATE OF SERVICE

I certify that on *9-3*, 2014, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record:

Spencer Hall
Janet D. McEachern
HALL ZANIG CLAFLIN MCEACHERN
1200 Fifth Ave. Suite 1414
Seattle, WA 98101

James A. Smith, Jr.
Whitney I. Furman
SMITH & HENNESSEY PLLC
316 Occidental Avenue South, Suite 500
Seattle, WA 98104


Ellen M. Krachunis, Legal Assistant

2014 SEP -3 11 14 34
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STATE OF WASHINGTON