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No. 742574

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

BELLA'S VOICE, JORDAN HOFFMAN-NELSON, and
YVETTE HOFFMAN,

Appellants,

v.

VANISHING PRICES LLC, MICHAEL PATRICK BROWN, and
TONI LYNN BROWN,

Respondents.

APPELLANTS' OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION AND RELIEF REQUESTED.....	1
II.	ASSIGNMENTS OF ERROR.....	3
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	4
IV.	STATEMENT OF THE CASE.....	5
	A. The Browns Publicly Offer To Donate Their Business.....	5
	B. The Parties Reach Agreement On A Deal For The Browns To Donate Their Business To The Hoffmans.....	7
	C. The Hoffmans Perform Their Obligations Under The Deal.....	9
	D. The Browns Breach Their Agreement And Demand Execution Of A “Promissory Note” Lacking Consideration.....	11
	E. The Browns Attempt To Enforce The Sham “Note”.....	14
	F. The Trial Court’s Erroneous Rulings.....	17
V.	ARGUMENT AND AUTHORITY.....	18
	A. The Standard Of Review Is De Novo.....	19
	B. The Trial Court Erred In Granting Summary Judgment Against The Hoffmans.....	20
	1. The Trial Court Erred In Entering Summary Judgment For The Browns On The “Note”.....	20
	a. Lack of consideration is a defense to the Browns’ claim under the “Note.”.....	20
	b. Resolution of factual disputes concerning purported consideration for the “Note” was improper on summary judgment.....	22

c.	Genuine issues of material fact exist regarding whether the “Note” is supported by consideration.	24
d.	Genuine issues of material fact exist regarding the terms of the parties’ written agreement.....	26
e.	Genuine issues of material fact exist regarding whether the Hoffmans’ performance may be excused by the Browns’ breach.	27
2.	There Are Issues Of Material Fact As To Whether The Browns Breached Their Obligation To Donate The Store To The Hoffmans.....	28
3.	Issues Of Material Fact Precluding Summary Judgment Also Exist With Regard To The Hoffmans’ Other Counterclaims	31
C.	The Trial Court’s Judgment Suffered From Additional Legal Defects	34
1.	The Trial Court’s Judgment Is Flawed Because Bella’s Voice Was Not A Party To The “Note”	34
2.	The Trial Court’s Judgment Is Flawed Because Plaintiffs Did Not Incur And Are Not Entitled To An Award Of Fees Or Costs	36
VI.	CONCLUSION.....	37

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Beers v. Ross</i> , 137 Wn. App. 566, 154 P.3d 277 (2007)	19, 20
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	22, 23, 31
<i>Brogan v. Anensen LLC v. Lamphiear</i> , 165 Wn.2d 773, 202 P.3d 960 (2009)	22
<i>Crown Plaza Corp. v. Synapse Software Sys. Inc.</i> , 87 Wn. App. 495, 962 P.2d 824 (1997)	27
<i>Eastwood v. Horse Harbor Found., Inc.</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010)	33
<i>Equitable Life Leasing Corp. v. Cedarbrook, Inc.</i> , 52 Wn. App. 497, 761 P.2d 77 (1988)	26
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986)	33
<i>Harris v. Morgenson</i> , 31 Wn.2d 228, 196 P.2d 317 (1948)	24
<i>Havens v. C&D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994)	32
<i>Jacoby v. Grays Harbor Chair & Mfg. Co.</i> , 77 Wn.2d 911, 468 P.2d 666 (1970)	30
<i>Kahn v. Salerno</i> , 90 Wn. App. 110, 951 P.2d 321 (1998)	19
<i>King v. Riveland</i> , 125 Wn.2d 500, 886 P.2d 160 (1994)	21
<i>Labriola v. Pollard Grp., Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004)	23

<i>Losh Family LLC v. Kertsman</i> , 155 Wn. App. 458, 228 P.3d 793 (2010).....	35
<i>Ltd. v. Trend Bus. Sys.</i> , 53 Wn. App. 77, 765 P.2d 339 (1988), <i>review denied</i> , 113 Wn.2d 1025 (1989).....	27
<i>Malacky v. Scheppler</i> , 69 Wn.2d 422, 419 P.2d 147 (1966).....	23
<i>Neuson v. Macy's Dept. Stores, Inc.</i> , 160 Wn. App. 786, 249 P.3d 1054 (2011).....	22
<i>Queen City Sav. & Loan Ass'n Manhalt</i> , 111 Wn.2d 503, 760 P.2d 350 (1988).....	30
<i>Reid v. Cramer</i> , 24 Wn. App. 742, 603 P.2d 851 (1979).....	21
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 19 P.3d 1068 (2001).....	19
<i>Wilson Court Ltd. v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	19
Statutes	
Washington Consumer Protection Act.....	4, 15, 32, 33

I. INTRODUCTION AND RELIEF REQUESTED

This is an appeal on behalf of Appellants Jordan Hoffman-Nelson, Yvette Hoffman, and Bella's Voice's (collectively, the "Hoffmans"), the owners of a small nonprofit who were duped into incurring a purported payment obligation arising from the transfer of a failing business's assets to them, after reaching an agreement that the transfer would be a donation. As described herein, pursuant to their agreement with Respondents Michael Brown, Toni Brown, and Vanishing Prices LLC (collectively, the "Browns") that the business assets were being donated, the Hoffmans provided services to the Browns over a month-long period and assumed the considerable liabilities of the business, including a \$200,000 long-term lease obligation. However, just as the business was to be transferred free of charge—pursuant to the parties' prior oral agreement as well as the written business sale documents to be executed—the Browns foisted upon the Hoffmans and demanded that they sign a so-called "Promissory Note" (the "Note"), which purported to require the Hoffmans to pay \$50,000 to the Browns. The Browns threatened that if the "Note" was not signed they would not complete the transfer to which they already agreed. Not wanting to forfeit the blood, sweat, and tears they had invested, and in fear they were on the hook for a long term lease they had no way of paying, the Hoffmans were forced to succumb and sign. In this case, the Browns seek payment under the sham "Note," and the Hoffmans dispute any obligation

to pay as inconsistent with the parties' agreement and Washington law.

Despite being presented with evidence of contract terms directly inconsistent with the Browns' claim to payment under the "Note," and genuine disputes between the parties on virtually every material fact at issue, the trial court improperly granted summary judgment in favor of the Browns. The trial court held that the "Note" was enforceable as a matter of law and that judgment as a matter of law was appropriate on all of the Hoffmans' defenses and counterclaims. These holdings were error.

At the most fundamental level, the trial court's erroneous decision was premised on its legal ruling that lack of consideration could not be a defense to the "Note," which apparently led the trial court to believe that it could somehow ignore the genuine disputes of fact concerning the terms of the parties' agreement and the lack of consideration for the "Note." But this ruling was legal error. Washington law is clear that lack of consideration is indeed available as a defense to payment for promissory notes issued without consideration, like the one here. At the very least, related disputes of material fact plague the record and plainly preclude summary judgment.

This Court's review is de novo and the trial court's decision should be reversed. As set forth herein, among other dispositive defects, the trial court's entry of summary judgment in favor of the Browns (1) relied on legal reasoning that is erroneous under Washington law, particularly

concerning the lack of consideration for the “Note”; (2) failed to appropriately address the myriad genuine issues of material fact that exist concerning the Browns’ claim on the “Note” and the Hoffmans’ defenses and counterclaims, particularly concerning whether the facts surrounding the transfer could constitute a breach of contract by the Browns or otherwise subject the Browns to liability; and (3) improperly construed the contract documents and material facts in the Browns’ favor, even though the law required them to be construed against the Browns (as the drafter of the documents and the moving party on summary judgment). In addition, the trial court’s ultimate judgment was further deficient because it improperly rendered judgment on the “Note” against an entity that was not even party to the “Note,” and awarded fees and costs to the Browns that were not authorized by contract or statute.

For the reasons set forth herein, the trial court’s decision granting summary judgment and its entry of judgment were error. The Hoffmans respectfully request that the trial court be reversed and that the case be remanded for trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in rendering its August 14, 2015 Memorandum Decision (“Memorandum Decision”). *See* CP91-94.

2. The trial court erred in concluding that there is no genuine issue as to any material fact in this case and that the Browns were entitled

to a judgment as a matter of law.

3. The trial court erred in granting summary judgment for the Browns on their claim to enforce the “Note.”

4. The trial court erred in granting summary judgment of dismissal in the Browns’ favor on the Hoffmans’ breach of contract claim.

5. The trial court erred in granting summary judgment of dismissal in the Browns’ favor on the Hoffmans’ other counterclaims for fraudulent misrepresentation, Washington Consumer Protection Act violation, and negligence.

6. The trial court erred in entering its October 13, 2015 Judgment (“Judgment”) based upon its Memorandum Decision and its September 9, 2015 Order Denying Reconsideration. *See* CP14-17, 74.

7. The trial court erred in entering its Judgment against Bella’s Voice.

8. The trial court erred in awarding costs and attorney’s fees to the Browns.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in granting the Browns’ motion for summary judgment and entering judgment in their favor? Specifically:

1. In an action on a promissory note like this one, is the defense of lack of consideration available? (Assignments of Error 1, 3, 6).

2. Are there genuine issues of material fact that preclude

summary judgment in the Browns' favor on the "Note," including for example as to whether there is consideration to support it? (Assignments of Error 1, 2, 3, 6).

3. Are there genuine issues of material fact that preclude summary judgment in the Browns' favor on the Hoffmans' breach of contract claim? (Assignments of Error 1, 2, 4, 6).

4. Did the trial court err by resolving ambiguities in the "Note" and the parties' agreement on summary judgment, and by construing the documents and facts in the Browns' favor (as the drafter of the documents and moving party on summary judgment), when the law requires otherwise? (Assignments of Error 1, 2, 3, 4, 5, 6).

5. Did the trial court err, in its entry of Judgment on the "Note," by including Bella's Voice, a non-party to the "Note," and in awarding fees and costs to the Browns even though they did not actually incur and had no right to recover any fees or costs under contract or law? (Assignment of Error 6, 7, 8).

IV. STATEMENT OF THE CASE

A. The Browns Publicly Offer To Donate Their Business

Appellants Yvette Hoffman ("Yvette") and Jordan Hoffman-Nelson ("Jordan") are mother and daughter. CP151:5-11, 161:5-11. Jordan, who is 23 years old, had a dream of starting a small nonprofit business to benefit animal welfare charities. Jordan and Yvette had

discussed this dream but they had no financial resources and did not see how it could possibly be realized. *Id.*

Then, on May 26, 2014, the Browns posted a public advertisement on www.craigslist.com offering to donate their small retail thrift store business, Vanishing Prices, to a nonprofit. CP151:12-25, 161:3-23. To the Hoffmans, the ad sounded like their dream come true. The ad stated, in relevant part:

ATTENTION NONPROFITS!!!!
INCREDIBLE OPPORTUNITY TO BRING IN A
CONSISTENT REVENUE STREAM IN FOR YOUR
NON-PROFIT ORGANIZATION!!!
**We are looking at DONATING our business to the right
Non-profit organization** looking for a way to create an
amazing income stream. . . . **DONATION includes all
inventory, fixtures, signage, POS system (cash registers,
large computer, and all necessary, software), high end
steam washer and dryer, etc. A complete turn-key
business!** Over \$75,000 invested into the store and
approximately \$20,000 in inventory all included!
ONLY non-profit organizations will be considered for this
donation opportunity, so please be prepared to tell us about
your non-profit if you call. **The best non-profit fit will be
the only chosen for this opportunity.** FOR MORE
INFORMATION CONTACT: Mike or Toni Brown[.]

CP298:5-16 (capitals in original; emphasis added). Jordan responded to the ad and spoke with Ms. Brown, indicating that she was calling in regard to the www.craiglist.com ad offering to donate the business. CP161:24-162:5. Ms. Brown and Jordan set up a time to meet.¹

¹ Unbeknownst to the Hoffmans at the time, the Browns had also put up a separate, *second* www.craigslist.com public advertisement offering to *sell* their business. *See* CP151:25-152:9. The Browns apparently received no real interest in their sale offer, as nobody was willing to pay anything to assume their failing, unprofitable business with its

B. The Parties Reach Agreement On A Deal For The Browns To Donate Their Business To The Hoffmans

Shortly thereafter, the Hoffmans met with the Browns to discuss the Browns' offer to donate their small thrift store business. CP152:10-11, 162:13-15. During this initial meeting, the Browns informed the Hoffmans that their business was failing. CP152:12-22, 162:14-25. The Browns explained that they had been losing tens of thousands of dollars per year and that they could no longer afford the store and its long-term lease obligations. *Id.* They further explained that they needed to get out from under the store's obligations and wanted to donate the business to a tax exempt entity so they could receive a tax write-off. *Id.*

During the discussion, the Hoffmans told the Browns of their own distressed financial situation. *Id.* The Hoffmans explained that they did not have any money, and confirmed that they could not and were not interested in paying anything for the store. *Id.* The Hoffmans also explained that, because of their limited means, they could take over the lease and other store obligations even as a donation only if the store could be profitable with just the two of them working, since they had no money and could not afford to incur any business losses whatsoever. *Id.*

The Browns also took Jordan and Yvette on a tour of the store. CP152:26-153:4, 162:26-163:4. During the tour, the Browns specifically

large financial obligations. On the initial call, Ms. Brown specifically asked Jordan which ad she was calling about, and Jordan responded that she was calling about the advertisement concerning donating the business to a nonprofit.

identified the fixtures, inventory, furnishings, and equipment that were to be included in the donation. *Id.* The Browns then took the Hoffmans to an offsite warehouse where the Browns identified additional inventory surplus that they said would be part of the proposed donation. *Id.*²

No specific terms were negotiated or agreed upon during this initial meeting, but the parties expressed interest in further discussions. Based on the representations made by the Browns, the Hoffmans certainly continued to believe the proposed donation was worth pursuing. *Id.* The following day, the Browns emailed Yvette to follow up on their meeting. CP300:1-5. In their email, the Browns expressly confirmed their intent to donate the store, writing: “Jordan and Yvette, Thank you so much for coming out to meet with us yesterday. **We very much enjoyed getting to know you both and discussing your intentions for the store if it is donated to you.**” *Id.* (emphasis added). This is the only documentary evidence in the record from the parties’ early June 2014 dealings.

Following some further discussions, in early June 2014 the parties came to an agreement on the basic terms of a deal for the donation of the store. Consistent with the www.craigslist.com ad and all of the parties’ discussions, the Browns agreed to donate their store to the Hoffmans

² At their initial meeting, the Browns mentioned that they had an investor who had contributed to their business and said it was extremely difficult for them to give up the business, especially since someone had helped them with it. The Hoffmans felt sorry for the Browns and told the Browns they would consider potentially helping the Browns reimburse their investor at some point in the future if the store eventually became successful again. No terms or specifics were ever discussed, nor was any assistance with the investor ever made part of any agreement. CP153:8-18, 163:8-18.

effective July 1, 2014—including all of the store’s fixtures, inventory, furnishings, and equipment—if the Hoffmans agreed to do the following:

1. Work unpaid for the Browns for the remainder of the month of June;
2. Form a tax-exempt, non-profit entity in June that would be the recipient of the transfer;
3. Pay for operating expenses throughout the June transition period and begin transferring business expenses into the Hoffmans’ name; and
4. Assume the store’s preexisting lease obligations (for the store and warehouse).

CP153:19-154:10, 163:19-164:11. The Browns informed the Hoffmans that if they agreed to these terms, then at the end of June they would be given the keys to the store and all of the business’s assets would be transferred to them free, clear, and without charge. *Id.* The Hoffmans and the Browns agreed on these terms and had a deal. *Id.* At no point did the Browns ever say anything to the Hoffmans about the Hoffmans having to buy the store or any of its assets, or ever suggest that they would require payment of any kind. *Id.* The parties’ agreement did not include any monetary payment. *Id.*

C. The Hoffmans Perform Their Obligations Under The Deal

In reliance on the agreement struck with the Browns in early June, the Hoffmans went to work to fulfill their end of the bargain. Specifically, the Hoffmans completed the following obligations prior to the July 1 transfer:

1. On June 9, 2014, the Hoffmans began working at the store full time free of charge. They continued working for the Browns—without receiving a single paycheck—all the way through to July 1, 2014. CP154:11-12, 164:12-14.
2. On June 12, 2014, the Hoffmans formed Bella's Voice as a Washington non-profit organization. Bella's Voice was intended to use sales proceeds from the thrift store business to support other local nonprofits involved in animal welfare. CP164:15-17, 173.
3. On June 16, 2014, the Hoffmans began transferring over the store's business permits into Bella's Voice's name. Later in June, the Hoffmans initiated the process to transfer the store's insurance policy into Bella's Voice's name. They also transferred over the store's ADT Security System and called Puget Sound Energy to transfer that utilities account into Bella's Voice's name. CP164:18-165:2, 175.
4. On June 30, 2014, the Hoffmans assumed the Browns' long-term lease obligation for the store space, which had a remaining balance of over \$200,000. The lease assignment was executed in the landlord's office with Mr. Brown and the landlord both present. CP154:15-18, 165:3-7, 177-178 (lease assignment), 182-225 (underlying lease).

All of the Hoffmans' actions in June 2014 were in performance of their oral agreement with the Browns and in reliance on the Browns promise that, effective July 1, 2014, the Browns would donate the store, including all of its fixtures, inventory, furnishings, and equipment, to the Hoffmans free of charge. CP165:8-10 (Jordan Decl.) (“All of our actions during the month of June were in reliance on the Browns' representation that, on July 1, 2014, they would donate us the store.”).

D. The Browns Breach Their Agreement And Demand Execution Of A “Promissory Note” Lacking Consideration

After the lease assignment was executed and both parties had signed the document in front of the landlord on June 30, the Hoffmans returned to the store with Mr. Brown. CP154:19-155:6, 165:11-166:2. There, he presented the Hoffmans with three documents to sign. Two of the documents—a Business Sale Agreement (“Business Sale Agreement”) and a Personal Property Bill of Sale (“Bill of Sale”)—in general accurately reflected the parties’ prior oral agreement. *Id.* These two documents were not unexpected, as the parties had contemplated that there would be some documentation signed to confirm the previously agreed upon donation and document the store’s transfer. The third document, however, was not expected and was inconsistent with what the parties had agreed to. The third document was entitled “Promissory Note” and purported to create a \$50,000 obligation flowing from the Hoffmans to the Browns. *Id.* The Hoffmans were absolutely shocked and dismayed to be presented with the “Note,” as they had never before discussed incurring any payment obligation to the Browns and because the parties had already previously agreed upon the business’s transfer being a donation (based upon which agreement the Hoffmans had *already performed* their obligations).

The Hoffmans initially refused to sign the “Note” because it was not part of their agreed upon deal. CP155:4, 165:23 (Jordan Decl.) (“We

could not believe what he was doing and objected to signing.”). Mr. Brown demanded that the Hoffmans sign the “Note” and threatened that if they did not sign, he would not transfer the store after all. CP155:1-4, 165:20-23. Not wanting to forfeit all of the work and time they had invested into the store, the Hoffmans felt they had no choice but to sign. Yvette told Mr. Brown that if she was forced to sign the document then, at a minimum, Jordan’s name would need to be removed from it. Mr. Brown agreed to this and informed the Hoffmans that he would be back the next day with a revised version. That night, Mr. Brown emailed the Hoffmans an updated version with Jordan’s name removed. CP166:3-4, 227-228.

The next day, July 1, 2014—the day the transfer was to occur according to the parties prior agreement—Mr. Brown again presented the Hoffmans with the *same* three documents. CP155:11-25, 166:4-20. Again, two of the documents, the Business Sale Agreement and Bill of Sale, which had been presented the prior day, were consistent with the parties’ prior oral agreement and accurately reflected the basic structure of the deal, which was the donation of the business to the Hoffmans. *Id.* Both of these documents correctly described the business transfer as a “donation”—indicating that any value of the store’s assets beyond \$10.00 (an amount the Browns had chosen and assured would be sufficient to validate the transaction) would be considered a donation. The Business Sale Agreement specifically stated that “[t]he total purchase price for all

fixtures, inventory, furnishings and equipment is \$10.00 Dollars” and that *“[t]he additional value of all fixtures, inventory, furnishings, and equipment shall be considered a donation.”* CP233-234 (executed Business Sale Agreement) (emphasis added). Likewise, the Bill of Sale confirmed that *“[t]he full purchase price for [the] Goods is \$10.00”* and that *“[a]ll fixtures, inventory, furnishing [sic], [and] equipment are considered a donation, \$10.00 is the consideration required to validate the transaction.”* CP237-238 (executed Bill of Sale) (emphasis added).

Contemporaneous with the parties’ execution of the Business Sale Agreement and the Bill of Sale, the Browns again foisted the “Note” upon the Hoffmans, despite the fact that the “Note” was blatantly inconsistent with the parties’ prior agreement or the terms of the other two documents they were signing. CP155:11-13, 166:4-7. While the Business Sale Agreement and Bill of Sale expressly provided that the transaction was a donation, the “Note” purported to create an obligation for the Hoffmans to pay the Browns \$50,000. *See* CP230-231. Notably, while the Business Sale Agreement references the Bill of Sale, making it clear they are part of the same deal, neither the Business Sale Agreement nor the Bill of Sale make any reference to the “Note,” and similarly the “Note” is completely devoid of any reference to them. The “Note” also entirely fails to describe or indicate what consideration the Hoffmans would be receiving for the purported obligation to pay \$50,000 to the Browns. *See id.*

Mr. Brown again demanded that the Hoffmans sign the “Note.” He expressly threatened the Hoffmans that if they did not sign, then the business’s assets would not be transferred to them—notwithstanding the fact that the Hoffmans had already assumed the store’s lease just the day before, expressly based on the parties’ prior agreement that the store would be donated. CP155:11-13, 166:4-7. Mr. Brown persisted that if the document was not signed, the Hoffmans would not be allowed to sign the Business Sale Agreement or Bill of Sale—the documents reflecting their actual deal. The Hoffmans remained reluctant. Then, to further coax the Hoffmans into signing the “Note” in furtherance of his scam, Mr. Brown represented to them that the Browns would not enforce the document, stating that it was simply for their own records. CP155:13-25, 166:7-20.

The Hoffmans felt they had absolutely no choice. Fearing that the donation and all of the work and time they had already invested in the deal would be forfeited, and that they would now be stuck with a lease obligation they could not afford, the Hoffmans reluctantly succumbed and signed the document. *Id.* Importantly, the Hoffmans, who had no money, were not represented by an attorney in any part of their dealings, and all documents were prepared and presented by Mr. Brown.

E. The Browns Attempt To Enforce The Sham “Note”

Thereafter, the Hoffmans took over the store and fulfilled all remaining obligations required of them under the parties’ actual

agreement, including paying all transition expense and satisfying all terms of the Business Sale Agreement and Bill of Sale. *See generally* CP155:26-156:8, 166:21, 167:6-168:24 (Jordan Decl.) (“To date, we have fully completed our obligations under the Business Sale Agreement and the Bill of Sale.”). But when the Browns subsequently tried to collect on the “Note,” the Hoffmans refused to pay, believing any payment obligation to be unenforceable, improper, and inconsistent with the parties’ actual agreement. CP168:8-12. To date, the Hoffmans have not paid anything under the “Note.”

In March 2015, the Browns commenced this lawsuit seeking to enforce the “Note.” CP378-382 (Summons and Complaint). The Hoffmans answered the complaint in April 2015. CP362-377 (Answer to Complaint for Damages and Counterclaims). In their answer, the Hoffmans admitted that they did not make any payments on the “Note” but asserted a variety of defenses including failure of consideration, the Browns’ own breach, duress, fraud or fraudulent inducement, illegality, mistake, undue influence, unconscionability, and violation of public policy. The Hoffmans also asserted various counterclaims arising from the Browns’ misconduct, including breach of contract, fraudulent misrepresentation, conversion, international interference with business relationship, Washington Consumer Protection Act violation, and negligence.

The fundamental premise of the Browns' claim in this case is that the "Note" is enforceable and that the \$50,000 obligation was somehow in consideration for the transfer of the business. *See* CP348:17-22. The Browns' own statements confirm that they arrived at the \$50,000 by adding up the assets of the business:

The "consideration" [for the "Note"] is all the assets we donated to them. We paid \$10,000 for the floors, \$10,000 for improvements, \$7,000 for the POS and computer systems, \$7,000 for store fixtures, \$6,000 for store supplies and production equipment, and \$10,000+ of inventory that [the Hoffmans] could sell immediately.

CP148 (Feb. 22, 2015 letter from Mr. Brown).

Yet, the plain language of the "Note" makes no mention of the business, its assets, or the transfer, and in fact does not mention any specific consideration whatsoever. CP230-231. And the assets that were supposedly the consideration for the "Note" are the same assets expressly identified in the Business Sale Agreement and Bill of Sale as being *donated* to the Hoffmans. *See* CP233-234 ("The total purchase price for all fixtures, inventory, furnishings and equipment is \$10.00 Dollars [and] [t]he additional value of all fixtures, inventory, furnishings, and equipment shall be considered a donation."), 237-238 ("The full purchase price for [the] Goods is \$10.00" and "[a]ll fixtures, inventory, furnishing [sic], [and] equipment are considered a donation, \$10.00 is the consideration required to validate the transaction."). The Browns have absolutely no explanation for the direct inconsistency between their theory about the

“Note” and the plain terms of the other documents executed by the parties, not to mention the Hoffmans’ testimony and other evidence reflecting the parties’ preceding oral agreement.

F. The Trial Court’s Erroneous Rulings

Notwithstanding the parties’ disagreement over the actual terms of their original agreement and the blatant inconsistencies among the three documents in dispute, the Browns moved for summary judgment on the theory that the “Note” was enforceable on its face and that all other claims should be dismissed as a matter of law. CP347-351 (Motion for Summary Judgment). The Hoffmans opposed the entry of summary judgment, principally on the ground that the myriad disputes of material fact in this case precluded the entry of judgment as a matter of law.

The trial court granted the Browns’ motion for summary judgment, holding that the “Note” was enforceable as a matter of law and that all of the Hoffmans’ counterclaims must be dismissed as a matter of law. CP91-94 (Memorandum Decision). The Hoffmans moved for reconsideration, which was summarily denied. CP84-90 (Motion for Reconsideration), 74 (Order on Motion for Reconsideration).

The Browns then moved for an award of attorney’s fees and costs, prejudgment interest, and entry of judgment. CP58-74 (Plaintiffs’ Motion for Attorney’s Fees and Costs, Prejudgment Interest, and Entry of Judgment). The Hoffmans opposed entry of judgment in the requested

form. CP24-35. The Hoffmans argued that judgment on the “Note” against Bella’s Voice, the entity, was improper because Bella’s Voice was not even a party to the “Note.” CP29:12-30:22. The Hoffmans further argued that an award of fees and costs was improper because the contract expressly allowed only recovery of fees and costs that were “incurred,” and the Browns had not actually incurred any fees or costs because they were being represented pro bono (just as the Hoffmans are and have been represented pro bono in this case). CP27:8-29:11. Despite these issues, the trial court entered the form of judgment presented by the Browns without modification. CP14-17 (Judgment). This appeal follows.

V. ARGUMENT AND AUTHORITY

The trial court’s decision marks a striking departure from established Washington law. To begin with, Washington law provides the maker of a promissory note a defense to payment if the note is not issued for consideration. Yet, without any legal authority whatsoever or any other rationale, the trial court held that this defense was not available to the Hoffmans. Moreover, the trial court’s summary judgment ruling required it to ignore numerous genuine issues of material fact; indeed, virtually every aspect of the deal at the heart of this case is disputed, given the evidence in the record, and all of the evidence should have been—but was not—construed in favor of the non-moving party, the Hoffmans. The trial court also improperly construed the Note (and the other transactional

documents) in the Browns' favor although they were the drafters, improperly resolved as a matter of law contract ambiguities requiring fact-finding, and erroneously concluded that renegeing on the payment terms in a contract and demanding additional compensation for previously-agreed performance could not constitute a breach of contract as a matter of law. The trial court's conclusions are unsupported by Washington law or the record and should be reversed.

A. The Standard Of Review Is De Novo

All issues presented by this appeal are subject to de novo review by this Court. The law is settled that summary judgment rulings are reviewed de novo. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001); *see also, e.g., Wilson Court Ltd. v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998) (questions of law are reviewed de novo). When reviewing an order granting summary judgment, the appellate court performs the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998); *see also, e.g., Beers v. Ross*, 137 Wn. App. 566, 570, 154 P.3d 277 (2007) (explaining that on summary judgment, courts must "weigh all facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party"). "Washington law favors resolution of cases on their merits," and affirmance of summary judgment is only

appropriate when the moving party has presented evidence establishing that there are no genuine issues of material fact and that the moving party is therefore entitled to judgment as a matter of law. *Beers*, 137 Wn. App. at 570.

B. The Trial Court Erred In Granting Summary Judgment Against The Hoffmans

The crux of this appeal is whether there are any genuine issues of material fact as to whether the “Note” is enforceable against the Hoffmans or as to whether the Browns’ actions could constitute a breach of the parties’ agreement or could result in liability on the Hoffmans’ other counterclaims. These issues are discussed below.

1. The Trial Court Erred In Entering Summary Judgment For The Browns On The “Note”

a. Lack of consideration is a defense to the Browns’ claim under the “Note.”

As noted above, the fundamental premise of the trial court’s decision in this case was that the defense of lack of consideration simply was not available to the Hoffmans on the Browns’ claim to enforce the “Note.” In particular, the trial court explained its decision to enforce the “Note” as a matter of law as follows:

Defendant does not dispute the existence or authenticity of the note or that the defendant’s principal signed the note, but argues that the note is unenforceable because it lacks consideration. If there were indeed a lack of consideration for the obligation, that could only have the effect of invalidating the contract which gave rise to the obligation but would not invalidate the note.

CP92:11-15. The trial court offered no additional rationale for its conclusion to enforce the “Note” beyond this opaque and puzzling legal conclusion, which is *directly contrary* to Washington law:

The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed.

RCW 62A.3-303(b) (emphasis added). Likewise, Washington case law makes clear that a promissory note is a contract to pay money, and that for any contract to be enforceable, it must be supported by consideration. *See, e.g., King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994); *Reid v. Cramer*, 24 Wn. App. 742, 744, 603 P.2d 851 (1979).

Thus, in other words, if the Hoffmans can ultimately prove at trial that the “Note” was issued without consideration, they will have a complete defense to the Browns’ claim on the “Note.” But whether there was consideration is an issue of fact inappropriate for resolution on summary judgment. Indeed, the trial court did not—and could not on this record—conclude on summary judgment that there was in fact consideration for the “Note.” To the contrary, as thoroughly examined below, genuine issues of material fact exist as to whether the “Note” was issued for consideration and on numerous other material issues as well. It was legal error for the trial court to enter summary judgment on the “Note” in light of the genuine disputes of material fact concerning the

Hoffmans' defenses. The trial court's decision should be reversed.

b. Resolution of factual disputes concerning purported consideration for the "Note" was improper on summary judgment.

Under Washington's "context rule," courts look to "the circumstances of the making of a contract for the purpose of interpreting the contract." *Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990). Washington law thus "tends to favor fact finding rather than summary resolution of . . . contract disputes." *Neuson v. Macy's Dept. Stores, Inc.*, 160 Wn. App. 786, 796, 249 P.3d 1054 (2011) (remanding to trial court motion to compel arbitration where fact finding was required as to contract). In other words, contract disputes involving the context rule and extrinsic evidence of meaning typically should not be resolved on summary judgment. *See, e.g., Brogan v. Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 777, 202 P.3d 960 (2009) (declining to consider the "weight or credibility of extrinsic evidence" on summary judgment and concluding that it only "raises material questions of fact making summary judgment inappropriate at this juncture"); *Berg*, 115 Wn.2d at 668 (holding that interpretation of a contract is for the trier of fact where a party resorts to extrinsic evidence in determining the meaning of a contract or argues an alternative meaning to the terms of the contract).

Here, the "Note" does not state, or even allude to, what promise was purportedly given by the Browns in exchange for the Hoffmans'

purported promise to pay \$50,000. *See Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004) (“Consideration is a bargained-for exchange of promises.”). Instead, the Note merely states that it was issued “FOR VALUE RECEIVED.” CP230. Under Washington law, however, such recitals are “not conclusive” and thus the proper course in cases like this one is to “inquire into the consideration and show, by parol evidence, the real or true consideration.” *Malacky v. Scheppler*, 69 Wn.2d 422, 425, 419 P.2d 147 (1966). Thus, the trial court here was required to examine parol evidence to determine what consideration, if any, supported the Note. *Id.* But an examination of parol evidence under the “context rule” is improper on summary judgment. *Berg*, 115 Wn.2d at 668. Whether there was consideration for the “Note” is an issue that requires determination by a finder of fact. It was an error of law for the trial court to grant the Browns’ motion for summary judgment to enforce the Note under these circumstances.

Even if it were permissible for the trial court to engage in this fact-intensive inquiry at the summary judgment stage, the record demonstrates that the Note at issue was *not* issued for consideration and is otherwise unenforceable against the Hoffmans, or at least that genuine issues of material fact exist on these issues. The Browns’ theory appears to rest on the faulty premise that consideration for the Note can be found in the concurrently executed Business Sale Agreement. Specifically, the Browns

contend that the consideration for the Note is the transfer of the assets of the business. But this contention is contradicted by the evidence in the record. The assets that were transferred are the *exact same assets* that the Hoffmans had already bargained for in early June 2014, when the parties agreed that the assets would be donated to the Hoffmans, principally in exchange for their promise to assume the Browns' \$200,000 lease. The Hoffmans were *already* entitled to receive the business's assets for no payment, and so the transfer of assets cannot be the consideration for the new \$50,000 payment obligation. Moreover, the Browns' theory about the assets being sold for \$50,000 is also directly inconsistent with the Business Sale Agreement and Bill of Sale, which both (accurately) describe the transaction as a donation. The trial court's resolution of all of these issues in the Browns' favor despite the procedural posture was error.

c. Genuine issues of material fact exist regarding whether the "Note" is supported by consideration.

Numerous issues of fact exist precluding summary judgment. To begin with, genuine issues of material fact remain as to whether the Browns had a preexisting duty to donate the store under the parties' original oral agreement. If the Browns had such a preexisting duty, then there was no consideration for the "Note" and it cannot be enforced. It is settled black letter law that a promise to perform an existing legal obligation is not valid consideration. *See, e.g., Harris v. Morgenson*, 31

Wn.2d 228, 241, 196 P.2d 317 (1948).

The Hoffmans have introduced substantial evidence that the Browns did have a preexisting duty to donate the business to them under the parties' original deal. Indeed, the evidence is overwhelmingly in the Hoffmans' favor on this issue—particularly considering that all facts must be construed in their favor at this stage—but there are disputes of fact at the very least. The *only* documentary evidence in the record relating to the parties' original agreement is the Browns' offer to donate their business, to which the Hoffmans responded (seeking a donation), and the email from Ms. Brown to the Hoffmans, sent just after their initial meeting, which similarly discussed a planned donation. To be clear, both the Browns' public offer and Ms. Brown's email about the potential deal with the Hoffmans *expressly* describe the forthcoming transfer as a "donation." *See* CP298:5-16, 300:1-5.

Likewise, both Jordan and Yvette have submitted declarations in which they have testified that the business was to be donated to them and that they had an agreement with the Browns in early June that included donation of the business. The Hoffmans also took extensive actions in June that can only be reasonably explained by a preexisting deal, including working for free for several weeks, transferring expense accounts to themselves, and assuming the store's long-term lease obligation. Finally, all of this evidence that the transfer was to be a donation is confirmed by

the Business Sale Agreement and the Bill of Sale, which *both* accurately and expressly confirm that the assets were being donated, and make no mention whatsoever of the “Note” or any material payment obligation.

By contrast, *the only contrary evidence in the record is the self-serving declarations submitted by the Browns in support of their summary judgment motion.* Even the “Note,” on which the Browns base their entire claim, does not even mention the transfer of the business or any other consideration. In light of the actual evidence in the record, it was entirely inappropriate for the trial court to enter summary judgment in the Browns’ favor. Issues of material fact remain as to whether the Browns had a preexisting duty to transfer the business, and the trial court’s decision thus should be reversed.

d. Genuine issues of material fact exist regarding the terms of the parties’ written agreement.

Genuine issues of material fact also exist concerning the actual terms of the parties’ July 1 written agreement, which is another reason the trial court’s summary judgment decision was error. Blatant and obvious inconsistencies exist between and among the three documents signed by the parties concurrently. As a result, the trial court was required to determine *what* the parties’ agreement actually was before entering summary judgment on *part* of the parties’ alleged agreement. *See Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 505,

761 P.2d 77 (1988) (“In determining this preliminary factual question of whether the parties intended the written document to be an integration of their agreement, ***the trial court must hear all relevant extrinsic evidence, oral or written.***”) (emphasis added)); *see also Crown Plaza Corp. v. Synapse Software Sys. Inc.*, 87 Wn. App. 495, 500-01, 962 P.2d 824 (1997) (explaining that “disputes about oral agreements depend a great deal on the credibility of the witnesses”). It did not do so. Even if it had done so, such fact-finding would have been inappropriate on summary judgment. The trial court erred by failing to consider and weigh all extrinsic evidence, which demonstrated material issues of fact, and, instead, summarily granting judgment in the Browns’ favor.

e. Genuine issues of material fact exist regarding whether the Hoffmans’ performance may be excused by the Browns’ breach.

Genuine issues of material fact also exist regarding whether the Hoffmans’ performance might be excused in light of the Browns’ own breach of contract (which is discussed further below). Once the actual terms of the parties’ agreement are determined (beginning with terms agreed upon back in early June 2014), the trial court must then resolve whether the Browns breached the agreement and, if so, whether their breach excused performance by the Hoffmans. These are *questions of fact*. *See, e.g., Bailie Comm.’s Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 82, 765 P.2d 339 (1988), *review denied*, 113 Wn.2d 1025 (1989) (material

breach is a question of fact). If the Browns really did promise to donate the business (as the evidence strongly shows), then the fact that they demanded execution of the “Note” and then attempted to collect on the “Note” when it purportedly came due constituted a breach of their agreement with the Hoffmans, which should excuse the Hoffmans’ performance. For all of these reasons, summary judgment in favor of the Browns was improper and should be reversed.

2. There Are Issues Of Material Fact As To Whether The Browns Breached Their Obligation To Donate The Store To The Hoffmans

Additional issues of material fact exist as to whether the Browns breached the parties’ contract, as alleged in the Hoffmans’ counterclaim for breach of contract, which the trial court summarily dismissed. The trial court’s flawed reasoning for dismissal of the breach of contract claim as a matter of law was, in its entirety, as follows:

Defendant alleges that the plaintiffs breached the contract for sale of the business for \$10.00 when the plaintiff told the defendant pay \$50,000 instead. However, as Plaintiff’s counsel pointed out in argument, the Business Sale Agreement never said that the plaintiff would not tell the defendant to pay an additional \$49,990 above the contract price.

CP92:22-93:7.

As an initial matter, the trial court’s reasoning is extraordinary and disturbing in its implications. Under the trial court’s decision, a contracting party can freely dupe an innocent counterparty into agreeing

on a contract at a certain price (and into actually performing under that contract), yet simply demand more money when it comes time for them to perform, without any consequence. According to the trial court, every contract must not only state a price, for that price to be binding, but also state that the price cannot be exponentially increased. This result has no basis in law or fact.

The trial court's reasoning was also an error of law. The Business Sale Agreement and Bill of Sale accurately reflect the parties' prior agreement that the transfer of the store's assets was to be a donation. The documents reflect a total purchase price of \$10.00 solely, as the documents confirm, to validate the transaction. The documents explicitly require that *any additional value* of the store's assets beyond the \$10.00 "***shall be*** considered a donation." CP223 (emphasis added), 237. Under the Business Sale Agreement and Bill of Sale, the Browns promised and were obligated to convey all of the business's assets for \$10.00. Correspondingly, they were required to consider any additional value beyond the \$10.00 a donation.

By wrongly attempting to charge the Hoffmans an additional \$49,990 for the *same assets* the Hoffmans were already entitled to obtain as a donation, under both the prior oral agreement and the Business Sale Agreement and Bill of Sale, the Browns breached the parties' contract requiring that any *additional value* be a donation. As the record clearly

demonstrates, the additional \$49,990 was precisely the value the Browns attached to the store's assets, which were supposed to be donated. CP148.

The trial court's conclusion that the Business Sale Agreement somehow permitted the Browns to charge the Hoffmans more for the store's assets than the agreed-upon \$10.00 directly contradicts the plain language of the Business Sale Agreement and the Bill of Sale and is a patently unreasonable interpretation of the contract. Indeed, the same reasoning could be said to effectively nullify any contract setting a fixed price for goods or services to be delivered at a later date. The trial court's decision was error and should be reversed.

To the extent the plain language of the Business Sale Agreement and Bill of Sale is somehow ambiguous (and it is not), the trial court's resolution of this ambiguity in favor of the documents' drafter (the Browns) was entirely improper, particularly on summary judgment. The general rule is that any ambiguity in a written contract is construed against the drafter. *See, e.g., Queen City Sav. & Loan Ass'n Manhalt*, 111 Wn.2d 503, 760 P.2d 350 (1988). "This rule can be rationalized by saying that the party formulating the language is to blame for the difficulty in interpreting it, and that he could have avoided the problem by more careful draftsmanship." *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 919, 468 P.2d 666 (1970). Here, where the parties' intent is disputed and the written document does not clearly support the Browns'

position, the trial court erred by construing the ambiguity in favor of the Browns, who drafted and presented the documents to the Hoffmans.

Furthermore, engaging in any construction of the documents to resolve ambiguities is entirely inappropriate on summary judgment. A contract must be read as a whole, analyzing and giving effect to all of its provisions. *Berg*, 115 Wn.2d at 667-68. Under the “context rule,” the court looks to “the circumstances of the making of the contract for the purpose of interpreting the contract.” *Id.* at 667. Washington law is clear, however, that the context rule tends to favor fact finding rather than summary judgment resolution of contract disputes. Summary judgment resolution of any ambiguities in the transactional documents (which, as the record makes clear, were plentiful) was an error of law. The trial court’s dismissal of the Hoffmans’ breach of contract claim on summary judgment should be reversed.

3. Issues Of Material Fact Precluding Summary Judgment Also Exist With Regard To The Hoffmans’ Other Counterclaims

The trial court erred in granting summary judgment in the Browns’ favor on the Hoffmans’ other counterclaims as well, as genuine issues of material fact exist mandating resolution of these claims on the merits.

With respect to the Hoffmans’ fraudulent misrepresentation counterclaim, the trial court concluded that the claim could not be maintained because the Hoffmans’ reliance on the Browns’ promise not to

enforce the “Note” was not reasonable. This conclusion was error. “Reasonableness” is an issue of fact that should not be resolved on summary judgment. *Cf. Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 181, 876 P.2d 435 (1994). Moreover, the trial court did not even address the principal basis for the Hoffmans’ fraudulent misrepresentation claim. The Browns intentionally induced the Hoffmans into satisfying a series of obligations in exchange for the Browns’ promise to donate the store, a promise the evidence now indicates the Browns never intended to keep. Nothing in the record supports the conclusion that the Hoffmans’ reliance on this promise was somehow unreasonable as a matter of law. If anything, the facts in the record support the exact opposite conclusion—i.e., that the Hoffmans were completely reasonable in relying on the Browns’ representations, which the Browns used to perpetuate their scheme and induce the Hoffmans, step by step, into their sham transaction, until the Hoffmans were at a point of no return, having already assumed the \$200,000 lease obligation. The trial court’s conclusion to the contrary was error.

With respect to the Hoffmans’ Washington Consumer Protection Act (CPA) claim, the trial court held that the claim was not viable because the allegations arose from a transaction involving one buyer and one seller. This reasoning was legally erroneous. Washington law makes perfectly clear that the CPA may indeed apply to a private transaction

between one seller and one buyer, so long as there is a risk of harm to the public—an issue that “is to be determined by the trier of fact.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789-90, 719 P.2d 531 (1986). The trial court’s conclusion on summary judgment that there was “no reason to believe that the public generally may be at risk” was improper under *Hangman Ridge*. *Id.* The Browns advertised their “donation” transaction *to the public* via www.craigslist.com, one of the most widely-known personal advertising websites in the world. The fact that the Hoffmans happened to be the Browns’ unlucky victims does not change the fact that there was public risk. *Id.* At the very least, this is yet another issue of material fact that should not have been decided on summary judgment. The trial court’s determination on the Hoffmans’ CPA claim should be reversed.

Finally, with respect to the Hoffmans’ negligence claim, the trial court’s conclusion that no negligence cause of action existed because there was no duty outside of those imposed in contract is a misstatement of law and unsupported by the record. *See, e.g., Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 394-95, 241 P.3d 1256 (2010) (“[T]he economic loss rule does not bar recovery in tort when the defendant’s alleged misconduct implicates a tort duty that arises independently of the terms of the contract.”). The parties’ extensive dealings, negotiations, and close relationship leading up to the eventual execution of a written

contract based on representations of the Browns, which are detailed in the record, at least create issues of material fact as to whether an independent duty existed between the parties beyond those imposed by their agreement. The trial court's determination on the Hoffmans' negligence claim should therefore be reversed.³

C. The Trial Court's Judgment Suffered From Additional Legal Defects

1. The Trial Court's Judgment Is Flawed Because Bella's Voice Was Not A Party To The "Note"

The trial court's entry of judgment against Bella's Voice, a distinct and separate legal entity from Jordan and Yvette, was an error of law. While there is no dispute that Jordan and Yvette each signed the "Note," Bella's Voice was not a party to the "Note." Because Bella's Voice was not a party to the Note, it cannot be said to be jointly and severally liable for liability under the "Note." The trial court's decision to nonetheless enter judgment against Bella's Voice on the "Note" was error.

The preamble of the "Note" states, in relevant part:

[T]he undersigned, Yvette Hoffman & Jordan Hoffman-Nelson, dba Bell's Voice [sic] a non-profit (the "Maker"), hereby promises to pay to the order of Michael & Toni Brown, dba Vanishing Prices ("Payee"), the principal sum of \$50,000 pursuant to the terms and conditions set forth herein.

CP230.

³ Although they disagree with the trial court's decision, the Hoffmans are not challenging herein the trial court's determinations on their conversion and interference with business relationship counterclaims.

The signature block of the “Note” contains the individual signatures of Yvette Hoffman, who is designated as a “Borrower,” and Jordan Hoffman-Nelson, who is also designated as a “Borrower.” Both Jordan and Yvette’s signatures are preceded by the word “Maker.” No other “Maker” or “Borrower” is identified or has a signature line. Bella’s Voice does not have a signature on the “Note,” nor is there even a place in the signature block for it to sign. Moreover, nothing in the content of the “Note” in any way indicates that Bella’s Voice is bound by the “Note” or its terms. Put simply, Bella’s Voice was not a party to and is not subject to the purported payment obligations set forth in the “Note.”

The “dba Bell’s Voice [sic] a non-profit” language contained in the preamble of the Note does not change this conclusion. Under Washington law, when an individual signs a promissory note “dba” another name, liability remains with the individual signatory. *Losh Family LLC v. Kertsman*, 155 Wn. App. 458, 463-64, 228 P.3d 793 (2010). “[W]here an agreement contains language binding the individual signer, ‘additional descriptive language added to the signature does not alter the signer’s personal obligation.’” *Id.* at 464 (quoting *Wilson Court Ltd. P’Ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 700, 952 P.2d 590 (1998)). The “dba” language contained in the “Note” is merely descriptive and certainly does not expand Jordan and Yvette’s personal obligation under the “Note” to a wholly separate legal entity, Bella’s Voice. At the very least, any

ambiguity in this regard presents yet another issue of fact that rendered summary judgment against Bella's Voice inappropriate. For these reasons, the trial court's entry of judgment against Bella's Voice was error and should be reversed.⁴

2. The Trial Court's Judgment Is Flawed Because Plaintiffs Did Not Incur And Are Not Entitled To An Award Of Fees Or Costs

The trial court's award for \$7,500 in attorney's fees and \$339 in costs was error. The Browns' sole basis for seeking fees and costs was the "Note" itself; the Browns did not allege any and have no statutory basis supporting their request. The "Note" expressly limited the recovery of attorney's fees and reasonable expenses to those actually "*incurred*" by the payee. Specifically, the "Note" states, in relevant part:

In the event any payment under this Note is not paid when due, the Maker agrees to pay, in addition to the principal and interest hereunder, reasonable attorneys' fees not exceeding a sum equal to 15% of the then outstanding balance owing on the Note, plus all other reasonable expenses *incurred by Payee* in exercising any of its rights and remedies upon default.

CP231 (emphasis added).

In contrast, *nowhere* in the document does it allow for the recovery of expenses not actually incurred by the payee or incurred by someone other than the payee. Nor is there any proof that the parties intended this

⁴ Alternatively, if the "dba" language is interpreted to mean that the Maker of the Note is really Bella's Voice, the entity, then it was error to enter judgment on the "Note" against Jordan and Yvette personally. In any event, there is no reasonable interpretation of the "Note" that would result in all three parties being considered makers.

provision to include expenses that were never incurred; nothing in the record would support such an interpretation. To the contrary, the plain language of the “Note” establishes the parties’ intent to allow the Browns to be reimbursed for up to 15% of the allegedly outstanding balance for attorney’s fees as well as other reasonable costs that they actually incurred as a result of a default.

As the record clearly demonstrates, the Browns did not *incur any* fees or costs. The Browns, like the Hoffmans, were represented pro bono. The fact that the Browns’ pro bono attorney spent “82 hours of time . . . , the *equivalent* of \$21,581.00 in fees” and advanced certain costs is irrelevant to this analysis. CP60 (emphasis added). As the Browns’ pro bono counsel confirmed, it was his law office and not the Browns that incurred this time and paid these costs. *Id.* Because the Browns have not incurred any expense, they are not entitled to reimbursement under the “Note.” The trial court’s award of attorney’s fees and expenses was error.

VI. CONCLUSION

The trial court granted the Browns’ summary judgment motion based on a legal rationale and factual analysis that is inconsistent with binding Washington precedent as well as the record in this dispute. Numerous genuine issues of material fact exist rendering the trial court’s summary judgment rulings and entry of judgment improper. Accordingly, and for the reasons set forth herein, the Hoffmans respectfully request

entry of an order reversing the entry of summary judgment, vacating the judgment in favor of the Browns, and remanding this matter to the trial court for trial. In the alternative, should the Court affirm the trial court's grant of summary judgment, the Hoffmans respectfully request that the trial court's award of attorney's fees and costs and entry of judgment against Bella's Voice be vacated.

Respectfully submitted this 25th day of January, 2016.

DORSEY & WHITNEY LLP

A handwritten signature in black ink, appearing to read 'S. Larsen-Bright', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served the foregoing on the following counsel of record by the method indicated:

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- Via Messenger
- Via Facsimile
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- Via Electronic Mail

Dated this 25th day of January, 2016.


Jackie Slavik

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