

No. 47576-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

BASIL D. BENA,

Respondent/Cross-Appellant,

v.

NATHAN B. SCHLEICHER and MARY L. SCHLEICHER,  
husband and wife,

Appellants/Cross-Respondents.

APPEAL FROM THE SUPERIOR COURT  
FOR CLALLAM COUNTY  
THE HONORABLE CHRISTOPHER MELLY

BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

The Schleichers agreed to pay Bena a total of \$450,000 for the purchase of certain real property, including \$350,000 cash and a \$100,000 promissory note to be secured by a mortgage against the property, which would be second to any loan that the Schleichers obtained to fund the cash purchase price. Consistent with that agreement, both parties signed a purchase and sale agreement for the \$350,000 cash purchase price and the Schleichers signed a note and mortgage for \$100,000 in favor of Bena.

Before the sale could close, the Schleichers asked Bena to release the note because it had to “go away” before the bank would loan them money for the cash purchase price. Based on the Schleichers’ assurance that they would reinstate the note and mortgage after they closed on their bank loan, Bena signed a release of the note and mortgage. After the Schleichers secured the cash purchase price from the bank and the purchase of the property closed, however, the Schleichers reneged and refused to reinstate the note and mortgage.

After a three-day trial, the trial court enforced the parties’ agreement and ordered the Schleichers to reinstate the note and mortgage, but declined to award attorney fees to Bena under the

mortgage and note's fee provisions. The trial court's decision to enforce the parties' agreement is supported by both the law and substantial evidence. However, the trial court erred in declining to award attorney fees to Bena. This Court should affirm the trial court's decision ordering the Schleichers to reinstate the note and mortgage, reverse the trial court's decision denying attorney fees to Bena, and award attorney fees to Bena on appeal.

## **II. CROSS-APPEAL ASSIGNMENT OF ERROR**

The trial court erred in denying attorney fees to Bena under the provisions of the mortgage and note requiring that "in case suit or action is commenced to collect this note or any portion thereof, we promise to pay, in addition to the cost provided by the statute, such sum as a Court may adjudge as reasonable attorney's fees therein (including any action to enforce the judgment and this provision as to attorney's fees and costs shall survive the judgment." (CP 105-07) (Appendix A)

## **III. CROSS-APPEAL STATEMENT OF ISSUE**

After the trial court found Bena prevailed in reinstating the note and mortgage that the Schleichers sought to avoid, did it err in refusing to award reasonable attorney fees pursuant to the provisions

of the note and the mortgage requiring the Schleichers to pay Bena's attorney fees if he was required to file suit to collect the note?

#### IV. RESTATEMENT OF FACTS

**A. The parties were close friends before the present dispute that arose from Bena's sale of real property, "Half Mile," to the Schleichers.**

Respondent/Cross-Appellant Basil Bena ("Bena") and his wife Jane Brae-Bedell (collectively, "the Benas") previously owned property located at 1010 East Half Mile Road in Port Angeles ("Half Mile"). (RP 9) With Mount Angeles to the South, Half Mile sits on 5 acres and includes an orchard and pond. (RP 221-22) Bena sold Half Mile to appellants Bruce and Mary Schleicher in March 2012. (RP 11)

The Benas and the Schleichers were very good friends up until the events precipitating this lawsuit. Jane was very close to Bruce's mother and had known Bruce for more than 30 years. (RP 94) Jane had been Mary's maid of honor when the Schleichers married 27 years earlier. (RP 314, 319)

When the Schleichers lived in Illinois, they visited the Benas at Half Mile on a number of occasions. (RP 17-18, 95-96) Mary testified that she fell "in love with Washington at first tree." (RP 318) The Schleichers eventually moved to Gig Harbor, Washington in

2003. (RP 218) Once the Schleichers moved to Washington, they and the Benas became even closer and described each other as “family,” and their “closest and dearest friends.” (RP 18, 97, 221, 252)

**B. Bena purchased Half Mile in 1998. Bena and his wife extensively remodeled the home and added other structures to the property.**

The Benas purchased Half Mile in 1998 for \$147,000 cash. (RP 9, 10, 95) The property was then “barely livable.” (RP 10) Over the years, the Benas extensively remodeled the home, putting in new floors, a new kitchen, and adding a solarium. (RP 10) They also built a well house, a separate storage building, and a garage/shop. (RP 10)

Jane suffers from polycythemia vera – an incurable disease likened to “leukemia in reverse.” (RP 89) Although Bena and Jane never physically separated, they divorced in May 2010. (RP 89) Unsure of how quickly Jane’s disease would progress, and due to concerns over what they feared would become mounting financial costs if the disease progressed rapidly, the Benas believed it best to legally separate their finances. (RP 16, 90) As a result of the divorce, Jane quit claimed Half Mile, along with other properties, to Bena. (RP 91)

Jane and Bena eventually remarried in February 2012. (RP 89) However, Half Mile was still in Bena's name only when it was sold to the Schleichers in March 2012, and he is the only named party in this action. (See CP 89; Ex. 13)

**C. The Schleichers often stayed at Half Mile while Bena and his wife traveled during the winter months.**

In 2007, the Benas listed Half Mile for sale. (RP 100, 102) A realtor performed a market analysis and established a listing price of \$550,000. (RP 12, 102) The Benas left Half Mile on the market at that price until 2009, when they switched to a different realtor, who reduced the listing price to \$515,000. (RP 12-14) During this period, the Benas started travelling in their RV between the months of September and April. (RP 13, 97-98) The rest of the year, the Benas resided at Half Mile and listed the property to accommodate any walk-throughs. (RP 22, 103)

During the months that the Benas traveled, the Schleichers often stayed at Half Mile. (RP 98) Bruce described Half Mile as both his future "retirement home" and his "cabin in the woods getaway." (RP 19-20, 98, 105) Mary loved trees and enjoyed the "rural and tranquil" lifestyle that Half Mile afforded. (See RP 96, 318) The Benas never charged the Schleichers for their use of Half Mile and

were happy to accommodate the Schleichers, who they considered “very good friends,” and because the Schleichers’ presence provided security for the property while they traveled. (RP 19-20, 98-99)

**D. In Spring 2011, the Schleichers offered to buy Half Mile. The parties agreed to a price of \$450,000, including a \$100,000 note and mortgage in favor of Bena.**

By summer 2010, the Benas had reduced the listing price to \$490,000. (RP 14, 103) The Benas declined a \$400,000 written offer in approximately March 2010. (RP 382) They later declined a \$475,000 verbal offer in August 2010 because of the number of contingencies attached to the offer. (RP 15, 103-04)

As the Benas were returning to Half Mile from their winter travel in April 2011, they advised the Schleichers that they were once again listing Half Mile for sale that summer. (RP 23-24, 104-05) The Schleichers asked the Benas to not list the property because they were interested in buying it. (RP 24-25, 105) According to Bruce, Mary was interested in “less home and more land” and Half Mile met those requirements. (RP 286-87; *see also* RP 225-26)

Although the Benas had intended to relist the property at \$490,000, they agreed to sell it to the Schleichers for \$450,000. (RP 25-26, 108) The Benas agreed to a reduced price because selling it

directly to the Schleichers would save them on commissions and other costs had they gone through the realtor. (RP 25-26, 108)

As they were negotiating the purchase, the Schleichers told the Benas that they could only be preapproved for a loan to accommodate a \$350,000 purchase price. (RP 25, 37, 121, 151, 159) Bena testified that Bruce did not want to take out a loan based on a \$450,000 purchase price because he wanted to get the lowest interest rate, and did not believe that he would qualify for a loan based on a purchase price of \$450,000. (See RP 25; see also RP 121) The Benas agreed that the Schleichers could pursue a bank loan for \$350,000, and the Benas would accept a promissory note for \$100,000 that would be secured by a second mortgage against Half Mile, inferior to any loan obtained through the bank. (RP 25, 31)

The parties filled in a pre-printed purchase and sale agreement together by hand.<sup>1</sup> (Ex. 1; RP 27-28, 110-11) The only contingency listed was the sale of the Schleichers' home at Gig Harbor. (Ex. 1; RP 32) The agreement allowed the Schleichers to move into Half Mile almost immediately, on May 1, 2011. (RP 33; Ex. 1) Based on the Benas' understanding that the sale would close soon

<sup>1</sup> Although Jane was not on the title, the Schleichers asked that she too sign the purchase and sale agreement for Half Mile, which she did. (RP 28; Ex. 1)

thereafter, they agreed to live in their RV at a park west of town for the summer. (RP 22-23, 36, 106-07)

The purchase and sale agreement listed the purchase price at \$350,000, since that was the price the Schleichers intended to represent to the bank for their loan. (Ex. 1; RP 30, 121, 157) “Purchase price” was defined by the agreement as the amount “the buyer shall pay to Seller including the Earnest Money *in cash* at closing unless otherwise specified in this Agreement.” (Ex. 1, emphasis added) This definition is consistent with the parties’ agreement, since the Benas would receive \$350,000 in cash at closing, and the remaining \$100,000 would be secured by the note, which the parties agreed would not mature for 5 years. (RP 31, 42-43) As Bena testified, the total purchase price of \$450,000 included the “\$100,000 that we agreed upon over and the above [ ] the closing purchase agreement” for cash of \$350,000. (RP 43)

Although the Schleichers denied it, the Benas testified that at the same time they prepared the purchase and sale agreement, the parties filled out a promissory note for \$100,000 and a real estate mortgage against Half Mile to reflect the total purchase price of \$450,000. (See Ex. 2, 3; RP 40-43, 111-12, 250) The Schleichers did not sign the note and mortgage at that time because the parties

intended to wait until at or near closing to record it to ensure that the note was second to any mortgage secured by the Schleichers from their bank. (RP 42-43)

The terms of the promissory note was that for “value received,” the Schleichers would pay \$100,000 with no interest to Bena, on demand after 5 years:

After Five (5) Years after date, with grace, we promise to pay to the order of Basil D. Bena the sum of One Hundred Thousand Dollars for value received, with interest at the rate of zero (0) interest per annum from date until maturity.

(Ex. 3; *see also* Ex. 2) In the event of default, the note would carry interest of 5%. (Exs. 2, 3) The note provided for attorney fees in the event of a suit to collect on the note. (Ex. 3) The real estate mortgage contained a similar attorney fee provision. (Ex. 2)

The Schleichers denied agreeing to a purchase price of \$450,000, and instead claimed that they only agreed to a purchase price of \$350,000 as set out in the purchase and sale agreement. (RP 247, 404) The Benas testified that they would not have agreed to sell the property for \$350,000 because they believed Half Mile was worth much more, noting that they had received an offer for \$475,000 only one year earlier. (RP 31, 116, 201-02, 209-10)

To support their claim that the purchase price was \$350,000, the Schleichers relied on appraisals for \$315,000 and \$350,000 that they received as part of their financing efforts after they signed the purchase and sale agreement. (RP 247, 267, 299) However, Bruce testified that when he presented Bena with the appraisal for \$350,000, Bena told him that appraisals “always come in \$100,000 too low” (RP 252, 299), which is consistent with the Benas’ testimony that they had agreed to a \$450,000 price, regardless of any lower appraisals. (See RP 201-03)

**E. Because the sale of Half Mile did not close before Bena and his wife left to travel in September 2011, the Schleichers executed the \$100,000 note and mortgage in advance of closing.**

The Benas assumed that the sale of Half Mile would close by September 2011, four months after the parties signed the purchase and sale agreement in May 2011. (See Ex. 1; RP 35-36, 43) During this time, the Schleichers lived rent free at Half Mile, paying only utilities and property taxes. (Ex. 1; RP 36, 289)

The Benas were eager to complete the closing before they left for their winter travel on Labor Day, but it did not. (RP 35-36, 43, 46, 114-15) The parties agreed to complete the remaining paper work for the sale of Half Mile in advance. (RP 46, 114-15) On August 30,

2011, the Schleichers signed the promissory note and real estate mortgage for \$100,000. (Exs. 2, 3; RP 44-45, 250-51)

Bruce testified that he had been “flabbergasted” that he was asked to sign the note and mortgage, and did so due to pressure from his wife Mary to “not rock the boat.” (RP 251; *see also* RP 298) The Schleichers denied that the note and mortgage were associated with their purchase of Half Mile, and claimed that the note and mortgage (which was in favor of Bena only), arose from a separate agreement that they had made with the Benas that if Jane’s health deteriorated and she had a medical emergency, the Schleichers would provide financial assistance. (RP 248-49)

The trial court did not find this testimony credible. The court found that it was “not persuaded that Bruce was cowed by Mary into signing a \$100,000 note, for charitable reasons, with a five year maturity (with interest if not timely paid), and secured on real property that he and Mary were purchasing.” (Finding of Fact (FF) 24, CP 14, *unchallenged*) The court acknowledged that “[w]hile spending \$450,000 for a property that appraised at \$350,000 may not make great sense, it makes even less sense to this Court that the [Schleichers] would formalize their charitable impulse towards Jane

with a promissory note secured by a mortgage on the property.”  
(Conclusion of Law (CL) 2, CP 15, *unchallenged*)

On the day the Schleichers signed the note and mortgage, Bena also signed a release of the mortgage. (Ex. 4; RP 44) Both parties testified that the release was only intended to be used in the event anything happened to the Benas during their travels. (RP 50, 119, 196, 298-99) In that event, the Schleichers would be provided with the release as an “inheritance.” (RP 50, 119, 195-96) This “inheritance” was indicative of the close relationship between the parties, as the Benas intended to gift forgiveness of the note to the Schleichers in the event of their deaths. (RP 50, 119, 195-96)

The Benas placed the note, mortgage, and release in their safety deposit box, with the understanding that the note and mortgage would be recorded after the Schleichers obtained financing from the bank. (*See* RP 43-44, 46, 51, 115) The Benas named Mary Schleicher as personal representative for their estates, and gave directions to their daughter to provide the release to the Schleichers if they died. (RP 50-51)

In addition to the release of mortgage, Bena also signed a real estate tax affidavit for the sale of Half Mile listing the purchase price at \$350,000, which matched the purchase and sale agreement that

would be presented to any lender. (RP 48) According to Bena, he was unsure if the tax affidavit had been filled in at the time he signed it, but if it had, it was completed by the title company and not him. (RP 49) Bena described it as one of a stack of documents the title company had him sign in advance of closing. (RP 49)

**F. Before the sale closed in March 2012, the Schleichers asked Bena to release the note and mortgage so they could secure financing for the rest of the purchase price. The Schleichers agreed to reinstate the note and mortgage after closing.**

The Benas left Port Angeles with the understanding that the sale of Half Mile would close in the latter part of September 2011 or the early part of October. (RP 50, 54) However, the closing continued to drag on, and the Benas became frustrated. (RP 60)

Based on assurances from the Schleichers that the purchase would close, the Benas purchased a new RV in December. (RP 56-57) Because the sale did not close in time, the Benas were forced to liquidate a stock account while they were traveling to complete the purchase of the RV. (RP 57- 60).

Meanwhile, the Schleichers' lender asked for additional information from the Benas, which further frustrated them as they had understood that the Schleichers had been preapproved for the loan. (RP 62-66) Animosity grew between the parties after the

Benas voiced their frustration to Mary in a telephone call, which upset Mary and angered Bruce. (See RP 125-26, 168-69, 260-64, 279, 365-68, 400-01, 422, 429)

The Schleichers consulted with an attorney about rescinding the purchase and sale agreement. (RP 329) Although the Schleichers denied that the note and real estate mortgage was related to the purchase of Half Mile, the attorney prepared documents that would have rescinded all three documents. (RP 335-36) The attorney testified that he believed that the note and mortgage were part of the same transaction to purchase Half Mile. (RP 339) The attorney testified that it was his understanding that the \$100,000 note was “in addition” to the purchase and sale agreement and “existed as part of the transaction.” (RP 331) The trial court agreed, finding that “having weighed the evidence and the credibility of the witnesses, the Court concludes that the promissory note and mortgage [ ] related to a business transaction for the purchase of the property.” (CL 2, CP 14, *unchallenged*)

The Schleichers and Benas eventually agreed to proceed with the purchase and sale of Half Mile, but the attorney advised the Schleichers that they would be required to disclose the note to the lenders. (RP 331) The Benas agreed that the Schleichers should

disclose the note to the lenders if it was necessary to avoid a “fraud,” as the Schleichers claimed. (RP 69) However, the Schleichers told the Benas that the bank would not loan them the money if “the note was still out there.” (RP 69-70) Specifically, Bruce told Bena that if the bank “had to do a second” they would not give them the loan. (RP 70; *see also* RP 127-28)

The Schleichers told the Benas that the only option was for Bena to release the note. (RP 69) That way, the Schleichers would not have to disclose to the bank that they owed \$100,000 to Bena. (RP 69-70) Bruce told the Benas that if Bena “would give him the satisfaction of the note that [the Schleichers] would re-sign it after closing, making it truly a second.” (RP 70; *see also* RP 127-28, 130) Based on the Schleichers’ promise that they would reinstate the note after closing, Bena signed a “release of mortgage” on February 2, 2012, stating that the “mortgage, dated 30 August, 2011, [ ] has been fully paid, satisfied, released and discharged.” (Ex. 6; RP 69-72, 75-76) It is undisputed that the Schleichers had not in any way “fully paid” or “satisfied” the mortgage when the release was signed. (*See* FF 21, CP 13 *unchallenged*)

The trial court found that “the promissory note and mortgage [ ] were released by Ben at Bruce’s urging prior to closing so that the

Bruce and Mary's lender could secure a first position lien on the property; but as between the parties, they did not intend that the terms of the note had been satisfied. The parties simply intended that Ben's mortgage would not be in a position senior to that of the other secured lender, Hunter Financial." (CP 17) While the Schleichers claim that there was no evidence to support the trial court's findings that the parties intended the lender to be in first position, the note and mortgage to be in second position, and the lender to rely on the release (App. Br. 12-13), in fact, there was substantial evidence to support these findings based on statements made by the Schleichers to the Benas. (See RP 31, 43, 44, 69, 70, 127) The trial court found the Benas credible. (FF 8, CP 10)

**G. The Schleichers refused to reinstate the note and mortgage after closing. Bena sued, and the trial court ordered the Schleichers to reinstate the note and mortgage after finding Bena and his wife more credible than the Schleichers.**

The sale of Half Mile finally closed on March 16, 2012, more than ten months after the purchase and sale agreement was executed and after the Schleichers had already moved in and lived there rent-free. (See RP 130; Exs. 1, 13) Shortly after closing, the Benas contacted the Schleichers about reinstating the note and mortgage as previously agreed. (RP 81-82, 132-33) Bruce now refused to

reinstate the note and mortgage, claiming “if it’s not in writing it’s not enforceable and I’m not going to sign it.” (RP 81-82, 182-83)

On September 5, 2013, Bena sued the Schleichers asking the court to order the Schleichers to reinstate the note and mortgage. (CP 89-92) On April 24, 2015, after a 3-day trial, Clallam County Superior Court Judge Christopher Melly entered an order requiring the Schleichers to execute a promissory note and mortgage in the same form as those previously executed. (CP 8-20) (Appendix B)

The trial court acknowledged the “conflicting testimony” regarding the parties’ agreements as to both the purchase price of Half Mile and the release of the mortgage. (FF 8, CP 10) The trial court noted that it “had the opportunity to observe the witnesses while testifying and to weigh their credibility, [and] after considering the entire record made at trial, the Court finds that the explanation offered by the [Schleichers] was less believable” than that offered by the Benas. (FF 8, CP 10 *unchallenged*)

The court noted that “the uncontroverted evidence is that the note and mortgage had to ‘go away’ so that the Schleichers could obtain financing for the purchase of the Half Mile Road property, without subjecting themselves to mortgage fraud if they failed to disclose the existence of the note and mortgage to their lender.

Rather than enter into a subordination agreement whereby Ben's interest would be junior to that of Bruce and Mary's lender, Bena executed a satisfaction of the note and release of the mortgage. There is no evidence presented that the amount represented by the note was, in fact, paid. Rather, the parties intended that the note and mortgage not stand in the way of Bruce and Mary's ability to obtain a loan to purchase the property. That financing would occur only if the Defendants' lender had a first position security interest in the property." (CP 15)

The court acknowledged that the parties had "inartfully tried to reorder the priority of security interest on the property in order to allow the Defendants to obtain commercial financing. The release executed by Ben, vis-à-vis Hunter Financial, the Defendants' lender, is valid since the lender presumably relied upon it to ensure that its loan to Bruce and Mary was secured by a first position lien on the subject property. And the parties intended that Hunter Financial rely upon the release so that financing could be obtained and the sale closed. But there is nothing in the record that would suggest that the parties intended their respective positions with regard to each other to change." (CP 15-16)

The trial court concluded that “if the parties intended that the release be relevant only with regard to Bruce and Mary’s new financing, then it would seem to necessarily follow that, as between the parties, the releases were not intended to effect change to their respective positions. Consequently, the note and the mortgage executed by the Defendants on August 30, 2011, remain valid and satisfy the requirement of writing under RCW 64.04.010.” (CP 16)

The trial court also concluded “that the promissory note and mortgage were not affected by the subsequent release and that each has continuing viability. The Court does not believe that the Defendants’ written promise to pay, secured by an interest in the subject property and executed prior to closing, merged into the deed issued in March 2012.” (CP 17) “Given the timing of the execution of the documents, the nature of the documents, i.e. promissory note and mortgage, the resemblance of what transpired to a ‘business transaction’ and the Court’s utter disbelief that the execution of the promissory note and mortgage was the result of cajolery or pressure, or that the Defendants would reduce a charitable impulse to the terms business transaction, the Court concludes that the Defendants intended that the promissory note and mortgage were part of the purchase price.” (CP 18)

The trial court noted that “the original promissory note (Trial Exhibit No. 3) contained a prevailing party attorney fee provision which is enforceable against the Defendants. The Plaintiff is the prevailing party in this matter, as he has an affirmative judgment rendered in his favor at the conclusion of the entire case.” (CP 19) Nevertheless, the trial court later declined to award Bena his reasonable attorney fees because it found that his action to reinstate the note and mortgage was not in fact an action to “obtain payment” on the note thus did not qualify as a basis for attorney fees under the note. (CP 105-07)

The Schleichers appeal. Basil Bena cross-appeals the denial of attorney fees.

## V. RESPONSE ARGUMENT

**A. The trial court properly enforced the parties’ agreement requiring the Schleichers to reinstate the note and mortgage.**

**1. The trial court’s determination that Bena and his wife were more credible than the Schleichers is indisputable on appeal, as are the facts that the trial court found formed the basis of the parties’ agreement.**

“Generally people have the right to make their agreements entirely oral, entirely in writing, or partly oral and partly in writing.”

*Lopez v. Reynoso*, 129 Wn. App. 165, 171, ¶ 12, 118 P.3d 398 (2005),

*rev. denied*, 157 Wn.2d 1003 (2006). “It is the court’s duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not. That is a question of fact.” *Lopez*, 129 Wn. App. at 171, ¶ 12 (*citations omitted*). “Disputes about oral agreements depend a great deal on the credibility of the witnesses.” *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 87 Wn. App. 495, 501, 962 P.2d 824 (1997). When one party claims the existence of an oral agreement, and the other denies it, “[o]nly a factfinder can determine which of these statements is more credible, considering all the evidence.” *Crown Plaza*, 87 Wn. App. at 501. “Questions of credibility are uniquely and exclusively within the province of the trial court, and we will not disturb that determination on appeal.” *Miller v. McCamish*, 78 Wn.2d 821, 831, 479 P.2d 919 (1971).

Here, “having weighed the evidence and the credibility of witnesses,” the trial court found that the parties had agreed to a purchase price of \$450,000 for Half Mile, as represented by the purchase and sale agreement for \$350,000 and accompanying \$100,000 note and mortgage, and that the subsequent release was solely for purposes of allowing the Schleichers to fund the cash purchase price through a third party lender. In making its

determination, the trial court relied on the following testimony that it found “credible”:

The details of the sale and purchase price of \$450,000 was agreed up on by all. [ ] Bruce Schleicher said he was pre-approved for only \$350,000. Ben agreed to take a promissory note for the balance of \$100,000.

(FF 9, CP 11; FF 8, CP 10; CL 1, CP 14)

Jane [ ] prepared a promissory note for the Defendants' signature in the amount of \$100,000. [T]hat sum represented the difference between the \$450,000 purchase price and the \$350,000 amount stated in the purchase and sale agreement.

(FF 13, CP 11; FF 8, CP 10; CL 1, CP 14)

Bruce told Ben he could not get a mortgage with the promissory note and mortgage outstanding. [ ] Concerned about potential for mortgage fraud if they didn't disclose the promissory note to their finance company, Bruce told Ben he needed the note “to go away.”

(FF 20, CP 13; FF 8, CP 10; CL 1, CP 14)

Bruce said he would re-sign a promissory note after he obtained financing. With that assurance, Ben signed a satisfaction for the note and sent it to Bruce.

(FF 21, CP 13; FF 8, CP 10; CL 1, CP 14)

Bruce and Mary never paid Ben the \$100,000 represented by the note and secured by mortgage in exchange for the 2012 Release of Mortgage which Ben signed.

(FF 21, CP 13; FF 8, CP 10; CL 1, CP 14)

[W]hen the subject of reissuance of the note was broached, Bruce told him [Ben] he wasn't signing a new note and exclaimed "if it's not in writing it's not enforceable" and hung up.

(FF 22, CP 13; FF 8, CP 10; CL 1, CP 14)

These findings, as well as the court's determination that the testimony of the Benas was more credible than the testimony of the Schleichers are not challenged on appeal. The findings are thus verities on appeal. *Ban-Co Inv. Co. v. Loveless*, 22 Wn. App. 122, 129, 587 P.2d 567 (1978). These findings support the trial court's conclusion that the parties agreed that the Schleichers would reinstate the note and mortgage for \$100,000, which had been part of their underlying agreement that the Schleichers would pay a total of \$450,000 to purchase Half Mile, consistent with the written purchase and sale agreement, note, and mortgage. All of the legal impediments that the Schleichers claim prevent enforcement of the parties' agreement fall in the face of these facts.

**2. The trial court properly considered parol evidence to enforce the parties' agreements.**

The trial court here properly enforced the parties' agreements, which were "partly oral and partly in writing." *See Lopez*, 129 Wn. App. at 171, ¶ 12. In interpreting these agreements, and then enforcing them, the trial court indeed considered the "intent" of the

parties. (App. Br. 13-14) “This intent may be discerned from the language of the agreement as well as from viewing the objective of the contract, the circumstances around its making, the subsequent conduct of the parties, and the reasonableness of their respective interpretations.” *Lopez*, 129 Wn. App. at 170, ¶ 11.

**a. The evidence supports the parties’ agreement that the full purchase price for Half Mile was \$450,000.**

The trial court properly concluded that the parties agreed to a total purchase price of \$450,000 for Half Mile. This agreement is evidenced by both the written purchase and sale agreement for \$350,000 in “cash at closing” and the accompanying promissory note and real estate mortgage for \$100,000. (Exs. 1, 2, 3) The trial court rejected the Schleichers’ claim that the note and mortgage were due to a “charitable impulse,” and concluded based on evidence it found more credible that the documents “were related to a business transaction for the purchase of the property.” (FF 8, CP 10; CL 1, CP 14)

Contrary to the Schleichers’ claims, the trial court did not use “extrinsic evidence to contradict writings.” (App. Br. 14) For instance, evidence that the parties agreed to a total purchase price of \$450,000 was not inconsistent with the written purchase and sale

agreement. The “purchase price” under the purchase and sale agreement is defined as the amount the “buyer shall pay to seller [ ], including the Earnest Money, in cash at Closing.” (Ex. 1) The additional \$100,000 in the form of a note and mortgage makes up the *total* purchase price. (Exs. 2, 3) This is not inconsistent with the purchase and sale agreement because the \$100,000 note and mortgage were not part of the “cash at closing.” Accordingly, like the parties in *Lopez v. Reynoso*, 129 Wn. App. 165, 118 P.3d 398 (2005), the parties here were not bound by the integration clause in the purchase and sale agreement. (See Ex. 1)

In *Lopez*, the parties disputed the price agreed upon for the purchase of a vehicle. The seller claimed that the actual sale price was \$8,000, but when the buyer provided a \$2,000 down payment, the buyer requested the written sale agreement to reflect a sale price of \$6,500 with \$500 down. The buyer claimed that the sale price was \$6,500 as written, and her down payment of \$2,000 reduced the amount owing on the sale price to only \$4,000 not \$6,000. The trial court found the seller more credible and concluded that the written agreement was only partially integrated. In affirming the trial court, Division Three concluded that evidence of a sale price of \$8,000 with a down payment of \$2,000 is not inconsistent with the written

agreement of a sale price of \$6,500 with \$500 down, as the result is the same – a balance owing of \$6,000. *Lopez*, 129 Wn. App. at 172, ¶ 15.

The *Lopez* court rejected the buyer’s claim that the parties were bound by the integration clause in the sale agreement. The Court held that “when material extrinsic evidence shows that outside agreements were relied upon, those parol agreements should be given effect rather than allowing boilerplate to vitiate the manifest understanding of the parties.” 129 Wn. App. at 173, ¶ 16.

The same is true here. “Material evidence” that the trial court found credible shows that the parties agreed to a total purchase price of \$450,000. The agreement is not inconsistent with the terms of the purchase and sale agreement that provides that only the “cash at closing” is \$350,000. The balance of \$100,000 secured by the note and mortgage made up the remainder of the total purchase price.

**b. The evidence supports the parties’ agreement that the release was intended solely for the Schleichers to obtain third party financing.**

The trial court also found that the parties agreed that the release of the note and mortgage was for the sole purpose of allowing the Schleichers to obtain third party financing to fulfill the \$350,000 “cash at closing” purchase price, and that the Schleichers would

reinstate the note and mortgage upon closing. (See FF 8, CP 10; FF 21, CP 13; CP 15-16) This agreement is evidenced by the \$450,000 purchase price that the trial court found credible, the undisputed evidence that the note and mortgage had not been satisfied, the release, and testimony from the Benas that the Schleichers agreed to reinstate the note once the third party financing was complete. Based on this evidence, the trial court properly concluded that the parties intended that the bank “rely upon the release so that financing could be obtained and the sale closed. But there is nothing in the record that would suggest that the parties intended their respective positions with regard to each to change.” (CP 16)

The fact that the written release did not include a provision requiring reinstatement of the note and mortgage does not make the parties’ agreement unenforceable. “Whether the oral agreement is viewed conceptually as a separate collateral contract or as a partially integrated contract with one part oral and the other part written, the intent of the parties is the critical fact to be ascertained.” *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 772, ¶ 21, 275 P.3d 339, *rev. denied*, 175 Wn.2d 1008 (2012) (*citations omitted*).

In *Dave Johnson Ins.*, the plaintiff and defendant executed a buy-sell agreement that gave defendant the first right of refusal to

buy an insurance agency in the event of plaintiff's death. The agreement also provided that the purchase could be funded by life insurance policies. Contemporaneous with this written agreement, the plaintiff transferred two insurance policies on his life to defendant. According to plaintiff, the transfer was to allow defendant to fund the purchase in the event of plaintiff's death and "for that need, and that need only." The defendant on the other hand claimed it was a "thank you gift" for all of the defendant's efforts in building the insurance agency.

After the defendant was subsequently released from the insurance agency and the buy and sell agreement was deemed void by its terms, the plaintiff sued for the return of the insurance policies. In affirming the trial court's decision ordering the return of the policies, this Court rejected the defendant's claim that the trial court added an additional term to the parties' written agreements. This Court agreed that nothing in the parties' written agreements required the return of the policies, but concluded that there was a "separate oral agreement reflecting the purpose of the insurance policies' transfer from [plaintiff] to [defendant], which was solely to fund the buy and sell agreement." *Dave Johnson*, 167 Wn. App. at 771, ¶ 20. In reaching that decision, this Court deferred to the trial court's findings of fact

and its determination that the plaintiff's description of the parties' agreement and understanding was more credible than the defendant. *Dave Johnson*, 167 Wn. App. at 772-73, ¶ 22.

Likewise here, the parties had a "separate oral agreement" that the release was intended solely to accommodate the third party financing and the note and mortgage would be reinstated after financing was completed. This Court should defer to the trial court's findings of fact and its credibility determinations that the Benas were more credible than the Schleichers in describing the purpose of the release. As the trial court found, "the parties intended that the note and mortgage not stand in the way of Bruce and Mary's ability to obtain a loan to purchase the property," but that the parties did not intend their "respective positions with regard to each other to change." (CP 15-16)

**3. The parties' agreement was not merged in the deed transferring Half Mile to the Schleichers.**

The parties' agreement that the \$100,000 note and mortgage, which fulfilled the total purchase price of \$450,000, be reinstated did not merge with the statutory warranty deed, and remained enforceable after closing. (App. Br. 20) The doctrine of merger provides that "the provisions of a contract for the sale of real estate, and all prior negotiations and agreements, are considered merged in

a deed made in full execution of the contract of sale.” *Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969); *see also Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955). “However, this rule is not ironclad and in the past this court has found grounds for exceptions.” *Black*, 75 Wn.2d at 248. Among those exceptions is when there are “stipulations in the contract which are not contained in, not performed by, and not inconsistent with the deed and which are held to be collateral to or independent of the obligation to convey.” *Black*, 75 Wn.2d at 248.

In *Black*, the parties had orally agreed that the property purchased by the plaintiffs would have a view reservation. However, the final written deed transferring the property contained no such reservation, providing only that the property was “subject to rights, restrictions, easements, and covenants of record, if any.” The Supreme Court held that the oral covenant to not impair the view was not inconsistent with the deed, was not subsumed in the deed, and remained separately enforceable. *Black*, 75 Wn.2d at 249.

In reaching its conclusion, the Court noted that “both the admissions and the actions of the defendants demonstrate that the oral covenant did in fact exist, was an inducement to enter the contract, and was foremost in the minds of all the parties subsequent

to the execution of the deed of conveyance.” *Black*, 75 Wn.2d at 249. Further, the Court recognized “the right of contracting parties to reduce some provisions of their contract to written form and to leave others unwritten, trusting the latter to oral expression only. The provisions not in writing may be proved by parol evidence insofar as they are not inconsistent with the written portion.” *Black*, 75 Wn.2d at 249.

Here, the parties’ agreement for the Schleichers to reinstate the \$100,000 note and mortgage did not merge into the decree. It was an “independent” obligation that was not “inconsistent” with the deed conveying the property. The Schleichers induced Bena to not only sign the release, but also to convey the property, based on the Schleichers’ promise that they would reinstate the \$100,000 note and mortgage soon thereafter. While the deed was conveyed with only the \$350,000 cash purchase paid and the \$100,000 note and mortgage outstanding, this is not inconsistent with the deed. (*See* Exs. 1, 2, 3, 13) The release of the note and mortgage was only executed at the Schleichers’ “urging prior to closing so that Bruce and Mary’s lender could secure a first position lien on the property; but as between the parties, they did not intend that the terms of the note had been satisfied.” (CP 17) Accordingly, the trial court “found that

the promissory note and mortgage were not affected by the subsequent release and that each has continuing viability. The Court does not believe that the Defendants' written promise to pay, secured by an interest in the subject property and executed prior to closing, merged into the deed issued in March 2012." (CP 17)

**B. The parties' agreements are not barred by the statutes of frauds.**

The parties' agreement requiring the Schleichers to reinstate the note and mortgage of \$100,000 after inducing Bena to sign a release is not unenforceable under either the real estate statute of frauds (RCW 64.04.010) or the contract statute of frauds (RCW 19.36.010). "[T]he main purpose of both statutes is to prevent fraud in contractual undertakings." *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002) (citing *Miller v. McCamish*, 78 Wn.2d 821, 828, 479 P.2d 919 (1971)). These statutes must be "narrowly construed to achieve its purpose to prevent fraud or avoidance of otherwise enforceable agreements." *Firth*, 146 Wn.2d at 614. These statutes should not be applied unless the agreement falls "strictly within its terms." *Firth*, 146 Wn.2d at 614. "To apply these statutes in such a manner as to promote and encourage fraud would be to *defeat the clear and unambiguous intent of the legislature in their enactment.*" *Miller*, 78 Wn.2d at 828 (emphasis in original).

Here, the agreement falls outside the statutes of fraud, and applying the statutes under these circumstances would not further the Legislature's intent of avoiding fraud because it would unfairly reward the Schleichers for inducing Bena to sign a release of the note and mortgage that has indisputably not been paid or otherwise satisfied:

First, this agreement falls outside of RCW 19.36.010 because it can be performed within one year. RCW 19.36.010 (1) ("every agreement that by its terms is not to be performed in one year from the making thereof" must be in writing). (App. Br. 26) The agreement to reinstate the note and mortgage was to be accomplished after the Schleichers secured financing, which was anticipated to occur (and did in fact occur) within two months of them making the agreement. An agreement is outside the statute of frauds if performance is possible within one year. *Duckworth v. Langland*, 95 Wn. App. 1, 10, 988 P.2d 967 (1998), *rev. denied*, 138 Wn.2d 1002 (1999).

Second, the agreement falls outside of RCW 64.04.010, which requires that any "encumbrance upon real estate, shall be by deed." (App. Br. 24) As the trial court acknowledged, "there is substantial evidence in the record that the Defendants executed the promissory

note and the mortgage as their free and voluntary act in August 2011. There is no oral expression sought to be enforced.” (CP 17) While the trial court acknowledged the release, it found “there is no evidence presented that the amount represented by the note was, in fact, paid.” (CP 15) The trial court further found, and substantial evidence supports, that the release was intended solely for the Schleichers to secure financing for the cash purchase price and “there is nothing in the record that would suggest that the parties intended their respective positions with regard to each other to change.” (CP 16; see RP 31, 43, 44, 69, 70, 127) Accordingly, the trial court concluded that “the note and the mortgage executed by the Defendants on August 30, 2011, remain valid and satisfy the requirement of writing under RCW 64.04.010.” (CP 16)

Finally, even if the agreement fell within the statutes of fraud, the parties partially performed the agreement, satisfying the statutes of fraud. *Miller*, 78 Wn.2d at 829 (upon proof of partial performance the court may exempt an agreement from the statute of frauds); see also *DewBerry v. George*, 115 Wn. App. 351, 361, 62 P.3d 525 (“the doctrine of part performance is an equitable doctrine which provides the remedies of damages or specific performance for agreements that

would otherwise be barred by the statute of frauds”), *rev. denied*, 150 Wn.2d 1006 (2003).

The Schleichers voluntarily signed the original note and mortgage for \$100,000. Based on the Schleichers’ assurance that they would reinstate the note and mortgage upon obtaining financing for the cash purchase price and the sale closing, Bena signed the release, and closed on the sale. The only part of the parties’ agreement that was not performed was for the Schleichers to reinstate the note. As the trial court found, “there was no evidence presented that the amount represented by the note was, in fact paid” (CP 15), the release was “not intended to effect change to their respective positions” (CP 16), and the “need for replacement documents exists in order to provide notice to future persons looking to the property for security.” (CP 16)

Because the agreement does not fall within the confines of the statutes of fraud, and in any event was partially performed, the trial court properly enforced the parties’ agreement.

**C. The Schleichers are estopped from avoiding their agreement to reinstate the note and mortgage that Bena released at their request.**

Although the trial court did not rely on the doctrine of estoppel to enforce the parties’ agreement, this Court could

nevertheless affirm on that basis. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002) (appellate court may affirm the trial court on any grounds established by the pleadings and supported by the record); *Hellbaum v. Burwell & Morford*, 1 Wn. App. 694, 701, 463 P.2d 225 (1969) (“if there is substantial evidence supporting the judgment on any theory, the trial court should be sustained”).

Under the doctrine of promissory estoppel, the Schleichers are estopped from avoiding their promise to reinstate the note and mortgage after financing was complete. The five elements of promissory estoppel are: “(1) A promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.” *Hellbaum*, 1 Wn. App. at 701.

Here, the Schleichers promised to reinstate the note after they obtained financing from the bank. Bena relied on that the promise when he signed the release, and would not have otherwise signed the release but for that promise. The only way to avoid the injustice of Bena losing \$100,000 of the price that the Schleichers had

previously agreed to pay would be to enforce their promise to reinstate the note.

Likewise, the Schleichers are equitably estopped from avoiding their agreement to pay \$450,000 for Half Mile. Equitable estoppel is established when the following elements are shown: “(1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury resulting from allowing the first party to contradict or repudiate such admission, statement, or act.” *Marriage of Barber*, 106 Wn. App. 390, 396, 23 P.3d 1106 (2001) (*citations omitted*).

Here, the Schleichers agreed to pay \$450,000 for Half Mile as evidenced by their execution of the purchase and sale agreement for \$350,000 cash and their execution of the \$100,000 note and mortgage. (Exs. 1, 2, 3) Bena relied on those actions in closing on the sale of Half Mile to the Schleichers. The Schleichers’ claim now that they only agreed to pay \$350,000 and their subsequent refusal to reinstate the note is inconsistent with their earlier actions. Bena would be injured if the Schleichers are allowed to contradict their earlier agreement to pay a total of \$450,000 for Half Mile.

The Schleichers are estopped from avoiding enforcement of their earlier agreement to reinstate the \$100,000 note and mortgage. The trial court properly ordered them to fulfill the total purchase price of \$450,000 that they promised to pay for the property that was conveyed to them.

**D. The parties' agreement was not illegal.**

The parties' agreement that the total purchase price for Half Mile was \$450,000 and that the Schleichers would reinstate the \$100,000 note and mortgage once financing was complete for the \$350,000 cash purchase price was not illegal. (App. Br. 27-30) The agreement was not intended to abet a "false statement" by the Schleichers to their lender. (App. Br. 28) Instead, it was to ensure that note and mortgage take second position to any loan obtained by the Schleichers from their third party lender. Further, the statement signed by the Schleichers (that in fact was signed *before* Bena signed the release) was not false in stating that "all additional debt obligations that are expected to exist at or around the time of this transaction closing" has been disclosed. (Ex. 5) The note did not mature for five years, and the "debt" was not due until a demand was made. Even if it were false, the Schleichers should not be allowed to avoid their agreement when the purported "illegality" benefited only

them by allowing them to obtain the mortgage that they sought. *Burt v. Washington State Dept. of Corrections*, 191 Wn. App. 194, 210, ¶ 21, 361 P.3d 283 (2015) (“it is well settled that a party with unclean hands cannot recover in equity”).

The agreement was also not illegal under the Real Estate Excise Tax Statute simply because the real estate tax affidavit stated the “gross selling price” as \$350,000, rather than the \$450,000 agreed upon. (App. Br. 29) While there is “rebuttable presumption” that the selling price is “equal to the total consideration paid or contracted to be paid to the seller” that presumption may be rebutted by a fair market appraisal of the property. *See* WAC 458-61A-102(19). Here, there was evidence that the property was appraised at \$350,000, which is the selling price listed in the real estate tax affidavit. (*See* RP 267)

In any event, the amount listed on the affidavit represented the amount actually received by Bena before the sale closed. The note for an additional \$100,000 did not mature for another 5 years after closing, and both parties testified that (at the time of the agreement) payment on the note may have been foregone entirely in the event of the Benas’ deaths. Stating the selling price as \$350,000

was reasonable because any tax should be paid on the amount actually received by the time the sale closed.

Further, a contract will not be enforced as illegal unless the agreement is “illegal in and of itself.” “If the promise sued upon is related to an illegal transaction, but is not illegal in and of itself, recovery should not be denied, notwithstanding the related illegal transaction, if the aid of the illegal transaction is not relied upon or required, or if the promise sued upon is remote from or collateral to the illegal transaction, or is supported by independent consideration.” *Brougham v. Swarva*, 34 Wn. App. 68, 79-80, 661 P.2d 138 (1983) (*citations omitted*).

Here, the parties’ agreement to release the note and mortgage until after the financing from the third party lender closed was not “illegal in and of itself.” There was no evidence that the agreement was intended to defraud the Schleichers’ lender. Instead, it was to ensure that the lender take “first position” over the note and mortgage in favor of Bena. (*See CP 17: “The parties simply intended that Ben’s mortgage would not be in a position senior to that of the other secured lender.”; See also RP 31, 43, 4, 69, 70, 127*)

Nor was there any evidence that the agreement was intended to avoid the additional \$1,500 to \$1,800 in taxes that would have

been owed had the selling price been listed at \$450,000. (*See* RP 145-46) Neither party filled in the real estate tax affidavit, which had apparently been prepared by the title company who presumably used the purchase and sale agreement to fill in the selling price. (*See* RP 48) Bena testified that he had not intended to avoid taxes when signing the real estate tax affidavit, and that he intended to pay taxes on the remaining purchase price of \$100,000 in five years when he receives it. (*See* RP 155-56)

The parties' agreement was not illegal and the trial court properly enforced it.

## **VI. CROSS-APPEAL ARGUMENT**

### **A. The trial court erred in denying attorney fees to Bena under the fee provisions of the note and mortgage.**

The note signed by the Schleichers included a fee provision that required them to pay attorney fees to Bena if a suit is filed to collect on the note:

In case suit or action is commenced to collect this note or any portion thereof, we promise to pay, in addition to the cost provided by the statute, such sum as a Court may adjudge as reasonable attorney's fees therein (including any action to enforce the judgment and this provision as to attorney's fees and costs shall survive the judgment.")

(Ex. 3) Similarly, the real estate mortgage also contained an attorney fee provision:

In case of failure to perform any of the foregoing covenants, or default is made in the payment of said note, or any part thereof, when the same shall become due, then this mortgage may be at once foreclosed for the entire principal sum, accrued interest and costs, and in such foreclosure suit there shall be included in the judgment a reasonable sum as attorneys' fees.

(Ex. 2)

RCW 4.84.330 provides that a contract containing an attorney's fee provision entitles the prevailing party in an enforcement action to recover reasonable attorney's fees and costs:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 4.84.330; *Singleton v. Frost*, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987) (an attorney fee provision in a promissory note is required to be enforced in favor of the prevailing party under RCW 4.84.330).

Although the trial court acknowledged that Bena was the prevailing party (CP 19), it erred in concluding that the attorney fee provision did not apply because he was not seeking "to collect" on the note. (CP 106) That interpretation of the fee provision is far too narrow. Bena's pursuit of enforcement of the parties' agreement to

reinstate the note and mortgage that the Schleichers sought to avoid were necessary actions to ensure collection on the note, and attorney fees were warranted. *See e.g Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 287 P.3d 606 (2012).

In *Atlas*, the plaintiff sued under a credit application which provided that “in the event applicant becomes delinquent in his account [plaintiff] shall have the right to bring suit [and] applicant agrees to pay the cost of collection including reasonable attorney fees by [plaintiff].” The defendants counterclaimed for breach of contract, breach of warranty, and negligent representation. After ordering the defendants to pay certain sums to plaintiff for defendants’ delinquency, the trial court only awarded fees to the plaintiffs that were necessary “to collect” the delinquent account. The trial court refused to award fees incurred by plaintiff in defending the counterclaims.

Division One reversed, holding that the trial court interpreted the fee provision too narrowly and that plaintiffs were entitled to all fees incurred to defend against counterclaims because they were necessary for it to succeed on the collection of the debt:

If [the counterclaims were] successful, they would have defeated Atlas’s claim on the debt. Thus, they had to be resolved for Atlas to prevail on its collection action.

*Atlas*, 170 Wn. App. at 240, ¶ 12.

Likewise, Bena is also entitled to all of the reasonable attorney fees that were incurred to enforce the note and mortgage because the action was necessary to succeed on the eventual collection of the note. If Schleichers had been successful in essentially setting aside the note and mortgage, Bena would have forever been foreclosed from pursuing collection. Because the Schleichers refused to even acknowledge their obligation under the note and mortgage Bena was forced to take this preemptive step to ensure any collection action by obtaining an order from the court requiring the Schleichers to reinstate the note and mortgage. The trial court erred in refusing to award attorney fees under the provisions of the note and mortgage.

**B. This Court should award Bena attorney fees on appeal.**

A prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). Here, both the note and mortgage contain fee provisions. This Court should award Bena attorney fees under the note and mortgage for having to defend this appeal and pursue the cross appeal. RCW 4.84.330 (prevailing party entitled to attorney fees if provided for under a contract); RAP 18.1.

## VII. CONCLUSION

This Court should affirm the trial court's orders enforcing the parties' agreement and remand for an award of attorney fees. This Court should also award attorney fees to Bena on appeal.

Dated this 23<sup>rd</sup> day of March, 2016.

SMITH GOODFRIEND, P.S.

By:   
Valerie A. Villacin  
WSBA No. 34515

Attorneys for Respondent/Cross-Appellant

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 23, 2016, I arranged for service of the foregoing Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	Facsimile Messenger U.S. Mail <input checked="" type="checkbox"/> E-Mail
Craig L Miller Craig L. Miller P.S. 711 E Front St Ste A Port Angeles WA 98362 cmiller@craiglmiller.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
David H Neupert Platt Irwin Law Firm 403 South Peabody Port Angeles WA 98362 dhneupert@plattirwin.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 23<sup>rd</sup> day of March, 2016.

  
Jenna L. Sanders

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**SUPERIOR COURT OF WASHINGTON  
COUNTY OF CLALLAM**

BASIL D. BENA, )  
 )  
 Plaintiff, )  
 vs. )  
 NATHAN B. SCHLEICHER and MARY )  
 L. SCHLEICHER, husband and wife, )  
 )  
 Defendants. )

NO. 13-2-00893-1  
MEMORANDUM OPINION  
and ORDER

The Plaintiff has moved for reconsideration of the award of attorney's fees. The Court awarded statutory fees of \$200. The Plaintiff asserts that RCW 4.84.330 controls and the Court lacks discretion to award less than a reasonable amount of attorney's fees. RCW 4.84.330 provides, in part, that:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. *Wachovia SBA Lending, Inc., v. Kraft*, 165 Wn. 2d 481, 200 P. 3d 683 (2009).

The note executed on August 30, 2011, provides, in part, that:

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“In case suit or action is commenced to collect this note or any portion thereof, we promise to pay, in addition to the cost provided by statute, such sum as a Court may adjudge reasonable as attorney’s fees therein, (including any action to enforce the judgment and this provision as to attorney’s fees and costs shall survive the judgment.)”

Because the note only provides for attorney’s fees against the Defendants, then RCW 4.84.330 would create the same right of recovery in favor of the Defendants against the Plaintiff. However, that is not an issue before the court.

The promissory note did not define the phrase “to collect” nor do there appear to be any cases in which the phrase is defined.

Black’s Law Dictionary, Revised 4<sup>th</sup> Edition, defines “collect,” in part, as follows:

“To collect the debt or claim is to obtain payment or liquidation of it . . .”

Here, the Plaintiff did not “obtain payment” on the promissory note. He obtained an order of the Court directing the Defendants to execute anew both the note and mortgage. The Court found that execution was necessary to establish the junior status of Plaintiff’s lien to that of the Defendant’s finance company, Hunter Financial Group, and to put the world on notice that the release of mortgage executed by the Petitioner had limited application, i.e., to establish Hunter Financial Groups senior lien status.

It may be that, at some point in the future, the Plaintiff will be required to initiate an action to “obtain payment” from the Defendants consistent with the terms of the note. If he were to prevail in litigation, attorney’s fees would be appropriate. But

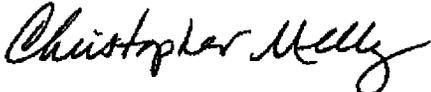
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under the facts here, the Court does not believe that the attorney's fees provision has been triggered. Therefore, only statutory attorney's fees are available.

**ORDER**

It is hereby ORDERED, ADJUDGED and DECREED, that the Plaintiff's Motion for Reconsideration is DENIED.

DATED this 11<sup>th</sup> day of May, 2015.

  
CHRISTOPHER MELLY  
JUDGE

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SUPERIOR COURT OF WASHINGTON FOR CLALLAM COUNTY

BASIL D. BENA,  
Plaintiff,

v.

NATHAN B. SCHLEICHER and MARY L. SCHLEICHER, husband and wife,  
Defendants.

NO. 13-2-00893-1

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

(Clerk's Action Required re: Judgment awarded to Plaintiff)

JUDGMENT SUMMARY

Judgment Creditor:	Basil D. Bena
Judgment Debtors:	Nathan B. Schleicher and Mary L. Schleicher
Attorney for Judgment Creditor:	David H. Neupert
Attorney for Judgment Debtor:	Craig L. Miller
Principal Judgment Amount:	\$100,000.00
Costs Awarded to Plaintiff:	\$ <u>1,360.07</u>
Attorney Fees Awarded to Plaintiff:	\$ <u>200.00</u>
Interest Rate on Judgment (after 8/31/16):	Five Percent (5%)
Interest Rate on Attorney Fees & Costs:	Five Percent (5%)

**TOTAL JUDGMENT** \$ 101,560.07

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on

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT - 1

PLATT IRWIN LAW FIRM  
403 South Peabody  
Port Angeles, WA 98362  
(360) 457-3327

1 THIS MATTER came on for trial on September 24-25, 2014. The plaintiff was  
2 represented by David H. Neupert of the Platt Irwin Law Firm, and the defendants were  
3 represented by Craig Miller. The Court having, having considered the testimony of the  
4 witnesses, the exhibits admitted at trial, and the arguments of counsel, issued its  
5 Memorandum Opinion on December 26, 2014. The Court now makes the following:

7 **FINDINGS OF FACT**

8 1. Plaintiff Basil ("Ben") Bena owned real property (the "property") in Clallam  
9 County located at 1010 E. Half Mile Road, Port Angeles, WA 98362 (TPN: 063026230300).

10 2. Ben is married to Jane Brae Bedell ("Jane"). Ben paid \$147,000.00 cash for  
11 the property when he purchased it in 1998. Ben made substantial improvements to the  
12 property; he remodeled the house, built a well house, storage, and a large shop/garage, which  
13 was also insulated.  
14

15 3. Jane has a medical condition, which caused her to suffer a number of strokes.  
16 Jane did not want to impoverish Ben for the cost of her medical care so they divorced in  
17 order to segregate assets and liabilities. Jane also quit-claimed her interest in the property to  
18 Ben. Ben and Jane later remarried. They did not live separate and apart during any time  
19 material to determination of the issues in this case  
20

21 4. Ben and Jane were well-acquainted with the defendants as family friends.  
22 When the defendants moved to Washington state, they bought a residence in Gig Harbor.  
23 The parties stayed in close contact.  
24  
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FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 2

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1           5.       Ben and Jane owned a fifth-wheel travel trailer which they used for travel  
2 between April and September of each year. The property was vacant while they were away.  
3 In 2011, the Defendants asked Ben and Jane if they could use the property as a weekend  
4 getaway. Ben and Jane agreed because they liked the Defendants, and that arrangement kept  
5 the property more secure.  
6

7           6.       The property was listed for sale in 2006-2007 at \$550,000.00. In 2009-2010,  
8 it was listed for sale for \$515,000.00. The price was later reduced to \$490,000.00. Ben and  
9 Jane received a \$475,000.00 offer in August 2010. That offer was not accepted because it  
10 had too many buyer's contingencies.  
11

12           7.       Jane later told Mary Schleicher ("Mary") that she and Ben planned again to  
13 list the property for sale, so the Defendants would keep it in good shape while they used it.  
14 According to Jane's testimony, Mary expressed an interest in purchasing the property.  
15 According to Mary's testimony, Jane urged the Defendants to purchase the property, because  
16 of Jane's poor health.  
17

18           8.       The parties introduced conflicting testimony regarding their eventual  
19 agreement under which the Defendants acquired the property. The court had the opportunity  
20 to observe the witnesses while testifying and to weigh their credibility. Neither explanation  
21 offered by the parties regarding their eventual agreement was entirely satisfying to the court.  
22 After considering the entire record made at trial, the Court finds that the explanation offered  
23 by the Defendants was less believable.  
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FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 3

**PLATT IRWIN LAW FIRM**  
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1           9.       Ben testified that he and Jane met with the Schleichers at the property in April  
2 2011 to discuss details of the sale and the purchase price of \$450,000 was agreed upon by all.  
3 Ben testified that Bruce Schleicher ("Bruce") said he was pre-approved for only \$350,000.  
4 Ben agreed to take a promissory note for the balance of \$100,000.  
5

6           10.       Bruce Schleicher offered conflicting testimony that the Defendants' home in  
7 Gig Harbor was within driving distance of Sea-Tac airport, which was important because  
8 Bruce was a commercial airline pilot. Bruce testified that the property was not very  
9 attractive to purchase because of the distance and time required to get to Sea-Tac airport.  
10 Bruce testified that Jane then offered to sell the property for \$350,000 to the Defendants.  
11

12           11.       Bruce obtained a "form" purchase and sale agreement from the realtors he had  
13 worked with on the purchase on his Gig Harbor residence.  
14

15           12.       At trial, Bruce denied there was any discussion about a \$450,000 purchase  
16 price. The appraisal of the property valued it at \$315,000. Bruce testified he agreed to a  
17 \$350,000 purchase price in part because of Jane's medical issues, and they wanted to help  
18 their friends.  
19

20           13.       Ben testified that Jane had prepared a promissory note for the Defendants'  
21 signature in the amount of \$100,000. He testified that sum represented the difference  
22 between the \$450,000 purchase price and the \$350,000 amount stated in the purchase and  
23 sale agreement. The \$100,000 note provided for no interest with a 5- year maturity or call  
24 date. The note provided for default interest at the rate of five percent (5%) per year. The  
25  
26

1 note was to be secured by a mortgage on the property. Jane prepared the promissory note  
2 and the mortgage based upon forms she located on the internet.

3  
4 14. Ben testified that the promissory note and the mortgage were to be held in his  
5 safe deposit box. In the event of Jane and Ben's death, then Mary, as their personal  
6 representative, would retrieve the promissory note and mortgage essentially as a bequest and  
7 the Defendants would not then be required to pay the promissory note.

8  
9 15. The Defendants executed the promissory note and mortgage on August 30,  
10 2011 (Trial Exhibit Nos. 3 & 2). The Defendants offered testimony that Mary told Bruce to  
11 "just sign" the promissory note and mortgage. Bruce testified that he was "flabbergasted"  
12 and signed the promissory note and mortgage without any meaningful review.

13  
14 16. After the promissory note and deed of trust were deposited in the safe deposit  
15 box, Ben and Jane left the area to travel for fall and winter.

16  
17 17. The purchase and sale agreement on the property had not closed by the time  
18 the Plaintiffs left the area. The Defendants were waiting to sell their residence in Gig Harbor  
19 in order to close on the property. The Defendants sold their Gig Harbor property for  
20 \$425,000 on or about December 15, 2011.

21  
22 18. Throughout the fall of 2011, Ben and Jane were in contact about closing the  
23 sale on the property. As time progressed, Ben's patience frayed, in no small part because he  
24 and Jane purchased a new fifth wheel in Texas and need an infusion of cash to cover the  
25 purchase price not covered by trade-in of their existing fifth wheel. With delays in closing,  
26 they were forced to liquidate their Schwab stock account.

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 5

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1           19.    The delays in closing and periodic requests for documents from Ben by Bruce  
2 to facilitate Bruce and Mary's financing for the property challenged the couple's friendship.

3           20.    As the Defendants were trying to obtain financing to purchase the property,  
4 the promissory note and mortgage which they had in August 2011 became a matter of  
5 concern to them. According to the testimony at trial, Bruce told Ben he could not get a  
6 mortgage with the promissory note and mortgage outstanding. Bruce and Mary consulted  
7 with an attorney. Concerned about potential for mortgage fraud if they didn't disclose the  
8 promissory note to their finance company, Bruce told Ben he needed the note "to go away."  
9

10           21.    Ben testified that Bruce said he would re-sign a promissory note after he  
11 obtained financing. With that assurance, Ben signed a satisfaction for the note and sent it to  
12 Bruce. With the issue of the note and mortgage resolved, Bruce and Mary secured their  
13 financing and the sale closed. Bruce agreed at trial that he and Ben spoke with the regard to  
14 the need for the note to go away, but he disputed that he agreed to reissue the note after the  
15 property closed. However, it appears undisputed that Bruce and Mary never paid Ben the  
16 \$100,000 represented by the note and secured by mortgage in exchange for the 2012 Release  
17 of Mortgage (Trial Exhibit No. 6) which Ben signed.  
18

19           22.    Following closing on the property, Ben contacted Bruce regarding reissuance  
20 of the note. Bruce was en route to the airport for a flight to Japan and, therefore, they spoke  
21 several days later. Ben testified that, when the subject of reissuance of the note was  
22 broached, Bruce told him he wasn't signing a new note and exclaimed "if it's not in writing  
23 it's not enforceable" and hung up. Bruce testified that he did not know what Ben was talking  
24  
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FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 6

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1 about. By this point in time, the couples' relationship generally had deteriorated and Jane  
2 and Mary's contacts had become acrimonious. Bruce never reissued the note and this  
3 litigation ensued.  
4

5 23. The Defendants offered testimony that the \$100,000 represented an inchoate  
6 charitable act, the monies to be used if and when Ben and Jane's medical issues go the better  
7 of their finances. Yet, the charitable interest was memorialized in a promissory note secured  
8 by a mortgage on their property.  
9

10 24. Bruce has a bachelor of science degree in computer science. He was  
11 entrusted with weaponry and defense of the United States; assigned to a military position  
12 generally held by higher ranking individuals, because, presumably, of his talents; entrusted  
13 with the lives of crews and passengers and presumably, trained to deal with a host of  
14 problems that can occur on an aircraft that gravity is attempting to pull earthward. The  
15 Court is not persuaded that Bruce was cowed by Mary into signing a \$100,000 note, for  
16 charitable reasons, with a five year maturity (with interest if not timely paid), and secured on  
17 real property that he and Mary were purchasing.  
18

19  
20 Based on the foregoing Findings of Fact, the Court makes the following Conclusions  
21 of Law:

22 1. Having weighed the evidence and the credibility of the witnesses, the Court  
23 concludes that the promissory note and mortgage did not relate to charitable impulses by the  
24 Defendants but, rather, related to a business transaction for the purchase of the property.  
25  
26

1           2.     While spending \$450,000 for a property that appraised at \$350,000 may not  
2 make great sense, it makes even less sense to this Court that the Defendants would formalize  
3 their charitable impulse towards Jane with a promissory note secured by a mortgage on the  
4 property.  
5

6           3.     As to the Defendants' affirmative defenses, the Court holds as follows:

7     a.     **Statute of Frauds**

8           The uncontroverted evidence is that the note and mortgage had to "go away" so that  
9 the Schleichers could obtain financing for the purchase of the Half Mile Road property,  
10 without subjecting themselves to mortgage fraud if they failed to disclose the existence of the  
11 note and mortgage to their lender. Rather than enter into a subordination agreement whereby  
12 Ben's interest would be junior to that of Bruce and Mary's lender, Ben executed a  
13 satisfaction of the note and release of the mortgage. There is no evidence presented that the  
14 amount represented by the note was, in fact, paid. Rather, the parties intended that the note  
15 and mortgage not stand in the way of Bruce and Mary's ability to obtain a loan to purchase  
16 the property. That financing would occur only if the Defendants' lender had a first position  
17 security interest in the property. That financing would occur only if the Defendants' lender  
18 had a first position security interest in the property.  
19  
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21

22           The parties, in artfully tried to reorder the priority of security interest on the property  
23 in order to allow the Defendants to obtain commercial financing.  
24

25           The release executed by Ben, vis-à-vis Hunter Financial, the Defendants' lender, is  
26 valid since the lender presumably relied upon it to ensure that its loan to Bruce and Mary was

1 secured by a first position lien on the subject property. And the parties intended that Hunter  
2 Financial rely upon the release so that financing could be obtained and the sale closed. But  
3 there is nothing in the record that would suggest that the parties intended their respective  
4 positions with regard to each other to change.  
5

6 If the parties intended that the release be relevant only with regard to Bruce and  
7 Mary's new financing, then it would seem to necessarily follow that, as between the parties,  
8 the releases were not intended to effect change to their respective positions. Consequently,  
9 the note and the mortgage executed by the Defendants on August 30, 2011, remain valid and  
10 satisfy the requirement of writing under RCW 64.04.010.  
11

12 As a result, Defendants' motion to dismiss under the statute of frauds is denied.

13 **b. Contract Statute of Frauds**  
14

15 The preceding analysis regarding the Statute of frauds also applies with regard to the  
16 need for a contract exceeding one year to be in writing pursuant to RCW 19.36.010. The  
17 agreement in this case was properly memorialized and remains so, though the need for  
18 replacement documents exists in order to provide notices to future persons looking to the  
19 property for security.  
20

21 Defendants' motion to dismiss under the contracts statute of frauds is denied.

22 **c. Merger**  
23

24 The doctrine of merger is founded on the parties' privilege to change the terms of  
25 their contract at any time prior to performance. Execution, delivery and acceptance of the  
26 deed become the final expression of the parties' contract and therefore subsumes all prior

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 9

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1 agreements. *Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955). In general, the  
2 provisions of a real estate purchase and sales agreement merge into the deed, although there  
3 may be exceptions to this rule when there are collateral contract requirements that are not  
4 contained in or performed by the execution and delivery of the deed, are not inconsistent  
5 with the deed, and are independent of the obligation to convey. *Barber v. Peringer*, 75 Wn.  
6 App. 248, 251-252, 877 P.2d 223 (1994).  
7

8           In this case, the purchase and sale agreement ("PSA") was executed by the parties in  
9 May 2011 and the promissory note and mortgage were executed by Bruce and Mary in  
10 August 2011. The property closed in March 2012 for an amount consistent with that set  
11 forth in the PSA as the sale price. The promissory note and mortgage, however, were  
12 released by Ben at Bruce's urging prior to closing so that Bruce and Mary's lender could  
13 secure a first position lien on the property; but as between the parties, they did not intend that  
14 the terms of the note had been satisfied. The parties simply intended that Ben's mortgage  
15 would not be in a position senior to that of the other secured lender, Hunter Financial. There  
16 is substantial evidence in the record that the Defendants executed the promissory note and  
17 the mortgage as their free and voluntary act in August 2011. There is no oral expression  
18 sought to be enforced.  
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22           The Court finds that the promissory note and mortgage were not affected by the  
23 subsequent release and that each has continuing viability. The Court does not believe that  
24 the Defendants' written promise to pay, secured by an interest in the subject property and  
25 executed prior to closing, merged into the deed issued in March 2012.  
26

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 10

**PLATT IRWIN LAW FIRM**  
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Port Angeles, WA 98362  
(360) 457-3327

1 The Defendants' motion to dismiss under the doctrine of merger is denied.

2 **d. Meeting of the Minds**

3 The Defendants asked for a rescission of the parties' agreements based on an  
4 allegation there was no meeting of the minds regarding the sale of the property.  
5

6 The parties negotiated over the sale of the property to the Defendants. The parties  
7 handled the transaction themselves in order to save a substantial real estate broker  
8 commission. The parties each had prior experience in real estate transactions.  
9

10 Before the deed was executed, the Defendants executed a promissory note for  
11 \$100,000, bearing interest at 5% after five years, which was to be secured by a mortgage on  
12 the property being sold.

13 At trial, the Plaintiff's theory was that the promissory note (Trial Exhibit 3)  
14 represented part of the agreed-upon \$450,000 purchase price for the property. The  
15 Defendants' theory was that the promissory note was not meant to be part of the \$450,000  
16 purchase price, but was, rather, a charitable action on their part to help fund future medical  
17 expenses of their friends if they did not have sufficient insurance coverage.  
18

19 Given the timing of the execution of the documents, the nature of the documents, i.e.  
20 promissory note and mortgage, the resemblance of what transpired to a "business  
21 transaction" and the Court's utter disbelief that the execution of the promissory note and  
22 mortgage was the result of cajolery or pressure, or that the Defendants would reduce a  
23 charitable impulse to the terms business transaction, the Court concludes that the  
24 Defendants intended that the promissory note and mortgage were part of the purchase price.  
25  
26

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 11

**PLATT IRWIN LAW FIRM**  
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1 As a result, the Defendants' motion to dismiss based upon "no meeting of the minds"  
2 is denied.

3  
4 4. The original promissory note (Trial Exhibit No. 3) contained a prevailing party  
5 attorney fee provision which is enforceable against the Defendants. The Plaintiff is the  
6 prevailing party in this matter, as he has an affirmative judgment rendered in his favor at the  
7 conclusion of the entire case.

8  
9 **ORDER AND JUDGMENT**

10 Based on the preceding Findings of Fact and Conclusions of Law, the Court *HEREBY*  
11 *ORDERS AS FOLLOWS:*

12 1. Within ten (10) business days of entry of this Order, the Defendants shall  
13 execute a promissory note in ~~substantially~~<sup>same</sup> the form as contained in Trial Exhibit 3. The  
14 promissory date shall have an effective date of March 21, 2012 with a maturity date of  
15 March 21, 2017, at which time it shall bear interest at the rate of 5% per year until paid in  
16 full. *The note principal shall be in the amount as set forth*  
17 *in P 3 herein.*  
18 2. Within ten (10) business days of entry of this Order, the Defendants shall  
19 execute a ~~standard form deed of trust~~<sup>mortgage (in the same form as Trial Exh. 2)</sup> on the property securing the \$100,000 obligation  
20 evidenced by the promissory note described in the preceding paragraph.

21  
22 **JUDGMENT IS AWARDED TO THE PLAINTIFF AS FOLLOWS:**

23 3. Plaintiff is awarded principal judgment in the amount of \$100,000 pursuant to  
24 paragraphs 1 and 2 of the Order and Judgment above. Principal judgment shall bear interest  
25 at the rate of five percent (5%) per year, effective March 21, 2017.

26 FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 12

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4. Plaintiff is awarded his reasonable attorney's fees of \$ 200.00 and costs of \$ 1360.07. Attorney's fees and costs shall bear interest at the rate of five percent (5%) per year, or the highest rate permitted under Washington state law.

*The judgment herein does not constitute a lien pursuant to RCW 4.56.190 and the clerk shall not enter it on the execution docket. The only lien on property intended by the court is the mortgage ordered in p 2 herein.*

DATED this 24th day of April, 2015

Christopher Melly  
Honorable Christopher Melly  
Clallam County Superior Court

Presented by:  
PLATT IRWIN LAW FIRM  
David H. Neupert  
David H. Neupert, WSBA #16823  
Attorney for Plaintiff

Copy received; Approved for entry as to form:

Craig L. Miller  
Craig L. Miller, WSBA #5281  
Attorney for Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER FOR JUDGMENT - 13

PLATT IRWIN LAW FIRM  
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**SMITH GOODFRIEND PS**

**March 23, 2016 - 4:27 PM**

**Transmittal Letter**

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Court of Appeals Case Number: 47576-6

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Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent Cross-Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

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