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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;
LANDMARK, LLC, a Washington limited liability company,

Respondents/Cross-Appellants,

vs.

ANTONE PRYOR, individually, and the marital community composed
of ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Appellants/Cross-Respondents,

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE KEVIN D. HULL

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

The trial court correctly found in over 100 findings of fact – entered after a ten-day trial involving a dozen witnesses and hundreds of exhibits – that appellant Antone Pryor had failed to prove each of his claims resting on his rejected allegation that respondent Douglas Nelson misrepresented the finances of their shared companies. But the trial court did err in relieving Pryor of his obligation to pay a \$60,000 promissory note he signed as consideration for his ownership interest in one of those companies, Landmark LLC. Though the trial court found Pryor never paid the promissory note, it forgave Pryor’s debt by erroneously conflating the notice requirements in two separate contracts – the promissory note and the purchase and sale agreement granting Pryor his ownership interest in Landmark. The trial court thus allowed Pryor to reap years of profits from Landmark without paying for his interest in the company. This Court should affirm the trial court except for its erroneous legal conclusion that the notice provision in the purchase and sale agreement applied to the promissory note, and should remand for entry of a supplemental judgment on Landmark’s claim that Pryor failed to pay the promissory note.

II. REPLY ARGUMENT IN SUPPORT OF CROSS-APPEAL

A. The notice provision in the Landmark Purchase and Sale Agreement does not apply to the promissory note.

The trial court erroneously relied on the notice provision in the Landmark Purchase and Sale Agreement (“PSA”),¹ which requires “demands and notices given hereunder shall be sent by registered mail” to erase Pryor’s obligation to pay the promissory note. The PSA and promissory note are separate contracts, and thus noncompliance with the PSA’s notice provision could not excuse Pryor’s obligation to pay the promissory note.

As this Court has held, where, as here, parties execute a sales contract and the buyer gives a promissory note as consideration for that contract, the sales contract and note are separate and distinct contracts. *Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 399, ¶ 19, 317 P.3d 1103 (2014) (“the promissory note, an unconditional promise not dependent on the underlying sales contract, gave rise to a ‘separate promise’ distinct from the sales contract”) (quoted source omitted); *see also Felt v. McCarthy*, 130 Wn.2d 203, 212-13, 922 P.2d 90 (1996) (Sanders, J., concurring) (purchase and sale contract was “separate contact” from promissory note; maker of

¹ The PSA references Retirement Ventures LLC, which later became Landmark. (FF 2, CP 425)

note “cannot be excused from his obligations under the promissory note based upon the frustration of the [PSA] contract.”). Pryor cites no authority to support his contention that the PSA and promissory note are a “unitary agreement” (Reply Br. 45), a result irreconcilable with *Groome*. Because the PSA and promissory note are separate contracts, whether Pryor received proper notice under the PSA has no bearing on Pryor’s obligation to pay the note.

The promissory note contains its own notice provision, which would be rendered superfluous by an interpretation that incorporates the PSA’s notice provision into the note. The note simply requires that “the company shall give a minimum of seven days notice to Buyer,” nowhere requiring that that notice be in written form sent by registered mail. (Ex. 1 at 3) Likewise, the promissory note sets out anew who the “Buyer” and “Seller” are, and Pryor separately signed the PSA and note – further redundancies that would not exist within a single “unitary contract.” (Ex. 1 at 3) *See Navlet v. Port of Seattle*, 164 Wn.2d 818, 842, ¶ 36, 194 P.3d 221 (2008) (courts avoid contract interpretations that render language redundant).

Moreover, the parties knew how to expressly incorporate other documents into their agreements, as evidenced by the PSA’s

language stating “The Buyer agrees to be bound by the Limited Liability Company Agreement.” (Ex. 1 at 2) Had the parties intended to incorporate the PSA’s notice provision into the note, they would have included similar language in the note. They did not. *Navlet*, 164 Wn.2d at 845 n.15, ¶ 39 (“[i]ncorporation by reference must be clear and unequivocal”; separate writing was not incorporated into contract where it did “not even mention, much less incorporate, the terms” of that writing) (quoted source omitted); *see also Groome*, 179 Wn. App. at 398, ¶ 15 (note incorporated notice provision of sales contract by stating “Any notice given under this Note and the attached Security Terms and Conditions shall be given in accordance with the Sales Contract between the parties”).

None of the language relied on by Pryor supports the notion that the promissory note and PSA are a single contract, governed by the same notice provision. (Reply Br. 45) The PSA’s language that “[t]his Agreement constitutes the entire agreement between the parties . . . and may not be changed or modified orally” is boilerplate language preventing oral modification of the PSA. (Ex. 1 at 2) Likewise, the word “hereunder” in the PSA’s notice provision does not somehow extend that provision to the note, which is nowhere

mentioned in that provision. (Ex. 1 at 1) The note states that it is “evidence of the obligation to pay for units of ownership” in Landmark and that failure to pay the note would “constitute default on said purchase of units as well as on this note” (Ex. 1 at 3), confirming that the PSA and note are separate contracts, and that non-payment creates two distinct defaults.

The fact that a *copy* of the promissory note was attached to the PSA agreement and admitted as one exhibit does not make them the same contract, as Pryor contends. (Reply Br. 44-45) Nelson had possession of the original note, which he presented at trial. (RP 261-63) The parties then stipulated the original note was authentic and that it need not be admitted into evidence because a copy was already attached to the PSA in Exhibit 1. (RP 262-63) Indeed, Pryor’s attorney confirmed that the fact the PSA and promissory note were admitted as a single exhibit meant nothing, referring to each as distinct documents. (RP 813) At other points in this case both Pryor and Nelson submitted the promissory note as a single exhibit, underscoring that how they chose to file it in court years after it was executed is irrelevant. (CP 16, 115) Nor did Nelson testify that the PSA and note were the same agreement, as Pryor now contends. (Reply Br. 45) Rather, he confirmed that the

note was simply the consideration given for Pryor's ownership interest in Landmark. (RP 41-43)

Even could the PSA and note be considered a single contract (they are not), the lack of written notice would not waive Pryor's obligation to pay the note. Fundamental precepts of law and equity preclude Pryor from reaping the benefits of ownership in a company without ever paying for it because of a technical breach of a notice provision. *Pardee v. Jolly*, 163 Wn.2d 558, 574, ¶ 27, 182 P.3d 967 (2008) ("Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.") (alteration and quoted source omitted).

Because the PSA's notice provision did not apply to the promissory note, the trial court erred in excusing Pryor's obligation to pay the note based on non-compliance with the PSA's notice provision. This Court should remand for entry of a supplemental \$60,000 judgment in Landmark's favor, plus interest to the date of judgment, and award Landmark the attorney's fees incurred in enforcing the note, as authorized by the note. (Ex. 1 at 3)²

² Consistent with the trial court's statement that the claim on the promissory note was "Nelson's claim" (CL 1, CP 450), the brief of respondent requested entry of judgment in favor of Nelson. (Resp. Br. 59) Landmark, however, brought the breach of contract claim against Pryor, and thus Landmark should be the judgment creditor. (CP 10)

B. The trial court correctly found that Landmark met its burden of proving Pryor did not pay the note.

1. The trial court did not shift the burden of proof to Pryor.

Pryor's argument the trial court erroneously shifted the burden to him distorts the trial court's straightforward finding he did not pay the note. "The interpretation or construction of findings, conclusions and judgments presents a question of law for the court." *Callan v. Callan*, 2 Wn. App. 446, 448, 468 P.2d 456 (1970). "The general rules of construction applicable to statutes, contracts and other writings are used with respect to findings, conclusions and judgment, . . . includ[ing] the rule that the intention of the court is to be determined from all parts of the instrument, and that the judgment must be read in its entirety and must be construed as a whole so as to give effect to every word and part, if possible." *Callan*, 2 Wn. App. at 448-49.

Taken as a whole, the trial court's findings and conclusions establish that Landmark proved Pryor never paid the note. The trial court stated "there is insufficient evidence that the Note has been paid" in Finding of Fact 8, and confirmed that finding in its first conclusion of law, stating there was "insufficient evidence establishing that Pryor paid the Note." (CP 427, 450) The trial

court prefaced its conclusion of law with a heading that asked “Has it been proven that Pryor breached the 2000 promissory note?” – recognizing that Landmark bore the burden of proving Pryor breached his promise to pay for his ownership interest in Landmark. (CP 450)³

The parties’ arguments at trial confirm there was no confusion about who bore the burden of proof on each claim. In his closing argument, Nelson argued on behalf of Landmark he had “met his burden of proof relating to his claims in this case.” (RP 1736-37) In Pryor’s closing argument, he twice stressed that Landmark had the burden of proving the note had not been paid. (RP 1738, 1775) Pryor’s contention that the trial court sua sponte imposed the burden of proof on him when the parties agreed Landmark bore that burden is absurd.

Regardless, any confusion in the trial court’s findings would, at the very most, warrant a remand for clarification. *Katara v. Katara*, 125 Wn. App. 813, 831, 105 P.3d 44 (2004) (remanding for court to clarify ambiguous findings), *rev. denied*, 155 Wn.2d 1005 (2005). But this Court should not do so because there is no

³ The trial court also included headings asking whether Pryor had proven his fraud and breach of fiduciary duty claims against Nelson, underscoring it knew who bore the burden of proof on each claim. (CP 451-53)

confusion. The trial court plainly and correctly found that Pryor had not paid the note.

2. This Court must defer to the trial court's finding that Pryor never paid the note.

This Court is not free to second guess the trial court's finding that Pryor never paid the note, as Pryor would have this Court believe. (Reply Br. 46-47) "[W]here a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, ¶ 17, 225 P.3d 266 (2009), *rev. denied*, 168 Wn.2d 1041 (2010)) Here, the trial court weighed conflicting evidence and found Pryor did not pay the note. "That is the end of the story." *Quinn*, 153 Wn. App. at 717, ¶ 17.

Even could this Court independently weigh the evidence and decide de novo whether Pryor paid the note, it should reach the same conclusion as the trial court. Nelson testified that Pryor had never paid the note, and then presented the original note, which had never been canceled or otherwise marked as paid. (RP 41-42, 261-63) In response, Pryor presented no evidence that he actually paid the note, such as a canceled check. As the trial court recognized, "at some point . . . there would be something . . . that

demonstrates that the note was paid.” (RP 1777) When pressed on whether he had a check proving the note had been paid, Pryor conceded he did not, and instead asserted that other witnesses would support his allegation he paid the note – but those witnesses never testified. (RP 1259)

Pryor’s assertion that Nelson’s possession of the original note has no evidentiary value “[a]s a matter of legal logic” (Reply Br. 48), ignores that a reasonable person who paid a promissory note would demand the original note be destroyed or otherwise marked as paid to avoid being required to pay twice. *Rodgers v. Seattle-First Nat. Bank*, 40 Wn. App. 127, 132, 697 P.2d 1009 (“one paying a note, either negotiable or nonnegotiable, should demand production of it upon payment or risk having to pay again”), *rev. denied*, 104 Wn.2d 1009 (1985). The trial court agreed, noting that “[t]ypically one might expect that if that note were presented and satisfied, it would be paid in full and initialed, or actually even better yet just shredded.” (RP 1733; *see also* RP 1779-80) Nelson’s possession of the original note is all the proof one can reasonably expect – Nelson could not “prove” he did not have possession of a non-existent check.

Instead of presenting evidence that he actually paid the note, Pryor relies on various accounting records that did not record the note, such as balance sheets for Landmark. (Reply Br. 46) But the testimony of the parties' shared bookkeeper, Helen Stevenson, upon which Pryor now relies (Reply Br. 46),⁴ explains why the note is not reflected in any accounting records. Stevenson would have recorded the note if Nelson "asked [her] to book it as a long-term note receivable" (RP 815), in which case she would have "expected" the note to appear on various accounting records. (RP 829-35, 876-79) But Nelson testified that he simply forgot to ask Stevenson to record the note (RP 229), and Stevenson confirmed that if she was not told about the note, it would not have been reflected in any records. (RP 1018)⁵ It was for the trial court, not this Court, to accept or reject this testimony. *Quinn*, 153 Wn. App. at 717, ¶ 16 (appellate court "do[es] not hear or weigh evidence [or] find facts").

⁴ In an inexplicable contradiction, Pryor asserts Stevenson's testimony is proof "beyond a shadow of a doubt" when it supports his claims (Reply Br. 46), but rejects her testimony when it undermines his allegations that Nelson defrauded him. (Reply Br. 35 (dismissing as mere "generalities" Stevenson's testimony (RP 1009, 1013) she never "thought or suspected that Mr. Nelson was attempting to influence the numbers" and that Nelson never "provide[d] any information to Mr. Davidson [Landmark's CPA] that was incorrect or false or misleading")

⁵ Some of the testimony relied on by Pryor makes no mention of the promissory note. (RP 868-72)

The trial court was free to reject Pryor's other "evidence" he cites to argue that he paid the note. That Pryor made other capital contributions to Landmark does not, as the trial court recognized, satisfy the note, where Pryor never directed that those contributions be considered payment of the note and the note was never canceled or marked as paid. (RP 1732; *cf. Oakes Logging, Inc. v. Green Crow, Inc.*, 66 Wn. App. 598, 601, 832 P.2d 894 (1992) ("unless the creditor has specific instructions from the debtor as to how payments are to be applied, the creditor may apply payments to any part of the debt, as he sees fit"))

Likewise, neither the 2006 Redemption Agreement's recital that Pryor's interest in Landmark was redeemed "free and clear of all liens [and] claims" nor the note's provision that "failure to pay . . . shall constitute default" prove payment of the note. (Reply Br. 49) Because the promissory note was a demand note under RCW 62A.3-108(a), there could be no default to give rise to a lien or claim until demand on the note was made, which did not happen until after the parties executed the Redemption Agreement. Indeed, Pryor conceded as much below, agreeing with the trial court the note "isn't a lien." (RP 1776) This Court must defer to the trial court's finding that Pryor did not pay the promissory note. Even

were the Court free to second guess that finding, Pryor provides no compelling reason to do so.

C. Landmark’s action on the promissory note was timely because the holder of a negotiable demand note has ten years to make demand on the note and six years from demand to bring an action.

Without citing any authority establishing the applicable statute of limitations, Pryor asserts Landmark’s action on the promissory note was untimely because it was not brought within six years. (Reply Br. 47-48) Landmark’s action was timely under RCW 62A.3-118 because he made demand on the note within ten years of its execution and brought suit within six years of that demand.

RCW 62A.3-118(b)⁶ sets forth the limitations period on a demand note and provides that “an action . . . must be commenced within six years after the demand” and that a demand must be made with ten years:

. . . if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor

⁶ The promissory note is a negotiable instrument under RCW ch. 62A.3 because it is an unconditional promise to pay a fixed amount. See RCW 62A.3-104, -106, -108; *Groome*, 179 Wn. App. at 396, ¶ 12 (“A negotiable instrument contains an ‘unconditional promise or order to pay a fixed amount of money.’”) (quoting RCW 62A.3-104(a)).

interest on the note has been paid for a continuous period of ten years.

Landmark's claim on the promissory note was timely under RCW 62A.3-118(b). Pryor executed the note on July 7, 2000 (Ex. 1 at 3), and Nelson, on Landmark's behalf, made demand on it in May 2008, within the ten years allowed by RCW 62A.3-118(b). (RP 99, 325) Nelson then brought suit on January 9, 2014, within six years of that demand. (CP 1-14)

Pryor's contention that Nelson should have known Pryor considered the note paid as of 2004 is irrelevant. (Reply Br. 48) Pryor alleges he testified at a 2004 deposition in the Sakai litigation that he paid the note and thus put Landmark and Nelson "on notice . . . Dr. Pryor considered it paid in full." (Reply Br. 48) But Pryor said in that same deposition that he could not remember if he paid the note. (RP 1257) Regardless, Pryor's erroneous testimony to the Sakais that he had paid the note could not start the limitations period. The triggering event under RCW 62A.3-118 is a demand on the note, which was not made until May 2008. This Court should reject Pryor's argument that Landmark's claim on the promissory note is time-barred.

D. Nelson, not Pryor, should be awarded attorney's fees on appeal.

As set forth in the Nelsons' response brief, the Nelsons and Landmark are entitled to all attorney's fees on appeal because the claims and issues in this case are intrinsically related. (Resp. Br. 56-57) That includes Landmark's claim the trial court erroneously relieved Pryor of his obligation to pay the \$60,000 note, which includes an attorney's fees provision. This Court should award the Nelsons and Landmark their attorney's fees on appeal, and like the trial court, decline to require segregation of fees.

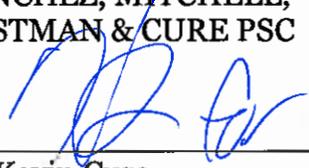
III. CONCLUSION

This Court should affirm the trial court except for its legal error in not holding Pryor liable on the \$60,000 promissory note, and remand for entry of judgment in Landmark's favor for \$60,000, plus interest and attorney fees at trial and on appeal.

Dated this 6th day of November, 2017.

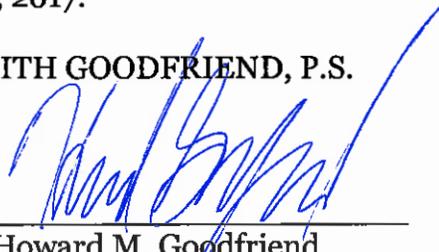
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DECLARATION OF SERVICE

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

That on November 6, 2017, I arranged for service of the foregoing Reply Brief of Respondents/Cross-Appellants, to the court and to counsel for the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of November, 2017.



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