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COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

MATHEW BULLDIS,

Appellant,

v.

GEORGE BULLDIS, SR.,

Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant/Defendant, Mathew Buldis (“Mathew”), and his father, Respondent/Plaintiff, George Buldis (“George”), are part of a family that has been in the oyster farming business since the 1920s. The family business is named National Fish and Oyster Co., Inc. (“NFOC”). George worked in the company for decades. And Mathew grew up around NFOC—dreaming from the time he was in kindergarten that he would become an oysterman. George was suffering from the effects of a forklift accident around the beginning of 2005, which left George unable to work, and so George decided it was time to turn the family business over to the next generation. George decided to transfer his stock in NFOC to Mathew and an equal share to Mathew’s sister, Catherine Buldis-Gyls (“Catherine”).

George retained an attorney to draft the paperwork effectuating the transfer. The parties to the deal decided on the payment price for the shares based on a valuation they had done by a third party. The parties to the deal decided payments would be made over a period of ten years pursuant to a promissory note. George requested, and the parties to the deal agreed, that payments would increase during the ten-year payment period instead of being a single, flat rate. George’s attorney suggested that the terms include a self-cancelling provision for the promissory note in the event of George’s death prior to payment in full, and the parties to the deal agreed with the

attorney's suggestion.

George's attorney prepared transaction documents, including an "Agreement to Purchase Stock and Assignment of Claims" and "Promissory Note" which documents reflected the agreement of the parties to the deal. The agreement was that Mathew and Catherine, together, would pay George a total \$340,500.00, plus interest, by October 1, 2015, but subject to the self-cancellation provision if George died. These documents state that no payments are due after the note is paid in full—and prepayment was allowed, without penalty.

It was a straightforward deal. But George was confused by the self-cancellation provision his attorney suggested. Despite the fact the Agreement to Purchase Stock and Assignment of Claims states that George received additional consideration for the self-cancelling provision, George apparently believed he was giving up something—as if he could take the money with him. George asked his children whether they would keep giving him money if he lived longer than ten years. Mathew then drafted a separate "Addendum to Contract," which stated that if George outlived the ten-year Note, "payments shall continue at the same rate as outlined in that agreement for the rest of [George's] life." The parties to the deal signed all of the applicable documents at the same time.

The Addendum to Contract was a modification of an existing

contract—*i.e.*, it modified the contract documents prepared by George’s attorney. The Trial Court in this case repeatedly stated in its decision that the Addendum to Contract “modified” the parties’ agreement. There was no consideration for the modification. Further, the modification did not require any payment because the rate outlined in the original Agreement was zero/nothing, after the Promissory Note was paid in full. Mathew’s understanding was that the modification was a side deal and did not create any obligation for ongoing payments. Mathew testified that he and George both referred to the modification as “our ‘side deal.’” Mathew believed the modification was nothing more than an expression of his hope, like many children with aging parents have, that he might be able to help take care of his father. Mathew indicated that any future payments he hoped to be able to give his dad would have been derived from NFOC if things with the business were going great.

George did not contradict Mathew’s testimony. And Mathew’s understanding of the situation is logical. George was ready to get out of the business. He testified, “I figured it’s about time I got out of Dodge.” George wanted Mathew to get part of the company. It makes no sense that the parties required Mathew to potentially pay George two or three times the fair market value of George’s shares (depending on how long George lives) for Mathew to become an owner of the family business. It makes no

sense that Mathew would be required to pay George indefinitely, even if NFOC went out of business or if Mathew got out of the business. And it is unclear what the amount of continuing payments should be (*i.e.*, what is the rate) given the Promissory Note is paid in full—for example, it makes no sense that Mathew should pay interest on a balance that has been paid in full. Further, it is unclear how ongoing payments, if they are required, should be characterized for tax purposes. Payment amounts and tax treatment are unclear because the documents and common sense dictate that required payments were intended to end once the Promissory Note was paid in full.

Prior to the ten-year note being paid in full, Mathew and Catherine found themselves on opposite sides of a lawsuit concerning the operation and ownership of NFOC. Mathew and Catherine settled their lawsuit and, pursuant to that settlement, Mathew agreed to transfer his shares in NFOC to Catherine and another family member. This transfer occurred at approximately the same time that George's ten-year Note was paid in full. After the settlement between Mathew and Catherine was finalized, which required George to release his lien on the shares secured by the now cancelled Promissory Note, both Mathew and Catherine stopped making payments to George. Catherine, who continues to be an owner of NFOC, resumed making payments to George after he threatened to file suit.

Mathew did not resume making payments to George. After Mathew sold his shares in NFOC, Mathew did not feel responsible for supplementing George's retirement with money from the family business—a business in which Mathew is no longer involved. The Trial Court ordered Mathew to continue making payments until George dies—including paying interest on a fully-paid balance, plus annual increases. Mathew requests that the Trial Court's order and corresponding judgment be reversed/vacated.

**II. ASSIGNMENTS OF ERROR TOGETHER
WITH ISSUES PRESENTED**

A. Assignments of Error

1. The Trial Court's Findings of Fact 1.7 and 1.8, that George did not have a payment schedule until after he signed the Agreement, were in error.

2. The Trial Court erred in concluding the agreements of the parties were ambiguous and in interpreting the documents to require that Mathew make ongoing payments to George for the remainder of George's life.

3. The Trial Court's Finding of Fact 1.12, that Mathew did not express to George that Mathew believed the Addendum to Contract was unrelated to the other documents, was in error.

4. The Trial Court erred by enforcing a contract modification despite the absence of consideration to support the modification.

5. Even presuming ongoing payments are required, the Trial Court erred in requiring the ongoing payments to include interest on a note that has already been paid in full.

6. Even presuming ongoing payments are required, the Trial Court erred in requiring the ongoing payments to increase each year.

7. Even presuming ongoing payments are required, the Trial Court erred in requiring the ongoing payments to be based in part on a note self-cancelling provision that will never go into effect because the Note has already been paid in full.

B. Issues Presented

1. The payment schedule, which reflects the timing of payments and amounts to be paid pursuant to the parties' Agreement, shows that payments stop (*i.e.*, they do not continue indefinitely) after 120 payments. Catherine testified that George had a payment schedule before he signed the Agreement.

The payment schedule introduced as an exhibit in this case, Trial Exhibit No. 7 (CP 41-45 and 215-217), had a fax date stamp of September

29, 2005. But the faxed date is not indicative of the document's creation date. Mathew testified the payment schedule was prepared by an accountant who did the taxes for the family business and for George. VRP 46:15-21. Catherine testified that George had reviewed a payment schedule prior to signing documents related to the parties' agreement for the transfer of stock. VRP 24:7-15. The evidence indicates that George did review a payment schedule prior to his signing documents and the payment schedule reflected that payments stopped after 120 payments. A correct finding, *i.e.*, that George had a payment schedule prior to signing the Agreement, would have been evidence that George signed the Agreement with the understanding that his payments were scheduled to stop once the Promissory Note was paid in full. (Assignment of Error No. 1.)

2. Requiring Mathew make ongoing payments to George for the remainder of George's life contradicts the applicable documents based on their plain reading.

The Agreement between the parties called for a purchase price of \$340,500.00, which was based on a professional appraisal and included consideration for company stock plus consideration for a note self-cancelling provision. The related Promissory Note indicated it would be cancelled upon George's death or upon payment in full of the \$340,500.00 principal amount, which was payable at any time before October 2015. The

amortization table prepared by George's accountant that was associated with the Promissory Note indicates no payments are owed if the 120 scheduled payments are made. The Addendum to Contract at issue in this case states that if George lived after October 2015, "then payments shall continue at the same rate as outlined in that agreement for the rest of his life." The rate outlined in the agreement is zero once the note is paid in full. (Assignment of Error No. 2.)

3. Mathew testified the document he drafted and signed, titled "Addendum to Contract," was separate from other agreement documents and that the Addendum was not part of a single, unified agreement with other documents that had been drafted by George's attorney. Mathew testified that he discussed matters with George and they both understood the Addendum was a separate "side deal." Mathew's testimony about conversations with George referring to the Addendum as a separate side deal was not contradicted.

The Court stated "[t]he witnesses testified credibly." VRP 79:1-2. And the Court acknowledged that "George testified credibly as to his poor memory of certain details." VRP 79:2-3. Mathew's testimony regarding the conversations he had with George was the only testimony about Mathew's personal conversations with George. A correct finding, *i.e.*, that George considered the Addendum a separate side deal, would have been

evidence that George signed the Agreement with the understanding that Mathew's obligation to pay George was scheduled to stop once the Promissory Note was paid in full. (Assignment of Error No. 3.)

4. The Trial Court concluded in Conclusion of Law 2.1 that “[t]he Addendum to Contract modified the parties agreement...” The Trial Court concluded in Conclusion of Law 2.5 that “the Promissory Note and Agreement to Purchase Stock and Assignment of Claims...were modified by the negotiated and signed Addendum to Contract.” And the Trial Court concluded in Conclusion of Law 2.6 that “[t]he Addendum to Contract modified the overall agreement...” However, in Conclusions of Law 2.8-2.9, the Trial Court treated the Addendum as part of the original Agreement instead of as a modification. And, as such, the Trial Court did not require the Addendum to be supported by new consideration. The Trial Court's treatment of the Addendum conflicts with the Trial Court's conclusions that the Addendum modified the Agreement. A modification is void if not supported by consideration independent of that which was given to form the original agreement.

Questions of law and conclusions of law are reviewed *de novo*. See, e.g., *Stieneke v. Russi*, 145 Wn. App. 544, 555, 190 P.3d 60 (2008). In this case, the Trial Court correctly concluded multiple times that the Addendum

to Contract was a modification. Modifications require separate consideration. *Lokan & Associates, Inc. v. Am. Beef Processing, LLC*, 177 Wn. App. 490, 496, 311 P.3d 1285 (2013). But while the Court found at Findings of Fact 1.13 that the modification “adds an additional obligation,” there is no evidence that the modification’s obligation was in exchange for any additional benefit. In other words, there was no separate consideration for the modification. (Assignment of Error No. 4.)

5. There is no rational basis to require ongoing interest payments against a note that has been paid in full.

Payments outlined in the parties’ Agreement were based upon a principal obligation of \$340,500.00, an agreed payment term of ten years, an agreed interest rate of 6.95%, and an agreed cash flow rate presuming the principal obligation was not prepaid. And like with most typical notes, the parties’ Agreement in this case was set up so that each regular payment paid both principal and interest—with the amount allocated to interest decreasing over time as the principal balance was paid down. In this case, the principal amount was eventually paid in full. As such, there is no principal amount to apply the interest rate to and the result is that no interest should be associated with any ongoing payment. (Assignment of Error No. 5.)

6. There is no rational basis to require ongoing payments to increase on each anniversary of the Note after the Note is paid in full.

The payments between the parties were scheduled so that they would increase over time. The effect was that George received more interest income than he would have under a payment schedule that called for the same periodic payments over time. But the entire schedule was designed so that the principal amount of the applicable Promissory Note would be paid in full at the end of ten years if every periodic payment were made on time in the scheduled amount. There is no basis to justify a continued increase over time after the principal is paid in full. (Assignment of Error No. 6.)

7. There is no rational basis to require ongoing payments for what amounts to an expired contract.

The Agreement between the parties indicates that \$230,800.00 was consideration for NFOC stock and \$109,700.00 was consideration for a note self-cancelling provision. The self-cancelling provision no longer has any possible effect because it was only in play until the Note was paid in full, which has already occurred. It is inequitable to force Mathew to continue making any payments, but particularly payments that are consideration for the self-cancelling provision based on the terms of the parties' Agreement.

If Mathew owes anything, which he denies, monthly payment calculations should be limited to Mathew's one-half of the consideration for the NFOC stock based on a ten-year term and with no interest (no interest because the principal amount of the note has already been paid). The result is \$961.67 per month. (Assignment of Error No. 7.)

III. STATEMENT OF THE CASE

NFOC has been in the Buldis family since the 1920s. VRP 34:22-35:3. Mathew's grandfather originally bought the company. *Id.* Mathew's father and uncles eventually bought the business. VRP 34:18-19. Mathew's father always told Mathew that the company would belong to Mathew one day, and it was Mathew's life-long dream to be an oysterman at NFOC. VRP 42:5-12. In 2005, Mathew's father decided it was time to turn NFOC to the next generation. *See, e.g.*, VRP 35:14-37:6.

Mathew's father, George, testified he had to sell NFOC because he "[g]ot hurt" and "couldn't do the work anymore." VRP 35:17. George repeated, "I had to sell, because I couldn't run the business. I got hurt." VRP 36:23-24. George further explained, "I rolled a forklift. I put two holes in my head, and I figured it's about time I got out of Dodge." VRP 37:3-4.

In George's view, Mathew is a "smart boy." VRP 35:18-19 and 37:5-6. And as the educated member of the family, Mathew was tasked in

early 2005 to begin figuring out how much of NFOC George owned so that George could transfer his interest to Mathew and Mathew's sister, Catherine. VRP 42:16-43:6.

Once George's ownership interest was determined, the parties engaged a firm called Dock Street Litigation to value George's shares in NFOC. The value determined by Dock Street Litigation was communicated to George's personal attorney, Mr. McGoldrick, who prepared the parties' transaction documents and incorporated into those documents the purchase price determined by Dock Street Litigation. 43:9-48:15.

George had meetings with his attorney. VRP 23:13-17. George's attorney prepared a Stock Pledge Agreement (CP 37-40 and 215-217), Agreement to Purchase Stock and Assignment of Claims (CP 31-32 and 215-217), and Promissory Note (CP 33-34 and 215-217) VRP 44:13-18. George's attorney sent the parties some draft documents. VRP 47:10. And then George's attorney mailed the final versions of the transaction documents to George. VRP 48:8-15.

In addition to transaction documents prepared by George's attorney, George's accountant prepared an amortization schedule that was consistent with the Promissory Note. (CP 41-45 and 215-217). George had the payment schedule a few days before he agreed to sign the transaction documents. VRP 24:6-15.

Prior to signing the transaction documents, Mathew and George went over some of the draft documents that had been prepared. VRP 48:16–50:7. George never indicated to Mathew that George had any hesitancy about signing the documents as prepared by George’s attorney. VRP 47:3–6. As George himself stated, he “had to sell.” VRP 36:23–24. But George asked Mathew to put a “side deal” together, which resulted in Mathew drafting the Addendum to Contract (CP 35 and 215–217). VRP 49:2–22.

George testified during trial that he cannot explain the Addendum to Contract. VRP 37:20–22. George stated, “I was out of it by then,” when Mathew drafted the Addendum to Contract. VRP 38:2–3. Mathew testified the Addendum to Contract was not a unified agreement with the documents that George’s attorney prepared, and that if the Addendum to Contract would have been intended to be incorporated into the Agreement, the parties would have gone back to Mr. McGoldrick to revise the documents. VRP 49:8–25. Mathew indicated the Addendum to Contract was an unofficial side deal that he and his sister might still pay George, if George lived past October 2015, as nice kids if everything with the business was going well. VRP 49:15–50:7.

The documents prepared by George’s attorney and the Addendum to Contract were signed on September 28, 2005. The Stock Pledge

Agreement states in pertinent part, “[George] has sold his stock in [NFOC]...to [Mathew and Catherine] in exchange for a Promissory Note in the amount of...\$340,500.00.” CP 37.

The Agreement to Purchase Stock and Assignment of Claims also states the purchase price related to the transaction is \$340,500.00. CP 31-32. The Agreement to Purchase Stock and Assignment of Claims states the purchase price was allocated between \$230,800.00 for George’s stock in NFOC as determined by a professional appraisal and \$109,700.00 in consideration of a self-cancelling note provision. *Id.* The Agreement to Purchase Stock and Assignment of Claims expressly states, “[t]he purchase price shall be...\$340,500.00...for all of said shares and the purchase price shall be secured by a Promissory Note.” *Id.*

The Promissory Note has a face value of \$340,500.00. CP 33-34. The Promissory Note allows prepayment without penalty, but outlines a payment schedule of 120 monthly payments, starting with payments of \$3,500.00 per month in year one and increasing each year so that the principal is scheduled to be paid in full at the end of ten years. *Id.* The stated interest rate is 6.95%. *Id.* The Promissory Note states, in pertinent part, “payments shall continue until the entire amount of such principal and interest shall be paid in full. Provided, however, should George Buldis die prior to the full satisfaction of this Promissory Note, this Note shall be

deemed fully satisfied and paid, as of the date of his death.” *Id.* An amortization schedule associated with the Promissory Note reflects that no payments are owed after ten years. CP 41-45.

The Addendum to Contract states in full, “[w]e, the undersigned, agree that should George S. Buldis outlive the 10 year note payable dated on or about October 1, 2005 for the purchase of his shares in [NFOC], then payments shall continue at the same rate as outlined in that agreement for the rest of his life.” CP 35.

Mathew and Catherine made payments to George for ten years pursuant to the amortization schedule and fully paid the Promissory Note. VRP 26:1-5. At about the same time the Promissory Note was paid in full, Mathew settled a lawsuit with Catherine and another family member who owns part of NFOC. VRP 50:8-11. The settlement involved Mathew being bought out of his interest in NFOC. VRP 26:6-10.

Mathew admits that he has not made payments to George since the time Mathew sold his interest in NFOC. CP 50. Similarly, Catherine stopped making payments to George after she bought part of Mathew’s interest in NFOC. VRP 28:18-29:13. But Catherine started making payments again after George threatened to sue her along with Mathew. *Id.* The Trial Court found that Catherine’s payments to George in 2016 and through the time of trial in September 2017 were \$2,286.46 per month. CP

309-310. This amount paid by Catherine has no apparent connection to the Promissory Note and/or amortization schedule—the 2015 payments were \$2,283.36 (each between Mathew and Catherine) until the Note was paid in full, and adding 3% for 2016 and 3% for 2017 (if ongoing payments were required and they were required to increase) would have been \$2,351.86 and \$2,422.41, respectively. CP 41-45.

The above described evidence was presented to the Trial Court in a short bench trial conducted on September 26, 2017. CP 306. The only witnesses were Mathew, George, and Catherine. *Id.* Findings of Fact and Conclusions of Law were filed on November 21, 2017. CP 306-311. Judgment against Mathew and in favor of George was entered December 15, 2017. CP 312-315. Mathew timely appealed. CP 305.

IV. SUMMARY OF ARGUMENT

Mathew agreed to buy, and George agreed to sell, stock in NFOC. The parties agreed to a price of \$340,500.00 based on a business valuation prepared by a third-party professional. The terms of the agreement were memorialized in contract documents drafted by George's attorney. Mathew separately drafted a document titled "Addendum to Contract," which modified the parties' Agreement. However, the modification lacked independent consideration. The modification is void for lack of consideration and cannot be enforced.

Even if the Addendum to Contract were part of the original Agreement, as opposed to being a modification, the terms of the Addendum do not require Mathew to make ongoing payments to George. The Addendum indicates payments shall continue at a rate outlined in other documents. And the other documents indicate that no payment is owed once George is paid the principal amount of \$340,500.00. If the parties had intended for George to be paid a certain amount every month for the remainder of his life, they would not have needed a Promissory Note—the agreement would have just said that payments would be “x amount every month” until George’s death, or an annuity could have been purchased for George.

Finally, it makes no sense to require Mathew to pay interest on a principal amount that has been paid in full. And even if ongoing payments were required, it makes no sense that payment amounts increase annually—because past annual increases were based on a payment schedule that was designed for a ten-year Promissory Note to be completely paid in 120 payments. The Promissory Note the parties in this case agreed to was paid in full and is cancelled. As stated above, this should mean that no payments are currently owed. But if payments were to continue, they should not include interest and should not include amounts that were previously

designated as consideration for a promissory note self-cancelling provision that is no longer applicable—because the promissory note has been cancelled by full payment. If Mathew is required to make ongoing monthly payments to George, the maximum amount should be \$961.67 per month and not the more than \$2,000.00 per month ordered by the Trial Court.

V. ARGUMENT

A. No ongoing payments are owed based on a plain reading of the contract documents. (Assignments of Error 1 and 2.)

The interpretation of an unambiguous contract is a question of law subject to *de novo* review. *Stranberg v. Lasz*, 115 Wn. App. 396, 402, 63 P.3d 809 (2003) (citing *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 900 P.2d 1323 (1995)). Whether a contract provision is ambiguous is also a question of law subject to *de novo* review. *Stranberg*, 115 Wn. App. at 402. A contract is not ambiguous merely because the parties suggest opposite meanings. *Id.*

Here, the Addendum to Contract, even presuming for argument's sake it is not a modification and instead is part of the original agreement as reflected in documents drafted by Mr. McGoldrick, states that payments pursuant to the Addendum shall be “the same rate as outlined in that agreement...” Whether “that agreement” in the Addendum to Contract refers to the Stock Pledge Agreement, Agreement to Purchase Stock and

Assignment of Claims, or Promissory Note makes no difference because all three of those documents repeat the same information—that the parties’ deal was based on paying the principal sum of \$340,500.00.

The amortization schedule prepared by George’s accountant also reflects that no payments were owed after the principal was paid in full. Additionally, the Promissory Note expressly states, “payments shall continue until the entire amount of such principal and interest shall be paid in full.” And there is a provision allowing for prepayment. It would make no sense to have a provision for prepayment if the debtors expected they would still have to make payments after paying the principal if they paid it early.

Further, the Agreement to Purchase Stock and Assignment of Claims specifically states the value of George’s NFOC shares as determined by a professional appraisal was \$230,800.00. The document indicates additional consideration was paid for a note self-cancelling provision. There is nothing in the documents that would justify an interpretation requiring payments to exceed the amounts stated in the Agreement to Purchase Stock and Assignment of Claims, which is incorporated in the Promissory Note.

Before George signed the Agreement to Purchase Stock and Assignment of Claims, he had the payment schedule reflecting that

payments stopped after ten years. And George had the opportunity to review the documents his attorney prepared stating that payments ended once the principal amount of \$340,500.00 was paid in full. He did not request changes to the documents his attorney prepared, and these documents outline a rate of zero once the Promissory Note is paid in full.

A plain reading of the written documents results in just one reasonable interpretation—*i.e.*, the payments to George stop once the principal amount of \$340,500.00 is paid in full whether that full payment occurred on schedule at the 120th month or was prepaid earlier. The documents do not support the argument that Mathew agreed to pay his one-half of \$340,500.00 plus interest, and also agreed to make additional monthly payments above the payments set forth in the Promissory Note, for stock worth \$115,400.00 according to the Agreement to Purchase Stock and Assignment of Claims. The price was \$340,500.00 and nothing further is due and owing.

B. No ongoing payments are owed based on extrinsic evidence.

(Assignment of Error 3.)

There is a distinction in this case between Mathew's conversations with George wherein they discussed the Addendum to Contract being a separate side deal from the other documents prepared by George's attorney (*see, e.g.*, VRP 49:11-22) versus Mathew not discussing with George that

Mathew did not intend the separate side deal to be binding (*see, e.g.*, VRP 52:13-53:10). Mathew did not tell George that Mathew did not believe the side deal was binding. VRP 53:3-8. But Mathew did discuss with George that the separate side deal, *i.e.*, Addendum to Contract, was not part of the purchase documents and was only Mathew being a good kid and continuing to pay George if things with NFOC were “going great.” VRP 49:11 – 50:7.

Mathew’s testimony about his conversations with George referring to the Addendum to Contract as a side deal was unrebutted. But the Trial Court found Mathew did not express to George “any personal belief that the Addendum to Contract was unrelated to the other documents.” CP 308-309.

“Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.” *Stieneke v. Russi*, 145 Wn. App. 544, 566, 190 P.3d 60 (2008). Here, the Trial Court indicated that Mathew testified credibly. VRP 79:1-2. But then the Trial Court entered a finding inconsistent with Mathew’s unrefuted testimony. The Trial Court’s finding was in error even under a substantial evidence standard.

Further supporting Mathew’s testimony that the Addendum to Contract was discussed as a side deal, and not part of the purchase transaction, is George’s testimony that he needed to sell. It does not make sense that George would recognize he “had to sell” his NFOC stock, enlist

his attorney to prepare transfer documents with a purchase price based on an independent appraisal of his NFOC stock, and then refuse to sell unless his children agreed to pay him more than the NFOC stock was worth.

As argued above, Mathew's position is the contract documents are unambiguous and can be interpreted as a matter of law without extrinsic evidence. However, "[e]ven if the contract language is clear and unambiguous, the trial court may consider extrinsic evidence for the limited purpose of determining the intent of the parties." *Paradise Orchards General Partnership v. Fearing*, 122 Wn. App. 507, 517, 94 P.3d 373 (2004) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). Also, extrinsic evidence may be considered to explain an ambiguity. *Paradise Orchards General Partnership*, 122 Wn. App. at 517 (citing *Stranberg*, 115 Wn. App. at 402)). "An appellate court's primary goal in interpreting a contract is to ascertain the parties' intent. *Paradise Orchards General Partnership*, 122 Wn. App. at 516 (citing *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 254, 76 P.3d 1205 (2003)). Thus, whether the contract documents were ambiguous or not, it is appropriate to consider the parties' testimony to determine intent.

The parties in this case intended that George sell his shares to Mathew and Catherine for market value. George needed to sell, and selling

at market value based on an independent business appraisal passes IRS scrutiny. Having some potential gift like payments be included in the transaction makes no sense and may not pass IRS scrutiny depending on how ongoing payments are treated for tax purposes. It is apparent that nobody has thought about tax treatment of ongoing payments, if they are required, which is further evidence that ongoing payments were not contemplated by the parties after the Promissory Note was paid in full.

The only evidence in this case that ongoing payments were intended was Catherine's testimony that she believed the Addendum to Contract was part of the purchase transaction unified with the agreement documents prepared by George's attorney. But Catherine was in a lawsuit with Mathew and likely has ill-will towards her brother as a result of the lawsuit. Further, Catherine's actions after the Promissory Note was paid indicate she believed she did not have to make ongoing payments. Catherine's testimony that George told her to stop paying is inconsistent with George's letter threatening suit against Catherine if she did not pay. And when Catherine resumed paying George, she paid an amount that is unrelated to the amounts described in the Promissory Note and amortization schedule.

The evidence in this case is that after the Promissory Note was paid in full, both Mathew and Catherine stopped paying George. Mathew testified that the side deal to pay George if things were going well with the

business was separate from the purchase transaction and not binding. George testified he did not remember if he thought the side deal was intended to be part of the purchase transaction and/or binding. The extrinsic evidence reflects a separate family arrangement that was not part of the purchase transaction. And the extrinsic evidence reflects that the side deal does not contemplate a specified payment amount.

C. The Trial Court correctly concluded that the Addendum to Contract was a contract modification, but then misapplied the law. A correct application of the law to the facts results in the contract modification being void for lack of consideration. No ongoing payments are owed because the Addendum to Contract is void. (Assignment of Error 4.)

Signing documents at the same time does not make one document part of the same transaction as another. *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 803, 237 P.3d 914 (Div. 2 2010) (quoting *Walker v. Horine*, 695 SW2d 572, 577 (Tex. App. 1985); “Although executed on the same day, they [the agreements] are not necessarily part of the same transaction...”). In *Ledaura*, 155 Wn. App at 804-05, the Court held that two separately signed documents were not part of a single unified contract even though the documents were signed on consecutive days, the documents contained some cross-references, and the documents concerned the same subject (the

agreements in *Ledaura* concerned rights in certain real property). The Court in *Ledaura* relied on a decision by the Texas Court of Appeals in *Walker, supra*.—the Walker Court held that agreements were separate even though they had been simultaneously executed in that case. 155 Wn. App. 802-03.

One document is not automatically merged with another to form a single contract just because the documents are simultaneously signed and the documents contain some cross-references. The *Ledaura* Court relying on *Walker* suggests three factors to analyze when determining whether documents signed together are different agreements: (1) are the documents physically separate and signed separately; (2) do the different agreements give the parties separate benefits and obligations; and (3) do the documents contain contradicting terms? *Id.* at 802-05.

In the present Bulldis matter, the Addendum to Contract is physically separate from the Purchase Agreement and physically separate from the Promissory Note. The Addendum to Contract was drafted by a different person than who drafted the other documents. And, the Addendum to Contract was separately signed—*i.e.*, it had separate signature blocks and the other documents were also signed.

In the present Bulldis matter, George alleges the Addendum to Contract provides him with separate benefits and imposes upon Mathew separate obligations—*i.e.*, ongoing payments in addition to previous

payments that paid the Promissory Note in full. These separate payments were not incorporated in any way into the other documents.

In the present Bulldis matter, the Addendum to Contract contradicts the Purchase Agreement and Promissory Note to the extent the Addendum to Contract requires ongoing payments, and the other documents expressly indicate no payments are due after the Promissory Note is paid in full. Moreover, requiring ongoing payments effectively changes the purchase price expressly stated in the Purchase Agreement.

If the parties had intended the Addendum to Contract to be a single unified contract with the Purchase Agreement and Promissory Note, the parties could have revised the Purchase Agreement and/or Promissory Note to make the documents consistent. But the parties chose not to integrate the documents. The fact that the Addendum to Contract was separately drafted and separately signed weighs in favor of the Addendum to Contract being considered a stand-alone document.

Based on the case law as described above, the Addendum to Contract should be classified as a contract modification. The Trial Court appeared to agree that the Addendum to Contract was a modification as the Trial Court stated repeatedly that the Addendum to Contract “modified” the parties’ Agreement. To the extent the Trial Court did not conclude the Addendum to Contract was a modification, such conclusion of law should

be reviewed *de novo*. See, e.g., *Stieneke*, 145 Wn. App. at 555. But presuming the Trial Court did conclude the Addendum to Contract in this case was a modification, the Trial Court incorrectly applied the law by ordering the perceived obligations created by the modification were enforceable absent a finding that separate consideration was received in exchange for the modified obligations. This legal issue should also be subject to *de novo* review. *Id.*

A modification requires consideration, or a mutual exchange in obligations and rights. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007); *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980); *Rosellini v. Banchemo*, 83 Wn.2d 268, 517 P.2d 955 (1974); *Ebling v. Gove's Cove, Inc.*, 34 Wn. App. 495, 663 P.2d 132, 26 Wage & Hour Cas. (BNA) 675 (1983). The consideration supporting a modification must be something separate from what was promised in the original contract. *Dragt, supra.*; *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004).

The Agreement to Purchase Stock and Assignment of Claims promised Mathew stock in NFOC in exchange for Mathew's payments towards the \$340,500.00 principal balance of the Promissory Note. Mathew [and Catherine] paid the Promissory Note in full and George released his interest in NFOC stock to Mathew [and Catherine], which stock Mathew

eventually sold. The only thing Mathew received was stock, which was valued at \$115,400.00 for Mathew's one-half according to the Agreement to Purchase Stock and Assignment of Claims drafted by George's attorney.

To the extent the Addendum to Contract is interpreted to require ongoing payments by Mathew to George, instead of the zero amount reflected in the documents now that the principal amount of the Promissory Note has been paid in full, the Addendum to Contract is void for lack of consideration. Mathew has received nothing in exchange for the Addendum to Contract.

D. Even presuming ongoing payments are owed, the amount of ongoing payments determined by the Trial Court are excessive. (Assignments of Error 5, 6, and 7.)

The Trial Court's conclusions of law indicated amounts the Trial Court directed Mathew to pay George on an ongoing basis. As stated above, conclusions of law should be reviewed *de novo*. See, e.g., *Stieneke*, 145 Wn. App. at 555. The Trial Court's payment determinations were in error based on mathematical law and common financial principals. Further, the Trial Court's payment determinations were inconsistent with its findings of fact—e.g., finding that Catherine's recent ongoing payments have not increased annually, but requiring Mathew to make ongoing payments subject to an annual increase. If Mathew is required to make ongoing

payments to George, the monthly amount should be no more than \$961.67 per month and the amount should not increase.

First, Mathew should not be required to pay ongoing interest. The interest, as is typical, was part of the Promissory Note. But the Promissory Note has been paid in full. Mathew paid over \$70,000.00 in interest based on the applicable amortization table. And, as is typical, the amount of monthly payments that went towards interest declined each month as the principal amount decreased. It is common knowledge that the amount of interest payable is dependent on the principal balance owed; *e.g.*, $I = prt$, which means interest paid equals principal multiplied by rate multiplied by time. If the principal is paid in full, there is no longer any interest owed. In this case, the principal was paid in full and no interest should be paid in the future.

Second, any future monthly payment amount should be a fixed amount and should not increase annually. The Promissory Note, as reflected by the amortization schedule, was designed to have monthly payments increase each year. But the schedule was carefully designed for a period of just ten years so that the principal amount would equal zero at the end of ten years. There is no justification for continuing to increase ongoing payment amounts every year now that the amortization schedule has reached the end point and the principal amount of the Promissory Note

has been paid in full. This argument is further supported by the fact that Catherine's ongoing monthly payments during 2016 and 2017 were the same amount and did not increase at the start of a new payment year.

Third, Mathew should not be required to pay any amount that was allocated as consideration for the note self-cancelling provision that George's attorney worked into the transaction documents. The \$340,500.00 Promissory Note was based on stock value of \$230,800.00 and consideration in the amount of \$109,700.00 for the potential self-cancellation. The self-cancelling provision cannot be realized at this point in time, and it would be inequitable to force Mathew to make extra payments on a self-cancelling provision that he already paid for and that will never benefit him.

If Mathew is required to make ongoing payments pursuant to the Trial Court's reasoning with respect to the relevant documents, the amount should be based on the value of NFOC stock that Mathew purchased. Mathew's payment amount should not be based on Catherine's ongoing payments, which the Court found has been \$2,286.42 per month. The monthly amount paid by Catherine does not appear to be related to the Promissory Note and/or amortization schedule, so it could just be an amount she is comfortable paying or it could be related to some other obligation.

Mathew's shares of the NFOC stock he and Catherine purchased

from George was valued at \$115,400.00 according to the Agreement to Purchase Stock and Assignment of Claims. When interest and payment for the self-cancelling provision is considered, Mathew paid over \$240,000.00 for those shares worth a stated \$115,400.00. It makes no sense to require Mathew to pay more, but to the extent he must, the ongoing payments should be calculated as consistently as possible with the transaction documents. Considering there should be zero interest and the amount should be fixed because there is no more principal left on the Promissory Note to pay, and presuming a term of ten years because that was originally the lifespan of the contemplated transaction, the monthly payment amount equals \$961.67 if the stock value were substituted as a theoretical new principal amount. In other words, \$115,400.00 divided by 120 months equals \$961.67 per month.

The exercise of trying to figure out what an ongoing payment amount should be for a transaction that has already been completed and paid for in full demonstrates the absurdity of attempting to read the Addendum to Contract as requiring ongoing payments. This reinforces the point that the rate outlined in the Agreement is currently zero. But if some amount must be paid, \$961.67 is consistent with the documents and is more than equitable given the stated value of the stock when Mathew purchased it.

VI. CONCLUSION

For the foregoing reasons, Appellant/Defendant, Mathew Buldis, requests that the Court of Appeals reverse the ruling of the Trial Court and direct that the judgment entered against Mathew be vacated. At a minimum, the judgment and amount of ongoing payments should be reduced.

RESPECTFULLY SUBMITTED this 29th day of May, 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29 day of May, 2018, at Olympia, Washington.



Pamela R. Armagost

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