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No. 51687-0-II

COURT OF APPEALS  
DIVISION II OF THE STATE OF WASHINGTON

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MATHEW BULLDIS,

Appellant,

v.

GEORGE BULLDIS, SR.,

Respondent.

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**APPELLANT'S REPLY TO RESPONDENT'S BRIEF**

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George Bulldis needed to sell his interests in the family business in 2005 because he was not able to continue working and he wanted his children, Mathew and Catherine, to completely take over from him. The parties agreed on a purchase price of \$340,500.00 payable over ten years and a Purchase Agreement was drafted with a corresponding Promissory Note. Mathew, as a good kid with the best intentions of helping his father, agreed to a side deal separate from the Purchase Agreement and Promissory Note. The side deal was not for any specific payment amount and was not referenced in any other agreement.

Mathew completed his obligations contained in the Purchase Agreement and Promissory Note after ten years. But during that ten year period, the relationships between Mathew and his father and between Mathew and Catherine became strained. The strained relationships are highlighted by the fact that Mathew and Catherine ended up on opposite sides of a lawsuit involving the family business, and during the course of resolving that lawsuit (whereby Mathew agreed to sell his interests in the family business to Catherine and a cousin) the business' attorney met with George and/or Catherine and secretly drafted a document ostensibly encouraging George to initiate the lawsuit that resulted in this appeal.

At all rates, with no specific payment amount required and the side deal having been agreed to without any consideration, Mathew was not

motivated, nor was he obligated, to make additional and ongoing payments to George. Mathew has already paid George the agreed purchase price plus interest. And Mathew is no longer part of the family business. For the reasons explained in Mathew's Opening Brief and in this Reply, it is both conceptually unfair and legally improper to impose ongoing payment obligations on Mathew.

### ARGUMENT

**A. The Trial Court erred on multiple findings of fact, which impacted the Trial Court's conclusions and the eventual judgment.**

**1. George was anxious to sell. George had seen the payment schedule prior to executing the Purchase Agreement, and George knew payments due him were scheduled to stop after 120 monthly payments.**

George testified, "I had to sell, because I couldn't run the business. I got hurt." VRP 36:23-24. He said it was time he "got out of Dodge." VRP 37:3-4. George's testimony is not that of a person who was reluctant to sell his shares of the family business to his children, and George never told Mathew that he [George] had any hesitancy about selling the business. VRP 47:3-6. While it is true that George asked Mathew to put a "side deal" together (VRP 49:2-22), it is also true that George had information explaining that the side deal did not provide for him to receive any payments in any specific amounts (VRP 24:6-15).

The date stamp of a fax machine is only indicative of when a particular fax was transmitted. It is not indicative of the creation date of the original document that is being faxed or whether other copies had been previously transmitted. The evidence in this case is that George had received a copy of the amortization schedule before he signed the Purchase Agreement. VRP 24:6-15. The fact George apparently received another copy of the amortization schedule that was faxed after he signed the Purchase Agreement does not take away from the earlier copy he received.

The importance of the amortization schedule is that it demonstrates with easy to read numbers that the rate outlined in the Promissory Note was designed to reduce the balance over time until there was nothing left to pay. The rate was zero at the end of 120 months. Zero balance. Zero principal. Zero interest. And Zero payment. CP 41-45.

**2. Mathew and George talked about the Addendum to Contract being a separate, side deal.**

The Trial Court stated in Finding of Fact 1.12 that “Mathew did not express to Catherine or George any personal belief that the Addendum to Contract was unrelated to the other documents.” But this finding directly contradicts Mathew’s testimony that he talked about the Addendum to Contract with George before it was written and it was referred to as a “side deal”. VRP 49:2-22. Mathew testified that George would have asked his

lawyer to draft the Addendum to Contract had it been intended to be integrated with the documents George's attorney had already drafted. *Id.* The Court's finding was clearly in error based on the Court's indication that it found the witnesses testified credibly, but George did not have a good memory. VRP 79:1-3.

It is error for the Court's finding to be the opposite of unopposed testimony by a credible witness. The evidence that Mathew and George had discussed the Addendum to Contract as a side deal, reflects the parties' intention that the Addendum to Contract be separate from the Purchase Agreement and Promissory Note.

**B. Under George's current interpretation of the Addendum to Contract, it contradicts the purchase price term reflected in the Purchase Agreement and Promissory Note. A contradicting term signifies that the Addendum to Contract is a separate transaction as opposed to an integrated part of the Purchase Agreement and/or Promissory Note. And as a separate transaction, the Addendum to Contract is void for lack of consideration.**

Mathew's interpretation of the Addendum to Contract is that it requires zero ongoing payments. This interpretation is consistent with the documents drafted by George's attorney and harmonizes the separate agreements regardless of whether the Addendum to Contract is integrated

with the other documents or not. Under Mathew’s interpretation of the Addendum to Contract, the purchase price is \$340,500.00 and the payment period is 120 months—after that, there is no obligation for any specific payments in any specific amount.

George’s current interpretation, on the other hand, leads to irreconcilable provisions; see, *e.g.*, Trial Court’s Conclusion of Law 2.6 indicating that George’s current interpretation (as erroneously adopted by the Trial Court) leads to the “Addendum to Contract technically contradict[ing] the Promissory Note...” However, without attempting to harmonize the terms of the contradicting documents, which would have been impossible, the Trial Court concluded the conflicting terms were consistent. This is an incongruous determination.

Mathew’s position that the contradicting Addendum to Contract is separate and should be void for lack of consideration reaches a result consistent with case law holding that irreconcilable provisions should be stricken. *In re W.L.W.*, 370 SW3d 799, 805 (Tex.App. 2012) (“When portions of a contract cannot be reconciled, a court may resolve the conflict by striking one of the provisions”). It is well settled that Court’s must attempt to harmonize contract documents where possible. *Kut Suen Lui v. Essex Insurance Company*, 185 Wn.2d 703, 710, 375 P.3d 596 (2016) (“Where possible, we harmonize clauses that seem to conflict...”). But

sometimes, harmonization is not possible. 17A Am.Jur.2d Contracts §374 (May 2018 Update). This is one of those times, and in Washington, a specific term is preferred over the general—here, the specific purchase price of \$340,500.00 trumps a vague and unspecified additional payment clause in a separate document.

At all rates, it is not Mathew's position that the Addendum to Contract is integrated with the Purchase Agreement and/or Promissory Note. Quite the opposite, the Addendum to Contract is a separate document. No case law has been cited where a separately titled, separately drafted, and separately signed document has been considered to be part of a document that contains a contradicting term.

George relies on an Indiana case dealing with a "no lien" addendum for the proposition that separate documents can be considered part of a single transaction. *Torres v. Meyer Paving Co.*, 423 NE2d 692 (Ind.App. 1981). But while this general premise is true, the case is distinguishable from the present matter. In *Torres*, a property owner contracted with a general contractor for construction of a convenience store. *Id.* The property owner and general contractor signed a no lien addendum in addition to their construction contract. *Id.* Later, a subcontractor attempted to foreclose on a lien. *Id.* The Court held that in other cases a no lien addendum might not be construed together with the separate construction contract, but in the

*Torres* case the separate documents would be considered part of the same transaction sharing the same consideration. *Id.* But the difference between *Torres* and the present case is that there is no indication in the *Torres* opinion that the no lien addendum contradicted any terms of the general contract.

In a second case discussed in the Respondent's Brief, *Edwards v. Heidelbaugh*, 574 SW2d 25 (Mo. App. 1978), the Court held that a personal guaranty signed the day after a promissory note could be considered together and be based on the same consideration. Here again, there is no indication in the *Edwards* case that any of the terms in the personal guaranty contradicted terms contained in the promissory note. *Id.*

In the present matter, the Addendum to Contract contradicts with the Promissory Note if George's current interpretation of the Addendum to Contract is accepted. This works to make the Addendum to Contract a separate document, which would require separate consideration to be valid. *Ledaura, LLC v. Gould*, 155 Wn.App. 786, 237 P.3d 914 (2010). The fact that the Addendum to Contract imposed separate obligations upon Mathew (under George's current interpretation) without conferring separate benefits does not save the Addendum to Contract by making it an integrated document. Based on George's reasoning, there could never be a modification void for lack of consideration because any modification that

failed for consideration would be conferred integrated status. This is not the law as set forth in *Ledaura*, supra.

The Addendum to Contract is not referenced in the Purchase Agreement or Promissory Note. The transaction is straight forward and sensible if the Addendum to Contract is voided—*e.g.*, there are no unanswered tax/basis questions and there is no gross overpayment. The Addendum to Contract needed its own consideration to be valid and without that it should be voided and left out of the Purchase Agreement, which effectively became a closed/final transaction when the Promissory Note was paid in full.

**C. The Trial Court’s determination of amount of ongoing “rate” is inequitable, is inconsistent with transactional/financial norms, and is additionally based on an unfounded conclusion.**

George compares the “rate” outlined in the Purchase Agreement and/or Promissory Note in this case to a contract calling for a payment adjustment tied to an outside index. But George’s comparison is like comparing apples to oranges. Outside indexes are typically used to adjust an otherwise fixed payment that continues in exchange for ongoing and/or additional consideration. In other words, the adjustments are intended as a mechanism to get future consideration closer to [future] prevailing market rates without the risk of having to renegotiate the deal from scratch [in the

future]. Probably the most common examples are long-term real estate leases that call for a fixed amount of rent that is subject to adjustment at regular intervals and employment agreements that provide for annual salary increases based on the rate of inflation.

Using the example of a real estate lease, when a tenants' rent increases at a given time tied to some index, the tenant continues to occupy the space and receive value from the lease. And ultimately, the new rent price is tied to some base price the landlord and tenant previously agreed was the value of the leased premises. The transaction between Mathew and George is nothing like this example. Mathew already paid full price for George's NFOC shares and is receiving no additional or ongoing value related to any future payments—Mathew in particular is not receiving additional or ongoing value since he sold his interests in the business to his sister and a cousin. In effect, having Mathew continue to pay George would be like making a tenant continue to pay their landlord even if the tenant bought the building from the landlord.

Ultimately, the point is that “rates” are tied to an underlying obligation. And here, Mathew's obligation to George was paid in full—Mathew paid the full price for the NFOC stock, Mathew paid the full price for the self-cancelling provision, and Mathew paid the full price (including interest) on the Promissory Note. There is no additional obligation and so

the effective rate is zero.

If the parties in this case had intended for George to be paid for the remainder of his life in ever increasing amounts, they would not have needed a Promissory Note in the first place. They could have simply said in the Purchase Agreement that, “George will be paid \$3,500.00 per month every month until he dies with the monthly payment amount to increase by 3% after each cycle of twelve monthly payments.” But the parties did not say this. Instead, they agreed on a value of NFOC’s shares and they agreed on a Promissory Note that required payments over time, which payments continuously reduced the balance of the obligation until it was zero.

It would be inequitable to force Mathew to pay multiple times more for George’s NFOC shares than what the parties agreed they were worth. And forcing a party to pay interest and escalating amounts on an obligation that has been fully paid would be unheard of. Further, the Court’s ruling appeared to place great significance on the amount of ongoing payments Catherine had made to George in 2016 and 2017. But Catherine had not paid increased/escalating amounts and she was not making monthly payments that were consistent with George’s current interpretation of the Addendum to Contract. The Court’s decision to make Mathew pay pursuant to the Addendum to Contract because the Court believed Catherine was continuing to pay is misplaced because Catherine’s continuing payments

were not the “rate” that George claims is required by the Addendum.

The rate outlined in the Purchase Agreement and Promissory Note for the years 2016, 2017, 2018 and all other future years is zero. But in no event should Mathew be required to pay interest on a fully paid obligation or increased payments that only increased because they were designed to reduce the previous obligation to zero at the end of 120 months. As set forth in Mathew’s Opening Brief, monthly payments should not be required, but if they are the maximum amount should be \$961.67.

### **CONCLUSION**

The purchase price George agreed to was \$340,500.00. This amount is specifically stated in paragraph 3 of the Purchase Agreement and is reflected in the Promissory Note. Determining the Addendum to Contract requires ongoing payments for an indefinite amount of time, after the agreed purchase price has been paid in full, makes the Addendum to Contract contradict the other documents. This contradiction cannot be harmonized—the purchase price is either \$340,500.00 or it is something different than \$340,500.00, but it cannot be both.

There were no contingencies in the Purchase Agreement. Mathew and Catherine were required to pay George \$340,500.00 and he as required to assign them his stock. A contradicting Addendum to Contract with vague meaning should not be permitted to trump specific terms of a

Purchase Agreement, and should not be given the favor as being considered an integrated part of the original agreement, as opposed to a separate modification, only because the parties did not add consideration for the modified term. The lack of consideration should defeat the conflicting term, not save it.

If the Addendum to Contract was intended to increase the purchase price and/or was supposed to have been integrated, the parties could have made that clear by having George's attorney make appropriate changes or by adding some writing to the Purchase Agreement to reflect a different price. But they did not do any of these things and the plain interpretation of the language in the documents as they exist is that the Addendum to Contract did not change the purchase price. In other words, the purchase price remained \$340,500.00 and once that amount was paid with interest then no further obligations were intended to exist.

The rate outlined in the Purchase Agreement and in the Promissory Note after 120 months is zero and no further payments are due in any amount. George has received the full amount of payments he contracted to receive. Any decision requiring Mathew to pay interest on a fully paid obligation, to pay an ever increasing amount, or to pay for an expired self-cancelling provision is especially unjust.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of July, 2018.

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I certify that I caused to be served a copy of the foregoing document on all other parties or their counsel of record on the date below as follows:

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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 20<sup>th</sup> day of July, 2018, at Olympia, Washington.

  
\_\_\_\_\_  
Kelley Strickland

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