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Division II
State of Washington
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No. 51687-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MATHEW BULLDIS

Appellant,

v.

GEORGE BULLDIS, SR.

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

As of 2005, George Buldis, the Plaintiff below, owned fifty percent (50%) of the outstanding shares of National Fish & Oyster Co., Inc., a family-owned company. At age 75, he wanted to retire and sell his shares to his two children, Catherine Buldis and Mathew Buldis,¹ so as to keep the business in the family and provide himself income for retirement. (RP 20-2)1 Mathew and Catherine agreed to purchase his shares for \$340,500, to be paid over 10 years per the terms of the Promissory Note. (Ex. 6) On October 28, 2005, George, Catherine and Mathew met to discuss and sign three documents that had been prepared by George's attorney: a Stock Pledge Agreement (Ex. 3); an Agreement to Purchase Stock and Assignment of Claims (Ex. 5); and a Promissory Note (Ex. 6). Mathew and George discussed the fact that per the note's terms, if George died prior to the ten year payoff, the note would be deemed fully satisfied and paid.

George discussed with Mathew what would happen if George outlived the ten year term of the note. Mathew agreed that if George outlived the note, the payments would continue for the rest of George's life. George said he wanted it in writing, and declined to sign any of the documents unless they contained a provision providing for continued payments as long as George lived. (RP 49) Therefore, Mathew prepared

¹ Since the three witnesses who testified in the trial all share the same last name, they will be referred to by their first names only throughout this brief. No disrespect is intended.

an Addendum to Contract (Ex. 4), providing that “Should George S. Buldis outlive the ten year note . . . then payments shall continue at the same rate as outlined in that Agreement for the rest of his life.” Mathew and Catherine paid off the note in December 2015. (RP 26) George lived on. Catherine kept making her share of note payments but Mathew refused to do so.

Mathew contests liability on two primary bases: (1) by characterizing the addendum as a contract amendment that is void for lack of new consideration, and (2) by claiming the addendum consequently became an unenforceable nullity upon payoff of the note. Both of these arguments are meritless. First, the addendum merely modified draft documents still under negotiation, as opposed to being a contract modification requiring additional consideration. With concurrent signatures of all documents on September 28, 2005, all of the promises in all of the documents served as consideration for each other. The Trial Court correctly concluded that all documents formed part of one transaction and contract, supported by the same consideration. Secondly, the Trial Court correctly concluded that the Addendum to Contract was a separate agreement, independently enforceable after payoff of the note, with the only function of the note after payoff being to establish the

benchmark amount of ongoing payments under the addendum. This Court should affirm the Trial Court judgment.

II. RESTATEMENT OF ISSUES

A. Whether substantial evidence supports Findings of Fact 1.7 and 1.8?

B. Whether the amortization schedule (Ex. 7), being informational only, did not create any new contract terms?

C. Whether the Addendum to Contract (Ex. 4) modified the proposed terms of the yet to be executed Promissory Note (Ex. 6), as opposed to modifying an existing contract requiring new consideration?

D. Whether the Trial Court correctly concluded that all the documents signed on September 28, 2005, when viewed together, are part of a single contractual promise?

E. Whether the Addendum to Contract imposes a payment obligation that is separate from that of the Promissory Note, supported by the same consideration, and which survived payoff of the note?

F. Whether substantial evidence supports the conclusion that in the Addendum to Contract, the parties intended "same rate as outlined in that agreement" to mean the monthly payment amount in effect as of the date of payoff of the Promissory Note, subject to three percent (3%) annual increases for the remainder of the life of George Buldis?

G. Whether the interest rate specified in the Promissory Note is immaterial to fixing the rate of the continuing payment obligation under the Addendum to Contract?

H. Whether substantial evidence supports Finding of Fact 1.12?

I. Whether Mathew Buldis's subjective intent to not be bound by the Addendum to Contract is irrelevant to contradict its plain language?

III. RESPONDENTS' STATEMENT OF THE CASE

National Fish and Oyster Co., Inc. (referred to below as "NFO") has been in the Buldis family since the 1920s. (RP 34-35) George Buldis was 87 years old at the time of trial. (RP 34) With brief exceptions, George had spent his whole working life in the family company. In 2005 at age 75 he decided to retire, and he began discussions with his two children, Mathew Buldis and Catherine Buldis, to sell them his NFO stock shares. (RP 20-21) George and his children determined and agreed that he owned 50% of the shares of NFO. (RP 21) They established a \$340,500.00 value for George's shares based upon a professional valuation. (RP 22-23, 44-45) George hired an attorney to draft business purchase and sale documents, including: a Stock Pledge Agreement (Ex. 3); an Agreement to Purchase Stock and Assignment of Claims (Ex. 5); and a Promissory Note. (Ex. 6) (RP 22, 44)

George, Mathew and Catherine met on September 28, 2005 to sign the business purchase and sale documents. (RP 24-25, 51) Mathew and George discussed the following language in Page 1 of the Promissory Note:

...[S]hould 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.

Before George would sign any documents, he insisted there be a provision whereby the note payments would continue for the rest of his life if he survived the 10 year note payoff. Mathew testified;

I showed him the self-canceling portion of it that his attorney put in there. Somehow, I had a draft of it, and he said, Well, what if I outlive this? What about it? He said, you keep paying me. Okay, okay, sure. He said, I want it in writing. Okay. So that is where I wrote it up.

(RP 49) Mathew drafted the Addendum to Contract which states:

We, 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 National Fish and Oyster Co., Inc., then payments shall continue at the same rate as outlined in that agreement for the rest of his life.

The addendum was acceptable to George, and the parties executed it along with the rest of the documents. (RP 24-25, 49, 51) Jason Koors, the company accountant, prepared an amortization schedule for the note. (Ex. 7) (RP 46) The parties did not receive the amortization schedule until the day after they signed the contract documents. (RP 33)

In December 2015, Mathew and Catherine paid off the note, and they entered into a contract for Catherine to purchase Mathew's shares of NFO. (RP 26) George signed a Release of Collateral dated December 30, 2015 (Ex. 18) to enable Catherine to purchase Mathew's shares free of George's security interest. (RP 26; Ex. 18)

After payoff of the Note, Catherine made one payment to George pursuant to the Addendum to Contract in January 2016, but made no further payments until May 2016, when she caught up the payments in response to a demand for payment from George's attorney. (Ex. 27). She has been making regular payments ever since. (RP 29) Mathew made no payments after December 2016. George commenced this lawsuit against Mathew to enforce the Addendum to Contract.

IV. ARGUMENT

A. Substantial evidence supports Findings of Fact 1.7 and 1.8.

It is unclear on what basis Mathew assigns error to Findings of Fact 1.7 and 1.8. This Court's inquiry is whether the Trial Court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). This Court reviews findings of fact under the substantial evidence standard. "Substantial evidence" is that "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Questions of law and conclusions of law are reviewed de novo. *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

Findings 1.7 and 1.8 accurately reflect to the language of the Addendum to Contract and Promissory Note, and correctly state that Exhibit 7, the amortization schedule, was not in existence on September 28, 2005. This latter fact is supported by Catherine's testimony that Ex. 7, bearing a fax date of September 29, 2005, "had to have come afterwards, because we didn't have this at signing." (RP 33)

B. The Addendum to Contract modified the terms of the yet-to-be executed Promissory Note, and was not a contract modification requiring additional consideration. The timing of when the parties first saw the amortization schedule is immaterial, since that document did not add to or subtract from the parties' obligations under the contract documents.

Matthew mischaracterizes the following language of Conclusion of Law 2.6 to argue that the parties entered into a contract modification requiring additional consideration:

The Addendum to Contract modified the overall agreement to address a contingency that was important to George and without which he would not sign the documents.

Mathew argument fails to take into account: (1) all contract documents were contemporaneously executed as part of the same transaction; (2) until mutual signature on all of the documents, all contract terms were still

subject to negotiation; and (3) George refused to enter into the contract unless the Addendum was included. Under Washington law, in these circumstances, all of the promises in all the documents served as consideration for each other, and the Addendum to Contract required no new consideration.

The first question is whether the parties intended all contract documents to be part of the same transaction. As a general rule a contract is entire when by its terms, nature and purpose, it contemplates and intends that each and all of its parts are interdependent and common to one another ***and to the consideration.***” *Saletic v. Stamnes*, 51 Wn.2d 696, 699, 321 P.2d 547 (1958)(quoting *Traiman v. Rappaport*, 41 F.2d 336, 338 (3d Cir. 1930)).² Whether separate agreements are in fact part of one transaction depends upon the intention of the parties as evidenced by the agreements. *Don L. Cooney, Inc. v. Star Iron & Steel Co.*, 12 Wn. App. 120, 122, 528 P.2d 487 (1974). “Generally, what the parties intend is a question of fact.” *Anderson Hay & Grain Co., Inc. v. United Dominion Indus., Inc.*, 119 Wn. App. 249, 255, 76 P.3d 1205 (2003).³ “However, the interpretation of an unambiguous contract is a question of law.” *Stranberg v. Lasz*, 115 Wn. App. 396, 402, 63 P.3d 809 (2003) (citing *Mayer v. Pierce County Med.*

² Emphasis added.

³ *Rev. den*, 151 Wn.2d 1016, 88 P.3d 964 (2004)(citing *Kenney v. Read*, 100 Wn. App. 467, 475, 997 P.2d 455 (2000)).

Bureau, Inc., 80 Wn. App. 416, 420, 909 P.2d 1323 (1995)). “In determining the parties' intent, the court should consider ‘the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties.’ ” *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 22 (1990)(quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Both the Note and the Addendum refer to the same subject matter and purpose, *i.e.*, establishing Mathew's and Catherine's payment obligation: (1) in the event of George's death before payoff of the Note, or (2) in the event George lives beyond the payoff date of the Note. The Addendum specifically refers to the payment obligation under the Note. This reference combined with simultaneous execution of the two documents indicates the parties intended them to be part of the same transaction.

Decisive to the analysis is the fact that George would not have entered into any contract at all without the Addendum, which addressed a contingency that was very important to him. Separately signed contract documents should be read together as part of one transaction “if the parties assented to all the promises as a whole, so that *there would have been no*

bargain whatever if any promise or set of promises had been stricken.”

Commander Oil Corp. v. Advance Food Service Equipment, 991 F.2d 49, 53 (2nd Cir. 1999)(quoting 6 Williston, *Contracts*, § 863, at 275 (3rd ed. 1970)).⁴

Mathew attempts to attach significance to the timing of when the parties received Ex. 7, the amortization schedule. While Catherine initially testified at RP 24 that George had the schedule prior to signing the documents, she later clarified at RP 33 that based upon the fax date, the amortization schedule had to have come after the other documents were signed. It was within the province of the trial court to determine which testimony to accept. Accordingly, Finding of Fact 1.7, which determined that Ex. 7 did not exist on September 28, 2005, was supported by substantial evidence. In any event, Ex. 7 simply reflects the periodic payment amounts and payoff date of the Promissory Note, and adds nothing of substance to the note or other contract documents. Whether George had the amortization schedule before or after he signed the contract documents is therefore immaterial to the issues on appeal.

Under the facts in this record, the addendum required no additional consideration because all of the covenants in each document served as consideration for all of the others. *Torres v. Meyer Paving Co.*, 423 N.E.2d

⁴ Emphasis added.

692 (Ind. App. 1981) illustrates this principle. In *Torres*, which involved a separate “no lien” addendum to a paving contract, the court held that when writings are executed at the same time and relate to and reference the same transaction and subject matter, consideration for one instrument may be found in the other. As the Court stated:

[Plaintiffs] argue that it is not necessary for both agreements to state separate consideration. We agree. It has long been recognized in Indiana that in the absence of anything to indicate a contrary intention, when writings are executed at the same time and relate to the same transaction or subject matter, they must be construed together in determining the contract . . . Furthermore, the consideration for one instrument may be found in a contemporaneous instrument⁵

The documents do not necessarily have to be executed at the same time if the parties intended them to be part of the same transaction. In *Edwards v. Heidelbaugh*, 574 S.W.2d 25 (Mo. App. 1978) the defendant on behalf of his corporation executed a promissory note made payable to the plaintiff and on the next day, signed a personal guaranty to ensure payment of the note. *Edwards*, 574 S.W.2d at 26. The corporation defaulted on the note and the plaintiff sued defendant personally based upon the personal guaranty. The defendant appealed a summary judgment in favor of the plaintiff, contending that because the two documents were not executed at the same time, material issues of fact existed as to whether the guaranty

⁵ *Torres*, 423 N.E.2d at 695 (internal citation omitted).

was supported by consideration. The Missouri Court of Appeals rejected this argument and upheld the summary judgment, even though the guaranty had been signed a day after the note:

A guaranty is a separate independent contract and requires consideration. A contract of guaranty when executed contemporaneously with the original contract may be considered part of the original contract and hence, may be supported by the same consideration. . . .

As the the word “guaranty” implies, when it does not appear to the contrary, that the entire matter was one concurrent act and the contract of guaranty was a part of the original agreement, supported by the same consideration.

Edwards, 574 S.W.2d at 27.⁶

Mathew mischaracterizes the holding in *Ledaura, LLC v. Gould*, 155 Wn. App. 786, 237 P.3d 914 (2010) to make the argument that because the note and addendum were integrally related, payoff of the note extinguished the addendum. *Ledaura* is factually distinguishable from the case at bar because (1) the option agreement in question was executed the day after the lease agreement, and (2) the tenants/buyers paid new and separate consideration for the option agreement. In *Ledaura*, the parties executed a lease for commercial property one day and a separate purchase option agreement the following day, for which the purchasers paid \$35,000 in additional consideration. *Id.* 155 Wn. App. at 790. When the

⁶ Internal quotations and citations omitted.

sellers/landlords evicted the tenants/purchaser for nonpayment of rent, the trial court found that the lease and option agreement were so “intertwined” that termination of the lease necessarily terminated the option to purchase. *Id.* at 796-97. The Court of Appeals reversed, holding that the contracts were separate, such that termination of the lease agreement did not terminate the option to purchase. Relying upon a factually analogous case, *Walker v. Horeen*, 695 S.W.2d 572 (Tex. App. 1985), the Court pointed out several relevant factors making the two contracts separately enforceable: (1) the lease and option agreement were separately titled, dated and signed; (2) neither document referenced or incorporated the other; (3) neither contained language making enforceability of one dependent on enforceability of the other; and (4) each agreement gave the parties entirely separate benefits and separate obligations. *Ledaura*, 155 Wn. App. at 801-03.

Although *Ledaura* is factually distinguishable from the instant case, the salient parts of its holding are actually authority for George’s position. To address the *Walker* factors in the instant case, the Promissory Note and Addendum to Contract are separately titled but were concurrently dated and signed. The addendum expressly incorporates the note. Neither contains language making enforceability of one dependent upon enforceability of the other. In fact, the Addendum to Contract by its

express terms creates an ongoing payment obligation. Like the lease and option agreement in *Ledaura*, the note and addendum gave the parties separate benefits and separate obligations. In summary, the Trial Court correctly rejected Mathew's argument that the addendum expired upon payoff of the note, correctly concluding they each gave rise to separately enforceable obligations.

C. The Trial Court correctly read the Promissory Note and Addendum to Contract so as to overcome apparent ambiguity and give effect to the language of both. Conclusions of Law 2.6 and 2.9 are consistent with each other.

The Trial Court held in Conclusion of Law 2.6 that "the terms of the addendum to contract are ambiguous" reasoning that a continuing payment obligation after the term of the note conflicted with the note's 10-year payment term. George disagrees that there is ambiguity between the two documents; however, his difference of opinion is immaterial in light of the fact that the Trial Court based Conclusion of Law 2.6 upon extrinsic evidence of all the surrounding circumstances in addition to the contract documents.

First, the Trial Court correctly read the two documents so as to harmonize and give effect to the language of both.

As a general rule ..., where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other.

Levinson v. Linderman, 51 Wn.2d 855, 859, 322 P.2d 863 (1958) (quoting 17 C.J.S. *Contracts* § 298, at 714 (1939)). Next, the Court correctly went on to construe the documents so as to give effect all of their provisions. “An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn. 2d 94, 101, 621 P.2d 1279 (1980)(citing *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953)).

Conclusion of Law 2.9, which requires Mathew to make ongoing payments at the last payoff rate applicable to the note, is consistent with Conclusion of Law 2.6. Mathew argues that because the terms of the note determined the ongoing payment amounts under the addendum, payment of the note automatically extinguished the addendum. Only by an absurd reading of the note and addendum could lead to such a result. The Addendum to Contract does not purport to keep any of the provisions of the note in effect after the note’s payoff. Rather, the addendum requires the makers to continue making payments after Note payoff “at the same *rate* as outlined in [the Promissory Note] for the rest of [George’s] life.” (Ex. 4). “Rate” is appropriately defined in this instance as a “payment or price fixed according to a ratio, scale, or standard.” See *Black’s Law Dictionary* (5th ed.). Accordingly, the only function of the note after its payoff was to establish a verifiable standard for fixing the future stream of payments.

This is no different than a provision in a lease or other contract incorporating some outside index or standard (*i.e.*, Consumer Price Index) to establish a future payment amount.⁷ This “rate,” based upon the plain language of the note, was the payment amount in effect as of payoff, subject to a three percent (3%) annual increase.

The Trial Court correctly concluded that the addendum merely added another term to the parties’ overall contract. Reflective of this analysis is Finding of Fact 1.13, to which Mathew did not assign error:

The Addendum to Contract adds an additional obligation to the obligations and benefits agreed to by the parties in the promissory note and other documents signed simultaneously.⁸

Regardless of whether this Court treats Finding of Fact 1.13 as a finding, conclusion, or mixed, it is both legally correct and supported by substantial evidence. This use of an outside index or standard to fix the future payment amount had no effect whatsoever on the enforceability of the addendum.

This result makes common sense in light of the parties’ circumstances at the time of contracting. George wanted, and his children

⁷ *E.g. see generally, Lee v. Kennard*, 176 Wn. App. 678, 310 P.3d 845 (2013).

⁸ If an appellant fails to assign error to a trial court’s findings of fact, they become verities on appeal. RAP 10.3(g); *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995). Where findings are actually conclusions of law or mixed findings of fact and conclusions of law, this Court reviews the factual components under the substantial evidence standard and review de novo the conclusions of law, including those mistakenly characterized as findings of fact. *In re Estate of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854 (2011).

agreed, that he should receive a stream of payments that would support him in retirement to the end of his life. In this context, the Promissory Note is only used to establish an index for the continuing payment amounts under the Addendum to Contract, which continues to be viable as a separate contract. The interest rate in the Promissory Note is irrelevant. In summary, the Trial Court did not err in construing both the Note and the Addendum so as to harmonize and give effect to both, consistent with the parties' intent as reflected by the surrounding circumstances and extrinsic evidence.

D. Mathew's subjective intent to not be bound by the Addendum to Contract is immaterial and was correctly rejected by the Trial Court.

Mathew's assignment of error to Finding of Fact 1.12 is misplaced. His sole justification for his refusal to pay is his subjective belief that all along, he considered the continuing payment obligation to be voluntary. However, his subjective intentions or beliefs cannot be admitted to contradict the plain language of the addendum. While the Court may consider extrinsic evidence, such evidence may not include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974

P.2d 836 (1999). Thus, a court may review the unwritten actions and manifestations of the parties as an aid in determining what the parties meant by the language they put in the agreement - but not to change or negate the terms of the written contract. *Berg*, 115 Wn.2d at 669-70; *DePhillips v. Zolt Const. Co., Inc.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998).

In any event, Mathew's own testimony at RP 52-53 supports Finding of Fact 1.12, in which he asserts that he signed the Addendum to Contract with the subjective intent that it not be binding, and confirms that he did not share this subjective intent with anyone else. This testimony supports the Court's finding that Mathew did not express to Catherine of George any personal belief that the addendum was unrelated to the other documents.

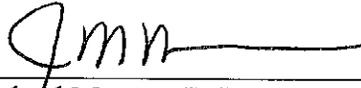
IV. CONCLUSION

In conclusion, the Trial Court correctly concluded all of the contract documents harmonized and formed as single contract. The addendum was not a contract modification requiring a new consideration because the parties had not entered into any binding contract until mutual execution of all of the documents on September 28, 2005. All of the promises in all of the contract documents served as consideration for each other. Therefore, the Addendum to Contract was fully enforceable and supported by

consideration. The Court correctly rejected Mathew's testimony that he subjectively believed the Addendum to Contract to be an unenforceable "side deal." This Court should affirm the decision below.

DATED this 26 day of June 2018.

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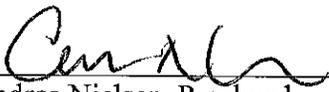
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below.

Mr. John A. Kesler, III Bean, Gentry, Wheeler & Peternell, PLLC 910 Lakeridge Way SW Olympia, WA 98502-6068 jkesler@bgwp.net	<input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
---	---

DATED this 26th day of June, 2018.



Andrea Nielsen, Paralegal
anielsen@worthlawgroup.com

WORTH LAW GROUP, P.S.

June 26, 2018 - 3:32 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: George Bulldis, Sr., Respondent v. Mathew Bulldis, Appellant
Superior Court Case Number: 16-2-01934-7

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