



No. 29575-3-III

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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**Plese-Graham, LLC, et al**

**Respondents**

**v.**

**Robert Loshbaugh, et al**

**Appellants**

---

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT  
THE HONORABLE SALVATORE F. COZZA

---

**BRIEF OF APPELLANTS ROBERT AND JANE DOE  
LOSHBAUGH**

---

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR AND ISSUES ..... 2

    A. ASSIGNMENTS OF ERROR. ....2

        1. *The trial court erred in granting summary judgment against Mr. Loshbaugh individually because there is no basis for personal liability.....2*

        2. *The trial court erred in granting summary judgment to Plese-Graham, LLC because it is not a party to the promissory note at issue. ....2*

        3. *The trial court erred in granting summary judgment in favor of Rod and Linda Plese because they were improperly joined. ....2*

        4. *The trial court erred in awarding attorney fees to Plese-Graham, LLC because Mr. Loshbaugh proved he is not liable to them. ....2*

    B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. ....2

        1. *Do The Undisputed Facts Show That Mr. Loshbaugh Personally Agreed To Pay Rod and Linda Plese For An Existing Company Obligation? (Assignment of Error No. 1). ....2*

        2. *Did Respondents Provide Sufficient Evidence To Show Mr. Loshbaugh Should Be Personally Liable For The Company Note? (Assignment of Error No. 1).....2*

        3. *Can Plese-Graham, LLC Maintain A Cause Of Action Against Mr. Loshbaugh Individually When Plese-Graham, LLC Is Not A Party To The Note? (Assignment of Error No. 2). ....2*

        4. *Did Respondents Inexcusably Neglect To Name Rod And Linda Plese As Real Parties In Interest Until After Arbitration And Summary Judgment Where Their Names Were On The Promissory Note Prior To Filing The Complaint? (Assignment of Error No. 4). ....2*

        5. *Does Mr. Loshbaugh Have To Pay Plese-Graham, LLC’s Attorney Fees If He Improves His Position Against Plese-Graham, LLC After Arbitration? (Assignment of Error No. 3).....3*

III. STATEMENT OF THE CASE ..... 4

A.	FACTUAL HISTORY .....	4
B.	PROCEDURAL HISTORY.....	5
IV.	ARGUMENT .....	6
A.	STANDARD OF REVIEW FOR SUMMARY JUDGMENT. ....	6
B.	MR. LOSHBAUGH IS NOT A PARTY TO ANY CONTRACT WITH RESPONDENTS.....	7
C.	THE COMPANY NOTE DOES NOT CREATE PERSONAL LIABILITY AGAINST MR. LOSHBAUGH.....	10
1.	<i>Respondents’ Bald Assertions Regarding Abuse Of Corporate         Form Failed To Satisfy Their Burden On Summary Judgment....</i>	10
2.	<i>The Facts Do Not Support Imposing Personal Liability For         Post-Dissolution Transactions. ....</i>	11
D.	THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLESE-GRAHAM.....	13
E.	RESPONDENTS’ REQUEST FOR JOINDER WAS IMPROPERLY GRANTED BECAUSE OF INEXCUSABLE NEGLECT.....	14
F.	THE COURT ERRED IN GRANTING PLESE-GRAHAM’S REQUEST FOR ATTORNEY FEES.....	16
G.	MR. LOSHBAUGH IS ENTITLED TO AN AWARD OF HIS ATTORNEY FEES.....	16
V.	CONCLUSION.....	17

## TABLE OF AUTHORITIES

### **Cases**

<i>Brown &amp; Shinitzky Chartered v. Dentinger</i> , 455 N.E.2d 128 (Ill. App. 1983) .....	9
<i>Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).....	16
<i>Culinary Workers and Bartenders Union No. 596 v. Gateway Café, Inc.</i> , 91 Wn.2d 353, 588 P.2d 1334 (1997).....	11, 12
<i>DiBlasi v. City of Seattle</i> , 136 Wn.2d 865, 969 P.2d 10 (1998) .....	7
<i>Equipto Div. Aurora Equip. Co., v. Yarmouth</i> , 134 Wn.2d 356, 950 P.2d 451 (1998).....	13, 14
<i>Green v. A.P.C.</i> , 136 Wn.2d 87, 94, 960 P.2d 912 (1998) .....	6
<i>In re Obaidi</i> , 154 Wn. App. 609, 616, 226 P.3d 787 (2010) .....	8
<i>Jacobsen v. State</i> , 89 Wn.2d 109, 569 P.2d 1152 (1977) .....	7
<i>Judy v. Hanford Env'tl. Health Found.</i> , 106 Wn. App. 26, 33-34, 22 P.3d 810 (2001).....	7
<i>Kim v. Moffett</i> , 156 Wn. App. 689, 234 P.3d 279 (2010) .....	15
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004) ..	19
<i>Larkins v. St. Paul &amp; Tacoma Lumber Co.</i> , 35 Wn.2d 711, 214 P.2d 700 (1950).....	8
<i>No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.</i> , 71 Wn. App. 844, 854 n. 11, 863 P.2d 79 (1993).....	7
<i>Reese Sales Co. v. Gier</i> , 16 Wn. App. 664, 557 P.2d 1326 (1977) .....	14
<i>S. Hollywood Hills Citizens Ass'n v. King County</i> , 101 Wn.2d 68, 677 P.2d 114 (1984).....	16
<i>Sea-Van Invs. Assocs. v. Hamilton</i> , 125 Wn.2d 120, 881 P.2d 1035 (1994) .....	8
<i>Tran v. State Farm Fire &amp; Cas. Co.</i> , 136 Wn.2d 214, 961 P.2d 358 (1998) .....	7
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999) .....	17
<b>Statutes</b>	
RCW 19.36.010 .....	9

RCW 23B.02.040.....	12, 15
RCW 23B.14.010 <i>et seq.</i> .....	14
RCW 4.84.330 .....	19
RCW 7.06.060 .....	18
<b>Rules</b>	
RAP 18.1.....	19
<b>Treatises</b>	
Farnsworth, <i>Contracts</i> § 6.9 (4th Ed. 2004) .....	9

## **I. INTRODUCTION**

This matter involves a creditor's attempts to wrongfully exact payment of a company debt from an individual. Respondent Plese-Graham, LLC seeks payment from Appellant Robert Loshbaugh for a debt that arose from construction work performed by the construction company, Ed Loshbaugh & Sons, Inc. (the Company). In late 2009, Plese-Graham hired the Company to perform work on one of Plese-Graham's real estate developments. The Company was unable to pay one of its subcontractors, which in turn filed a lien on the project. Plese-Graham paid the debt for the Company, then sued the Company for construction defects and breach of contract, and also named Mr. Loshbaugh individually. After mandatory arbitration, Mr. Loshbaugh sought relief in Spokane County Superior Court. The trial court granted Respondents' motion for summary judgment based on a promissory note that was for payment of an existing Company debt. Neither the promissory note nor the holders of the note were referenced in the Complaint. Mr. Loshbaugh appeals.

## **II. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error.**

1. The trial court erred in granting summary judgment against Mr. Loshbaugh individually because there is no basis for personal liability.

2. The trial court erred in granting summary judgment to Plese-Graham, LLC because it is not a party to the promissory note at issue.

3. The trial court erred in granting summary judgment in favor of Rod and Linda Plese because they were improperly joined.

4. The trial court erred in awarding attorney fees to Plese-Graham, LLC because Mr. Loshbaugh proved he is not liable to them.

### **B. Issues Pertaining to Assignments of Error.**

1. Do The Undisputed Facts Show That Mr. Loshbaugh Personally Agreed To Pay Rod and Linda Plese For An Existing Company Obligation? (Assignment of Error No. 1).

2. Did Respondents Provide Sufficient Evidence To Show Mr. Loshbaugh Should Be Personally Liable For The Company Note? (Assignment of Error No. 1).

3. Can Plese-Graham, LLC Maintain A Cause Of Action Against Mr. Loshbaugh Individually When Plese-Graham, LLC Is Not A Party To The Note? (Assignment of Error No. 2).

4. Did Respondents Inexcusably Neglect To Name Rod And Linda Plese As Real Parties In Interest Until After Arbitration And

Summary Judgment Where Their Names Were On The Promissory Note Prior To Filing The Complaint? (Assignment of Error No. 4).

5. Does Mr. Loshbaugh Have To Pay Plese-Graham, LLC's Attorney Fees If He Improves His Position Against Plese-Graham, LLC After Arbitration? (Assignment of Error No. 3).

### **III. STATEMENT OF THE CASE**

#### **A. Factual History**

For over 10 years, Mr. Loshbaugh and his father Ed Loshbaugh operated a construction business in Spokane called Ed Loshbaugh & Sons, Inc. (“the Company”). (CP 52, ll. 9-11). During that time the Company worked on numerous projects and developments for Plese-Graham, LLC (“Plese-Graham”). (CP 52, ll. 9-11; 106, ll. 22-24). In 2008, Plese-Graham hired the Company to install the sewer and water system for new developments. (CP 52, ll. 1-8). During the course of construction, there were issues with a sinkhole and underpayment of one of the Company’s subcontractors. (CP 52, ll. 1-8, 12-18). The subcontractor filed a lien against Plese-Graham’s property on March 16, 2009. (*Id.*) The Company was short on work and revenue and it performed work for Plese-Graham without being paid to reduce the amount owed on the lien. (CP 107, ll. 1-10, 17-19). On May 24, 2009, the Company’s surety cancelled its contractor’s registration bond and its status as a registered contractor was suspended. (CP 107, ll.4-6).

On June 24, 2009, Plese-Graham paid the subcontractor to remove the lien from its property. (CP 52, ll. 18-24; 107, ll. 20-22). Shortly thereafter Mr. Loshbaugh agreed to sign a promissory note on behalf of Ed

Loshbaugh & Sons, Inc. for the amount Plese-Graham paid to the subcontractor. (CP 107, ll. 20-22). Plese-Graham disputes this promise was on behalf of the Company. (CP 53, ll. 5-16; CP 101, ll. 3-6).

On or about June 30, 2009, Mr. Plese drafted a promissory note for payment of \$16,265.12 to Rod and Linda Plese due on June 30, 2010 and sent it to Mr. Loshbaugh for his signature. (CP 53, ll. 3-6; 88). This note listed “Bob Loshbaugh” as the signing party (the “Personal note”). (CP 88; 107, ll. 23-24 to 108, ll. 1-2). Mr Loshbaugh refused to sign the Personal note. (CP 88; 108, 3-5). Although the exact date is unclear, no later than August 19, 2009, Mr. Loshbaugh requested that Mr. Plese redraft the note to name “Ed Loshbaugh & Sons, Inc.” as the signing party (the “Company note”). (CP 53, ll. 6-11; 90; 183, ll. 3-17; 185). Mr. Plese complied and sent the Company note to Mr. Loshbaugh. (CP 53, ll. 9-11; 90). Despite email confirmations by Mr. Loshbuagh, Mr. Plese never received a signed copy of the note. (CP 53, ll. 11-16). Payment on the Company note was due on June 30, 2010. (CP 90). As set forth below, Plese-Graham filed its Complaint on December 1, 2009. (CP 5).

**B. Procedural History**

On December 1, 2009, Plese-Graham, LLC filed its complaint captioned “Complaint for Breach of Construction Contract” against the

Company, Travelers' Casualty & Surety Co. (the bonding company), Mr. Loshbaugh, Mr. Loshbaugh's father, and Mr. Loshbaugh's wife. (CP 5, ll. 1-22; 95, ll. 26-29). The Complaint alleges that defendants were overpaid on a construction contract by failing to pay a subcontractor on the project, but makes no reference to any promissory notes (CP 6, ll. 8-17). The matter was subject to mandatory arbitration and the arbitrator filed his decision on July 7, 2010. (CP 45). Mr. Loshbaugh timely appealed for trial de novo. (CP 49). Both parties filed motions for summary judgment (CP 104-105; CP 118-19). The summary judgment proceedings were heard on October 15, 2010. (CP 136). The trial granted Respondents' motion, and Mr. Loshbaugh appeals that ruling to this Court.

#### **IV. ARGUMENT**

##### **A. Standard Of Review For Summary Judgment.**

When reviewing a summary judgment, an appellate court engages in the same inquiry as the trial court. *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Thus, this Court may affirm the trial court's order granting summary judgment only if it is satisfied, after considering the facts and all reasonable inferences therefrom in a light most favorable to Mr. Loshbaugh, that there is no genuine issue of material fact, and Plese-Graham, LLC is entitled to judgment as a matter of law. *DiBlasi v. City of*

*Seattle*, 136 Wn.2d 865, 872, 969 P.2d 10 (1998); *Jacobsen v. State*, 89 Wn.2d 109, 569 P.2d 1152 (1977). On motion for summary judgment, neither the trial or appellate court may weigh the evidence. *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 854 n. 11, 863 P.2d 79 (1993). Summary judgment is improper if reasonable minds could reach different conclusions or “if all the necessary facts to determine the issues are not present.” *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998).

**B. Mr. Loshbaugh Is Not A Party To Any Contract With Respondents.**

There is no contract, express or implied, between Mr. Loshbaugh and Plese-Graham, LLC or Mr. and Mrs. Plese. A valid contract requires offer, acceptance, mutual assent, and consideration. *In re Obaidi*, 154 Wn. App. 609, 616, 226 P.3d 787 (2010). Here, the Respondents cannot meet their burden to satisfy all of these essential elements.

First, there was no acceptance of the Personal note. Mr. Loshbaugh rejected the proposed Personal note offered by Mr. Plese, evidenced by the handwritten delineations replacing the “Robert Loshbaugh” with “Ed Loshbaugh & Sons, Inc.” (CP 88; 108, 3-5). Acceptance must mirror the offer or there is no meeting of the minds and no enforceable contract. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d

120, 126, 881 P.2d 1035 (1994). Mr. Loshbaugh clearly rejected the Personal note, and Rod Plese abandoned the Personal note by redrafting it as the Company note. (CP 53, ll. 9-11; 90).

Second, and even if the Court finds acceptance, the Personal note is wholly unsupported by consideration because Mr. Loshbaugh received no benefit from agreeing to its terms. Consideration is essential to an enforceable contract. *Larkins v. St. Paul & Tacoma Lumber Co.*, 35 Wn.2d 711, 720, 214 P.2d 700 (1950). Here, the purported Personal note with Mr. Loshbaugh is unenforceable because Respondents failed to prove the existence of consideration. *See id.*

Lastly, even if the Court finds acceptance and consideration, the contract violates the surety provision of the statute of frauds in RCW 19.36.010(2). That statute states in pertinent part:

[A]ny agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: [...] every special promise to answer for the debt, default, or misdoings of another person....

Respondents argued below that their payment to a third party constitutes “part performance” thereby removing Mr. Loshbaugh’s purported oral promise to pay from the statute of frauds. (CP 122, ll. 26 to 124 ll. 7).

However, the part performance exception is unavailable in surety situations. Farnsworth, *Contracts* § 6.9 (4th Ed. 2004); accord *Brown & Shinitzky Chartered v. Dentinger*, 455 N.E.2d 128, 129 (Ill. App. 1983) (holding the part performance exception “would render these provisions totally meaningless” because normally a party “does not attempt to enforce a surety contract until after that party’s performance . . . is complete.”). Otherwise, a creditor could always eviscerate the writing requirement and bind any third party surety by claiming it had already paid money on behalf of the debtor, creating part performance. See *Brown*, 455 N.E.2d at 129.

To be clear, Mr. Loshbaugh does not contend the *Company* note is unenforceable and concedes that the subsequent emails satisfy the statute of frauds as to the *Company* note. However, Respondents have provided no evidence that shows Mr. Loshbaugh’s alleged *personal* guarantee was ever agreed to, authenticated, or referenced in subsequent emails. Accordingly, the evidentiary function of the statute of frauds necessarily precludes Mr. Loshbaugh’s liability as the *Company*’s surety absent a signed writing.

In sum, when the facts are necessarily viewed in a light most favorable to Mr. Loshbaugh, Respondents fail to establish the existence of

any Personal note by Mr. Loshbaugh because there was no acceptance, consideration, or requisite writing.

**C. The Company Note Does Not Create Personal Liability Against Mr. Loshbaugh**

Both the facts and the law show that Mr. Loshbaugh is not personally liable for the Company's promissory note. In their briefing and at the summary judgment proceeding, Respondents commingled various theories of individual liability, including corporate piercing and common-law agency principles of liability. (CP 100-102; VPR<sup>1</sup> 8:20-10:13). However, none of those arguments are supported by sufficient facts, let alone facts that are undisputed, and the trial court erred in granting summary judgment.

**1. Respondents' Bald Assertions Regarding Abuse Of Corporate Form Failed To Satisfy Their Burden On Summary Judgment**

Respondents are expected to argue that a corporation should be "set aside" when the corporate form is used to violate a duty owed. Below Respondents relied on *Culinary Workers and Bartenders Union No. 596 v. Gateway Café, Inc.*, 91 Wn.2d 353, 588 P.2d 1334 (1997). (CP 125, ll. 7-10). *Culinary Workers* does not control the present situation. In that case, purchasers of a corporation transferred all of the defunct company's assets

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<sup>1</sup> Verbatim Report of Proceedings from October 15, 2010.

to a new company, then resumed the exact type of business as the predecessor corporation in an attempt to avoid payment of union dues. *Id.* at 356-358.

No such facts exist here. In 2009, Ed Loshbaugh & Sons, Inc., like many other construction companies, began struggling economically and was unable to continue operations. (CP 107, ll. 1-10). There was no fraudulent transfer of corporate assets, preferential distributions to shareholders, or any other type of corporate misconduct that implicates looking beyond the corporate entity, nor has any such activity been alleged. (CP 5-10; CP 33, ll. 14-17). As such, Respondent's "set aside" argument fails.

**2. The Facts Do Not Support Imposing Personal Liability For Post-Dissolution Transactions.**

Equally meritless is Respondents' argument that Mr. Loshbaugh is personally liable because the Company's promise to pay occurred when no corporation existed. (CP 101, ll. 6-25). This argument is based on RCW 23B.02.040<sup>2</sup> as construed in *Equipto Div. Aurora Equip. Co., v. Yarmouth*, 134 Wn.2d 356, 950 P.2d 451 (1998). In *Equipto*, the trial court granted summary judgment against Mr. Yarmouth, the sole shareholder, director,

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<sup>2</sup> RCW 23B.02.040 states: All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting . . . .

and officer of a corporation, making him personally liable for the outstanding bills on merchandise purchased over one year after the corporation was administratively dissolved. On appeal, the Washington State Supreme Court reversed the trial court's entry of summary judgment because whether Mr. Yarmouth knew about the dissolution was a question of fact. *Id.* at 371. In reaching its holding, the Court rejected the lower court's common law application of agency principles to the issue of post-dissolution liability. *Id.* at 363.

Below, Respondents argued Mr. Loshbaugh was personally liable for the Company note as a post-dissolution transaction. (CP 102, ll. 11-21). Part of Respondents' argument was that the Company was "de-facto" dissolved in May of 2009 because it ceased doing business. (CP 101-102). The problem with Respondents' theory is twofold. First, Washington's Business Corporation Act provides the exclusive method for dissolving corporations. *See Reese Sales Co. v. Gier*, 16 Wn. App. 664, 667, 557 P.2d 1326 (1977) (interpreting former Act). By implication, the Legislature extinguished common law theories such as "de facto" dissolution. *See id.* Corporate dissolution may only be accomplished voluntarily, administratively, or judicially. *See* RCW 23B.14.010-.310; *Reese* 16 Wn. App. at 667. Second, the Supreme Court made clear in

*Equipto* that an individual must have *actual* knowledge of dissolution. *Id.* at 371. The statutory methods of dissolution provide a clear-cut time when the corporation must discontinue new business. De-facto dissolution blurs the clear line established by the Legislature, making actual knowledge of dissolution more difficult to ascertain.

Here, the Company was administratively dissolved on October 1, 2009. (CP 93-94). The facts, when viewed in a light most favorable to Mr. Loshbaugh, show that he agreed to the promissory note on the Company's behalf no later than August 19, 2009, well before the administrative dissolution. (CP 53, ll. 6-11; 90; 183, ll. 3-17; 185). As such, neither Mr. Loshbaugh nor any other agent or shareholder of the Company may be held personally liable under RCW 23B.02.040 because the corporation had not been dissolved when the obligation arose. Because the undisputed facts do not support Respondents' legal theories of personal liability, Mr. Loshbaugh is not personally liable for the Company note.

**D. The Court Erred In Granting Summary Judgment In Favor of Plese-Graham**

As set forth above, any potential claims against Mr. Loshbaugh arise out of the promissory notes. Plese-Graham, LLC is not a party to either of the notes at issue, a real party in interest, or entitled to any

judgment on the notes. (CP 88, 90). As such, it was improper for the trial court to enter summary judgment in favor of Plese-Graham, LLC. *Kim v. Moffett*, 156 Wn. App. 689, 698, 234 P.3d 279 (2010) (noting that every action must be brought in the name of a real party in interest).

**E. Respondents' Request For Joinder Was Improperly Granted Because Of Inexcusable Neglect.**

Although leave to amend the pleadings to join additional parties should be freely given, such leave is improper when the failure to do so was due to inexcusable neglect or when it causes prejudice to the nonmoving party. *See S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 77-78, 677 P.2d 114 (1984) (finding inexcusable neglect where the proper parties' names were readily available to respondent and his counsel) and *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 483-84, 209 P.3d 863 (2009).

First, Respondents inexcusably neglected to add Rod and Linda Plese as initial plaintiffs. Inexcusable neglect exists when no reason for the initial failure to include a party appears in the record. *S. Hollywood Hills*, 101 W.2d at 77-78. Respondents were the parties who drafted the promissory note. (CP 53, ll. 9-11; 90). As such, they knew the identity of the holder of the note and who the proper and necessary parties were. There is no reason for their initial failure to include Rod and Linda Plese

as parties to the Complaint from the commencement of the action. As a result, the trial court's decision to add Rod and Linda Plese as parties after the summary judgment hearing was manifestly unreasonable and an exercised on untenable grounds.

Second, Mr. Loshbaugh was prejudiced by the court's ruling. Factors to be considered include undue delay and unfair surprise. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). Here, Respondents failed to join the requisite real parties in interest until after arbitration and summary judgment proceedings. (CP 156-157). Even after the trial court granted Respondents' motion to join additional parties, they failed to amend the pleadings to state a cause of action on behalf of Rod and Linda Plese. (CP 156-157). Respondents' actions, or lack thereof, betray their efforts to find recourse against Mr. Loshbaugh for pre-existing corporate debts. Indeed, the Complaint makes no reference to the promissory note, nor are Rod and Linda Plese even mentioned as real parties in interest. (CP 5-10). What's more, the promissory notes at issue were not due until June 30, 2010, yet Respondents filed suit in December 2009. (CP 5, 88, 90). This entire lawsuit was based on construction defects and the cost of doing business during an economic downturn. (CP 5-10). When this issue was raised at oral argument, the trial court invited

Respondents to make a motion to add Rod and Linda Plese. (CP 136; VRP 22:9-21). This motion was made verbally and over Mr. Loshbaugh's objection. (VRP 22:16-21). Rod and Linda Plese have not alleged any facts to support their claims. (CP 5-10). Nothing but questions surround the issue of why Rod and Linda Plese were the holders of the note when the original contractual obligation was owed to Plese-Graham, LLC. Mr. Loshbaugh was prejudiced by the deprivation of any right to assert affirmative defenses (such as a lack of consideration) against them and the denial of the right to conduct discovery into their claims.

**F. The Court Erred In Granting Plese-Graham's Request For Attorney Fees**

Plese-Graham requested attorney fees pursuant to RCW 7.06.060, which requires a party who requests de novo review of mandatory arbitration to pay the opponent's attorney fees if the requesting party fails to improve his position. (CP 151, ll. 19-23). Since, Mr. Loshbaugh owes no money to Plese-Graham, it was error for the trial court to award fees. The trial court's award of attorney fees should be reversed.

**G. Mr. Loshbaugh Is Entitled To An Award Of His Attorney Fees.**

Mr. Loshbaugh requests fees and costs on appeal be awarded to him. Mr. Loshbaugh has a contractual right to fees and expenses based

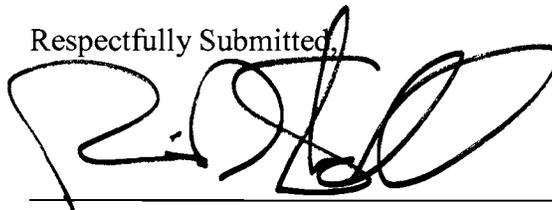
upon the promissory note furnished to him. (CP 91). If this Court finds that no contract exists between Mr. Loshbaugh and Plese-Graham, then Mr. Loshbaugh is entitled to his fees incurred at the trial level and on appeal. RAP 18.1; RCW 4.84.330; *see also, Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (holding that attorneys fees and costs are awarded to the prevailing party even when the contract containing the attorneys fee provision is invalidated).

**V. CONCLUSION**

Wherefore, based upon the foregoing the trial court should be reversed and the matter remanded for trial.

DATED this 28<sup>th</sup> day of February, 2011.

Respectfully Submitted,



RICHARD D. CAMPBELL, WSBA #24078  
Attorney for Appellants