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No. 55247-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NEIL J. ARNTZ and MARIAN ARNTZ, husband and wife,
dba ARNTZ FAMILY LIMITED PARTNERSHIP, NEIL J.
ARNTZ, General Partner,

Respondents,

v.

LUZ O. VALDEZ n/k/a LUZ O. ZABKA,

Appellant.

BRIEF OF APPELLANT

Luz O. Zabka
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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the written order of January 29, 2010, and denying Defendant's motion for continuance of hearing on Plaintiffs' summary judgment motion.

2. The trial court erred in entering the written order of January 29, 2010, and granting Plaintiffs' motion to strike Defendant's response to Plaintiffs' summary judgment motion.

3. The trial court erred by refusing to hear defendant Luz O. Zabka's cross-motion to dismiss Plaintiffs' action that was originally scheduled by the trial court for hearing on January 8, 2010.

4. The trial court erred in entering the written order of January 29, 2010, and granting Plaintiffs' motion for summary judgment on promissory note.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Defendant's signature is found only once on the note at issue, followed by her title "Chief Portfolio Manager" and the represented Party "Seattle Capital Group." The Commissioner of this Court has ruled that Plaintiffs' note, *on its face*, showed that Luz O. Zabka unambiguously signed in her representative capacity on behalf of Seattle Capital Group—citing authority. CP 2943. However, the trial court ruled that Plaintiffs' note, *on its face*, showed that Luz O. Zabka signed personally—citing no authority. RP 24-25. Did the trial court err in granting summary judgment *where* the two courts reached different conclusions on the same note, *on its face*. (Assignment of Error 4)

2. Genuine issues of material fact remain as to what amount remains unpaid on the note (if any), whether Defendant received consideration for signing the note, whether there was breach of the note by Defendant, in what capacity Defendant signed the note, and whether Plaintiffs' note is authentic. Did the trial court err in granting summary judgment *where* genuine issues of material fact remain? (Assignment of Error 4)

3. Generally, the statute of limitations for actions on written contracts is six years and three years for oral contracts. However, if one of the five elements necessary for a written contract is absent and the court must rely on parole evidence to address the deficiency, then the written contract is considered partly oral the three-year limitations period under RCW 4.16.080(3) applies. Plaintiffs filed their action *more than* three years after demand was sent and Plaintiffs' note is missing two of the five elements: 1) Luz Zabka is not expressly named as an individual party to the note and 2) she did not receive any consideration for signing the note. Did the trial court err in granting Plaintiffs' summary judgment and denying Defendant's dismissal where Plaintiffs' claims are time barred? (Assignment of Error 4)

4. Plaintiffs received a \$212,500 settlement from ProTrader Securities under a National Association of Securities Dealers ("NASD") arbitration. CP 2142-44. Defendant recently discovered Plaintiffs' NASD Complaint (CP 2022-40) and Amended NASD Complaint (CP 2086-2120) showing that Plaintiffs' ProTrader settlement involved the same

promissory note with Seattle Capital Group—a material issue. Did the trial court abuse its discretion in denying Defendant Zabka’s motion for continuance and striking her response to Plaintiffs’ motion for summary judgment *where* the trial court applied draconian time limitations, ignored the merit of Defendant’s arguments, and failed to rule in the interest of justice? (Assignments of Error 1, 2, 3, and 4)

5. Plaintiffs’ note was secured against the equity balance of Plaintiffs’ ProTrader Securities account—that the note stated as “**\$462,000**”. CP 1686. However, Plaintiffs recently admitted (for the first time in their Motion for Summary Judgment) and provided statements showing that the total equity balance on the date of the note was **\$362,907**. CP 1703, 1753-4. Thus, the note contains a **\$100,000 discrepancy** in equity balance. Luz O. Zabka did not draft the note and was not aware of the discrepancy. Is the contract unconscionable (one sided and overly harsh to enforce) and missing mutual assent (offer and acceptance) *where* the equity balance stated in the note was \$462,000 and the true equity balance was only \$362,907? (Assignment 1, 2, 3, and 4)

6. King County Local Rule 58(c) states: “*This court will sign no judgment upon a promissory note until the original note has been reviewed by the court.*” (emphasis added) Did the trial court abuse its discretion by waiving KCLR 58(c) *where*: i) Plaintiffs surreptitiously claim that they lost the original note; ii) Plaintiffs’ copy contains a \$100,000 discrepancy; and iii) Plaintiffs failed to disclose all amounts

received on the promissory note under various other actions.
(Assignments of error 1, 2, and 4)

7. Plaintiffs had previously acquired a summary judgment against Mrs. Zabka on the same promissory note. However, this Court reversed the prior judgment and dismissed Plaintiffs' action on appeal. *Arntz v. Valdez*, 2005 Wash. App. LEXIS 2585 (Div.1. **Oct. 3, 2005**). Does the statute of limitations under RCW 4.16.240 require that Plaintiffs' present action on promissory note be dismissed *with prejudice* and summary judgment be denied *where* Plaintiffs' present action was commenced on **May 14, 2008**, more than one year after the reversal? (Assignments of Error 1, 2, 3 and 4)

III. STATEMENT OF THE CASE

A. In 1999, Seattle Capital Group (SCG) was formed by Jae Ho Pak

The declaration of Jae Ho Pak states:

In August of 1999, I filed an Application to Form a Limited Liability Company (along with applicable fees) with the Washington Secretary of State("SOS") to form Seattle Capital Group, LLC.

In August of 1999, I also filed form SS-4 with the Internal Revenue Service (IRS") and Seattle Capital Group, LLC was assigned EIN number 91-1995226.

In August of 1999, I also filed for a Master Business License with the Washington State Department of Licensing (“DOL”) and Seattle Capital Group, LLC was assigned UBI Number 602-413-137.

I entered contracts, paid employees, and filed tax returns on behalf of Seattle Capital Group, LLC. I also opened a business checking account for Seattle Capital Group, LLC at Bank of America.

Seattle Capital Group, LLC filed federal taxes, Washington State Department of Revenue taxes and paid annual license renewal fees with the DOL.

CP 350-51.

B. Luz O. Valdez n/k/a Luz O. Zabka believed that SCG was a valid and existing entity

Seattle Capital Group shared an office and secretary with ProTrader Securities, Inc. n/k/a Instinet (ticker INET) at 1000 Dexter Ave. N. Suite 202 in Seattle, Washington. Seattle Capital Group, LLC also had a name plate affixed to the door of the shared office. CP 350.

On evidence and belief that Seattle Capital Group, LLC was properly registered and licensed, Pak commenced business operations. CP 350. Seattle Capital Group entered contracts, paid employees, filed federal taxes, Washington State Department of Revenue taxes and paid annual license renewal fees with the DOL. CP 351. Thus, Valdez believed at all

pertinent times that Seattle Capital Group, LLC was a valid and existing company.

C. Zabka did not solicit Plaintiffs

Plaintiffs told the DFI that Pak, not Valdez, solicited them. The DFI report states: “On or about January 2001, Pak solicited \$700,000 from a Washington investor (“Investor A”).” CP 5. “On February 12, 2001, Investor A, on behalf of the Family, LP, and Pak, on behalf of SCG, entered into a contract authorizing SCG to engage in transaction in securities on behalf of the Family LP in a joint investment account.” CP 20.

“Investor A provided Pak two checks paid to the order of Seattle Capital Group totaling \$700,000 on February 12, 2001. That same day, Pak endorsed both checks and deposited the same into a Bank of America account held jointly with his wife Dong Yen Hua (the “Joint Account”) on February 12, 2001.” CP 20-21.

“Mr. Arntz was provided online access through ProTrader to view account activity in the Joint Investment Venture Account. Mr. Arntz had knowledge of the types and frequency of trades that were being executed in the account on a daily basis.” CP 353.

“Initially, Robert Lee traded the Joint Investment Venture Account.” CP 353. “The 4MAC account value declined dramatically, reaching a low of \$352,04.33 on June 18, 2001.” CP 21. Mr. Arntz confronted Pak regarding the low balance. Pak “explained that the losses were attributable to a “bad trader,” referencing Lee.” CP 353. Pak “also told Arntz that [he] had a new trader, Luz Valdez . . . who could trade the Joint Investment Venture Account. Mr. Arntz agreed to the change and Ms. Valdez began trading the account.” CP 353. Therefore, Ms. Valdez was asked to trade the account after serious losses were already incurred.

D. Zabka’s boss Pak required her to sign the note at issue on behalf of SCG

On June 11, 2002, Defendant Luz O. Zabka’s boss, Jae Ho Pak, instructed her to sign a promissory note on behalf of his company Seattle Capital Group. CP 353. Pak has attested that he “asked her to sign in her capacity as ‘Chief Portfolio Manager’ of Seattle Capital Group.” CP 353. Pak stated in his declaration, “Ms. Valdez signed the note in her capacity as “Chief Portfolio Manager” of Seattle Capital Group. Ms. Valdez thereafter received no salary or other compensation of any kind from Seattle Capital Group.” CP 353. Luz Valdez n/k/a Luz Zabka did not draft the note and only signed the note because her boss, Jae Pak, instructed her

to sign the note on behalf of his company. Luz Zabka was not told by Plaintiffs or Jae Pak that she was signing the note personally.

E. Zabka received no consideration or compensation on the note

Zabka was an employee—never a partner, member, or shareholder of Seattle Capital Group. Ms. Valdez has consistently held and Pak has attested that: “Luz Valdez n/k/a/ Luz Zabka received no benefit or compensation for signing the note on behalf of Seattle Capital Group. I explained to her before she signed the note that she was signing the note in her corporate and not as an individual.” CP 358.

F. Plaintiffs filed their first action against Zabka and were granted judgment on the note

Plaintiffs’ first action against Defendant Luz O. Zabka (CP 33-44) based on a promissory note between Plaintiffs and Seattle Capital Group (CP 13-14) was commenced on October 21, 2003, under King County Superior Court No. 03-2-09230-4KNT. Therein, Plaintiffs requested and were granted service by publication, an order of default, and ultimately summary Judgment (CP 45-46) against Luz O. Valdez and John Doe Valdez.

G. On October 3, 2005, this Court “Reversed” Plaintiffs’ first judgment against Zabka and “Dismissed” on appeal.

On **October 3, 2005**, this Court of Appeals, Division I reversed the order of default and summary judgment against Luz O. Valdez and John Doe Valdez and dismissed Plaintiffs' action for lack of personal jurisdiction. *Arntz v. Valdez*, 2005 Wash. App. LEXIS 2585 (Div. 1, 2005). CP 216-22.

H. On May 14, 2008, Plaintiffs filed this second action against Zabka on the note

On **May 14, 2008**, Plaintiffs hired a new attorney and commenced this second action against Luz Zabka on the same a promissory note under KCSC Cause No. 08-2-16647-3KNT. Plaintiffs based their second action entirely upon their void summary judgment (CP 45-46) and over 100 pages of void attorney's fees and costs (CP 57-172) from their first action that this Court had reversed and dismissed on October 3, 2005. CP 216-22.

In Plaintiffs' Responses to Defendant Luz Zabka's Revised First Set of Requests for Admissions (CP 2963), Plaintiffs "Admit that the amounts Plaintiffs' claim under KCSC Cause No. 03-2-09230-4KNT and KCSC Cause No. 08-2-16647-3KNT derive from the same Promissory Note dated June 11, 2002." CP 2957.

I. Zabka filed a Motion to Dismiss Plaintiffs' second action that was granted in part and denied in part

Defendant Luz Zabka files a Motion to Dismiss the Plaintiffs' lawsuit because: (1) the Partial Summary Judgment and underlying case against Luz Zabka have already been dismissed, (2) as a result the post Partial Summary Judgment attorney's fees requested are void, (3) Plaintiffs have been overcompensated for amounts requested, (4) the note at issue was signed by Luz Zabka in her corporate capacity, not individually, and (5) the statute of limitations has tolled on all of Plaintiffs' claims. CP 194.

On November 6, 2008, the trial court ruled that defendant was not previously dismissed with prejudice from this action, the note is subject to a 6 year statute of limitations and the action was filed and served within the statutes time limits, defendant has not shown that she is not liable on the Promissory note and factual issues remain as to the balance due under the Note. CP 500.

J. Zabka filed a Motion for Clarification and Reconsideration

On November 17, 2008, defendant Luz Zabka filed a Motion for Clarification and Reconsideration. On December 4, 2008 the trial court judge denies defendant Luz Zabka's Motion for Reconsideration and Clarifies the Motion. The Motion is clarified as follows: The following issues remain for trial (i) Whether defendant breached the contract/Promissory Note, (ii) Whether defendant is personally liable

under the contract/Note, (iii) What amount remains unpaid in principal and interest on the Note, if any, after consideration of payments made and monies received by Plaintiffs' on the Note and (iv) Whether and, if so in what amount, attorneys fees and cost shall be paid by either party. CP 528. The trial court judge also ruled that the statute of limitations has run on the claims for fraud, misrepresentation, unjust enrichment, negligence and other common-law claims, but has not run as to the written contract/promissory note, the issue of specific performance was not addressed in the motion and the action is not barred by R.C.W. 4.22.070. CP 529.

K. Zabka filed an interlocutory appeal with this Court

On December 8, 2008, defendant Luz Zabka files a Notice of Appeal to the Washington State Court of Appeals, Division 1. On February 2, 2009, the Commissioner's Ruling stated that:

Some of Arntz's arguments are not compelling. **It is the form of signature that is critical and when an individual signs a promissory note naming the principal with an indication of their representative capacity, then only the principal is bound. RCW 62A.3-402(b)(1); 1A KELLY KUNSCH, WASHINGTON PRACTICE: METHODS OF PRACTICE §38.27, at 136 (1997).** To the extent that Arntz is contending that the form of signature does not unambiguously indicate that Zabka was signing in a representative capacity, I do not see any ambiguity in her individual signature followed by the recitation of her representative capacity. **Additionally, co-makers of a note are generally jointly and severally liable on the note so the references to joint and several liability in the note are not especially compelling. RCW 62A.3-116(a)(unless otherwise provided in the note, two or more makers are jointly and severally liable "in the capacity in which they sign.").** (emphasis added)

CP 2943. The Commissioner's Ruling also stated that:

Zabka indicated in her rebuttal that there is case law that would not bind the agent who did not know of a defect in the status of the principal. But that would be an issue for trial, rather than a basis to conclude that the three-year statute of limitations bars the claim on the note.

CP 2944. However, the trial court judge ruled on December 4, 2009:

I looked at the promissory note. The promissory note consistently says jointly and severally liable. The fact that the people that signed it – that would be both Ms. Valdez and Mr. Pak – put their titles from Seattle Capital Group after it does not defeat that idea that this was a note that was signed on which they were personally and severally liable.

RP 24.

L. Zabka filed her Discovery Requests on Plaintiffs

On Aug. 20, 2009, defendant filed her First Set of Requests for Admissions to Plaintiff Neil J. Arntz. CP 1410. On September 9, 2009, defendant filed her Second Set of Requests for Admissions to Plaintiff Neil. J. Arntz. CP 1551. On September 18, 2009, defendant Luz Zabka filed a Revised First Set of Requests for Admissions to Plaintiff Neil J. Arntz. CP 2953. The discovery cutoff date was set for **January 25, 2010**. CP 1597. The trial was set for **June 14, 2010**. CP 1597.

M. Plaintiffs' filed a Motion for Summary Judgment on November 3, 2009

In Plaintiffs' statement of facts, the Plaintiffs state: "On June 11, 2002 (the date of the Note), Plaintiffs' total equity balance was \$362,907.00. CP 1703. However, on the face of the note, the equity that

is stated is \$462,000.00. CP 1686. The Commissioner's Ruling under the facts section states:

A June 11, 2002 promissory note provides that if the trading account suffered two weeks of consecutive downturn in its equity balance, "the undersigned jointly and severally promise(s) to pay to Arntz" the amount by which **the balance of the trading account goes below \$462,000** together with interest on that amount."

CP 2939. However, the note was signed when the equity balance was already below \$462,000. The equity balance was \$362,907.00. CP 1703.

The Plaintiffs go on to state, " Because of the two weeks of depreciation, Plaintiffs sent a Demand to Pay Promissory Note Order (dated November 22, 2002) to Defendant and Mr. Pak for payment of \$462,000." CP 1703. However, the demand that was sent to defendant Luz Zabka by the Plaintiffs was titled as "Luz Valdez, Chief Portfolio Manager, Seattle Capital Group." CP 1758. The defendant signed the demand in her representative capacity, not as individual. CP 1758.

N. Zabka filed a Motion for Continuance of the Hearing Date of Plaintiffs' Summary Judgment on newly discovered evidence

- 1. The evidence was the Plaintiffs' July 19, 2004 Amended Statement of Claim against ProTrader/Instinet filed with the NASD (CP 2086-2120) and the NASD Arbitration Uniform Submission Agreement (CP 2122-2140) showing that the Plaintiffs' \$212,500 settlement from ProTrader Securities was based primarily on their investment with SCG and the promissory note at issue (where Plaintiffs had previously claimed it was not).**

In this motion, Luz Zabka includes as an exhibit the newly discovered evidence that proves that Plaintiffs have been overpaid for the note at issue. Prior to this discovery, the Plaintiffs have stated to the lower Court that the amount they received from the NASD arbitration (\$212,500.00 CP 286) was separate and not related to Seattle Capital Group. CP 259. The newly discovered evidence are the Plaintiffs' July 19, 2004 Amended Statement of Claim against ProTrader/Instinet filed with the NASD (CP 2086-2120) and the NASD Arbitration Uniform Submission Agreement (CP 2122-2140).

After the Plaintiffs' collected \$409,949.97 at Jae Pak's bankruptcy on May 19, 2007, the Plaintiffs still claim that \$57,182.30 is still due on the note. CP 260. Of the amount the Plaintiffs claim is still owed, the Plaintiffs did not include any of the NASD Arbitration award of \$212,500.00 received on November 15, 2004. CP 286-288.

"The first page of Plaintiffs' Amended NASD Complaint references Seattle Capital Group seven (7) times." CP 2078 and CP 2086.

“Moreover, Seattle Capital Group is referenced on almost every other page ...” CP 2078 and CP 2086-CP 2120. In Plaintiffs’ Amended NASD Complaint, Plaintiffs show a breakdown in their Complaint of money lost that they want reimbursed from ProTrader. CP 2119-2120.

ARNTZ LOSE AND EXPENSE TO COLLECT, TO DATE:

\$700,000 LESS \$239,900.65	= \$460,099.35
	[Net loss with Seattle Capital Group. CP 2137.]
\$262,681 LESS \$47,879.00	= \$214,802.00
ATTORNEY CAST TO DATE	= \$50,320.00
NASD FEES AND EXPENSE	= \$1580.00
ARNTZ AND DAUGHTER TIME	= \$64300.00
643 HOURS	
TOTAL	= \$726,801.35

CP 2119-2120

The \$700,000 reference above was Plaintiffs’ investment with Seattle Capital Group. CP 2091. The \$262,681 referenced above was Plaintiffs’ self-directed account. CP 259. Therefore, Plaintiffs’ NASD settlement of \$212,500.00 consisted of the note at issue, his self-directed account, and other fees related to these two accounts.

Plaintiffs stated in their NASD Arbitration Submission: “Arntz request all Arntz funds lost as a result of illegal and fraudulent security activities by Seattle Capital and ProTrader be returned to him along with interest and cost incurred.” CP 2078 and 2138. Moreover, the Plaintiffs

state in their NASD Arbitration Submission, “SEATTLE CAPITAL REFUSED TO PAY THE PROMISSORY NOTE.” CP 2137. Plaintiffs also reference the first lawsuit referencing the note as “CASE NO 03-2-09230-4KNT.” CP 2140.

O. Zabka filed a Response to Plaintiffs’ Motion for Summary Judgment.

Zabka’s response (CP 2171): i) pointed out material issues of fact not addressed by Plaintiffs’ evidence, ii) the issue that Plaintiffs’ contract is unconscionable, and iii) addressed newly discovered evidence that raised issues of material fact.

P. Zabka filed a Cross-Motion to Dismiss with Prejudice

Zabka’s Cross-Motion to Dismiss pointed out that Defendant’s action is time barred. CP 2461. Defendant scheduled this Cross-Motion to be heard on January 8, 2010. CP 2075.

Q. Zabka filed a Motion for Order Shortening Time to hear her Motion for continuance and her Response to Plaintiffs' Motion for Summary Judgment

On November 30, 2009, ABC legal services personally served on Plaintiffs' counsel Zabka's Motion Order Shortening Time, Motion for Continuance, Response to Plaintiffs' Motion for Summary Judgment, and her Cross-Motion to Dismiss along with Exhibits and Affidavits. CP 2897-2901. Thus, Zabka provided Plaintiffs a meaningful opportunity to respond prior to the December 4, 2009 hearing.

R. Plaintiffs filed a Motion to Strike Zabka's Response to their summary judgment motion *without* notice ex parte or motion to shorten time.

Plaintiffs never gave ex parte notice that they filed a Motion to Strike (CP 2828-2832) her Response to Plaintiffs' Motion for Summary Judgment. Plaintiffs sent their Motion to Strike *snail mail to Illinois*. Plaintiffs never contacted Zabka by phone, fax, email or any other means alerting her that Plaintiffs' Motion to Strike had been filed. Further, Plaintiffs never contacted Zabka or filed a motion to shorten time to hear their Motion to Strike. Luz Zabka learned of Plaintiffs' Motion to Strike for the first time at Plaintiffs' Summary Judgment Hearing. Thus, Plaintiffs and the trial court effectively denied Zabka the ability to respond and thus due process. U.S. Const. am. 5 and 14.

S. The trial court granted Zabka's Motion to Order Shortening Time to hear Zabka's Motion for Continuance and Zabka's Response to Plaintiffs' Motion for Summary Judgment.

At the December 4, 2009 telephonic hearing, the trial court granted Zabka's Motion to Shorten Time. Thus the trial court agreed to take Zabka's Response on short time and hear Zabka's Motion for Continuance. As a result, the trial court was aware at that time that Plaintiffs' collection under their NASD arbitration did involve their \$700,000 investment with Seattle Capital Group and Plaintiffs' promissory note. The trial court was also aware of Zabka's arguments from the Motion for Continuance that under RCW 4.16.240 that Plaintiffs' action was time barred because it was commenced more than one year after this Court of Appeals had reversed judgment and dismissed Plaintiffs' prior action on the same note. Further, the Court was alerted that it had previously scheduled a Cross-Motion to Dismiss Plaintiffs' action.

T. The trial court denied Zabka's Motion for Continuance, refused to consider Zabka's new evidence, struck Zabka's Response, refused to hear Zabka's Cross-Motion for Su.

Nevertheless, the trial court ignored these issues of law and material issues of fact, denying Zabka's Motion for Continuance. Then, the trial court waived the notice requirements on Plaintiffs' Motion to Strike (filed only three days prior), waived Plaintiffs' requirement to provide a motion and declaration for order shortening time, and granted Plaintiffs' Motion to Strike Zabka's response to Plaintiffs' Motion for Summary Judgment – WHERE ZABKA HAD NO NOTICE that Plaintiffs' Motion to Strike was ever filed.

This, waiver of local rules for Plaintiffs placed Zabka at a huge disadvantage *where* immediately thereafter, the trial court heard argument on Plaintiffs' Motion for Summary Judgment. The trial court refused to allow Zabka to raise any arguments contained in her Response or address any portion of the record not attached to Plaintiffs' Motion for Summary Judgment. Not surprisingly, the trial court then granted Plaintiffs' Motion for Summary Judgment.

U. The trial court requested briefing on Plaintiffs' failure to produce the original note, then entered a written order granting Plaintiffs' Motion for Summary Judgment even though Plaintiffs failed to produce the original.

Following the summary judgment hearing, the trial court requested briefing on Plaintiffs' failure to produce an original note. Zabka once again addressed material issues as to inconsistencies on the note on its face and in light of contradictory extrinsic evidence.

1. To grant Plaintiffs' judgment, the trial court waived many rules for Plaintiffs.

The Court again waived its local rules that prohibit judgment absent having viewed the original note, and entered its written order granting Plaintiffs' Motion for Summary Judgment. Hence, the trial court waived numerous local rules to hear Plaintiffs' Motion to Strike and overcome Plaintiffs' failure to produce an original copy of the note at issue. However, the trial court rigidly applied the court rules to deny admission of Zabka's material new evidence. Moreover, the trial Court granted summary judgment aware that Plaintiffs' action was time barred because it was commenced more than one year after their prior action on

the same note and the judgment therein was reversed and dismissed on appeal. Zabka appeals.

IV. IV. SUMMARY OF ARGUMENT

The trial court erred in entering an order granting summary judgment where Plaintiffs' present action was time barred under RCW 4.16.240. That statute requires that Plaintiffs commence a new action within one year of the reversal of a judgment of a prior action on error or appeal. Plaintiffs' first action against Luz O. Valdez n/k/a Luz O. Zabka was reversed on appeal on **October 3, 2005**. *Arntz v. Valdez*, 2005 Wash. App. LEXIS 2585 (Div.1. Oct. 3, 2005). However, Plaintiffs waited until **May 14, 2008** to serve this present action. Because Plaintiffs waited more than one year to commence their new action, this action is time barred.

The trial court also erred in denying Luz O. Zabka's motion for continuance. In her motion for continuance, Luz O. Zabka addressed the time barred nature of Plaintiffs' action. Mrs. Zabka also introduced newly discovered evidence (Plaintiffs' NASD Complaint (CP 2022-40) and Amended NASD Complaint (CP 2086-2120)) showing that the \$212,500 settlement (CP 2142-44) Plaintiffs received from ProTrader Securities involved the same promissory note at issue—a material issue. The trial court denied Mrs. Zabka's Motion for Continuance and struck Mrs. Zabka's response, rigidly enforcing the time for response.

Cases should be decided upon their merits, rather than upon strict compliance with draconian rule limitations. The civil rules with respect to the time and procedure for the filing of papers are not set in stone, nor are

they absolute. The rules are subject to modification according to the discretion of the Court. Thus, any material offered at a time later than required by rule, over objection of counsel, may be accepted or considered by the Court upon the discretionary ruling of the Court.

The rules should be interpreted to allow a decision on the merits and to do justice. The trial court's decisions do neither. Moreover, there is no showing of any prejudice to the Plaintiffs where discovery cutoff was still two months away and trial was still over 6 months away. Moreover, the newly discovered evidence shows that the Plaintiffs have lied in their pleadings and their declarations when they stated under perjury laws that the settlement they received from the NASD arbitration had nothing to do with the Seattle Capital Group and the promissory note at issue. A trial court has a duty to accord parties a reasonable opportunity to make their record complete before ruling on a motion for summary judgment, especially where a continuance of the motion would not result in delay.

Failure on the part of the Court to follow the longstanding legal precedent of deciding cases upon their merits, rather than upon strict compliance with draconian rule limitations constituted reversible error.

V. ARGUMENT

A. Standard of Review.

“Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” Cerrillo v. Esparza, 158 Wn.2d 194, 200 (2006). “Under

CR 56(c), a motion for summary judgment is granted *only*: if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (emphasis added) Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

"A material fact is one upon which the outcome of the litigation depends, in whole or in part." Id. "The party moving for summary judgment has the burden of showing that there is no issue of material fact; the court must resolve all reasonable inferences from the evidence against the moving party and will grant the motion only if reasonable people could reach but one conclusion." Detweiler v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99, 108, 751 P.2d 282 [*510] (1988). (emphasis added)

"When reviewing an order for summary judgment, we consider all facts and reasonable inferences in the light *most favorable to the nonmoving party* and review all questions of law de novo." (emphasis added) Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998).

B. Where Reasonable Minds Reached Different Conclusions, Summary Judgment Was Improper.

The Washington Supreme Court has ruled: “If reasonable minds can reach different conclusions, summary judgment is improper.” DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 30 (1998). This Court has likewise ruled that:

“Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” Tanner, 128 Wn.2d at 674. Therefore, “summary judgment is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.” Hall, 87 Wn. App. at 9. [et seq.]

Go2net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 85 (Div. 1. 2003).

Summary judgment was improper in this action: 1) where the Commissioner of this Court reached a different conclusion than the trial court as to the interpretation of Plaintiffs' note *on its face* and 2) where extrinsic evidence contradicts the note.

1. This Court and the trial court have ruled differently on the note on its face.

On February 2, 2009, the Commissioner of this Court cited to Washington authority ruled:

Some of Arntz's arguments are not compelling. It is the form of signature that is critical and when an individual signs a promissory note naming the principal with an indication of their representative capacity, then only the principal is bound. RCW 62A.3-402(b)(1), 1A KELLY KUNSCH, WASHINGTON PRACTICE: METHODS OF

PRACTICE §38.27, AT 136 (1997). To the extent that Arntz is contending that the form of signature does not unambiguously indicate that Zabka was signing in a representative capacity, I do not see any ambiguity in her individual signature followed by the recitation of her representative capacity. Additionally, co-makers of a note are generally jointly and severally liable on the note so the references to joint and several liability in the note are not especially compelling. RCW 62A.3-116(a)(unless otherwise provided in the note, two or more makers are jointly and severally liable “in the capacity in which they sign.”

CP 2943. However, on December 4, 2009, the trial court citing no authority ruled:

I am going to grant summary judgment. We have to look at a document and see whether it's clear on its face before we go outside the document.

I looked at the promissory note. The promissory note consistently says jointly and severally liable. The fact that people that signed it – that would be both Ms. Valdez and Mr. Pak – put their titles from Seattle Capital Group after it does not defeat the idea that this was a note that was signed on which they were personally and severally liable.

It would make no sense for there to be a note that says the makers are jointly and severally liable and then say, but there's only one maker, which would be Seattle Capital Group. That doesn't make any sense.

So I think the note is clear that it was intended, and the language in the note is clear, that the parties – Mr. Pak is not before me, obviously but Ms. Valdez is personally liable on the note. (RP 24-25)

RP 24-25. Clearly, the Commissioner of this Court ruled correctly that Plaintiffs' note, *on its face*, showed that Luz O. Zabka unambiguously signed in her representative capacity on behalf of Seattle Capital Group—and the trial court erred. Moreover, two reasonable minds have reached different conclusions as to the contract on its face and summary judgment is improper.

Even if the trial court had looked outside of the contract (which it did not), Seattle Capital Group was at a minimum a de facto corporation. Jae Ho Pak made a good faith effort to organize Seattle Capital Group and used it as a corporation. *See Declaration of Jae Ho Pak (CP 349-387)*.

The Supreme Court of Washington has ruled:

Contrary to the assertion of respondent, we consider the great weight of authority is that the individual members who promote a corporation, which becomes at least a de facto corporation, by having attempted in good faith, so far as the record shows, to organize a corporation, followed by user as a corporation, cannot be held individually liable as partners.

Refsnes v. Myers, 164 Wash. 205, 209-210 (Wash. 1931)

Plaintiffs believed as did Luz Zabka that at the time the note at issue was signed, Seattle Capital Group was a valid corporation and that

Zabka signed in capacity. In a related action against Dong Yen Hua, Plaintiffs admit against interest that: “. . . a promissory note was signed by [Plaintiffs] and Mr. Pak and Luz Valdez (“Ms. Valdez”) *as representatives of SCG* [“Seattle Capital Group”].” (emphasis added) CP 430 ll. 20-22. Even the trial court ruled: “. . . there was evidence that Mr. Pak believed that Seattle Capital Group was registered with the State.” CP 3283.

2. Extrinsic evidence clearly contradicts the note on its face.

a. Plaintiffs’ account balance was \$362,907.00 not \$462,000.00 (a \$100,000 discrepancy).

In Plaintiffs’ motion for summary judgment under statement of facts, Plaintiffs stated: “On June 11, 2002 (the date of the Note), Plaintiffs’ total equity balance was \$362,907.00.” CP 1703. Plaintiffs also presented a ProTrader Security statement showing the \$362,907.00 balance attached as “Exhibit E” to their motion for summary judgment. CP 1753-54. However, on the face of the note, the equity balance is stated as “\$462,000.00.” CP 1686. That constitutes a \$100,000 discrepancy.

This Court’s Commissioner previously ruled:

A June 11, 2002 promissory note provides that if the trading account suffered two weeks of consecutive downturn in its equity balance, “the undersigned jointly and severally promise(s) to pay to Arntz” the amount *by which the balance of the trading account*

goes below \$462,000 together with interest on that amount.
(emphasis added)

CP 2939. However, Plaintiffs' recent admission and new evidence show that the equity balance was already below \$462,000—**\$100,000 below!** This discrepancy is material, it makes Plaintiffs' contract partly oral, and it disqualifies Plaintiffs' note from summary judgment on its face.

b. Luz Zabka did *not* receive any consideration.

Plaintiffs have also argued in error that Luz Zabka received consideration under the note because the note contains the phrase “for value received.” However, Luz Zabka signed the note on behalf of Seattle Capital Group (the represented party) and she received no consideration. Jae Ho Pak, Luz O. Zabka's boss testified in an affidavit (attached to Plaintiffs' motion for summary judgment) that:

“Ms. Valdez received no consideration for signing the note. Moreover, Ms. Valdez thereafter received no salary or other consideration for signing the note.” (CP 353, ll. 16-18);

Plaintiffs have never testified that Luz Zabka received consideration. Plaintiffs' only testimony to the matter was:

“It is hard to believe that she would sign the note if she were to get no consideration from it.”

CP 331, ll. 9-10. Further, the trial court could not identify the alleged consideration. When asked for clarification on the issue, the trial court Judge admitted:

I don't know what consideration you received ma'am. I don't know what it is. All I know is that you stated that you did get it. . . . I don't know what it is. I don't know. I can guess. And I have theories about why you guys did this, but that's not a material issue. . . . So, no. I don't know what it was.

RP 30, l. 25 thru 31, l. 1.; RP 31, ll. 2-4.; and RP 31, l. 15. Plaintiffs should *not* have been granted Summary Judgment because Plaintiffs failed to show any evidence of consideration to Luz Zabka individually and the mere recital of consideration is *not* sufficient

C. A recitation of consideration is not conclusive.

In Crow v. Crow, 66 Wn.2d 108 (1965), the Washington Supreme Court ruled:

Recitals of consideration in a written instrument are not conclusive.

Likewise, in Kinne v. Lampson, 58 Wn.2d 563, 567, 364 P.2d 510 (1961) the Washington Supreme Court ruled:

Parol evidence has been held to be admissible to show what the true consideration is where the contract contains a mere recital of consideration (e.g., "one dollar and other valuable consideration") as contrasted to contracts in which the

stated consideration is a "contractual element" of the contract.

These cases establish that consideration is a "contractual element" and that recitals of consideration are not conclusive.

1. The trial court failed to inquire what consideration, if any, Zabka received.

On December 4, 2009, the trial court ruled:

I don't know what consideration you received ma'am. I don't know what it is. All I know is that you stated that you did get it.

RP 30, l. 25 thru 31, l. 1. The trial court did not make a competent ruling because it did not inquire as to consideration prior to ruling. The Washington Supreme Court has ruled:

It is competent to inquire into the consideration and show, by parol evidence, the real or true consideration. (emphasis added)

Kinne v. Lampson, 58 Wn.2d 563, 567, 364 P.2d 510 (1961). All of the evidence and testimony presented in this case shows that Luz Zabka did not receive any consideration. Because the trial court admitted that it did not know what the consideration was and only knew that the note had a recital of consideration, the trial court erred in granting summary judgment.

D. Plaintiffs' Action is Time Barred Under RCW 4.16.080(3).

The trial court erred in entering an order granting summary judgment where Plaintiffs' present action was time barred under RCW 4.16.080(3).

1. Plaintiffs' contract is missing two elements of a written contract: a) Zabka is not named and b) she did not receive any consideration

Two factual elements necessary for an action for breach of a written contract are missing: (1) Luz Zabka is not expressly named as an individual party to the note and (2) she did not receive any consideration for signing the note. Luz Zabka signed the note at issue in her capacity as "Chief Portfolio Manager" on behalf of "Seattle Capital Group" and received no consideration in return. Thus, two of the five elements necessary for an action based on a written contract are not met.

2. Plaintiffs' contract is partly oral

RCW 4.16.080(3) defines the three-year limitations period for oral contracts. However, if one of the five elements necessary for a written contract is absent and the court must rely on parole evidence to address the deficiency, then the written contract is considered partly oral and a three-year limitations period applies. In Bogle & Gates, P.L.L.C. v. Zapel, 121 Wn. App. 444, (Div. 1, 2004), the Court summarized the principal as follows:

The six-year limitation period of RCW 4.16.040(1) for actions on written contracts applies only to agreements that are in writing and that contain all of the essential elements of a contract, viz.: (1) subject matter, (2) parties, (3) promise, (4) terms and conditions, and (5) price or consideration. If parol (or extrinsic) evidence is needed to establish any of the essential elements, the contract is partly oral and the three-year limitation period of RCW 4.16.080(3) applies.

The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention. The essential elements of a contract are the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration. A written agreement for purposes of the 6-year statute of limitations must contain all the essential elements of the contract, and if resort to parol evidence is necessary to establish any essential element, then the contract is partly oral and the 3-year statute of limitations applies.

3. Plaintiffs' note was not a negotiable instrument

Plaintiffs have also argued a six-year statute under RCW 62A.3-118. However, **Plaintiffs' note is not a negotiable instrument.** The Washington Supreme Court has ruled:

“An instrument to be negotiable must conform to the following requirements: . . . Must be payable on demand, or at a fixed or determinable future time. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable on or at a fixed period after the occurrence of a specified event, *which is certain to happen*, though the time of happening be uncertain. *An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.*” (emphasis added)

Puget Sound State Bank v. Wash. Paving Co., 94 Wash. 504, 511 (Wash. 1917), 94 Wash. 504, 511 (1917).

a. Plaintiffs' note was based on a contingency

Plaintiffs' note was not payable on demand or at a fixed or determinable future time. Rather, order to pay was based on a contingency not certain to happen: the account suffering "two weeks of consecutive downturn in the equity balance." Whether or not the event occurs, does not cure the defect. Thus, plaintiffs cannot claim the six year statute of limitations afforded negotiable instruments under RCW 62A.3-118. Further, the Commissioner of this Court ruled:

It also appears that the note is not a negotiable instrument subject to the provisions of article 3 of the UCC because it is only payable on the uncertain condition that the balance of the account must fall below the guaranteed level. Therefore, the RCW 62A.3-118 statute of limitations applicable to instruments does not apply.

CP 1115.

As a result, the 3-year limitations period in Wash. Rev. Code Sec. 4.16.080(3) does apply to bar the Plaintiffs' Breach of Contract/Promissory Note claims. As stated in Bogle & Gates, P.L.L.C. v. Zapel, 121 Wn. App. 444, (Div. 1, 2004): "A written agreement for purposes of the 6-year statute of limitations must contain all the essential elements of the contract, and if resort to parol evidence is necessary to

establish any essential element, then the contract is partly oral and the 3-year statute of limitations applies.”

E. The Primary Consideration For Continuance Should Have Been “Justice”

“The primary consideration in the trial court’s decision on the motion for a continuance should have been justice.” (emphasis added) Coggle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (Div. 1, 1990). “We fail to see how justice is served by a draconian application of time limitations.” *Id.* “The ruling on the motions for a continuance and for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion.” *Id.*

1. Zabka’s new evidence showed that Plaintiffs were attempting to collect amounts already received under a prior NASD arbitration against ProTrader Securities.

In her motion for continuance, Luz O. Zabka addressed the time barred nature of Plaintiffs’ action. Mrs. Zabka also introduced newly discovered evidence (Plaintiffs’ NASD Complaint (CP 2022-40) and Amended NASD Complaint (CP 2086-2120)) showing that the \$212,500 settlement (CP 2142-44) Plaintiffs received from ProTrader Securities involved the same promissory note at issue—a material issue. The trial court denied Mrs. Zabka’s Motion for Continuance and struck Mrs. Zabka’s response, rigidly enforcing the time for response.

2. The trial court abused its discretion by refusing to evaluate new evidence.

The trial court abused its discretion in denying Luz O. Zabka's motion for continuance where it refused to evaluate the new evidence. The trial court should have reviewed Zabka's newly discovered evidence, because when viewed in the light most favorable to Zabka, it did raise a material issue of fact. As this Court ruled in Coggle v. Snow: "If the court, after failing to grant the continuance, also refused to evaluate the [new evidence] and their impact on the motion for summary judgment, then this was an abuse of discretion flowing from the court's initial denial of the motion for a continuance. Id.

3. Plaintiffs' counsel misled the trial court.

a. Plaintiffs implied that they had previously submitted Zabka's newly discovered evidence (when Plaintiffs had not).

Misleading comments from opposing counsel during the hearing of Defendant's Motion for Continuance confused the trial court. Opposing counsel, Mr. Paul W. Routt, implied repeatedly that the new evidence (Plaintiffs' NASD Complaint and Amended NASD Complaint) presented by Luz Zabka had been previously provided by Plaintiffs. For example, opposing counsel stated:

. . . I think the only reason she has that document is because it was an exhibit that I provided, attached to the motion for summary judgment.

RP 5. Of course, opposing counsel is well aware that he did not attach a copy of Plaintiffs' NASD Complaint or Amended NASD Complaint to Plaintiffs' motion for summary judgment or any prior pleading.

Shortly thereafter, opposing counsel again attempted to mislead the trial court. His second attempt went as follows:

I believe – and I can't remember exactly, but I believe that she attached these same papers to a previous pleading. I can't remember which one. But I'm sure that we have dealt with this before.

RP 5. Of course, opposing counsel is well aware that Luz Zabka had never before presented these documents because they were not previously in her possession. The fact is, the evidence had never before been presented, and needed to be considered because it was material to the outcome of the action.

4. Draconian application of time limitations did not serve justice.

“We fail to see how justice is served by a draconian application of time limitations.” Cogle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (Div. 1, 1990). The civil rules with respect to the time and procedure for the filing of papers are not set in stone, nor are they absolute. Moreover, the rules are subject to modification according to the discretion of the trial court.

5. This case should have been decided on the merits.

Cases should be decided so that a decision is reached on the merits.

“In considering the application of CR 56(f), we note that the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case.”

Id. citing Weeks v. Chief of Wash. State Patrol, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982). The trial court erred by ruling against Zabka’s motion for continuance simply for the purpose of rigidly enforce a time limitation on Zabka’s response to Plaintiffs’ summary judgment.

The rules should be interpreted to allow a decision on the merits and to do justice. The trial court’s decisions do neither. There is no showing of any prejudice to the Plaintiffs where discovery cutoff was still over 2 months away when Plaintiffs filed their Motion for Summary Judgment and trial was still over 6 months away. Moreover, the newly discovered evidence shows that the Plaintiffs lied in their pleadings and their declarations when they stated under perjury laws that the settlement they received from the NASD arbitration had nothing to do with the Seattle Capital Group and the promissory note at issue.

A trial court has a duty to accord parties a reasonable opportunity to make their record complete before ruling on a motion for summary judgment, especially where a continuance of the motion would not result in delay. Failure on the part of the trial court to follow the longstanding legal precedent of deciding cases upon their merits, rather than upon strict compliance with draconian rule limitations constituted reversible error.

F. Plaintiffs’ Contract is Unconscionable.

The trial court erred when it granted summary judgment on Plaintiffs' contract because the contract is unconscionable.

1. Substantive unconscionability alone supports a finding of unconscionability.

Contracts can be substantively and/or procedurally unconscionable. Plaintiffs' contract was both substantively and procedurally unconscionable. However, as the Washington Supreme Court Ruled: "Substantive unconscionability alone is sufficient to support a finding of unconscionability." (emphasis added) McKee v. AT&T Corp., 164 Wn.2d 372, 396 (2008) citing Adler, 153 Wn.2d at 346-47.

2. A contract is substantively unconscionable where it is one-sided and overly harsh.

The Washington Supreme Court in McKee v. AT&T Corp., 164 Wn.2d 372, 396 (2008) defined substantive unconscionability as follows:

Substantive unconscionability involves those cases where a clause or term in the contract is *one-sided or overly harsh*. (emphasis added)

Thus, a contract is unconscionable where it is one-sided or overly harsh.

3. Plaintiffs' contract was one-sided and overly harsh

- a. The note stated Plaintiffs' account balance as \$462,000 when the actual account balance was \$362,907.**

Plaintiffs' note states that it is secured against "**\$462,000**," the equity balance in the ProTrader Securities account # 34011432 on June 11, 2002. CP 1686. However, the actual balance of the ProTrader Securities account # 34011432 was **\$362,907**. CP 1703, 1753-4. Thus, there is a **\$100,000 discrepancy** between the stated equity balance and the actual equity balance. Plaintiffs' note also states that a two week consecutive downturn in equity would cause the note to come due.

Plaintiffs' contract was unconscionable because it contains a \$100,000 discrepancy between Plaintiffs' actual account balance (the collateral for the note) and the account balance stated on the account. Moreover, the trial court's erroneous ruling was particularly harsh where Plaintiffs only alleged that \$57,182.30 was due on the note and this Plaintiffs' action should have been dismissed.

Luz Zabka addressed this issue—*referencing Plaintiffs' motion for summary judgment*—at the hearing on December 4, 2010 as follows:

Okay. In his motion, Your Honor, he states that the balance on the ProTrader account, which the note is collateralized, was \$362, 000 on the date the note was signed.

However, the promissory note states \$462,000. So the promissory note is inconsistent to the ProTrader account, though its collateralized. He submitted those statements, which I never had access to before.

When I saw the \$362,000 balance, it didn't make sense that the promissory note for value received on that account – which was for \$462,000, so there's a big discrepancy on the note, on the balance that is owed.

I don't understand why the balance on the ProTrader account is \$362,000, but he's suing for \$462,000 on a promissory note. *It makes the note unconscionable.* (emphasis added)

RP 18. The clauses and terms addressed by Mrs. Zabka are clearly one-sided or overly harsh (Id) and the trial court should have stricken the contract. Instead it erred by granting summary judgment on the erroneous \$462,000 balance stated on the face of the note, rather than Plaintiffs' actual account balance—a \$100,000 discrepancy.

b. Plaintiffs enforced the stated as opposed to actual balance.

Plaintiffs admit that the account balance was only \$362,907 on the date the note was signed. Nevertheless, Plaintiffs seek to enforce the note for the erroneous \$462,000 balance stated on the face of the note.

c. Zabka did not authorize the contract and was not aware of the discrepancy.

Luz Zabka did not author the contract. Moreover, she was *not* aware that the actual “value received” (\$362,907) was \$100,000 less than the stated “value received” (\$462,000) stated within the note. The difference of almost \$100,000 makes enforcement of Plaintiffs’ note against Luz Zabka (where Plaintiffs allege that the contingency was met just two weeks after the note was signed). Because Luz was not made aware of the discrepancy, Plaintiffs’ contract was one-sided and overly harsh.

d. Even this Court believed in error that Plaintiffs’ account balance was \$462,000, due to Plaintiffs’ nondisclosure.

The Commissioner of this Court was not aware of the \$362,907 balance and twice interpreted the balance of the account to be \$462,000 (based on the erroneous balance stated in the note):

A June 11, 2002 promissory note provides that if the trading account suffered two weeks of consecutive downturn in its equity balance “the undersigned jointly and severally promise(s) to pay to Arntz” the amount by which the balance of the trading account goes below \$462,000 together with interest on that amount.

CP 1113 and 2939. Clearly, the Commissioner believed, as did Luz Zabka, that the balance was \$462,000 as stated in the note because

plaintiffs did not disclose the actual balance of \$362,907 until their recent motion for summary judgment.

4. Plaintiffs' contract should have been stricken as unconscionable by the trial court

The Washington Supreme Court in McKee v. AT&T Corp., 164 Wn.2d 372, 396 (Wash. 2008) ruled:

. . . when unconscionable provisions so permeate an agreement, we strike the entire section or contract. See Zuver, 153 Wn.2d at 320 (quoting Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1180 (9th Cir. 2003); Alexander v. Anthony Int'l, LP, 341 F.3d 256, 271 (3d Cir. 2003)). (emphasis added)

Further, because Plaintiffs' contract was unconscionable, it should have been stricken. It would be one-sided and overly harsh to enforce the contract against Mrs. Zabka who was unaware of the \$100,000 discrepancy. Thus, the contract is unconscionable.

G. There Was No Mutual Assent.

There was no mutual assent under Plaintiffs' contract. Thus, the trial court erred in granting summary judgment. The Supreme Court of Washington in Yakima County (west Valley) Fire Prot. Dist. No. 12 v. Yakima, 122 Wn.2d 371, 389 (1993)

Mutual assent is required for the formation of a valid contract. "It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time. Mutual assent generally takes the form of an offer and an acceptance." (Footnote omitted.) *Pacific Cascade Corp. v. Nimmer*, 25 Wash. App. 552, 555-56, 608 P.2d 266, review denied, 93 Wash. 2d 1030 (1980). The offer element of mutual assent is met by "a promise to render a stated performance in exchange for a return promise being given." *Pacific Cascade Corp.*, at 556.

Thus, mutual assent existed unless there was a misrepresentation. (emphasis added)

Mutual assent did not exist between Plaintiffs and Luz Zabka because Plaintiffs misrepresented their account balance.

1. Plaintiffs misrepresented their account balance.

The balance of Plaintiffs' account was stated on the note to be \$462,000. However, the actual balance of the account was \$362,907—\$100,000 less than the amount stated on the note. Moreover, Luz Zabka did not communicate regarding the contract with Plaintiffs prior to signing on behalf of Seattle Capital Group. CP 2958—Plaintiffs' admissions. Because the note contained misrepresentations, the offer element of mutual assent never existed and Plaintiffs' summary judgment should have been denied.

H. Plaintiffs' *un*withdrawn admissions raise material issues of fact.

Superior Court Civil Rule 36(b) states:

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

CR 36(b) requires that Valdez's requested admissions (CP 2953-2960) served on Plaintiffs by ABC Legal Services on September 18, 2009 be treated as "admitted" and "conclusively established" where Plaintiffs failed to answer or object within 30 days of service (CP 2961), Plaintiffs did not motion to have the admissions withdrawn, and the trial court did not order the admissions withdrawn.

1. Plaintiffs "agreed that Luz Zabka would not be held individually liable on said Promissory Note.

Further, Plaintiffs' admissions raise issues of material fact as to Luz O. Zabka's liability *where* plaintiffs admit that they "had *not* intended to have Luz Zabka sign the note, did not ask Luz Zabka to sign the Note, did not discuss the Promissory Note with Luz Zabka before it was signed, did not witness the signing of the Promissory Note, and during Plaintiffs' first conversation with Luz Zabka following the signing of the Promissory Note, *agreed that Luz Zabka would not be held individually liable on said Promissory Note.*" (emphasis added) CP 2958-9. Because Luz Zabka's

requested admissions were in effect under Superior Court Civil Rule 36(b), the trial court should have denied Plaintiffs' summary judgment motion.

I. KCLR 58(c) prohibits judgment absent review of the original note, not a copy.

1. Plaintiffs failed to produce the original note.

The trial court had a duty to review Plaintiffs' original note, not a copy. King County Local Rule 58(c) that states:

The court will sign no judgment upon a promissory note until the original note has been reviewed by the court.

Plaintiffs failed to produce the original note because they claim that they lost it. Plaintiffs should not have been granted summary judgment under KCLR 58(c).

2. The trial court abused its discretion when it waived KCLR 58(c).

The standard of review on waiver of a local rule is abuse of discretion. The trial court abused its discretion when it waived KCLR 58(c). Luz Zabka has found no other case where waiver of this rule has been upheld on appeal. This case is no different.

In defense of its waiver, the trial court claimed that:

- i. The original of the promissory Note had been lost;

- ii. Neither the plaintiffs nor anyone else have attempted to negotiate or enforce the promissory note except in action filed in court and referenced in the documents filed in this case; and
- iii. The defendant has never challenged the authenticity of the promissory note, which has been at issue until this local rule was raised by the court.

However, the trial court's ruling clearly has no merit where:

a. Negligence is not a valid excuse – i.e. “We lost it.”

Negligence is not a valid excuse for non-production.

b. Plaintiffs *did* negotiate their note in other actions.

Plaintiffs *did* negotiate their note in under a NASD arbitration against ProTrader Securities resulting in a \$212,500 settlement that they failed to disclose. They also negotiated the note under a complaint to the Washington Department of Financial Institutions. In addition, Plaintiffs had previously sought and obtained judgment in the King County Superior Court. The same judgment that Plaintiffs now seek to enforce against Zabka.

c. The document has a \$100,000 discrepancy on its face.

The note states that the balance of Plaintiffs' account was \$462,000 where Plaintiffs admit that the value was \$362,907. Zabka

undoubtedly raised this issue in her Motion for Continuance and prior to the trial court raising the issue.

The trial court had an affirmative duty to consider both Mrs. Zabka's declaration in favor of her motion for continuance that showed that Plaintiffs' note was negotiated in a separate action and her opposition to Plaintiffs' authentication brief that showed—under declaration—a \$100,000 discrepancy.

Many of trial court's errors are attributable to its not understanding that affidavits should be considered at any time prior to entering a final order on a summary judgment. The Court of Appeals Division 3 has ruled:

In fairness to the highly respected and learned trial judge we point out that the circumstances of this case were unusual and he was not advised of the few court decisions which hold that an affidavit should be considered at any time prior to entering a final order on the summary judgment.

Cofer v. County of Pierce, 8 Wn. App. 258, 263 (Div. 3, 1973)

J. Plaintiffs' Action is Time Barred Under RCW 4.16.240.

The trial court erred in refusing to hear Luz Zabka's cross-motion to dismiss *with prejudice* and instead entering an order granting summary judgment where Plaintiffs' present action was time barred under RCW 4.16.240 which states:

If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he dies and the cause of action survives, his heirs or representatives may commence a new action within one year after reversal.

1. Plaintiffs' action was commenced more than one year after the reversal of their prior action on the same note by this Court of Appeals, Division 1

Plaintiffs commenced this present action more than one year after a reversal on appeal of their judgment from their prior action on the same promissory note. Plaintiffs' first action against Luz O. Valdez n/k/a Luz O. Zabka was reversed on appeal on **October 3, 2005**. *Arntz v. Valdez*, 2005 Wash. App. LEXIS 2585 (Div.1. Oct. 3, 2005). However, Plaintiffs waited until **May 14, 2008**, over two and 1/2 years to serve this present action. Because Plaintiffs waited more than one year to commence their new action, the action is time barred and should be dismissed *with prejudice*.

VI. CONCLUSION

Even if the trial court's denial of Zabka's Motion for Continuance were upheld, summary judgment is still improper. The Commissioner of this Court and the trial court have interpreted Plaintiffs' note differently based on the face of the note. The Washington Supreme Court has ruled: "If reasonable minds can reach different conclusions, summary judgment is improper." *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 30 (1998).

Further, material facts remain because Plaintiffs received \$212,500 under a separate action on the same note that was never accounted for, the

note stated Plaintiffs' account balance as \$462,000 when the actual account balance was only \$362,907 (a \$100,000 discrepancy), and the fact that all evidence on file shows that Luz Zabka never received any consideration for signing the note on behalf of Seattle Capital Group. Accordingly, summary judgment should be reversed.

Further, Defendant Luz Zabka presented newly discovered material evidence in her motion for continuance that would change the outcome of the case. Cases should be decided upon their merits, rather than upon strict compliance with draconian rule limitations. Moreover, the primary consideration in the trial court's decision should have been justice. Accordingly, summary judgment should be reversed.

In addition, Plaintiffs' action is time barred under RCW 4.16.080(3), because Plaintiffs' note does not contain the five elements of a contract and must be viewed as partly oral. This issue was raised by Defendant Luz Zabka in her Motion to Dismiss under CR 12(b)(6). CP 193-249. Plaintiffs' action is also time barred under RCW 4.16.240, because it was commenced more than one year after Plaintiffs' prior judgment on the same note was dismissed by this Court of Appeals, Division 1. This issue was raised in Mrs. Zabka's Cross-Motion to Dismiss under CR 12(b)(6). CP 2461-2732. This issue was also raised in Mrs. Zabka's Declaration and "Motion to Continue the summary judgment hearing [that] was heard on the date of the Summary Judgment hearing." CP 3281. Accordingly, Plaintiffs' action should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 28TH day of September, 2010.



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