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No. 64997-3-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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

v.

LUZ VALDEZ nka LUZ ZABKA,  
Appellant.

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BRIEF OF RESPONDENTS

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2010/11/11 11:56:30

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**I. INTRODUCTION**

The trial Court judge, Judge Middaugh, granted summary judgment for the Arntzes because Ms. Zabka was unable to show that there were genuine issues of material fact. RP at 27-28.

Also, Ms. Zabka failed to file and serve her response to the Arntzes' Motion for Summary Judgment until just four days before the hearing. She claimed that this failure (which were also her grounds for a continuance on the hearing) was due to her not having picked up certain documents from the home of her parents-in-law (who lived in the same city and on the same street as her) until Monday, November 23, 2009, the same day that her response to the Arntzes' summary judgment motion for was due. RP at 5, 8. For this reason, Judge Middaugh denied Ms. Zabka's Motion for Continuance and struck her response to the Arntzes' summary judgment motion.

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**II. STATEMENT OF THE CASE**

Judge Middaugh ordered summary judgment in favor of the Arntzes. RP at 24. She found that the Arntzes "entered into a Promissory Note ["the Note"] signed by [Ms. Zabka] and Jae H. Pak." CP at 3282. "The note provided that [the Arntzes] would be paid the amount of \$462,000 if performance of [the Arntzes'] investment account suffered continued losses for two consecutive weeks." CP at 3282.

1           “The condition precedent for payment of the Note was met in that  
2 the value of [the Arntzes’] account did suffer two weeks of consecutive  
3 downturn in its equity balance.” CP at 3282. Judge Middaugh found that  
4 the promissory note consistently says jointly and severally liable. CP at  
5 3283, RP at 24. Judge Middaugh found also that the fact that Ms. Zabka  
6 put her title after her signature from Seattle Capital Group (“SCG”) “does  
7 not defeat the idea that this was a note that was signed on which [she was]  
8 personally and severally liable.” RP at 24.

9           Judge Middaugh further found that it would make no sense for the  
10 Note to say that the makers are jointly and severally liable and then say  
11 that only the business entity (Seattle Capital Group (“SCG”)) is the sole  
12 maker. RP at 24-25. She said “the note is clear that it was intended, and  
13 the language in the note is clear, that ... [Ms. Zabka] is personally liable  
14 on the note.” RP at 25. Judge Middaugh found also that any conversation  
15 that Ms. Zabka would not be personally liable on the note “is outside of  
16 the document itself [and] does not defeat her obligation under the note to”  
17 the Arntzes. RP at 25. Judge Middaugh also stated that no were no  
18 material facts in this action, including Ms. Zabka’s alleged good faith  
19 belief that SCG was a valid business entity. RP at 25.  
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1 Judge Middaugh found that Ms. Zabka received consideration  
2 under the Note when she signed the Note in front of a notary public. CP at  
3 3283, RP at 26.

4 **III. STATEMENT OF THE ISSUES**

5 I have identified and addressed the following issues:

6 (a) Ms. Zabka's Motion for Continuance; (b) alleged abuse of  
7 discretion by the lower Court judge; (c) Ms. Zabka's summary judgment  
8 response was stricken; (d) Ms. Zabka's Cross-Motion to Dismiss; (e) the  
9 alleged \$100,000.00 "discrepancy"; (f) alleged failure to disclose amounts  
10 received by other means; (g) Ms. Zabka's personal liability on the Note;  
11 (h) SCG was never an entity so it could not be represented; (i) Ms. Zabka  
12 did not solicit the Arntzes; (j) Ms. Zabka breached the Promissory Note;  
13 (k) Ms. Zabka received consideration on the Note; (l) the prior Summary  
14 Judgment; (m) alleged expiration of statutes of limitations; (n) the lost  
15 original Promissory Note; (o) defenses on appeal that were not pursued  
16 before the trial Court: claims of alleged (i) lack of mutual assent, (ii) one-  
17 sidedness/harshness, and (iii) unconscionability.  
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19 **IV. SUMMARY**

20 "On November 30, 2009, ABC legal services personally served on  
21 Plaintiffs' counsel Zabka's Motion [for] Order Shortening Time, Motion  
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1 for Continuance, Response to Plaintiffs' Motion for Summary Judgment,  
2 and her Cross-Motion to Dismiss...." Zabka Brief at 17.

3 The Arntzes had filed their Motion for Summary Judgment against  
4 Ms. Zabka on November 3, 2009. RP at 3. Ms. Zabka admitted this in her  
5 Brief at 12. The hearing was timely scheduled for Friday, December 4,  
6 2009, 28 days after the Motion filing. CP at 1600, RP at 3. Under CR  
7 56(c), "[t]he adverse party may file and serve opposing affidavits,  
8 memoranda of law or other documentation *not later than 11 calendar days*  
9 *before the hearing.*" Emphasis added. Therefore, if Ms. Zabka wanted to  
10 respond to the Motion for Summary Judgment, she was required to file  
11 and serve her response *by Monday, November 23, 2009*. She failed to do  
12 this. RP at 10.

13 Instead, I was served with her (a) response to the Arntzes'  
14 summary judgment motion, (b) motion to shorten time, (c) motion for  
15 continuance, and (d) cross-motion to dismiss on Monday, November 30,  
16 2009, *just four days* before the summary judgment hearing, so Ms. Zabka  
17 was *seven days late* on filing her response. Ms. Zabka admits this in her  
18 Brief at 17. She claims that this four days gave me "a meaningful  
19 opportunity to respond prior to the December 4, 2009 hearing." Zabka  
20 Brief at 17.  
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1 opportunity to make the record complete. Judge Middaugh said of Ms.  
2 Zabka, “[y]ou should have paid attention to this and responded to it in a  
3 timely fashion, and you didn’t do it…” RP at 30.

4 Ms. Zabka claims that “a continuance of the motion would not  
5 result in delay.” Zabka Brief at 21. A continuance is a delay. Mr. Arntz  
6 is close to 80 years old.

7 Ms. Zabka claims that she asked for a continuance on the  
8 summary judgment hearing because she claimed that there was “newly  
9 discovered evidence” that prevented her from timely serving her  
10 response to the Arntzes’ summary judgment motion. RP at 4-5, Ms.  
11 Zabka’s Brief at 2, 14, 33-35.

12 Ms. Zabka failed to state in her Brief that (a) this evidence was at  
13 the home of her parents-in-law (RP at 5); (b) she did not look at it until  
14 Monday, November 23, 2009, the day her response to the Arntzes’  
15 summary judgment motion was due (to which she admitted at the  
16 summary judgment hearing (RP at 5)); and (c) during this time period, Ms.  
17 Zabka lived on the same street in the same city as her parents-in-law. Ex.  
18 “A”.

19 Judge Middaugh made the following observations: (a) Ms. Zabka  
20 was a sophisticated businesswoman who had been involved in million  
21 dollar deals (RP at 8); (b) “you [Ms. Zabka ] should have the wherewithal  
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1 to understand that you need to respond” (RP at 8); (c) “[y]ou just chose  
2 not to pay attention to this summary judgment motion” (RP at 9); (d) “[t]o  
3 come before the Court and say that you couldn’t respond to the summary  
4 judgment motion because you didn’t know about these documents until  
5 the 23<sup>rd</sup>, which is the day the response was due, doesn’t make any sense”  
6 (RP at 9); and (e) regarding the issue of this evidence, the documents, it  
7 “has been raised from day one in this lawsuit, and *you have raised that*  
8 *and argued that ... [a]nd you should have done your discovery to find out*  
9 *you had evidence to support that argument, and you didn’t do that in time*  
10 *for this.”* RP at 9-10. Emphasis added.

11 Judge Middaugh stated in her summary judgment Order against  
12 Ms. Zabka (a) “[t]he defendant [Ms. Zabka] said at the hearing that she  
13 had just received the documents from NASD arbitration from a box that  
14 her in-laws had” (CP at 3281); (b) “[t]he issue of the arbitration had been  
15 raised by the defendant [Ms. Zabka] in other motions before the court”  
16 (*Id.*); (c) “[t]he defendant [Ms. Zabka] provided no reason why the  
17 information was not available to her before the deadline to submit her  
18 response to the Summary Judgment hearing, especially when the trial  
19 had been continued to allow her to do discovery... and the documents  
20 she said she needed were in the possession of her family” (CP at 3281);  
21 and (d) “[t]he court found that the defendant [Ms. Zabka] had not  
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1 established good cause to continue the Summary judgment hearing.” CP  
2 at 3282. For these reasons, Ms. Zabka’s motion for continuance was  
3 denied.

4 2<sup>nd</sup> ISSUE: Alleged Abuse of Discretion by Judge Middaugh.

5 The standard of review for abuse of judicial discretion is clearly  
6 untenable or manifestly unreasonable grounds. *Coggle v. Snow*, 56 Wn.  
7 App. 499, 505, 784 P.2d 554 (1990).

8 Ms. Zabka complains that the lower Court (a) manifestly abused  
9 its discretion and (b) was “draconian” in not allowing a continuance on  
10 the summary judgment hearing (Zabka Brief at 21, 33-35) even though  
11 she was very late on filing her response and motions. It is hard to  
12 imagine how Judge Middaugh (a) was draconian, (b) manifestly abused  
13 her discretion, or (c) used untenable reasoning in denying a continuance  
14 when Ms. Zabka waited until just four days before the summary  
15 judgment hearing to file and serve her documents.  
16

17 “[T]he trial court may deny a motion for a continuance when ...  
18 the moving party does not offer a good reason for the delay in obtaining  
19 the evidence....” *Coggle* at 507. As Judge Middaugh stated, “[t]he  
20 defendant [Ms. Zabka] provided no reason why the information was not  
21 available to her before the deadline to submit her response to the Summary  
22 Judgment hearing....” CP at 3281.  
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1                    3<sup>rd</sup> ISSUE: Ms. Zabka's Summary Judgment Response was  
2 Stricken.    The Court reviews a summary judgment de novo. *Fell v.*  
3 *Spokane Transit Auth.*, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996).

4                    Judge Middaugh struck Ms. Zabka's response to the Arntzes'  
5 Motion for Summary Judgment because it was late. RP at 11. Judge  
6 Middaugh stated that, except for the documents stored at the house of  
7 Ms. Zabka's parents-in-law, her response "could have been filed on  
8 time." RP at 11.

9                    Judge Middaugh observed that "[t]here's nothing in there that was  
10 new or novel to you in this case, and you could have filed that on time,  
11 and you chose not to do so, I assume on the assumption that I would grant  
12 another continuance when you'd asked because you weren't able to get  
13 something done on time." *Id.* Therefore, Judge Middaugh refused to  
14 consider Ms. Zabka's response. RP at 11.

15                    The "newly discovered evidence" to which Ms. Zabka refers is  
16 entirely irrelevant anyway because it involved an entirely different deal  
17 in which the Arntzes paid to ProTrader/Instinet a total of \$262,681.00  
18 (\$200,000 by cash transfer and \$62,681.00 in Boeing stock). CP at  
19 1945-47. Because of poor results, ProTrader/Instinet had refunded to the  
20 Arntzes a total of \$260,337.70 (CP at 1949-51) following arbitration.  
21 Even Ms. Zabka believed that the two matters were separate and "had  
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1 nothing to do with Seattle Capital Group's money." RP at 7. Regarding  
2 the Arntzes' contention of this separation, she said "I thought they were  
3 right." RP at 7.

4 The whole ProTrader/Instinet matter was settled entirely separate  
5 from Ms. Zabka and SCG. *Id.* Judge Middaugh correctly ruled that "the  
6 NDSA arbitration involved separate parties and issues." CP at 3284.

7 This was not new evidence to Ms. Zabka because she had some  
8 of the evidence as early as November 3, 2008 when she attached a  
9 document of this "evidence" (a release) as Ex. "8" to her Reply for  
10 Motion to Dismiss. CP at 388-93, 415-19.

11 All that she had to do to get all of the information that I had  
12 related to this Release was to send me a Request for Production for it and  
13 I would have sent it to her. But, she never asked for it so I never knew  
14 that she wanted this information. But of course, she already had all of  
15 the information anyway because it was stored at the house of her  
16 parents-in-law. RP at 5, 8, CP at 3281.

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18 4<sup>th</sup> ISSUE: Ms. Zabka's Cross-Motion to Dismiss. The  
19 Court reviews a summary judgment de novo. *Fell v. Spokane Transit*  
20 *Auth.*, 128 Wn.2d at 625.

21 Ms. Zabka complains that Judge Middaugh refused to hear her  
22 Cross-Motion to dismiss this action. Zabka Brief at 1. Ms. Zabka had  
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1 brought a Motion to Dismiss hearing in November 2008 at which the  
2 Court refused to dismiss this action. She brought up virtually all of the  
3 same issues heard at the summary judgment hearing and every other  
4 contact with the Court.

5 I believe that at the summary judgment hearing, Judge Middaugh  
6 would not entertain her cross-motion to dismiss because “this case has  
7 been replete with delays, and it has to stop someplace....” RP at 30.

8 5<sup>th</sup> ISSUE: The Alleged \$100,000.00 “Discrepancy”. The  
9 Court reviews a summary judgment de novo. *Fell v. Spokane Transit*  
10 *Auth.*, 128 Wn.2d at 625.

11 Ms. Zabka claims that she is not liable on the Note because there is  
12 a \$100,000.00 discrepancy in it. Zabka Brief at 3, 38-42, 46. She claims  
13 that “[t]he balance of [the Arntzes’] account was stated to be \$462,000.”  
14 Zabka Brief at 42. This is untrue and there is no discrepancy. Ms. Zabka  
15 mis-states the terms of the Note. Because of Seattle Capital Group’s  
16 (“SCG”) poor performance on the Arntzes’ account (#34011432), Ms.  
17 Zabka and Jae Pak agreed (with joint and several liability) to pay to the  
18 Arntzes \$462,000.00 (not the value of the account) if their account  
19 continued to depreciate in value over the next two weeks. CP at 3282.

20  
21 The \$462,000 was not the balance of the account. It was the  
22 amount that Ms. Zabka agreed to pay if the \$362,907.00 account balance  
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1 continued to deteriorate over the next two weeks, which it did. Only Ms.  
2 Zabka is claiming that the \$462,000.00 figure was the account balance.  
3 The Arntzes are trying to collect on the figure (\$462,000.00) that Ms.  
4 Zabka agreed to pay if the \$362,907.00 account balance depreciated over  
5 the next two weeks.

6 At the time that the Note was signed, the Arntzes' account was  
7 worth \$362,907.00. CP at 1754. At end of the two week time period, the  
8 account was in fact down over \$6,600.00 (CP at 1754); thus the obligation  
9 of Ms. Zabka and Jae Pak to pay the \$462,000.00 became effective.

10 Ms. Zabka now is trying to alter the terms of the Note by saying  
11 she is supposed to pay only the amount of the value of the Arntzes'  
12 account that it was at the time of the signing of the Note. This is where  
13 she gets the \$100,000.00 "discrepancy". Zabka Brief at 3, 38-41. Ms.  
14 Zabka is trying to lower or obviate her liability.

15 Ms. Zabka claims that she "was not aware of the discrepancy."  
16 Zabka Brief at 3, 39-40. She was in fact aware of it because she signed  
17 the Note. CP at 13-14. This means that she read and understood it. The  
18 notary public said that she had signed it freely and voluntarily. CP at 14.

19 Ms. Zabka admits that she saw the dollar figures in the Note yet  
20 she signed it anyway. Zabka Brief at 39. The text of the Note is only one  
21 and a half pages. It is safe to assume that she read and understood it. If  
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1 Ms. Zabka is sophisticated enough to be SCG's Chief Portfolio Manager  
2 (CP at 14), then she is sophisticated enough to (a) read and understand the  
3 terms of the Note, (b) see any discrepancies, (c) consult an attorney about  
4 any discrepancies, (d) demand any changes, and (c) refuse to sign it if  
5 necessary.

6 Ms. Zabka claims that "[e]xtrinsic evidence clearly contradicts the  
7 note on its face." Zabka Brief at 26. She does not state what this extrinsic  
8 evidence is. None is needed anyway because the Note has all the details  
9 of the bargain between the parties.

10 6<sup>th</sup> ISSUE: Alleged Failure to Disclose Amounts Received by  
11 other Actions. The Court reviews a summary judgment de novo. *Fell v.*  
12 *Spokane Transit Auth.*, 128 Wn.2d at 625.

13 Ms. Zabka claims that the Arntzes "failed to disclose all amounts  
14 received on the promissory note under various other actions." Zabka Brief  
15 at 3-4. This is untrue. She has known of garnishment efforts since at least  
16 July 2008 (CP at 195-96, 234-36) and the arbitration matter is discussed  
17 *supra* at 9-10.

18 7<sup>th</sup> ISSUE: Ms. Zabka's Personal Liability on the Note. The  
19 Court reviews a summary judgment de novo. *Fell v. Spokane Transit*  
20 *Auth.*, 128 Wn.2d at 625.  
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1 Ms. Zabka claims that she signed the Note only as a representative  
2 for SCG so allegedly she is not personally liable on it. Zabka Brief at 1.  
3 She claims also that she is not personally liable on the Note because Jae  
4 Pak required her to sign it. Zabka Brief at 7. However, Ms. Zabka states  
5 no consequences if she had refused to sign it. She has not claimed that Jae  
6 Pak forced her in any way into signing the Note. She could have resigned  
7 her position rather than sign it and agree to the personal liability, but she  
8 did not. Also, the notary public attested that Ms. Zabka had  
9 acknowledged that her signing of the Note was a “free and voluntary  
10 act...” CP at 14.

11 Ms. Zabka claims that she “did not draft the note....” Zabka Brief  
12 at 7. This is irrelevant because presumably she read and understood it  
13 before she signed it. If Ms. Zabka had any questions about any terms of  
14 the Note or her personal liability on it, then she should have (a) not signed  
15 it all or (b) delayed doing so until she had consulted an attorney.  
16 Apparently, she did neither. But she did sign it. CP at 14.

18 Ms. Zabka also claims that she is not liable on the Note because  
19 she “was not told by [the Arntzes] or Jae Pak that she was signing the note  
20 personally.” Zabka Brief at 8. She did not need to be told this because on  
21 the first page alone of the Note there is reference to (a) “the undersigned  
22 jointly *and severally* promise(s) to pay....” (emphasis added); (b) “a  
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1 PROMISE TO PAY by the maker of this note...”; and (c) “each maker  
2 and endorser severally...”; (d) to hold each of them liable...”; (e) “each  
3 maker and endorser...”; and (f) “[e]ach maker and endorser further agrees,  
4 jointly and severally...” CP at 13-14.

5 Ms. Zabka is personally liable under the Note also because:

6 The understanding between the Arntzes, Ms. Zabka, and Mr. Pak,  
7 based on discussions and the structure of the language of the Note, was  
8 that Ms. Zabka and Mr. Pak would agree to sign the Note under which, if  
9 the Arntzes’ account continued to depreciate further for an additional two  
10 weeks from the date of the Note, they (the Arntzes) would be paid  
11 \$462,000.00, *not by SCG*, but by each of Ms. Zabka and Mr. Pak jointly  
12 *and severally*. CP at 1679-81, 1750-51. The additional two weeks of  
13 depreciation did occur as discussed *supra* at 12.

14 Also, (a) the Note is not on SCG letterhead; (b) there is no  
15 language that identifies SCG as the principal in the Note (*Major Prods.*  
16 *Co., Inc. v. N.W. Harvest*, 96 Wn. App. 405, 407, 979 P.2d 905 (1972));  
17 (c) the name “Seattle Capital Group” or “SCG” is not even mentioned at  
18 all in the text or body of the Note; (d) there is no language in the text or  
19 body of the Note that SCG, rather than Ms. Zabka and Mr. Pak, was to be  
20 liable on it; (e) it is not apparent “from the body of the note that....” Ms.  
21 Zabka signed as an agent for another person (*Id.*); (f) the numerous  
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1 references to her and Mr. Pak’s “joint and several liability” state that the  
2 two of them, not SCG, were liable on the Note: (i) the second paragraph of  
3 the Note (to which Ms. Zabka admits in CP at 1775) says “the undersigned  
4 [Ms. Zabka and Mr. Pak] jointly *and severally* promise(s) ... to pay to the  
5 order of ARNTZ ... the principal sum of ... \$462,000.00.” (emphasis  
6 added); (ii) the fifth paragraph of the Note says (A) “[e]ach maker and  
7 endorser *severally* waives demand, protest and notice of maturity, non-  
8 payment or protest and all requirements necessary to hold *each of them*  
9 *liable as makers and endorsers...*” and (B) *each maker and endorser*  
10 *waives trial by jury ....*” (emphasis added); (iii) the sixth paragraph of the  
11 Note (and to which Ms. Zabka admits in CP at 1775) says “[*e]ach maker*  
12 *and endorser* further agrees, jointly and *severally*, to pay all costs of  
13 collection ... in case the principal of this note or any payment on the  
14 principal or any interest thereon is not paid ... or it becomes necessary to  
15 protect the security hereof ....” (emphasis added); (g) Ms. Zabka and Mr.  
16 Pak signed the Note as makers and endorsers; and (h) the notary public  
17 stated that Ms. Zabka had acknowledged that she had *freely and*  
18 *voluntarily* signed the Note. CP at 1681, 1751.

20 Ms. Zabka has never claimed that at the time that she signed the  
21 Note that she was suffering from any infirmity or defect that might have  
22 affected her judgment.  
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1 In *Union Mach. & Supply Co. v. Taylor-M. L. Co.* (143 Wash. 154,  
2 254 P. 1094 (1927)), the signer of the promissory note was held not  
3 personally liable because *a corporation in that action actually existed* and  
4 he was found to have been representing that corporation. *Id.* In our  
5 action, there was no corporation or LLC that existed for Ms. Zabka to  
6 represent. *See* discussion at 23-28 *infra*. Therefore, she (a) signed for  
7 herself only and not as a representative for any entity, (b) has no corporate  
8 immunity, and (c) is personally liable on the Note.

9 Even if there were an actual LLC or corporation, Ms. Zabka cannot  
10 hide behind it and claim no personal liability “to take advantage of [her]  
11 own wrong.” *Daniel v. Glidden*, 38 Wash. 556, 563, 80 P. 811 (1905). In  
12 our action, Ms. Zabka’s wrong is not paying the full amount due on the  
13 Note.

14 Analogy: Administratively dissolved entities. Under  
15 administratively dissolved entities caselaw, Ms. Zabka is personally liable  
16 because “when a person assumes to *act as a corporation*, the person *is*  
17 *personally liable* to the other party on the contract.” *White v. Dvorak*, 78  
18 Wn. App. 105, 109, 896 P.2d 85 (1995). Emphasis added. “Imposing  
19 liability is supported by the strong inference that a person intends to make  
20 a present contract *with an existing person.*” *Id.* at 112. SCG did not exist,  
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1 so (a) the Arntzes could not and did not have a contract with it and (b) Ms.  
2 Zabka could not represent it.

3 The presumption that the parties to an obligation intend it to be  
4 enforceable extends to contracts made in the name of a non-existent  
5 corporation. *White* at 114. “An enforceable contract can exist only if the  
6 person purporting to act as a corporation is a party to the contract because  
7 the corporation lacks existence and cannot be bound.” *Id.*

8 Analogy: Promoter Liability. Under promoter liability  
9 caselaw, a promoter is personally liable on a contract if the corporation  
10 does not exist. *Refrigeration Engineering Co. v. McKay*, 4 Wn. App. 963,  
11 972, 486 P.2d 304 (1971). “There is a ‘strong inference that a person  
12 intends to make a present contract with an existing person.’” *Goodman v.*  
13 *Darden, Doman & Stafford*, 100 Wn.2d 476, 479, 670 P.2d 648 (1983).

14  
15 By denying personal liability, Ms. Zabka argues that the Arntzes  
16 must look solely to SCG, not her. As the proponent of this argument, Ms.  
17 Zabka “has the burden of proving this.” *Id.* Because SCG never existed,  
18 it cannot be held responsible for the Arntzes’ losses; therefore, only Ms.  
19 Zabka is now held personally liable (*Id.* at 482) because she agreed to be  
20 so and there is no one else.

21 “All persons who assume to act as a corporation without authority  
22 so to do shall be jointly and severally liable for all debts and liabilities  
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1 incurred or arising as a result thereof.” *Heintze Corp., Inc. v. N.W.*  
2 *TechManuals. Inc.*, 7 Wn. App. 759, 760, 502 P.2d 486 (1972).

3 This action is similar to *Horton v. Haley* (12 Wash. 74, 40 P. 624  
4 (1895)). Because both signers to the Note did so jointly and severally, “it  
5 was understood that [they] were to bind themselves individually...” *Id.*  
6 at 76. Because there was no *de jure* or even a *de facto* corporation, (a)  
7 “there was nothing upon the face of the note to indicate that *there was*  
8 *such a corporation in existence....*” and (b) the Arntzes are *not* estopped  
9 from seeking *personal liability* against Ms. Zabka. *Id.* “There [is] nothing  
10 ambiguous about” Ms. Zabka’s personal liability. *Id.*

11 The Note in this action “was joint and several in form, and there  
12 was no ear-mark of any kind to show that [Ms. Zabka and Mr. Pak]  
13 intended to bind someone else than themselves, or that they were acting in  
14 a representative capacity only.” *Id.* “There was no agreement that they  
15 were *not* to be bound individually....” *Id.* Emphasis added.

17 Because there was no entity that Ms. Zabka possibly could have  
18 represented because none existed, then her signature could not “show  
19 unambiguously that [her] signature [was] made in a representative  
20 capacity....” and she “is liable on the instrument to a holder in due course  
21 that took the instrument without notice that the [alleged] representative  
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1 was not intended to be liable on the instrument.” RCW 62A.3-  
2 402(b)(2)(ii). Plaintiffs are holders in due course. RCW 62A.3-302.

3 Piercing the Corporate Veil. Even assuming the existence of a  
4 corporation or LLC in this action, the equitable remedy of corporate entity  
5 disregard and piercing of the corporate veil may be “imposed to rectify an  
6 abuse of the corporate privilege.” *Truckweld Equipment Co. v. Olson*, 26  
7 Wn. App. 638, 643, 618 P.2d 1017 (1980). “[T]he Courts will ignore the  
8 fiction of corporate entity, where it is used as a blind or instrumentality to  
9 defeat public convenience [or] justify wrong..., and will regard the  
10 corporation as an association of persons” (*Nat’l Bank of Commerce of*  
11 *Seattle v. Dunn*, 194 Wash. 472, 499-500, 78 P.2d 535 (1938)) “to the end  
12 that rights of third parties shall be protected.” *Spokane Merchants Ass’n v.*  
13 *Clere Clothing Co.*, 84 Wash. 616, 623, 147 P. 414 (1915).

14  
15 Even if the relevant SCG were an existing corporation or LLC,  
16 then its veil should be pierced because it has been intentionally used to  
17 violate and evade a duty to the Arntzes and an unjustified loss to them will  
18 occur if it is not pierced. *Hiller Corp. v. Port of Port Angeles*, 96 Wn.  
19 App. 918, 924, 982 P.2d 131 (1999). The Arntzes were owed \$462,000.00  
20 upon additional losses, but they have yet to be fully compensated on this  
21 debt. The unjustified loss of this payment will result if the corporate form  
22 is not disregarded and its veil not pierced.  
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1            “If a corporate officer participates in the wrongful conduct, ... then  
2 the officer ... is liable for the penalties.” *State of Wash. v. Ralph*  
3 *Williams’ N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423  
4 (1976). “Corporate officers cannot use the corporate form to shield  
5 themselves from *individual liability*.” *Id.* Emphasis added.

6            Ms. Zabka admitted to being the (a) Chief Portfolio Manager of  
7 SCG (Zabka Brief at 1, CP at 197, 199, 1751, 1875), (b) Chief Investment  
8 Officer (CP at 199), and (c) Chief Financial Officer (CP at 1898) at SCG.  
9 Mr. Pak also said that Ms. Zabka was Chief Portfolio Manager of SCG.  
10 The state of Washington Department of Financial Institutions (“DFI”)  
11 stated that she was the Administrative Executive at SCG. CP at 1738. All  
12 of these positions were officer positions of the alleged entity. Ms. Zabka  
13 admitted signing the Note. Zabka Brief at 1.

14            After losing much of the Arntzes’ investment funds and then  
15 refusing to make restitution to them as required by the Note, Ms. Zabka  
16 participated in the wrong of not making restitution. Thus, Ms. Zabka is  
17 personally liable on the Note.  
18

19            When the makers of a Note agree to be jointly and severally on it,  
20 “as to the payee they [are] all principals, and all bound jointly and  
21 severally to pay the debt.” *Holland v. Tjosevig*, 109 Wash. 142, 144, 186  
22 P. 317 (1919). “There are no apt words used in the note showing that the  
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1 corporation is obligated.” *Daniel v. Glidden*, 38 Wash. 556, 564, 80 P. 11  
2 (1905). Also, Mr. Pak was held personally liable on the Note in the  
3 Superior and U.S. Bankruptcy Courts actions. CP at 1790-91, 1864-66,  
4 1869-70.

5 On or about January 26, 2004, the DFI declared an emergency and  
6 ordered Ms. Zabka, *et al.*, to cease and desist from violations of (a) RCW  
7 21.20.010 (the anti-fraud section of the Securities Act), (b) RCW  
8 21.20.030 (which prohibits certain performance-based investment  
9 advisory contracts), and (c) RCW 21.20.040 (which requires registration  
10 of persons acting as investment advisors, investment advisor  
11 representatives, broker-dealers, or securities salespersons). CP at 1648-49,  
12 1745-46.

13 The DFI determined that Ms. Zabka, *et al.*, “knowingly and  
14 recklessly violated the registration and anti-fraud provisions of the  
15 Securities, Act, and that the imposition of fines under RCW 21.20.395  
16 [was] required in light of the severity of the violations” and that liability  
17 should be joint *and several*. CP at 1650, 1746-47.

18 Ms. Zabka has the burden of showing that she signed the  
19 instrument for the purpose of lending her name to another party to it.  
20 *Hendel v. Medley*, 66 Wn. App. 896, 899, 833 P.2d 448 (1992) (citing  
21 RCW 62A.3-415(1)). Ms. Zabka has failed to do this because there are  
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1 no words in the Note to the effect of “as representative for...”,  
2 “representing...”, etc. CP at 1750-51.

3 *Even an authorized representative who signs her own name to an*  
4 *instrument is personally obligated* on it if the instrument does not show  
5 that she signed in a representative capacity. *Emmerson v. Beckett*, 30  
6 Wn. App. 456, 460, 635 P.2d 747 (1981). Because (a) Ms. Zabka agreed  
7 to joint and several liability, (b) there were no words stating that she was  
8 a representative, and (c) there was no business entity (discussed *infra* at  
9 23-28), she could not be a representative for anyone or any entity. Also,  
10 “parol evidence is not admissible to disestablish this liability, even  
11 between the immediate parties.” *Emmerson* at 460. Ms. Zabka fails to  
12 show that she signed the Note in a representative capacity, so she is  
13 personally liable on it.

14  
15 Ms. Zabka may have held a title, but that does not block personal  
16 liability when she has agreed to several liability. Even if she signed as a  
17 representative, she also signed for herself personally because of the joint  
18 and several liability language in the Note. There is no language in the  
19 Note that Ms. Zabka signed as a representative, let alone as a  
20 representative only.

21 Judge Middaugh correctly found that “[i]t makes no sense for the  
22 individual signatories to agree to be ‘jointly and serially’ liable on the  
23

1 note, if the intent was only that the 'Seattle Capital Group' would be  
2 liable." CP at 3283. "This interpretation is inconsistent with the plain  
3 language of the note which states that [ ] the signors were 'jointly and  
4 severally' liable and that 'Each maker ... severally waives demand,' and  
5 'Each maker ... agrees, jointly and severally to pay...' CP at 3283.

6 8<sup>th</sup> ISSUE: SCG was Never an Entity so it Could Not Be Represented.

7 The Court reviews a summary judgment de novo. *Fell v. Spokane*  
8 *Transit Auth.*, 128 Wn.2d at 625.

9 SCG Was Never A De Jure Corporation.

10 Ms. Zabka claims that (a) "SCG was a valid and existing entity"  
11 (Zabka Brief at 5) and (b) she only represented SCG in this action. Zabka  
12 Brief at 7, CP at 13, 25-26, 392. However, SCG never was a legal entity,  
13 so she could not have represented it. One cannot represent a non-entity;  
14 therefore Ms. Zabka represented nobody and so she is personally liable on  
15 the Note.  
16

17 There were three different Seattle Capital Groups in this saga, none  
18 of which Ms. Zabka could have represented in any way. The first one was  
19 Seattle Capital Group, LLC, which was incorporated on January 9, 1998  
20 by a Nicholas Jenkins with the Washington state Secretary of State. CP at  
21 1634, 1649, 1737, 1880-83. It was given its own unique UBI ("Uniform  
22 Business Identifier") number. CP at 1880. It was dissolved on April 22,  
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1 2002 (CP at 1634, 1638, 1885), *two months before the Note in this action*  
2 *was signed by Ms. Zabka.* It had nothing to do with Ms. Zabka and the  
3 investment business of which she was a part. CP at 1649, 1737-38. Mr.  
4 Jenkins and his attorney confirmed this. CP at 1887-88.

5 The second Seattle Capital Group, LLC, was incorporated in  
6 Delaware on November 27, 2000 (CP at 1890-91) and was only  
7 tangentially related to the Seattle Capital Group of which Ms. Zabka was a  
8 part. That entity ceased to exist on August 2, 2001 (CP at 1893), *ten*  
9 *months before the Note in this action was signed.*

10 The third Seattle Capital Group, which Ms. Zabka claims to have  
11 represented and which she claims allegedly gives her corporate immunity,  
12 was never incorporated nor formed as an LLC. CP at 1621, 1635, 1649,  
13 1737. Because Mr. Pak did not check whether there was another “Seattle  
14 Capital Group” in existence (discussed *infra*), the state Department of  
15 Licensing thought that Mr. Pak’s Seattle Capital Group was Mr. Jenkins’  
16 The Seattle Capital Group. CP at 1621, 1895. When the Department of  
17 Licensing straightened out the situation, its record shows that Mr. Pak’s  
18 “Seattle Capital Group LLC as a company not officially registered with  
19 the Secretary of State....” CP at 1896. Thus, the Seattle Capital Group  
20 which Ms. Zabka claims gives her immunity was never a legal entity  
21 because it was never registered as an LLC or a corporation.  
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1 Mr. Pak violated RCW 25.15.010(1)(e), which requires that the  
2 name of a newly formed LLC be distinguishable from the name of an  
3 already existing corporation, partnership, or LLC. At the time that Mr.  
4 Pak tried to form his SCG, Mr. Jenkins' unrelated LLC by this same name  
5 already existed, discussed *supra*. CP at 1621, 1635, 1649. Also, non-use  
6 of the article "The" by Mr. Pak did not distinguish it from Mr. Jenkins'  
7 SCG. RCW 25.15.010(3)(b), CP at 1635. Therefore, the Secretary of  
8 State's office could not and would not register the SCG in this action as an  
9 LLC. CP at 1621, 1635, 1649. Thus, there was no LLC for the SCG in  
10 this action.

11 *None of these Seattle Capital Groups existed at the time the Note*  
12 *in this action was signed.* Therefore, Ms. Zabka was not representing nor  
13 could she represent any entity because there was no entity to represent.  
14 Therefore, Ms. Zabka is personally liable on the Note. Again, "parol  
15 evidence is not admissible to disestablish this liability..." *Emmerson v.*  
16 *Beckett*, 30 Wn. App. at 460. Ms. Zabka has the burden of proving that  
17 she was representing SCG. *Hendel v. Medley*, 66 Wn. App. at 899. She  
18 cannot do so because it never existed.

19  
20 SCG Was Never a De Facto Corporation. Nor was there was a  
21 *de facto* corporation that provided Ms. Zabka with corporate immunity.  
22 The SCG in this action was an alleged limited liability company (LLC),  
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1 not a corporation. Even if a *de facto* LLC were possible, there must be a  
2 good faith attempt to organize it. *Refsnes v. Myers*, 164 Wash. 205, 209, 2  
3 P.2d 656 (1931). “‘Good faith’ means honesty in fact and the observance  
4 of reasonable commercial standards of fair dealing.” RCW 62A.3-103.

5 There was no good faith because:

6 First, Mr. Pak made no effort to make sure that (a) there was not  
7 another entity with a name the same or similar to his choice; (b) his  
8 entity’s name was distinguishable from Nicolas Jenkins’ SCG; or (c) his  
9 non-use of the word “The” would distinguish his entity from any other  
10 entity. He never received (a) acknowledgement papers from the Secretary  
11 of State’s Office that would have informed him that his entity was  
12 properly registered or (b) a unique UBI number from the state, but he  
13 never bothered to check out why he never received any verifications. He  
14 merely tacked onto the UBI number of Mr. Jenkins’ SGC and went on his  
15 way.  
16

17 Second, SCG was never registered with the state of Washington as  
18 required by the Securities Act, RCW 21.20. CP at 1648-50, 1744. Non-  
19 registration violated RCW 25.15.030(1) which authorizes any LLC formed  
20 under this chapter to carry on any *lawful* business or activity. While SCG  
21 unlawfully carried on its day-to-day business of investing the public’s  
22 money, it was not registered to do so as required by this statute.  
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1           “The rationale of the doctrine of substantial compliance is that one  
2 who has made a good faith effort to comply with a technical requirement,  
3 noncompliance with which leaves him open to liability, should not be  
4 subject to that liability for a failure to literally comply.” *True’s Oil Co. v.*  
5 *Keeney*, 76 Wn.2d 130, 139, 455 P.2d 954 (1969). The SCG in this action  
6 *made no good faith effort* to comply with the statutory formalities of state  
7 incorporation law. These violations of statutory requirements show a lack  
8 of good faith. *Hill v. County Concrete Co., Inc.*, 108 Md. App. 527, 672  
9 A.2d 667, 672 (1996). This lack (a) makes inapplicable the doctrine of  
10 corporate estoppel (*Id.*) and (b) prevents the concept of a *de facto*  
11 corporation or LLC for SCG. *Refsnes v. Myers*, 164 Wash. at 209.  
12 Therefore, without even a *de facto* corporation or LLC, by default, Ms.  
13 Zabka therefore is personally liable on the Note because there was no  
14 entity for her to represent.  
15

16           Also, although it is claimed that there was a good faith attempt to  
17 form an LLC, the stamp on the second page of the Note says “Seattle  
18 Capital Group Inc., State of Washington, 1990”. CP at 1751. This stamp  
19 was disingenuous of Defendant and Mr. Pak because no corporation by  
20 this name was ever formed in the state of Washington by anybody and  
21 definitely not in 1990. These fabrications show a definite lack of good  
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1 faith, so not even a *de facto* corporation or LLC is conceivable in this  
2 action.

3 Ms. Zabka claims that she believed that SCG was “a valid and  
4 existing entity.” Zabka Brief at 5-6. This totally untrue because she was  
5 aware that the SCG in this action was *not even a de facto corporation or*  
6 *LLC* because she had requested in November 2000 from the Department  
7 of Licensing a copy of SCG’s Master Application. CP at 1898. An  
8 examination of this application by Ms. Zabka would reveal that neither of  
9 the applications submitted by Mr. Pak had been validated by the  
10 Department, thus putting Ms. Zabka on notice that SCG had not been  
11 properly formed with the State of Washington. CP at 1626-32.

12 9<sup>th</sup> ISSUE: Ms. Zabka Did Not Solicit the Arntzes. Ms. Zabka’s  
13 Brief at 6. It is irrelevant that she did not solicit the Arntzes.

14 10<sup>th</sup> ISSUE: Ms. Zabka Breached the Promissory Note. The  
15 Court reviews a summary judgment de novo. *Fell v. Spokane Transit*  
16 *Auth.*, 128 Wn.2d at 625.

17 Ms. Zabka claims that she did not breach the Note. Zabka Brief at  
18 2. She breached the Note by not paying any money on it to the Arntzes  
19 even though she had promised in it to do so. CP at 1750-51. As noted  
20 *supra*, Ms. Zabka admitted this. She was aware of her duty to pay on it,  
21 not only because she had signed the Note (*Id.*) and the account balance  
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1 had depreciated enough to trigger her performance on it (CP at 1754), but  
2 also because, as noted *supra*, the Arntzes had sent to her their Demand to  
3 Pay Promissory Note Order. CP at 1740, 1758. Ms. Zabka acknowledged  
4 receipt of this demand by signing it on November 25, 2002. CP at 1758.

5 When Ms. Zabka was asked to admit that she had signed the  
6 Demand letter (CP at 1872), she did so in our Conference of Counsel and  
7 in CP at 1875. When she was asked to admit that she had never  
8 communicated with the Arntzes to dispute this Demand (CP at 1873), she  
9 did so in our Conference of Counsel and in CP at 1876. For these reasons,  
10 Ms. Zabka did in fact breach the Note.

11 11<sup>th</sup> ISSUE: Ms. Zabka Received Consideration on the Note.

12 The Court reviews a summary judgment de novo. *Fell v. Spokane*  
13 *Transit Auth.*, 128 Wn.2d at 625.

14 Ms. Zabka claims that she cannot be held liable personally on the  
15 Note because she received no consideration, compensation, or benefit on  
16 the Note. Zabka Brief at 2, 7, 8, 27, 30. However, Ms. Zabka was in  
17 fact a direct beneficiary of the value given in the Note (in other words,  
18 consideration, compensation, benefit) because, as she admitted, the first  
19 three words of the second paragraph are “For value received....” CP at  
20 1750, 1775. Judge Middaugh confirmed this. CP at 3283, RP at 26.  
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1 Ms. Zabka states that the Arntzes never claimed that she received  
2 consideration. Zabka Brief at 27. This is untrue. In the Arntzes'  
3 summary judgment motion they state at CP at 1708 that Ms. Zabka  
4 admitted receiving consideration. Ms. Zabka also claims that the  
5 Arntzes "failed to show any evidence of consideration to" her. Zabka  
6 Brief at 28. Yes, they did: the Note signed by her *jointly and severally*  
7 states in the second paragraph "[f]or value received..." CP at 1750.

8 Ms. Zabka tries to make an issue that the trial Court did not  
9 "identify the alleged consideration" and so summary judgment was  
10 improper. Zabka Brief at 28. It does not matter that the consideration  
11 was not identified. All that matters is that Ms. Zabka admitted receiving  
12 consideration and this makes the Note valid.

13 Ms. Zabka says that under *Crow v. Crow* (66 Wn.2d 108, 110,  
14 401 P.2d 328 (1965)) "mere recital of consideration is not enough."  
15 Zabka Brief at 28. *Crow* goes beyond this. That case dealt with what  
16 the real consideration was in an agreement, not with whether Ms. Zabka  
17 received consideration, which she has admitted. This is also true of her  
18 cite to *Kinne v. Lampson* (58 Wn.2d 563, 364 P.2d 510 (1961)): that case  
19 also deals with what the true consideration is, not whether a party has  
20 received consideration. So neither case is applicable.  
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1                    12<sup>th</sup> ISSUE: Prior Summary Judgment.     The Court reviews a  
2 summary judgment de novo. *Fell v. Spokane Transit Auth.*, 128 Wn.2d at  
3 625.

4                    Ms. Zabka implies that the Superior Court and Court of Appeals  
5 dismissed her with prejudice from Plaintiffs' earlier suit. Ms. Zabka's  
6 Brief at 9. This is untrue. The Court of Appeals, while reversing the  
7 Order of Default and Summary Judgment against Ms. Zabka and  
8 dismissing the underlying action against her in its unpublished opinion  
9 and the Superior Court, while similarly vacating the Order of Default  
10 and Summary Judgment against her and dismissing her, *did not rule that*  
11 *this reversal, dismissal, and vacation were with prejudice.* If these  
12 Courts had meant this, then they would have said so; but they did not.  
13 Thus, both Courts left open the possibility of the Armtzes pursuing  
14 justice on the Note. CP at 1750-51.

16                    13<sup>th</sup> ISSUE: Alleged Expiration of Statutes of Limitations.

17                    The Court reviews a summary judgment de novo. *Fell v. Spokane*  
18 *Transit Auth.*, 128 Wn.2d at 625.

19                    Ms. Zabka alleges that under RCW 4.16.080(3) there is a three  
20 year statute of limitations that bars this action. Zabka Brief at 2, 29-31.  
21 This statute states that a three year statute of limitations applies on "an  
22 action upon a contract or liability, express or implied, *which is not in*  
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1 *writing, and does not arise out of any written instrument” except as*  
2 *provided in RCW 4.16.040(2).* Emphasis added. There are at least two  
3 problems in using this statute: (a) it is inapplicable because there is an  
4 express written contractual liability which arises from the Note, a written  
5 instrument, and (b) RCW 4.16.040(2), a six year statute of limitations,  
6 applies to an action on an account receivable, which this is. She even  
7 admits in her Brief at 30 that the Note is written.

8 In her claim of RCW 4.16.080(3) three year statute of limitations  
9 applicability, Ms. Zabka further claims that “[t]wo factual elements  
10 necessary for an action for breach of a written contract are missing....” in  
11 the Note. Zabka Brief at 30-33. She claims that (a) she is not expressly  
12 named as an individual party to the Note and (b) she received no  
13 consideration under the Note. Zabka Brief at 30.

14 Of course Ms. Zabka is named as an individual party to the Note.  
15 She signed her name at the end it after she agreed numerous times to joint  
16 and several liability. CP at 1750-51. As to her claim that she received no  
17 consideration under the Note, please see discussion in this Brief at 29-31  
18 *supra*. Thus, all of Ms. Zabka’s five elements of a written contract are  
19 present and so the six year statute of limitations does apply and no parole  
20 evidence is required.  
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1 Ms. Zabka claims that under RCW 4.16.240, the Arntzes had to  
2 file any new action against her within one year of the reversal of the  
3 partial summary judgment of July 23, 2004. Zabka Brief at 20, 46-47.  
4 This statute is inapplicable because this summary judgment was not  
5 reversed on error or appeal. Ms. Zabka was excluded from its effect, but  
6 the whole judgment has never been reversed.

7 Also, under RCW 4.16.040(1), there is a six year statute of  
8 limitations for “an action upon a contract upon a contract in writing, or  
9 liability express or implied arising out of a written agreement.” The Note  
10 exactly fits this definition so the Arntzes’ action is not barred.

11 14<sup>th</sup> ISSUE: The Lost Original Promissory Note. The Court  
12 reviews a summary judgment de novo. *Fell v. Spokane Transit Auth.*, 128  
13 Wn.2d at 625.

14 Ms. Zabka claims that the trial Court should not have accepted a  
15 copy of the Note for its review. Zabka Brief at 3, 19, 44-45. The location  
16 of the original Note is unknown. Judge Middaugh ruled that (a) “[t]he  
17 original of the Note has been lost” (CP at 3286) and (b) “[t]he defendant  
18 [Ms. Zabka] has never challenged the authenticity or existence of the  
19 promissory note ... until this local rule was raised by the court.” CP at  
20 3286.  
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1 I filed a brief with the Court to accept an authenticated copy of the  
2 Note for purposes of satisfying KCLR 58(c). CP 3241-46. "In making a  
3 determination as to authenticity, a trial court is not bound by the rules of  
4 evidence." *State v. Williams*, 136 Wn. App. 486, 500, 150 P.3d 111  
5 (2007). It may rely instead on lay opinions, hearsay, or the proffered  
6 evidence itself. *Id.* "The rules of evidence ... do not supersede statutes  
7 and other rules defining methods of authentication; they serve to provide  
8 an alternate means of authentication." *State v. Ross*, 30 Wn. App. 324,  
9 327, 634 P.2d 887 (1981).

10 "The requirement of authentication or identification ... is satisfied  
11 by only some evidence that is sufficient to support a finding by the fact-  
12 finder that the matter in question is what its proponent claims." ER  
13 901(a), *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). Only a  
14 *prima facie* showing of authenticity is required. *Id.* at 108.

15 ER 901 does not limit the types of evidence that are allowed to  
16 authenticate a document. *Id.* at 106. Circumstantial evidence can  
17 establish authentication or identification. *Payne* at 109.

18 Authentication or identification can be done by (a) "testimony that  
19 a matter is what it is claimed to be" (ER 901(b)(1), *Int'l Ultimate, Inc. v.*  
20 *St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 746, 87 P.3d 774  
21 (2004)); (b) "[c]omparison by the court ... with specimens which have  
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1 been authenticated” (ER 901(b)(3)); (c) appearance, contents, substance,  
2 internal patterns, or other distinctive characteristics, taken in conjunction  
3 with circumstances (ER 901(b)(4), *Int’l Ultimate, Inc.* at 746); and (d) and  
4 any other “method of authentication or identification provided by statute  
5 or court rule.” ER 901(b)(10).

6 “A record of an act, condition or event, shall ... be competent  
7 evidence if the custodian or other qualified witness testifies to its identity  
8 and the mode of its preparation, and if it was made in the regular course of  
9 business, at or near the time of the act, condition or event, and if, in the  
10 opinion of the court, the sources of information, method and time so  
11 preparation were such as to justify its admission.” RCW 5.45.020.

12 Neil Arntz provided a Declaration stating that the proffered copy of  
13 the Note was a true and accurate copy of the original one. CP 3248-52.  
14 He personally knew both signers of it. CP at 3248. The account number  
15 stated in the Note was in fact his account number. CP at 3251. Ms. Zabka  
16 and Mr. Pak signed the Note and had it acknowledged by their notary  
17 public, Jae H. So. CP at 3252-53. It was made in the ordinary course of  
18 their business dealings together. CP at 3248-49. The Note was written,  
19 signed, and acknowledged at the time that the parties agreed to the terms  
20 of it. CP at 3249.  
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1           The writing of Ms. Zabka’s first name on the signature page of her  
2 Brief at 49 matches her writing of her first name on the signature line of  
3 the Note. CP at 3252. Ms. Zabka has changed her last name due to  
4 marriage. Exhibit “B”.

5           “Extrinsic evidence of authenticity ... is not required with respect  
6 to ...” (a) a copy of (i) an entry into “an official record or report...” (ER  
7 902(d)) or (ii) “a document authorized by law to be recorded or filed and  
8 actually recorded or filed in a public office, ... certified as correct by the  
9 custodian or other person authorized to make the certification ... or  
10 complying with any ... applicable law of a state ...” (*Id.*); or (c)  
11 “[d]ocuments accompanied by a certificate of acknowledgement executed  
12 in the manner provided by law by a notary public ... authorized to take  
13 acknowledgments” ER 902(h).

14           The Arntzes provided a certified copy of the Note from the DFI.  
15 CP at 3251-52. Also, the Note was acknowledged by notary public Jae H.  
16 So. CP 3252.

17           The Note in this action is a record “required or authorized by to  
18 law to be made or kept” by the state “to be photographed,  
19 microphotographed, reproduced on file, or photocopied for all purposes of  
20 recording documents, ... files or papers, or copying or reproducing such  
21 records” under RCW 40.20.020.  
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1 The copy of the Note provided is an official record kept in the file  
2 of the DFI. CP 3251-52. It has been attested to and duly certified by a  
3 public officer of the DFI under its official seal as being in the custody of  
4 the DFI. CP at 3251-52. Such attestation and certification makes the Note  
5 admissible into evidence in any state Court and deemed to be an original  
6 record for all purposes. RCW 5.44.040, *State v. Chapman*, 98 Wn.  
7 App.888, 890-91, 991 P.2d 126 (2000) (citing RCW 5.44.040), RCW  
8 40.20.020, RCW 40.20.030, CR 44.

9 “A public record certified in this manner is self-authenticated.”  
10 *Chapman* at 891 (citing ER 902(d)). No foundation for a public record by  
11 a public officer’s testimony is required because the foundation is evident  
12 on its face. *Id.* at 891. The Note in this action became a public document,  
13 record, and “routine product [ ] of government....” (*Id.*) when the DFI  
14 incorporated it into its investigation against Ms. Zabka. Judge Middaugh  
15 rightly accepted it. CP at 3286.

16  
17 Defenses on Appeal that were not Pursued before the Trial Court.

18 “The appellate court may refuse to review any claim of error which  
19 was not raised in the trial court.” *Wingert v. Yellow Freight Sys.*, 146  
20 Wn.2d 841, 853, 50 P.3d 256 (2002).

21 For the first time in this action, Ms. Zabka brings up on appeal in  
22 her Brief at least two entirely new issues: (a) one-sidedness/harshness of  
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1 the Note (Zabka Brief at 37-38, 40-41) and (b) lack of mutual assent.  
2 Zabka Brief at 3, 41-42. She brought up the issue of unconscionability for  
3 the first time before Judge Middaugh at the summary judgment hearing.  
4 RP at 17.

5 Because she has not brought up one-sidedness/harshness and lack  
6 of mutual consent until now, and unconscionability at the summary  
7 judgment hearing, they should not be considered on appeal. *Wingert*.

8 15<sup>th</sup> ISSUE: Claim of Alleged Lack of Mutual Assent. The  
9 Court reviews a summary judgment de novo. *Fell v. Spokane Transit*  
10 *Auth.*, 128 Wn.2d at 625.

11 Nevertheless, Ms. Zabka claims that “[m]utual assent did not exist  
12 between Plaintiffs and Luz Zabka because Plaintiffs misrepresented their  
13 account balance.” Zabka Brief at 42. The Arntzes could not have  
14 possibly misrepresented their account balance because Ms. Zabka traded  
15 on it daily so she would know exactly what the Arntzes’ account balance  
16 was daily.  
17

18 Also, perhaps there was no mutual assent because, as Ms. Zabka  
19 admitted in her Brief at 42, she “did not communicate regarding the  
20 contract with Plaintiffs prior to signing...” She could have, but she chose  
21 not to do so.  
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1                    16<sup>th</sup> ISSUE: Claim of Alleged One-sidedness/Harshness.    The  
2 Court reviews a summary judgment de novo. *Fell v. Spokane Transit*  
3 *Auth.*, 128 Wn.2d at 625.

4                    Ms. Zabka for the first time in this action brings up the issue of  
5 one-sidedness/harshness. Zabka Brief at 37-38. She claims that it is one-  
6 sided and overly harsh because there was the claimed \$100,000.00  
7 discrepancy in the dollar amount of the Note. Zabka Brief at 38-39. This  
8 is discussed *supra* at 11-12.

9                    Ms. Zabka could have refused to sign this Note, but she did not.  
10 She could have consulted with an attorney before she signed the Note but  
11 she did not. She could have demanded that this figure be taken out, but  
12 she did not. Instead, she freely and voluntarily agreed to the terms of the  
13 Note as we see them today.

14                    17<sup>th</sup> ISSUE: Claim of Unconscionability.    The Court reviews  
15 a summary judgment de novo. *Fell v. Spokane Transit Auth.*, 128 Wn.2d  
16 at 625.

17                    Ms. Zabka never mentioned the defense of unconscionability until  
18 the summary judgment hearing. RP at 17. Now she claims that there was  
19 substantive unconscionability because of the claimed \$100,000  
20 “discrepancy” (Zabka Brief at 37-39, 41) discussed *supra* at 11-12.  
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Ms. Zabka's Background.

Ms. Zabka was not a novice in business. She had equal authority at SCG to transact any business with its bank. CP at 1935-36. Ms. Zabka had “full power and authority to do and perform all and every act and thing whatsoever to be done....” regarding SCG. CP at 1938. In addition to SCG and Millennium, Ms. Zabka served as director, manager, member, agent, and secretary at a minimum of six different investment firms. CP at 1910, 1912, 1940-43.

Judge Middaugh observed: “It is quite clear from the pleadings ... that you are not an unsophisticated businesswoman.” RP at 8. “You were involved in major business things here involving millions of dollars.” *Id.*

CR 56

Under CR 56, “[a] party seeking to recover upon a claim ... may ... move ... for a summary judgment in his favor upon all or any part thereof” (CR 56(a)) and “[t]he judgment sought shall be rendered forthwith if the pleadings, ... answers to interrogatories, and admissions on file, together with the affidavits ... 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.” CR 56(c). *See also Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998) (citing CR 56(c)).

1 Summary judgment should be granted when all reasonable  
2 persons can reach only one conclusion regarding the material facts.  
3 *Teagle v. Fischer & Porter Co.*, 89 Wash.2d 149, 152, 570 P.2d 438  
4 (1977).

5 Ms. Zabka filed and served substantially late her motion for  
6 continuance and response to the Arntzes' summary judgment motion  
7 because she did not pick up papers from nearby storage on time; thus, the  
8 lower Court refused to consider her response.

9 This means that Ms. Zabka failed to provide any proof that shows  
10 "specific facts showing that there is a genuine issue for trial."  
11 *Controlled Atmosphere, Inc. v. Branom Instrument Co.*, 50 Wn. App. 343,  
12 350, 748 P.2d 686 (1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317,  
13 324 (1986)). She is not relieved of this burden. *Baldwin v. Sisters of*  
14 *Providence in Washington, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298  
15 (1989).  
16

17 The Arntzes, in having pointed out to the Court that there is an  
18 absence of an issue of material fact" (*Young v. Key Pharmaceuticals,*  
19 *Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)), have shown "that there  
20 is an absence of evidence to support...." Ms. Zabka's case. *Id.*, fn. 1  
21 (quoting *Celotex Corp. v. Catrett*, 477 U.S. at 325).  
22  
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1 Also, the Arntzes “need not support their motion with affidavits  
2 or other similar material *negating* Ms. Zabka’s claim in order to prevail  
3 on summary judgment....” *Controlled Atmosphere, Inc. v. Branom*  
4 *Instrument Co.*, 50 Wn. App. at 350 (citing *Celotex* at 323). Emphasis in  
5 original.

6 **VI. CONCLUSION**

7 After considering the Arntzes’ evidence and the lack of evidence  
8 from Ms. Zabka, reasonable persons can reach only one conclusion  
9 regarding the material facts: Ms. Zabka is personally liable to the  
10 Arntzes and the trial Court was correct in granting summary judgment.

11 Therefore, for these reasons, this Court should rule that (a) there  
12 are no genuine issues of material fact of any kind to be heard by the fact-  
13 finder, (b) Ms. Zabka has presented no evidence to support her defense  
14 claims, (c) the Arntzes’ claims for damages are granted, and (d) the Order  
15 for Summary Judgment should not be overturned.  
16

17 Dated this 26th day of October 2010 at Renton, Washington.

18  
19 

20 Paul W. Routt, WSBA #30402  
21 Attorney for Respondents Arntz  
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Bing

White pages

Make msn.com your home page

People Search Yellow Pages Reverse Lookup Area & Zip Codes

People Search

2 Results matching "Robert Zabka, Charleston, IL surrounding area".

List View Map View

Display: All (2) Home (2) Work (0) Sort by: - Select -

Robert K Zabka

18515 Chief Rd
Charleston, IL 61920-8217
(217) 345-5265

Age: 60-64

Listing Details

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Social Network Info Found For Robert Zabka
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classmates.com

Where are they now?

Robert K Zabka

926 Fuller St
Charleston, IL 61920-1725
(217) 348-5059

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robert zabka in il - 5 More Records Located

Table with 4 columns: Name, Location, Age, Contact Details. Lists Robert Keith Zabka and Robert K Zabka with their respective locations and contact options.

See All Verified Records

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Table with 5 columns: Name, Age, Location, Email, Places Online. Lists Robert A Zabka, Robert Zabka, Robert P Zabka, and Robert K Zabka.

View All 4 Profiles for robert zabka

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Click to View robert zabka's Full Email Address and Profile Info

Person City, State Email Profile Report

Exhibit A

Bing

White pages

Make msn.com your home page

People Search Yellow Pages Reverse Lookup Area & Zip Codes

[See What debra zabka's Home is Worth](#)

People Search

3 Results matching "Debra Zabka, Charleston, IL surrounding area".

List View Map View

Display:  All (3)  Home (2)  Work (1) Sort by: - Select -

**Debra Zabka**  
18515 Chief Rd  
Charleston, IL 61920-8217  
**(217) 345-5265**  
[Listing Details](#)

Age: 55-59

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[Search School Yearbooks in Charleston IL](#)

[datamati.com](#)  
[Find School Friends](#)

**Debra Zabka**  
1443 7th St  
Charleston, IL 61920-2811  
**(217) 348-5141**  
[Listing Details](#)

Job title: Owner  
Company: Seventh Glory

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**Debra T Zabka**  
926 Fuller St  
Charleston, IL 61920-1725  
**(217) 348-5059**  
[Listing Details](#)

SPONSORED LINKS  
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[Find School Friends](#)

Display:  All (3)  Home (2)  Work (1) Sort by: - Select -

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**debra zabka in il - 1 More Records Located**

Name	Location	Age	Contact Details
<a href="#">Debra Teens Zabka</a>	Charleston, IL	58	<a href="#">View Details</a>

[See All Verified Records](#)

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Unemployed Mom Makes \$6,397/Month Working Online.  
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**Mom's \$5 Wrinkle Trick**  
Dermatologists DON'T want you knowing about this Skin Care Secret!  
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**DON'T Pay For White Teeth**  
Mom discovers one simple trick to turn yellow teeth white from home for under \$10.  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

ROBERT K. & DEBRA ZABKA,  
Plaintiffs(s)

vs.

PAUL M. FRANKLIN, JAE HO PAK,  
MICHAEL EDWIN DENIO, STEVE  
SNYDER, RYAN LANDRY, L. MANN,  
KENNETH STILLWELL, VANTAGE  
CAPITAL MANAGEMENT, LLC, a Nevada  
limited liability company, VANTAGE  
PARTNERS, LIMITED PARTNERSHIP, a  
Nebraska limited partnership, CURO  
MANAGEMENT, L.L.C., a Nevada limited  
liability company, CURO FUNDS, L.P., a  
Nevada limited partnership, CURO  
MANAGEMENT, L.L.C., a Washington  
limited liability company, CURO FUNDS,  
L.P., a Washington limited partnership,  
SEATTLE CAPITAL GROUP, L.L.C., a  
Delaware limited liability company, SEACAP  
FUND, L.P., a Delaware limited partnership,  
SONIC, LTD, ESTATE PLANNING  
CONSULTANTS, a Nevada corporation, and  
Covery Real Estate Investments,  
Defendant(s)

No.

04-2-08649-3 SEA

RICHARD A. JONES

COMPLAINT FOR COMMON LAW  
FRAUD/PROMISSORY FRAUD,  
BREACH OF CONTRACT AND/OR  
DUTY TO ACT IN GOOD FAITH,  
VIOLATIONS OF RCW 25.15.315,  
VIOLATIONS OF RCW 25.10.490,  
THEFT IN THE FIRST DEGREE,  
VIOLATIONS OF RCW 21.20.010,  
VIOLATIONS OF RCW 21.20.030,  
VIOLATIONS OF RCW 21.20.040,  
SECURITIES FRAUD, MAIL FRAUD,  
CIVIL CONVERSION, CIVIL  
CONSPIRACY, WIRE FRAUD,  
TORTIOUS INTERFERANCE WITH A  
BUSINESS TRANSACTION,  
CRIMINAL PROFITEERING,  
PRELIMINARY AND PERMANENT  
INJUNCTION, OPPORTUNITY LOSSES  
AND ATTORNEY'S FEES, PRAYER  
FOR RELIEF.

COMPLAINT FOR COMMON LAW FRAUD/PROMISSORY FRAUD, BREACH OF CONTRACT AND/OR DUTY TO ACT IN GOOD FAITH, VIOLATIONS OF RCW 25.15.315, VIOLATIONS OF RCW 25.10.490, THEFT IN THE FIRST DEGREE, VIOLATIONS OF RCW 21.20.010, VIOLATIONS OF RCW 21.20.030, VIOLATIONS OF RCW 21.20.040, SECURITIES FRAUD, MAIL FRAUD, CIVIL CONVERSION, CIVIL CONSPIRACY, WIRE FRAUD, TORTIOUS INTERFERANCE WITH A BUSINESS TRANSACTION, CRIMINAL PROFITEERING, PRELIMINARY AND PERMANENT INJUNCTION, OPPORTUNITY LOSSES AND ATTORNEY'S FEES, PRAYER FOR RELIEF. - Page 1 of 113

1 20.5 A judgment against Defendants Pak, Franklin, Denio, Snyder, Mann, Stillwell, Seattle  
2 Capital Group, LLC (DE), Seacap Fund, LP (DE), Curo Funds, L.P. (NV), Curo Funds,  
3 L.P. (WA), Curo Management L.L.C. (NV), Curo Management, L.L.C. (WA), Vantage  
4 Capital Management, LLC (NV), Vantage Partners, Limited Partnership (NE), Sonic Ltd.,  
5 and 4 Covery, to attach both jointly and severally, for reasonable attorney's fees in the  
6 amount of eighty-one thousand one hundred eighty three dollars and fifty-six cents  
7 (\$81,183.56) in favor of the Plaintiffs (See Exhibit 9).

8 20.6 That the court order the impressing of a constructive trust in favor of Plaintiffs upon the  
9 relief requested by Plaintiffs and attorney's fees as requested. Also, that tracing of these  
10 funds be permitted under the court's jurisdiction so as to enable a meaningful opportunity  
11 of recovery.

12 Such other relief at law and in equity as the Court may deem just and equitable.

13 DATED this 30<sup>th</sup> day of April, 2004.

14 Respectfully submitted,

15 Robert and Debra Zabka

16 Signed: Robert Zabka Debra Zabka  
17 18515 Chief Rd. 18515 Chief Rd.  
18 Charleston, IL 61920 Charleston, IL 61920

**COLES COUNTY, ILLINOIS**

**Certification of Marriage**

**Groom Name:** MARSHALL BRENT ZABKA  
**Date of Birth:** 6/ 3/1975  
**Age at Application:** 27  
**Place of Birth:** CHARLESTON, IL  
**Fathers Name:** ROBERT KEITH ZABKA  
**Mothers Maiden Name:** DEBRA VOYTOVICH

**Bride Name:** LUZ ORCILLA VALDEZ  
**Bride Maiden Name:** VALDEZ  
**Date of Birth:** 7/14/1967  
**Age at Application:** 35  
**Place Of Birth:** MANILA, PHILIPPINES  
**Fathers Name:** WILLIAM RAY CHAMBERS  
**Mothers Maiden Name:** VIOLETA LLARENAS ORCILLA

**License Number:** 4204  
**Date Certificate Issued:** 5/12/2005

**Official's Name and Title:** RANDAL S LANGLEY, MINISTER  
**Date of Marriage:** 5/20/2003  
**Marriage City and State:** CHARLESTON, IL

CERTIFIED COPY OR ABSTRACT OF VITAL RECORDS

STATE OF ILLINOIS }  
 COUNTY OF COLES } SS

I, Betty Coffrin, Coles County Clerk, do hereby certify that this document is a true and correct copy or abstract of the original record which is on file in the office of the County Clerk, Coles County, Charleston, Illinois.



*Betty Coffrin*  
 BETTY COFFRIN  
 COUNTY CLERK

Exhibit B

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COURT OF APPEALS, DIVISION ONE OF THE STATE OF  
WASHINGTON

NEIL J. ARNTZ, *et al.*,  
  
Respondents.  
  
v.  
  
LUZ ZABKA,  
  
Appellant.

NO. 64997-3-I  
  
AFFIDAVIT OF SERVICE  
BY MAIL

I certify that I served a copy of the Brief of Respondents on  
Tuesday, October 26, 2010 on Luz Valdez, aka Luz Zabka, Appellant,  
at 18515 Chief Rd., Charleston, Illinois, 61920 by first class mail.

I am over the age of 18 years.

DATED this 26th day of October 2010 at Renton, Washington.



Paul W. Routt, WSBA #30402  
Respondents' Attorney

**ORIGINAL**

1  
2 COURT OF APPEALS, DIVISION ONE OF THE STATE OF  
WASHINGTON

3 NEIL J. ARNTZ, *et al.*,

NO. 64997-3-I

4 Respondents.

AFFIDAVIT OF SERVICE  
BY MAIL

5 v.

6 LUZ ZABKA,

7 Appellant.  
8

9  
10 I certify that I served a copy of the revised Table of  
11 Authorities to Respondents' Brief on Monday, November 8, 2010 on  
Luz Valdez, aka Luz Zabka, Appellant, at 18515 Chief Rd.,  
Charleston, Illinois, 61920 by first class mail.

12 I am over the age of 18 years.

13 DATED this 8th day of November 2010 at Renton,  
14 Washington.

15 

16  
17 Paul W. Routt, WSBA #30402  
18 Respondents' Attorney

25  
**ORIGINAL**