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No. 68428-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

SEATTLE SHRIMP & SEAFOOD COMPANY, INC.,
a Washington Corporation,

Appellant,

v.

STILNO, INC., a Washington corporation d/b/a Samish Island Seafood,
and ROBERT E. STILNOVICH AND JANE DOE STILNOVICH, a
marital community,

Respondents.

BRIEF OF RESPONDENTS
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COURT OF APPEALS, DIVISION I
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A. INTRODUCTION

Seattle Shrimp & Seafood, Co. (“Seattle Shrimp”) appeals a summary judgment order dismissing Robert Stilnovich and his wife Debbie Nygren (collectively “Stilnovich”) from the case, denying its summary judgment motion, and dismissing its case. It contends the terms of a guarantee¹ allegedly signed by Robert in his personal capacity, and the nature of guaranties generally, establish that the guarantee is enforceable against Stilnovich personally. By contrast, Stilnovich asserts that the guarantee was superseded by a later executed agreement containing independent security and further that the guarantee is unenforceable because it does not guarantee payment to Seattle Shrimp. Seattle Shrimp is neither a creditor nor a beneficiary under the guarantee and has no right to sue Stilnovich personally.

Even assuming for the sake of argument that Robert signed a personal guarantee, it is invalid and does not provide Seattle Shrimp with the relief it now seeks. Seattle Shrimp did not provide Stilnovich with any consideration to induce him to sign the guarantee to ensure performance of then-existing executory contract obligations. Moreover, Robert was unilaterally mistaken about the identity of the other party bound by the

¹ For consistency, Stilnovich will spell "guarantee" the same was as Seattle Shrimp.

guarantee and the legal consequence of such a guarantee based on the misinformation Seattle Shrimp provided. Seattle Shrimp bore the risk of this mistake.

The trial court did not err by denying Seattle Shrimp's summary judgment motion or by dismissing Stilnovich. This Court should affirm.

B. ASSIGNMENTS OF ERROR

Stilnovich acknowledges Seattle Shrimp's assignments of error, but believes the issues pertaining to those assignments are more appropriately formulated as follows:

(1) Did the trial court properly dismiss a plaintiff's lawsuit against husband and wife defendants where the guarantee forming the basis of the plaintiff's claims against the marital community personally was superseded by an agreement the parties executed two years later containing a new form of security?

(2) Did the trial court properly dismiss a plaintiff's lawsuit against husband and wife defendants where the guarantee that the husband signed on behalf of his business unambiguously ensured payment to a non-party not now before the Court, and the plaintiff is neither a creditor nor a beneficiary under that guarantee?

(3) Did the trial court properly dismiss a plaintiff's lawsuit against husband and wife defendants where the husband added language

after his signature on a guarantee indicating that he was signing the guarantee in his representative capacity, which created an ambiguity requiring judicial construction of the guarantee and there was no evidence the husband intended to execute a personal guarantee?

(4) Did the trial court properly deny summary judgment to a plaintiff and dismiss husband and wife defendants where the plaintiff did not provide any separate consideration to induce the husband to sign a guarantee to ensure the performance of contract obligations that were executory?

(5) Did the trial court properly deny summary judgment to a plaintiff and dismiss husband and wife defendants where the husband was unilaterally mistaken as to the identity of the other party to be bound by a guarantee he signed and the legal consequences of his acts?

C. COUNTERSTATEMENT OF THE CASE

Stilnovich must begin the counterstatement of the case by pointing out the obvious: Seattle Shrimp's introduction and statement of the case violate RAP 10.3(a)(5).² Both sections of Seattle Shrimp's brief are hopelessly entangled with inappropriate argument and endless insinuations that Stilnovich is a liar, making it challenging for this Court and Stilnovich

² RAP 10.3(a)(5) requires a brief to contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument."

to distinguish between the improper arguments and the facts. Seattle Shrimp's arguments are a far cry from the "fair recitation" required by the rules and place an unacceptable burden on Stilnovich and the Court.³ *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied*, 116 Wn.2d 1021 (1991). Moreover, the statement of the case lacks critical background facts necessary for the Court to properly consider the case. The Court should thus rely on the following more complete and impartial recitation of the facts:

Robert Stilnovich is the owner, sole shareholder, and president of Stilno, Inc., which does business as Samish Island Seafood ("Samish"). CP 83. Samish is a seafood broker. CP 68. As a broker, Samish purchases seafood from a number of suppliers that it then resells to retail customers and distributors. CP 68, 271. Robert's wife, Debbie, has never participated in Samish's business or affairs. CP 83, 310. She is not an officer, board member, or employee of any of Robert's companies. CP 310. She has never executed a personal guarantee for Samish. CP 310. Neither Robert nor Debbie has ever commingled personal assets with business assets of Samish or any other business that Robert owns. CP 85.

³ Based on Seattle Shrimp's blatant disregard for the appellate rules, this Court should strike its statement of the case and impose sanctions. RAP 10.7; *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999).

Seattle Shrimp is a seafood supplier that sells its products to companies throughout the country. CP 31. Former Seattle Shrimp employee Danny Whitted recruited Samish as a business customer. CP 83, 92, 224-25. Whitted served as Seattle Shrimp's agent throughout the parties' relationship and was Samish's main contact. CP 92, 225, 279-80. On March 21, 2007, Seattle Shrimp agreed to extend credit to Samish for the purchase of seafood. CP 22-23, 38.

Seattle Shrimp neglects to mention in its statement of the facts that the parties' early transactions were not governed by a written contract. CP 83, 92. Instead, each seafood purchase was preceded by an oral agreement between the parties that was later confirmed in writing. CP 83, 92. The subsequent writing memorialized the essential terms of the oral agreement, including the operative time period (typically six months), the price, and the total amount of seafood that Samish agreed to purchase. CP 83, 92. Samish would then draw against that total poundage during the contract term and Seattle Shrimp would bill Samish for each individual draw. CP 92. Whitted, who was Samish's primary contact at Seattle Shrimp, confirmed that this was the typical procedure for all transactions between Seattle Shrimp and Samish. CP 92, 225.

Samish paid for each purchase with a check written on its corporate checking account. CP 84. Robert never conducted business

with, or otherwise contacted, Seattle Shrimp in his personal capacity. CP 84-85. He acted at all times as Samish's authorized principal and representative. CP 83. In that capacity, he received and authorized payment on all purchase orders received from Seattle Shrimp. CP 84. All of the correspondence between the parties, whether transmitted by email or facsimile, was directed to Robert in his official capacity. CP 85.

In July 2008, Stilnovich and Samish entered into an agreement to confirm orders at set prices for the period between August 2008 and February 2009. CP 83, 87.

On July 31, 2008, in the middle of an existing contract term, Seattle Shrimp sent a document to Samish by facsimile that included a document titled "Business Credit Application." CP 40, 83. Uncertain about the document, Robert called Whitted. CP 295. Whitted, acting as Seattle Shrimp's agent, told Robert he had to sign the document for the credit company. CP 226-27, 230. As Seattle Shrimp explained, it was not big enough to offer its own credit so it worked with a third-party company to provide credit on behalf of its customers. CP 84.

By its very terms, the credit application did not guarantee payment to Seattle Shrimp. CP 40. As Seattle Shrimp admits in its brief, the application by its terms guaranteed payment to a non-party, Fox Business Systems ("Fox"). Br. of Appellant at 8, 13. No one from Seattle Shrimp

signed the credit application and Seattle Shrimp is not mentioned in that application. CP 40. Seattle Shrimp admits that Fox is not a party to the transactions between Seattle Shrimp and Stilnovich. CP 128; Br. of Appellant at 2.

The credit application included a section titled “Individual Personal Guarantee” (hereinafter “guarantee”). CP 40. As with the credit application, the guarantee ensured payment by Samish to Fox and not to Seattle Shrimp. CP 40; Br. of Appellant at 2, 8, 13. Seattle Shrimp used a guarantee form from Fox, an unrelated business, “so that additional expense would not be incurred drafting a specific personal guarantee for this situation.” CP 107.⁴

The guarantee states, in its entirety:

I, (name) Robert E. Stilnovich residing at (address) 9746 Samish Rd. for and in consideration of your extending credit at my request to (company) Samish Island Seafood (hereinafter referred to as the “company,”) of which I am (title) President, hereby personally guarantee to you *the payment at Fox Business Systems, in the state of Kansas* any obligation of the Company and I hereby agree to bind myself to pay you on demand any such sum which may become due to you by the Company whenever the Company shall fail to pay the same. It is understood that this guarantee shall be a continuing and irrevocable guarantee and indemnity for such indebtedness of the

⁴ This Court should reject Seattle Shrimp’s request for a lifeline and refuse to reform the guarantee to provide it with the guarantee it wishes it had executed where it could not be bothered to draft a proper guarantee in the first place.

Company. I do hereby waive notice [sic] default, non-payment and notice hereof and consent to any modification of renewal of credit agreement hereby guarantee [sic.]

CP 40 (emphasis added).⁵

Despite the fact that open purchase orders were pending, Seattle Shrimp informed Samish that Robert had to sign the guarantee for Samish to remain a Seattle Shrimp customer and for Samish to continue receiving seafood shipments under the existing contract. CP 84, 107, 115. Seattle Shrimp never explained to Robert that he was going to be personally guaranteeing his company's debts. CP 84. Robert signed the guarantee on July 31, 2008 as an authorized representative of Samish and in his capacity as Samish's President.⁶ CP 40. He also handwrote "\$150,000 credit app to FoodMax & Cash & Carry accounts only." CP 40.

Nearly two years later, on September 21, 2010, Seattle Shrimp insisted the parties enter into a Letter Agreement ("Agreement") in which Seattle Shrimp agreed to continue extending credit to Samish under certain conditions. CP 32-33, 42. Among other things, Samish was obligated to

⁵ The underlined sections reflect Robert's handwritten completion of the blanks on the form. A copy of the guarantee is in the Appendix.

⁶ Seattle Shrimp continually claims that it agreed to extend credit to Samish and that Stilnovich executed the guarantee "in conjunction therewith." *E.g.*, Br. of Appellant at 2, 5, 23, 32. Consistently repeating such misinformation does not make it fact. Seattle Shrimp initially agreed to extend credit to Samish in March 2007. The guarantee could not have been executed "in conjunction with" the original agreement to extend credit because it was not executed until July 2008, *more than a year later*.

pay all invoices within 42 days from the date of invoice and Stilnovich was required to obtain a key man life insurance policy⁷ of not less than \$300,000 naming Seattle Shrimp as the sole beneficiary. CP 42, 44-45. The Agreement was effective through January 31, 2011 and supplemented “prior arrangements” between Seattle Shrimp and Samish. CP 24, 42. It did not specifically mention or incorporate the guarantee. CP 42.

Samish purchased seafood from Seattle Shrimp on three separate occasions in late 2010. CP 33-34, 47-66. Seattle Shrimp shipped the product and invoiced Samish the same day. CP 33-34. Stilnovich verbally approved the sales on behalf of Samish. CP 24, 33-36. Payment was due from Samish 42 days from the date of each invoice. CP 24, 42. Samish did not pay Seattle Shrimp for those purchases. CP 31-65.

Seattle Shrimp filed suit against Samish and Stilnovich in the King County Superior Court in January 2011, alleging breach of contract and unjust enrichment. CP 1-4. All of Seattle Shrimp’s claims arose from Samish’s alleged breach of the Agreement. CP 33-34. Stilnovich answered, asserting among other things that neither Robert nor Debbie had

⁷ “Key man insurance” is life insurance taken out by a company on an essential or valuable employee, with the company as beneficiary. Black’s Law Dictionary (9th ed. 2009).

signed a personal guarantee and that neither agreed to act as a surety for Samish's debts.⁸ CP 85.

Seattle Shrimp moved for summary judgment against Samish and Stilnovich in April 2011. CP 21-30. In particular, Seattle Shrimp claimed Samish owed it, jointly and severally, \$270,980 plus finance charges and prejudgment interest and that Stilnovich was personally liable for \$150,000 of that amount based on his personal guarantee. CP 25, 27, 32. Stilnovich responded, arguing among other things that Robert and Debbie should be dismissed with prejudice because the guarantee was unenforceable and/or inapplicable.⁹ CP 67-79, 118-23.

On hearing the parties' cross motions on May 6, 2011, the trial court, the Honorable Michael Hayden, consolidated the legal issues and ordered the parties to file supplemental briefs addressing the impact of the form guarantee Seattle Shrimp provided to Stilnovich and the issue of unilateral/mutual mistake. CP 126, 178, 313. The hearing was rescheduled and both parties submitted supplemental briefing. CP 127-31, 135-44, 147-48, 150-53, 172-79.

⁸ During the course of the case, Seattle Shrimp and Stilnovich became embroiled in a dispute over Seattle Shrimp's billing practices. CP 70, 72, 84, 92-93, 104-07. Despite Seattle Shrimp's repeated references to this issue, it was resolved below and is not relevant for purposes of this appeal.

⁹ Alternatively, Stilnovich asked the trial court to continue the motions until Seattle Shrimp answered overdue discovery. CP 68.

The trial court granted Seattle Shrimp's summary judgment motion on August 5, 2011, granting judgment against Samish in the amount of \$319,487.23. CP 194-98. Samish's liability is thus no longer at issue. Br. of Appellant at 1. But the court did not resolve the issue of Stilnovich's personal liability and denied the cross-motion to dismiss without prejudice. CP 197. Recognizing the need for discovery, the trial court granted the parties permission to depose Whitted and Robert. CP 194-98, 200.

Whitted was deposed on October 4, 2011. CP 218-65. Stilnovich was deposed on November 16, 2011. CP 267-308. The parties submitted additional briefing relating to the guarantee after the depositions. CP 199-206, 313-20.

The trial court denied Seattle Shrimp's summary judgment motion, but granted Stilnovich's cross-motion to dismiss on February 3, 2012. CP 388, 389-92. Seattle Shrimp appealed the order dismissing Stilnovich and denying its summary judgment motion. CP 393-98.

D. ARGUMENT

(1) Standard of Review

In reviewing a summary judgment order, this Court evaluates the matter *de novo*, performing the same inquiry as the trial court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, 828 P.2d 549

(1992). Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). The Court must consider the facts and all reasonable inferences arising from those facts in the light most favorable to Stilnovich as the nonmoving party. See *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

This Court will sustain the trial court's judgment upon any theory established in the pleadings and supported by proof. *Failor's Pharm. v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 886 P.2d 147 (1994).

(2) The Trial Court Did Not Err by Dismissing Stilnovich and by Denying Summary Judgment to Seattle Shrimp

a. The law of guarantees

A guarantee is a binding collateral promise to answer for the debt or default of another. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 707, 952 P.2d 590 (1998); *B & D Leasing Co. v. Ager*, 50 Wn. App. 299, 306, 748 P.2d 652 (1988). Because a guarantee is a collateral undertaking to perform for another, it must import the existence of an obligation by the principal debtor. *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943). Therefore, if the primary or principal obligation does not exist, a guarantee is unenforceable. See *id.*

(no contract of guarantee can exist in the absence of a primary obligation of the debtor).

The rules of construction and interpretation applicable to contracts generally apply in construing a guarantee. *Bellevue Square Managers v. Granberg*, 2 Wn. App. 760, 766, 469 P.2d 969, review denied, 78 Wn.2d 994 (1970). Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties, rather than the unexpressed subjective intent of any party. *Wilson Court*, 134 Wn.2d at 699; see also, *Hall v. Custom Craft Fixtures*, 87 Wn. App. 1, 937 P.2d 1143 (1997) (applying objective manifestations test to asserted guarantee agreement).

Fancher Cattle Co. v. Cascade Packing, Inc., 26 Wn. App. 407, 613 P.2d 178, review denied, 94 Wn.2d 1012 (1980), recites various rules on reviewing a guarantee contract. Where the language of the guarantee is not ambiguous, a reviewing court may not resort to other evidence to determine the parties' intent, but must ascertain their intent from the instrument itself. *Id.* at 409. See also, *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 276 n.9, 883 P.2d 1387 (1994), review denied, 127 Wn.2d 1003 (1995) (where no ambiguity exists, a court need not rely on maxims of construction to interpret contracts); *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337,

348-49, 147 P.2d 310 (1944) (noting the courts do not interpret what was intended to be written but what was written). But where the language of a contract is ambiguous, it is the duty of the court to search out the parties' intent by viewing the contract as a whole and considering all the circumstances surrounding the transaction, including the subject matter and the subsequent acts of the parties. *Fancher Cattle*, 26 Wn. App. at 409. See also, *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

A guarantor is not to be held liable beyond the express terms of his or her engagement. *Matsushita Elec. Corp. of America v. Salopek*, 57 Wn. App. 242, 246, 787 P.2d 963, review denied, 114 Wn.2d 1029 (1990). If there is a question of meaning, the guarantee is construed against the party who drafted it. *Fancher Cattle*, 26 Wn. App. at 410; *Fischler v. Nicklin*, 51 Wn.2d 518, 523, 319 P.2d 1098 (1958). This Court reviews a guarantee for ambiguity as a question of law, not a question of fact. *Fancher Cattle*, 26 Wn. App. at 409. In construing contracts, words are to be given their ordinary and usual meaning. Ambiguity exists when the words of the guarantee contract are "fairly susceptible to two different interpretations, both of which are reasonable." *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005) (citation omitted).

b. The guarantee was abrogated by the subsequent Agreement

Seattle Shrimp contends the primary dispute in this case is its “mistaken” omission from the guarantee. Br. of Appellant at 13. But it fails to recognize a more fundamental issue: the guarantee was inconsistent with and supplanted by the Agreement, which contained its own form of security.

Seattle Shrimp admits that the Agreement represents a valid and binding contract between the parties and that its claims are based on Samish’s breach of that contract. CP 2-3; Br. of Appellant at 6-7. But it also claims that Stilnovich is personally liable for the debts Samish incurred under the Agreement based on the guarantee. The fatal flaw in this argument is that the guarantee was executed *two years before* the Agreement. It is inconceivable to think that Stilnovich could be held personally liable for the debts Samish incurred years later under a different contract containing its own distinct security.

The guarantee is inconsistent with the Agreement because the security required is different. Generally, when two contracts are in conflict, the legal effect of a subsequent contract made by the same parties and covering the same subject matter, but containing inconsistent terms, “is to rescind the earlier contract. It becomes a substitute therefor, and is

the only agreement between the parties upon the subject.” *Higgins v. Stafford*, 123 Wn.2d 160, 165-66, 866 P.2d 31 (1994) (quoting *Bader v. Moore Bldg. Co.*, 94 Wash. 221, 224, 162 P. 8 (1917) (quoting *Sherman v. Sweeny*, 29 Wash. 321, 329, 69 P. 1117 (1902))); 17B C.J.S. *Contracts* § 598. *See also, Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009) (noting that the second contract prevails if it is inconsistent with the first).

Here, the Agreement does not refer to the original guarantee or propose a new personal guarantee allowing Seattle Shrimp to sue Stilnovich personally for Samish’s debts. Instead, the Agreement explicitly requires a *new* form of security from Samish: a key man life insurance policy. CP 42, 44-45. Seattle Shrimp abandoned the guarantee as security for Samish’s future purchases when it specified the life insurance policy as security for the Agreement, which was executed after the parties’ previous written agreements had been fully performed and had ceased by their respective terms. The Agreement, rather than the guarantee, thus provides the only basis for Seattle Shrimp’s recovery. *Higgins*, 123 Wn.2d at 166. That recovery does not extend to Stilnovich personally.

The Agreement yields only one form of security for the parties’ contract - a life insurance policy - and certainly not a personal guarantee.

This Court should decline Seattle Shrimp's invitation to bootstrap Stilnovich's personal liability where none was intended, memorialized, or pledged in the contract covering the seafood shipments at issue.

c. The guarantee does not ensure payment to Seattle Shrimp

Seattle Shrimp argues its mistaken omission from the guarantee is an inadvertent scrivener's error. Br. of Appellant at 13-14. It goes on to argue at length about the parties' subjective and objective intent when executing the guarantee to convince this Court to reform it by substituting Seattle Shrimp for Fox. *Id.* at 13-15. Any discussion of the parties' intent is unnecessary because the guarantee is unambiguous. *Fancher Cattle*, 26 Wn. App. at 409. It does not guarantee payment to Seattle Shrimp.¹⁰

¹⁰ Seattle Shrimp claims that Robert is willing to lie to avoid liability and that his deposition testimony that the guarantee was executed for Euler, Seattle Shrimp's insurance company, contradicted the statement in his earlier declaration that the guarantee was executed for Fox. Br. of Appellant at 17-18. Robert was at best unclear, and at worst completely mistaken about the identity of the other party contemplated in the guarantee. CP 295-96, 303, 327-29. The fact remains, however, that he never testified that he was executing a guarantee in favor of Seattle Shrimp. Even Whitted, Seattle Shrimp's employee, was confused about the nature and purpose of the guarantee and testified that it was for Euler. CP 227, 229, 231-32.

Regardless, Seattle Shrimp admitted that Euler closely monitored its creditors. It would not be unreasonable for Robert to provide some scope to the guarantee knowing that the other party bound by the guarantee would not be privy to Samish's invoices or have knowledge of the customer accounts at issue.

Reformation would thus be inappropriate when there has been no mere scrivener's error.¹¹

Under the law governing guarantees, this Court must first address whether the guarantee is ambiguous. If it determines that the language in the guarantee is unambiguous, it must ascertain the parties' intent from the guarantee itself. *Id.* The courts, under the guise of construing or interpreting a contract, should not make another or different contract for the parties. *Poggi v. Tool Research & Eng'r Corp.*, 75 Wn.2d 356, 364, 451 P.2d 296 (1969).

Here, Seattle Shrimp fails to establish that the operative words of the guarantee are ambiguous. Its fatal mistake is to *assume* that it is a party to the guarantee. It clearly is not and thus has no right to enforce the guarantee against Stilnovich, even assuming for the sake of argument that the document Robert signed was a personal guarantee.

The guarantee provides for "*the payment at Fox Business Systems, in the state of Kansas* any obligation of the Company[.]" CP 40 (emphasis added). Seattle Shrimp admits that the guarantee ensures

¹¹ The equitable remedy of reformation allows the Court to revise a defective writing to correctly express the parties' real agreement where the writing incorrectly expresses it. *Denaxas v. Sandstone Court of Bellevue LLC*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003). But the burden on a party seeking reformation is substantial and must overcome the rebuttable presumption that deliberately prepared and executed written instruments accurately reflect the parties' true intentions. 28 Richard A. Lord, *Williston on Contracts*, § 70:209 at 230-31 (4th ed.2003).

payment to Fox. Br. of Appellant at 2, 8. There is nothing imprecise about the language of the guarantee – it ensures payment to Fox, not to Seattle Shrimp. Moreover, it does not refer to an underlying business transaction between Seattle Shrimp and Stilnovich or to any particular time period. That Seattle Shrimp faxed a copy of a blank business credit application and guarantee to Stilnovich in July 2008 is not evidence that it was a party to that guarantee or that it was entitled to receive any benefit from it. There is no evidence that Seattle Shrimp enjoyed any contractual privity with Fox entitling it to any benefits under the guarantee. The operative words of the guarantee are unambiguous and do not grant Seattle Shrimp the right to enforce the guarantee against Stilnovich. Where there is no existing guarantee in favor of Seattle Shrimp, Seattle Shrimp cannot sue Stilnovich personally.

Seattle Shrimp nevertheless argues that its mistake in sending Stilnovich a business credit application and guarantee that ensured payment to Fox does not relieve Stilnovich of personal liability. Br. of Appellant at 13-17. It asks the Court to reform the guarantee by substituting Seattle Shrimp for Fox to reflect the agreement it thinks ought to have been made.¹² *Id.* at 15. The Court should reject Seattle Shrimp's

¹² Seattle Shrimp claims that a scrivener's error allows this Court to reform the guarantee. That would only be true if it could prove that Robert was clear about the true meaning and purpose of the guarantee he was signing, an aspect of the legal standard that

request. To do anything else would be to rewrite the guarantee, which this Court cannot do. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005); *Restatement of Contracts (Second)* § 155 cmt. b (1981). *See also, S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 306, 540 P.2d 912 (1975), *review denied*, 87 Wn.2d 1001 (1976) (the courts cannot rewrite a contract or create a new one under the guise of judicial interpretation). The trial court did not err by dismissing Stilnovich and by denying summary judgment to Seattle Shrimp where the guarantee did not ensure payment to Seattle Shrimp.

d. Robert did not execute a personal guarantee

Even if this Court were to find the guarantee ambiguous, there is no evidence that Robert intended to execute a *personal* guarantee. Seattle Shrimp contends that Robert's signature and his failure to cross out language in the guarantee indicating it was to be personal in light of his handwritten modification limiting the guarantee to a maximum of \$150,000 indicate his intent to be personally bound. Br. of Appellant at 20-22. Not so. Robert clearly executed the guarantee in his official rather than his personal capacity. Moreover, his handwritten modification is

has been left out of Seattle Shrimp's analysis. Seattle Shrimp, through its principal Tab Goto, repeatedly asserted that it knew what Robert knew at the time Robert signed the guarantee. Hearsay aside, this is not direct evidence of Robert's state of mind. In fact, Robert's testimony, bolstered by Whitted's confirmation that the guarantee was corporate in nature and in favor of a third-party, is the only direct evidence in this case.

simply evidence of a limitation of the guarantee. It is neither evidence of his understanding of the identity of the other party nor evidence that he intended to execute a personal guarantee.

It is well-established that descriptive language following a signature on a guarantee, such as the title or the name of an entity, does not automatically prevent personal liability for the signer. *See Tony Maroni's*, 134 Wn.2d at 700. There is a presumption that the words are merely descriptive and do not indicate representative capacity. *Id.* Where the face of the document does not indicate the signer's capacity, "a signature with additional descriptive language may create an ambiguity requiring judicial construction of the agreement to determine who is bound by its terms." *Id.*

Here, the guarantee does not on its face indicate the guarantor's capacity. CP 40. Robert filled in the blanks on the form where required and then followed his signature with the word "Pres." CP 40. This creates an ambiguity, allowing the Court to resort to parole evidence to resolve it. That evidence clearly reveals that Robert was never asked to sign a personal guarantee, that he denied having signed a personal guarantee, and that he intended to execute only a corporate guarantee as Samish's President. CP 85, 295. It further reveals that he never signed personal guarantees. CP 298, 307.

Robert was at best unclear, and at worst completely mistaken, about the purpose and identity of the other party contemplated in the guarantee. This lack of clarity was made painfully clear during his deposition. While it is clear today that Fox is an entity wholly unrelated to any party in this case, that Robert possessed that knowledge during his deposition in 2011 did not demonstrate that he was clear about that fact in 2008 when he executed the guarantee. The only thing Robert's deposition confirms is that *as of the date of the depositions in 2011*, the parties knew that Fox was not a party to the guarantee.

Seattle Shrimp asks the Court to make a leap of logic to find that Robert's handwritten modification of the guarantee proves that he knew for whom the document was intended and who it was intended to bind. Br. of Appellant at 21-22. Robert's testimony does not support this leap. CP 331-32. In fact, the modification supports his understanding that he was executing a *corporate* guarantee in favor of Euler - a company that would not be privy to Samish's invoices or have knowledge of the customer accounts at issue. His modifications were merely limiting instructions.

- e. The guarantee is unenforceable because it lacked consideration

Even assuming for the sake of argument that Robert executed a personal guarantee, that guarantee is invalid and does not provide Seattle Shrimp the relief it seeks. Seattle Shrimp seems to suggest that the guarantee was executed concurrently with the Agreement, with the result that the guarantee was supported by the same consideration as the Agreement. Br. of Appellant at 2, 5, 23, 32. Not so. Seattle Shrimp did not provide Stilnovich with any consideration to induce him to sign the guarantee to ensure the performance of contract obligations already under way by July 2008.

As with other contracts, a contract of guarantee is not enforceable unless it is supported by consideration. *Gelco IVM Leasing Co. v. Alger*, 6 Wn. App. 519, 522, 494 P.2d 501 (1972); *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (“Every contract must be supported by a consideration to be enforceable.”). Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. *Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971) (“Before an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise.”). *Ward v. Richards & Rossano, Inc.*, 51 Wn. App. 423, 432, 754 P.2d 120 (1988); *Restatement of Contracts (Second)* § 71(1) (1981).

Courts rarely inquire into the adequacy of consideration. But the adequacy of consideration is different from the legal sufficiency of consideration. The legal sufficiency of consideration is a question of law. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 597-98, 949 P.2d 1260 (1997), *cert. denied*, 522 U.S. 1076 (1998); *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P.2d 314 (1967).

A benefit to the principal debtor or to the guarantor on the one hand, or some detriment to the guarantee on the other, is sufficient consideration for a contract of guarantee. *Universal C.I.T. Credit Corp. v. De Lisle*, 47 Wn.2d 318, 322, 287 P.2d 302 (1955). But a promise to carry out an already existing duty does not constitute consideration. *Northern State Constr. Co. v. Robbins*, 76 Wn.2d 357, 457 P.2d 187 (1969).

A guarantee contract made independently of the main debt requires separate and distinct consideration. *Gelco*, 6 Wn. App. at 522. For this new undertaking, a past transaction or executed consideration will not support the guarantee. *Id.* But if the guarantee is a part of the transaction which created the principal debt, it is not necessary for the consideration to be distinct from the principal debt. *Gelco*, 6 Wn. App. at 522.

Here, there was no existing debt at the time the guarantee was executed. Seattle Shrimp sent Robert the business credit application and

guarantee during an open contract period in which Robert had already quoted his customers and paid Seattle Shrimp for the seafood that had been delivered. Seattle Shrimp was simply withholding delivery on the balance of the account. There was no bargained-for consideration. The guarantee was a separate contract, tendered and executed *a year after* the parties had begun their business relationship and *two years before* the parties executed the Agreement giving rise to Seattle Shrimp's claims. More importantly, it was tendered while Samish had a pending purchase order that Seattle Shrimp refused to fill without it and before any debt was incurred. According to Robert, he signed the guarantee to keep the supply of shrimp coming under the existing contract. He received nothing in exchange for executing the guarantee other than what he had already bargained for and been promised.¹³ Samish risked not being able to serve its customers if Robert did not sign the guarantee. That is not the same as providing additional consideration to induce *new* performance not previously undertaken.

Two cases are illustrative. In *Old Nat'l Bank of Washington v. Seattle Smashers Corp.*, 36 Wn. App. 688, 692-93, 676 P.2d 1034 (1984)

¹³ Seattle Shrimp's contention that it would not have sold seafood to Samish if Stilnovich's personal guarantee had not been in place is disingenuous to say the least and an outright untruth at worst. CP 133. As the evidence confirms, Seattle Shrimp began selling seafood to Samish in 2007. Robert did not sign the guarantee until 2008 and the parties did not enter into their Agreement until 2010.

and *Washington Grocery Co. v. Citizens' Bank of Anacortes*, 132 Wash. 244, 231 P. 780 (1925), the guaranties were a part of the same transaction as the underlying debt. In both cases, credit was extended to the debtor in reliance on the promise to execute a guarantee in the future. By contrast here, because the guarantee was made prior to and independent of the principal debt, separate consideration was required. Construing the evidence in the light most favorable to Stilnovich, the Court can draw but one conclusion - the guarantee was not supported by consideration. The trial court did not err by denying summary judgment to Seattle Shrimp and by dismissing Stilnovich.

f. The guarantee is unenforceable because of a unilateral mistake

Finally, even if the Court concludes that Robert signed a personal guarantee, the guarantee remains unenforceable because of a unilateral mistake caused by the misinformation Seattle Shrimp provided to Robert.

A mistake is “a belief that is not in accord with the facts.” *Simonson v. Fendell*, 101 Wn.2d 88, 91, 675 P.2d 1218 (1984) (citing *Restatement (Second) of Contracts* § 151 (1981)). The belief need not be an articulated one, and a party may have a belief as to a fact when he merely makes an assumption with respect to it, without being aware of alternatives. *Restatement (Second) of Contracts* § 151, cmt. a. The

erroneous belief must relate to the facts as they exist at the time of the making of the contract. *Id.* As the Restatement notes, “[f]acts include law.” *Id.*, cmt. b. The law in existence at the time of the making of the contract is treated as part of the total state of facts at that time. A party’s erroneous belief with respect to the law or with respect to the legal consequences of his acts may constitute a mistake. *Id.*

A unilateral mistake occurs where the mistake of one party at the time a contract was made as to a basic assumption upon which the contract is based has a material and adverse affect on the agreed upon exchange of performances. *Restatement (Second) of Contracts* § 153 (1981). The identity of the other contracting party is usually a basic assumption on which a contract is made. *Id.*, § 153(b), cmt. g.

A unilateral mistake of the type identified by the *Restatement* occurred here because Robert was mistaken about the identity of the other party bound by the guarantee and the legal consequences of his acts. *Restatement (Second) of Contracts* § 151, cmt. a (noting an erroneous belief as to the effect of a writing that expresses the agreement is, however, a mistake). Seattle Shrimp *admittedly* provided Robert with a blank credit application and guarantee that *admittedly* ensured payment to a non-party. CP 107. When Robert signed the guarantee, he believed that he was executing a corporate guarantee for a third-party credit provider

rather than a personal guarantee for Seattle Shrimp. His mistaken belief was reinforced by his telephone conversation with Whitted, who was acting as Seattle Shrimp's agent, and by the fact that the guarantee did not identify Seattle Shrimp as a creditor or a beneficiary. Seattle Shrimp's decision not to draft a proper guarantee, in conjunction with Whitted's comments to Robert about the purpose of the guarantee, caused Robert to mistake the identity of the other party to the guarantee.

Robert's mistake was material because it had a significant impact on the legal consequences that flowed from Samish's breach of the Agreement. Robert believed that Samish's business relationship with Seattle Shrimp was being underwritten by a third-party credit provider and that he was signing a corporate guarantee because the guarantee identified Samish's corporate accounts and information. The legal effect of a personal guarantee as opposed to a corporate guarantee is clearly, and significantly, different. That Robert admits signing the guarantee neither changes the facts nor the reality that at the time he signed the guarantee, he held an erroneous belief as to the legal consequences of his act.

Where a mistake as to the identity of the other contracting party occurs, the contract is voidable if the other party caused a mistake as to his identity or if he had reason to know of the mistake, as long as it has a material effect on the agreed exchange of performances. *Restatement*

(Second) of Contracts § 153, cmt. g (1981). Contract avoidance is available so long as the mistaken party did not bear the risk of the mistake and the other party's fault or conscious ignorance caused the mistake. *Id.* § 153(b). *See also, Puget Sound Nat'l Bank v. Selivanoff*, 9 Wn. App. 676, 681, 514 P.2d 175 (1973) ("Generally a defendant is not liable under a contract executed by him as a result of his material unilateral mistake if the plaintiff knows of the defendant's mistake or is charged with knowledge of it.").

Seattle Shrimp caused the confusion at issue here when it provided Stilnovich with a defective guarantee because it did not want to incur additional expense in drafting a proper one. CP 107. The Court should not enforce the terms of the guarantee where Robert was operating under a unilateral, mistaken belief as to the other party bound by that guarantee and the legal consequences of his signature on that guarantee. Seattle Shrimp bore the risk of Robert's mistake based on the misinformation it provided to him. Accordingly, this Court should affirm the trial court order denying summary judgment dismissal to Seattle Shrimp and by dismissing Stilnovich.

E. CONCLUSION

The guarantee was superseded by the Agreement, which contained its own form of security. Even if it was not, Seattle Shrimp is not entitled to sue Stilnovich personally because it is neither a creditor nor an intended beneficiary under that guarantee. The Court should not reform the guarantee to provide Seattle Shrimp with the personal guarantee it wishes Robert had executed. Seattle Shrimp bore the risk of Robert's unilateral mistake, which voids the guarantee and any liability thereunder. At the end of the day, the guarantee is unenforceable because Seattle Shrimp provided no new, separate consideration for it.

This Court should affirm the order denying summary judgment to Seattle Shrimp and dismissing Stilnovich. Costs on appeal should be awarded to Stilnovich.

DATED this 27th day of July, 2012.

Respectfully submitted,



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APPENDIX

FOX BUSINESS SYSTEMS - 531 Fort Riley Blvd., Manhattan, KS 66502

Business Credit Application

Billing Information

Full Legal Name SAMISH ISLAND SEAFOOD Business Tel # 206 605 8485 Fax # 360 706 6017
 Street Address 9746 SAMISH IS. RD City BOW State WA Zip 98232
 Shipping Address (if different) _____ City _____ State _____ Zip _____
 How long have you been in business? 1999 Type of business TRADER
 Annual Sales Volume 5M Estimated Yearly Purchases 3M

Business Credit Application

Principal Authorizes Officer _____ Title(s) _____
 Contact Person(s) _____ Duns Number _____
 Name of Parent Company _____
 Street Address _____ City _____ State _____ Zip _____

Bank Reference

Bank Name _____ Contact _____ Account # _____
 Bank Address _____ City _____ State _____ Zip _____
 Telephone Number _____ Fax Number _____

Trade References

1) Name _____ Acct # _____ Contact _____
 Addr _____ City _____ State _____ Zip _____ Tel _____
 2) Name _____ Acct # _____ Contact _____
 Addr _____ City _____ State _____ Zip _____ Tel _____
 3) Name _____ Acct # _____ Contact _____
 Addr _____ City _____ State _____ Zip _____ Tel _____

THE UNDERSIGNED, BY THE EXECUTION OF THIS CREDIT APPLICATION, AGREES THAT IT SHALL PAY FOR ALL OUTSTANDING BALANCES PER TERMS AS AGREED BETWEEN BOTH PARTIES. IN THE EVENT THIS ACCOUNT IS REFERRED TO ANY ATTORNEY FOR COLLECTION, THE PARTIES AGREE THAT AN ADDITIONAL TWENTY-FIVE (25%) OF THE OUTSTANDING BALANCE DUE WILL BE PAID AS ATTORNEY'S FEES.

Auth. Signature _____ (Print Name) _____ Title _____ Date _____

INDIVIDUAL PERSONAL GUARANTEE

I, (NAME) ROBERT E. STILOVICH RESIDING AT (ADDRESS) 9746 SAMISH IS RD FOR AND IN CONSIDERATION OF YOUR
 EXTENDING CREDIT AT MY REQUEST TO (COMPANY) SAMISH ISLAND SEAFOOD (HEREINAFTER REFERRED

TO AS THE "COMPANY", OF WHICH I AM (TITLE) PRESIDENT HEREBY PERSONALLY GUARANTEE TO YOU THE PAYMENT AT FOX BUSINESS SYSTEMS, IN THE STATE OF KANSAS ANY OBLIGATION OF THE COMPANY AND I HEREBY AGREE TO BIND MYSELF TO PAY YOU ON DEMAND ANY SUM WHICH MAY BECOME DUE TO YOU BY THE COMPANY WHENEVER THE COMPANY SHALL FAIL TO PAY THE SAME. IT IS UNDERSTOOD THAT THIS GUARANTEE SHALL BE A CONTINUING AND IRREVOCABLE GUARANTEE AND INDEMNITY FOR SUCH INDEBTEDNESS OF THE COMPANY. I DO HEREBY WAIVE NOTICE OF DEFAULT, NON-PAYMENT AND NOTICE HEREOF AND CONSENT TO ANY MODIFICATION OF RENEWAL OF CREDIT AGREEMENT HEREBY GUARANTEE.

Auth. Signature _____ (Print Name) ROBERT E. STILOVICH Title PRES. Date 7/31/08

150,000 CREDIT ADD TO FOODMAX & CASH & CARRY ACCOUNTS ONLY
RS

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of: Brief of Respondents Robert and Jane Doe Stilnovich in Court of Appeals Cause No. 68428-1-I to the following parties:

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Original filed with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 27, 2012, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick