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NO. 69856-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROGER BEL AIR and NICK BRINEY, doing business as BEL AIR &
BRINEY, a Washington general partnership,

Appellant.

v.

1ST SECURITY BANK OF WASHINGTON,

Respondent

RESPONDENT'S BRIEF

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FILED
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
2011 JUN 13 PM 4:43

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I. INTRODUCTION

This is a case about an offer of unilateral contract that was revoked before ever being accepted. The dispute lies in whether the revocation was proper, as the Respondent Bank maintains or whether the offeree had already performed in part, as Appellants claim.

The case arises out of a failed scheme by two hard money lenders (B&B) to squeeze money out of their former debtor, using the Bank as an unwitting pawn. B&B learned that one of their debtors (Mr. Yagi) also owed money to the Bank in the form of an old judgment. B&B contacted the Bank and asked it to sell the old Yagi judgment, claiming they were just trying to clear title on a Yagi-owned property. The Bank responded by offering to sell the judgment to B&B for less than half its value. What the Bank didn't know was that B&B had settled its own debt from Yagi; that there was no longer any need to worry about clear title and that B&B intended basically to "flip" the old Yagi judgment. B&B would buy the judgment at a deep discount and then collect the full amount from Yagi for a quick profit of \$37,000.

Fortunately for Yagi, he discovered the scheme. B&B had never paid the Bank for the old judgment, so Yagi was able to arrange with the Bank to satisfy the judgment. The Bank revoked its offer B&B.

B&B hedged its bets. B&B never committed the money necessary to accept the Bank's unilateral offer so they didn't secure any contractual right to buy the judgment. Nevertheless they sued the Bank for alleged breach of a contract, their claimed damages being the amount of profit they would have gotten from obtaining the judgment at a discount and collecting against Yagi in full.

The trial disposed of B&B's claims by applying the simple doctrine that an offer of unilateral contract for payment of money can only be accepted by precisely that – payment of money. The trial court rejected B&B's last-ditch effort to avoid dismissal by arguing "part performance" because the court concluded that B&B only took actions too trivial to be deemed "part performance." The evidence regarding the parties' dealings and communications was not in dispute summary judgment was proper. This Court should affirm that judgment.

II. STATEMENT OF THE CASE

Respondent 1st Security Bank of Washington (the "Bank") is a Washington state chartered bank with its home office in Mountlake Terrace, Washington. CP 67.

Plaintiffs Roger Bel Air and Nick Briney ("Briney") are partners in Bel Air & Briney ("B&B"). B&B are "hard money lenders" who provide

high interest loans, secured by real property, to persons who do not otherwise qualify for traditional bank financing. CP 77.

A. Judgment and Bank's Unilateral Offer to Appellants.

In early January 2012, the Bank was contacted by Briney regarding a judgment the Bank had obtained years earlier against Mr. Koichi Yagi. Originally the judgment was for \$31,054.72. By the time Briney contacted the Bank the judgment had accrued interest and was worth almost \$60,000.00. Briney told the Bank that he had a mortgage on certain commercial property owned by Mr. Yagi in SeaTac, Washington. Briney informed the Bank that his mortgage was junior to the Bank's Judgment lien and that he was potentially going to foreclose on the property. Briney wanted the Bank's Judgment released so that he would be in first secured position and have clear title after the foreclosure. CP 67-68.

Briney did not tell the Bank that he was then engaged in negotiations with Yagi's representatives or that Yagi was now solvent. CP 68. Based upon the inactivity on the account, the Bank offered to satisfy the Judgment and remove the lien on the property for a greatly reduced sum, \$30,000.00. CP 68. In its letter to Briney of January 4, 2012, the Bank confirmed its offer, stating in part:

Per our phone conversation today, January 4, 2012, 1st Security Bank of Washington will accept \$30,000 to release our judgment.

1st Security Bank of Washington will waive all interest, late fees and collections charges. The payoff of \$30,000 will remain through May 1, 2012. If more time is required please call for an updated payoff letter.

CP 72.

B&B made no proposal for other terms, did not negotiate an exclusive option for the release of the Judgment, nor did it seek to have the offer be non-revocable. Therefore, the Bank was free to make competing offers for the Judgment, to transfer or convey the Judgment, or to revoke the offer at any time.

B. B&B's Dealings With the Yagi Family.

Members of the Yagi family, including Mr. Yagi ("Yagi Family"), owned several commercial properties. In August 2006, they needed \$200,000 to save some of their properties from foreclosure. CP 77-78. Conventional bank financing was unavailable to them and the Yagi Family reluctantly turned to "hard money lenders" and B&B. CP 78. The Yagi Family borrowed \$200,000 from B&B under oppressive terms, including an originating loan fee of \$10,000, base interest of 12% per annum, default interest at 24% per annum and 10% late fees. CP 78.

The Yagi Family, after incurring substantial roll-over fees, late fees and interest at 24%, was unable to continue to service the B&B loan

and defaulted. B&B sued the Yagi Family in October 2010 and obtained a default judgment in the full amount of the principal loan, interest, fees and penalties. CP 80.

In early January 2012, when Briney first contacted the Bank regarding the Judgment, B&B was in active negotiations with the Yagi Family for settlement of their debt in exchange for a full value payment. B&B was aggressive in their negotiations and refused to compromise the debt. These negotiations resulted in a settlement agreement in April 2012 under which members of the Yagi Family agreed to pay B&B \$217,500. CP 80.

C. Bank Revises Offer and B&B's Plan to Exploit Judgment Against Yagi Family.

When it became apparent to B&B that the Yagi Family had assets and were going to pay B&B's judgment, Briney requested a different offer from the Bank. Instead of a release of the Judgment as offered in the January 4, 2012 letter, Briney asked to "buy" the judgment so that B&B could enforce it against the Yagi Family. CP 68. B&B also requested an extension of the Bank's offer through May 30, 2012. The Bank changed its offer to include an assignment of the Judgment and the requested extension. CP 68. The Bank confirmed the new offer in a letter to Briney, stating in part:

1st Security Bank of Washington, fda Washington Credit Union agrees to assign the judgment Washington Credit Union vs Koichi Yagi for the sum of \$30,000.

The total balance due including principal, interest, attorneys fees and Legal Costs is \$60,790.72. . . .

CP 76.

The reason that B&B requested a change in the Bank's offer was to exploit the full value of the Judgment against the Yagi Family. B&B was aware that the Yagi Family had significant assets and knew that the Bank was unaware of this fact. By May 2, 2012, B&B had negotiated a settlement with the Yagi Family under which it was going to receive more than \$217,000, full value on the loan it had made. CP 80. That settlement with the Yagi Family would mean that B&B no longer had a lien against the Yagi Family property. B&B could no longer foreclose on property in order to recover from the Yagi Family and would therefore have no concern about being second in priority behind the Bank's Judgment lien. In short, release of the Bank's Judgment against the Yagi Family would no longer be necessary for B&B to be paid by the Yagi Family. However, B&B stumbled onto the existence of this old Judgment against the Yagi Family and now hatched a new plan to exploit the Judgment. B&B decided to extract additional money from the Yagi Family by getting control of the Bank's Judgment against the Yagi Family and then demanding full payment on threat of execution.

B&B now requested to “buy” the Judgment from the Bank at the price of \$30,000. CP 68. Becoming the owner of the Judgment would allow B&B to demand the full \$60,000 value of the Judgment from the Yagi Family. B&B requested the change, without disclosing any of those dealings to the Bank, that its judgment debtor was available and solvent, or that B&B had just negotiated a substantial settlement with the Yagi Family. CP 68-69. B&B’s sole goal in this transaction was to exploit the full value of the Judgment to the detriment of the Bank and the Yagi Family.¹

B&B's desire exploit the Judgment is confirmed in their attorney’s communications with the Yagi Family in early May, seeking reassurance that its settlement with the Yagi Family on its own loan would not interfere with B&B’s ability to enforce another judgment lien. CP 84-85. It was not until B&B received confirmation of this fact that B&B decided to take action on the Bank’s amended offer. CP 84-85; CP 153.

D. Bank Accepts the Yagi Family’s Offer to Satisfy the Judgment and Revokes Offer to B&B.

On May 10, 2012, the Bank was contacted by the Yagi Family's attorney regarding satisfying the Bank’s Judgment against Mr. Yagi. The attorney advised the Bank of the Yagi Family's long history with B&B,

¹ Indeed, B&B’s entire claim for damages in this case (\$30,790.72) is the difference between the purchase price and the full value of the Judgment it hoped to exploit against the Yagi Family. See, CP 7.

including its recent negotiations and agreement to settle the loan default. CP 69. When advised that the Bank had an outstanding offer to B&B to assign the Judgment for payment of \$30,000, the Yagi Family offered to pay \$32,000 for satisfaction of the Judgment. On May 11, 2012, the Bank accepted the Yagi Family's offer. That same day, the Bank revoked its offer to B&B and advised Briney of the sale of the Judgment to the Yagi Family. CP 69. Up to that point, B&B had tendered no money to the Bank. CP 69.

E. The Lawsuit for Breach of Contract and Summary Judgment Dismissing B&B's Claim.

B&B filed this lawsuit against the Bank alleging breach of contract and seeking enforcement of the Bank's offers to them. CP 1. B&B originally claimed there was an existing bilateral contract with the Bank. CP. 6-7. The Bank filed its Motion for Summary Judgment on grounds that it had made only an offer of unilateral contract and that B&B had not performed – had never accepted the offer. CP 56. In B&B's response to the motion for summary judgment, it agreed that the arrangement was one of unilateral contract but alleged for the first time, that it had part performed under the Bank's offers. CP 89. The trial court granted the Bank's motion for summary judgment finding, inter alia, that the Bank's offers to B&B were offers of unilateral contract; that the Plaintiff's actions

in obtaining a cashier's check and placing phone calls to the Bank were merely preparations to perform and do not constitute part performance; and that B&B failed to fully perform under the Banks offers. CP 200. B&B appealed the dismissal of its claims on summary judgment. CP 202.

III. ARGUMENT

A. Standard of Review

The applicable standard of review on this appeal from a summary judgment is de novo. Under that standard this Court engages in the same inquiry as the trial court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006). Under that de novo standard of review:

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* We consider all disputed facts in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion.

Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

B. B&B Assigns Error for the Trial Court's Failure to Grant B&B Relief they Never Requested

B&B muddies the water procedurally in its assignment of error on appeal. B&B's assigns error to the trial court's dismissal of B&B's complaint and says the trial court "should instead have concluded that the

Bank breached its contract with Bel Air & Briney.” *Brief of Appellant* (“BA”) 2. B&B cannot assign such error and this Court should not frame the issues in that way, because B&B never asked the trial court to conclude that the Bank breached its contract.

This appeal arose from the trial court’s granting the Bank’s motion for summary judgment and dismissing B&B’s claims. In a nutshell, the Bank requested the trial court to conclude that B&B could not maintain their claim for breach of contract because B&B had never accepted the Bank’s unilateral offer and therefore no contract had been formed. In opposition, B&B asked the trial court to deny the Bank’s motion because, B&B claimed, their “part performance” deprived the Bank of its ability to revoke the offer it had made to B&B. B&B argued that the trial court should not dismiss their claim. B&B did not go further; it did not make its own motion for summary judgment. B&B did not seek the relief it now claims the trial court erred in withholding. It did not ask the trial court to rule that a contract existed and was breached by the Bank.

Had B&B sought that relief, they would have been required to establish as a matter of law which act(s) constituted part performance, precisely when those acts took place, when the Bank was placed on notice of the “part performance” actions and precisely when the Bank lost its right to revoke its offer. B&B would have been required to establish as a

matter of law that the Bank's revocation of its offer was too late. Had B&B sought any such relief and made the necessary factual record in support of that motion, the Bank would have offered evidence to refute those claims. There being no motion by B&B and the issue not being before the trial court, the Bank had no reason to submit any such evidence.

To the extent B&B seeks to assign error to the trial court's failure to conclude that a contract existed and that the Bank breached it, that assignment is improper on the procedural and factual record in this case. *Kendall v. Public Hospital District*, 118 Wn.2d 1, 9, 820 P.2d 497 (1991) (party who asked trial court to review specific records of county commissioners may not complain on appeal of failure of that court to review additional records).

C. The Bank's Offers to B&B Were Offers of Unilateral Contract Which Could Only be Accepted by Full Performance.

The Court should affirm the dismissal of B&B's claims on summary judgment. Both parties agree that the Bank's offers were offers of unilateral contract that could only be accepted by payment of \$30,000. Both parties agree that B&B did not pay any money to the Bank, let alone the full tender of \$30,000.

B&B's arguments are confusing. They concede this was an offer of a unilateral contract yet their analysis rests on principles of bilateral

contract. The trial court decided the case properly when it found that the Bank's offers to B&B were offers of unilateral contract that can only be accepted by full performance.

1. The Law of Unilateral Contract.

Both parties now agree that the Bank's offers of January 4, 2012 and May 2, 2012, were offers of unilateral contract, although B&B did not always concede that fact.²

Unilateral contracts have their own unique body of law. Washington law recognizes two kinds of contracts: bilateral and unilateral. *Cook*. A bilateral contract is formed by an exchange of promises. *Id.*; *Govier v. N. Sound Bank*, 91 Wn. App. 493, 499, 957 P.2d 811 (1989). In contrast, a unilateral contract involves only one promise to perform and that promise is conditioned upon actual performance by the other. *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 583-84, 790 P.2d 124 (1990); *Higgins v. Egbert*, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947).

The essential distinction between a unilateral contract and a bilateral contract is the method of acceptance. In a unilateral contract:

² Prior to the filing of the Bank's motion for summary judgment, B&B had repeatedly insisted that the Bank's offers were valid and enforceable bilateral contracts. Upon receipt of the Bank's motion for summary judgment arguing that only a unilateral contract had been offered, B&B then flip-flopped their claim, now asserting that not only had a unilateral contract been offered, it had been part performed. CP 89.

[T]he offer or promise of the one party does not become binding or enforceable until there is performance by the other party, whereas, [in a bilateral contract], it is not performance which makes the contract binding, but rather the giving of a promise by the one party for the promise of the other.

Multicare, 114 Wn.2d at 584; quoting *Higgins*, 28 Wn.2d at 317-18.

Under a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance.

Multicare, 114 Wn.2d at 584; *Cook*, 37 Wn.2d at 23.

In this case, only full payment of \$30,000 by B&B would obligate the Bank to perform, at which point the contract is created. Because the only consideration for the Bank's promise of performance is B&B's full performance (i.e., payment), the Bank could revoke its unilateral offer at any time before that performance. That revocation could be either by communication or by acts inconsistent with the offer of which B&B becomes aware. *Multicare*, 114 Wn.2d at 584; *Cook*, 37 Wn. 2d at 23.

The trial court said it correctly when it held that the Bank's offers to B&B were "offers of unilateral contract that can only be accepted by full performance." CP201. B&B does not claim to have paid the agreed amount; they paid nothing. Summary judgment dismissal of B&B's claim for breach of contract was correct and should be affirmed.

2. The Bank's Use of Unilateral Contracts in Debt Collection is a Matter of Policy Arising out of Practical Experience.

The Bank's procedure of making offers for unilateral contract arises from its long-held policy when attempting to collect debts like the Judgment. Instead of seeking B&B's promise to pay for the Judgment, the Bank extended an offer that could only be accepted by performance. In this case, the Bank's offer to assign the Judgment to B&B could only be accepted by B&B's payment of \$30,000.

When seeking to collect on a debt or Judgment, the Bank does not accept promises to pay debts, nor does it seek such promises. In the debt collection business, many promises are made to pay debts, but in the Bank's experience very few of those promises are ever fulfilled. CP 70. The Bank will not agree to take any action regarding a debt until it first receives payment in full of the agreed funds. CP 69. In short, based upon the realities of the debt collection business, the Bank requires performance in the form of payment, not promises to pay, for any debt. This is a particularly suitable application of a unilateral contract and is typical in the banking industry; a fact of which real estate lenders like B&B should surely be aware.

D. The Trial Court Properly Rejected B&B's Efforts to Turn a Cashier's Check and Two Voice Mail Messages into Part Performance; the Legal Equivalent of an Option Payment.

B&B is in a tough spot. They concede that the Bank's offer was an offer of unilateral contract. They further concede that the performance sought was payment of \$30,000 and that they did not pay it. In a desperate attempt to keep their claims alive, B&B had to cast about for a legal theory to cure their obvious failure to accept the Bank's offers. They seized upon "part performance." B&B examined Briney's activities during the last day before the Bank revoked the offer and they tried to make those activities legally significant. They have failed. Contrary to B&B's urging, obtaining a check and leaving two voice mail messages cannot satisfy the element of full performance. As more fully set forth below, those inconsequential undertakings do not rise to the level of part performance as a matter of law. The trial court correctly rejected B&B's threadbare argument and so should this Court.

E. The Trial Court Correctly Concluded that B&B's Incidental Actions were not Part Performance.

1. Knight v. SeaFirst Controls and Confirms the Proper Dismissal of B&B's Claim.

Washington courts have recognized that "part performance" by the offeree may preclude withdrawal of an offer of unilateral contract. *Knight v. Seattle First National Bank*, 22 Wn. App. 493, 589 P.2d 1279 (1979).

Both parties agree that the opinion of this Court in *Knight* controls the determination of B&B's claims in this case. It is the only Washington case addressing part performance of a unilateral contract. A review of the *Knight* decision confirms that B&B did not part perform in response to the Bank's offers.

In *Knight*, SeaFirst bank foreclosed on the plaintiffs' mortgage and became the successful bidder for the plaintiffs' property at a foreclosure sale. Several months after the plaintiffs' statutory right of redemption expired, the bank advised plaintiffs that if they could get a third-party offeror to withdraw his offer of purchase, SeaFirst would sell the property back to plaintiffs for the amount then owing under the mortgage, approximately \$22,000. Toward that end, the plaintiffs hired a lawyer, wrote a letter to the previous offeror and commenced a lawsuit against the previous offeror. SeaFirst sold the property to another person before the plaintiffs caused the third party to withdraw his offer and before plaintiffs tendered any funds to SeaFirst. The plaintiffs sued SeaFirst seeking to prevent the sale of the property and alternatively for damages. SeaFirst moved for summary judgment and all of plaintiffs' claims were dismissed. Plaintiffs appealed to Division One of the Court of Appeals.

On appeal, the *Knight* court confirmed that SeaFirst's offer to plaintiffs was an offer of unilateral contract that could only be accepted by

full performance. *Id.* at 496. The plaintiffs in *Knight* contended that they had begun performance under SeaFirst's unilateral offer and, as a result, SeaFirst could no longer withdraw its offer to sell to plaintiff. *Id.* After a thorough analysis of the law of unilateral contract, including the applicable standards for part performance thereof, the court determined that the plaintiffs' actions "represented only preparations to undertake the invited performance, and did not constitute part performance which would require enforcement of the Bank's offer." *Id.* at 499 (emphasis supplied). The *Knight* court noted that SeaFirst's offer called for performance by the payment of money and that no money was tendered. *Id.* at 498-99.

Applying the rule set forth by this Court in *Knight*, B&B's conduct comes no closer to "part performance" than did the *Knight* plaintiffs— who arguably did far more than B&B.

2. The Only Part Performance that Could Have Been Effective Here Would have Been the Payment of a Sum of Money.

B&B's purchase of a cashier's check and its voice mails to the Bank could never be part performance of the Bank's offers because it did not result in the payment of money. Where the offer of unilateral contract calls solely for payment of money, part performance must include an actual tender of money.

What is tendered must be part of the actual performance requested in order to preclude revocation under this Section. Beginning preparations, though they may be essential to carrying out the contract or to accepting the offer, is not enough.

Knight, 22 Wn. App. at 498; quoting *Restatement (Second) of Contracts* § 45, comment a (Tent. Draft No. 1, 1964). The requirement of tender of part of the actual performance requested has long been necessary in order to preclude revocation.

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offer is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

Knight, 22 Wn. App. at 497; quoting *Restatement of Contracts* § 45, at 53 (1932) (emphasis added).

Because it is the performance of the unilateral offer that provides consideration for the contract, receipt by the offeror of some part of the requested performance is necessary in order to invoke a claim of part performance and thereby limit revocation of an otherwise fully revocable offer. Here, the required performance to form the contract was the payment of \$30,000.00. It is undisputed that the B&B never tendered, and the Bank never received any money in response to its offers from January to May. Nevertheless B&B claims to have part performed and thereby to

have created an option contract, a claim which was properly rejected by the trial court.

3. Part Performance Could not Apply Where the Required Performance was a Single, Simple Tender of \$30,000.

The application of part performance to unilateral contracts is limited to offers that will take time and expense on the part of the offeree to perform. This principle is enunciated in *Knight* as follows:

The right of the offeror to revoke his offer even after part performance by the offeree is supported by certain American decisions but in other cases where the question has arisen the offeror has been held bound

The difficulty may best be met . . . by holding, if the consideration requested in an offer of unilateral contract will necessarily take time and expense for its performance, that the offer contains by implication a subordinate offer to keep the main offer open for a reasonable time in consideration of the beginning of performance of the offeree.

Id. at 497. (quoting 1 Williston, Contracts §60A, at 188-91 (3d ed. 1957) (emphasis added). Here, the performance requested by the Bank was the tender of money. Tendering money is not an undertaking that takes time or expense. The actual tender of money in any transaction requires only a few minutes' time (arranging for the method of funds transfer) and very limited expense (the transactional cost of transferring funds). Thus, a

unilateral offer calling for the tender of money is not the type of undertaking requiring the application of part performance.

No amount of hyperbole can convert obtaining a check and leaving two voice mail messages into tasks of great time or expense. Thus, the court properly rejected B&B's claim of part performance.

4. B&B's Insignificant Actions Were Merely Preparations to Perform, Far Short of Part Performance.

At best, B&B's action in obtaining a cashier's check and leaving two voice mails with the Bank are merely preparations for performance, which do not rise to the level of "part performance" of the Bank's offers. Preparations to perform under a unilateral offer, even though they may be essential to carrying out the contract or to accepting the offer, are not enough. *Knight*, 22 Wn. App. at 498. The distinction between mere preparations and part performance turns on many factors:

the extent to which the offeree's conduct is clearly referable to the offer, the definite and substantial character of that conduct, and the extent to which it is of actual or prospective benefit to the offeror rather than the offeree, as well as the terms of the communications between the parties, their prior course of dealing, and any relevant usages of trade.

Knight, 22 Wn. App. at 497; (quoting *Restatement (Second) of Contracts* § 45, comment f (Tent. Draft No. 1, 1964)) (emphasis added).

Applying the Restatement factors to B&B's claimed acts of "part performance," it is clear that they were no more than preparations to perform. First, obtaining a check and leaving two voice mail messages are not definite and substantial conduct. Obtaining the check was simply B&B's movement of money from one form (cash) into another (a check) in preparation for the actual performance requested, the tender of \$30,000 to the Bank. It took no more than a few minutes and was of only a modest expense.

Similarly, leaving two voice mail messages with the Bank was not definite and substantial conduct. Again, the calls were completed in mere minutes. Furthermore, B&B's voice mail statements to the Bank regarding when they would like to pay the funds could not be part performance. In *Knight*, the court held that even a promise to pay, short of any tender of the money, is immaterial since the offer called for acceptance by performance, not promissory obligation. If an actual promise to tender is inadequate, B&B's voice mails – not even rising to the level of a promise -- could not be deemed part performance. B&B's actions were not definite or substantial.

Second, and most important, obtaining a check without also tendering it had no actual or prospective benefit to the Bank. Until the check is actually tendered by B&B it is simply funds remaining within

B&B's control. Until the check is tendered, B&B are free to walk away from the Bank's offers without legal consequences and without financial detriment. Without tender, B&B retain control of the funds; remain free to use the funds in any manner that they chose, including simply returning the check to the originating bank account without accepting the Bank's offers. The Bank receives no benefit from the fact a check has been procured. Until the check is tendered, the Bank has no ability to access the funds and has no legal recourse to force B&B to provide the funds to the Bank.

Accepting B&B's flawed definition of part performance would result in confusion and inequity. Under B&B's definition of part performance, an unscrupulous offeree could potentially "part perform" the payment of money by immediately obtaining a check and telling the offeror he wants to tender payment, but never doing so. Under B&B's analysis, that unscrupulous offeree would thereby have the ability to tie up the offeror without ever transmitting any value; without having obligated himself in any way, standing by to scuttle any other deal the offeror might make, if it suits his purposes. This hypothetical is not far-fetched. It is consistent with the self-serving strategic actions of B&B throughout its dealings with the Bank.

Courts from other states have held under similar circumstances that absent a tender of money, steps taken in order to facilitate the tender of money are not sufficient to be part performance. See, *Ragosta v. Wilder*, 156 Vt. 390, 592 A.2d 367 (1991) (attempts at financing without tender was merely engaging in preparation for performance); *State v. Delaney* 157 Vt. 247, 598 A.2d 138 (1991) (costs incurred and efforts to obtain financing by passing resolutions are not part performance of unilateral offer to sell property).

The trial court correctly concluded that B&B's actions in obtaining a check and leaving two voice mail messages with the Bank were merely preparations to perform, insufficient to prevent the Bank from withdrawing its offers of unilateral contract. This Court should reach the same conclusion and should affirm the order granting summary judgment.

F. By Blurring the Lines Between Unilateral and Bilateral Contracts, B&B Invites the Court to Hold that a Binding Contract was Formed, Which Would be Error.

B&B concedes the law of unilateral contract governs this dispute. However, B&B improperly tries to impose obligations of bilateral contract on the Bank because without such obligations, B&B cannot keep their claims alive. Several times in their Opening Brief B&B suggests that a contract was created prior to any attempted performance by B&B. This is an incorrect statement of the law of unilateral contract. Until a unilateral

offer is accepted by the requested performance, no contract is created, it remains merely an offer.

The term “unilateral” has also been used to describe what is sometimes denominated a contract, but which in reality is merely an offer to contract, as, for example a promise to pay one for services if he should perform them, the latter being under no obligation to perform such services. . . . Still another illustration is an agreement signed by an owner of property to pay a broker commissions in the event that broker finds a purchaser for the property or in the event of a sale by either the owner or the broker. After the act upon which the promise is based is performed, a valid contract comes into existence.

Higgins, 28 Wn.2d at 317. Until the offeree accepts by performance, the offeror is under no obligation to perform and may revoke its offer at any time without adverse legal consequences. *Cook*, 37 Wn.2d at 23; *Knight*, 22 Wn. App. at 496.

B&B seek to ignore this clear statement of the law when they suggest the Bank should have kept them informed of dealings with the Yagi Family; should have given preference to dealing with B&B rather than the Yagi Family; and should have returned B&B’s calls more quickly than it did. The heart of B&B’s entire argument is that the Bank should not have dealt with anyone else if it had any indication B&B would ever accept its offer by paying \$30,000.00. The law of unilateral contract does not impose such a duty on an offeror whose offer has not been yet been accepted by full performance. This Court should reject B&B’s invitation

to inject bilateral contract considerations into this undisputedly unilateral contract setting.

G. B&B Didn't Negotiate an Exclusive Option Contract with The Bank.

It is undisputed that B&B did not negotiate an exclusive option contract with the Bank for purchase of the Judgment. B&B's suggestion that the Bank had an obligation to deal with them exclusively sounds like an option contract, although B&B does not explicitly call it that. Their Opening Brief is replete with the implication that the Bank breached an agreement by negotiating with the Yagi Family instead of assigning the Judgment to B&B. Without the Bank being subject to this implied "option-like" obligation, B&B is dead in the water.

The law of unilateral contract is clear that before B&B's acceptance by performance, the Bank was free to offer to sell or assign the Judgment to any prospective buyer of its choosing. Absent an exclusive option contract (for which B&B would have to had paid consideration), B&B assumed the risk that Bank would offer, negotiate or convey the Judgment to another person before B&B paid the required \$30,000.00. Similarly, the Bank had no assurance that B&B would ever accept its offer and pay the required sum. Having received no consideration, the Bank was not required to wait and see what B&B decided to do. The Bank's

employees are charged with the responsibility of getting the best return for the Bank out of any collection settlement or Judgment sale, so there was nothing surprising or inappropriate about the Bank's discussions and ultimate transaction with the Yagi Family.

An option contract is a "complete, valid and binding agreement," to which general contract principles apply. *Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968). An option contract is a promise which meets the requirements of the formation of a contract and limits the promisor's power to revoke an offer. *Restatement (Second) of Contracts* § 25 (1981). It is undisputed that B&B failed to negotiate an exclusive option for purchase of the Judgment from the Bank or to give the Bank any consideration at the time of the offers. Any implication by B&B that the Bank had an obligation to deal with them exclusively regarding the Judgment is unfounded and the Court should give it no consideration.

H. B&B's New Claims of "Misconduct" by the Bank are Fabrications, Unsubstantiated by the Record and Unsupported by Washington Law.

For the first time on appeal, B&B claim the Bank committed misconduct and that the law of unilateral contract should somehow not apply. Once the Court navigates through B&B's hyperbole and mischaracterizations, the "misconduct" by the Bank appears to be: 1)

negotiating with the Yagi Family before B&B accepted the Bank's offer or tendered any money; and 2) returning Mr. Briney's telephone call on the next business day following his telephone message. B&B's attempts to characterize these acts as misconduct are specious, but the entire argument can be disregarded because it was never presented before this appeal.

Until they submitted their Opening Brief, B&B had never presented the argument that the Bank had committed "misconduct," thereby excusing B&B from the requirement of full performance. Arguments raised for the first time on appeal are prohibited and should be rejected by the appellate court. *Seattle-First National Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 240, 588 P.2d 1308 (1978). In the *Shoreline Concrete* case, the defendant had waited until the appeal to raise its argument that fault of a party should be a basis for reduction of damages even in a strict liability case. The court refused to consider the argument and held that the party was precluded from raising it where it had not been presented to the trial court. 91 Wn.2d at 240.

The cases supporting this doctrine regarding arguments first raised on appeal were marshaled well in *Martin v. Municipality of Metropolitan Seattle*, 90 Wn.2d 39, 42, 578 P.2d 525 (1978). The Supreme Court wrote:

This court has consistently held that claims not presented at trial will not be considered upon appeal. *Boeing Co. v. State*, 89 Wn.2d 443, 572 P.2d 8 (1978). *International Tracers of America v. Hard*, 89 Wn.2d 140, 570 P.2d 131 (1977). More particularly, we have declined to pass on the rights of parties where relief asked for on appeal was not part of either the prayer for relief or the theory of the case presented to the trial court. *Stewart v. Johnston*, 30 Wn.2d 925, 195 P.2d 119 (1948). We also recently have stressed that "We are committed to the rule that, insofar as possible, there shall be one trial on the merits with all issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials." *Haslund v. Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976). Appellant's request is not consistent with these cases.

90 Wn.2d at 42.

RAP 2.5(a) describes the three narrow circumstances under which a party may raise new arguments for the first time on appeal. Specifically, they must be issues which allege (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief may be granted, or (3) manifest error affecting a constitutional right. RAP 2.5(a).

None of those circumstances exist in this case. Appellate courts usually refuse to consider such arguments and this Court should follow suit. *Smith v. Shannon*, 100 Wn. 2d 26, 38, 666 P.2d 351 (1983). The underlying principle is one of judicial economy and fairness. Trial courts should be informed of the rules of law sought to be applied so as to avoid an incorrect decision, an unnecessary appeal and significant wasted cost to

all concerned. *Haslund v. Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976).

Applying that rationale here, B&B never before claimed that the Bank committed misconduct and that such misconduct was a basis for discarding the legal analysis applicable to unilateral contracts. Had B&B advanced that argument in the proceedings below, there is no way of knowing how the Bank would have addressed it, what additional evidence might have been included in the record or what the trial court would have done with that argument. It is too late for B&B to raise it now.

1. B&B's Characterization of the Bank's Actions as Misconduct is Legally Flawed and Factually Inaccurate.

B&B's attempt to characterize the Bank's negotiation with the Yagi Family as "misconduct" is simply an extension of B&B's misapplication of the law of unilateral contract. It also relies on "facts" not found in the record on appeal; nothing more than speculation on B&B's part.

B&B imputes near-malice to the Bank for its choice to deal with the Yagi Family and the Bank's resultant withdrawal of its previous offers to B&B. The Bank was within its rights to take the actions it did. Until B&B accepted the Bank's offers by tendering \$30,000.00, there is no contract between the parties or any obligations between them. Until B&B

performed, the Bank was free to offer the Judgment to others, negotiate with others for the purchase of the Judgment and to convey the Judgment on any terms it desired. Given the Bank's absolute right to take such actions, they cannot fairly be characterized as misconduct.

2. The Bank Returned Mr. Briney's Phone Call Quickly and Reasonably on the Next Business Day.

B&B attempt to impute a nefarious intent to the lack of an immediate return phone call on May 10th is unsupportable. The undeniable fact remains that the Bank returned Mr. Briney's May 10th voice mail messages by the close of business on May 11th. CP 69. This is an admirable turn-around time for a return phone call and a practice to which many businesses aspire. As far as the motivation for the timing of that call, there is no evidence in this record to support B&B's claims that Bank employees "intentionally" or "deliberately" did anything other than return Mr. Briney's phone call by the next business day. Most important, the intent or motivation for the Bank's communications with B&B are not legally relevant to the issues of full performance or part performance, which were the only issues before the trial court.

3. The Bank Did Not Prevent B&B from Tendering the Check.

B&B suggest that by not returning Mr. Briney's May 10th telephone calls until the next day, the Bank intentionally prevented them

from delivering the check. BA 28-29. This argument is completely unfounded. B&B had the unrestricted ability to accept the Bank's offer by tendering \$30,000 from the date of the offer on January 4, 2012 until it was revoked on May 11, 2012. The failure of B&B to tender the required payment was due to B&B's own self-interested delays, waiting until the second week in May to ensure that Judgment would be fully exploitable against the Yagi Family.

The fact that Mr. Briney and the Bank representative did not actually connect telephonically on May 10-11 did nothing to prevent Mr. Briney from tendering a check. He had been discussing the offers with Bank employees for more than four months and was fully aware of what actions were necessary to accept the Bank's offer. It was his choice to wait for a phone call instead of taking any action to tender the funds.

Mr. Briney was aware of the Bank's business address and could have personally delivered the check himself. He could also have had the check messengered, mailed or even had the funds wire transferred to the Bank. Mr. Briney voluntarily took none of these actions even though he became aware that the Bank had been contacted by the Yagi Family and that his scheme had been revealed. Mr. Briney was free to tender the payment in numerous ways and did not need Bank permission to do so.

Any inaction on Mr. Briney's part was due to his own conscious choice and cannot be attributed to the Bank.

4. The Implied Contractual Condition of *Wolk* and its Progeny Have no Application to Unilateral Contracts.

Not only has B&B not presented any facts from which an inference of misconduct could be drawn, they also don't have any law to support their late-added claim. B&B ask this Court to impose an implied contractual duty on the Bank's unilateral offers. For this proposition, B&B rely upon *Wolk v. Bonthius*, 13 Wn. 2d 217, 127 P.2d 1023 (1942) and similar depression era and turn-of-the-century cases. B&B acknowledge that in the 70 years since *Wolk*, no Washington court has applied this implied contractual duty to a unilateral contract. This Court should not do so in this case, because *Wolk* and its progeny have no application to unilateral contracts.

The *Wolk* court held that one party to a bilateral contract cannot avail himself of nonperformance where the nonperformance is occasioned by his acts. *Id.* at 219. Much like a duty of good faith and fair dealing, a duty not to prevent performance by the other party is an implied contract condition in every bilateral contract. See, *Cavell v. Hughes*, 29 Wn. App. 536, 539, 629 P.2d 927 (1981); *Hydraulic Supply Mfrg. Co. v. Mardesich*, 57 Wn.2d 104, 105, 352 P.2d 1023 (1960); *Wolk* at 219.

Wolk and its progeny are inapplicable to this case for several reasons. First, as discussed above, the Bank did nothing to prevent B&B's tender of money to the Bank. Second, the implied duty not to prevent performance is only applicable to bilateral contracts. Each of the cases cited by B&B in support of this implied condition arises from bilateral contracts, including *Wolk* (bilateral contract for construction of cold storage plant.) In a unilateral context, until an offer is accepted by performance by the offeree, the prospective parties have no obligations to each other, implied or otherwise. See, *Multicare*, 114 Wn.2d at 584 (In a unilateral contract, the offeror's offer or promise is not binding until the other party performs). Third, the offeror of a unilateral offer is free to withdraw the offer at any time prior to performance either by communication to the offeree or by acts consistent with the offer. *Knight*, 22 Wn. App. at 496. Because the offer is freely revocable, either expressly or by actions, there is no practical reason to invoke an implied duty not to interfere with performance.

I. B&B's Proposed Definition of Tender is Contrary to the Law of Unilateral Contract and Should be rejected.

B&B contends that they "tendered" by offering to pay money to the Bank. BA 25. They cite to Black's Law Dictionary for the proposition that "tender" is defined as an "offer to tender." *Id.* B&B's proposed

definition of tender attempts to turn the law of unilateral contract on its head and should be rejected.

A unilateral contract requires performance from an offeree, not promises. A unilateral contract consists of a promise on the part of the offeror and performance of the requisite terms by the offeree. *Higgins*, 28 Wn.2d at 317. “[U]nder a unilateral contract, an offer cannot be accepted by promising to perform; rather, the offeree must accept, if at all, by performance, and the contract then becomes executed.” *Multicare*, 114 Wn.2d at 584. The Bank’s offers in this case did not request a promise from B&B. Because the Bank’s offers requested performance by payment of money, it can only be accepted by the payment of money, which in this case was never done.

B&B cannot accept the Bank’s offer by a promise to tender \$30,000, nor can it claim part performance by such a promise. B&B’s proposed definition of tender is contrary to the law of unilateral contract and must be rejected.

V. CONCLUSION

This Court should affirm the order of the trial court dismissing B&B's claims with prejudice.

RESPECTFULLY SUBMITTED this 13th day of May, 2013.

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DECLARATION OF SERVICE

On May 13, 2013, I caused to be transmitted via ABC Legal Messenger a copy of the attached BRIEF OF RESPONDENT on the following:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this ___ day of May 2013, at Bellevue, Washington.


Sarah Scoringe
Assistant to William T. McKay

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STATE OF WASHINGTON