

71502-0

71502-0

FILED
COUNTY CLERK'S DIV I
JAN 12 2012 9:43

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

BARRIE BEHRMANN and
RONALD BEHRMANN,
Appellants,

vs.

FRANK D'APRILE and JANE DOE
D'APRILE, husband and wife, and
the marital community composed
thereof,
Respondents,

CASE # 71502-0-1

[King County Superior Court
Case # 12-2-11952-0 KNT]

APPELLANTS'
OPENING BRIEF

Helmut Kah, Attorney at Law
16818 140th Avenue NE
Woodinville, WA 98072-9001
Phone: 425-949-8357
Fax: 425-949-4679
Cell: 206-234-7798
Email: Helmut.Kah@att.net
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

 State Cases ii

 State Statutes..... iii

 Court Rules iii

I. Introduction.....1

II. Assignments of Error3

III. Issues Pertaining to Assignments of Error.....5

IV. Statement of the Case7

V. Argument and Authorities.....15

VI. Attorney Fees25

VII. Conclusion27

TABLE OF AUTHORITIES

State Cases

Baker-Boyer National Bank v. Hughson, 5 Wash. 100,
31 P. 423 (1892)17

Bingham v. Lechner, 111 Wn. App. 118, 127, 45 P.3d 536 (2002)16

Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.,
126 Wn. App. 352, 358, 110 P.3d 1145 (2005)16

Brundridae v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441,
191 P.3d 870 (2008)17

Edwards v. Petrone, 160 Wis.2d 255, 465 N.W.2d 847, 848 (1990),
review denied, 471 N.W.2d 510 (1991)21

Felt v. McCarthy, 130 Wn.2d 203, 211-12, 922 P.2d 90 (1996)20

<i>Felton v. Menan Starch Co.</i> , 66 Wn.2d 792, 797, 405 P.2d 585 (1965)	19
<i>Forest Marketing Enterprises, Inc. v. State, Department of Natural Resources</i> , 125 Wn.App. 126, 132 – 133, 104 P.3d 40 (Wash.App., Div. 2, 2005)	18, 19
<i>M.A. Mortenson Co., Inc. v. Timberline Software Corp.</i> , 140 Wn.2d 568, 998 P.2d 305 (2000)	22
<i>McKenzie v. Oregon Imp. Co.</i> , 5 Wash. 409, 31 P. 748 (1892)	17
<i>Queen City Sav. & Loan Ass'n v. Manhalt</i> , 111 Wn.2d 503, 760 P.2d 350 (1988)	18
<i>Roberts, Jackson & Assoc. v. Pier 66 Corp.</i> , 41 Wash.App. 64, 69, 702 P.2d 137 (1985)	18
<i>Scott v. Bourn</i> , 13 Wash. 471, 43 P. 372 (1896)	17
<i>Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.</i> , 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993)	19
<i>State v. Hill</i> , 123 Wn.2d 641, 644, 870 P.2d 313 (1994)	16
<i>State v. Lew</i> , 156 Wn.2d 709, 733, 132 P.3d 1076 (2006)	16
<i>State v. Ross</i> , 106 Wn. App. 876, 880, 26 P.3d 298 (2001)	16, 17
<i>State Bank of Clarkston v. Morrison</i> , 85 Wash. 182, 147 P. 875 (1915)	17
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wash.2d 250, 254, 510 P.2d 221 (1973)	18
<i>Sunnyside Valley Irr. Dist. v. Dickie</i> , 149 Wn.2d 873, 879, 73 P.3d 369 (2003)	15
<i>Tanner Elec. Co-op. v. Puget Sound Power & Light Co.</i> , 128 Wn.2d 656, 674, 911 P.2d 1301 (1996)	19
<i>Vancouver Nat'l Bank v. Katz</i> , 142 Wash. 306, 313, 252 P. 934 (1927)	20
<i>Wm. Dickson Co.</i> , 128 Wn.App. at 493	19

Wilson Court Ltd. v. Tony Maroni's, Inc., 134 Wn.2d 692,
698, 952 P.2d 590 (1998)16

State Statutes

RCW 4.84.18526, 27
RCW 19.40.03122
RCW 62.A2-20421, 22
RCW 62A.30323

Court Rules

CR 1125, 27
RAP 18.927

Appendix

Promissory Note1
Cashier's Check2
Purchase and Sale Agreement 3 - 4
Bill of Sale 5 - 6

I. Introduction

Appellants Ron and Barrie Behrmann, husband and wife, bought the Seattle Sun tanning salon business in 1996 after Barrie retired from 35 years employed at the Boeing Company. (RP 26 l. 2 – 20) They operated the business for eleven years until early 2007. In early 2007, after Barrie became too ill to continue working, respondent Frank D'Aprile offered to buy the Seattle Sun business for \$85,000. (RP 28 l. 1 to 30 l. 20).

Four documents reflect D'Aprile's purchase of the Behrmanns' Seattle Sun tanning salon business:

- D'Aprile's \$50,000 promissory note dated March 3, 2007 (the "Note") (Ex 7)
- D'Aprile's \$35,000 cashier's check dated February 28, 2007 (Ex 6); and
- Purchase and Sale Agreement dated February 28, 2007 (Ex 4);
- Bill of Sale dated February 28, 2007 (Ex 5);

The Purchase and Sale Agreement, Bill of Sale, and the Note were all prepared by the Behrmanns' daughter based on documents she found on the internet.

The Note recites as follows:

\$50,000.00
Principal amount

3-3-2007
Dated

State of **WASHINGTON** County of **KING**

For value received, the undersigned hereby jointly and severally promise to pay to the order of **BARRIE BEHRMANN** and **RON**

BEHRMANN the sum of **FIFTY THOUSAND** dollars (**\$50,000.00**) together with interest thereon at the rate of 2 % per annum on the unpaid balance. Said sum shall be paid in the following manner.

Amount to be paid in full on or before **MARCH 31, 2012**.

This note may be prepaid at any time, in whole or in part, without penalty.

(Ex 7; CP 7) D'Aprile signed the Note twice, both as borrower and as guarantor. His signatures were observed by a salon patron who signed the Note as a witness. (Ex 7; CP 7; App p. 1) (RP 49 l. 19 to 58 l. 22).

D'Aprile made no payments on the Note. (CP 12 l. 7 – 11). When the Note came due and payable in full on March 31, 2012, Ron contacted D'Aprile and asked for payment. (RP 44 l. 8 -9; RP 122 l. 19 to 123 l. 2) D'Aprile did not pay. The Behrmanns filed this lawsuit on April 6, 2012. (RP 44 l. 15 to RP 46 l. 5; CP. 3 - 7)

D'Aprile answered the complaint on April 18, 2012 (CP 8 – 9) and filed an amended answer and affirmative defenses on June 5, 2012 (CP 11 – 13). Both his original answer and amended answer admit that D'Aprile signed the Note on March 3, 2007, that the copy attached to the complaint is a true copy of the Note, and that he made no payments on the Note. (CP 9 l. 2 - 6; CP 12 l. 7 – 11)

D'Aprile's affirmative defenses include the parole evidence rule, the statute of frauds, lack of consideration, and failure of consideration.

After a non-jury trial the court denied relief to the Behrmanns, stating at Conclusion of Law no. 2 that

“The promissory note dated March 3, 2007 is not enforceable for lack of consideration.”
(CP 78 – 81)

The trial court entered judgment dismissing the Behrmanns’ claims with prejudice and awarding D’Aprile judgment of \$519.96 for costs and statutory attorney’s fees. (CP 82 – 83)

Behrmanns timely appealed to this court.

II. Assignments of Error

1. Appellants assign error to **Finding of Fact no. 2** which states:

“Plaintiffs and Mr. D’Aprile entered into a purchase and sale agreement for the business known as Seattle Sun on February 28, 207 (sic). Plaintiff’s daughter Lisa Hale drafted the purchase and sale agreement and related documents on Plaintiffs’ behalf and at Plaintiffs’ request. The contract provided for a purchase price of \$35,000 and set the closing date for February 28, 2007. The contract did not contain any reference to a promissory note or to a price greater than \$35,000.”

2. Appellants assign error to the second sentence of **Finding of Fact no. 3** which states:

“[T]he Behrmanns executed a Bill of Sale with the attached schedule listing the assets of the business that were sold (tanning beds, equipment, supplies, inventory, and goodwill) and providing the total value of \$35,000 for the assets sold.”

3. Appellants assign error to **Finding of Fact no. 4** which states:

“Plaintiff’s testimony that the purchase price for the business was \$85,000 and was to be paid \$35,000 at closing and \$50,000 under the promissory note contradicts the plain language of the purchase and sale agreement. The contract does not state that the \$35,000 was a down payment and that an additional amount would be paid under a promissory note.”

4. Appellants assign error to **Finding of Fact no. 6**, which states:

“The fair market value of the business as of the closing date was equal to or less than \$35,000.”

5. Appellants assign error to the last sentence of **Finding of Fact no. 7**, which states:

“The note did not reference the purchase and sale contract, nor did it provide for any payment terms other than a maturity date.”

6. Appellants assign error to the second sentence of **Finding of Fact no. 9**, which states:

“The Court found Mr. Hautala’s testimony as to what he heard when the promissory note was signed to be less credible than other evidence presented.”

7. The trial court erred in entering **Conclusion of Law no. 1** which states that:

“The purchase and sale agreement, promissory note, and related documents must be construed against Plaintiffs as the drafters of the documents.”

8. The trial court erred in entering **Conclusion of Law no. 2** which states that:

“The promissory note dated March 3, 2007 is not enforceable for lack of consideration. ”

9. The trial court erred in entering **Conclusion of Law no. 3**

which states that:

“Plaintiffs’ testimony that the parties agreed to a purchase price of \$85,000 is not supported by the evidence.”

10. The trial court erred in entering **Conclusion of Law no. 4**

which states that:

“The promissory note is unenforceable and Mr. D’Aprile has no obligation to the Behrmanns. Plaintiffs’ clam should be dismissed with prejudice . Defendant is entitled to an award of costs and statutory attorney fees as the prevailing party in this action. Judgment should be entered in accordance with these findings and conclusions.”

11. The trial court erred in entering the Judgment filed December 23, 2013, dismissing the plaintiffs’ claims and awarding judgment for costs and statutory attorney’s fees to defendant.

III. Issues Pertaining to Assignments of Error

The written documents for the 2007 sale of the Behrmanns’ family business to D’Aprile consist of (1) a Purchase and Sale Agreement and a Bill of Sale, both inartfully drafted by the Behrmanns’ daughter who has no legal training, (2) D’Aprile’s \$35,000 cashier’s check given in part payment of the purchase price, and (3) D’Aprile’s unconditional \$50,000 promissory note for the balance of the purchase price which was given to the Behrmanns three days after the date of items (1) and (2). D’Aprile

admits in his testimony at trial that he agreed to pay the purchase price part in cash (the cashier's check) and part with a \$50,000 promissory note. The seller husband Ron Behrmann testified that the purchase price was \$85,000 that D'Aprile agreed to pay with a \$35,000 cashier's check and a \$50,000 promissory note. D'Aprile in fact paid in that manner and in those amounts. Due to ambiguity in the inartfully drafted Purchase and Sale Agreement and Bill of Sale, D'Aprile urges that the promissory note, which he gave only three days after the other transaction documents were signed, is not part of the transaction and, therefore, is not supported by consideration. Alternatively, D'Aprile urges that although the promissory note is by its terms unconditional, its standard language "for value received" means that his obligation to pay the note is contingent on the earnings of the business under his management and control. When the note became due and payable in full five years after it was executed, D'Aprile did not pay.

Under the context rule, in viewing the parties' contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, and the reasonableness of the respective interpretations advocated by the parties:

1. What was the agreed price for the Behrmanns' sale and D'Aprile's purchase of the Seattle Sun tanning business? Was the price \$35,000 as D'Aprile contends or \$85,000 as the

Behrmanns' contend? (Assignments of Error no. 1, no. 2, no. 3, no. 6, no. 7, no. 8, no. 9, no. 10, and no. 11.)

2. Is the promissory supported by consideration or, in other words, is the note unenforceable for lack of consideration? (Assignments of Error no. 1, no. 2, no. 3, no. 4, no. 5, no. 6, no. 7, no. 8, no. 10, and no. 11)

IV. Statement of the Case

Barrie Behrmann retired in 1995 after working 35 years for the Boeing Company. (RP 26 l. 2 – 9) Ron and Barrie Behrmann purchased the Seattle Sun tanning salon in January 1996 for Barrie to have something to do after retirement. (RP 26 l. 2- 20) They operated the tanning salon for 11 years until January 2007 when Barrie became too ill to continue working. (RP 28 l. 1 to RP 29 l. 17).

Frank D'Aprile had been a regular customer at the Seattle Sun tanning salon since 1989. (RP 27 l. 2 – 25; RP 133 l. 21 to 134 l. 22) D'Aprile met Ron Behrmann at the salon in the early '90s. They became good friends. They socialized together, had season tickets and box seats at the Mariners and Seahawks stadiums in Seattle. They would get together socially about once a month, for holidays, sports events, and special occasions. (RP 24 l. 20 to 25 l. 20; RP 27 l. 15 – 25; RP 106 l. 3 to 108 l. 4)

When the Behrmanns owned the salon, D'Aprile tanned there an average of two to three times per week, as he had done since 1989, and less frequently after he installed a tanning bed at his home . (RP 133 l. 21 to 134 l. 22) Behrmanns gave D'Aprile a key to the salon. He used the salon after closing at night and before opening in the morning, sometimes at 2:00 or 3:00 a.m. before he went to work. (RP 27 l. 2 – 10; RP 69 l. 4 – 16; RP 76 l. 15 to 23; RP 107 l. 20 – 108 l. 4)

D'Aprile worked at the salon on occasion, at the front desk, putting patrons in their tanning bed, “filled in”, and had access to the customer logs and records. (RP 27 l. 11 – 14; RP 29 l. 18 – 21; RP 68 l. 16 – 25; RP 107 l. 10 – 19; RP 127 l. 5 – 15) He was very familiar with the salon’s operations, having been a dedicated and frequent customer since 1989.

When Barrie Behrmann fell ill in January 2007, D'Aprile told Lisa Hale, the Behrmanns’ daughter, he is interested in buying the business. Lisa told D'Aprile to talk to her father. (RP 29 l. 22 to 30 l. 10; RP 61 l. 5 to 62 l. 5; RP 110 l. 6 – 14). D'Aprile spoke with Ron by phone and offered \$85,000. Ron followed by having a family discussion with Lisa and Barrie about D'Aprile’s offer. They decided to accept his offer of \$85,000. (RP 30 l. 11 – 20; RP 62 l. 19 to 62 l. 12)

Ron subsequently met with D'Aprile at Angelo's restaurant in Burien to discuss D'Aprile's offer. D'Aprile said he could not come up with cash for full payment of the \$85,000 purchase price. They agreed that D'Aprile would pay \$35,000 by cashier's check and give a \$50,000 promissory note for the balance. No papers were signed at that meeting. (RP 30 l. 21 to 32 l. 11)

On Wednesday, February 28, 2007, a month after the meeting at Angelo's restaurant, D'Aprile met with Ron and Barrie at their home. At this meeting, D'Aprile gave Behrmanns his \$35,000 cashier's check and all three signed a Purchase and Sale Agreement (Ex 4) and a Bill of Sale (Ex 5). Lisa had not yet drafted the promissory note.

Neither party had a lawyer for the transaction. All documents were prepared by Lisa Hale, the Behrmanns' daughter, a non-lawyer, who found form documents on-line through a Google search. (RP 32 l. 12 to 33 l. 15; RP 63 l. 17 to 68 l. 15; RP 71 l. 1 to 72 l. 17)

The parties agreed that Ron would meet with D'Aprile at the salon on Saturday morning, March 3, 2007, where D'Aprile would sign the \$50,000 promissory note and receive his copy of the documents signed at the Behrmanns' home on February 28. As agreed, Ron went to the salon and met with D'Aprile on Saturday morning March 3, 2007. He brought the unsigned promissory note, and D'Aprile's copy of the

documents signed February 28. (RP 33 l. 16 to 34 l. 12; RP 36 l. 25 to 38 l. 8)

A salon patron, Donald K. Hautala, came to the salon while Ron and D'Aprile were meeting in the morning of March 3. Mr. Hautala signed the Note as witness to D'Aprile's signatures on the Note. D'Aprile told Mr. Hautala the Note was his final payment for the salon, \$50,000, plus the \$35,000 cashier's check (RP 38 l. 9 to 39 l. 25; RP 50 l. 11 to 58 l. 15), and also that he was buying the salon from the Behrmanns, the purchase price was \$85,000, and the \$50,000 Note was to complete the sale. (RP 52 l. 13 to 53 l. 1; RP 56 l. 25 to 57 l. 23)

D'Aprile made no payments on the Note between March 3, 2007, and March 31, 2012. (CP 12 l. 7 – 11) Behrmanns heard little to nothing from D'Aprile during the five years after March 3, 2007. When the March 31, 2012 due date of the Note arrived, Ron phoned D'Aprile to discuss payment. (RP 44 l. 8 -9; RP 122 l. 19 to 123 l. 2) D'Aprile responded that he knows he owes it but he does not have the funds to pay the Note. (RP 44 l. 15 to RP 46 l. 5)

After default, D'Aprile made no arrangements to pay the Note. The Behrmanns were left with no alternative but to file this lawsuit (CP 3 - 7) to enforce payment.

D'Aprile asserts several affirmative defenses including lack of consideration and failure of consideration. (CP 11 – 13) None is supported by credible evidence. The note is unconditional. It recites that it is given "*for value received*". (Ex 7)

The Purchase and Sale Agreement (Ex 4) has no language that resembles an integration clause. It expressly states in the opening recitals that it is made "*in consideration of the mutual agreements, covenants, and conditions contained herein and for other good and valuable consideration*".

D'Aprile's own statements to Mr. Hautala on March 3, 2007, establish that the \$50,000 Note is supported by valuable consideration, i.e. the Behrmanns' transfer to D'Aprile of their Seattle Sun tanning for \$85,000.(RP 36 l. 25 to 38 l. 8) Ron testified that:

He [D'Aprile] offered the 85,000, but he told me he couldn't come up with the total, that he would give 35,000 in cashier's check and a note for the other 50,000. And I said 'OK'
(RP 31 l. 9 – 14)

D'Aprile admits that the \$50,000 Note was part of his agreed means for paying the purchase price of the business, together with the \$35,000 cashier's check:

Q. So at the meeting that you and Mr. Behrmann had at Angelo's Restaurant --
A. Yes.

Q. You talked about the cash payment and you also talked about the promissory note, correct?

A. Yes.

Q. That's just a yes or no question. Yes?

A. I said yes.

Q. All right. And you talked about the promissory note being in the amount of \$50,000, correct?

A. That's what he presented, yes.

(RP 141 l. 24 to 142 l. 9)

D'Aprile further admitted, as follows, that the Note was for purchase of the tanning salon business from the Behrmanns:

Q. * * * but was anyone else present in the salon?"

A. Yeah, Don showed up. We were, you know, doing our business talk about this. Don showed up and so the conversation changed and it became, you know, just small talk, you know, joking with Don just like the shop always does with things. And small talk was running out so it was time, you know, for Don to go in and tan and Ron said, 'Well, let's get our paperwork taken care of.' And knew that there was this note to sign and we needed Don as a witness, which he agreed to, **and literally his involvement with it was knowing that it was something to do with the salon and the purchase that we had talked about.** And leaned up to the desk after I signed it, he signed his names standing up, took all of 30 seconds. Put him in to tan."

"Q. And then he went into a tanning room?

A. Mm-hmm.

Q. Did you tell -- did you say anything about the purchase price?

A. No, we didn't talk about the specifics of the sale. **We talked about me buying it and that I was the new owner and, you know, Don had already heard that prior to, we had a whole month just about while I had prepared the loan and that I was planning on buying it.** So he already kind of knew that I was."

(emphasis in bold added)
(RP 118 l. 5 to 119 l. 4)

The above quoted evidence at trial conclusively establishes that the Note was given “for value” and is part of the consideration paid by D’Aprile for the Seattle Sun tanning salon.

D’Aprile was critical of how the Behrmanns operated the salon. He testified he believes he could run it better than the Behrmanns had been doing:

Q. What was the condition of the building, the premises after you started running the business?

A. Not up to my standards * * *.”
(RP 120 l. 3 - 5)

Q. So it's a fairly simple matter to calculate how much potential revenue you could generate at that salon, correct?

A. If you were to fill the bed every day with tanners. The question is how do you get the tanners to the salon?

Q. Sure.

A. How do you rebuild the reputation.

Q. Rebuild the reputation? Was there something wrong with the reputation?

A. Well, cleanliness is one of why customers don't come back.

Q. All right. So you knew that, so in your mind --

A. I could do better.

Q. The manner in which the Behrmanns operated the salon in an uncleanly manner limited the amount of

people who wanted to go there and tan, as opposed to some place else; is that your testimony?

A. It's a possibility.

Q. And you had been a regular customer of that salon since, was it 1989?

A. Fair to say.

(RP 133 l. 5 - 23)

Q. All right. So you felt that the Behrmanns weren't operating the salon in --

A. I didn't like seeing the dirt coming from the fans as a customer.

Q. Dirt coming from what?

A. The fans.

Q. What are you saying? What fans?

A. The fans that were cooling you on your bed.

Q. And so you felt that the dirt from the fans and the uncleanliness of the beds reduced the amount of customer patronage?

A. Possible.

Q. Possible or likely?

A. Probable.

Q. Probable. When did you first notice that condition?

A. Can't tell you for sure. Maybe, I don't know, 2000, 2001, you know, they had owned it for a few years, they started slacking on some of the things.

Q. What was the condition like before they bought it? Was it about the same as you're describing?

A. No, probably worse.

Q. Even worse?

A. You had Sid and Lola that ran it.

(RP 134 l. 23 to 135 l. 20)

Q. So really on this question of performance of the business, isn't it true, Mr. D'Aprile, that the performance of this business is entirely dependent on how it's operated by its owners?

A. Any business would be.

Q. And you terminated your relationship with the Behrmanns four or six months after you acquired the salon, correct?

A. I said six or seven is what I said.

Q. Six or seven, all right. And so without doubt from that point forward how that business performed was entirely within your control?

A. Well, it was in my control from the beginning. I was the owner.

Q. I would agree with that. Thank you.

A. Okay. Well, that's with any business.

(RP 156 l. 19 to 157 l. 8)

V. Argument and Authority

Standard of Review:

The findings of fact are critical to the resolution of whether there was a contract. The findings are reviewed to determine whether substantial evidence exists to support them. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)

Challenged findings and conclusions are reviewed by determining if substantial evidence supports the findings and if the findings in turn

support the conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *State v. Lew*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). It is defined as a "quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Where the parties dispute a legal conclusion resulting from the facts, and not the facts themselves, the issue is decided as a matter of law. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358, 110 P.3d 1145 (2005).

Questions of law are reviewed de novo. *Wilson Court Ltd. v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998).

The court reviews de novo the trial court's conclusions of law to determine if they are supported by the findings of fact. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 536 (2002)

The application of the law to the facts is a question of law and subject to de novo review. *Brundridae v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 870 (2008)

Burden of Proof:

The burden of proof is upon the party asserting lack or failure of consideration. *State Bank of Clarkston v. Morrison*, 85 Wash. 182, 147 P. 875 (1915); *Scott v. Bourn*, 13 Wash. 471, 43 P. 372 (1896); *McKenzie v. Oregon Imp. Co.*, 5 Wash. 409, 31 P. 748 (1892); *Baker-Boyer National Bank v. Hughson*, 5 Wash. 100, 31 P. 423 (1892) D'Aprile has not met his burden of proof.

The record establishes that D'Aprile's unconditional \$50,000 promissory note was given as the non-cash portion of his agreed \$85,000 purchase price for the business. The Purchase and Sale Agreement (Ex 4), the Bill of Sale (Ex 5), D'Aprile's \$35,000 cashier's check (Ex 6), and the Note (Ex 7), are a single transaction. D'Aprile argued that the court cannot consider the Note he gave on Saturday, March 3, 2007, because it is not mentioned in the inartfully drafted Purchase and Sale Agreement (Ex 4) or Bill of Sale (Ex 5) The record shows that D'Aprile himself testified that he gave the Note as part of his agreed payment for the business.

D'Aprile's trial brief contends that the transaction documents are ambiguous and therefore must be construed against the drafters:

“Any ambiguity in a written contract must be construed against the drafter.” *Queen City Sav. & Loan Ass'n v. Manhalt*, 111 Wn.2d 503, 760 P.2d 350 (1988).
(CP 24 I. 11)

The law is otherwise. A contract is not construed against the drafter where the intent of the parties can be ascertained:

“But we do not always construe ambiguous contracts against the drafter:

“[d]etermination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

“If, after viewing the contract in this manner, the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter.

Roberts, Jackson & Assoc. v. Pier 66 Corp., 41 Wash.App. 64, 69, 702 P.2d 137 (1985) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 254, 510 P.2d 221 (1973)).

Here, viewing the contract as a whole and in context, we can determine the parties' intent. Thus, we need not construe the contract against DNR. *Forest Marketing Enterprises, Inc. v. State, Department of Natural Resources*, 125 Wn.App. 126, 132 – 133, 104 P.3d 40 (Wash.App., Div. 2, 2005)

The finder of fact must discern the parties' intent in order to interpret the contract. *Wm. Dickson Co.*, 128 Wn.App. at 493 (as a general rule, the parties' intent is a question of fact); see also *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) ("The touchstone of contract interpretation is the parties' intent."). Under the "context rule", the fact finder determines the contracting parties' intent by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.' " *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993) (quoting *Berg*, 115 Wn.2d at 663, 667). If, after viewing the contract in this manner, the fact finder cannot determine the parties' intent, it may construe the remaining ambiguities against the drafter. *Felton v. Menan Starch Co.*, 66 Wn.2d 792, 797, 405 P.2d 585 (1965); *Forest Mktg. Enter., Inc. v. Dep't of Natural Res.*, 12 Wn.App. 126, 132-33, 104 P.3d 40 (2005).

The Purchase and Sale Agreement ("PSA") (Ex 4) contains no integration clause. It does not purport to be an integrated contract. The 3rd paragraph on page 1 of the PSA recites:

“Based on the foregoing, and in consideration of the mutual agreements, covenants, and conditions contained herein, **and for other good and valuable consideration**, the receipt of which is hereby acknowledged, the Parties hereby agree as follows:”
(Emphasis in **bold** added)

The \$50,000 March 3, 2007, Promissory Note is unconditional. It recites that it is given “for value received.” It is signed by D’Aprile in two places, once as maker and then as guarantor. Both signatures were witnessed by Don Hautala in D’Aprile’s presence and at his request. D’Aprile stated in Mr. Hautala’s presence that the note is for the balance of the \$85,000 purchase price. (RP 38 l. 9 to 39 l. 25; RP 50 l. 11 to 58 l. 15; RP 52 l. 13 to 53 l. 1; RP 56 l. 25 to 57 l. 23)

As between the maker and the payee, a promissory note is but a simple contract to pay money. *Felt v. McCarthy*, 130 Wn.2d 203, 211-12, 922 P.2d 90 (1996); *Vancouver Nat’l Bank v. Katz*, 142 Wash. 306, 313, 252 P. 934 (1927). D’Aprile’s purchase of the salon business was complete when the Behrmanns transferred the business to D’Aprile in exchange for the \$35,000 cashier’s check and the \$50,000 promissory note execution of which was delayed by just three days. All promises were fulfilled on the morning of March 3, 2007, and nothing remained to be done after that date. All of the acts necessary to give rise to D’Aprile’s obligation -- a transfer of the business and all its assets and his promise to

pay represented by the Note -- had been performed. See *Edwards v. Petrone*, 160 Wis.2d 255, 465 N.W.2d 847, 848 (1990), review denied, 471 N.W.2d 510 (1991), where the payor of a promissory note, Petrone, refused to pay the remainder of the note to the payee, Edwards, and claimed the affirmative defenses of failure of consideration and accord and satisfaction. In holding that the defense of failure of consideration was not available to the payor, the court noted that an executed contract is a contract in which all promises have been fulfilled and nothing remains to be done, while an executory contract is one in which the parties have bound themselves to future activity that is not yet completed. *Id.* The court concluded:

The promissory note from Petrone to Edwards is an executed contract. Edwards delivered \$50,000 to Petrone and Petrone, in exchange, gave his written [922 P.2d 95] promise, the promissory note, to repay the money. Promises were exchanged and nothing more had to be done to complete the contract. The requirement that Petrone make payments does not make the promissory note an executory contract. All of the acts necessary to give rise to Petrone's obligation--a delivery of money and a promise to repay--have been performed. *Id.* (citations omitted). See also *Hotchkiss v. James*, 65 N.E.2d 161, 163 (Ohio App.1945) ("Therefore at the moment the note was delivered to the plaintiff the obligation of defendant under the contract was fully performed.")

RCW 62.A2-204 allows a contract to be formed 'in any manner sufficient to show agreement. . . even though the moment of its making is

undetermined,' *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*,
140 Wn.2d 568, 998 P.2d 305 (2000). RCW 62A.2-204 regarding
formation of a contract, provides:

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

The Uniform Fraudulent Transfers Act, RCW 19.40.031, contains a definition of "value" as follows:

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied,
* * * ."

(b) [omitted]

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

[1987 c 444 § 3.]

The Behrmanns gave value in exchange for D'Aprile's obligation by transferring the salon business, which is "property", to D'Aprile. The transfer was substantially contemporaneous.

RCW 62A.303 provides:

(a) An instrument is issued or transferred for value if:

(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration.

The language of the Note is clear. It contains no fine print. Its amount, date, rate of interest, and due date are all written in bold black ink. D'Aprile read it. He signed it in the presence of independent witness Don Hautala. D'Aprile expressed no misunderstanding of the language of the promissory note. He did not express a belief that it meant anything other than the ordinary meaning of the plain language on its face. The Note is plainly supported by consideration and should be enforced according to its clear, plain and unambiguous terms.

D'Aprile called Cary Deaton, an economist, as an expert witness to give an opinion regarding the value of the tanning salon business at the time he purchased it. (RP 161 – 178) Mr. Deaton's valuation is based solely on the income (loss) reported on the Behrmanns' federal income tax return Schedules C, and is irrelevant. No valuation was performed when D'Aprile purchased the business in 2007. Behrmanns made no representations of value or income under their operation of the business. D'Aprile did not rely on any representations of value or income of the business in going forward with the purchase. D'Aprile does not contend that the Behrmanns made any such representations upon which he could have reasonably relied. D'Aprile testified that he asked to see the Behrmanns tax returns before purchasing the business and that the Behrmanns did not provide them. D'Aprile admitted at his deposition that he had never asked the Behrmanns to set up a meeting at which he can look at the books and records and tax returns:

Page 25, beginning at line 6 through line 14:

"Question: Well, isn't it true that Ron offered to show you the books, the records, tax returns?"

Answer: No, he offered, and when I asked he said, "Oh, yes, yes, I'll show them to you." He never, ever produced them, never followed through.

Question: Did you ever say, "Hey, Ron, let's set up a meeting at which I can look at the books and records and tax returns?"

Answer: Not specifically."

(RP 182 I. 14 – 23)

Though Mr. Deaton's testimony was enlightening in terms of his valuation process, it is irrelevant since there was no valuation, no representation of value, and no representation of income made to D'Aprile when he purchased the business in 2007.

The Purchase and Sale Agreement states, inter alia, at paragraph 6(a)(iii) as to each party that "*Such party has made an investigation of the facts pertaining to this Agreement, and all matters pertaining thereto, as the party deems necessary.*" Based on his own testimony, D'Aprile did not consider a review of the books, records, and tax returns to be an important factor in his decision to buy the business.

VI. Attorney Fees

Appellants requests an award of expenses and attorney fees on the following grounds:

Plaintiffs' counsel issued a CR 11 safe harbor warning at the outset of this case in the trial court. Defendant did not heed the warning. Appellants ask this Court to award expenses and reasonable attorney fees against respondent under CR 11 on this appeal because respondent's position both in the trial court and on this appeal is frivolous and legally and factually baseless and is advanced in a continuing mendacious effort to avoid his obligation to the plaintiffs.

The record shows that the three transaction documents, the Purchase and Sale Agreement, Bill of Sale, and Promissory Note, are part of respondent's purchase of the Seattle Sun tanning salon for \$85,000 in a single transaction. It is immaterial that two of the three documents were executed on Wednesday and the third was executed on Saturday two days later. As the Note itself recites, it was given "for value received" and is thus supported by consideration.

In addition, appellants requests an award of their reasonable expenses and attorney fees under RCW 4.84.185 which provides that the prevailing party is to receive expenses for opposing a frivolous action or defense:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

Neither CR 11 nor RCW 4.84.185 are listed among the rules and statutes in RAP 18.22(b) that are superseded by the Rules of Appellate Procedure.

Behrmanns further request an award on appeal under RAP 18.9.

VII. Conclusion

The record shows that D'Aprile executed the promissory note on March 3, 2007 of his own free will, without any threats, coercion, undue influence, misrepresentations, or fraud practiced upon him. D'Aprile admitted that he executed the Note, that he did so in the presence of an independent witness, and that he has made no payments on the Note. The record shows that the Note was issued for value and is supported by adequate consideration.

Wherefore, Appellants respectfully ask this Court to:

1. Reverse the trial court's order of dismissal;
2. Reverse the trial court's award and judgment of costs and statutory attorney fees against Behrmanns;
3. Remand this matter to the trial court with instructions that judgment be entered for plaintiffs Behrmanns against defendant D'Aprile according to the terms of the March 3, 2007, promissory note (Ex 7);

4. Award the Behrmanns their costs, expenses and reasonable attorney fees on this appeal;

5. That the Behrmanns be awarded their costs, expenses and reasonable attorney fees in the trial court.

Dated this 15th day of August, 2014.



Helmut Kah, WSBA # 18541
Attorney for Appellants

Promissory Note

\$ 50,000.00
Principal amount

3-3-2007
Dated

State of WASHINGTON County of KING

For value received, the undersigned hereby jointly and severally promise to pay to the order of BARRIE BEHRMANN and RON BEHRMANN the sum of FIFTY THOUSAND dollars (\$50,000.00) together with interest thereon at the rate of 2 % per annum on the unpaid balance. Said sum shall be paid in the following manner.

Amount shall be paid in full on or before MARCH 31, 2012.
This note may be prepaid at any time, in whole or in part, without penalty.

Signed in the presence of:

Daniel K. Havel
Witness

[Signature]
Borrower

Witness

Borrower

Guarantee

We, the undersigned, jointly and severally guarantee the prompt and punctual payment of moneys due under the aforesaid note and agree to remain bound until fully paid.

In the presence of:

Daniel K. Havel
Witness

[Signature]
Borrower

Witness

Borrower

PURCHASE AND SALE AGREEMENT

This is an agreement dated February 28, 2007, by and between Ron and Barrie Behrmann, d/b/a SEATTLE SUN ("Seller"), and Frank D'Aprile ("Buyer"), collectively the "Parties".

The Parties have agreed that Buyer will purchase free and clear any liens or encumbrances certain operating assets and inventory presently used in the operations of Seller.

Based on the foregoing, and in consideration of the mutual agreements, covenants, and conditions contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Assets to be purchased.** Buyer will purchase the trade name, SEATTLE SUN, trademark logo currently registered to Seller, a copy of which is attached hereto as Exhibit A, inventory, tangible assets, including but not limited to, furniture fixtures, equipment, and the goodwill related to Seller's operations.
2. **Purchase and Sale.** The assets shall be purchased as of the closed of business on February 28, 2007 (the "closing date"), all in accordance with the provisions set forth in this agreement. The Seller shall sell, assign, and transfer all of the assets to the Buyer as of the close of business on the closing date on February 28, 2007 (see Exhibit B-Bill of Sale)
3. **Purchase Price.** In consideration for the sale of the assets, the Buyer agrees to pay and the Seller agrees to accept a cash payment in the amount of \$35,000 (the "Purchase Price").
4. **Assumed Liabilities.** The Seller shall be responsible for any and all claims, demands, liens, causes of action, suits, obligations, controversies, debts, costs, expenses, damages, judgments, and orders of whatever kind or nature, in law, equity, or otherwise, whether known or unknown.
5. **Tax matters.** The parties shall each file all required Federal, state and local income tax returns and related returns. In the event a party does not comply with the preceding sentence, the non-complying party shall indemnify and hold the other party wholly and completely harmless from all cost, liability, and damage that such other party may incur.
6. **Representations, warranties and covenants.**
 - a. **Of each party.** The Seller and the Buyer each hereby represents and warrants to and covenants to each other party that:
 - (i) Such party has the right, power, legal capacity and authority to execute and enter into this Agreement and to execute all other documents and perform all other acts as may be necessary in connection with the performance of this Agreement.

(ii) No approval or consent not heretofore obtained by any person or entity is necessary in connection with the execution of this Agreement by such party or the performance of such party's obligations under this Agreement.

(iii) Such party has made such investigation of the facts pertaining to this Agreement, and all of the matters pertaining thereto, as the party deems necessary.

(iv) Such party relies on the finality of this Agreement as a material factor inducing the party's execution of this Agreement, and the obligations under this Agreement.

(v) To the best knowledge and belief of such party, there are no claims, demands, liens, causes of action, suits, obligations, controversies, debts, costs, expenses, damages, judgments, and orders of whatever kind or nature, in law, equity or otherwise.

b. Additional representation, warranty and covenant of the Seller. The Seller hereby represents and warrants to and covenants to the Buyer that the Seller owns the Assets free and clear of any and all liens, claims, encumbrances, and adverse equities.

7. Noncompetition Agreement. During the 36 month period immediately following the Closing Date, the Seller agrees that he shall not, either as principal, owner, agent, consultant or employee, directly or indirectly engage in any work or other activity that competes with the business was conducted now or in the future, by the Buyer within a five mile radius of Burien.

8. Miscellaneous.

(a) Survival. All of the terms, representations, warranties, and other provisions of this Agreement shall survive and remain in effect after the Closing Date.

(b) Incorporation by Reference. Every exhibit, schedule, and other appendix attached to this Agreement and referred to herein is hereby incorporated in this Agreement by reference.

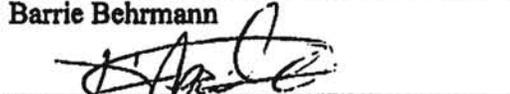
(c) Amendments. Any amendment to this Agreement shall be in writing and executed by each party hereto.

IN WITNESS WHEREOF, the parties hereto have approved and executed this Agreement as of the date first set forth above.

SELLERS:


Rob Behrmann


Barrie Behrmann


Frank D'Aprile

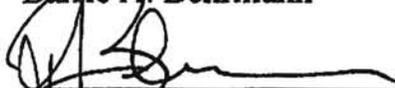
Bill of Sale

Know all by these present: That **BARRIE BEHRMANN** and **RON BEHRMANN**, d/b/a SEATTLE SUN, sole proprietorship ("seller"), for an in consideration of the sum of ~~THIRTY FIVE THOUSAND DOLLARS~~ ^{THIRTY FIVE THOUSAND DOLLARS} **\$35,000.00** paid to seller by **FRANK D'APRILE** (buyer(s)), the receipt and adequacy of which are hereby acknowledged, hereby sells, and delivers unto "buyer(s)" all of the inventory and tangible assets used as a part of or in connection with "sellers" operation including, but not limited to, the furniture, fixtures, equipment and the goodwill related to sellers operation (the "assets") described on schedule "A" attached hereto and incorporated herein by this reference.

To have and to hold all the "assets" unto "buyer(s)", their successors and assigns forever, "seller" hereby represents covenants and warrants to "buyer(s)" that "seller" is the lawful owner of the "assets"; the "assets" are free from all encumbrances and are in good working order; that "seller" hereby agrees to warrant and forever defend title to the "assets" unto "buyer(s)" against the lawful claim and demands of all persons.

Dated as of this date 28th day of FEBRUARY 2007.

Seller: 
Barrie A. Behrmann


R.H. Behrmann

Attachments:
Schedule "A"- description of assets

Schedule "A"

Description of Assets:

Value:

- *Seven tanning beds
- *Equipment/Supplies
- *Inventory
- *Goodwill

<u>18,000</u>	20K
<u>2,000</u>	50
<u>3,000</u>	50
<u>13,000</u>	500
Total Value:	
<u>35,000</u>	20,000