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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN GOWEN and SHELLEY GOWEN, husband and wife, Appellants, v. MICHAEL ERICSON and KAREN ERICSON, husband and wife; COMPANION VETERINARY SERVICES, LLC, a Washington limited liability company, Respondents.	No. 80832-0-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — This case involves the sale of a veterinary clinic between two couples without the involvement of any attorneys and with the use of a contract from an unrelated sale that led to several undisputed errors. Steven and Shelly Gowen (collectively the "Gowens") owned and operated the Companion Pet Clinic (Clinic). The Gowens self-financed the sale of the Clinic to Michael and Karen Ericson (collectively the "Ericsons") who renamed the Clinic the Companion Veterinary Services, LLC (CVS). After the Gowens made accommodations to financially help the Ericsons, the relationship between the sellers and buyers deteriorated.

The Gowens filed a complaint for expectation damages, reformation, specific performance, declaratory relief, interest and costs, and attorney fees and costs. The Gowens alleged the Ericsons and CVS materially breached contracts by failing to make timely payments, failing to provide financial statements, and declaring bankruptcy. After a bench trial, the trial court reformed multiple provisions of the contracts. The trial court also determined the Ericsons did not materially breach the contracts, but it determined the Ericsons did materially breach a personal loan. The Gowens appeal. Because the trial court reformed parts of a contract on untenable grounds and the Ericsons did not provide timely financial statements as they were contractually obligated to do, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

When the Gowens decided to sell the Clinic, they took their time to find a buyer that was the "exact fit." In 2011, the Gowens met the Ericsons and thought they were "really nice."

Steven, using another veterinarian's contracts from the sale of an Oregon clinic as templates, drafted a Business Purchase and Sale Agreement (PSA), Promissory Note (Note), Bill of Sale, and Comprehensive Security Agreement (CSA). At the time Steven created the contracts, the Ericsons had not established the name CVS for the Clinic, so in various places, Steven wrote "Companion Pet Clinic, Clearview, LLC" or "Companion Pet Clinic, LLC."

The Gowens sold the Clinic to the Ericsons as the executive officers for the purchase price of $655,000 plus the value of the inventory and supplies. The PSA provided the Gowens would finance a Business Loan to the "Companion Pet Clinic, Clearview, LLC" for $605,000 with a nine percent interest rate amortized over 30 years. At closing, the Ericsons were to provide a down payment of $50,000.

When the Ericsons said they did not have the money for the down payment, the Gowens, despite Shelley's reluctance, decided to help. The Gowens covered the $50,000 down payment plus $28,424.31 for the cost of the inventory and supplies through the Note. The Note provided that the "Maker," "Companion Pet Clinic, Clearview, LLC," promised to pay the Gowens $78,424.31. The interest rate would be zero as long as the maker paid $6,535 monthly starting on June 1, 2011 with the balance paid in full by April 30, 2012. However, if the Ericsons did not make the payments in accordance with those parameters, the Note bore "interest at the rate of 10 [percent] per annum." The Bill of Sale transferred the Clinic's assets to the "COMPANION PET CLINIC, LLC." The CSA listed the Ericsons as the "Debtor" and listed several events of default and potential remedies.

On April 11, 2011, the parties entered into the PSA and CSA. On May 1, 2011, they executed the Note and Bill of Sale. None of the transactions involved attorneys.

In April 2012, the Note turned into a Personal Loan.[1] Karen approached Steven about the Note and asked for a couple of more months before starting the 10 percent interest. She discussed with Steven the possibility of selling a boarding kennel that the Ericsons owned in New Jersey and using the proceeds from the sale to pay off the Note. Steven anticipated the Ericsons would sell the kennel within a couple of months and then quickly pay off the Note. Steven decided to use the Gowens' personal line of credit to pay off the Note on behalf of the Ericsons so that the Ericsons would not have to pay the 10 percent interest. Steven then gave Karen two receipts dated April 12, 2012 documenting that the Gowens received from the Ericsons the $50,000 down payment and $28,424.31 for a "personal private loan that was given to them in May 2011." Steven gave the Ericsons payment slips from the bank for the line of credit and the Ericsons used the slips to make the monthly payments on the Gowens' line of credit. By doing this, Steven believed the parties agreed to transform the amount owed under the Note to an amount owed as a Personal Loan.

In July 2012, recognizing the Ericsons were "having trouble keeping up with bills in the clinic" and believing the Ericsons would be able to pay off the Personal Loan by either obtaining their own loan with a bank or from proceeds when they sold their kennel, the Gowens again offered to help. Steven emailed

[1] The Ericsons did not cross-appeal the trial court's conclusion that the Ericsons owe the Gowens payment for the Personal Loan.

the Ericsons that they could make payments of just the interest on the Personal Loan.[2] The Ericsons made interest-only payments in July and September.

By October, it was apparent the Ericsons had not sold the kennel, the Ericsons were not able to get their own loan, but the Gowens needed to pay off the line of credit so they could refinance their mortgage. Steven met with and told the Ericsons that their first payment on the Personal Loan would be due on November 1, 2012. The Gowens provided the Ericsons a Personal Loan Statement that specified the outstanding balance was $77,692.66 and the minimum payment due was $200. From then on, the Gowens made monthly payments of only $200.[3]

In May 2013, the Gowens asked to audit CVS's business books. Nothing in the record suggests that the Ericsons permitted the audit. Instead, the Ericsons unsuccessfully sued the Gowens.[4]

On November 23, 2013, the Gowens sent the Ericsons a letter notifying them they were in default of the CSA and demanding they provide missing financial statements:

> You also have not been providing us with monthly and annual financial statements reflecting the activity of the Clinic, as required under paragraph 4(g) of the Comprehensive Security Agreement. While we have not insisted on compliance with this obligation to date they are enforceable under the security agreement you signed

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[2] The Ericsons were never able to sell the kennel and instead later surrendered it in lieu of foreclosure.

[3] The Ericsons stopped making payments when they filed for personal bankruptcy in January 2019.

[4] The Ericsons' suit alleged the Gowens violated the non-compete provision in the PSA. That lawsuit ended in 2017. During the pendency of the lawsuit, the Gowens sent the Ericsons some of the late payment notices via their respective attorneys.

> and notarized and we must demand them to be sent to us now. Given certain allegations in the pending litigation, we feel the need to more closely track the condition of our secured interests, which the financial statements will assist us in doing. This is imperative as we hold the entire note. Therefore, please be advised that your failure to provide the required financial statements constitutes an event of default under the security agreement. We reserve our right to take any action provided for in paragraph 6 of the agreement, or otherwise available at law, if you do not cure this default within 30 days for each previous month and moving forward. Please send the required monthly statements from May 2011 to the current month . . .

Michael testified that he received the letter on or about November 25, 2013. On November 25, the Gowens emailed the Ericsons requesting business loan payments be made timely.

On May 10, 2017, the Gowens again wrote to the Ericsons that the Ericsons had fallen behind on their payments for the Business and Personal Loans.

On September 5, 2017, the Gowens filed a complaint for expectation damages for the Business Loan and Personal Loan, reformation, specific performance of returning the business minus offsets to the Gowens, enforcement of the Note, declaratory relief, interest and costs, and attorney fees and costs. The Gowens alleged the Ericsons and CVS materially breached the PSA by failing to make timely payments on the Business Loan, materially breached the Note, and materially breached the CSA by making late payments and failing to provide financial statements. In addition to their complaint, the Gowens again requested CVS produce financial statements dating back to April 2011.

On January 24, 2018, the Gowens filed a motion to compel discovery of various financial statements. CVS opposed the motion. On February 9, 2018, a commissioner of the Snohomish County Superior Court granted the Gowens' motion and ordered CVS to produce "monthly and annual profit and loss reports and balance sheets."

On January 25, 2019, the Ericsons individually filed for Chapter 13 bankruptcy. Three days later, on January 28, the trial court entered default judgment against the Ericsons and CVS after they failed to appear (hereinafter, "first trial"), apparently believing the bankruptcy filing stayed the trial. After hearings, on February 19, the trial court vacated the judgment and denied the Gowens' motion to reconsider vacating the judgment. The matter proceeded to a second bench trial (hereinafter, "second trial").[5] During the second trial, in addition to the previously stated alleged breaches, the Gowens alleged the Ericsons materially breached the CSA by declaring for bankruptcy.

The trial court reformed multiple provisions in the CSA, found the Ericsons were not personally liable under the contracts, and concluded CVS did not materially default on the Business Loan and sufficiently complied with the CSA.[6]

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[5] The Gowens argue that when the trial court vacated the default judgment, it failed to vacate the findings of fact and conclusions of law, so this court may consider the findings and conclusions on appeal. Nothing in the record suggests that when the trial court issued its second findings and conclusions following the second trial, it relied on its first findings and conclusions supporting the default judgment that it later vacated. We consider only the findings and conclusions entered after the second trial.

[6] Although the trial court identified the party as "The Ericsons" in its Conclusions of Law, the trial court determined CVS is the purchaser of the Clinic and the party to the PSA and CSA.

The trial court did conclude that the Ericsons materially breached the Personal Loan and ordered them to pay the outstanding balance including 10 percent interest starting on November 1, 2012. The trial court found that both parties substantially prevailed on their respective claims, so neither party was the prevailing party entitled to attorney fees. The Gowens appeal.

DISCUSSION

Standard of Review

We review "a trial court's decision following a bench trial by asking whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law." Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712, 334 P.3d 116 (2014). Substantial evidence exists where a rational trier of fact could find the necessary facts by a preponderance of the evidence. Martin v. Smith, 192 Wn. App. 527, 531, 368 P.3d 227 (2016). We do not disturb findings of fact supported by substantial evidence even where there is conflicting evidence. Id. at 532 (citations omitted). We review the application of law to facts and the trial court's conclusions of law regarding contract interpretation de novo. Viking Bank, 183 Wn. App. at 712.

Contract Interpretation

We follow the "objective manifestation theory" of contracts. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). "A valid contract requires the parties to objectively manifest their mutual assent to all material terms of the agreement." P.E. Systems, LLC v. CPI Corp., 176

Wn.2d 198, 219, 289 P.3d 638 (2012). " 'The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.' " Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) (no meeting of the minds where the only material term agreed to was the price) (quoting Blue Mt. Constr. Co. v. Grant City Sch. Dist. 150-204, 49 Wn.2d 685, 688, 306 P.2d 209 (1957)). "If any additional conditions contained in the purported acceptance can be implied in the original offer, then they . . . do not constitute material variances so as to make the acceptance ineffective." Id. at 126. "What constitutes a material variation is dependent upon the particular facts of each case." Id. at 126 (citing Northwest Television Club, Inc. v. Gross Seattle, Inc., 96 Wn.2d 973, 980-81, 640 P.2d 710 (1981)). "[T]he existence of mutual assent or a meeting of the minds is a question of fact." Id. at 126 (citing Multicare Med. Ctr. v. Dep't of Soc. & Health Srvcs., 114 Wn.2d 572, 586 n. 24, 790 P.2d 124 (1990)).

"The purpose of contract interpretation is to ascertain the intent of the parties." Kelley v. Tonda, 198 Wn. App. 303, 311, 393 P.3d 824 (2017). Where a contract contains conflicting terms, we "determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst Commc'ns, Inc., 154 Wn.2d at 503; Green River Valley Foundation, Inc. v. Foster, 78 Wn.2d 245, 249, 473 P.2d 844 (1970) ("In construing an agreement containing a conflict in terms, courts must give effect to the manifest intent of the parties."). Our primary goal is to determine the parties' intent at the time they executed the contract rather than

"the interpretations the parties are advocating at the time of the litigation." Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). "We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." Hearst Commc'ns, Inc., 154 Wn.2d at 503. "Additionally, '[a] contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings.' " Martin, 192 Wn. App. at 532-33 (quoting GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074 (2014)).

Because we recognize the difficulty in interpreting contracts solely by the plain meaning of the words in the document, we apply the "context rule." Hearst Commc'ns, Inc., 154 Wn.2d at 502. Under the context rule, to interpret the intent of the contracting parties, we examine the context surrounding the contract's execution. Id. at 502. If relevant, we may consider:

> (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties.

Kelley, 198 Wn. App at 312 (quoting Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 129 Wn. App. 303, 311, 119 P.3d 854 (2005)). Accordingly, "[c]ontract interpretation is a question of fact when a court relies on inferences drawn from extrinsic evidence," and is a question of law when the court does not rely on extrinsic evidence or only one reasonable inference can be

drawn from the extrinsic evidence. Id. at 312 (quoting Spectrum Glass Co., 129 Wn. App. at 311).

Contract Reformation

"Reformation is . . . employed to bring a writing that is materially at variance with the parties' agreement into conformity with that agreement." Denaxas v. Sandstone Court of Bellevue, LLC, 148 Wn.2d 654, 669, 63 P.3d 125 (2003). A party seeking reformation must prove by clear, cogent, and convincing evidence that the parties made a mutual mistake or committed fraud. Denaxas, 148 Wn.2d at 669. A mutual mistake occurs where the parties had identical intentions at the time they executed the agreement, but the written agreement does not express those intentions. Snyder v. Peterson, 62 Wn. App. 522, 527, 814 P.2d 1204 (1991).

Reformation is also justified where there is a scrivener's error. Id. at 526 (finding reformation to a deficient description in a deed to be appropriate where there is a scrivener's error or mutual mistake). "A scrivener's error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in expressing that intention." Reynolds v. Farmers Ins. Co. of Wash., 90 Wn. App. 880, 885, 960 P.2d 432 (1998); See also *Scrivener's Error*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the "doctrine of scrivener's error" as "[a] rule permitting a typographical error in a document to be reformed by parol evidence, if the evidence is precise, clear, and convincing."). Thus, the party seeking reformation must establish the parties' intentions were identical at the time of the transaction. Denaxas, 148 Wn.2d at 669.

Reformation is an equitable remedy that we review for abuse of discretion. GLEPCO, LLC v. Reinstra, 175 Wn. App. 545, 563, 307 P.3d 744, 751 (2013). A trial court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A. Personal Liability

The Gowens argue the trial court erred in finding CVS liable for the Business Loan and Note under the terms of the PSA and CSA and for not finding the Ericsons personally liable. The Gowens support this argument by reference to the plain language of the CSA. The first page of the CSA provides that "Karen Ericson/Michael Ericson," and the signature block of the CSA provides that "MICHAEL ERICSON, DVM," are the "DEBTOR." The Gowens argue Michael's signature as "DVM" ("Doctor of Veterinary Medicine") is evidence that he did not sign the CSA in his business capacity.

However, other language in the CSA suggests the parties intended the Debtor to represent the purchaser of the Clinic, CVS, and not the Ericsons personally. For example, the CSA states, "Except as may be expressly permitted pursuant to the terms of the [PSA], Debtor is, and at all times hereafter will be the sole owner of the Collateral." The CSA also states, "Debtor will pay prior to delinquency all taxes, liens and assessments of any kind whatsoever levied or assessed against the Collateral, or any part thereof." The Gowens concede the Ericsons signed the PSA in their business capacity. Because the PSA defines

the CVS as the entity purchasing the collateral, these CSA provisions make sense only if CVS is the Debtor.

Furthermore, the CSA's "RECITALS" provide, "By the terms of that Comprehensive Agreement for the [PSA] of the Assets of COMPANION PET CLINIC, LLC . . . , Debtor is acquiring specified Limited Liability Corporation assets used in the operation of that veterinary facility commonly known and described as COMPANION PET CLINIC, LLC." A recital is the "preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, or showing the existence of particular facts." BLACK'S LAW DICTIONARY (11th ed. 2019). Generally, courts may use recitals to aid in contract construction " 'only where there is an ambiguity in the operative portion of the agreement.' " Sethre v. Washington Educ. Ass'n, 22 Wn. App. 666, 670, 591 P.2d 838 (1979) (quoting Brackett v. Schafer, 41 Wn.2d 828, 834, 252 P.2d 294, 297 (1953)). Where the operative language of a contract and the recitals create an ambiguity, courts may consider extrinsic evidence. Id. at 670.

The trial court properly considered the PSA as extrinsic evidence to resolve the discrepancies within the CSA.[7] The PSA provides, "Companion Pet Clinic, Clearview, LLC with executive officers Michael and Karen Ericson

[7] The parties do not dispute whether the trial court could consider extrinsic or parol evidence. Generally, "parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. . . [P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing." Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

('Purchaser') agrees to purchase Companion Pet Clinic, LLC from executive members: STEVEN C. GOWEN, D.V.M. Secretary, and SHELLEY M. GOWEN, President, ('Sellers')." On the signature block, the "Purchaser" is the Companion Pet Clinic, Clearview, LLC by Michael Ericson, D.V.M., and Karen Ericson, Manager. The Gowens transferred the Clinic to the Ericsons who changed the name to CVS after the purchase. The PSA establishes the Ericsons entered the Business Loan on behalf of CVS.

Similarly, the Note and Bill of Sale establish the Ericsons entered into those agreements on behalf of CVS. The Ericsons signed the Note on behalf of the "Maker" the "Companion Pet Clinic, Clearview, LLC." And the Bill of Sale provides "Steven C. Gowen, DVM, secretary, and Shelley M. Gowen, President, ('Sellers'), sells, assigns, conveys, sets over and transfers unto COMPANION PET CLINIC, LLC, a Washington limited liability company ('Buyer'), all of the furniture, fixtures, equipment listed on the attached."

Substantial evidence supports the trial court's finding that any reference to the "Purchaser," "Debtor," or "Maker" was CVS, and the Ericsons signed the CSA, PSA, and Note in their representative capacity on behalf of CVS. Because CVS was the "Purchaser," "Maker," and "Buyer" that acquired the LLC's assets under the PSA, Note, and Bill of Sale, the CSA's recitals make sense only if CVS is the Debtor. So, substantial evidence supports the trial court's finding that the

Ericsons were not personally liable under the CSA. The trial court did not abuse its discretion by reforming the language of the CSA accordingly.[8]

B. Life Insurance

The CSA's life insurance provision provides as an "Event of Default," "The failure of Debtor to continuously provide and maintain in full force and effect the life insurance on the life of LAURA L OLSEN-ERBACH D.V.M., an irrevocable assignment of the proceeds of which is required under the terms of the Agreement for Purchase."[9] The trial court found the CSA "refers to a life insurance policy on the life of 'LAURA L OLSEN-ERBACH D.V.M,' an individual unelated and unknown to CVS or the Ericsons." The trial court found this to be a scrivener's error and reformed the language of the life insurance provision by replacing the name with CVS.

The parties do not dispute that the inclusion of the original name was a scrivener's error. And, the parties both contend the trial court abused its discretion by reforming the language of the life insurance provision by replacing

[8] The Gowens point to a number of additional provisions of the CSA as evidence that it applies to the Ericsons personally: The Gowens argue the fact that the CSA permits the Gowens to assert a lien on the Ericsons' residence is evidence the CSA applies to the Ericsons personally because CVS does not own a residence. However, the lien provision in the CSA lists a residence in Oregon, an obvious holdover from the template contract and unrelated to the Ericsons. The Gowens argue the Event of Default where the Debtor fails to comply with "the Promissory Notes . . . executed by Debtor" is evidence of intent of personal lability. The Gowens argue the fact that the CSA requires the Debtor to provide financial statements of the business, rather than personal financial statements of the Debtor, is evidence of personal liability. For the reasons discussed, these arguments are unpersuasive.

[9] The CSA makes no reference to how CVS should assign the proceeds from the life insurance.

the original name with CVS. We agree. The trial court did not abuse its discretion by removing the reference to the original name. However, the trial court did abuse its discretion by reforming the language of the life insurance provision by requiring the Debtor to provide and maintain *life* insurance on CVS, an entity. This reformation was based on untenable grounds. See Tacoma Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 81, 96 P.3d 454 (2004) ("The doctrine of impossibility and impracticability discharges a party from contractual obligations when a basic assumption of the contract is destroyed and such destruction makes performance impossible or impractical.").

The Gowens request we reverse this error and order the trial court to reform the language of the life insurance provision to replace "CVS" with "Michael Ericson." The Gowens assert the intent of the life insurance provision was to "secure the loan on the Clinic in case Mr. Ericson (doctor of veterinary medicine) passed away while still owing on the loan." The only testimony in the record related to this issue was during direct examination of Karen. Karen testified that CVS "continued the same policies that the Gowens had" and added "Dr. Gowen's name" as a co-benefactor to the business insurance. The record suggests this insurance was related to the Debtor maintaining "business interruption insurance," which is in subsection (1)(f)(x) of the CSA and not the life insurance provision under subsection (1)(f)(xi). The only question asked to any witness directly related to life insurance was when the Gowens' attorney asked Karen if she had life insurance and she said "Yes." Furthermore, the life insurance provision states that it is "an irrevocable assignment of the proceeds of which is

required under the terms of the Agreement for Purchase." The PSA, however, does not reference requiring life insurance.[10]

Based on this record, the trial court did not abuse its discretion by not reforming the language to require CVS to provide and maintain life insurance for Michael Ericson.

C. Lien

Similar to the life insurance provision, the CSA's lien provision provides, "Debtor agrees to execute and permit Secured Party to file a lien on her property at 6570 SW King Blvd., Beaverton, 97008, in the County Recorders Office as additional security for all the secured parties named in the [PSA]." The trial court found, "Paragraph 4J of the CSA refers to an address in Beaverton, Oregon. That address should be reformed to reflect the correct address of 17424 State Route 9 SE Ste. A, Snohomish, Washington 98296." The Snohomish address is the location of CVS and represents leased property.

The parties do not dispute that the Oregon address was a scrivener's error. The parties also do not dispute that because CVS leases its property, the Gowens cannot acquire a lien on it. Thus, this provision as reformed by the trial court is unenforceable.

The trial court did not abuse its discretion by reforming the language of the lien provision by removing the Oregon address. However, the trial court abused

[10] The PSA's insurance provision states: "Purchaser may assume existing insurance, subject to approval of Seller's insurance carrier, or secure new insurance, at purchaser's option. If insurance is assumed, the premium paid by seller shall be pro-rated."

its discretion by replacing the Oregon address, with the address of CVS, which is leased property. The reformation was based on untenable grounds.

The Gowens contend the address should have reflected the Ericsons' personal residence. When asked about the Oregon address during cross examination, Michael said "Dr. Gowen put it in there for some reason. I have no reason why he put it in there."[11] Although Steven testified that he intended the address in the lien provision to reflect the Ericsons' address, based on the record before the trial court, we cannot say the trial court abused its discretion by failing to reform the contract to insert the Ericsons' address in the lien provision.

Breach

"A material breach is one that 'substantially defeats' a primary function of an agreement." 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 724, 281 P.3d 693 (2012). "Substantial performance is said to be the antithesis of material breach; if it is determined that a breach is material, or goes to the root or essence of the contract, it follows that substantial performance has not been rendered, and further performance by the other party is excused." DC Farms, LLC v. Conagra Foods Lamb Weston, Inc., 179 Wn. App. 205, 220, 317 P.3d 543 (2014).

[11] Steven testified that he did change the language in the CSA to reflect the correct parties and addresses but that he forgot to hit save on his computer and did not print out the correct versions before presenting the contracts to the Ericsons.

While the trial court determined that the Ericsons were not credible, it limited that determination only as to one issue: Whether the Personal Loan bore interest and had a payment due date.

"The materiality of a breach, and thereby the issue of substantial performance, is a question of fact." Id. at 221. We review the trial court's findings that the Ericsons did not materially breach the CSA to determine whether substantial evidence supports those findings, and if so, whether those findings support the trial court's conclusions of law and judgment. Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the declared premise. The party challenging a finding of fact bears the burden of showing that it is not supported by the record." Id. at 425 (citation omitted).

Even if a breach is not material, the breach may still give rise to a claim for damages. Restatement (Second) of Contracts § 241 cmt. a (1981); See TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 210, 165 P.3d 1271 (2007).

A. Untimely Payments

The CSA provides as an "Event of Default," "The failure by Debtor to make payment when due of any installment of any indebtedness of Debtor due to Secured Party as required by the terms of the Agreement for Purchase." The CSA also provides,

> Debtor shall not be deemed to be in default under the terms of any of the foregoing provisions (other than the failure to make payment of the indebtedness) for a period not to exceed thirty (30) days, so long as Debtor has continuously and diligently from such act of default undertaken all reasonable steps required to cure or otherwise remedy such matter.

The Gowens argue the trial court erred by not finding CVS's untimely payments on the Business Loan to be a material breach of the CSA.

The trial court correctly found the business loan's "amortization table does not include a first payment due date or a monthly payment due date." The trial court also found that, although CVS made some payments later in the month with some instances of payments not made until the following month, "all payments were made by CVS under the agreement and no payments were missed." Substantial evidence supports the trial court's findings, and these findings support the trial court's conclusion that CVS did not materially default on the Business Loan.

The Gowens also argue the trial court erred by not concluding CVS's untimely payments on the Note to be a material breach of the CSA. The Gowens did not assign error to the trial court's finding that "[i]n April of 2012, CVS paid the 2011 Promissory Note off in full." But, the Gowens assign error to the trial court's finding that explains how the Gowens refinanced the Note and transformed it into the Personal Loan. By his own admission, in an effort to help CVS avoid accruing interest on the Note, Steven used the Gowens' own line of credit to assist CVS to satisfy the Note and avoid the 10 percent contracted interest. Steven even provided the Ericsons with two receipts from April 12, 2012 to confirm he paid the Note in full, thereby satisfying the Note and transforming it into the Personal Loan. The Gowens also sent a May 10, 2017 letter to the

Ericsons stating how the Gowens transformed the Note into a Personal Loan.[12] Substantial evidence supports the finding that the Gowens satisfied the Note, and the parties agreed the Ericsons would pay the Gowens back in the form of a Personal Loan. The trial court did not err in failing to conclude that the Ericsons materially breached the CSA by making untimely payments on the Note.

The Gowens also assign error to finding of fact 2.2, which states in part, "The personal loan is not secured by the Business Purchase Agreement or the CSA." As already discussed, the Personal Loan did not exist at the time the parties executed the PSA and CSA. The Note expressly states, "This note is unsecured." Nothing in the record suggests the Personal Loan, which the parties entered into without a written contract, was secured by the PSA or CSA. The record supports the finding that the Personal Loan was not secured.

B. Bankruptcy

As an "Event of Default," the CSA's bankruptcy provision provides, in relevant part, "The suspension of the business of Debtor or the commencement of proceedings under any bankruptcy . . . law or statute of the federal government or any state government, or the adjudication of Debtor as bankrupt or insolvent under any law or statute."

The Gowens contend the trial court erred in not finding the Ericsons personally liable and in breach of the CSA's bankruptcy provision. As previously discussed, substantial evidence supports the trial court's finding that CVS is the

[12] For the Personal Loan, the Ericsons made monthly interest payments and then monthly payments of $200 to the Gowens. At trial, Michael testified to having a Personal Loan with the Gowens.

contracting entity under the CSA. Accordingly, CVS triggers the CSA's bankruptcy provision when it suspends business or commences bankruptcy proceedings. It is undisputed that the Ericsons personally filed for bankruptcy. Nothing in the record suggests CVS filed for bankruptcy. The trial court did not err by not finding that CVS or the Ericsons materially breached the CSA's bankruptcy provision.

C. Financial Statements

The CSA includes two provisions addressing financial statements. The provision under "Further Obligations of Debtor. Debtor warrants, represents and agrees as follows:"

> Debtor will provide Secured Party with monthly financial statements reflecting the activity of the PET CLINIC (but not necessarily the personal financial statements of the individual debtors) within thirty (30) days of each month's end and sixty (60) days for the end of each fiscal year of said veterinary practice, all certified by Debtor to be true and correct.

The "Event of Default" provision states, "Debtor shall provide to Secured Party during the term of deferred payments under the Agreement for Purchase, monthly financial statements depicting the financial activity of the PET CLINIC, only, which monthly financial statement shall be certified by Debtor as true and correct." The CSA also warns that "[t]he failure by Debtor to keep or perform any of its covenants in or to observe any of the terms of this Agreement or in the Agreement for Purchase" constitutes an "Event of Default." If there is an Event of Default, the Gowens must provide CVS with 30 days written notice before exercising any of its remedial rights under the CSA.

The Gowens argue CVS materially breached the CSA by failing to provide the Gowens with monthly and yearly financial statements. CVS does not dispute that it intentionally delayed providing financial statements but contends that the parties disputed over which monthly financial statements were required both before and after signing the CSA. Because the financial statements were eventually provided, CVS argues the trial court correctly concluded CVS did not materially breach the CSA.

The trial court made the following findings of fact related to the financial statements:

> 2.12 The CSA requires CVS to provide the financial reports monthly to the Gowens. There is no definition of "financial reports" in the CSA. The Gowens did not enforce this requirement for a period of time. When Dr. Gowen requested the reports, CVS intentionally stalled in providing them. This forced Plaintiffs to spend resources commanding their production. Eventually, the reports were provided.
>
> 2.13 Even though CVS did delay in providing the financial documents, CVS did not materially breach the CSA. CVS's performance in compliance with the provisions of the CVS were not a material default under the CSA.
>
> [. . .]
>
> 2.28 At present, there is no material breach of contract and therefore no reason to accelerate the obligation.
>
> 2.29 The Comprehensive Security Agreement promises production of financial statements. Defendants failed to produce financial statements. It appears that the Ericsons delayed as much as possible in getting financial statements to the Gowens, but they did ultimately do so after forcing plaintiffs and this court to spend resources commanding their production. Additionally, there was an issue about a protective order. Currently the Ericsons are in compliance with the financial statement request and this provision of the contract.

The trial court made the following conclusion of law related to the financial statements:

> 3.8 The Ericsons did not materially default as to financial statements. However, the CSA is not clear as to what financial statements are to be provided. The CSA requires reformation as to this issue. The financial statements that have been provided for the majority of 2018 and 2019 are sufficient to comply with the CSA. CVS shall continue to provide those same type of financial statements to the Gowens on a monthly basis as has been done in 2018 and 2019. The financial statements shall continue to be provided in the same format and time throughout the remainder of the Business Loan.

The Gowens assign error to findings of fact 2.13, 2.28, 2.29, and conclusions of law 3.8. However, the Gowens only challenge the part of the findings and conclusions related to the determination that the delay in providing the financial statements did not constitute a material breach. The Ericsons do not dispute the trial court's findings or conclusions. Unchallenged findings are verities on appeal. Martin, 192 Wn. App. at 532.

Contrary to the Ericsons' contention, the trial court did not find and the record does not support that the Ericsons, prior to signing the CSA, communicated any confusion about the financial statements. When asked during trial to explain her understanding of the requirement for financial statements in the CSA, Karen answered, "That we are obligated to provide monthly financial statements."

While the Gowens waited until November 23, 2013 to enforce the requirement and provide notice of default to the Ericsons, nothing in the CSA suggest this delay caused the November letter to have any less force or effect. In fact, the CSA includes a waiver provision that states the secured party does

not waive any rights unless such waiver is in writing and signed by the secured party.[13] Both Karen and Michael acknowledged at trial to receiving the letter from the Gowens notifying the Ericsons that they were in default for not providing the monthly financial statements.

The Ercisons still did not provide financial statements after receiving the November notice. The Gowens initiated this civil action in September 2017.[14] The Gowens again requested financial statements. This time, the Gowens' request was in the form of a request for production served on the Ericsons on August 18, 2017:

> REQUEST FOR PRODUCTION No. 1. Please produce monthly (1) profit and loss reports, (2) balance sheets, and [3] [sic] anything else you believe are financial statements consistent with the Comprehensive Security Agreement, Section 4(g), from April 11, 2011 to present. Please produce electronically stored information both (1) in native format, and (2) as a PDF (word searchable if reasonable and efficient) file each with a control number (i.e., Bates stamped.)

CVS refused to provide the financial statements unless the Gowens stipulated to a protective order. The Ericsons provided the financial statements only after the trial court granted the Gowens' motion to compel. The trial court found that the

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[13] Section 7 of the CSA reads: "Waiver. The Secured Party shall not be deemed to have waived any rights hereunder under any other agreement, instrument, or paper signed by the Debtor unless such waiver is in writing and signed by the Secured Party. No delay or omissions on the part of the Secured Party in exercising any right hereunder shall operate as a waiver thereof or of any other right. A waiver upon any one occasion shall not be construed as a bar or a waiver of any right or remedy on any future occasion. All of the rights and remedies of the Secured party, whether evidenced hereby or by any other agreement, instrument, or paper, shall be cumulative and may be exercised singly or concurrently."

[14] The Gowens signed the complaint on August 15, 2017, but did not file the complaint until September 5, 2017.

CSA did not "define" financial statements. However, the CSA did indicate that the Ericsons were to provide "monthly financial statements depicting the financial activity of the PET CLINIC." Furthermore, the request for production expressly requested profit and loss reports, balance sheets, and "anything else you believe are financial statements consistent with the Comprehensive Security Agreement, Section 4(g), from April 11, 2011 to present."

More importantly, the trial court's findings stated, "CVS intentionally stalled in providing [the financial statements]" and "the Ericsons delayed as much as possible in getting financial statements to the Gowens." Although the trial court did not make a finding of exactly when the Ericsons satisfied their obligation to provide financial statements, the record supports that it was not until February 2018. At trial, Karen was asked, "Do you know how you've satisfied your obligation under the Comprehensive Security Agreement to provide financial documents?" She answered, "Yes. And I believe it was February of 2018 all the documents that were requested were provided."

When asked why the Ericsons signed the CSA agreeing to provide financial statements without any restrictions of a protective order, Karen testified, "I don't think that we comprehended or even saw that as a requirement, although we should probably -- I admit we didn't read it as thoroughly as we could." "[A] party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." Nat'l Bank v. Equity Inv'rs, 81 Wn.2d 886, 912, 506 P.2d 20 (1973).

Once the trial court compelled CVS to provide the financial statements, the Gowens learned through those statements that CVS had been losing thousands of dollars every year between 2013 and 2017.[15]

Substantial evidence supports that CVS defaulted on the CSA by not providing financial statements as they had agreed to do. The trial court, nevertheless found that CVS did not materially breach the CSA. A material breach is one that substantially defeats a primary function of an agreement. 224 Westlake, LLC, 169 Wn. App. at 724. One of the primary functions of the CSA is to assure the Gowens that their decision to finance the Debtors is secure. The Gowens' security interest in the collateral includes "proceeds." The CSA includes a provision whereby the "Debtor agrees to execute any financing statement and to take whatever steps are necessary to perfect and continue Secured Party's Security Interest in the Collateral."

Had CVS complied with its contractual obligation to provide timely financial statements, the Gowens could have exercised one of their options under the CSA to secure their interest. For example, under CSA § 4(h), the Gowens could have demanded CVS to take steps necessary to perfect and continue its security interest in the collateral before the Ericsons ran CVS further into debt.

[15] CVS provided Profit and Loss statements reporting losses of $28,235.63 in February 2017, $9,032.20 in December 2017, $11,068.73 in November 2018, $5,262.27 in May 2019. The Ericsons provided 2011-2017 tax returns data reporting earnings of $99,992 in 2011 and $87,325 in 2012, followed by losses of $15,042 in 2013, $11,755 in 2014, $67,184 in 2015, $31,435 in 2016, and $71,880 in 2017.

Substantial evidence supports finding CVS materially breached the CSA. The trial court erred in concluding otherwise.

Personal Loan Judgment

The Gowens argue the trial court erred in entering judgment on the Personal Loan against the Ericsons for $63,809.59 because this amount conflicted with the trial court's conclusion that the Personal Loan was subject to the 10 percent interest rate originally agreed to in the Note. In other words, the Gowens argue the trial court improperly excluded the interest owed on the Personal Loan.

The Ericsons do not cross appeal this issue nor do they dispute the trial court's judgment on the Personal Loan in favor of the Gowens. Instead, the Ericsons argue we should not consider the issue of the Personal Loan's interest because the Gowens failed to submit interest calculations to the trial court and did not contest the loan amount during post trial hearings. The record does not support these arguments: Frist, on appeal, neither party submitted post-trial hearing records. Second, at trial, the Gowens submitted Exhibits 24 and 25 providing a balance of $112,383.60 for the Personal Loan, which included interest owed from November 2012 to January 2019. Third, after trial, the Gowens submitted proposed findings of fact and conclusions of law recalculating the total amount owed on the Personal Loan with interest to be $116,942.

On August 15, 2019, the trial court concluded the Ericsons owe the Gowens for the Personal Loan with interest. The trial court asked the parties, "I believe the personal loan [h]as a balance -- I have of $63,890.59. Is that right?"

The attorney for the Ericsons said, "We can work out the actual numbers." The trial court then stated, "The personal loan has a balance of whatever you folks are going to agree on, and I'll make sure that you agree on it before you leave today." Later, the attorney for the Ericsons asked, "on the personal loan, you want us to calculate interest at ten percent starting November of 2012. Does that mean that we take the principal on November 1st, 2012, and we go forward at ten percent to today?" The trial court said, "Yes." The attorney for the Ericsons responded, "Your Honor. I don't know that we can calculate it here today." And, the court replied, "I realize you probably can't." The attorney for the Ericsons then stated, "But now we have the formula for the calculation. So I think we can do it."

As previously mentioned, on September 4, 2019, three months before the trial court filed its findings of fact and conclusions of law, the Gowens submitted proposed findings of fact and conclusions of law including an updated calculation of the total amount owed on the Personal Loan with interest to be $116,942.

On November 27, 2019, the trial court issued its written findings of fact and conclusions of law that "[t]he personal loan has a balance of $63,890.59. . . . The personal loan is in default. Interest accrues from November 2012 to present at the rate of 10%." The trial court even acknowledged that "[a]ll parties agree that a judgment is necessary for the bankruptcy court to determine the proper amount of the Ericson[s'] personal obligation to the Gowens on the Personal Loan note." We remand for the trial court to determine the total amount owed on the Personal Loan including interest and to amend its order accordingly.

Trial Court Attorney Fees

The Gowens argue the trial court erred in determining both parties substantially prevailed on their respective claims and denying both parties attorney fees.

A court may award attorney fees when authorized by the parties' contract, by statute, or by recognized ground in equity. TMT Bear Creek Shopping Ctr., Inc., 140 Wn. App. at 214.

Here, the CSA includes a unilateral attorney fee provision:

> In the event any terms of this document require enforcement, interpretation where the indebtedness described herein is disputed, any attorneys' fees, legal expenses, whether or not in connection with a lawsuit, including attorneys' fees and expenses incurred in bankruptcy proceedings, appeals, and any interest paid post judgment collection services, Debtor shall pay any and all costs incurred by the Secured Party. . . In the event that Secured Party incurs any other expenses whatsoever to protect or enforce its rights hereunder, Secured Party shall be entitled to recover all sums and incidental expenses from Debtor.

RCW 4.84.330 provides a "unilateral attorney fees provision will not preclude a prevailing party from recovering attorney fees." Pub. Utility Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc., 184 Wn. App. 24, 54, 336 P.3d 65 (2014). In other words, RCW 4.84.330 makes unilateral agreements bilateral. Id. at 54. The CSA, through RCW 4.84.330, allows the trial court to award the prevailing party attorney fees and costs.

"In general, a prevailing party is one who receives an affirmative judgment in his or her favor." Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). "If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question

depends upon the extent of the relief afforded the parties." Id. at 633. "When both parties prevail on a major issue, there may be no prevailing party for attorney fee purposes." Hawkins v. Diel, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011) (citations omitted). "Whether a party is a 'prevailing party' is a mixed question of law and fact that we review under an error of law standard." Id. at 10.

In Hawkins, Division Two of this court determined that where one party prevailed on a claim entitling them to an award of affirmative relief, only that party was the prevailing party. Id. at 10-13. There, the opposing party successfully prevailed in its defense on some claims but did not receive any affirmative relief, so they were not the prevailing party. Id. at 12-13. The same is true here.

Because CVS defaulted on the CSA by failing to provide timely financial statements, the Gowens were the only party to receive affirmative relief, thus, the Gowens were the prevailing party. We reverse and remand for the trial court to enter an award of attorney fees and costs for the Gowens.

Appellate Attorney Fees

CVS requests attorney fees on appeal. The Gowens do not request attorney fees on appeal. Because CVS is not the prevailing party, we deny its request.

CONCLUSION

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

WE CONCUR: