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COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

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

APPELLANT,

v.

STILNO, INC. d/b/a SAMISH ISLAND SEAFOOD, a Washington corporation, and ROBERT  
E. STILNOVICH AND JANE DOE STILNOVICH, a marital community,

RESPONDENTS.

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APPELLANT'S REPLY BRIEF

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 ORIGINAL

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## I. INTRODUCTION

Respondents Robert B. Stilnovich and Jane Doe Stilnovich's (hereinafter "Stilnovich") Respondent's Brief is based on facts that have been proven to be false or for which there is not any evidence whatsoever. There is no basis upon which to dismiss Plaintiff/Appellant Seattle Shrimp & Seafood Company's (hereinafter "Seattle Shrimp") claims against Stilnovich. In fact, Seattle Shrimp is the party entitled to summary judgment.

Stilnovich argues for the first time on appeal that the execution of the September, 2010, Letter Agreement (hereinafter "Letter Agreement") abrogates the Individual Personal Guarantee (hereinafter "Guarantee"). While doing so, he ignores the language in the Letter Agreement which states that it supplements prior agreements between the parties. Finally, contrary to Stilnovich's claim, the Key Man Life Insurance for Stilnovich is consistent with his personal obligation to pay Samish's debts.

Furthermore, Stilnovich overlooks established law when claiming that the Guarantee must be ambiguous before extrinsic evidence is admissible. Extrinsic evidence is admissible as to the parties' intent without first establishing an ambiguity exists. *Berg v. Hudesman*, 115

Wn.2d 657, 669, 801 P.2d 222 (1990); *see also Stephens v. Gillispie*, 126 Wn. App. 375, 380, 108 P.3d 1230 (2005). In fact, extrinsic evidence is admissible to establish an ambiguity. *Id.* In this case, there was an ambiguity as to the beneficiary of the Guarantee because Fox Business Systems, the party named in the document, was not a party to the transaction.

As for Stilnovich's claim of "mistake," he overlooks that the facts lead to but one conclusion; that Seattle Shrimp was the intended beneficiary under the Guarantee. There is no dispute that: (a) the Guarantee came from Seattle Shrimp; and (b) the only creditor involved in the transaction was Seattle Shrimp. Inexplicably, Stilnovich changed his story three times as to who was the intended beneficiary under the Guarantee (i.e. Fox Business Systems, not Fox Business Systems and Euler). In short, Stilnovich is not absolved of liability based on "mistake."

Moreover, Stilnovich's claim that he was not bound personally for Samish's debts is absurd and contradicts the plain language of the Guarantee. The Guarantee unambiguously holds "Robert B. Stilnovich" personally liable for the debts of Samish. CP 40. Even assuming some ambiguity exists on this issue, to conclude that Samish personally

guaranteed a promise already made to Seattle Shrimp (i.e. to pay for seafood product) leads to a commercially unreasonable result. Under Stilnovich's desired interpretation, the Guarantee would be meaningless.

Additionally, Stilnovich's argument that the Guarantee lacks consideration misconstrues the purchase order language and the dealings between the parties. Stilnovich ignores that the purchase order provides that it is subject to the credit allowance of Samish. CP 87. Consistent with that language, the Guarantee was executed for further credit to cover Samish's purchases. Ultimately, the credit line and the price guaranteed by the purchase orders are two separate but related parts of the parties' transactions.

Finally, regarding the Motion to Strike Seattle Shrimp's Statement of the Case, Stilnovich failed to identify the objectionable "argument" which violates the court rules. He also failed to provide authority that supports sanctions in the instant situation. Accordingly, the motion and request for sanctions should be denied.

## **II. THE GUARANTEE WAS NOT ABROGATED BY THE LETTER AGREEMENT**

Stilnovich's argument that the Guarantee was abandoned because of the Letter Agreement is not only without merit, but improperly before

the Appellate Court. Stilnovich did not argue that the Letter Agreement abrogated the Guarantee at Summary Judgment. Accordingly, the Court should disregard the argument as it is being raised for the first time on appeal. *Deacy v. College Life Ins. Co.*, 25 Wn. App. 419, 425, 607 P.2d 1239 (1980).

Moreover, even if the Court were to consider whether the Guarantee was abandoned by the execution of a subsequent Letter Agreement, Stilnovich's argument fails. The Letter Agreement states:

This letter agreement is to **supplement prior arrangements** between SSSC [Seattle Shrimp] and Samish. All other terms remain unchanged.

CP 42 (emphasis added).

Thus, by its terms, the Letter Agreement supplemented, but did not supplant the Guarantee. The objectively manifested intent was to keep prior agreements in place. Again, Stilnovich completely ignores the language and thus, the intent of the parties objectively manifested in the Letter Agreement.

Furthermore, the Letter Agreement is consistent with the Guarantee. The Letter Agreement explains that “[Seattle Shrimp] will continue to extend credit to [Samish] *and Bob Stilnovich...*” repeating

Stilnovich's personal obligations to Seattle Shrimp for credit extended to Samish. CP 42 (emphasis added). Also, the language regarding the Key Man Life Insurance taken out on Stilnovich is consistent with Stilnovich's personal obligation for Samish's debts. The policy would pay out upon the death of the guarantor under the Guarantee.

**III. THE GUARANTEE PROVIDES FOR PAYMENT TO SEATTLE SHRIMP FROM STILNOVICH**

**A. Seattle Shrimp Properly Relied Upon Extrinsic Evidence To Establish That It Was The Intended Beneficiary Of The Guarantee.**

Stilnovich's argument that parol evidence cannot be admitted to ascertain the parties to the Guarantee, without first establishing an ambiguity, ignores the established rules of contract interpretation. *Berg*, 115 Wn.2d at 669. The court in *Berg* ruled:

We thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible. Cases to the contrary are overruled.

*Id.*

Parol 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.

*Id.* (citing *Olsen v. Nichols*, 86 Wn. 185, 149 P. 668 (1915)).

Extrinsic evidence is also admissible to clarify a misunderstanding between the parties to an agreement. *Stephens*, 126 Wn. App. at 380; *see also Berg*, 115 Wn.2d at 668 (citation omitted). The courts have admitted extrinsic evidence to determine whom the parties' intended be bound by the agreement. *Stephens*, 126 Wn. App at 381. Accordingly here, Seattle Shrimp appropriately relied upon extrinsic evidence to establish that it was *the party* the parties' intended to be named in the Guarantee notwithstanding whether an ambiguity existed.

As noted however, there was an ambiguity regarding who was the intended beneficiary of the Guarantee as it named Fox Business Systems, a non-party to the transaction. In fact, the trial court requested additional briefing and testimonial evidence on this very issue. CP 339 & CP 376-378; *see also* Appellant's Brief, p. 9. Ultimately, the surrounding circumstances regarding the execution of the Guarantee established an ambiguity existed as to the named beneficiary and it was proper to admit extrinsic evidence.

Indeed, "[e]ven though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed." *Stephens*, 126 Wn. App. at 380 (*quoting*

*Berg*, 115 Wn.2d at 668). “Where it appears, therefore, that there has been a misunderstanding between the parties, the court may consider extrinsic evidence of intent.” *Id.* The arguments regarding the parties’ intent as to the beneficiary under the Guarantee will be further set out below in Section B and were argued in Section V(B) of the Appellant’s Brief.

**B. The Guarantee Is Not Voidable For Mistake.**

As a matter of law, Stilnovich failed to establish “mistake.” As noted in the Appellant’s Brief, his testimony and that of Danny Whitted established that Stilnovich knew he was executing a Guarantee for the credit extended by Seattle Shrimp. *See* Appellant’s Brief, Sec. V(B).

Again specifically, Stilnovich was not mistaken as to the creditor involved in the transactions. Stilnovich testified that no other company but Seattle Shrimp provided Samish with credit. CP 303 (Deposition of Robert Stilnovich, Nov. 16, 2011, 37:5-13), CP 305 (Stilnovich Dep. 39:3-6). Also, Stilnovich was not mistaken that the Guarantee came from Seattle Shrimp; he testified that the Guarantee came from Seattle Shrimp, not Fox Business Systems. CP 327-329 (Stilnovich Dep. 33:25-34:10; 35:7-16).

Likewise, Mr. Whitted confirmed that Seattle Shrimp provided credit to Samish and that the Guarantee came from Seattle Shrimp. Specifically, when Mr. Whitted was asked about the creditor involved in the transaction, he testified as follows:

Q: Okay. But ultimately, Seattle Shrimp was the creditor; correct?

A: That's – yes.

CP 337 (Deposition of Danny Whitted, Oct. 4, 2011, 36:22-24).

Mr. Whitted also testified that the Guarantee came from Seattle Shrimp, not Fox Business Systems. CP 336 (Whitted Dep. 18:12-18). Significantly, both Mr. Whitted and Stilnovich confirmed that they knew Fox Business Systems was not a creditor involved in the transaction. CP 327-329 (Stilnovich Dep. 33:25-34:10 & 35:7-16) & CP 336 (Whitted Dep. 18:12-18).

Moreover, contrary to Stilnovich's claim, changing his story about who was the intended beneficiary under the Guarantee does not establish "mistake." Again, Stilnovich changed his story three times. Stilnovich claimed that the Guarantee came from Fox Business Systems in his Declaration. CP 83-84. At his deposition, he testified that the Guarantee came from Seattle Shrimp, not Fox Business Systems. CP 327-329

(Stilnovich Dep. 33:25-34:10; 35:7-16). Upon filing the second round of supplemental briefs, Stilnovich changed his story to the Guarantee came from Seattle Shrimp, but was intended to benefit Euler, Seattle Shrimp's insurance company and a party that has never had any dealings with Stilnovich or Samish. CP 200-201 & 204.

At the very least, Stilnovich's testimonial "flip-flopping" creates a genuine issue of material fact that supports reversal. It is a long-standing rule that "all reasonable inferences from the evidence are considered in the light most favorable to the nonmoving party." *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 502-503, 722 P.2d 1343 (1986) (citations omitted). Also, if the declarations submitted by the parties conflict as to material facts, summary judgment should be denied because credibility issues are present. *Id.*; see also *Riley v. Andres*, 107 Wn. App. 391, 397, 27 P.3d 618 (2001) (citation omitted).

Additionally, Stilnovich's argument that his testimony only shows what he knew in 2011, and not at the time he received the Guarantee, is unsupported. The plain language of his testimony indicates that he was testifying about what he thought *at the time* he received the Guarantee document:

Q: Where did you get this document from?  
A: Off my fax machine.  
Q: From whom?  
A: I have no idea. I assumed it was sent by Danny.  
Q: Do you see where it identifies Fox Business Systems right there?  
A: Yes.  
Q: Who's Fox Business System?  
A: I have no idea.  
Q: **Did you think it came from Fox Business Systems?**  
A: **No...**

CP 327-329 (Stilnovich Dep. 33:25-34:10) (emphasis added).

**C. The Guarantee Binds Stilnovich Personally.**

Stilnovich's claim that he did not intend to be bound personally by the Guarantee, but rather in his corporate capacity as the President of Samish is unsupported as a matter of law. At best, Stilnovich is merely proclaiming his "subjective intent" in signing the document, which is not supported by the four corners of the Guarantee.

In short, the Guarantee unambiguously provides that Stilnovich is personally liable for Samish's debts. Descriptive language added to a signature does not create an ambiguity if the language of the guaranty unambiguously identifies an intent to be bound personally (e.g. "I will personally guarantee payment to you"). See *Key v. Cascade Packing Co.*, 19 Wn. App. 579, 582, 576 P.2d 929 (1978).

Here, the Guarantee names “Robert E. Stilnovich” in the first person and states that he is personally guaranteeing payment for credit extended to “Samish Island Seafood.” CP 40. Again, the Guarantee states that it is an “INDIVIDUAL PERSONAL GUARANTEE.” CP 40. The Guarantee also provides that Stilnovich will “bind [himself] to pay... on demand any sum which may become due... whenever [Samish] shall fail to pay the same.” CP 40. In short, the Guarantee unambiguously creates personal liability for Stilnovich.<sup>1</sup>

Moreover, even if an ambiguity was created by the use of “Pres” on the signature line, it would be a commercially unreasonable interpretation to conclude that Stilnovich is not personally liable for the debts of Samish. *Wilson Court Ltd. Partnership v. Tony Maroni’s Inc.*, 134 Wn.2d 692, 695 & 710, 952 P.2d 590 (1998). In short, it would be absurd for Samish’s President to guarantee the obligations Samish had already promised to perform (i.e. paying for product from Seattle Shrimp).

Indeed, a “guaranty” is a “promise to answer for the debt, default, or miscarriage of another person.” *Wilson*, 134 Wn.2d at 707 (citing *Robey v. Walton Lumber Co.*, 17 Wn.2d 242, 255, 135 P.2d 95 (1943)).

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<sup>1</sup> That is not to say that the issue of the parties to be bound by the Guarantee is unambiguous. The issues are treated separately.

A contract guaranty, being a collateral engagement for the performance of an undertaking of another, imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor. If a primary or principal obligation does not exist, there cannot be a contract of guaranty.

*Id.*

Thus, in light of the very purpose of a guaranty, the Guarantee must apply to Stilnovich personally; or, at the very least, there is a genuine issue of material fact regarding how the Guarantee should be construed.

**D. There Is Sufficient Consideration For The Guarantee.**

Stilnovich's argument that the Guarantee lacks consideration is without merit. Stilnovich overlooks that the Purchase Order "contract" he relies upon dealt with the price of product for a fixed period of time, but not the credit necessary for payment. In short, the Purchase Order clearly provides that it is subject to the credit line of Samish/Stilnovich. CP 87.

The plain language of the Purchase Order provides that it is only a promise related to price of the product. CP 87. It is not an "existing contract" covering all aspects of the parties' dealings as Stilnovich apparently argued.<sup>2</sup> The credit line extended to Stilnovich/Samish is

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<sup>2</sup> Also, the Purchase Order was not signed, was e-mailed from Danny Whitted, formerly of Seattle Shrimp, to presumably Stilnovich. CP 87.

separate but related to Samish's ability to purchase product on an on-going basis. At the bottom of the Purchase Order it states that payment is "based on credit allowance." CP 87.<sup>3</sup>

Contrary to Stilnovich's claim, the Guarantee was not executed to cover one purchase order. Stilnovich executed the Guarantee for additional credit needed to continue doing business with Seattle Shrimp. CP 255-256 (Whitted Dep. 38:22-39:7). In other words, the Guarantee was executed in exchange for additional credit for Samish's purchases. Ultimately, Seattle Shrimp would have stopped selling seafood to Samish if not for the Guarantee; thus, consideration was sufficient.

**IV. THE COURT SHOULD CONSIDER SEATTLE SHRIMP'S STATEMENT OF THE CASE**

The Court should reject Stilnovich's request to strike Seattle Shrimp's Statement of the Case and impose sanctions. Stilnovich failed to point out which portions of the Statement of the Case allegedly violate the Rules on Appeal. He just simply states that it is "obvious." See Respondent's Brief, p. 3. In short, for an objection to be of any avail, Stilnovich must specifically identify the offending portions of the

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<sup>3</sup> Stilnovich apparently overlooked the language "based on credit allowance" when alleging that Seattle Shrimp essentially strong-armed him into executing the Guarantee (for further credit) by holding back a pending order from delivery.

Statement of the Case. See *Pacific Northwest Pipeline Corp. v. Myers*, 50 Wn.2d 288, 291, 311 P.2d 655 (1957) (quoting *Keen v. O'Rourke*, 48 Wn.2d 1, 290 P.2d 976 (1955)).

Moreover, contrary to Stilnovich's argument, the Statement of the Case sets out the facts in a persuasive manner. The section is not replete with argument. In fact, Stilnovich's Counterstatement of the Case insufficiently sets forth the circumstances surrounding the supplementation of the Summary Judgment briefing. In other words, Stilnovich failed to adequately describe what happened at the trial court level.

Furthermore, the cases relied upon by Stilnovich are distinguishable. *Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999) (the court imposed sanctions for cumulative violations of the rules); see also *Lawson v. Boering Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990) (the court imposed sanctions for failing to provide cites to the record for factual statements). Also, *Litho* and *Lawson* based sanctions on the hardships created to the other party and the Court by a party's failure to follow the court rules. *Id.* Stilnovich has failed to point to any hardship created by Seattle Shrimp's Statement

of the Case.

Additionally, the rules do not prohibit using argument or persuasion in the Introduction section of a brief. Indeed, an Introduction section is optional. RAP 10.3(a)(3). In any event, Seattle Shrimp's Statement of the Case should be considered, the motion to strike should be denied and sanctions should not be imposed.

#### V. CONCLUSION

As noted above, Stilnovich failed to establish that the trial court's decisions should be affirmed on appeal. The trial court erred in dismissing all of Seattle Shrimp's claims and causes of action against Stilnovich on Summary Judgment. The trial court also erred by denying Seattle Shrimp's Summary Judgment.

Accordingly, the Court should reverse the trial court's decision to grant Stilnovich's Motion for Summary Judgment/Motion to Dismiss. The Court should grant Seattle Shrimp's Motion for Summary Judgment against Stilnovich and award judgment of \$150,000.00, plus pre-judgment interest, to Seattle Shrimp.

Alternatively, the Court should reverse the trial court's decision to grant Stilnovich's Motion for Summary Judgment/Motion to Dismiss,

affirm the denial of Seattle Shrimp's Motion for Summary Judgment against Stilnovich, and issue instructions that there are genuine issues of material fact regarding Stilnovich's personal liability that should be decided at trial.

DATED this 27<sup>th</sup> day of August, 2012.



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