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COURT OF APPEALS  
DIVISION II

2014 SEP -9 AM 10: 29

STATE OF WASHINGTON

BY DEPUTY

No. 71502-0-I

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

\_\_\_\_\_  
BARRIE BEHRMANN and RONALD BEHRMANN, Appellants,

v.

FRANK D'APRILE, Respondent.

\_\_\_\_\_  
**RESPONDENT'S BRIEF**  
\_\_\_\_\_

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## **INTRODUCTION**

Mr. D'Aprile purchased a tanning salon from the Behrmanns in 2007. The parties dispute whether the agreed purchase price was \$35,000 or \$85,000. On the specified closing date, the parties signed a contract stating a purchase price of \$35,000, the Behrmanns executed a bill of sale reciting consideration of \$35,000, and Mr. D'Aprile delivered a \$35,000 cashier's check. A few days later, Mr. D'Aprile signed a \$50,000 promissory note that was not referenced in the purchase contract and that does not make any mention of the business purchase. The trial court considered the discrepancy between the documents and the competing testimony of the parties and entered findings of fact supporting the \$35,000 purchase price. This court should reject the Behrmanns' request to reevaluate the facts and substitute its judgment for that of the trial judge.

## **ISSUES PRESENTED**

The assignments of error present the following issues on appeal:

1. Are the trial court's findings of fact supported by substantial evidence where they are consistent with Mr. D'Aprile's testimony and with the purchase agreement and bill of sale drafted by the Behrmanns?

2. Is the trial court's credibility determination against the Behrmanns' witness supported by substantial evidence where the testimony was contradicted by Mr. D'Aprile and where the witness conceded his inability to remember other details?

3. Are the trial court's conclusions of law supported by the findings of fact where the conclusions follow directly from resolution of the fundamental factual dispute between the parties as to the purchase price of the business?

#### **STATEMENT OF FACTS**

The statement of facts in Appellants' Brief only references the testimony in support of their position. Respondent provides the following summary of the relevant facts.

The Behrmanns owned and operated the Seattle Sun tanning salon. RP 26:12-16. Mr. Behrmann had discussions with his long-time friend, Mr. D'Aprile, about buying the business. RP 30:12-14, 110:6-14, 110:24-111:6. The parties met at a restaurant to discuss the transaction, although there is a dispute as to whether the discussion was for a purchase price of \$35,000 or \$85,000. RP 31:9-14, 111:19-24.

The Behrmanns had their nonlawyer daughter, Ms. Hale, prepare documents for the sale. RP 33:1-3, 78:25-79:1. On February 28, 2007,

approximately a month after the restaurant meeting, Mr. D'Aprile and the Behrmanns met in the Behrmanns' kitchen to sign documents. In the kitchen, they signed a purchase agreement and bill of sale (each reflecting a \$35,000 purchase price) and Mr. D'Aprile delivered a check for \$35,000, which Mr. Behrmann deposited the next day. RP 32:14-20, 84:3-9, 115:4-19; Ex. 4-6.

A few days later, on March 3, Mr. Behrmann appeared at the salon where Mr. D'Aprile was now working and gave copies of the signed documents. RP 34:2-5, 118:2-4. He also presented a promissory note for \$50,000, which had not been prepared at the kitchen meeting. RP 33:13-15, 81:3. Mr. D'Aprile signed the note and a salon patron, Mr. Hautala, witnessed his signature. RP 38:9-12, 118:7-19; Ex. 7. The parties dispute whether any details of the transaction were discussed in Mr. Hautala's presence. RP 38:19-23, 143:7-14.

Mr. D'Aprile continued to run the salon for a few years but never showed a profit. RP 124:1-2. He sold the business in 2012. RP 126:2-3.

On the date the note was purportedly due, Mr. Behrmann called Mr. D'Aprile. The parties disagree as to what was said. RP 44:21-45:18, 123:1-16. The Behrmanns filed a complaint after Mr. D'Aprile failed to make any payments on the note. The Behrmanns argue that the note was given as partial payment for the business. Mr. D'Aprile testified that he

only agreed to purchase the business for \$35,000 and that Mr. Behrmann suggested the note as a side transaction contingent upon profit. RP 113:5-114:3, 127:19-22, 142:10-20, 143:3-5. After a two-day trial, the trial court rejected the Behrmanns' evidence and ruled in favor of Mr. D'Aprile.

### **ARGUMENT**

There is no reason to overturn the trial court. The findings of fact are supported by ample evidence and the conclusions of law follow directly from the findings. The Behrmanns have no new arguments and do not suggest adequate grounds for this court to substitute its judgment for the trial judge's reasoned review of the testimony and exhibits presented over the course of two days. The judgment should be affirmed.

#### **A. Substantial Evidence Supports The Findings of Fact.**

The court should affirm the trial court's findings of fact. The reviewing court must determine whether the trial court's findings are supported by substantial evidence and whether those findings support the conclusions of law. *Thompson v. Hanson*, 142 Wn. App. 53, 59-60, 174 P.3d 120 (2007). "Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true." *Id.* at 60. The court of appeals "is not permitted to weigh the evidence or the credibility of the witnesses." *Vermette v. Andersen*, 16 Wn. App. 466, 470,

558 P.2d 258 (1976). The court should therefore “defer[] to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses.” *Thompson*, 142 Wn. App. at 60. The court of appeals should not “substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.” *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

To determine whether there is sufficient evidence to support the findings of fact, “an appellate court need only consider evidence favorable to the prevailing party.” *Thompson*, 142 Wn. App. at 60. Substantial evidence “is not made any less substantial by the presence of contradictory testimony, which the trial court may have disregarded as not being credible.” *Vermette*, 16 Wn. App. at 470. The trial court’s decision to rely on the testimony of a single witness despite contradictory testimony is sufficient to support the related findings of fact.

Each element of the challenged findings of fact is supported by substantial evidence and must be upheld. The Behrmanns have challenged findings 2, 3, 4, 6, 7, and 9.

*1. Findings of Fact 2 and 3*

Plaintiffs and Mr. D’Aprile entered into a purchase and sale agreement for the business known as Seattle Sun on February 28, 2007. Plaintiffs’ 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.

... On the same day, the Behrmanns executed a bill of sale for \$35,000, 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.

CP 63.

In support of findings 2 and 3, Mr. D'Aprile testified that the purchase and sale agreement and bill of sale with its schedule were signed on February 28, 2007 in the Behrmanns' kitchen. RP 114:21-115:19, 116:14-19. The exhibits themselves and Mr. Behrmann's testimony agree. RP 32:14-17; Ex. 4-6. There is no dispute that the documents were prepared by the Behrmanns' daughter. RP 33:1-3, 78:25-79:1. Mr. Behrmann's testimony and the documents themselves establish that the purchase and sale agreement shows a \$35,000 purchase price and does not refer to the promissory note. RP 80:7-21; Ex. 4. All parties agree that the cashier's check was delivered on February 28. RP 84:3-5, 116:18-19.

## *2. Finding of Fact 4*

Plaintiffs' testimony that the purchase price for the business was \$85,000 and was to be paid \$35,000 in cash at closing and \$50,000 under a 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.

CP 63

Finding no. 4 is simply a recitation of what is apparent from the face of the purchase agreement itself. Ex. 4. While Mr. Behrmann testified that the \$35,000 was only a down payment, he admitted that this was not included in the plain language of the agreement he signed. RP 80:7-21. Mr. D'Aprile denied that he offered or agreed to pay \$85,000 for the business. RP 127:16-18.

*3. Finding of Fact 6*

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

CP 63.

Finding no. 6 is supported by the testimony of the Defendant's expert, Cary Deaton. Mr. Deaton considered the value of the hard assets as specified by the parties, the prior income of the business, and figures of comparable sales, and gave his opinion that as of the date of the sale, the business was not worth any more than the hard asset value fixed by the parties. RP 166:12-23, 169:5-170:12.

The value of the business on the date of sale is relevant because the Behrmanns argued they were entitled to relief based on unjust enrichment.

CP 42. Further, the salon's prior income and its value are relevant in light of Mr. D'Aprile's testimony that his requests for tax returns were evaded and he was instead reassured that he'd make a lot of money. RP 112:1-7, 22-25, 117:10-15.

4. *Finding of Fact 7*

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

CP 64

The accuracy of the challenged portion of finding no. 7 is apparent from the face of the note itself. Ex. 7. The promissory note contains only a few lines of text. There is no reference to the purchase agreement. As for repayment, it provides only "Said sum shall be paid in the following manner: Amount shall be paid in full on or before March 31, 2012." *Id.* Mr. D'Aprile testified that the promissory note was separate from the purchase of the business and that it was the seller's attempt to get additional money if the salon made a profit under Mr. D'Aprile's ownership. RP 113:5-114:3, 127:19-22, 142:10-20, 143:3-5.

Contrary to the Behrmanns' argument,<sup>1</sup> Mr. D'Aprile never admitted at trial that the note was given as consideration for his purchase of the business. He testified that Mr. Behrmann presented the idea of a

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<sup>1</sup> See pages 11-13 of Appellants' Opening Brief.

\$50,000 promissory note at the restaurant meeting but he clarified that the note was “not in connection” with the business purchase. RP 141:7-20. He testified that Mr. Hautala heard that the note was “something to do with the salon and the purchase,” RP 118:13-17, consistent with his other testimony that the note represented a possible payment to the Behrmanns out of the salon’s profits, 146:8-14. Finally, the testimony that Mr. Hautala was aware that he would be the new owner because “we had a whole month just about while I had prepared the loan and that I was planning on buying it,” RP 119:1-4, was not a reference to the promissory note (which Mr. D’Aprile did not prepare) but instead to his home equity loan out of which he paid the \$35,000 purchase price, RP 114:6-10. The claimed “admissions” actually reflect only the Behrmanns’ misreading of the trial testimony.

*5. Finding of Fact 9*

... 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.

CP 64

The challenged portion of finding no. 9 is a credibility determination based upon the trial court’s evaluation of the demeanor of the witness and other factors. Mr. Hautala’s testimony was contradicted by Mr. D’Aprile. RP 118:5-25, 143:7-14. On cross-examination, Mr. Hautala

admitted that he could not remember other details of the conversation, RP 55:18, 56:17, but he was unusually firm on his testimony regarding the alleged statement about purchase price, RP 57:6-12. Regarding Mr. Hautala's testimony, Judge Schapira said:

I found his testimony – let's put it this way: lots of people remember lots of things that can happen in later conversations or something. I certainly don't think he came here prepared not to tell me what he remembered, but I find it less credible that those remarks were made and that he remembers them more clearly than other things. ... So I would find that Mr. Hautala may not have remembered clearly, so I did not rely on his testimony.

RP 218:22-219:3, 219:19-20.

#### *6. Conclusion of Law 3*

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

CP 64.

Challenged conclusion no. 3 contains an implicit finding of fact that the parties did not agree to a purchase price of \$85,000. There is ample evidence in support of this finding, as follows:

Mr. D'Aprile repeatedly testified that the agreed purchase price was \$35,000. RP 111:25-112:1, 115:24, 127:16-18, 143:3-5. He testified that the \$50,000 promissory note was a side attempt by the seller to share in potential profit. RP 113:5-16, 127:19-22, 143:3-5.

There is nothing in the purchase agreement itself that suggests a purchase price other than \$35,000. Ex. 4. It provides for a closing date of February 28, and Mr. D'Aprile paid the \$35,000 purchase price on that date. Ex. 4, 6; RP 84:3-9.

Schedule A to the bill of sale shows two columns of figures, one adding to \$35,000 and the other adding to \$80,000. Ex. 5. Mr. D'Aprile testified that the \$35,000 figure was put in by Mr. Behrmann because that was the purchase price and the second column of figures was an illustration of a possible allocation in the event there was future profit. RP 115:23-116:11. There is no reason for a second column of figures if the parties had agreed to a purchase price of \$85,000 all along as the sellers testified. Further, the fact that the second column is only \$80,000 emphasizes the uncertainty in the supposed additional payment.

The promissory note itself was not even drafted on the closing date despite more than a month having passed from the parties' initial discussion where they agreed on the purchase price. RP 81:1-3.

All of this evidence is sufficient to persuade a rational, fair-minded person that the parties only agreed to a \$35,000 purchase price, as the court found.

**B. The Trial Court Properly Applied the Law to the Facts.**

The trial court's conclusions of law should also be affirmed. Questions of law are reviewed de novo and the conclusions are evaluated to ensure that they are supported by the findings of fact. *Thompson*, 142 Wn. App. at 60. The conclusions entered below are proper given the findings.

*1. Ambiguous Contracts Are Construed against the Drafter*

The trial court properly construed the documents against the Behrmanns as the drafters. The general rule is that any ambiguity in a written contract is construed against the drafter. *E.g. Queen City Sav. & Loan Ass'n v. Manhalt*, 111 Wn.2d 503, 760 P.2d 350 (1988). "This rule can be rationalized by saying that the party formulating the language is to blame for the difficulty in interpreting it, and that he could have avoided the problem by more careful draftsmanship." *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 919, 468 P.2d 666 (1970). In circumstances where there is no ambiguity and the intent of the parties can be determined, it can be argued that this rule of construction should not be applied. *See id.* Here, where the parties' intent is disputed and the written documents do not clearly support the Behrmanns' position, the trial court properly applied the general rule to construe ambiguities against the drafter.

Appellant's Brief points to evidence suggesting that the parties *could have* intended that the purchase price for the salon was \$85,000, payable with a \$35,000 down payment and a \$50,000 promissory note. The Behrmanns fail to note that this evidence was disputed, that all the evidence was weighed by the trial court, and the court found that this suggested intent was not supported by the evidence.

As stated previously, Mr. D'Aprile consistently testified that he never agreed to an \$85,000 purchase price. RP 111:25-112:1, 115:24, 127:16-18, 143:3-5. Reading just the purchase and sale agreement and the bill of sale executed on February 28, there is absolutely no indication whatsoever that there was anything more to the deal other than Mr. D'Aprile's payment of \$35,000. Ex. 4, 5. The bill of sale conclusively provides that all assets were conveyed in exchange for the \$35,000 payment. Ex. 5. Consistent with these documents, the sale was closed and the transaction was complete on February 28, before the promissory note was even drafted. Based on this evidence, it cannot be reasonably argued that there is no ambiguity and the intent of the parties is clear such that the contract should not be construed against the Behrmanns as the drafter.

Contrary to the Behrmanns' argument, the terms of the purchase agreement do not resolve the dispute in their favor. The contract contains the mutual representation that each party "relies on the finality of this

Agreement as a material factor in inducing the party's execution of this Agreement, and the obligations under this Agreement." Ex. 4 at ¶6(a)(iv). The only consideration mentioned in the agreement is the cash payment of \$35,000. Ex. 4. Mr. Behrmann acknowledged that the contract does not unambiguously support the claimed purchase price of \$85,000: "I don't recall why it doesn't [state a purchase price of \$85,000]. The \$35,000 was the down payment and **probably if we would have had legal advice we would have worded that a little bit differently.**" RP 80:10-12 (emphasis added). Given the ambiguity, it was appropriate to construe the document against the drafter.

The Behrmanns' reliance upon the testimony of Mr. Hautala is also not persuasive. The trial court specifically found that Mr. Hautala's testimony was not credible. CP 64; RP 218:22-219:3. Even if believed, Mr. Hautala's testimony does not change the language in the instruments and remove the inherent ambiguity.

The trial court found that the parties intended that the business be sold for \$35,000. As reflected in Finding no. 4 and Conclusion no. 3, the Behrmanns failed to meet their burden to establish their allegation that the purchase price was \$85,000, so the court relied on the figure stated in the purchase agreement. CP 63, 64; *see also* RP 213:6-11. Given the patent discrepancy between the contract and the note, it would have been error

for the trial court to find the contract was unambiguous and construe it in the Behrmanns' favor.

2. *There Was No Consideration for the Promissory Note.*

The court also properly concluded that the promissory note was not supported by consideration because the sale of the business was already complete. A promissory note, like any contract, must be supported by consideration to be enforceable. *E.g. King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994); RCW 62A.3-303. "The drawer or maker of an instrument has a defense if the instrument is issued without consideration." RCW 62A.3-303(b). It is well-settled that a promise to perform an existing legal obligation is not valid consideration. *E.g. Harris v. Morgensen*, 31 Wn.2d 228, 196 P.2d 317 (1948).

It is not enough that a promissory note simply contains the recitation "for value received" if there is not actually consideration underlying the note. "Recitals of consideration in a written instrument are not conclusive. It is competent to inquire into the consideration and show, by parol evidence, the real or true consideration." *Malacky v. Scheppler*, 69 Wn.2d 422, 425, 419 P.2d 147 (1966).

The trial court ruled that Defendant had the burden of proof on the defense of lack of consideration. RP 213:2-4. Mr. D'Aprile met his burden of proof as reflected in the court's findings of fact. The purchase

documents referenced a purchase price of \$35,000 and a closing date of February 28, the stated price was in fact paid and a bill of sale executed on February 28, and the contract did not contain any reference to a promissory note or price greater than \$35,000. CP 63 (Findings 2-4). Based on these findings, it was proper to conclude that the later promissory note was not supported by consideration. Under the contract they signed on February 28, the Behrmanns were obligated to convey all business assets for \$35,000. The trial court found they already agreed to convey the salon for \$35,000 and they in fact did so. They already had a legal duty to convey the business and therefore the business itself could not act as consideration for the note. The Behrmanns never suggested any consideration for the note other than the business.

The Behrmanns' citation to the Wisconsin decision of *Edwards v. Petrone*, 160 Wis.2d 255, 465 N.W.2d 847 (1990), does not help their position. First, the reason that the defense of failure of consideration was denied in *Edwards* was because the promissory note was under seal, which in Wisconsin means that there is "conclusive proof of consideration." *Id.* at 258-59. Such a rule has no application in Washington, which has abolished private seals. RCW 64.04.090. The discussion in *Edwards* as to whether the note was an executory or an executed contract is simply irrelevant. That is not the dispute in this case. Rather, the central dispute is

what the parties actually intended when they signed one set of documents referencing a \$35,000 purchase price and later a separate promissory note for \$50,000. The trial court resolved this factual dispute in Mr. D'Aprile's favor. Accordingly, the conclusions of law should be affirmed.

### **C. Attorney's Fees**

The Behrmanns are not entitled to attorney's fees under CR 11, RCW 4.84.185, or RAP 18.9 even if they prevail on this appeal. Because only baseless pleadings are in violation of CR 11, a court "should impose sanctions only when it is patently clear that a claim has absolutely no chance of success." *MacDonald v. Korum Ford*, 80 Wn. App. 877, 884, 912 P.2d 1052 (1996) (internal quotations and citations omitted). Similarly, a defense is frivolous under RCW 4.84.185 only if it "cannot be supported by any rational argument on the law or facts." *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 340, 798 P.2d 1155 (1990).

Mr. D'Aprile testified that the purchase price for the business was \$35,000 as stated in the purchase and sale agreement. RP 111:25-112:1, 115:24, 127:16-18, 143:3-5. He further testified that the promissory note was a separate transaction executed as a way to further compensate the Behrmanns if Mr. D'Aprile made a profit. RP 113:5-114:3, 127:19-22, 142:10-20, 143:3-5. Because the business was conveyed upon payment of the full purchase price of \$35,000 and because the salon never made a

profit after Mr. D'Aprile's purchase, the note was unenforceable. This defense to enforcement of the note was a rational argument based on the law and facts and was successful at the trial level. There can be no argument that his defense had "absolutely no chance of success" as would be required to find that the defense was frivolous.

The only frivolous arguments that have been presented in this matter are those in the Behrmanns' appeal. The Behrmanns' arguments are simply a repeat presentation of their testimony at trial without any substantive analysis as to why this court should accept their testimony and reject Mr. D'Aprile's testimony on the fundamental factual dispute. The Behrmanns continue to rely on the testimony of Mr. Hautala as the key to their version of the facts without explaining any rational basis to overturn the trial judge's credibility determination. The Behrmanns fail to present any rational argument on the law or the facts that could justify overturning the trial court. Mr. D'Aprile should recover the attorney's fees incurred in defending this meritless appeal under RAP 18.9.

### **CONCLUSION**

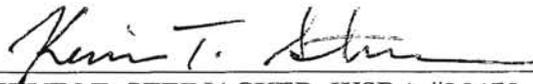
This appeal hinges on resolution of a fundamental factual dispute between the parties regarding the sale of the salon to Mr. D'Aprile. The contract and bill of sale state that the salon was sold for \$35,000. The trial

court heard conflicting explanations from each of buyer and seller as to why there was an additional promissory note three days later and determined that the Behrmanns' position was not adequately supported by the evidence. Substantial evidence supports the finding that the parties agreed to a purchase price of only \$35,000 for the business. Because the purchase price was already paid and the note was only a side attempt by the sellers to get additional money above and beyond the agreed-upon purchase price, the trial court properly concluded that the Behrmanns offered nothing in exchange for the promissory note and it was not enforceable against Mr. D'Aprile.

The Behrmanns present a very narrow view of the evidence but the trial judge's decision was based on all the evidence, not just the excerpts the Behrmanns cite in support of their position. The Behrmanns have not established sufficient cause to ignore the evidence presented by Mr. D'Aprile at trial and to supplant the trial court's findings with what they wish the court had decided. The judgment should be affirmed.

Respectfully submitted this 8<sup>th</sup> day of September, 2014.

STEINACKER LAW PLLC



KEVIN T. STEINACKER, WSBA #35475  
Attorney for Respondent

**Certificate of Service**

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that on the date below I ~~mailed~~<sup>delivered</sup> the original and one copy of the Respondent's Brief to the Court of Appeals and served a copy of the brief upon:

Helmut Kah  
16818 140<sup>th</sup> Ave NE  
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Service was accomplished by:

Hand delivery  
 First class mail  
 Email

DATED this 9<sup>th</sup> day of September, 2014, at Tacoma, Washington.

  
\_\_\_\_\_  
Kevin Steinacker