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No. 74257-1

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COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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BELLA'S VOICE, JORDAN HOFFMAN-NELSON, and  
YVETTE HOFFMAN,

Appellants,

v.

VANISHING PRICES LLC, MICHAEL PATRICK BROWN, and  
TONI LYNN BROWN,

Respondents.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

This appeal arises from a contract-related dispute where the underlying contractual documents are inconsistent with one another, and where the extrinsic evidence is likewise entirely disputed and contradictory. It is the kind of case for which Washington law requires a trial. Nonetheless, relying on a fundamental error of law, the trial court entered summary judgment by interpreting the disputed material facts and resolving them *against* the nonmoving party.

In their Brief, Respondents Michael Brown, Toni Brown, and Vanishing Prices LLC (collectively, the “Browns”) have unsuccessfully attempted to frame the issues in this case as simple, straightforward, and undisputed. In doing so, they have ignored critical, admissible evidence exemplifying the numerous genuine issues of material fact that remain in this case, which cannot be resolved on summary judgment against Appellants Jordan Hoffman-Nelson, Yvette Hoffman, and Bella’s Voice (collectively, the “Hoffmans”).

Most glaringly, the Browns ignore the facial contradiction between the material terms of the contract documents they claim constitute a “single transaction,” which create blatant ambiguity as to whether the deal in question was to be a donation (as the Hoffmans argue) or a sale (as the Browns argue). The Browns also ignore the trial court’s error of law in concluding that lack of consideration is not a defense to the enforceability of a promissory note. In their Brief, the Browns *do not even mention* (and thus apparently concede) this fundamental error of law. Rather than address the dispositive, disputed issues head on, the Browns instead offer

a highly skewed portrayal of this appeal, repeatedly asserting that matters are “undisputed” while ignoring material facts and misconstruing the circumstances under which the documents at issue were signed. In doing so, they urge the Court to weigh credibility and to not only choose between competing inferences drawn from the record—an exercise entirely inappropriate at the summary judgment stage—but to also select the inference that favors them as the moving party and the drafters of the conflicting documents. Established Washington law requires otherwise.

Ultimately, nothing in the Browns’ Brief changes or justifies either the trial court’s error of law in concluding that the defense of lack of consideration is not available to challenge the enforceability of a promissory note or its further error in improperly resolving material issues of fact on summary judgment. The trial court’s decision should be reversed and remanded for trial.

## **II. ARGUMENT AND AUTHORITY**

### **A. The Entry Of Summary Judgment Was Improper Where It Required Resolving Competing Inferences And Weighing Extrinsic Evidence.**

At its most basic level, the Browns’ Brief urges this Court to affirm the trial court by resolving competing inferences in their favor. *See, e.g.*, Resp. Br. at 7 (“The extrinsic evidence submitted by Appellants unambiguously confirms that Appellants purchased the Business in consideration for the \$50,000 . . .”). But doing so is inappropriate on this appeal of a summary judgment. Even assuming, as the Browns contend, that the underlying contractual documents at issue in this case are a “fully integrated” agreement (they are not, *see* App. Br. at 26-31), summary

judgment for the Browns would *still* be inappropriate. Under Washington law, “it is for the trier of fact to interpret the meaning of an integrated contract ‘if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.’” *Lokan & Assocs., Inc. v. Am. Beef Processing*, 177 Wn. App. 490, 496, 311 P.3d 1285 (2013). Here, the ambiguity as to whether the store was to be sold or donated and, more specifically, whether the Note is supported by consideration, requires the examination of extrinsic evidence and can *only* be resolved by choosing between competing inferences drawn from that evidence. For this overriding reason, the Browns’ position fails. Summary judgment in this case was improper.

**a. The Contract Documents Are Inherently Inconsistent.**

To begin with, the material terms of the contract documents in question are facially inconsistent and therefore ambiguous. The Browns, who drafted the documents, largely ignore this fundamental inconsistency.

First, the Bill of Sale contains the following operative provision: “The goods being sold under this bill of sale (Goods) are: All fixture [sic], inventory, furnishings, [and] equipment . . . . The full purchase price for Goods is \$10.00. In exchange for Goods, Buyer(s) has/have paid Seller(s) (choose one): X the full purchase price.” CP237-238 (executed Bill of Sale). Just like the description of the Goods, the Browns handwrote the “X” to check the option that \$10.00 was the full purchase price. The Bill of Sale goes on to provide separate options to identify whether the amount paid was a down payment and whether a promissory note has been executed in conjunction with the Bill of Sale for the balance of the

purchase price. *Id.* The Browns did not check either of these options, confirming that the amount in the Bill of Sale was not just a down payment and that no promissory note had been executed for the balance of the purchase price. The final paragraph in the Bill of Sale contains the following statement, again handwritten by the Browns: "All fixtures, inventory, furnishing [sic], [and] equipment are considered a donation, \$10.00 is the consideration required to validate the transaction." *Id.*

For ease of reference, the key language in the Bill of Sale appeared as follows:

**PERSONAL PROPERTY BILL OF SALE**

1. Michael + Toni Brown, Seller(s), hereby sell(s) the goods described in paragraph 2 to Jordan Hoffman-Alson + Yvette Hoffman, Buyer(s).

2. The goods being sold under this bill of sale (Goods) are: All fixture, inventory, furnishings, + equipment located at:  
4001 198<sup>th</sup> St SW, ste 8+9 and 15806 Hwy 99, Ste 4  
Lynnwood, WA 98036 and Lynnwood, WA 98087

3. The full purchase price for Goods is \$ 10.00. In exchange for Goods, Buyer(s) has/have paid Seller(s) (choose one):

the full purchase price.

\$ \_\_\_\_\_ as a down payment, balance due in \_\_\_\_\_ days.

\$ \_\_\_\_\_ as a down payment and has/have executed a promissory note for the balance of the purchase price.

8. Additional terms of sale for Goods are as follows: All fixtures, inventory, furnishings, + equipment are considered a donation, \$10.00 is the consideration required to validate the transaction.

CP237-238.

In summary, nothing in the Bill of Sale the Browns drafted even remotely supports their current contention that the transaction was not a donation with a payment of \$10, but was instead a sale for \$50,000.

Like with the Bill of Sale, the Business Sale Agreement contains

the following, operative provision: “The total purchase price for all fixtures, inventory, furnishings and equipment is \$10.00 Dollars . . . . The additional value of all fixtures, inventory, furnishings, and equipment shall be considered a donation.” CP233-234 (executed Business Sale Agreement). This language is typewritten and is included in the body of the agreement. The Bill of Sale and Business Sale Agreement are inconsistent with the Browns’ current assertions about the transaction.

In contrast, the alleged promissory Note contains the following, generic recital of consideration: “FOR VALUE RECEIVED, the undersigned . . . hereby promises to pay to the order of Michael & Toni Brown, dba Vanishing Prices (“Payee”), the principal sum of \$50,000 . . . .” CP230-231. By its plain terms, this recital directly conflicts with the statements in the Bill of Sale and Business Sale Agreement that \$10.00 was the “full” and “total” purchase price and that any remaining value in the store’s assets was to be “considered a donation.” Nothing in the plain language of these operative documents resolves this inconsistency and ambiguity.<sup>1</sup>

**b. Extrinsic Evidence Is Necessary To Resolve The Documents’ Inconsistencies.**

Notwithstanding the contradictions in the operative documents, the Browns argue that the documents at issue constitute “a single transaction,”

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<sup>1</sup> The Assignment of Lease does not aid in resolving the facial inconsistency between the Bill of Sale and Business Sale Agreement, on the one hand, and the Note on the other. The Assignment of Lease states, in typewritten language: “FOR VALUE RECEIVED, the undersigned Assignor hereby assigns to Yvette Hoffman, Assignees herein, that certain SHOPPING CENTER LEASE . . . and all right, title and interest in and to and under said Lease and Assignment.” CP177-180 (executed Assignment of Lease). The Assignment of Lease does not by its terms explain the nature of the value received. *Id.*

and that the Note should therefore be enforced. But whether this Court accepts the Browns' argument about the documents involving "a single transaction" makes no difference to the outcome of this appeal. If the documents signed by the parties *do not* constitute a single transaction, extrinsic evidence is required to resolve the myriad factual disputes relating to whether the stand alone Note was supported by consideration. *See generally* App. Br. at 22-31. If the Court accepts the Browns' theory that the documents constitute a single transaction, the conflicting key terms create ambiguity that can only be resolved by examining the extrinsic evidence presented by the parties. In either case, extrinsic evidence is required to determine whether the Browns were required to donate the store to the Hoffmans, so long as that evidence does not vary or contradict the *unambiguous* written terms of the parties' agreement. The record contains just such evidence and it supports the Hoffmans' appeal.

The Browns attempt to avoid this problem by contending that the extrinsic evidence favoring the Hoffmans is inadmissible. As explained in the following paragraphs, the Browns' argument that this evidence is inadmissible contradicts established Washington law.

**c. The Extrinsic Evidence Supporting The Conclusion That The Business Was To Be Donated Is Admissible.**

The Browns make three arguments concerning the admissibility of the extrinsic evidence submitted by the Hoffmans to show that the transaction was a donation. First, they incorrectly argue that the extrinsic evidence conclusively shows that the store was to be sold for \$50,000.

Second, they argue that the parties' discussions and negotiations leading up to the documents' signing are inadmissible because they supposedly contradict terms from the parties' written agreement. Third, they argue that aspects of the extrinsic evidence are inadmissible because they show a party's subjective or unilateral intent. All three of these arguments fail.

(1) The Extrinsic Evidence Does Not  
Conclusively Show The Transaction  
Was A \$50,000 Sale

The Browns argue that the extrinsic evidence surrounding the signing of the contract is uncontroverted and demonstrates a \$50,000 sale. This argument is constructed by simply ignoring the key facts that do not support the Browns' position. As fully discussed in the Hoffmans' Opening Brief, the parties dispute almost every aspect of the parties' agreement—including the critical issue of whether the store was to be a donation or sale. The Hoffmans' declarations establish that the Browns promised to donate the store, principally in exchange for the Hoffmans agreeing to assume the long-term lease the Browns could no longer afford. CP153:19-154:10, 163:19-164:11. The Browns, expectedly, contend—through their own declarations—that the store was to be sold for \$50,000. CP321:22-322:2, 326:22-327:18. There is nothing uncontroverted about the parties' stated understandings of this transaction.

Beyond the competing declarations, which themselves are sufficient to show material issues of fact precluding summary judgment under the circumstances, the *only* contemporaneous evidence that exists on the record uniformly supports the Hoffmans' position that the transaction was a donation. The Browns advertised a *donation* of the store and, in her

May 28, 2014 email to the Hoffmans following the Hoffmans' response to that advertisement, Ms. Brown unequivocally described the anticipated deal as a donation, stating: "*We very much enjoyed getting to know you both and discussing your intentions for the store if it is donated to you.*" CP399-400 (emphasis added). The Browns have not produced *any* evidence from the relevant time period conflicting with Ms. Brown's characterization of the transfer as a donation. The contention that the extrinsic evidence undisputedly shows the deal was a \$50,000 sale is baseless.

(2) The Extrinsic Evidence Does Not  
Improperly Contradict Any  
Unambiguous Contract Term

The Browns next argue that the Hoffmans' evidence should be excluded (while theirs is admitted) because extrinsic evidence may not be used to "vary, contradict, or modify the written word." This argument is unavailing. The only supposed contract term the Browns have identified as being contradicted by the Hoffmans' evidence is the Note's purported term that the Hoffmans pay the Browns \$50,000. But that disputed obligation is not some unambiguous term for which extrinsic evidence may not be admitted. To the contrary, that term itself *directly* conflicts with the more descriptive terms in the other contract documents (the Bill of Sale and the Business Sale Agreement), which the Browns themselves argue are all part of the same transaction and which expressly state that \$10.00 is the full purchase price. Ms. Brown's contemporaneous statement characterizing the transaction as a donation confirms that the value of the assets—beyond the \$10.00 to validate the transaction—was to

be considered a donation. In the context of this dispute, there is nothing unambiguous about the provisions of the Note on which the Browns rely. Reliance on extrinsic evidence is not just appropriate but necessary.

As noted above, if the Court determines that the Note was not part of the parties' deal, the extrinsic evidence confirms and explains the transactions. Alternatively, if the Court concludes that all four documents comprise the agreement, then the extrinsic evidence is admissible to resolve the facial ambiguity among the documents' key terms. Either way, the evidence cannot simply be ignored as urged by the Browns.

(3) The Extrinsic Evidence Is Not Offered To Show Subjective Or Unilateral Intent

The Browns also attempt to avoid the critical extrinsic evidence in the record by characterizing it as merely concerning "a party's subjective or unilateral intent." This argument is also without merit.

In fact, the very cases cited by the Browns confirm that the Hoffmans' evidence is admissible. For example, in *Watkins v. Restorative*, a case relied on by the Browns, the court confirmed the longstanding principle that extrinsic evidence is admissible to ascertain the parties' objective intent, and can include: "(1) the situation of the parties at the time the instrument was executed, (2) the circumstances under which the instrument was executed, and (3) the subsequent conduct of the contracting parties." 66 Wn. App. 178, 191, 831 P.2d 1085 (1994) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). See also *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994) ("[P]arol evidence is admissible to show the situation of the parties

and the circumstances under which a written instrument was executed . . . .” (quoting *Berg*, 115 Wn.2d at 669)).

Here, the parties’ situation at the time of execution and the circumstances under which the documents were signed are evidence of objective intent, and strong indicia that the transaction was a donation. The Hoffmans responded to an online advertisement offering to donate the store. CP161:24-162:5. The Hoffmans told the Browns that they were broke and could not afford the store unless it was donated to them. CP152:10-22, 162:14-25. The Hoffmans worked for the Browns for a month unpaid and gradually began assuming the Browns’ financial obligations—all under the promise that the store would be donated to them at the end of the month. CP154:11-18, 164:12-165:10. On the day the documents were to be signed, the Hoffmans and the Browns executed the Assignment of Lease in front of the store’s landlord. CP177-178, 182-225.<sup>2</sup> Only *after* the Assignment of Lease was signed, and the Browns were no longer encumbered by the long-term lease or other financial obligations assumed by the Hoffmans, did Mr. Brown first present the Hoffmans with the Note in the privacy of his own office. CP154:19-155:9, 165:11-166:2. Indeed, the Browns do not dispute that “Mr. Brown sprang the Note on Appellants” on June 30, 2014. Resp. Br. at 8. Having already assumed the lease, the Hoffmans reluctantly succumbed and

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<sup>2</sup> Although the Assignment of Lease confirms that the Browns were assigning the lease “FOR VALUE RECEIVED,” none of the documents expressly discuss or otherwise mention that the Browns had *already received the value* of the Hoffmans’ free work and transfer of liabilities by the end of June. By the very authority relied on by the Browns, this evidence is admissible “to prove the terms not included in the writing . . . .” *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 32-33, 959 P.2d 1104 (1998).

signed the Note, along with the Business Sale Agreement and Bill of Sale, in response to Mr. Browns' threat that the entire deal would be off and his commitment that he would never actually enforce the Note. CP155:10-25, 166:3-20. The Hoffmans have since then refused to pay down the Note.

None of these facts constitute extrinsic evidence of mere *subjective* intent. Instead, they are offered to show the circumstances surrounding execution of the parties' agreement and to resolve the patent ambiguities plaguing the documents drafted by Mr. Brown. *Watkins*, 66 Wn. App. at 191. Furthermore, the evidence of the parties' behavior is consistent with the true meaning and intent of the agreement—that the store would be donated to the Hoffmans to run their nonprofit in exchange for their promise to, among other things, assume the lease. For these reasons, the evidence is admissible under Washington law and should have been construed in favor of the Hoffmans as the nonmoving parties.

**d. The Ambiguities Require A Choice Between Competing Inferences And Credibility Determinations, Which Is Improper On Summary Judgment**

From the admissible, extrinsic evidence comprising the record on appeal, the parties draw competing inferences. The Hoffmans, on the one hand, maintain that the Browns agreed to donate the store to them. CP153:19-154:10, 163:19-164:11. Beyond the key terms from the Bill of Sale and Business Sale Agreement, this agreement is evidenced by the online advertisement of a donation posted by the Browns (CP394), Jordan and Yvette's declarations describing the donation, and the only statement contemporaneous to the parties' negotiations—Ms. Brown's email to the Hoffmans characterizing the transaction as a donation. CP399-400.

The Browns, on the other hand, argue that they promised to sell the store to the Hoffmans for \$50,000. This is evidenced, according to the Browns, by their declarations and the mere fact that the Hoffmans were forced into signing the “Note.” Resp. Br. at 9. The Browns effectively ask the Court to make a credibility determination—deciding whether to believe the Browns’ declaratory testimony over that of the Hoffmans’—and to weigh the evidence in the Browns’ favor. Yet the Browns have put forth no authority supporting their suggestion that their declaration should be given weight while the Hoffmans’ declarations are ignored. Nor have the Browns offered any authority as to why Ms. Brown’s contemporaneous statement that the planned transaction was a donation should be ignored while the facts are construed in their favor to exclude the possibility that the deal was a donation, even though they drafted the documents and were the moving party on summary judgment. Nor could they. Their positions are contrary to Washington law. *See Lokan*, 177 Wn. App. at 496.

The Browns do not dispute that, in the month leading up to the documents’ signing, the Hoffmans worked unpaid for the Browns and began assuming the Browns’ liabilities. In fact, they essentially ignore this critical aspect of the parties’ agreement. Nor do the Browns dispute that the value received in exchange for the Hoffmans’ promise to assume the lease was the store’s transfer. The Assignment of Lease—with a remaining balance of over \$200,000—was executed in exchange for the transfer of the store *before* the Hoffmans were aware that the Browns intended to coerce them into signing the Note. Stated differently, the Browns’ had already bargained away the store’s assets and, accordingly,

presented the Note only after incurring a preexisting obligation to donate the store to the Hoffmans. *See* App. Br. at 10.

The most reasonable interpretation of the facts in the record is that the Browns promised to donate the store to the Hoffmans in exchange for the value they received in getting out from under the lease they could no longer afford for their failing business. But while such a reasonable inference would be proper to make in favor of the *nonmoving* party on summary judgment (here, the Hoffmans), it is for the trier of fact to choose between the competing inferences in this case. *Berg*, 115 Wn.2d at 668. Accordingly, summary judgment was not appropriate.

e. **Despite the Browns' Argument To The Contrary, The Conflicting Documents Are Not A Single Transaction As A Matter Of Law.**

An additional fundamental deficiency in the Browns' argument is their contention that because “[i]nstruments that are part of the same transaction, relate to the same subject matter, and are executed at the same time are read and construed together as one contract,” the Assignment of Lease, Business Sale Agreement, Bill of Sale, and Note should be considered a single transaction. Resp. Br. 5-6. The Browns' statement of the law is incomplete. The actual rule is that “[w]here agreements are composed of several instruments, they should be construed together **insofar as they are not inconsistent.**” *Dennis v. Southworth*, 2 Wn. App. 115, 120-21, 467 P.2d 330 (1970) (emphasis added) (citing *Paine-Gallucci, Inc. v. Anderson*, 41 Wn.2d 46, 246 P.2d 1095 (1952)). Here, the inconsistencies in the documents, particularly concerning the purchase price and donation, preclude the Business Sale Agreement and Bill of Sale

from being construed together with the Note as one transaction. This conclusion is bolstered by the fact that, while the Bill of Sale and Business Sale Agreement refer to one another, neither refers to the Note. Nor does the Note make reference to any of the other documents. In fact, the Business Sale Agreement goes so far as to state that “[c]onsummation of the sale” is completed with “delivery by the Seller of the Bill of Sale,” making no reference to any related promissory note. CP233. Likewise, the Bill of Sale form actually contains a check box to reflect whether there is a related promissory note, and that box *was not selected*. CP237. All of these facts suggest that the Note was something entirely separate from the agreed upon deal, just as the Hoffmans have always contended.

The Browns argue that the contract documents must be read together and that the donation in the Business Sale Agreement and Bill of Sale somehow provides consideration for the Note. But Washington law does not require *inconsistent* terms to be read together to the exclusion of other terms. It is not just that there is nothing in the Bill of Sale or Business Sale Agreement that suggests they are consideration for the Note; it is that their terms are contradictory to the Note. Basic principles of contract construction do not permit ignoring those contradictions.

Because the plain terms of the documents are ambiguous and contradictory, the Court must consider admissible parol evidence to resolve the ambiguity and determine what consideration, if any, supports the Note. *See, e.g., Dennis*, 2 Wn. App. at 120 (“Parol evidence is admissible to determine the intention of the parties, explain ambiguities, supply omissions, or prove whether or not oral agreements were or were

not merged into a written contract.”). As discussed above, at least one reasonable inference that can be drawn from the record in this case is that the Browns had a preexisting legal duty to donate the store, and thus that there was no consideration for the Note. *See* App. Br. at 24-25. It was improper to resolve this dispute of material fact on summary judgment.

**f. Even If The Documents Are One Transaction, The Conflicting Terms Still Preclude Summary Judgment.**

Even assuming that the documents at issue were part of one single transaction, as the Browns contend, the Court is *still* required to resolve any remaining ambiguity inherent in the documents. As confirmed by the authority relied on by the Browns (Resp. Br. at 5), ambiguity in contract documents creates “a question of fact . . . which may be not be resolved by a summary judgment.” *Turner v. Wexler*, 14 Wn. App. 143, 147, 538 P.2d 877 (1973). Because the key terms of the four documents the Browns contend were part of one transaction directly conflict as to the purchase price in the deal, a question of fact remains on that critical issue. This question of fact should not have been resolved on summary judgment. *Id.*

**g. Even If The Court Could Potentially Resolve The Conflicting Terms, Summary Judgment For The Browns Was Still Improper.**

Even if it were proper for the Court to resolve the conflicting terms in the documents at issue, established Washington law confirms that any such resolution on the record here would have to be in the Hoffmans’ favor. Again, summary judgment for the Browns was error.

“In construing an agreement containing a conflict in terms, courts must give effect to the manifest intent of the parties.” *Green River Valley*

*Found., Inc. v. Foster*, 78 Wn.2d 245, 249, 473 P.2d 844 (1970) (citing *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 P. 116 (1905)). “Where provisions of the same transaction are clear but conflicting, the operative provisions prevail over the recitals.” *Id.* (citing *First Nat’l Bank & Trust Co. v. United States Trust Co.*, 184 Wash. 212, 50 P.2d 904 (1935); *Brackett v. Schafer*, 41 Wn.2d 828, 252 P.2d 294 (1953)). “Moreover, written or typed provisions prevail over conflicting printed clauses.” *Id.* (citing *Creditors Ass’n v. Fry*, 179 Wash. 339, 37 P.2d 688 (1934)). Furthermore, to resolve conflicting terms, Washington courts have long given effect to the provision which more nearly effectuates the purpose of the entire agreement. *See, e.g., Vance v. Ingram*, 16 Wn.2d 399, 416, 133 P.2d 938 (1943).

When the four documents are read in accordance with these principles, the clear conclusion to be drawn is that the transfer of the store was to be a donation. The parties’ manifest intent to donate the assets of the store comes through the documents for at least three principal reasons.

First, the operative provisions in the Business Sale Agreement and the Bill of Sale, which specifically and descriptively state that \$10.00 was to be paid for *all* of the store’s fixtures, inventory, furnishings, and equipment, control over the Note’s generic statement that \$50,000 was to be paid “for value received.” *Green River*, 78 Wn.2d at 249-50.

Second, the key provisions in the Bill of Sale that identified what would be transferred, set the sales price at \$10.00, and specified that any excess value was to be considered a donation were all *handwritten* by the Browns. Accordingly, they control over the generic printed recitals in the

Note. *Id.* at 249. This makes sense, as the handwritten modifications could not have been incorporated until after the documents were printed and prepared, and the provisions specifically handwritten by the Browns offer far better indicia of intent than recitals in a pre-printed form.

Third, the documents were drafted by the Browns and thus should be construed against them. The Browns do not dispute that they prepared the documents. Yet, the Browns have failed to explain—if it really was the parties’ intent to sell/purchase the store for \$50,000—why the Business Sale Agreement and Bill of Sale that *they prepared* contradict that purported intent, or why those documents were not modified to be consistent with the Note. Prior to presenting the Hoffmans with the documents for signature, the Browns had nearly a month to draft the purported contract terms. If a \$50,000 sale was truly the parties’ intent (it was not), Mr. Brown could have simply prepared a Business Sale Agreement and Bill of Sale to reflect that sale. He did not do so.

Moreover, Mr. Brown had another opportunity to modify this language after the Hoffmans balked when he initially presented them the documents on June 30. *See* CP165:11-4 (indicating that Mr. Brown drafted additional versions of the agreement). But he did not make these changes. Instead, the Browns used a pen and *handwrote* that **the full purchase price** was “\$10.00” and that all fixtures, inventory, furnishings, and equipment “**are considered a donation.**” CP237-238 (emphasis added). The Browns have failed to explain why the Browns’ own more descriptive, handwritten terms should be ignored in favor of the general recitals in the Note, nor can they. Such an argument would conflict with

established Washington law. *See Green River*, 78 Wn.2d at 249-50.

The fundamental rules of contract construction do not support the Browns' contentions in this case, nor does the admissible extrinsic evidence in the record. For these additional reasons, the trial court's entry of summary judgment for the Browns was error.

**B. The Browns' Argument That The Language Describing The Transaction As A Donation Is Merely A "Placeholder" Ignores Operative Terms In The Documents And Impermissibly Conflicts With Established Washington Law.**

Lacking any actual explanation for the inconsistency in the documents as to the purchase price, the Browns argue that the \$10.00 stated in the Business Sale Agreement should be read as merely a placeholder and thus essentially ignored. *See Resp. Br.* at 7. This baseless argument fails for at least six reasons.

First, the Browns' suggested interpretation of the documents is unreasonable as it requires ignoring the specific descriptive language in both the Bill of Sale and Business Sale Agreement setting the \$10.00 price and explicitly stating (including in the Browns' handwritten additions) that this amount was the "full" and "total" purchase price and that any remaining value of the store's assets was a donation. It also requires ignoring that Mr. Brown did not reference the Note in the Business Sale Agreement or Bill of Sale, and specifically chose not to check the box on the Bill of Sale that asked whether there was a related promissory note.

Second, it suggests a reading of the documents that would render their more descriptive language meaningless, in violation of Washington's rule against superfluous language. *See Bogomolov v. Lake Villas Condo*

*Ass'n of Apt. Owners*, 131 Wn. App. 353, 361, 127 P.3d 762 (2006) (“When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless.”). Accepting the Browns’ position would effectively read specific, key terms out of the documents altogether.

Third, the Browns’ offered interpretation contradicts the legal requirement that all facts and inferences must be taken in the light most favorable to the nonmoving party on summary judgment. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998); *Beers v. Ross*, 137 Wn. App. 566, 570, 154 P.3d 277 (2007). Under the Browns’ tenuous theory, the Court would have to ignore key, descriptive portions of the documents, along with the *only* non-testimonial evidence (Ms. Brown’s contemporaneous characterization of the potential deal as a donation), in favor of generic, boilerplate terms in a form note. Such a strained inference in the Browns’ favor is simply improper on summary judgment.

Fourth, the Browns’ proffered reading is contrary to Washington’s canon of construction that ambiguous contract terms should be construed against the contract’s drafter. *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 760 P.2d 350 (1988). To the extent the conflicting provisions need to be harmonized, Washington law directs that they be interpreted in favor of the Hoffmans and not in favor of the Browns.

Fifth, the Browns fail to put forth any *evidence* supporting their new theory that the \$10.00 was intended to serve as a “placeholder.” *See* Resp. Br. at 6-7. *Nothing* in the Browns’ declarations or anywhere else in the record supports such a reading. *See, e.g.*, CP321-325 (Decl. of T.

Brown), 326-342 (Decl. of M. Brown). Because it is unsupported by any record evidence, the “placeholder” argument should be ignored.

Sixth, the Browns fail to provide *any* relevant legal support for the position that the \$10.00 price quoted in the Business Sale Agreement should be read as a nominal placeholder. The Browns cite *Kinne v. Lampson*, 58 Wn.2d 563, 567 (1961), ostensibly for the proposition that “[c]ontracting parties will frequently use a nominal recital of consideration in one instrument while placing the true contract price in another.” Resp. Br. 7, n.1. *Kinne* says nothing of the sort. There, the issue was whether parol evidence was admissible to vary the stated consideration. The Court expressly held that “none of the factors necessary to vary the stated consideration by parol evidence [was] present.” *Id.* at 627. “The consideration, the purchase price . . . , is spelled out precisely including the installments . . . to be paid.” *Id.*

Perhaps more critically, the documents at issue in *Kinne* were not inconsistent like the documents at issue here. As discussed, the express terms of the Business Sale Agreement and Bill of Sale—including the purchase price and installments in which it is to be paid—directly conflict with the Note. The Note purports to provide that the \$50,000 is to be paid in 100 monthly installments. CP230-231. The Bill of Sale states that the full purchase price is \$10.00 and that it has been paid. CP237-238. Additionally, it expressly contains the option for the drafter to designate whether the \$10.00 was merely a down payment or whether the parties “have executed a promissory note for the balance of the purchase price.” *Id.* The Browns chose not to check these options and instead handwrote

an “X” designating that the full purchase price of \$10.00 had already been paid. Yet, now they argue—directly contrary to their actions—that the \$10.00 was not a purchase price at all and that the store was sold for \$50,000 under a promissory note. These types of inconsistencies preclude the Browns’ “placeholder” interpretation. The mere recitation of consideration found in the Note cannot reasonably overcome the specific contractual elements of the parties’ agreement that the full purchase price was \$10.00 and that any additional value was a donation. *See Kinne*, 58 Wn.2d at 567. The Browns have failed to provide legal authority to the contrary, and their “placeholder” theory should be rejected.

**C. The Hoffmans’ Fraud Defense Is Not Barred As A Matter of Law.**

In their Brief, the Browns contend that the Hoffmans’ fraud defense is barred as a matter of law, relying on *Cornerstone Equip. Leasing, Inc. v. Macleod*, 159 Wn. App. 899 (2011). This argument is unavailing. In *Cornerstone*, this Court held that a promissory note’s maker could not bring a fraud-in-the-inducement defense because he had no right to rely on an oral promise not to enforce a contemporaneous written agreement. *Id.* at 902. In making this holding, the Court stated that “[i]t is patently unreasonable to *freely sign* a document acknowledging a debt based on oral assurance that the document is meant for ‘internal purposes.’” *Id.* at 906 (emphasis added). The Court further reasoned that the note’s maker “was an experienced business person who could have retained counsel.” *Id.*

Like their approach to virtually all the issues in this case, the Browns ignore the critical, distinguishable facts from this case that render

the Court's holding in *Cornerstone* inapplicable. Most importantly, the facts at hand unequivocally establish that the Hoffmans did not "freely sign" the Note, as the maker in *Cornerstone* did. To the contrary, the Browns had already locked the Hoffmans into the deal by inducing them to execute the Assignment of Lease *before* the Note was presented or signed. Prior to presenting the Note, the Browns knew that, without access to the business, the Hoffmans would be unable to pay their new obligation under the lease. Correspondingly, the Hoffmans, who were broke, jobless, and without representation, were in no position to forfeit the time and expense they incurred over the prior month (or incur *additional* time and expense attempting to reverse these events). Without resources or any other way out, the Hoffmans reasonably relied on the Browns' representation that the Note was desired by the Browns for their internal records but would not be enforced.

The inapplicability of *Cornerstone* is further highlighted by the fact that the Browns' promise not to enforce the Note is consistent with the *other three documents* signed by the parties, along with the original online ad, Ms. Brown's statement via email that the store was to be "donated," and the parties' actions leading up to execution. All such evidence (which, aside from the Note and the Browns' self-serving declarations, represents the *entire record in this case*) confirms that the transaction was to be a donation—with \$10.00 being the full purchase price—and comports with the Browns' statement that the Note was merely for "internal purposes" and would not be used against the Hoffmans. The decision in *Cornerstone* is inapplicable here and does not change the

error committed by the trial court in dismissing the Hoffmans' fraud counterclaim on summary judgment. The decision should be reversed.

**D. The Browns Do Not Offer Any Real Arguments In Opposition To The Hoffmans' Remaining Counterclaims and Defenses.**

In their Opening Brief, the Hoffmans detailed why the trial court erred in dismissing their other counterclaims and defenses on summary judgment. The Browns make various general assertions about their views on the merits of the Hoffmans' other claims and defenses, but do not offer any specific legal or factual grounds justifying the trial court's pre-trial dismissal of these claims. *See* Resp. Br. at 12-15.<sup>3</sup> For this reason, the Browns' arguments in support of their opposition should be ignored. RAP 10.3(a)(6) (arguments in support of issues presented must contain citations to legal authority).

**E. The Browns Are Not Entitled to Attorneys' Fees.**

The Browns completely mischaracterize the issue as to whether they are entitled to recover attorneys' fees. The Hoffmans are not suggesting that indigent litigants who cannot afford legal representation should never be able to recoup fees when they have a legal right to recover them. That is not the issue. The case law cited by the Browns concerning the rights of indigent persons to recover fees under statutory fee shifting provisions, such as civil rights laws, is completely inapposite. There is no right to fees under any statute in this case.

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<sup>3</sup> The Browns' attempt to misconstrue the Court's holding in *Losh Family LLC v. Kertsman*, 155 Wn. App. 458, 228 P.3d 793 (2010), to suggest that entry of judgment against Bella's Voice on the Note was appropriate even though it was not a party to the Note, is unavailing. There is no basis in this case for collapsing the legal distinction between the individuals and the corporate entity. As described in the Opening Brief, judgment against Bella's Voice was improper.

Here, the sole potential basis for fees is a contract provision, and that contract provision expressly provides only for the recovery of fees *incurred* by the Browns. It is undisputed that the Browns have not incurred any legal fees. Both the Hoffmans and the Browns are represented in this case *pro bono*. By nonetheless awarding fees to the Browns for legal fees they never actually incurred, the trial court granted the Browns a right not found in their agreement. The evidence presented by the Browns' *pro bono* attorney concerning his rate or hours spent on this matter is irrelevant, as those amounts were never incurred by the Browns. As such, imposing an obligation on the Hoffmans to pay for these costs would improperly create a term not found in the Note itself.

Finally, the Browns' request for attorneys' fees in connection with this appeal is utterly without merit. The Browns make the baseless and offensive assertion that this appeal is "frivolous." It is not. "An appeal is frivolous when there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal." *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987). There is nothing like that here. As stated in Appellants' Opening Brief and herein, numerous genuine issues of material fact remain that preclude summary judgment and have a substantial impact on the rights and obligations on the parties to this dispute. The Hoffmans are legally entitled to exercise their right to appeal and have done so. For appropriate, good faith reasons, they believe the judgment below should be reversed and that judgment should ultimately be entered in their favor so that they can continue operating the non-profit

business they began in reliance on the Browns' unfulfilled promise to donate the store to them.

### III. CONCLUSION

The Hoffmans respectfully request that the court reverse the trial court's erroneous decisions and remand for trial.

Respectfully submitted this 24<sup>th</sup> day of March, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused to be served the foregoing on the following counsel of record by the method indicated:

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Dated this 24<sup>th</sup> day of March, 2016.

  
Jackie Slavik