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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 39766-8-II

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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RON COLEMAN d/b/a COLEMAN AND SONS  
CONSTRUCTION  
Plaintiff/Respondent,

v.

DAVID AND VIRGINIA MILNE, et. al.,  
Defendants/Appellants,

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BRIEF OF APPELLANTS

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## I. ASSIGNMENT OF ERROR

A. Assignment of Error. The trial court erred by granting summary judgment on the promissory note where there were genuine issues of material fact raised by the declarations on file.

B. Issues Relating to Assignment of Error. Whether summary judgment was appropriate where the declarations on file demonstrated the existence of genuine issues of material fact, and that Coleman was not entitled to judgment as a matter of law.

## II. STATEMENT OF FACTS

A. Procedural History. Milne's liability on the promissory note was decided by the trial court on Coleman's motion for summary judgment. On May 28, 2009 Coleman filed a motion for summary judgment against Milne on a promissory note signed by David Milne. (CP 30-35). A copy of the promissory note was attached to the Coleman's Second Amended Complaint on Promissory Note, Breach of Contract and Lien Foreclosure. (CP 8-9). On August 14, 2009 the trial court granted Coleman's motion and entered judgment against Milne on the promissory note. (CP 124-126). On September 9, 2009, Milne filed this appeal. (CP 127-131).

### B. Facts

The respondent, Ron Coleman d/b/a Coleman and Sons ("Coleman") contracted to do the construction work on the development of the plat of Horstman Heights in Port Orchard, Washington. (CP 37)

The project was owned by David Alan Development, LLC (“DAD”). (CP 72) Appellant David Milne (“Milne”) is the managing member of DAD. (CP 72) In the summer of 2008, DAD disputed some of the charges by the plaintiff and refused to pay. (CP 37) Coleman filed a lien against DAD’s real property and stopped working on the project. (CP 37) On or about August 8, 2008, the Coleman and DAD reached an agreement that was formalized in a written Amended Agreement for Construction Services (“Agreement”). (CP 43-48) Milne personally signed a promissory note in the amount of \$63,733.00 and delivered a certified check in the amount of \$33,176.67 in consideration for the promises set forth in the Agreement: release of the lien and the Coleman’s promise to perform the work on the plat in accordance with the terms of the Agreement. (CP 73).

In opposition to Coleman’s summary judgment motion, Milne argued, supported by his sworn declaration, that Coleman failed to perform the scope of work as set forth in the Agreement. (CP 73-74) The Washington Department of Ecology issued a citation because of the improper work on the project. (CP 75). Also, on November 5, 2008, West Sound Utility District sent a letter directly to Coleman expressing concerns about the Coleman’s construction standards and noting serious problems with the storm water system and the water pipe installation. (CP 96-103) Those matters constituted a substantial and material breach of the Agreement by Coleman.

### III. ARGUMENT

#### **A. Summary Judgment Standards.**

Summary judgment is not a substitute for trial. *Babcock v. State*, 116 Wn.2d 596, 809 P.2d 143 (1991). Summary judgment is only appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). The court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Grundy v. Thurston County*, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). The court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997). Based on these standards, summary judgment for Coleman was not appropriate.

An appellate court reviews summary judgment de novo, engaging in the same inquiry as the trial court and views the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006).

**B. There was a genuine issue of material fact as to what constituted the consideration for the promissory note.**

Coleman claims that the only consideration for the promissory note was the release of the lien. (CP 34) Milne contends that the consideration for his signature on the promissory note was Coleman's agreement to go back to work and complete the plat in accordance with the Agreement. (CP 73-74) The promissory note itself states only that it was given for valuable consideration. (CP 8-9). If a contract has two or more reasonable meanings when viewed in context, a question of fact is presented. *Chatterton v. Bus. Valuation Research, Inc.*, 90 Wn. App. 150, 155, 951 P.2d 353 (1998). The promissory note was signed in connection with the Agreement. Even Coleman admits that. (CP 37). In that context, it is reasonable to infer that the consideration for the promissory note was all of the promises contained in the Agreement, including the promise to complete the plat.

**C. There was a failure of consideration for the promissory note.**

Failure of consideration is a good defense in an action on a negotiable instrument as between the original parties to the instrument. *See, Burton v. Dunn*, 55 Wn. 2d 368, 347 P.2d 1065 (1960). In that case, the respondent, Dunn, had executed a promissory note as part of an agreement to settle a paternity issue. Part of the consideration in the agreement was the promise by Burton to not in "any way claim or make any statements of any kind or nature, publicly or privately, whereby,

directly or indirectly, it may or might be implied that Richard J. Dunn is the father of her [Burton's] unborn child.”

Dunn stopped making payments on the promissory note and Burton sued. Dunn defended on the basis that there was a failure of consideration and the trial court agreed finding that Burton had breached that part of the agreement quoted above.

Like that case, here there were several promises by Coleman that were consideration for David Milne's signing and delivery of the promissory note. Part of the consideration was for plaintiff to complete the construction of the plat in accordance with the Preliminary Plan dated March 22, 2007 as amended and the Sewer and Water Plan dated July 9, 2008 by West Sound Utilities. Coleman breached that part of the Agreement and that breach constituted a failure of consideration for the promissory note.

Coleman argued that the only consideration for the promissory note was the release of the lien, but the Agreement clearly states that “Upon execution of this Amended Contract, Contractor shall cause a lien release in the form previously provided to Owner ...” Clearly the lien release was part of the overall agreement which included Coleman's promise to perform the work under the “Scope of Work” provision. To the extent there was a dispute as to the intent of the Amended Agreement,

summary judgment was not appropriate because genuine issues of material fact need to be resolved at trial.

Coleman claimed that the promissory note stands on its own and is not connected with the Amended Construction Contract dated either August 8, 2008 or August 15, 2008. If so, then what was the consideration for Milne obligating himself personally for the alleged debts of DAD for which he previously had no personally liability? The signing of the promissory note was, as a practical matter, Milne's personal guaranty of DAD's alleged preexisting liability.

A promissory note is simply a contract to pay money and a guaranty is a contract whereby the guarantor obligates himself to perform the primary obligor's duties. Both are governed by basic contract law. Every contract must be supported by consideration to be enforceable. *Dybdahl v. Continental Lumber Co.*, 133 Wash. 81, 85, 233 P. 10 (1925). Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. *Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971); *Guenther v. Fariss*, 66 Wn. App. 691, , 696, 833 P. 2d 417 (1992), review denied, 120 Wn.2d 1028 (1993). Before an act or promise can constitute consideration, it must be bargained for and given in exchange for the promise. *Ward v. Richards & Rossano, Inc., P.S.*, 51 Wn. App. 433, , 432, 754 P.2d 120, review denied, 111 Wn.2d 1019 (1988); *Williams Fruit Co. v. Hanover*

*Ins. Co.*, 3 Wn. App. 276, 281, 474 P.2d 577, review denied, 78 Wn.2d 995 (1970).

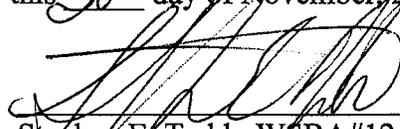
With respect to a guaranty given after the original debt has been incurred, it is well established that the guaranty must be supported by independent consideration. *Universal C.I.T. Credit Corporation v. Delisle*, 47 Wn.2d 318, 287 P.2d 302 (1955). In *Gelco IVM Leasing Co. v. Alger*, 6 Wn. App, 519, 494 P.2d 501 (1972), relying in part on the *Delisle* case, considered the following issue: Is a guaranty signed after the principal obligation has been incurred bind a guarantor without the guarantor's commitment in advance to guarantee the obligation? In the *Gelco* case, the Court of Appeals concluded that the guaranty was not enforceable because there was no independent consideration for the guaranty. In this case, there was no evidence that Milne ever committed in advance to personally pay DAD's obligations under any construction contract with Coleman and there was no independent consideration for Milne to assume or guarantee DAD's debt – by way of the promissory note - after the debt had already been incurred.

#### IV. CONCLUSION

There were genuine issues of material fact concerning the nature of the consideration for the promissory note and whether there was a failure of that consideration. It was error for the trial court to conclude that no genuine issues of material fact existed and to enter judgment on the

promissory note. The judgment should be reversed and the matter remanded for trial on these issues.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of November, 2009.

  
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Attorney for Appellants Milne

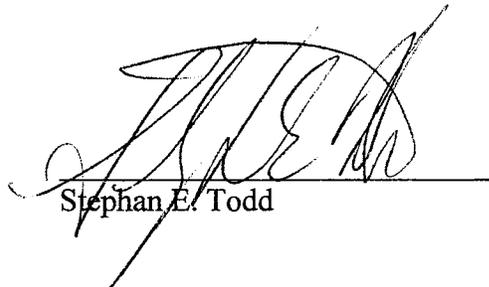


On November 20, 2009, the undersigned cause to be sent by first class mail, with postage prepaid in the mails of the United States at Mill Creek, Washington a copy of the Brief of Appellants to the following:

David P. Horton  
3212 NW Byron Street, Suite 104  
Silverdale, WA 98383  
Attorney for Plaintiff

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Mill Creek, Washington, this 20<sup>th</sup> day of November 2009.



Stephan E. Todd