

ORIGINAL

No. 39853-2-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

10 MAR 17 PM 1:03

STATE OF WASHINGTON

BY *Cm*
DEPUTY

KAHALA FRANCHISE CORP., a Delaware corporation,

Plaintiff

v.

HIT ENTERPRISES, LLC, a Washington limited liability company; and THOMAS S. KLUTZ, JR., and HEIDI KLUTZ, husband and wife

Defendants and Third Party Plaintiffs / Respondents

v.

DRAGON FIRE INVESTMENTS, LLC, a Washington limited liability company; REGINA NORBY-THORBECKE and WILLIAM THORBECKE, KYLE LEONARD a single man; RODNEY MANZO a single man; and CHRISTOPHER BOYD and JANE DOE BOYD, husband and wife,

Third-Party Defendants / Appellants (Dragon Fire & Thorbeckes)

AMENDED OPENING BRIEF
FOR APPELLANT'S DRAGON FIRE AND THORBECKES

Robert D. Michelson, WSBA # 4595
Attorney at Law
PO Box 87096
Vancouver, WA 98687-0096
(360) 260-0925 Fax (360) 944-1947
Email: rmitchelson@msn.com

TABLE OF CONTENTS

I. Introduction.....1

II. Assignments of Error.....2

III. Issues Pertaining to Assignments of Error.....3

IV. Statement of the Case.....5

V. Argument

 a. Standard of Review For Summary Judgment in
 Contract Interpretation.....7

 b. A Reading of the Entire Agreement Results in More
 Than One Reasonable Interpretation.....10

 1. The Court Must Interpret a Document as a Whole,
 Including any Attachments, Incorporations or
 Referenced Documents When Interpreting the
 Document.....11

 2. Ambiguities Present in the Agreement Must be
 Construed Against the Drafter.....15

c. Washington Law Precludes Courts From Interpreting Contracts in a Manner That Leads to an Absurd Result.....	17
d. Extrinsic Evidence Demonstrates More than One Potential Intent.....	20
1. The Consideration Paid Grossly Surpasses the Estimated Value of the Assets of Schedule A.....	22
2. The Depositions and Declarations Present Differing Facts Surrounding Intent of the Parties.....	23
3. The Conduct of the Parties Provides Evidence the Parties Intended the Agreement to Include the Franchise Rights.....	25
VI. ATTORNEY FEES	27
VII. CONCLUSION	28

TABLE OF AUTHORITIES

CASES

<i>Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.</i> , 115 Wash. 2d 506 (1990).....	7
<i>Berg v. Hudesman</i> , 115 Wash. 2d 657.....	8, 10, 19, 21, 29
<i>Bogomolov v. Lake Villas Condo. Association of Apartment Owners</i> , 131 Wash. App. 353 (2006).....	14
<i>Boyd v. Davis</i> 127 Wash. 2d 256 (1995)	11
<i>Forest Mktg Enter, Inv. v. Department of Natural Resources</i> , 125 Wash. App. 126 (2005).....	9, 16, 18, 16
<i>In re Glant</i> , 57 Was. 2d 309 (1960)	17, 19
<i>GO2NET, Inc. v. C 1 Host, Inc.</i> , 115 Wash. App. 73 (2003).....	9
<i>Green River Valley Found. Inc., v. Foster</i> , 78 Wash. 2d 245 (1970).....	9
<i>Hearst Commc’ns, Inc. v. Seattle Times Co.</i> , 154 Wash. 2d 493 (2005).....	9, 21
<i>J.L. Cooper & Co. v. Anchor Sec. Co.</i> , 9 Wash. 2d 45 (1941).....	17, 19
<i>Leland v. Frogge</i> , 71 Wash. 2d 197 (1967).....	8
<i>Paine-Gallucci, Inc. v. Anderson</i> 41 Wash. 2d 46 (1952).....	11

<i>Reed v. Davis</i> , 65 Wash. 2d 700 (1965).....	15, 24
<i>State v. Lathrop</i> , 125 Wash. App. 353.....	9
<i>Turner v. Wexler</i> , 14 Wash. App. 143 (1957).....	11
<i>Wilson v. Stenbach</i> , 98 Wash. 2d 434 (1982).....	8
<i>WM. Dickson Co. v. Pierce County</i> , 128 Wash. App. 488 (2005).....	7

COURT RULES

CR 56(c).....	5, 7, 24
---------------	----------

1. Introduction

This matter comes to the appellate court following the trial court's ruling on Third-Party Defendants Dragon Fire Investments, LLC, William Thorbecke, Regina Norby-Thornbecke's¹ Motion for Partial Summary Judgment rendered after the court reviewed the three primary sales documents; (1) Agreement to Sell Business, (2) Promissory Note, and (3) Bill of Sale, Exhibits 1, 2, & 3 to C.P. 61.

The trial court concluded no genuine issues of fact existed for two propositions. First, the court concluded Hit sold a business to the Dragon Fire by contract dated November 16, 2005, CP 61 Ex-1. Second, the court concluded the November 16, 2005 transaction did not include the transfer of any franchise rights held by Hit to the Dragon Fire. *Id.* The trial court then granted summary judgment to Hit. *Id.*

Dragon Fire seeks review, reversal and/or remand of the trial court's grant of summary judgment to Hit.

¹ Dragon Fire Investments LLC, and the Thorbeckes will be referred to collectively as "Dragon Fire". HIT Enterprises and the Klutz parties will be referred to collectively as "Hit".

Dragon Fire challenges the trial court's conclusions that no material issues of fact existed in relation to the intent of the parties as represented by both the objective manifestations found in the Agreements and applicable extrinsic evidence. (CP 61 Ex-1,2, &3,) (hereafter "The Agreements")² did not include the Samurai Sam's³ Teriyaki Grill franchise rights, i.e. trade name, mark etc. In support of their position Dragon Fire will show the record contains sufficient evidence to establish material issues of fact relating to the intent of the parties entering into the agreements and objectively manifested by the agreements and by extrinsic evidence providing additional support.

II. Assignments of Error

a. The trial court erred in failing to consider the Agreement to Sell the Business in conjunction with all integrated documents when determining the existence of issues of fact related to the intent of the parties.

² Clerk Document 61 contains complete copies of the agreement to sell business along with the Note and Bill of Sale.

³ Samurai Sam's is a trade name owned by Kahala Franchise Corporation, Plaintiff in the underlying lawsuit.

b. The trial court erred in determining the record before it contained issues of material fact relating to the ambiguity of the Agreement to Sell the Business as an on-going franchise.

c. The trial court erred in failing to examine extrinsic evidence for the purpose of giving meaning to the terms of the Agreement to Sell the Business.

d. The trial court erred in failing to review the record for extrinsic evidence to establish the parties' intent in entering the potentially ambiguous Agreement to Sell the Business.

e. The Trial court improperly granted relief to a party by way of Summary Judgment when several issues of material fact existed in the evidence before the court.

III. Issues Pertaining to Assignments of Error

a. Should the trial court have construed all of the sales agreements together and concluded that a reasonable person might have construed the language of the documents to include the transfer of franchise rights as well as the simple tangible property of the business such as equipment and fixtures?

b. Should the trial court have either concluded that a reasonable interpretation of the sales documents, when taken together, was that the franchise rights were intended to be transferred, or determined them to be ambiguous, leaving open material issues of fact to be determined on the merits at trial?

c. Should the trial have examined extrinsic evidence such as deposition testimony of Thomas Klutz that he thought he had permission to transfer the franchise rights the obvious, the large differential between the value of the items described in Exhibit "A", the statements of the Thorbeckes in their declarations, that it was always the intent of the parties to transfer the franchise rights and that Klutz promised to do so and had the ability to do so? Their statements created material issues of fact to be determined at trial on the merits.

d. The trial court refused or failed to consider an obvious element of the sales transaction, i.e. the payment of royalties as being strong extrinsic evidence that franchise rights were intended to be transferred under the sales agreement, thereby ignoring a material

issue of fact upon which reasonable people might differ had Dragon Fire been given its day in court

e. The trial court's own letter of opinion essentially contains rulings on disputed material facts upon which reasonable minds could easily reach the different conclusions. Doing so was improper under the requirements of CR 56.

IV. Statement of the Case

In denying Dragon Fire's motion, and granting summary judgment to Hit, the trial court concluded the parties were aware Samurai Sam's was a franchise; that the Dragon Fire had copies of the Franchise agreement prior to entering the Agreement; and were aware certain procedural steps were required before the Hit could transfer the franchise. CP 80 at page 1-2. Further, the Trial Court concluded the Dragon Fire sent Hit monthly payments described as franchise rights royalties to Hit and the Agreements at no point expressly included mention of a transfer of the franchise rights as one of the assets being purchased. *Id.* Finally, the court concluded royalties paid by Dragon Fire some how demonstrated an intent of

the parties to sell the physical assets only and not transfer the Samurai Sam's franchise rights. *Id.*

The relevant facts at issue are disputed by the parties. In October and November 2005 the parties involved began negotiations for the purchase of a business known to the public as Samurai Sam's located at 164th Avenue in Vancouver, Washington. CP 61 at page 3. On or about November 16, 2005, the parties executed the Agreement to Sell Business along with numerous other documents referenced within the Agreement. *Id.* at 4. Like most negotiations, the Agreement was the result of substantial verbal negotiations and the Hit drafted all documents. Hit during the negotiations represented they were able to sell the restaurant and transfer the franchise rights under the franchise agreement, and that they had the right to transfer any and all franchise rights, CP 70 (deposition of William Thorbecke at 42-43). Nearly two years following the purchase of the restaurant, the franchising corporation (Kahala) notified Dragon Fire they were operating the restaurant under the franchise name without authorization and requested they either cease to do so or apply for,

pay for and qualify as a Samurai Sam's franchise. CP 59 at Ex. D attached thereto.

Dragon Fire contends the evidence before the court on summary judgment created several material issues of fact entitling Dragon Fire to a trial on the merits and therefore no party was entitled to summary judgment.

V. Argument

a. Standard of Review for Summary Judgment in Contract Interpretation

Washington appellate courts review orders granting summary judgment de novo, and engage in the same inquiry as a trial court. *Atherton Condo. Apartment-Owners Ass'n Bd of Dir. v. Blume Dev. Co.*, 115 Wash.2d 506, 515-516 (1990). The court may only grant a summary judgment if the pleadings, depositions, answers to interrogatories, admissions, and affidavits/declarations on file demonstrate that no genuine issue of material fact exist, thereby entitling a party to judgment as a matter of law. CR 56(c), *WM. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 492(2005). The

court must view facts and any reasonable inferences therefrom in a light most favorable to the nonmoving party. *Id.* at 492. After reviewing the file and considering any facts and/or inferences, a ruling for summary judgment is appropriate only if a reasonable person could reach but one conclusion. *Id.*(citing *Wilson v. Stenbach*, 98 Wash.2d 434, 437 (1982)). A court should not grant summary judgment if the court perceives the existence of material issues of fact even if the court cannot specifically identify particular issues. *Leland v. Frogge*, 71 Wash. 2d 197, 203 (1967).

Although Washington law prefers conclusions based on the text of a document, a court can consider extrinsic evidence to discern the meaning or intent of words or terms used by contracting parties even if the words appear to be clear and unambiguous. *Berg v. Hudesman*, 115 Wash. 2d 657, 668-669 (1990). *Berg* recognized extrinsic evidence could assist in interpreting the intent and meaning of terms included in a contract. *Id.* at 669. *Berg* did not open up the door for parties to use extrinsic evidence to show an intention independent of the instrument, or to vary, contradict or modify the

written word. *Hearst Commc'ns Inc., v. Seattle Times Co.*, 154 Wash. 2d 493, 503 (2005). Extrinsic evidence can only be used to determine the meaning of specific words. *Id.* Admissible extrinsic evidence does not include evidence of a party's unilateral or subjective intent as to a contract's meaning. *GO2NET, Inc. v. C 1 Host, Inc.*, 115 Wash App. 73, 85 (2003).

Finally, Washington law dictates that any ambiguity existing in the language of a contract and/or intent of the parties as to specific terms must be resolved against the drafter. *Forest Mktg. Enters, Inc. v. Dep't of Natural Res* 125 Wn. App. 126, 132 (2005) and *State v. Lathrop*, 125 Wn. App. 353. A court should not strive to find ambiguity in a contract if the meaning and intent of the contract can be ascertained by a reading of the contract as a whole. *Green River Valley Found., Inc. v. Foster*, 78 Wash. 2d 245, 249 (1970).

In the matter before the court the intent of the parties is central. Any analysis of the parties' intent must begin with an examination of the entire Agreement. Summary judgment is in this case only proper if the objective manifestations of the parties

indicate the only reasonable interpretation of the Agreement is that the intent of the Agreement was not to transfer the franchise rights. However, the court can move beyond the four corners of the Agreement if the court believes examination of extrinsic evidence will assist in determining the intent of the parties. *Berg*, 115 Wash. 2d at 668-669. In this matter the record before the court contains ample evidence to establish the existence of material issues of fact regarding the intent of the parties, and the meaning of the words used in the Agreement.

b. A Reading of the Entire Agreement Results in More Than One Reasonable Interpretation.

The Trial Court concluded the only reasonable interpretation of the Agreement was that Dragon Fire only purchased assets of the restaurant location as identified by Schedule A of the Agreement. CP 61 Ex-2 attachment. In reaching this conclusion the trial court ignored several aspects of the Agreement demonstrating ambiguity. The ambiguous and conflicting nature of the agreement results only in the conclusion that a reasonable person could interpret the intent

of the parties in entering the Agreement in more than one manner, including the intent and duty to transfer Hit's franchise rights.

1. The Court Must Interpret a Document as a Whole, Including any Attachments, Incorporations or Referenced Documents When Interpreting the Document.

A contract is more than just a single document. Rather, a contract can include separate documents so long as the documents relate to a single transaction. *Boyd v. Davis*, 127 Wash. 2d 256, 261 (1995); *Paine-Gallucci, Inc. v. Anderson*, 41 Wash. 2d 46, 51 (1952). In such cases, the court should construe all documents as if they were one and if parts are inconsistent they should be construed as to harmonize with one another. *Turner v. Wexler*, 14 Was. App. 143, 146 (1975).

The Agreement consists of several parts including 1) Agreement to Sell Business, 2) Schedule A (Asset Listing), 3) Schedule B (Promissory Note), 4) Schedule C (Amortization & Payment Schedule, and 5) Bill of Sale. CP 61 at Ex. 1 page 3, CP 31. These documents were created and executed at approximately the

same time and as part of one transaction. CP 33. Accordingly, the documents should be construed as one. Relevant portions of the complete agreement concerning the matters before the court include the Agreement to Sell Business, Schedule A and Schedule D. A consideration of the Agreement and attached Schedules reveals the existence of material issues of fact relating to the objective intent of the parties.

First, in the recital section to the Agreement to Sell, their is language clearly indicating the intent of the parties is the purchase of the “business now being operated at 1401 S.E. 164th Avenue, #150, Vancouver, Washington 98683 and known as Samurai Sam’s Teriyaki Grill and all assets thereof as contained in Schedule “A”. CP. 61 at Ex. 1 page 1. The language selected, in particular using the name of the franchise in addition to the specific address should lead a reasonable person to infer the parties intended to transfer the franchise rights. By including the franchise name the parties do more than identify the restaurant. Use of the name demonstrates the parties placed value on the name in valuing the company. This

interpretation gains additional strength when considering the drafting party⁴ found it necessary to include “and all assets thereof:” following the identity of the restaurant. *Id.* Had the parties intended to only sell the restaurant assets they could have easily used more specific language throughout the entire document to make this intent clear.

Also, the Agreement expressly identifies and includes a Bill of Sale (Schedule D), executed on the same day as the Agreement. This document provides another example of the parties’ intent by specifying the Third-Party Defendants for good and sufficient consideration purchased 1) “All and singular, the goods and chattels, property and effects listed in Schedule “A” annexed hereto, which is incorporated herein and made a part hereof; and 2. The whole of the good will of the Samurai Sam’s Teriyaki Grill business formerly operated by the undersigned which is the subject of this sale.” CP 61, Ex. 2 page 1 (Emphasis added). The restaurant became a “Samurai Sam’s” during or before 1999. CP 58 at page 3. Therefore,

⁴ CP 61, Ex. 4, page 42.

the parties must have intended to transfer any goodwill associated with the name. Schedule D provides additional evidence that Hit knew they were selling all assets, tangible and intangible to the Dragon Fire, including the expectation the franchise rights would transfer.

In contrast, the only indication Hit was selling nothing more than the fixtures, furnishings and equipment comes in paragraph 1 of the Agreement to Sell. The reference to the assets identified on Schedule A, at first glance appears to counter to the overriding intent of the parties evidenced by the entirety of the Agreement. However, because Washington law requires the court to give all provisions meaning so as to avoid superfluous language, the court must read paragraph 1 in light of the entire contract. *Bogomolov v. Lake Villas Condo. Assoc'n of Apartment Owners*, 131 Wn. App. 353, 361 (2006). By focusing on Paragraph 1 of the agreement the trial court interpreted the contract in a manner rendering the remaining text superfluous.

Moreover, Washington law requires that courts examining conflicting clauses must give effect to the manifest intent of the parties. *Forest Mktg. Enters, Inc. v. Dep't of Natural Res.*, 125 Wn. App. 125, 132 (2005). In reaching its summary judgment decision below the court failed to identify these conflicts or properly consider the agreement in light of all included provisions.

The purpose of the court at summary judgment is nothing more than determine if material issues of fact exist. *Reed v. Davis*, 65 Wash. 2d 700, 705 (1965). It is not proper for the trial court to make decisions resolving any issues of fact identified. *Id.* A review of the entirety of the Agreement to Sell and related documents might lead a reasonable person to the conclusion reached by the trial court, but could just as easily lead to a reasonable conclusion the parties intended to transfer the franchise rights. Therefore, because there is more than one reasonable interpretation this Court must remand the matter to the trial court for trial on the merits.

2. *Ambiguities Present in the Agreement Must be Construed Against the Drafter*

A drafter of documents stands in a powerful position to sculpt the language of a document in ways that obscure the intent and meanings considered by the parties during negotiation. For this reason, Washington law follows the precept that the language of an ambiguous document must be construed against the drafter. *Forest Mktg. Enter., Inc. v. Dep't of Natural Res.*, 125 Wn. App. 126,132 (2005). In the matter before the court Hit purchased form documents and inserted particular terms.⁵ CP 61, Ex. 4 page 42. Therefore, the terms must be construed against Hit, along with any inconsistencies and conflicts when viewing the whole of the Agreement. It is without question Hit drafted the various attachments to the Agreement, including both Schedule A and Schedule D. *Id.* As drafter of the document, Hit included language they saw fit and to impart their subjective intent into the document. In drafting the document Hit made references to purchasing only the assets of Schedule A as well as language referencing an objective intent to

⁵ Third-Party Defendants could not identify a specific point in the record before the court indicating the exact terms supplied by the purchased forms versus the terms added and/or fully drafted by Third-Party Plaintiffs, except for those specifically identified.

sell the entirety of the business. This includes the reasonable inference that Hit's goodwill was virtually all tied to the national franchise name, methods of operation, recipes, menus, etc. The apparent conflict of these two ideas creates an issue of material fact which can only be resolved at trial.

Testimony given by Mr. Klutz makes it clear the intent of the parties was to sell the business. In this testimony Mr. Klutz indicated he sold both the property outlined in Schedule A and the goodwill of the business as identified as Schedule D. CP 61, Ex. 4 page 44. Since goodwill is an inseparable aspect of a business it is a reasonable assumption and inference that the parties intended to include the franchise rights with the sale. *In re Glant*, 57 Wash. 2d 309, 312 (1960); *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 53 (1941). A restaurant's name is a large portion of the restaurant's value.

c. *Washington Law Precludes Courts From Interpreting Contracts in a Manner That Leads to an Absurd Result*

Washington courts must refrain from interpreting language in a contract in a manner that would lead to an absurd result. *Forest Mktg Enter., Inc.* 125 Wn. App. at 132. This maxim requires a court to read the contract in a manner that will give the parties practical and reasonable results rather than a literal interpretation. *Id.* Concluding the Agreement as only including the assets of Schedule A for the price of \$170,000.00 is the exact type of absurd interpretation precluded by law.

Schedule A lists a number of office, food preparation and service necessities. Among other things this list includes items such as cash registers, desk, chairs, filing cabinets, telephones, gas rice cookers, and a number of other items. CP 62 at Ex. 1 page 4. This schedule does not provide any estimates of current value, original value, or record of depreciation. In fact there is no instance of documentary proof of value of these assets provided by the drafter, Hit, anywhere in the record before this court.

The only estimate of the value of this equipment comes from the declaration of Kyle Leonard. Mr. Leonard places the values of

the identified equipment as being around \$10,000.00. CP 58 at page 4. This amount is \$160,000.00 less than the agreed purchase price of the restaurant. To conclude the purchase price identified in Paragraph 1 of the Agreement to Sell Business document only covered the specific assets in Schedule A and exclude the goodwill and expectation Hit would transfer franchise rights is the type of absurd result frowned upon by Washington law. The difference in the apparent value of the items in Schedule A in comparison to the purchase price stated in the Agreement creates an issue of material fact as to the objective intent of the parties that must survive to trial.

Washington law recognizes the importance of goodwill by noting the goodwill of a going business inheres in the business and cannot be separated from the whole. *In re Glant*, 57 Wash. 2d 309, 312 (1960). The goodwill of a company includes, among other things including the name, location, reputation, and individual talents. *Id.* Goodwill is considered an asset and can be owned, transferred and sold. *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 53 (1941). In regard to restaurants, some of the most

important goodwill includes the name and intellectual property. For the restaurant at issue before the court all of these elements of goodwill exist only if the restaurant can continue the use of franchisor's name together with tangible and intangible rights, i.e. menus, recipes, trademark, etc.

Not only did the amount of money promised by Hit greatly exceed the estimated value of the assets; the amount also exceeded the estimated costs to open a similar restaurant by nearly \$130,000.00. CP 58 at page 4, CP 70 (deposition of Thomas Klutz at page 32). In order to believe the parties did not intend to transfer the franchise rights would require the suspension of reality and believe well educated individuals would pay four times the cost to open a restaurant of a similar nature and/or believe the same well educated person would agree to pay \$160,000.00 more than the estimated value of specifically identified assets.

d. Extrinsic Evidence Demonstrates More than One Potential Intent.

Washington adopted the “context rule” in 1990 and thereby recognized the principal that the intent of contracting parties cannot be interpreted without examining the context surrounding an instrument’s execution. *Hearst Commc’n Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 503 (2005) (clarifying *Berg v. Hudesman*, 115 Wash. 2d 657 (1990)). The *Hearst* decision clarified the *Berg* rule to allow courts to examine circumstances surrounding the making of a contract, subsequent acts of the parties, conduct of the parties, and reasonableness of the interpretations urged by the parties. *Id.* By clarifying *Berg* the *Hearst* court recognized the danger of using extrinsic evidence to bypass the parol evidence rule and precluded the use of extrinsic evidence to add, remove or modify terms of the contract. *Id.* *Hearst* precludes the use of extrinsic evidence to demonstrate intentions independent of the document as written. *Id.* However, no Washington court has held *Berg* or its progeny to preclude use of extrinsic evidence where the document is ambiguous. In fact, *Berg* permits the use of extrinsic evidence of

subjective intent, if the court is unable to determine the parties' intent by reviewing the subject document. *Id.* at 504.

As discussed above, the Agreement at the center of this case is rife with ambiguity, conflicting clauses, and differing statements of intent capable of leading to various reasonable interpretations. For those reasons any court reviewing the contract should examine relevant extrinsic evidence in order to determine the parties' intent. There are numerous examples of extrinsic evidence in the record before the court to support a determination that significant and material issues of fact exist regarding the intent of the parties.

1. The Consideration Paid Grossly Surpasses the Estimated Value of the Assets of Schedule A

Third-Party Defendants agreed to pay \$170,000.00 to Hit for purchase of the restaurant. Hit and the court below, argue this amount only purchased the assets listed in Schedule A. A simple review of the identified assets brings those conclusions into question. Uncontroverted testimony by Kyle Leonard places the approximate value of these assets at \$10,000.00. CP 59 at 4. If the

position of the lower court and Hit is to be believed, Dragon Fire agreed to pay more than \$160,000.00 over the estimated market price of the identified assets. The parties must have intended to sell something in addition to the assets.

Name recognition is a vital aspect of any operating restaurant. Samurai Sam's is a nationally recognized trade name owned by the Kahala Corporation. CP 61 at Ex. 6 (Declaration of Sean Wieting) page 22. All of the parties in this suit recognized the value of the business name, in particular the "goodwill" associated with the name "Samurai Sam's." CP. 61, Deposition attached at Ex. 6, pages 45-46.

2. *The Depositions and Declarations Present Differing Facts Surrounding Intent of the Parties*

Hit, in their Response to Motion for Summary Judgment admit to the existence of issues of fact. The introductory paragraph to the Response states "the declarations that have been submitted are contradicted by deposition testimony and by other documents." CP 67 at 2. Any allegation regarding the veracity of evidence presented by either party should have no bearing on the court's determination

of the existence of an issue of material fact. As discussed *supra*, the grant of a summary judgment is only proper when the pleadings, depositions, answers to interrogatories, admissions, and affidavits/declarations on file demonstrate that no genuine issue of material fact exists thereby entitling a party to judgment as a matter of law. CR 56(c). In this case the evidence before the court includes numerous contradictory statements, deposition testimony and declarations leading to the unmistakable conclusion material issues of fact exist and remained in dispute. It is not the trial court's function to resolve factual issues when considering a motion for summary judgment, rather the court is only considering if an issue of material fact exists. *Reed v. Davis*, 65 Wash. 2d 700, 705 (1965).

It is without question all parties understood the restaurant central to the agreement was a franchise. CP 70, deposition of Bill Thorbecke at page 42-43. Mr. Thorbecke provided significant testimony regarding the franchise status of the store learned during negotiations. First, he indicated he did not receive a copy of the relevant franchise agreement until spring of 2006. *Id.* at page 43.

Next, he testified that he could not recall any discussion of a necessary franchise fee or transfer process, but that there would be required royalty payments, that royalties would be paid to the Hit who would then forward the payments to Kahala. *Id.* at 48-49.

Mr. Thorbecke also reasonably believed, based upon information provided by Mr. Klutz, that Mr. Klutz had authority to transfer the franchise rights. *Id.* at 97. All relevant information provided to Dragon Fire originated with Hit and Dragon Fire relied upon the information provided to them due to their unfamiliarity with franchising. *Id.* at 49. Dragon Fire believed they were purchasing the restaurant and they would be able to continue operating the restaurant as a franchise of Samurai Sam's and would not have purchased the restaurant had the sale not included the franchise rights. *Id.* at 59 and 97.

3. *The Conduct of the Parties Provides Evidence the Parties Intended the Agreement to Include the Franchise*

Following the sale the subject restaurant continued operating, with Dragon Fire responsible for all aspects of owning and

managing the restaurant. These tasks included sending of royalties required under the franchise agreement. CP 70, deposition of Thomas Klutz at page 49. Initially, Hit collected the royalties, deposited them in an account with their names and forwarded the payment to Kahala. *Id.* Hit took this step because they believed doing so would not raise any issues with the Kahala accounting department. *Id.* Eventually, Hit changed this procedure and required Dragon Fire to send the royalties directly to Kahala. *Id.* Kahala's rejection of the direct royalty payments is the first notice Dragon Fire received indicating they were not entitled to use Samurai Sam's rights. CP 59 at page 4.

None of the sales documents mention royalties, yet they were required to be paid by Hit, collected by Hit and paid by Dragon Fire, again raising a reasonable inference that not all important considerations of sale were mentioned in the sales agreements.

Actions related to royalty payments provide extrinsic evidence to show the true intent of the parties was for Hit to sell the entirety of the restaurant, including the franchise rights, to Dragon

Fire. Had Hit merely sold the restaurant there would have been no reason for them to request the new procedure in making royalty payments. The making of royalty payments to Hit does nothing other than provide further proof Plaintiffs wished to wash their hands of the restaurant and all related obligations. The Agreement, as interpreted by Hit and the trial court would leave Hit without any responsibility or other connection to the business other than being a middleman between the Dragon Fire and Kahala, who they had never had contact with or negotiated with.

VI. Attorney's Fees

Hit was awarded \$17,914.30 in attorney's fees based on language in C.P. 61 Ex-3 (The Note paragraph 10). Dragon Fire should have a remand order that those fees be refunded pending trial and an award of fees on Appeal, if affirmative relief in favor of Dragon Fire is granted together with having all fees charged against Dragon Fire in relation to the summary judgment proceedings refunded.

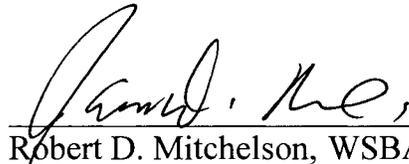
VII. Conclusion

The record demonstrates the trial court exceeded the applicable scope of review in considering the Motion for Summary Judgment. The court erred in its consideration of the record by failing to properly construe the entirety of the Agreement; by not identifying ambiguous and conflicting clauses; and by interpreting the ambiguities in favor of the drafting party. By concluding the parties only purchased certain assets listed in Schedule A, the court ignored evidence of intent available by viewing the contract in its entirety. This evidence created ambiguity and difficulty in determining the intent of the parties to the Agreement.

The use of extrinsic evidence, as permitted by Washington law, provides further evidence to demonstrate the intent of the parties included the transfer of franchise rights. The extrinsic evidence cited and discussed herein does not seek to add, modify or otherwise violate the integrity of the Agreement; rather it clarifies the objective intent of the Agreement. Therefore, the court erred by ignoring the issues of material fact in the record created by the

extrinsic evidence presented by the parties. Under *Berg* and subsequent cases interpreting the decision, the court is free, if not encouraged, to seek the use of extrinsic evidence to assist in providing meaning to the objective intent of the parties to a contract. In this matter, the record before the court shows there is more than one potential interpretation of the parties' intent when entering the Agreement. Therefore, because material issues of fact existed regarding the Agreement this court must reverse and remand the matter back to the trial court for trial.

Respectfully submitted this 12th day of March, 2010.



Robert D. Mitchelson, WSBA#4595
Attorney for Dragon Fire & Thorbeckes / Appellants

ORIGINAL

FILED
COURT OF APPEALS
DIVISION II

10 MAR 17 PM 1:03

STATE OF WASHINGTON

BY Cw
DEPUTY

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

KAHALA FRANCHISE CORP., a Delaware corporation,

Plaintiff,

v.

HIT ENTERPRISES, LLC, a Washington limited liability company; and THOMAS S. KLUTZ, JR., and HEIDI KLUTZ, husband and wife,

Defendants.

HIT ENTERPRISES, LLC, a Washington limited liability company; and THOMAS S. KLUTZ, JR., and HEIDI KLUTZ, husband and wife,

Third-Party Plaintiffs,

v.

DRAGON FIRE INVESTMENTS, LLC, a Washington limited liability company; REGINA NORBY-THORBECKE and WILLIAM THORBECKE, husband and wife; KYLE LEONARD a single man; RODNEY MANZO a single man; and CHRISTOPHER BOYD and JANE DOE BOYD, husband and wife,

Third-Party Defendants.

APPEALS CASE NO.: 39853-2-II

**CLARK COUNTY SUPERIOR
COURT CASE NO.: 07-2-02065-2**

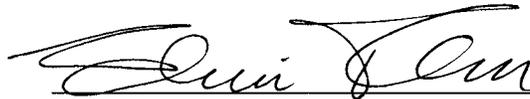
PROOF OF SERVICE

1 STATE OF WASHINGTON)

2 ss.

3 COUNTY OF CLARK)

4 I state under penalty of perjury under the laws of the State of
5 Washington that I am competent to be a witness and over the age of
6 twenty-one (21) years; that on March 15, 2010, I mailed a true copy of the
7 Appellant's Amended Opening Brief via the US Postal Service to each
8 party/attorney listed below.

9 

10 Sherri Farr, assistant to
11 Robert D. Mitchelson WSBA#4595

12 Ben Shafton
13 CARON, COLVEN, ROBISON & SHAFTON P.S.
14 900 Washington St. Suite 100
15 Vancouver, WA 98660
(Attorney for Hit / Klutz)

16
17 Richard T. Anderson, Jr.
18 ANDERSON & MONSON, P.C.
19 10700 SW Beaverton Hillsdale Hwy
Beaverton, Oregon 97005
(Attorney for Kahala)

20 David W. Ridenour
21 Attorney at Law
22 1014 Franklin Street
23 Vancouver, WA 98660
(Attorney for Boyd)