

No. 46702-0-II

**Court of Appeals, Div. II,
of the State of Washington**

Sam and Odalis Groome,

Appellants,

v.

Alpacas of America, LLC,

Respondent.

Brief of Respondent

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1. Introduction

This is an action for collection on two promissory notes. Alpacas of America, LLC (“AOA”) sold alpacas to Sam and Odalis Groome and took the Groomes’ promissory notes as partial payment of the purchase price. Groomes did not pay the notes when due. The notes have matured and remain unpaid. AOA established the validity of the notes in *Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 317 P.3d 1103 (2014). On remand, AOA moved for summary judgment. Groomes did not dispute the amounts due on the notes and failed to raise material issues of fact on the essential elements of their claimed offsets. The trial court granted final judgment in favor of AOA.

On appeal, Groomes fail again to present any argument, authority, or evidence to support the essential elements of their claimed offsets. There are no genuine issues of material fact. AOA is entitled to judgment as a matter of law. This Court should affirm the judgment and award AOA its attorney fees on appeal, pursuant to contract.

2. Counter-statement of Issues

1. Whether the trial court did not err in granting summary judgment to AOA where Groomes failed to present any argument, authority, or evidence to raise material issues of fact on the essential elements of their claimed offsets.

2. Whether the trial court did not abuse its discretion in denying a continuance under CR 56(f) where Groomes failed to demonstrate that the evidence sought would have raised material issues of fact.

3. Whether the trial court did not abuse its discretion in denying Groomes' motion for reconsideration.

3. Statement of the Case

3.1 Groomes purchased alpacas from AOA, financed by promissory notes.

Sam and Odalis Groome have purchased many alpacas from AOA, at least some of which were financed by AOA. CP 20, 48, 139. In January 2006, Groomes purchased Phashion Model (D981) and Dark Seeqret (D965) from AOA. CP 17, 138, 168. The animals were sold "as is" except for a limited warranty of fertility spelled out in the form "Female Sales Contract." CP 23. The warranty provides that a maiden alpaca is guaranteed at maturity (age thirty-six months) to conceive when bred to an AOA herd sire at the AOA ranch. CP 23.

In January 2007, Groomes purchased Black Thunder's Midnight (D1107) from AOA. CP 18, 139. The animal was sold "as is" except for a similar limited warranty of fertility, as provided in the revised form Female Sales Contract. CP 34.

Groomes made and delivered promissory notes to AOA in connection with Phashion Model and Black Thunder's Midnight. CP 25-29, 36-40. AOA also financed at least four other purchases by Groomes,

including Dark Seeqret. *See* CP 48, 150. Groomes failed to make their monthly payments on the six notes in May and June of 2007, but brought their payments current in July and August. CP 150.

3.2 AOA provided warranty service for Dark Seeqret.

Groomes initially attempted to breed Dark Seeqret at their own ranch, from June 2006 to August 2007, without success. CP 146. When Dark Seeqret reached maturity in mid-July 2007, Groomes requested AOA provide warranty service. CP 146, 168. As provided in the 2006 Female Sales Contract, AOA required Groomes to provide medical records showing an inability to conceive. CP 23, 168. AOA made arrangements to take possession and perform the requested breeding. CP 146. Dark Seeqret arrived in mid-September and became pregnant in October. CP 150, 168, 186.

On September 24, 2007, Sam Groome wrote a letter to Randy Snow, AOA's Ranch Manager, to vent his frustrations over the process and to ask for personal contact and extra-contractual remedies. CP 146. When Mr. Snow contacted Groome, Groome expressed "concerns about whether AOA would be able to fulfill its warranty obligations on Black Thunder's Midnight." CP 141. At the time, Black Thunder's Midnight did not qualify for warranty service because she was only two years old. *See* CP 33 (date of birth: Aug. 13, 2005). Mr. Snow "assured [Groome] that [AOA] would take care of Dark Seeqret first and then turn their attention to Black Thunder's Midnight." CP 141. AOA notified Groomes of the successful breeding of

Dark Seeqret in December 2007. CP 185. AOA returned Dark Seeqret to Groomes in April 2008, where she gave birth to a live cria on September 8, 2008. CP 168.

3.3 Groomes stopped paying on the notes.

The last monthly payments made by Groomes on the six notes were in September or October of 2007. CP 18-20, 30, 41, 48, 141. Groome claims that he stopped paying “as a way of forcing AOA to deal honestly with its warranty obligations.” CP 141. However, he does not testify that he ever communicated this reason to AOA. *See* CP 141, 146. In fact, he did not communicate it to AOA, though he did give other excuses in 2008-09. CP 169.

Groomes made two lump-sum payments in 2008-09, but did not direct that any of the money be applied to the notes for Phashion Model or Black Thunder’s Midnight. CP 20-21. AOA contacted Groomes on multiple occasions in 2008-09 and attempted to convince Groomes to bring their monthly payments current, to no avail. CP 150-53, 169. Groomes never disputed or paid the amounts due on the notes at issue in this case, for Phashion Model and Black Thunder’s Midnight. CP 169.

3.4 Groomes alleged infertility of Black Thunder’s Midnight.

Groome testifies that at about the time he stopped paying on the notes, “it was apparent that we were going to have difficulties impregnating Black Thunder’s Midnight.” CP 140-41. However, he does not testify that he

made a warranty claim at that time. Black Thunder's Midnight was, at that time, about 27 months old and did not yet qualify for warranty service. *See* CP 33 (date of birth: Aug. 13, 2005), 34 (warranty triggered at maturity, age 36 months). Groome does not testify as to when he attempted to make a warranty claim for Black Thunder's Midnight. *See* CP 138-44. AOA's records indicate that the first time Groomes notified AOA of the alleged infertility was in December 2008, more than a full year after they defaulted on their payments. CP 20, 152. AOA refused to provide warranty service until Groomes were current on their payments. CP 152. Groomes later communicated to The Alpaca Registry, Inc. ("ARI") that Black Thunder's Midnight gave birth to a cria, MFM's MFM Late Night Tango Girl, on August 2, 2009, with an estimated conception date of September 10, 2008. CP 20, 47. Phashion Model also gave birth to cria in 2007, 2009, and 2010. CP 19, 44-46.

3.5 AOA sued to enforce the notes.

AOA sued Groomes in April 2012 to enforce their obligation to pay the notes. *Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 394, 317 P.3d 1103 (2014). The trial court dismissed the case as untimely under the four-year statute of limitations of UCC Article 2. *Id.* at 395. On appeal, this Court reversed and remanded for further proceedings, holding that the notes were negotiable instruments under UCC Article 3 and therefore the six-year statute of limitations applied. *Id.* at 393-94.

On remand, Groomes requested extensive discovery related to Randy Snow, AOA's former Ranch Manager. CP 58-63. AOA objected that the requests were not calculated to lead to the discovery of admissible evidence relevant to AOA's claims or Groomes' expected defenses. *E.g.*, CP 60. In response to Groomes' request for emails and other communication with Mr. Snow, AOA produced its entire file on the Groomes, "which includes notes of any communications or instructions from Randy Snow." CP 60.

3.6 The trial court granted AOA's motion for summary judgment.

AOA moved for summary judgment, arguing that the Groomes' obligation to pay the notes was undisputed and that Groomes could not meet their burden of proof on their anticipated claims of offset for accord and satisfaction or breach of warranty. CP 10-16. Groomes' three-page response argued primarily that the court should grant a continuance under CR 56(f) to allow discovery of the Randy Snow emails, which might disclose "why AOA failed to live up to its warranty obligations." CP 162-65. Though supported by two lengthy declarations, the response brief made only passing mention of accord and satisfaction and breach of warranty, providing no argument or authority for Groomes' contention that they could prove those offset claims. CP 165.

There was no evidence that Groomes ever disputed the amounts due for Phashion Model or Black Thunder's Midnight. Groomes conceded at oral argument that they did not contest the notes; they only claimed a right of offset. RP, Aug 15, 2014, at 7:25-8:4. There was no evidence that Groomes

ever offered or tendered a compromise on the amounts due for either Phashion Model or Black Thunder's Midnight. There was no evidence of medical records, breeding records, or other documentary proof of infertility of either Phashion Model or Black Thunder's Midnight.

The trial court granted AOA's motion for summary judgment. CP 203-04. In denying Groomes' request for a continuance, the court held that the discovery would only reveal the intent of AOA or Mr. Snow, which was not a material issue. RP, Aug. 15, 2014, at 14:23-15:4. The trial court recognized that it could not resolve any disputed facts. *Id.* at 13:17-20. The trial court held that the disputed facts were immaterial:

Folks, I don't get to that because I don't believe that there has been a sufficient showing on the part of the defendants that there are material issues of fact. I have conclusory statements. I have allegations. I have speculation. I do not have a sufficient set of facts that allow me to go the next step, and that is to declare a material issue of fact.

Id. at 16:15-22.

3.7 The trial court denied Groomes' motion for reconsideration.

Groomes moved for reconsideration, arguing that the trial court had made an improper credibility determination. CP 212-24. Groomes' motion attempted, for the first time, to explain how their responsive declarations raised material issues of fact on the issue of infertility of Black Thunder's Midnight. *Id.* Groomes offered no excuse for their failure to present such

argument or authority in response to the summary judgment motion. *Id.*

Groomes offered no argument regarding accord and satisfaction. *Id.*

AOA responded by pointing out that none of the disputed facts raised by Groomes were material to the outcome of the case; that Groomes could not rely on unsubstantiated, conclusory statements of ultimate fact; and that Groomes relinquished any remedies they otherwise could have obtained under the warranty by their unjustified refusal to pay the notes. CP 250-56.

The trial court denied the motion and entered final judgment. CP 307-09. In its oral ruling, the court indicated that it had not made a credibility determination; rather, it found that Groomes had failed to produce sufficient evidence to create a genuine issue of material fact:

I don't think that I said I was weighing credibility, and I don't think I was. I indicated that there were issues that I did not believe were answered by the defendant when the plaintiff moved for summary judgment with anything other than speculation or conclusory statements.

What I do not have in this case as to Black Thunder's Midnight is any documentation that said this animal was infertile. I have people saying, well, she was and we said she was. I would have liked to have seen some documentation.

RP, Sept. 12, 2014, at 20:12-22.

4. Summary of Argument

This Court should affirm the judgment and all challenged decisions of the trial court in this case. AOA is entitled to judgment in its favor on the unpaid notes. Groomes failed to present the trial court with argument, authority, or evidence to raise material issues of fact on the essential elements of their claims of offset against the amounts due on the notes. Groomes failed to present evidence validating their assertion of infertility of Black Thunder's Midnight. They failed to present evidence that AOA had ever accepted payment in full satisfaction of either of the notes. The evidence they did present was immaterial to the outcome of the case, given the lack of any evidence of these essential elements. The trial court did not make any credibility determinations. Rather, it properly disregarded any facts that were immaterial to the outcome.

The trial court did not abuse its discretion in denying a continuance under CR 56(f). The evidence sought would not have raised any material issues of fact.

The trial court did not abuse its discretion in denying Groomes' motion for reconsideration. The motion and accompanying declaration did not present any new facts that would have been material to the outcome.

5. Argument

5.1 Standards of Review.

This Court reviews summary judgment orders *de novo*. *Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011). The Court engages in the same inquiry as the trial court. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004). Summary judgment should be granted when there is no genuine issue as to any material fact and the issues can be resolved as a matter of law. CR 56(c). The court considers the facts in the light most favorable to the nonmoving party. *Labriola*, 152 Wn.2d at 833. A material fact is one that affects the outcome of the litigation, in whole or in part. *Schmitt*, 162 Wn. App. at 404. A genuine issue of material fact exists only if reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). This Court may affirm on any theory supported by the record and legal authorities. *Heidgerken v. Dep't of Nat. Res.*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000).

This Court reviews a trial court's decision on a motion for a continuance under CR 56(f) for abuse of discretion. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009). The abuse of discretion standard also applies to a trial court's decision on a motion for reconsideration. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008). A trial court abuses its discretion if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *Id.* "An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court." *Id.*

5.2 The trial court did not err in granting summary judgment to AOA where Groomes failed to present any argument, authority, or evidence to raise material issues of fact on the essential elements of their claimed offsets.

The trial court was correct in granting AOA's motion for summary judgment because Groomes failed to carry their burden as the nonmoving party. Their burden was to "set forth *specific facts* which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009) (emphasis added). The nonmoving party cannot rely on speculation or conclusory statements. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The Washington Supreme Court explained:

A fact is an event, an occurrence, or something that exists in reality ... as distinguished from supposition or opinion. The "facts" required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice.

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

A court should grant summary judgment when the nonmoving party fails to make a showing sufficient to establish a claim or defense on which it bears the burden of proof at trial. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other

facts immaterial.” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)).

AOA sued for judgment on two promissory notes taken as payment in the sales of Phashion Model and Black Thunder’s Midnight. A promissory note is a negotiable instrument, governed by UCC Article 3, enacted in Washington as Chapter 62A.3 RCW. This Court has already concluded that the promissory notes at issue here are valid negotiable instruments under the UCC. *Alpacas of Am., LLC v. Groomes*, 179 Wn. App. 391, 398, 317 P.3d 1103 (2014). On remand, the validity and amounts due on the notes were undisputed.

UCC Article 3 provides that an action to recover on a negotiable instrument is subject to certain, limited, defenses. RCW 62A.3-305. Breach of warranty in the underlying sale is allowed as a claim in recoupment under RCW 62A.3-305(a)(3), to reduce the amount owing on the note. Accord and satisfaction is also allowed as a defense under RCW 62A.3-305(a)(2).

AOA’s motion for summary judgment argued that Groomes would be unable to present any evidence to dispute AOA’s claim or to establish their own defenses. AOA was correct. Groomes did not present any evidence or argument disputing the amounts due on the notes. Groomes did not present any authority or evidence to support their claimed defenses. The trial court did not make a credibility determination because Groomes did not present any disputed facts that were material to the outcome. Groomes have not shown otherwise on appeal. This Court should affirm the trial court’s order

granting AOA's motion for summary judgment because there are no issues of material fact and AOA is entitled to judgment as a matter of law.

5.2.1 Groomes failed to present sufficient evidence or argument to establish breach of warranty.

The primary issue identified in Groomes' opening brief relates to facts which Groomes argue support their claim of offset due to breach of warranty. However, Groomes do not cite any authority for the elements of the defense. They do not make any argument regarding the meaning of the written terms of the warranty. They do not explain to the Court how any of the evidence they highlight would support a finding of breach. Their response to AOA's summary judgment motion did not present any authority or argument on this issue, but merely asserted that Groomes could prove AOA's breach. CP 165. They failed to present sufficient evidence to support their bare assertion.

The UCC Comments explain how breach of warranty can operate to offset the amount due on a note:

[S]uppose Seller delivered the promised equipment and it was accepted by Buyer. The equipment, however, was defective. ... Buyer may have a claim against Seller for breach of warranty. If Buyer has a warranty claim, the claim may be asserted against Seller as a counterclaim or as a claim in recoupment to reduce the amount owing on the note.

RCW 62A.3-305, [UCC Comment 3].

Under the UCC, the buyer of goods bears the burden of proving the seller's breach. RCW 62A.2-607(4). It is not enough that the seller rejected a

claim; the buyer must prove that the goods were in fact defective. *Richards Mfg. Co. v. Gamel*, 5 Wn. App. 549, 550, 489 P.2d 366 (1971). Under the terms of AOA's fertility warranty, a remediable defect exists only if the alpaca cannot conceive at maturity (36 months old). CP 23, 34.

Each Alpaca is sold "AS IS" WITHOUT ANY WARRANTY OF ANY KIND, EXPRESSED OR IMPLIED, EXCEPT AS STATED IN THIS CONTRACT. A maiden female Alpaca that has never been bred is warranted to be fertile at maturity when bred to Seller's herd sire. If Buyer claims a maiden female Alpaca is not fertile by the age of thirty-six months, Seller will have the right to physically possess such Alpaca for a period of up to six months thereafter at Seller's expense and shall determine the validity of Buyer's claim during that period. Should Buyer's infertility claim be valid, Seller shall elect whether to provide Buyer with another female under the same Contract terms and conditions, or to reimburse Buyer in the full amount of such Alpaca's purchase price without interest. ... Seller is not liable to Buyer for any warranty or other claims if circumstances beyond Seller's control, or Buyer's negligence, proximately cause an Alpaca's infertility or loss of pregnancy.

CP 34 (warranty for Black Thunder's Midnight; the warranty for Phashion Model is substantially similar). Under this warranty, a bare allegation of infertility is not enough to establish a claim. After the Buyer makes a claim, AOA has the right to determine the validity of the claim by attempting to breed the animal to its own herd sire—the animal is only warranted to be fertile when bred to AOA's herd sire. The Buyer is not entitled to receive any remedy until after the claim is validated—that is, until actual infertility is proven by evidence other than the Buyer's own opinion.

AOA's motion presented evidence that both Phashion Model and Black Thunder's Midnight had given birth to offspring. CP 19-20, 44-47. Groomes' burden, in order to avoid summary judgment was to present evidence, other than Groomes' own opinion, that either Phashion Model or Black Thunder's Midnight, or both, not only did not give birth to those offspring, but also *would have been unable to conceive when bred to AOA's herd sire* at or after age 36 months. The trial court properly granted summary judgment in favor of AOA because Groomes failed to present specific facts that would create a material dispute.

Groome's declaration provided nothing more than speculation, opinion, or conclusory statements, to the effect that Black Thunder's Midnight was infertile.¹ Conclusory statements or ultimate facts, of the kind a party might allege in a pleading, are insufficient to defeat a motion for summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). Groomes did not testify to the details of their breeding attempts, if any; did not present any documentary evidence of breeding or infertility; and did not present any medical evidence or expert testimony. The terms of the warranty require validation of any infertility claim. Groomes did not present any evidence to validate their claim. Groomes failed to support an essential element of their claim of offset. The trial court was correct to grant summary judgment in favor of AOA.

¹ It is undisputed that Phashion Model did, in fact, give birth to at least three offspring, in 2007, 2009, and 2010. Groomes cannot claim an offset against the note for Phashion Model for breach of warranty.

5.2.2 Groomes failed to present sufficient evidence or argument to establish accord and satisfaction.

In their opening brief, Groomes make no argument relating to their defense of accord and satisfaction. In fact, the opening brief does not even once use the phrase “accord and satisfaction.” Groomes do not raise accord and satisfaction as an issue for review. They do not cite any authority for the elements of the defense. They do not inform the Court of what evidence in the record they believe would support the elements. Neither their response to the summary judgment motion nor their own motion for reconsideration raised any argument or authority to support the defense, either. *See* CP 162-65, 212-24.

Generally, this Court will not consider issues that an appellant fails to raise as an assignment of error and fails to present any argument or provide any legal citation. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). This Court also generally will not consider on appeal a claim or defense the appellant failed to argue in response to a summary judgment motion. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001). This Court should decline to address the issue of accord and satisfaction, of which Groomes have made no more than a passing mention in their briefs to the trial court and to this Court.

To prove an accord and satisfaction, the debtor must demonstrate (1) that it tendered payment (2) on a disputed claim, (3) that it communicated that the payment was intended as full satisfaction of the disputed claim, and (4) the creditor accepted the payment. *Douglas NW. v. Bill O'Brien & Sons*

Constr., 64 Wn. App. 661, 685-86, 828 P.2d 565 (1992). The debtor bears the burden of proving there was a meeting of the minds and that both parties understood that full satisfaction of the claim would be the result. *Id.* at 686. If proven, accord and satisfaction is a defense or offset to an action on a note. *U.S. Bank Nat'l Ass'n v. Whitney*, 119 Wn. App. 339, 350, 81 P.3d 135 (2003).

Groomes failed to present even a scintilla of evidence to support any of the four elements of accord and satisfaction. Groomes did not present any evidence that they tendered payment for Phashion Model after they defaulted in the fall of 2007. Groomes did not present any evidence that the amount due on Phashion Model (D981) was ever in dispute. Groomes did not present any evidence that they ever communicated an intent to make a payment in full satisfaction of the note for Phashion Model (D981). Groomes did not present any evidence that AOA ever accepted or credited Groomes with such a payment.

The only evidence Groomes presented on this issue was an unauthenticated—and therefore inadmissible—ARI registration certificate, which they claimed was evidence that AOA transferred ownership to them sometime in 2009-2010. CP 157. AOA presented additional evidence and argument from which the trial court could have made an evidentiary determination that the certificate was not authentic. *See* CP 170, 188-89, 192, 196-97. But even if authentic, Groome's testimony about the certificate was pure speculation: "*I believe* this certificate was issued ... because a reconciliation of my account had finally been made..." CP 142-43 (emphasis

added). This is insufficient to defeat summary judgment. Groomes' failure to present any evidence that they ever tendered payment or disputed the amount due for Phashion Model or for Black Thunder's Midnight renders all other evidence, including the alleged certificate, immaterial. Groomes cannot establish the defense of accord and satisfaction for either of the two notes. This Court should affirm the trial court's grant of summary judgment in favor of AOA.

5.2.3 The trial court did not make a credibility determination because Groomes failed to present any factual disputes that were material to the outcome.

The crux of Groomes' appeal is their argument that the trial court made an improper credibility determination. However, an issue of credibility is present only if the nonmoving party comes forward with evidence that contradicts the movant's evidence on a material issue. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626, 818 P.2d 1056 (1991).

A material issue is one that affects the outcome of the litigation. *Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011).

A party may not preclude summary judgment by merely raising argument and inference on collateral matters: [T]he party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and that the opposing party may not merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.

Howell, 117 Wn.2d at 626-27. Groomes fail to establish that any of the facts they cite would have been material to the outcome.

Groomes argue that the trial court discredited Groome's declaration testimony that his reason for nonpayment of the notes was "as a way of forcing AOA to deal honestly with its warranty obligations." CP 141. However, Groomes fail to demonstrate how their reason for nonpayment has any effect on the outcome of the case. Even if Groome's testimony is accepted as true, Groomes have still failed to prove essential elements of their claims of offset, rendering any other facts immaterial. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Groomes were not justified to withhold payment out of worry that AOA might not live up to its warranty on Black Thunder's Midnight. The promissory note was an unconditional promise to pay. *Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 398, 317 P.3d 1103 (2014). Groomes could not condition their payment on whether they subjectively felt secure in the warranty. Despite Groomes' subjective fear, the undisputed evidence shows that AOA was in full compliance with its contractual obligations in the fall of 2007. *See* Part 3.2, above. When Groomes stopped paying at that same time, they were in default on the note and in breach of the sale contract, without any justification. Groomes' reasons for nonpayment are immaterial to the outcome.

Similarly, AOA's reasons for not providing warranty service are also immaterial. Because AOA was not in breach, Groomes' nonpayment was an anticipatory repudiation of the contract. By refusing to live up to their own

obligations, Groomes relinquished any remedies they otherwise could have received under the contract. *See* RCW 62A.2-703 (“Where the buyer ... fails to make a payment due ... or repudiates with respect to a part or the whole, then with respect to any goods directly affected ... the aggrieved seller may ... (f) cancel [the contract].”); RCW 62A.2-610 (“When either party repudiates the contract ... the aggrieved party may: ... await performance by the repudiating party; or resort to any remedy for breach ... **and in either case suspend his or her own performance.**” (emphasis added)). AOA was legally justified in suspending its performance—refusing to provide warranty service—until Groomes were current in their payments. AOA’s reasons for not providing warranty service are immaterial to the outcome.

Groomes appear to argue that the trial court discredited Groome’s testimony about promises made by Randy Snow in late 2007 to early 2008. However, such promises could not create any additional obligations on the part of AOA. The written warranty speaks for itself. According to Groome, Randy Snow “assured me that they would take care of Dark Seeqret first and then turn their attention to Black Thunder’s Midnight.” CP at 141. This promised nothing more than what was already provided in the sale contract: If Black Thunder’s Midnight was infertile at maturity (thirty-six months old, August 13, 2008) AOA would provide the promised warranty service. To the extent Mr. Snow may have promised something beyond the terms of the contract, the promise is of no legal effect, because Groomes did not provide any additional consideration for a modification of the contract. Indeed, they instead chose to withhold the consideration they already owed: payment of

the original purchase price. Any promises made by Mr. Snow to Groomes are immaterial to the outcome because they had no legal effect.

The trial court did not make any credibility determinations because Groomes did not present any factual disputes that were material to the outcome. This Court should affirm the judgment.

5.3 The trial court did not abuse its discretion in denying a continuance under CR 56(f) where Groomes failed to demonstrate that the evidence sought would have raised material issues of fact.

Groomes argue that the trial court should have granted a continuance for discovery of emails between Randy Snow and AOA. A court may deny a motion for a continuance under CR 56(f) when (1) the requesting party does not offer a good reason for the delay in obtaining the evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the evidence sought would not raise a genuine issue of fact. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009). The trial court's denial of Groomes' motion is reviewed for abuse of discretion. *Id.* "An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court." *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

Groomes argue the emails would verify the promises made to Groomes by Mr. Snow and would explain why AOA would not provide warranty service for Black Thunder's Midnight. Groomes do not attempt to explain to the Court how such evidence would raise an issue of material fact;

they simply say that it does. However, as demonstrated in Part 5.2.3, above, these issues are not material to the outcome.

Groomes are seeking evidence of motive. But without proof of the essential elements of Groomes' defenses, motive evidence cannot affect the outcome of the case. Even if further discovery could have yielded everything Groomes had hoped for, they would still have been unable to prove that Black Thunder's Midnight was infertile or that AOA accepted a payment in satisfaction of the note for Phashion Model. Groomes would still have failed to prove the essential elements of their defenses. A continuance could not have changed the outcome. The trial court was well within its discretion when it denied a continuance because the evidence sought would not raise a genuine issue of fact. This Court should affirm.

5.4 The trial court did not abuse its discretion in denying Groomes' motion for reconsideration.

Groomes identify the trial court's denial of their motion for reconsideration as error and an issue on appeal, but their entire argument on this issue is contained in a single sentence on page 26 of their Opening Brief, which argues only that the trial court should have reconsidered based on the facts presented in Groome's second declaration (filed with the motion for reconsideration). The trial court's denial of reconsideration is reviewed for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 497, 183 P.3d 283 (2008).

Groome's second declaration does not present any new facts that would be material to the outcome of the case. *See* CP 206-09. Groome does

not present any new testimony or supporting evidence that Black Thunder's Midnight was infertile or that AOA accepted a payment in satisfaction of the note for Phashion Model. The trial court indicated that its decision on the summary judgment motion was based on a lack of evidence. RP, Sept. 12, 2014, at 20:12-20. Neither the motion nor the declaration provided the court with any new, material evidence to change the court's mind. The trial court did not abuse its discretion in denying the motion for reconsideration. This Court should affirm.

5.5 AOA is entitled to an award of attorney fees on appeal.

The trial court awarded attorney fees and costs to AOA pursuant to the terms of the two notes. The note for Phashion Model provides, "the Note holder shall be entitled to collect all reasonable costs and expenses of collection, including but not limited to reasonable attorneys' fees and litigation related expenses regardless of whether or not a lawsuit is commenced, and including such fees, costs and expenses which may be incurred at trial, on appeal, or for protecting the interest of the Note holder." CP 26. Similarly, the note for Black Thunder's Midnight provides that default on the note "entitl[es] AOA to ... reimbursement of all attorney fees and expenses incurred by AOA in collecting this Note or enforcing its security interest." CP 37. This Court should award AOA its attorney fees and expenses on appeal, pursuant to the terms of the notes and RAP 18.1.

6. Conclusion

There are no genuine issues of material fact and AOA is entitled to judgment in its favor as a matter of law. Groomes failed to present evidence to support essential elements of their claims of offset against the amounts due on the notes. The trial court did not abuse its discretion in denying Groomes' motions for continuance or reconsideration. This Court should affirm the judgment and award attorney fees and expenses to AOA pursuant to the terms of the notes and RAP 18.1.

Respectfully submitted this 2th day of March, 2015.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on March 2, 2015, I caused the original of the foregoing document, and a copy thereof, to be served by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail
copy:	James B. Meade Forsberg & Umlauf, P.S. 1 N. Tacoma Avenue Suite 200 Tacoma, WA 98405 jmeade@forsberg-umlau.com	<input checked="" type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 2nd day of March, 2015.

/s/ Rhonda Davidson
Rhonda Davidson, Legal Assistant

CUSHMAN LAW OFFICES PS

March 02, 2015 - 3:54 PM

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