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62931-0

NO. 62931-0-I

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

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WILLIAM AND TERESA GROVER,

Appellants,

v.

LOSH FAMILY, LLC;  
AND ILIA AND VICTORIYA KERTSMAN

Respondents.

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BRIEF OF RESPONDENTS KERTSMAN

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## I. INTRODUCTION

The Assignment of Lease central to this appeal is a one-page document. The text of the Assignment consists of 298 words. In that space, the Assignment states *five separate times* that it binds “William and Teresa Grover as individuals, dba Grover International, LLC.” Thus, 50 of the 298 words of the Assignment evidence the intent to create personal liability in the Grovers. It is hardly possible to conceive of an agreement that could more effectively, more objectively express the intent to impose personal liability on William and Teresa Grover.

On December 12, 2005, in connection with the purchase of a food importing business from Ilia and Victoriya Kertsman, William Grover signed this unambiguous Assignment. In this appeal, the Grovers argue—contrary to long-established Washington law—that the form of Mr. Grover’s signature on the Assignment trumps the unambiguous language of the Assignment and precludes personal liability. In effect, the Grovers argue for a rule that would allow a party to create a voidable-at-will contract based purely on the form of the signature. Such an absurd result finds no support in Washington law.

Reprising the voidable-at-will theme, the Grovers contend that technical defects in the description of the leased property and execution of the Assignment relieve them of liability. This argument similarly lacks

merit and, under the facts of the case, is easily disposed of under settled Washington law. Thus, the sound reasoning of the trial court must be affirmed.

## **II. ASSIGNMENTS OF ERROR**

The Kertsmans respectfully submit that the court below committed no reversible errors.

## **III. KERTSMANS' STATEMENT OF ISSUES**

1. Are the Grovers personally liable under the Assignment?
2. Are the Grovers bound by the Assignment in spite of any alleged technical defects in its form or execution?
3. Have the Grovers failed to demonstrate that they are entitled to attorney fees?
4. Must the Kertsman defendants' award of summary judgment as to the Grovers' cross-claims be sustained?

## **IV. STATEMENT OF THE CASE**

As described in more detail below, the liability in this case arises out of the breach of a commercial lease. The leased property at issue was used in connection with a food importing business which Ilia and Victoriya Kertsman ("Kertsmans") sold to William and Teresa Grover ("Grovers" or "Appellants") who in turn sold to Yuri Sushkin and Tatyana

Rubtsova (collectively “Sushkin”). In connection with the sale, the Grovers agreed to the Assignment from the Kertsmans.

Sushkin eventually defaulted on the lease. Neither the Kertsmans nor the Grovers obtained releases from the landlord, Losh Family, LLC (“Losh”). As a result, both the Kertsmans and Grovers (in addition to Sushkin) remain liable on the lease. As between the Kertsmans and Grovers, the Grovers are the primarily liable party and must reimburse the Kertsmans for any payments the Kertsmans make to the plaintiff to satisfy the judgment. With this appeal, the Grovers seek to avoid their obligations to both the plaintiff and the Kertsmans under the Assignment.

**A. The Agreements between the Parties**

On November 10, 2004, Ilia Kertsman and J. Brian Losh executed a Commercial Lease (the “Lease”) relating to commercial real estate in Renton, WA (the “Property”). CP 12, 17. The Lease had a five year term. *Id.* 12. Although executed in November of 2004, the term of the Lease commenced on September 1, 2003. *Id.* Out of this location, the Kertsmans operated their international food business, Baza International, LLC (“Baza”). CP 290–91 at ¶2. The plaintiff, Losh, is the current owner of the Property. CP 4 (Complaint); CP 49 (Grovers’ Answer).

On October 13, 2005, William and Teresa Grover executed a Business Opportunity Purchase and Sale Agreement (“Agreement”) to

purchase Baza from the Kertsmans. CP 304–09. Ilia and Victoriya Kertsman executed the Agreement several days later. *Id.* at 309. The parties also executed several addendums in the next month and a half. *Id.* at 312–14. In every instance, the Agreement and addendums indicate that William and Teresa Grover, personally, are the buyers and they signed the Agreement accordingly. *Id.* at 309, 312–14. The Agreement makes no reference to Grover International, LLC. *Id.* at 304–14. Further, the Grovers affixed to the Agreement letters of recommendation from their accountant and their mortgage broker attesting to their personal wealth and experience with real property transactions. *Id.* at 310–11. Based upon these representations, the Kertsmans were satisfied that the Grovers could personally satisfy the obligations specified in the Agreement and executed the Agreement. *See id.* at 309 (signed Agreement). Sometime in December 2005 (the record does not indicate when), the transaction closed. CP 100–01 (Bill of Sale with blank date line).<sup>1</sup> The Bill of Sale evidences the sale of the Baza business but does not purport to impose additional rights or obligations beyond those reflected in the Agreement. *See id.*

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<sup>1</sup> The Grovers assert that the transaction was an asset sale, *e.g.*, Appellants’ Br. 5, but the court below did not consider this issue and the Kertsmans have alleged that the transaction involved the outright purchase of the Baza business, less several very specific assets. *See, e.g.*, CP 30 at ¶ 11.

On or about December 12, 2005, J. Brian Losh, Ilia Kertsman, and William Grover, who is a real estate agent, *see* CP 42 at ¶ 23 (agency disclosure provision of Agreement), executed the Assignment. CP 20. As described above, the Assignment contains less than 300 words but indicates five times that it binds William and Teresa Grover (the people who executed the Agreement to purchase Baza) “as individuals.” CP 20. The Assignment states that the Grovers do business as Grover International, LLC but makes no other reference to the LLC. *Id.* There is no dispute that William Grover freely signed the Assignment specifying personal liability (*i.e.*, there are no allegations of duress or forgery or the like) and that his signature described him as a member of Grover International, LLC. *Id.* Ruling on Losh’s motion for summary judgment, the trial court, on September 30, 2008, held that this Assignment bound Mr. Grover and the Grovers’ marital community. CP 163–171.

The Assignment also explicitly states that the Kertsmans will be “secondarily liable” on the Lease. *Id.* Accordingly, in response to the Kertsmans’ motion for summary judgment the trial court ruled that, as between the Grovers and the Kertsmans, the Grovers are the primarily liable party who must indemnify the Kertsmans for any payments made to the plaintiff in satisfaction of the joint and several judgment. *See* CP 506 (ordering summary judgment to Kertsmans including right to

indemnification). The Grovers do not dispute that if bound by the Assignment they are the primarily liable party, but they hope to avoid liability altogether by demonstrating that the Assignment does not bind them. *See* Appellants' Br. 3–4 (assigning error to grant of summary judgment for Kertsman but no issues pertaining to primary liability).

At the end of March 2006, the Grovers sold their 100% interest in Grover International, LLC to Yuri Sushkin and Tatyana Rubtsova. CP 112 (Bill of Sale notarized March 25, 2006); CP 332–33 (agreement related to sale of Grover International, LLC executed on March 25, 2006 and effective March 27, 2006) [hereinafter “Grover-Sushkin Agreement”]. The Grover-Sushkin Agreement first states that Sushkin will be “assuming all rights and liabilities of the Company.” CP 332 at ¶ 1. However, the Grover-Sushkin Assignment separately requires Sushkin to assume the Lease, thereby suggesting that the Lease is not a “right[] or liabilit[y]” of Grover International, LLC. *Id.* at ¶ 5. Paragraph 6 of the Grover-Sushkin Agreement then confirms that the Grovers understand that they are personally bound to the Lease:

Within 15 Days after closing, Sushkin shall cause the Grovers to be removed from all Company contracts, accounts and liabilities *except for the lease.*

*Id.* at ¶ 6 (emphasis added). The Grover-Sushkin Agreement defines “Grover” to mean “William and Teresa Grover.” *Id.* (preamble).

Consistent with these obligations described in the Grover-Sushkin Agreement, the Grovers also attempted to execute an Assumption of Lease with the Sushkins (“Assumption”). CP 89. The face of the Assumption refers to William and Teresa Grover doing business as Grover International LLC. *Id.* (defining term “Grover” to mean “William and Teresa Grover dba Grover International LLC”). Both William and Teresa Grover, along with Yuri Sushkin and Tatyana Rubtsova, signed the Assumption. *Id.* The signatures contain no description of any representative capacity. *Id.* Although there are signature lines for J. Brian Losh and Ilia Kertsman, neither executed the Assumption. *Id.* The Grovers’ lawyer notarized Sushkin’s acknowledgment of the Assumption. *Id.* at 90.

Sushkin subsequently used the Property to run the international foods business. CP 76 at ¶ 7. In November of 2006 and thereafter, Sushkin failed to make the rent and triple net payments required by the Lease. *Id.* at ¶ 9. As a result, Losh Family, LLC commenced this litigation to recover for the default. *See* CP 3–10 (Complaint).<sup>2</sup> Since neither the Kertsmans nor the Grovers obtained releases, both remain

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<sup>2</sup> The trial court also granted a default judgment against Sushkin. CP 727–28.

liable and the plaintiff may recover from either (or Sushkin) as it chooses. CP 164 (order holding defendants jointly and severally liable). However, as between the Kertsmans and Grovers, the Grovers are the primarily liable party and the Kertsmans are entitled to reimbursement of any amounts they pay to satisfy the judgment. CP 506 (order declaring that the Grovers must indemnify the Kertsmans).

Having succeeded in obtaining their respective summary judgments, Losh and the Kertsmans obtained awards of attorneys' fees pursuant to fee provisions in the various agreements. CP 599 (letter incorporated into judgment granting attorneys' fees to Losh and Kertsmans). These awards are captured in the trial court's final judgment. CP 645–649.

**B. Occupation, Use, and Representations Regarding the Leased Property**

While they now argue to the contrary, *e.g.*, Appellants' Br. 14–15, the Grovers admitted in their Answer that they, not Grover International, LLC (for whom they did not Answer), “occupied the subject property.” CP 50 at ¶ 4.11. They further admit that the subject property is the property legally described by plaintiff in its Complaint. CP 6 at ¶ 3.1 (Complaint); CP 50 at ¶ 3.1 (Grovers' Answer). That legal description is

wholly consistent with the description of the Property on the face of the Lease. *Compare* CP 6 at ¶ 3.1, *with* CP 12.

The Agreement contemplated that the Lease to the Property would likely be assigned as part of the sale by the Kertsmans to the Grovers, CP 304–305 at ¶¶ 3, 8(a), and the Agreement specifically required the Kertsmans to make the Lease available for inspection by the Grovers during the contingency period, which they did. *Id.* 305 at ¶ 8(a); CP 291 at ¶ 4. The Lease included a provision requiring the lessees to pay the remaining balance towards installation of an air conditioning system and new office carpet. CP 17 at ¶ 39. The Assignment explicitly required the Grovers to “perform all of the duties and obligations of Lessee under the” Lease. CP 20.

The record is bereft of any evidence that, prior to this litigation, any of the lessees or sublessees ever questioned the extent of the leased Property, the term of the Lease, or any other provision. Further, the Grovers had the right and opportunity, under the Agreement, to inspect the Lease and the leased Property. CP 305 at ¶ 8. Indeed, in connection with the Baza sale, Ms. Grover shadowed Mr. Kertsman on the Property to inspect the Baza business. CP 292 at ¶ 12. Moreover, the international foods business originally owned and operated on the Property by Mr. Kertsman continued to operate on the Property under the ownership of the

Grovers and later Sushkin. CP 30 (alleging that Grovers operated foods business from Property); CP 53 (admitting that Grover International did business at the Property); CP 4–5 at ¶¶ 1.3, 1.6 (unrebutted allegations in complaint concerning use of Property by Sushkin). Thus, it was clear to all parties from the outset what property the Lease encompassed.

Uncontradicted and undisputed evidence demonstrates that the Grovers relied upon and sought to avail themselves of their rights in the 5-year Lease. They represented in a number of documents that they could assign the Lease (indicating on at least one occasion that the term was more than 5 years) in connection with their sale of the international foods business. CP 336–43 (various listing agreements). Consistent with the description of the Property in the Lease, this listing described the Property as being on a corner location. *See id.* 342. The listing also evidences an intention to improve the premises by adding a storefront (or encouraging a future tenant to do so). *Id.* This is again consistent with the actual Property.

### **C. Additional Factual and Procedural Clarification**

The Grovers' statement of facts and procedural history requires three additional clarifications. First, the Grovers appear to argue that Losh Family, LLC cannot bring these claims. *E.g.* Appellants' Br. 4, 7. However, the Grovers cannot challenge the plaintiff's standing to assert

the claim or authority to bind them to the Lease because: (1) they admit in their Answer that Losh Family LLC “is the successor in interest to Losh Family Limited Partnership, which took title to the property which is the subject of the Lease herein on April 21, 1987, CP 4 at ¶ 1.1(Complaint); CP 49 at ¶ 1.1 (Grovers’ Answer); and (2) they never questioned the authority of the plaintiff in the trial court, the Kertsmans did. CP 166, 168.

Second, the Grovers never filed a motion for summary judgment in accordance with Civil Rule 56(c) or Local Rule 7(b)(5). Rather, the Grovers requested that they be granted summary judgment as the non-moving party in response to the plaintiff’s motion for summary judgment. Thus, the Respondent Kertsmans never had the proper opportunity in the trial court to marshal evidence and fully rebut the Grovers’ request for summary judgment. CP 159–60.

Finally, the Grovers ask this Court to reverse all judgments below. Appellants’ Br. 5, 18. It is important for the Court to recognize that the summary judgment granted to the Kertsmans involved both affirmative claims for relief, which implicate the Assignment, and dismissal of the Grovers’ cross-claims, which are unaffected by whether the Assignment binds the Grovers or not. *See* CP 505. As argued below, should this Court

reverse or vacate any part of the judgment, it should clarify that the Grovers' cross-claims remain dismissed with prejudice.

## V. ARGUMENT

The precedent which disposes of one of the two primary substantive issues in this dispute, also aptly describes the applicable standard of review:

When reviewing an order for summary judgment, [a reviewing court] engage[s] in the same inquiry as the trial court, and will affirm summary judgment if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed de novo. [A reviewing court] will sustain the trial court's judgment upon any theory established in the pleadings and supported by proof.

*Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Additionally, the party challenging the trial court's ruling (here, the Grovers) "bears the burden of showing that the record does not support the findings ... [they] challenge[]." *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 78, 180 P.3d 874 (2008). Under these standards, the trial court must be affirmed.

As they did before the trial court, the Grovers argue that this Court could also enter judgment against the moving party. Appellants' Br. 8 (citing *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 236, 189 P.3d 253, 256 (2008)). If the Grovers were to prevail on this appeal (and they should not), they still would not be entitled to summary judgment because their non-moving co-defendants', the Kertsmans, have never "had an adequate opportunity to present materials and argument in rebuttal." *Home Realty*, 146 Wn. App. at 236.

**A. The Assignment Binds the Grovers as Individuals**

Turning settled Washington law on its head, the Grovers seek to persuade this Court that they have the right to ignore the Assignment's clear intention to impose personal liability, based upon the form of the signature. Washington courts holds just the opposite: When a contract unambiguously specifies personal liability, additional language in a signature indicating a representative capacity will be ignored as mere *descriptio personae*. *E.g. Gavazza v. Plummer*, 53 Wn. 14, 15, 101 P.370 (1909) (addition of descriptive language in signature indicating agent or representative capacity ignored as *descriptio personae* where agreement specifies personal obligation); *Key v. Cascade Packing Co.*, 19 Wn. App. 579, 683, 576 P.2d 929 (1978) ("[Washington] cases do not support ...

[the] contention that, because ... [a] corporate title was affixed, a completely clear document was rendered ambiguous.”).

### 1. **There Is No Ambiguity in the Assignment**

“Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party.” *Tony Maroni’s*, 134 Wn.2d at 699. Accordingly, Washington courts look to the plain meaning of the terms of the contract rather than parties’ unexpressed desires to determine the parties’ intent:

[W]e attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written.

*Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503–504, 115 P.3d 262 (2005) (internal citation omitted).

With these rules of construction in mind, there can be absolutely no doubt that the Agreement, which specifies five times that it binds William and Teresa Grover “as individuals,” unambiguously describes the objective intent to impose personal liability upon the Grovers, as the trial court held. *See* CP 168 (Order Granting Plaintiff’s Motion for Summary Judgment) [hereinafter “Order”] (recognizing that the plain language of the Assignment clearly contemplates individual liability). In such instances, the form of the signature *does not* introduce ambiguity or otherwise relieve the signer of personal liability:

Early Washington cases regarding descriptive language following a signature on a contract indicate such language is generally considered to be *descriptio personae*, that is, merely descriptive of the person executing the agreement, and does not foreclose personal liability for the person signing the document. ***Where the agreement contains language binding the individual signer, additional descriptive language added to the signature does not alter the signer’s personal obligation.***

*Tony Maroni’s, Inc.*, 134 Wn.2d at 700.<sup>3</sup> The Grovers’ assertion that a court “must [first] determine whether the signature is ambiguous” simply

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<sup>3</sup> Not surprisingly, many of the cases which discuss the form of a signature involve guaranty contracts. Nonetheless, the *Tony Maroni’s* Court took great pains to emphasize that its decision rested on basic, generally applicable contract principles and not specialized law governing guaranty contracts. *E.g.* 134 Wn.2d at 699 (general rules of contract formation apply to guaranty contracts), 700 (describing the rule indicated by “Washington contract cases”), 702 (citing to *Seattle-First Nat’l Bank v. Hawk*, 17 Wn.

mischaracterizes *Tony Maroni's* and the cases upon which it relies.

Appellants' Br. 10.

Thus, when a contract unambiguously specifies personal liability, parol evidence may *not* be introduced to contradict the clear terms on the face of a contract. *Id.* (judicial construction of the agreement may be allowed only when “the face of the document does not otherwise indicate the signer’s capacity” and the signature includes additional descriptive language); *Bailie Commc'ns, Ltd. v. Trend Bus. Sys*, 53 Wn. App. 77, 80 765 P.2d 339 (1988) (holding that parol evidence regarding the capacity of the signer “is not even admissible” when the face of the document is unambiguous); *see Key*, 19 Wn. App. at 582 (“[T]he intent behind the form of signature is crucial ... [in] cases involve[ing] ambiguity ... *in the body of the document itself.*”) (emphasis added). As Judge Fleck recognized below, “[i]f an agent or representative wishes to escape personal liability, ‘the intention so to do must be expressed in clear and explicit language; otherwise, a personal obligation arises.’”<sup>4</sup> CP 168 (Order) (quoting *Gavazza*, 53 Wash. at 15). If the Grovers did not want to

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App. 251, 562 P.2d 260 (1977), which “demonstrates the application of contract principles in resolving an ambiguity in the scope of a guaranty”, 704 (asserting that cases the relied upon by the Court “comport with the basic principles in contract cases for addressing whether signatures with added descriptive language create personal liability on the part of the signer”).

<sup>4</sup> Notably, Judge Fleck, the trial judge in the instant action, was also the trial judge in *Tony Maroni's*.

be personally bound, they should not have signed, in any form, a contract specifying personal liability.

The authority cited by the Grovers is simply inapposite because it describes inapplicable Uniform Commercial Code authority and situations in which the contract or instrument at issue *does not* unambiguously describe personal liability. In *St. Regis Paper Co. v. Wicklund*, 24 Wn. App. 552, 597 P.2d 926 (1979), *rev'd on other grounds*, 93 Wn.2d 497, 610 P.2d 903 (1980), the promissory note at issue did not state on its face who was to be bound. *Id.* at 554. Unlike the Assignment in the instant case, with its repeated specification of personal liability, only upon inspection of the signature of the *St. Regis* promissory note was it possible to determine who the “I” in “I promise to pay” referred to. *Id.* Moreover, that case was governed by the former version of UCC rules not applicable to the Lease at issue here. *Id.* at 555–56.

Similarly, the Author’s Comment to the Washington Practice Series supplement cited by the Grovers involves specific applications of Article 3 of the UCC, which governs negotiable instruments. 7 Wash. Practice 2008 Supp. § 3-402, p. 474 (2008). Further, the discussion of the form of signature under Section 3-402 assumes that the promissory note (or other instrument) itself identifies on its face the represented person or entity. *Id.*; RCW 62A.3-402(b). In the instant case, the face of the

Assignment specifies personal liability of the Grovers rather than liability for the Grover International, LLC entity or any other principal. CP 20.

Even if the Court considers the form of the signature, personal liability is called for. The language at issue in the Assignment states that it binds “William and Teresa Grover as individuals, dba Grover International, LLC.” A signature indicating that Mr. Grover is a member of Grover International, LLC is wholly consistent with such contractual language referencing the dba. It reinforces that the Grovers would be leasing the property in order to carry on their Grover International, LLC business, which is exactly what they did. In other words, even giving force to the descriptive language accompanying the signature fails to create any ambiguity.

**2. Even with Resort to Extrinsic Evidence, the Grovers Cannot Carry Their Burden**

The Grovers argue that “the trial court appears to have determined that the signature was ambiguous, but nonetheless ruled that it could resolve that question on summary judgment.” Appellants’ Br. 11. The first part of this statement is incorrect. The court below first decided that the Assignment clearly contemplates personal liability and determined, following the analysis just described, that the form of the signature does not allow the Grovers to avoid personal liability. CP 168. The court then

pressed forward and held, in the alternative, that even if there were an ambiguity the Grovers still would be bound. *Id.* 168–69.

Again, the trial court got it right. Even if the Grovers were allowed to resort to parol evidence to prove that the parties intended to bind the LLC rather than themselves personally, their argument would not succeed because there is absolutely no evidence in the record that the parties considered binding, much less agreed to bind, the LLC rather than the Grovers. What extrinsic evidence there is points in the opposite direction.

When the face of a document does not indicate the capacity of the signer and a signature with additional descriptive language creates an ambiguity, then the following rules and burdens apply:

[W]hen words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, *prima facie*, they are descriptive of the person only; but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted, may be shown by extrinsic evidence; but the burden of proof rests upon the party seeking to change the *prima facie* character of the contract.

*Tony Maroni's*, 134 Wn.2d at 700–701 (citing *Griffin v. Union Sav. & Trust Co.*, 86 Wash. 605, 150 P. 1128 (1915)). Thus, the burden rests with

the Grovers to demonstrate that the parties intended the additional language accompanying Mr. Grover's signature to determine the character or capacity in which he contracted.

The record is devoid of any such evidence. Rather than point to any extrinsic evidence of the parties' intentions (because there is none), the Grovers merely attempt to persuade the Court that that the signature alone controls and trumps the text of the Assignment. Appellants' Br. 11–12. But even when an agreement is ambiguous, the signature alone does not control but rather allows a party to look outside the contract to show what the parties intended. The Grovers had the burden and the opportunity in the trial court to present such evidence but failed to present any.

For example, nothing in the record indicates that the Grovers had any communications with Losh whereby those parties agreed to impose liability on the LLC only. Indeed, numerous documents in the record demonstrate that the Grovers intended to bind themselves personally, believed that they had bound themselves personally, and acted as if personally bound. *See, e.g.*, CP 304–14 (Agreement), 332–33 (Grover-Sushkin Agreement), 89 (Assumption). The Grovers failed to carry their burden and adduce evidence which demonstrates that the language

accompanying Mr. Grover's signature should be construed as anything other than merely descriptive. *See Tony Maroni's*, 134 Wn.2d at 700–701.

The Grovers' argument reduces to the assertion that a signature trumps the text of a contract thereby allowing a party to slyly render an unambiguous contract voidable at will by merely affixing a signature in a certain form. The Court should reject this argument, which contradicts policies respecting the fundamental enforceability of contracts.

**B. Equity Binds the Grovers to the Lease**

The Grovers challenge the Lease because it is unacknowledged and does not contain a complete legal description. As the trial court determined, the doctrine of part performance applies to the Lease and takes it outside of the Statute of Frauds, curing the lack of acknowledgement and the possibly defective legal description on the face of the Lease.<sup>5</sup> CP 170–71 (Order) (citing *Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1981)).

Under the equitable doctrine of part performance, a lease will be enforced even though it fails to fully comply with the statute of frauds:

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<sup>5</sup> Although perhaps not a perfect description, the legal description in the Lease may not be defective. It appears to contain enough information to allow a person to look at King County real estate records and determine that the legal description of the Property listed in the Complaint (and admitted by the Grovers to accurately describe the property) describes the only possible parcels that correspond to the description in the lease. *See Home Realty*, 146 Wn. App. at 239 (“[T]he legal description must be *sufficiently adequate* to avoid the need to examine [the parties’] intent.”) (emphasis added).

An instrument may be taken out of operation of the statute of frauds by a form of equitable estoppel based upon the notion it would be inequitable for the challenging party to assert invalidity of the instrument to which that party agreed.... Leases have been sustained where the lessee had performed acts called for in the lease in reliance upon it, giving rise to estoppel or part performance. The facts must show the parties acted upon the instrument as a lease.

*Tiegs v. Watts*, 135 Wn.2d 1, 15–16, 954 P.2d 877 (1998). The typical part performance analysis considers three factors:

(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract.

*Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). It is not necessary for a court to find evidence of all three factors to invoke the doctrine. *Id.* at 557–58. Indeed, on numerous occasions courts apply the doctrine or indicate that it can be applied when evidence of less than three of the factors is present. *E.g., id.* (holding that in some instances one element may be sufficient); *Powers*, 93 Wn.2d at 721–22 (“[T]his court **repeatedly** has found sufficient part performance where two elements exist.”) (emphasis added) (collecting cases); *Pardee v. Jolly*, 163 Wn.2d 558, 567, 182 P.3d 967 (2008) (recognizing that all three factors need not be present).

In particular, a “lease need not necessarily be acknowledged if the lessee pays the rent and takes possession,” which is exactly what the Grovers did here. *Tiegs*, 135 Wn.2d at 16. Specifically, the Grovers admitted in their Answer to occupying “the subject property.” CP 50 at ¶ 4.11. Further, they argue in their opening brief that they both occupied the Property and performed the Lease. Appellants’ Br. 16 (“The Grovers performed the lease while they occupied [the Property]....”). Other evidence in the record also demonstrates that the Grovers arranged for payment of rent through their wholly owned LLC. CP 112 (acknowledged Bill of Sale, in which the Grovers warrant that they are sole owners of all membership units of Grover International, LLC); CP 105–09 (bank and checkbook records showing rent plus triple net payments by Grover International, LLC).

In addition to rent payments, the Grovers paid Triple Net Costs—a share of the real property taxes, insurance, and utilities for the Property—totaling at least \$1015 each month. CP 12 at ¶ 3, 17 at ¶ 37 (Lease specifying monthly rent of \$4,150 and triple net costs), 18 (attachment A to Lease specifying initial Triple Net Payments of \$1015 per month), 105–109 (financial records showing monthly payments of \$5585 which exceed rent and initial triple net payments). Such payments strongly point to the existence of the Lease. *Tiegs*, 135 Wn.2d at 16 (describing leases

sustained under part performance where facts “show the parties acted upon the instrument as a lease”).

Washington courts recognize that the equitable part performance doctrine must be flexible and consider all relevant facts in order to ensure that it will “mitigat[e] ... the harsh results of a too-strict application of the statute of frauds.” *Stevenson v. Parker*, 25 Wn. App. 639, 643, 608 P.2d 1263 (1980); *see Powers*, 93 Wn.2d at 722 (“The determination of each case, however, depends upon the particular facts and circumstances.”).

Harsh results must especially be avoided where, as here,

we have an express, but unacknowledged, written lease. The parties do not dispute its basic terms. Absent then are the evils the potential for fraud and the uncertainty inherent in oral agreements which necessitated the statute of frauds.

*Stevenson*, 25 Wn. App. at 643.

In the instant case, numerous other facts demonstrate the soundness of the trial court’s decision to apply the equitable doctrine of part performance in an effort to avoid an inequitable result. Moreover, these facts help to reveal the character and terms of the contract, which is precisely why courts apply the part performance doctrine. *Ting*, 125 Wn.2d at 572 (part performance aims to provide “proof certain enough to remove doubts as to the parties’ oral agreement” and ensure that the

statute is not enforced “to defeat the very purpose for which it was enacted—*i.e.*, the prevention of fraud arising from uncertainty inherent in oral contractual undertakings.”).

For example, the Grovers took several actions which demonstrate that they knew and benefitted from the fact that the Lease had an initial term of five years and a provision authorizing a five year extension. CP 12 at ¶ 3 (Lease specifying initial 5-year term), CP 17 at ¶ 38 (option to renew for 5 years). First, the Grovers’ listing for the sale of the business indicated that the Lease was assignable and had a term of more than 5 years. CP 343 (listing input sheet); CP 14 at ¶ 12 (Lease is assignable). Second, the Grovers’ Assumption with Sushkin is acknowledged. CP 23. This would be totally unnecessary if the term of the Lease were merely month to month, since such agreements fall outside the statute of frauds. RCW 59.04.010 (“Leases may be in writing or print, or partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals.”).

Additionally, consistent with the Property’s true location and the terms of the Lease, the Grovers:

- Inspected the Property and the business operated out of the Property prior to completing the purchase of the international foods business. CP 292 at ¶ 12

- Continued to operate the international foods business from the Property subject to the Lease. CP 95 at ¶ 5 (Declaration of William Grover)
- Leveraged the Property’s corner location and the possibility of opening a storefront when promoting the sale of the international foods business. CP 342
- Signed numerous contracts referring to the Lease and representing to others their rights under the Assignment. CP 336 at ¶ 4 (Commercial Brokers Association Business Exclusive Sale Listing Agreement indicating that food business is located on leased property which the Grovers “will assign ... to buyer at closing”); CP 340 at ¶ 4 (Business Opportunity Exclusive Sale and Listing Agreement with similar assignment provision)

Under the totality of these circumstances, it would be inequitable to allow the Grovers to disavow a lease that they performed, urged others to rely on, and whose existence and contours cannot be doubted. They must be bound (notwithstanding any technical non-compliance with the statute of frauds) under the doctrine of part performance. *See Tiegs*, 135 Wn.2d at 15 (“We have recognized as enforceable leases ones that do not fully comply with statutory requisites when under the facts it would be

inequitable for the challenging parties to assert invalidity of their own agreements.”).

**C. Ms. Grover Is Personally Liable**

The record and application of Washington’s community property law make absolutely clear that that the judgment may be properly enforced against Mr. Grover and the Grovers’ marital community. CP 29 at ¶ 2 (Kertsmans’ Answer to Complaint and Cross Complaint); CP 52 at ¶ 2 (Grovers’ Answer to Cross Claim and Cross Claims) (admitting that the Grovers are martial community and that all actions that they undertook in connection with the international food business and leased Property “were done for and on behalf of the marital community.”); *Key*, 19 Wn. App. at 583–84 (imposing liability on marital community in case where husband, but not wife, signed personal guaranty and included corporate title in signature).

The Kertsmans acknowledge that the trial court indicated in its order on Losh’s summary judgment motion that it did not decide the question of Ms. Grover’s personal liability. *See* CP 170 (Order) (“While it is arguable that Ms. Grover’s signature on the Assumption of Lease document with Sushkin and Rubtsova indicates inferentially that she is individually responsible too, I do not make that determination.”). Nonetheless, the Kertsmans submit that the following evidence in the

record (much of which was presented to the court in a motion subsequent to the ruling on Losh's summary judgment motion) sufficiently supports liability against Ms. Grover personally:

- The Grovers admit that both of their actions were done for the benefit of the community. CP 29 at ¶ 2; CP 52 at ¶ 2
- The Grovers admit that they *both* occupied the subject property. CP 50 at ¶ 4.11
- Teresa Grover signed the Agreement to purchase the Baza business, which operated out of the leased property. CP 309
- Teresa Grover signed (as an Owner) a Commercial Brokers Association Business Exclusive Sale Listing Agreement in connection with the sale of the international foods business. CP 336–338. The Listing Agreement indicates that “[t]he commercial real estate in/on which the business is located is:  Leased by Owner and Owner will assign the lease to buyer at closing....” *Id.* 336 at ¶ 4
- Teresa Grover signed (as a Seller) a Business Opportunity Exclusive Sale and Listing Agreement, which included provisions for the assignment of the Seller's interest in the Lease. CP 341

- Teresa Grover signed (as a Seller) a Listing Input Sheet, which included provisions for the assignment of the Seller’s interest in the Lease. CP 343
- Teresa Grover signed the Grover-Sushkin Agreement which specifically referenced the Lease and forbade Sushkin from removing “the Grovers ... [from] the lease.” CP 332–33
- Teresa Grover signed the Assumption. CP 89
- Teresa Grover shadowed Mr. Kertsman on the Property during the inspection period to confirm that the business operating there was as represented, thereby exercising rights and satisfying obligations under the Agreement. CP 292 at ¶ 12

There is ample legal and factual basis for this Court to sustain the judgment against Teresa Grover personally. *Tony Maroni’s*, 134 Wn.2d at 699 (“[A reviewing court] will sustain the trial court's judgment upon any theory established in the pleadings and supported by proof.”).

**D. The Grovers Are Not Entitled to Summary Judgment**

The Grovers argue that this court can enter summary judgment in their favor as the nonmoving party. Appellants’ Br. 8 (citing *Home Realty*, 146 Wn. App. at 236). The grant of summary judgment to the non-

moving party against the moving party is appropriate only when the affected parties have had an adequate opportunity to present material in rebuttal. *See Home Realty*, 146 Wn. App. at 256. Such a ruling would be inappropriate in this case because the Kertsmans, co-defendant's and not the moving party, never had the opportunity in the trial court to present evidence or fully rebut the Grovers' unnoted cross-motion for summary judgment. *See* CP 159–160.

Washington courts have issued summary judgment for the nonmoving party in cases involving a single plaintiff and defendant or where the interests of any additional defendants, plaintiffs, or other third parties align with those of the other plaintiffs or defendants. *Id.* (plaintiff and interpleader sought same outcome); *Rubenser v. Felice*, 58 Wn.2d 862, 865, 365 P.2d 320 (1961) (reversing summary judgment against heirs that was originally granted to devisees where all heirs and all devisees shared common interest); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992) (appellate court granted summary judgment to non-moving party in single plaintiff, single defendant case). This case does not fit the pattern of prior cases which grant summary judgment to the non-moving party. *See Leland v. Frogge*, 71 Wn.2d 197, 201-02, 427 P.2d 724 (1967) (summary judgment to non-moving party not appropriate when more than one claim are impacted). Since granting summary judgment to

the Grovers against Losh could impact the Kertsmans' rights to indemnification, summary judgment for the Grovers should be denied as against all Respondents.

**E. Nor Should the Grovers Should Be Awarded Fees**

The Grovers are not entitled to attorneys' fees from the Kertsmans. While Paragraph 21 of the Lease may contain a broad attorney fee provision, *see* CP 82 at ¶ 21, that provision only authorizes fees in disputes between a Lessee and Lessor. *Id.* It says nothing about disputes between an Assignee and Assignor. Nor does the Assignment contain a fees provision. In any event, the fee provision applies only if the Grovers are the prevailing party. *Id.* For the reasons above, the Grovers arguments should be rejected and they should not be a prevailing party.

Additionally, since they have failed to identify, in their opening brief, an “appropriate ground[] for an award of attorney fees as costs,” the Grovers are entitled to none. *Tony Maroni's*, 134 Wn.2d at 710–11 n.4; *see also* RAP 18.1.

**F. This Appeal Has No Impact Upon the Dismissal of the Grovers' Cross-Claims**

In their Summary of Relief Requested, the Grovers twice state that “[a]ll judgments should be reversed.” Appellants' Br. 17–18. The Grovers explain that all judgments must be reversed because all judgments

were based on the Lease and Assignment. *Id.* at 18. This is untrue. The Grovers' cross-claims against the Kertsmans, which the court below dismissed on a summary judgment motion brought by the Kertsmans, CP 506 (order dismissing Grovers' cross-claims with prejudice), did not implicate the Assignment in any manner. *See* CP 54-55 (cross-claims for fraud, breach of warranty, and breach of non-compete provision). Thus, even if the Court were to order further proceedings with respect to the Assignment, there would be no basis for overturning the dismissal of the cross-claims, which the Grovers failed to support with *any* evidence in the trial court. CP 480-483 (Appellants' Response to Kertsmans' Motion for Summary Judgment) (marshalling no facts supporting cross-claims). Moreover, the Grovers' opening brief fails to identify any issues related to the cross-claims, Appellants' Br. 3-4, and they therefore have waived review of this aspect of the judgment. *See Saviano*, 144 Wn. App. at 84 (holding that a reviewing court will "not address issues that a party neither raises appropriately nor discusses meaningfully with citations to authority").

**G. The Kertsmans Request Their Costs and Fees**

The Agreement provides for attorneys' fees and expenses to the prevailing party: "If Buyer of Seller institutes suit concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees

and expenses.” CP 308 at ¶ 25. Accordingly, pursuant to RAP 18.1, the Kertsmans request that this Court award them their fees as prevailing party. The amount of such fees will be set forth in an appropriate affidavit following a decision by the Court. *See* RAP 18.1(d).

Additionally, the Kertsmans believe that the arguments asserted by the Grovers are contrary to settled Washington law. Accordingly, the Kertsmans respectfully request that this Court award them the costs they expended defending this appeal, including their attorney’s fees. Both RAP 18.1 and RAP 18.9 provide a basis for such an award.

RAP 18.1 provides for the recovery of fees and expenses as allowed by “applicable law.” RCW 4.84.185 is such law. As its title suggests, that code section allows a prevailing party in any civil action “to receive expenses for opposing [a] frivolous action or defense.” RCW 4.84.185. The statute specifies that attorneys’ fees are an element of the recoverable expenses. *Id.* The statute applies to frivolous appeals as well as trial actions. *Fernando v. Nieswandt*, 87 Wn. App. 103, 111–112, 940 P.2d 1380 (1997).

Independently, RAP 18.9 gives “the appellate court on its own initiative or on motion of a party” the right to impose a sanction on a party who files a frivolous appeal. A sanction under the rule can include fees and costs. *Kearney v. Kearney*, 95 Wn. App. 405, 418, 974 P.2d 872

(1999).

Under either rule, an appeal is frivolous when there are no debatable issues and no reasonable likelihood of reversal. *Fernando*, 87 Wn. App. at 112; *Kearney*, 95 Wn. App. at 418.

In the instant case, Washington law supports neither of the Grovers' two primary arguments. On the signature issue, the Grovers essentially ignore or badly misinterpret the clear, controlling authority and instead point the Court to authority governing other types of instruments. Nowhere do the Grovers indicate that they are urging this Court (or urged the court below) in good faith to change the settled law, which is decisively against them. Nor would there be any reason for a court to look favorably upon the Grovers' voidable-at-will theory of signing contracts.

As to the statute of frauds issues, the Grovers neglect to inform the court that frequently leases will be sustained in spite of technical statute of frauds defects when two of the typical elements of part performance, such as possession and payment are shown, focusing instead almost solely on the third element: evidence of improvements. Moreover, it strains credibility that a party would be allowed to deny the existence of a lease that it performed, urged others to rely on, and transferred rights to— exactly what the Grovers seek to do with this appeal.

In both instances, these arguments have “so little merit that the

chance of reversal is slim.” *Kearney*, 95 Wn. App. at 418. As a result, this relatively straightforward case that should have been resolved long ago lingers and the fees pile up. This Court should not countenance the Grovers’ insistence upon drawing the case out, and therefore, the Kertsmans respectfully request that the Court award them all the fees and costs they have incurred opposing this appeal.

## VI. CONCLUSION

The Kertsmans respectfully submit that, pursuant to settled Washington, law this Court should reject the Grovers’ request to render the Assignment and Lease voidable at will by denying the Grovers the relief they seek and affirming the trial court in its entirety. Additionally, the Kertsmans believe that they are entitled to their fees and costs as set forth above.

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RESPECTFULLY SUBMITTED this 5th day of August, 2009.

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**CERTIFICATE OF SERVICE**

I certify that on this 5th day of August, 2009, I caused a copy of the foregoing Brief of Respondents to be served by messenger on the following parties:

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

Executed this 5<sup>th</sup> day of August, 2009 at Seattle, Washington.

  
\_\_\_\_\_  
Suzette Barber

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