

NO. 69856-7-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ROGER BEL AIR and NICK BRINEY, doing business as
BEL AIR & BRINEY, a Washington general partnership,

Appellant,

v.

1ST SECURITY BANK OF WASHINGTON,

Respondent.

On Appeal from King County Superior Court
Honorable Julie Spector

BRIEF OF APPELLANT

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I. INTRODUCTION

It is undisputed that:

- Appellant partnership Bel & Briney and Respondent 1st Security Bank (“the Bank”) entered into a contract committing the Bank to deliver the assignment of its \$60,790 Judgment against Koichi Yagi to Bel Air & Briney if the latter delivered a \$30,000 cashier’s check to the Bank by May 31, 2012.

- On May 10, 2012 Bel Air & Briney decided to complete the transaction. Partner Nick Briney acquired the cashier’s check and telephoned the Bank to arrange for the time to deliver the check to the Bank office and pick up the Assignment, in accordance with the procedures upon which the parties had previously agreed.

- Rather than fulfilling its contractual obligation to Bel Air & Briney, the Bank used its knowledge that Bel Air & Briney was ready to purchase the Judgment for \$30,000 to extract \$32,000 from the Yagi family on the following day, May 11.

Bel Air & Briney’s purchase of the cashier’s check and attempt to deliver it to the Bank constituted sufficient performance to prohibit the Bank from subsequently attempting to revoke the contract with Bel Air & Briney. This Court should reverse the trial court’s order granting the Bank’s Motion for Summary Judgment dismissal and rule that the Bank

breached the contract.

II. ASSIGNMENTS OF ERROR

The trial court erred in granting the Respondent Bank's Motion for Summary Judgment dismissing the Complaint of Appellant Bel Air & Briney. It should instead have concluded that the Bank breached its contract with Bel Air & Briney.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The parties entered into what was initially a unilateral contract, in which Bel Air & Briney had until May 31, 2012 to deliver a \$30,000 cashier's check to the Bank in exchange for receiving an assignment of the Bank's \$60,790 Judgment against Koichi Yagi. Bel Air & Briney began its performance on May 10, 2012, converting the unilateral contract to an option contract, which the Bank breached by instead using Bel Air & Briney's commitment to sell the Judgment to the Yagi family for \$32,000, costing Bel Air & Briney almost \$31,000.

A. Did the trial court err in finding as a matter of law that ". . . the offers of Defendant 1st Security Bank of Washington (the "Bank") to Plaintiffs were offers of unilateral contract that can only be accepted by full performance"?

B. Did the trial court err in finding as a matter of law that ". . . the Plaintiffs [sic] efforts in obtaining a cashier's check and placing phone

calls to the Bank were merely preparations to perform and do not constitute part performance of the Bank's unilateral offer"?

C. Did the trial court err in finding as a matter of law that "... Plaintiff failed to fully perform as required in the Bank's offers, and therefore, no contract was created; ..."

IV. STATEMENT OF THE CASE

A. **Bel Air & Briney Obtained A Judgment Against Several Members Of The Yagi Family In 2010.**

Roger Bel Air and Nick Briney are long time Seattle residents, friends, and business partners. (CP 148, 156-157) They met at SeaFirst Bank: Mr. Briney spent 20 years at SeaFirst, becoming a Vice President of Operations and Personnel. (CP 156-157) They formed Bel Air & Briney over 35 years ago, beginning by fixing up and selling real estate, then purchasing discounted contracts, and for the last approximately 25 years, making loans directly to borrowers. (CP 156-157)

In August 2006, Bel Air & Briney loaned \$200,000 to Koichi Yagi, his son Peter Yagi, his daughter Kandace K. Yagi and her husband Richard Y. Furukawa, and The Anna Yagi Trust for Surviving Spouse U/W ("the Yagis"), who agreed to re-pay the loan pursuant to the terms of a Promissory Note signed by them ("the Note"), secured by a first Deed of Trust against a six-unit apartment building they owned. (CP 148-149) Peter Yagi approached Mr. Bel Air and Mr. Briney for that loan: they had known each other for around 30 years, as Mr. Yagi has been a real estate lender in the Seattle area for as long as Bel Air & Briney. (CP 149)

The Note required the Yagis to pay the debt in full within six months. (CP 149) At Peter Yagi's request Bel Air & Briney extended the deadline for paying the loan numerous times over the next three years. (CP 149) Although the Yagis still failed to pay off the Note, Bel Air & Briney gave them another seven months before finally filing a Complaint against them in King County Superior Court in October 2010, over three and one-half years after payment was initially due. (CP 149)

On November 8, 2010 a Default Judgment in the amount of \$183,102.75 was entered on behalf of Bel Air & Briney against all the Yagis except Peter, who had filed for bankruptcy two months earlier. (CP 149) To prevent Bel Air & Briney from executing on the judgment or foreclosing on the Deed of Trust, sister Kandace Yagi (and her husband Richard Furukawa) and Koichi Yagi also filed bankruptcy on January 6, 2011. (CP 149)

The Yagis' bankruptcies prevented Bel Air & Briney from attempting to collect any money on the debt for over a year. (CP 150) Mr. Briney and Peter Yagi finally agreed on the terms of a settlement in March 2012. (CP 150)

During April 2012 Bel Air & Briney's attorney, Michael Hunsinger, and Robert Wilson, the attorney for Koichi Yagi's Estate (Mr. Yagi had passed away), and Kandace Yagi and her husband, worked out the details. (CP 150) Bel Air & Briney signed the final agreement on April 27, 2012, Mr. Hunsinger sent it to Mr. Wilson on May 1, and the Yagis signed it in mid-May, 2012. (CP 150)

B. 1st Security Bank Also Had A Judgment Against One Of The Yagis From 2002, Which Created A Potential Obstacle To Bel Air & Briney's Attempts To Execute On Its Judgment And Foreclose On Its Deed Of Trust.

Although Bel Air & Briney's Deed of Trust securing the Note was recorded against the Yagis' six-unit apartment building in 2006, a judgment had been previously entered on December 17, 2002 in favor of Washington Credit Union against Koichi Yagi in the amount of \$31,054.72 ("the Judgment") that was recorded against that property.¹ (CP 150) This created a problem during Mr. Briney's negotiations with Peter Yagi, who was attempting to sell the apartment building to pay Bel Air & Briney, because the first approximately \$60,790 in sales proceeds would be paid to 1st Security Bank which had "inherited" the Judgment. (CP 150) Bel Air & Briney decided to contact the Bank and attempt to negotiate a discounted amount to remove the obstacle presented by the Judgment. (CP 150-151)

C. On January 4, 2012 Bel Air & Briney And 1st Security Bank Entered Into A Contract In Which Bel Air & Briney Would Pay The Bank \$30,000 By May 1, 2012 In Return For A Release Of The Yagi Judgment.

On January 4, 2012, Mr. Briney called the Bank and spoke with one of its loan control representatives, Paula Smith. (CP 151) He told Ms. Smith that he held a mortgage or Deed of Trust against the apartment building, and may be foreclosing on it, so he wanted to attempt to settle the Judgment. (CP 151) Ms. Smith told Mr. Briney that although the

¹ According to the Bank, as of May 30, 2012 the total amount of the Judgment, including accrued interest, was \$60,790.72. (CP 174)

principal balance of the Judgment was \$31,054, her “boss liked round numbers” so she offered to release the Judgment for \$30,000. (CP 151) Mr. Briney accepted her offer. (CP 151) Ms. Smith and Mr. Briney agreed that the Bank would accept \$30,000 to release the Judgment, to be paid at any time up to May 1, 2012. (CP 151)

This agreement (“the Agreement”) was immediately confirmed in the form of the following letter Ms. Smith emailed to Mr. Briney at 4:29 p.m.:

Dear Nick:

Per our phone conversation today, January 4, 2012, 1st Security Bank of Washington will accept \$30,000 to release our judgment.

1st Security Bank of Washington will waive all interest, late fees and collection charges. The payoff of \$30,000 will remain through May 1, 2012. If more time is required please call for an updated payoff letter.

Feel free to call me on my direct line of 425-697-8015 if you have any questions.

Sincerely,

Paula Smith
Loan Control Representative
1st Security Bank of Washington
(CP 161)

D. The Bank Later Agreed To Assign The Yagi Judgment To Bel Air & Briney Upon Payment By May 31, 2012.

Throughout early 2012 Peter Yagi was telling Mr. Briney he had a potential purchaser for the apartment building. (CP 150) That deal did

not materialize, and the two continued their negotiations while Peter Yagi was still in bankruptcy. (CP 150) On April 2, 2012, Ms. Smith telephoned Mr. Briney to inquire about the status of their Agreement. (CP 151) Mr. Briney responded with a telephone call, followed by an email later that morning, informing her that he was still negotiating a possible agreement with the Yagis and expected to have the agreement completed by the May 1 deadline. (CP 151-152, 166) He also said he was considering purchasing the Judgment instead of releasing it. (CP 166) Ms. Smith replied that transferring the Judgment to Bel Air & Briney would be fine with the Bank. (CP 151)

By the end of April 2012, the attorneys for Bel Air & Briney and the Yagis had nearly formalized their settlement agreement. (CP 151-152) In fact, on April 27 Messrs. Bel Air and Briney approved and signed the final draft of that agreement which had been prepared by the Yagis' attorney. (CP 113-117) They were ready, willing, and able to purchase the Judgment from the Bank for the agreed-upon \$30,000 the moment they learned the Yagis had also signed the settlement agreement. (CP 152)

Just to be safe, on April 27, 2012 Mr. Briney called Ms. Smith, told her he was not sure Bel Air & Briney was going to make the May 1 deadline and said they may need another day or more. (CP 152) Ms. Smith responded, "no problem, how about a month?" (CP 152) At 4:14 p.m. on April 27 Ms. Smith sent Mr. Briney an email stating "[w]e will be happy to extend our offer to you through the 30th of May. I am glad this will work for you." (CP 166)

E. From May 1 Through May 10, 2012 Both Bel Air & Briney And The Bank Remained Committed To Completing Their Transaction.

On Tuesday, May 1, 2012, Mr. Hunsinger emailed the Yagi settlement agreement signed by Bel Air & Briney to the Yagis' attorney, Robert Wilson, with a cover letter. (CP 113-117) Although Bel Air & Briney wanted to purchase the Judgment immediately, Mr. Hunsinger asked Mr. Wilson to first confirm that the language in the agreement calling for the release of the Bel Air & Briney Deed of Trust "and judgment liens against the secured property" upon the Yagis' payment in full of the settlement amount did not include the Judgment. (CP 113)

In the afternoon, Mr. Briney and Ms. Smith exchanged emails: Mr. Briney stated "[w]e are pretty much ready [sic] go. We expect the funds to be ready today. Will 'your people' prepare the assignment?" (CP 168) Ms. Smith responded that she would have the form of assignment to Mr. Briney the following day. (CP 168)

On Wednesday, May 2, 2012, Ms. Smith emailed Mr. Briney a letter confirming that "1st Security Bank of Washington, fda Washington Credit Union agrees to assign the judgment: Washington Credit Union vs. Koichi Yagi for the sum of \$30,000." (CP 171) Accompanying the letter were the Bank's Assignment of Judgment form and the loan payoff quote of \$60,790.72 as of May 30, 2012. (CP 173-174)

That afternoon, Ms. Smith and Mr. Briney again exchanged emails. (CP 176) At 12:43 p.m. Ms. Smith told Mr. Briney the Bank preferred payment in the form of a cashier's check or certified funds, and

asked how Mr. Briney wanted to deliver the funds. (CP 176) “Are you in a hurry? If so maybe you could come up to the office? Or over-night the payment & us overnight the forms. I can email copies as soon as we receive payment & then over night originals.” (CP 176)

Mr. Briney responded that, “I am not in a big hurry. . . Coming to your office to ‘close’ this would be fine.” (CP 176)

On Thursday, May 3, 2012, Ms. Smith emailed Mr. Briney to inform him that she would be out of the office on May 4. (CP 176)

In her deposition testimony, Ms. Smith confirmed that as of May 4, 2012, had Mr. Briney delivered a \$30,000 cashier’s check to her, she would have given him the signed Assignment of Judgment. (CP 134) She had given no thought to withdrawing the Bank’s offer. (CP 134) She and Mr. Briney both believed – as they had throughout the entire four-month period of their Agreement – that they had an agreement and the details by which it would be consummated: Bel Air & Briney would pay \$30,000 in the form of a cashier’s check which would be delivered by Mr. Briney to Ms. Smith at her office; in turn she would sign the Assignment of Judgment form and give it to Mr. Briney. (CP 134)

As soon as Mr. Hunsinger received an acceptable response from the Yagis’ attorney to his May 1 letter, Mr. Briney was ready to obtain the cashier’s check, take it to Ms. Smith, and pick up the Assignment. (CP 152)

On Friday, May 4, 2012, having learned from Mr. Hunsinger’s May 1 letter of the existence of the Judgment, Yagi family attorney Robert

Wilson telephoned the Bank for the first time. (CP 111) He told Bank employee Dan Desmond (Ms. Smith had the day off) that he represented the Yagis and asked for a pay-off amount on the Judgment. (CP 111) Mr. Desmond told Mr. Wilson that he would first need to send the paperwork to the Bank proving that he had authority to act on behalf of the Yagis. (CP 111)

On the morning of Monday, May 7, 2012, Ms. Smith discussed Mr. Wilson's telephone call with her manager, Kathy VonHagel. (CP 110) They agreed that they would continue to deal with Mr. Briney and not Mr. Wilson and would definitely assign its Judgment to Bel Air & Briney when Mr. Briney delivered the \$30,000. (CP 110) In her deposition testimony Ms. Smith confirmed that had Mr. Briney delivered a \$30,000 cashier's check to her on May 7, she would have given him the signed Assignment of Judgment. (CP 135)

On May 7 and 8, 2012 Mr. Briney and Mr. Bel Air continued to wait for Mr. Wilson's response to Mr. Hunsinger's May 1 letter. (CP 153) They knew that they had the rest of the month to pay the Bank \$30,000 in return for the Assignment of the Judgment, but were anxious to complete the transaction as soon as possible. (CP 153)

At 5:14 p.m. on Wednesday, May 9, 2012, Mr. Wilson emailed his long-awaited response to Mr. Hunsinger. (CP 119) Mr. Briney immediately concluded that it gave him and Mr. Bel Air adequate assurances that if they purchased the Judgment they would be able to enforce it, and decided to proceed with the purchase of the Judgment. (CP

153)

F. On Thursday, May 10, 2012, Mr. Briney Acquired The Cashier's Check And Called The Bank To Complete The Transaction.

At 7:40 a.m. on Thursday, May 10, 2012, Mr. Hunsinger sent Mr. Wilson an email accepting the terms of Mr. Wilson's May 9 response. (CP 121) In the afternoon, Mr. Briney purchased a \$30,000 cashier's check payable to the Bank. (CP 178)

At 2:26 p.m. the same afternoon, unbeknownst to Mr. Briney, Mr. Wilson sent an email to the Bank's Dan Desmond, providing him with documents showing that he had the authority to represent the Yagis. (CP 123) He asked Mr. Desmond to confirm that the Bank owned the Judgment and tell him who at the Bank had authority to negotiate a "payment" of the Judgment. (CP 123)

At 3:24 p.m. Mr. Briney received an email from Ms. Smith asking "[W]here do we stand? We received some paperwork today from attorney Robert Wilson represents [sic] estate of Koichi Yagi & personal rep Kandace Yagi." (CP 180) After calling Ms. Smith and leaving her a voice mail (CP 154) Mr. Briney emailed her at 3:38 p.m.: "Please call me". (CP 180) Ms. Smith did not respond to either the voice mail or email. (CP 154)

At 4:04 p.m., Ms. Smith sent Mr. Wilson an email asking him to call her to discuss his email of 2:26 p.m. (CP 125) Later that afternoon, Mr. Wilson called Ms. Smith. (CP 136) He told her about Bel Air & Briney's possible foreclosure action against the Yagi Estate and that he

had just learned of the Judgment. (CP 136) He made some comments about Bel Air & Briney that were not complimentary, although Ms. Smith could not recall the specifics. (CP 137) He said he wanted to offer to pay the Bank approximately \$6,000 to release the Judgment: Ms. Smith told him that the Bank already had an offer of \$30,000. (CP 140-141)

G. On Friday, May 11, 2012, After Mr. Briney Called The Bank Again, Instead Of Fulfilling Its Contractual Obligations To Bel Air & Briney, The Bank Used Bel Air & Briney's Commitment To Extract An Extra \$2,000 From The Yagi Family.

On the morning of Friday, May 11, 2012, Mr. Briney left Ms. Smith a second voice mail telling her he was ready to come to her office and complete the transaction. (CP 154) Before 9:26 that morning, Ms. Smith informed her supervisor, Ms. VonHagel, of her phone conversation with Mr. Wilson the previous afternoon. (CP 140) They decided that they were still “good to go” with the assignment of the Judgment to Bel Air & Briney in return for the payment of \$30,000. (CP 110, 141)

However, until the Bank actually receives payment in full, its loan control department feels no obligation to fulfill its contractual obligations: as Ms. VonHagel testified at her deposition, “[a]s far as I am concerned, it’s all a negotiation until we have cash in our hand.” (CP 145)

Accordingly, instead of calling Mr. Briney in response to his voice mail messages and arranging for him to come to the Bank with his cashier’s check in exchange for the Assignment of the Judgment, Ms. VonHagel and Ms. Smith decided to give Mr. Wilson one last opportunity to tell them by the end of the day whether the Yagi Estate “planned to beat

[Bel Air & Briney's] offer". (CP 110)

At 9:26 a.m. Ms. Smith sent Mr. Wilson an email, stating:

Thank you for talking with me yesterday afternoon.

As I stated yesterday 1st Security Bank has had an offer for Assignment of Judgment for \$30,000. **Unless the Estate of Koichi Yagi is willing or able to beat that offer 1st Security Bank will accept [the Bel Air & Briney offer].** Unfortunately, we have a very tight time frame.

Please let me know today if the Estate plans to pay the judgment." (CP 127) (emphasis added)

At 2:56 p.m. Friday afternoon, Mr. Wilson responded with an email to Ms. Smith offering to pay the Bank \$32,000. (CP 127)

At some time before 4:10 p.m. Ms. Smith sent an email to Mr. Wilson accepting his offer, as long as the funds were received by May 18. (CP 129) By 4:10 p.m., Mr. Wilson confirmed their agreement by email. (CP 131)

Mr. Briney spent most of Friday waiting for Ms. Smith to tell him what time she wanted him to drive to her office and deliver the cashier's check. (CP 154) She concedes she gave no thought about telling Mr. Briney of Mr. Wilson's 2:56 p.m. offer of \$32,000. (CP 142)

Only after completing the arrangements with Mr. Wilson did Ms. Smith call Mr. Briney late on the afternoon of May 11. (CP 110, 154-155) She told Mr. Briney that the Bank was going to satisfy the Judgment on

Monday, May 14. (CP 110, 154-155) He asked her whom had she made arrangements with to have the Judgment satisfied, but she refused to tell him. (CP 110, 155) He angrily told her that Bel Air & Briney had a contract with the Bank; Ms. Smith said there was no contract. (CP 110, 155) Mr. Briney asked to speak with Ms. Smith's manager. (CP 110, 155) She told him that Ms. VonHagel was gone for the day. (CP 110, 155)

On Monday, May 14, 2012, Ms. VonHagel and Ms. Smith called Mr. Briney. (CP 110, 155) They again refused to disclose any information regarding the satisfaction of the Judgment, citing the customer's request for confidentiality (a condition imposed by Wilson as part of his \$32,000 offer). (CP 110, 155) Mr. Briney asked that the Bank assign the judgment to Bel Air & Briney pursuant to the Agreement: Ms. VonHagel and Ms. Smith refused even though, according to Ms. VonHagel, the Bank's "offer" to Bel Air & Briney was apparently still in play even after the Bank's agreement or offer with Mr. Wilson and the Yagi Estate on the afternoon of May 11. (CP 110, 155)

Q. At what point did you know, if you ever did, that the bank first told Nick that they were not going ahead with the \$30,000 offer, that they were not going to give him an assignment of judgment if he showed up with the \$30,000 cashier's check?

A. When we got the \$32,000 in. Money talks. (CP 145)

On Friday, May 18, 2012, a Satisfaction of the Judgment was entered in King County Superior Court. (CP 147)

The Bank filed a Motion for Summary Judgment (CP 56–88, 181–198), to which Bel Air & Briney filed response pleadings (CP 89–180) and its own Motion for Summary Judgment, which was scheduled to be heard after the hearing on the Bank’s Motion. (CP 90) The Court entered an Order Granting Defendant’s Motion for Summary Judgment. (CP 199–201) Bel Air & Briney appealed. (CP 202–206)

V. ARGUMENT

A. **Standard Of Review And Burden Of Proof: This Court Reviews The Order Granting Respondent’s Motion For Summary Judgment De Novo.**

CR 56(c) sets forth the conditions for granting a summary judgment motion: “[T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. The burden is on the moving party to demonstrate there is no genuine dispute as to any material fact, and all reasonable inferences from the evidence must be resolved against the movant. *Morris v. McNicol*, 83 Wn.2d 491, 494 519 P.2d 7 (1974).

Here, the parties agree there are no disputed material facts: which

party is to prevail is solely a matter of law.

Of course, this Court reviews de novo the summary judgment order. *Estate of Bracken*, 175 Wn.2d 549, 562, 290 3d 99 (2012).

B. The Trial Court Erred In Concluding That Bel Air & Briney Had Not Sufficiently Performed The Contract Before the Bank Tried to Revoke It.

This case is to be resolved by applying fundamental principles of contract law. The Bank made an offer to form a unilateral contract. Bel Air & Briney began the performance that was invited by the Bank's offer. By operation of law, an option contract was created when Bel Air & Briney began performance, after which the Bank's offer could no longer be revoked. The Bank attempted to revoke its offer only after it became irrevocable. The Bank breached the option contract by allowing the Yagi Estate to pay to satisfy the Judgment instead of giving Bel Air & Briney the opportunity to complete its performance in return for the Assignment.

1. A Unilateral Contract Existed Between The Parties From January 4 Through May 10, 2012.

Under Washington law, contracts are classified as either bilateral or unilateral. The parties agree that *Cook v. Johnson*, 37 Wn.2d 19, 23, 221 P.2d 525 (1950) establishes the principles regarding the formation and implementation of a bilateral contract:

The law recognizes, as a matter of classification, two kinds of contracts – bilateral and unilateral. A bilateral contract is one in which there are reciprocal promises. The promise by one party is consideration for the promise by the other.

Each party is bound by his promise to the other. A unilateral contract is a promise by one party – an offer by him to do a certain thing in the event the other party performs a certain act. The performance by the other party constitutes an acceptance of the offer and the contract then becomes executed. Until acceptance by performance, the offer may be revoked either by communication to the offeree or by acts inconsistent with the offer, knowledge of which has been conveyed to the offeree. An example of this class of contract is the offer of a reward. 17 C.J.S. 326, Contracts, § 8; 1 Page on Contracts 65, § 51; *Mowbray Pearson Co. v. E. H. Stanton Co.*, 109 Wash. 601, 187 Pac. 370, 190 Pac. 330, and cases cited therein. *Higgins v. Egbert*, 28 Wn. (2d) 313, 182 P. (2d) 58.

The parties also agree that:

- The Bank initially agreed to release, and later to assign, the Judgment to Bel Air & Briney upon receiving a \$30,000 cashier's check from Bel Air & Briney by May 31, 2012;
- The agreement was a unilateral contract;
- Until Bel Air & Briney performed the requested conduct, the Bank had the right to revoke its obligation to assign the Judgment;
- Before the Bank revoked the offer Mr. Briney acquired the \$30,000 cashier's check, and notified the Bank of that acquisition and his desire to deliver it to the Bank;
- Mr. Briney failed to deliver the check because while he was waiting for the Bank to tell him what time to deliver it, the Bank extracted

an additional \$2,000 from the Yagis and only then notified Mr. Briney of its revocation of its offer to Bel Air & Briney.

The parties agree to all the material facts, as well as all of the legal issues save one: whether the Bank had the legal right to revoke the offer after Mr. Briney acquired the cashier's check and notified the Bank of his desire to deliver it to the Bank in exchange for the Assignment of the Judgment. It did not. As a matter of law, the order granting summary judgment must be reversed.

2. An Offeree To A Unilateral Contract Has Sufficiently Performed To Make The Offer Irrevocable If It Tenders Performance, Begins Performance, or Tenders A Beginning Of Performance.

While the Washington Supreme Court's 63-year old opinion in *Cook, supra*, is still good law regarding the formation and implementation of unilateral contracts, the 1979 opinion of *Knight v. Seattle-First National Bank*, 22 Wn. App. 499, 589 P.2d 1279 (493) by Division 1 of the Washington Court of Appeals defines performance of a unilateral contract and the consequence of that performance. Consequently, understanding the facts in *Knight* and its analysis of the law is critical in determining the appropriate outcome in this case.

In *Knight*, Seattle-First National Bank ("SeaFirst") lent money to the Knights secured by a deed of trust against their real property. After the Knights fell behind on their payments the Bank obtained a decree of foreclosure and judgment of \$20,311 against them, and later acquired title to the property via sheriff's deed.

The Knights learned that Kenneth Johnston (“Johnston”) was negotiating to buy the property. On December 17, 1976 the Bank agreed to sell the property to the Knights if they could persuade Johnston to withdraw his offer of purchase and pay \$22,000 to the Bank. Ms. Knight claimed the Bank told her it would not conclude the sale within the ensuing two or three weeks.

On December 22 the Knights’ attorney sent a letter to Johnston requesting him to release the Bank from any obligation arising from the Bank’s agreement to sell the property to Johnston. Johnston, however, refused to do so.

On January 6, 1977 the Knights informed the Bank it would pay the \$22,000 and a week later filed a lawsuit against the Bank and Johnston seeking to enjoin the sale of the property to Johnston and/or damages. It was not until after the filing of the lawsuit that the Knights learned that on December 22, 1976 the Bank had entered into an agreement to sell the property to Johnston.

The Court of Appeals correctly upheld the trial court’s entry of an order of summary judgment dismissing the Knights’ lawsuit because “[t]he Knights’ action . . . represented only preparations to undertake the invited performance, and did not constitute part performance which would require enforcement of the Bank’s offer.” *Knight* at page 499.

By applying the same analysis as the *Knight* court to the significantly different facts presented here, this Court should conclude that Bel Air & Briney’s action did “constitute part performance which would

require enforcement of the Bank's offer".

The *Knight* analysis of what constitutes part performance begins at page 496 with, "The rule is well recognized by American courts that part performance by the offeree may preclude withdrawal of the offer".

It then outlines the historical development of this principle through a discussion of Section 45 of The Restatement of the Law, Contracts (1932) as updated by the draft of the Second Restatement of Section 45 in 1964:

The principle is enunciated in 1 Williston, *Contracts* § 60A, at 188-91 (3d ed. 1957):

The right of the offeror to revoke his offer even after part performance by the offeree is supported by certain American decisions but in other cases where the question has arisen the offeror has been held bound . . .

The difficulty may best be met . . . by holding, if the consideration requested in an offer of a unilateral contract will necessarily take time and expense for its performance, that the offer contains by implication a subordinate offer to keep the main offer open for a reasonable time in consideration of the beginning of performance of the offeree.
(Footnotes omitted.)

The Restatement view follows:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate

performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

Restatement of Contracts § 45, at 53 (1932).

Not satisfied with the statement of the rule promulgated in the Restatement, the drafters of the Restatement (Second) of Contracts § 45 (Tent. Draft No. 1, 1964), conceiving the problem in terms of an option contract, write as follows:

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree begins the invited performance or tenders part of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer. *Knight*, 22 Wn. App. 493 at 496-497.

In 1981, two years after *Knight*, the Second Restatement was adopted in its final, present, form. It contains not two but three means by which an option contract is created: "Where an offer invites an offeree to accept by rendering performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it." (emphasis added)

What constitutes the performance of an unilateral contract has

evolved over the past 80 years, from

- “full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time” (Restatement First, 1932); to

- “the offer contains by implication a subordinate offer to keep the main offer open for a reasonable time in consideration of the beginning of performance of the offeree” (Williston, 1957); to

- the unilateral contract is converted to an option contract “when the offeree begins the invited performance or tenders part of it” (Restatement Second Draft, 1964 and *Knight*, 1979); to

- the unilateral contract is converted to an option contract “when the offeree tenders or begins the invited performance or tenders a beginning of it.” (Restatement Second, 1981)

According to Section 45 of the Restatement (Second) of Contracts and *Knight*, if an offeree tenders performance called for under a unilateral contract, or begins the invited performance, or tenders a beginning of it, it has provided sufficient consideration to create an option contract for a reasonable time to complete performance. Once that occurs, the former offeror cannot revoke its contractual obligations.

Whether the offeree’s actions constituted the beginning of performance or mere preparations depends on the application of five factors described in comment f to the draft Restatement (Second) of Contracts, § 45 and adopted in *Knight* at page 498:

The writers of the Restatement (Second) of Contracts (Tent. Draft No. 1, 1964) suggest that the invitation to perform necessarily includes an invitation to begin performance and that beginning of performance implies a promise to complete performance. Section 45, comment *d*. Preparations, although they may be essential to carrying out the contract or to accepting the offer, are not enough. The distinction turns on many factors:

the extent to which the offeree's conduct is clearly referable to the offer, the definite and substantial character of that conduct, and the extent to which it is of actual or prospective benefit to the offeror rather than the offeree, as well as the terms of the communications between the parties, their prior course of dealing, and any relevant usages of trade.

The *Knight* court applied those five factors distinguishing the beginning of, from preparations for, performance, correctly concluding that the Knights' actions only involved the latter:

Applying these factors to the facts at hand, we see that the conduct of the Knights in beginning the lawsuit was referable to the offer, and that the conduct was of a definite and substantial character. It is apparent, however, that the lawsuit, begun after the sale to Patrick, can be of no actual or prospective benefit to the Bank; indeed the contrary is true. The terms of the offer

called for the withdrawal of Johnston's offer to buy and tender of the purchase price. The Knights promise to pay, absent any tender of the money, is immaterial since the offer called for acceptance by performance, not by promissory obligation. That the Knights initiated a lawsuit of uncertain outcome did not bring them significantly closer to achieving the bargained-for performance. The prior course of dealing between the Knights and the Bank reflects a long unsuccessful effort by the Knights to retain the property; the Bank had indulged various means to enable them to do so, all of which had failed. The Knights' action therefore represented only preparations to undertake the invited performance, and did not constitute part performance which would require enforcement of the Bank's offer. *Knight*, 22 Wn. App. at 498-499.

Unlike the Knights, Bel Air & Briney either tendered performance, or began performance, of its contractual obligations.

3. Bel Air & Briney Tendered Performance Of Its Obligations Under the Contract On May 10, 2012 Before It was Illegally Revoked By The Bank The Following Day.

It is undisputed that the Bank revoked the unilateral contract only after learning from Mr. Briney that Bel Air & Briney had acquired the \$30,000 cashier's check and notified the Bank of its desire to properly deliver it to the Bank in exchange for the Assignment. The latter constituted a "tender" of performance.

Bel Air & Briney accepts the definition of "tender" from the sixth (1994) edition of Black's Law Dictionary used by the Bank in its Reply in

Support of its Motion for Summary Judgment: “The actual proffer of money, as distinguished from mere proposal or proposition to proffer it. Hence mere written proposal to pay money, without offer of cash, is not ‘tender’.” (emphasis added) (CP 184)

It is significant that the definition does not require the delivery of money, only that it be proffered, which the ninth (2009) edition of Black’s Law Dictionary defines as “to offer or tender (something, esp. evidence) for immediate acceptance.” Mr. Briney did more than merely offer to pay the money: he already had an agreement with Ms. Smith that when he obtained a cashier’s check for \$30,000 he would drive to her office, give it to her, and receive the Assignment in return; he obtained the check; and he left her two phone messages telling her he had the check and wanted to know what time he could drive to her office, deliver the check to her, and pick up the Assignment.

Bel Air & Briney tendered performance of its obligation under its agreement with the Bank, before the Bank revoked it.

4. Alternatively, Bel Air & Briney Had Begun The Performance Of Its Obligations On May 10, 2012 Before It Was Illegally Revoked By The Bank The Following Day.

Applying the five *Knight* factors to the present case, it is clear that Bel Air & Briney began actual performance of the Bank’s requested conduct before the Bank notified Mr. Briney of its intent to revoke the offer to form the contract.

Ms. Smith admits that from her first phone conversation with Mr.

Briney and confirming letter on January 4, 2012, through the late afternoon of May 10, 2012 at the earliest, at all times the Bank would have delivered the Assignment of the Judgment to Mr. Briney upon his delivery of \$30,000. (CP 134-135)

During Mr. Briney's exchange of emails with Ms. Smith on May 1 and May 2, 2012, the two agreed on the form and manner in which the exchange would take place: the Bank sent Mr. Briney the form of the Assignment, the \$30,000 would be in the form of a cashier's check, which Mr. Briney would deliver to Ms. Smith at her office, at which time she would give Mr. Briney the signed Assignment. (CP 167-176)

On the afternoon of May 10, 2012 Mr. Briney purchased a \$30,000 cashier's check payable to the Bank. (CP 178) On May 10 and 11, 2012, Mr. Briney left voice mails with Ms. Smith informing her on at least one occasion that he was ready to come to her office and complete the transaction. (CP 154) Mr. Briney spent all of May 11 waiting for Ms. Smith to call him back to let him know what time to bring the payment to her office. (CP 154)

Mr. Briney's purchase of a cashier's check payable to the Bank and his phone calls to Ms. Smith **were clearly referable** to the Bank's offer, constituted **conduct of a definite and substantial character**, and were **of actual and prospective benefit to the Bank**. The **terms of the communications** between Ms. Smith and Mr. Briney established an agreement on the form of the payment and the Assignment, and the means by which they would be exchanged. In fact, every aspect of their **course**

of dealing — from January 4 through close of business on May 11, 2012 — confirmed their Agreement.

Under the rules adopted in *Knight*, Mr. Briney began the performance invited by the Bank's offer no later than the afternoon of May 10, 2012. Upon doing so, an option contract was created, and the Bank could no longer revoke its offer.

Until an offer to form a unilateral contract becomes irrevocable it may only be revoked by communicating revocation to the offeree or by acts inconsistent with the offer, knowledge of which has been conveyed to the offeree. *Knight*, 22 Wn. App. at 496 (citing *Cook*, 37 Wn.2d at 23).

The Bank did not communicate to Bel Air & Briney that it would not honor its offer, or take any inconsistent acts that were conveyed to Bel Air & Briney until around 5:00 p.m. on May 11, 2012. By then, the Bank's attempt to revoke the contract was too late: Bel Air & Briney had tendered or begun performance over 24 hours earlier.

5. Even If Delivery Of The \$30,000 Were Required For Bel Air & Briney To Adequately Perform, Its Failure To Do So Was Excused By The Bank's Misconduct.

The only reason Bel Air & Briney did not deliver the \$30,000 cashier's check before the Bank tried to revoke the contract was the latter's decision to instead use its knowledge of Mr. Briney's commitment to extract an extra \$2,000 from the Yagi family.

Mr. Briney had purchased the \$30,000 cashier's check on the afternoon of Thursday, May 10, after which he sent Ms. Smith an email and left her a voice mail message. Instead of responding to those

messages, at 4:04 p.m. Ms. Smith sent Mr. Wilson an email inviting him to call her, which he did that afternoon, making his initial offer to satisfy the Judgment for around \$6,000. On Friday Mr. Briney left his second voice mail message to Ms. Smith, asking when he could come to her office to complete their transaction.

In the meantime, on Friday morning Ms. Smith and her manager, Ms. VonHagel, decided to not return Mr. Briney's calls. They chose instead to take advantage of those messages to try to extract more than \$30,000 from the Yagis, knowing if that effort failed Mr. Briney and his \$30,000 cashier's check were only a phone call and a short drive away.

Ms. Smith sent Mr. Wilson an email that if the Yagi Estate did not "beat Bel Air & Briney's offer" that day, the Bank would accept the \$30,000 and assign its \$61,000 Judgment to Bel Air & Briney to collect from the Yagi Estate.

While Mr. Briney was waiting for Ms. Smith to tell him when to come to her office with the check, the Yagis were smart enough to realize that it would behoove them to pay \$32,000 to the Bank instead of almost \$62,000 to Bel Air & Briney to satisfy the Judgment. Only after Ms. Smith accepted Mr. Wilson's offer that afternoon – which put an extra \$2,000 in the Bank's pocket – did she finally call Mr. Briney back at around 5:00 p.m. She would not give him any details, not even the name of the person or party with whom she had dealt. She told him only that the Judgment would be satisfied on Monday, May 14, which was patently false: Ms. Smith knew her agreement (or to use her language, her "offer")

with Mr. Wilson called for the \$32,000 payment to be made by the following Friday, May 18, the date the Satisfaction was ultimately entered.

Ms. Smith intentionally prevented Mr. Briney from delivering his cashier's check and receiving the Assignment. The law does not permit the Bank to benefit from this conduct.

In Washington, it is a long-established rule of contract law that one of the parties to a contract cannot avail himself of nonperformance where the nonperformance is occasioned by his own acts. *Wolk v. Bonthius*, 13 Wn. 2d 217, 219, 124 P.2d 553 (1942) (citing *Blair v. Wilkeson Coal & Coke Co.*; 54 Wn. 334, 103 P. 18 (1909); *McDonald v. Wyant*, 167 Wn. 49; 8 P.2d 428 (1932); *Payne v. Ryan*, 183 Wn. 590, 49 P.2d 53 (1935); *Mogul Logging Co. v. Smith Livesey Wright Co.*, 185 Wn. 509, 55 P.2d 1061 (1936)).

This rule prevents a person from benefiting from his own wrongful acts. *Id.* It appears not yet to have been applied in a case involving a unilateral contract. See, e.g., *Id.* (and cases cited therein). See also, e.g., *Hydraulic Supply Mfg. Co. v. Mardesich*, 57 Wn.2d 104, 104, 352 P.2d 1023 (1960); *Pacific County v. Sherwood Pac., Inc.*, 17 Wn. App. 790, 799, 567 P.2d 642 (Div. 2, 1977). Nevertheless, the principle of the rule—that a person ought not benefit from his own wrongful acts—is a universal precept: there is no reason why it would not apply here.

Mr. Briney had purchased the cashier's check and attempted to deliver it by contacting Ms. Smith by phone and email to arrange a time to deliver the check to her. Ms. Smith deliberately refused to take his calls,

respond to his voice messages, or reply to his email, knowing that her failure to communicate would prevent Mr. Briney from delivering the check. Bel Air & Briney would have performed (if performance required the actual delivery of the check) had the Bank not frustrated its attempts to do so. The Bank prevented performance, and under the rule from *Wolk* and its progeny, the Bank cannot use Bel Air & Briney's alleged failure to perform as a defense to the lawsuit.

VI. SUMMARY

The trial court misapplied the law when it granted the Bank's Motion for Summary Judgment by concluding that the unilateral contract between the parties could "only be accepted by full performance"; and Bel Air & Briney "failed to fully perform as required in the Bank's offers, and therefore, no contract was created".

Concluding that Bel Air & Briney was required to deliver the cashier's check to the Bank in order to perform under the unilateral contract flies in the face of three separate principles of law:

- Under the Bank's own definition of "tender" of the funds, which it claims was required for performance, Bel Air & Briney did tender full performance;
- It completely ignores the *Knight* analysis, which requires the Court to apply the Restatement (Second) of Contracts §45 concept that it is not necessary for offeree's performance to have been completed, it merely has to have begun; and
- It allows the Bank to benefit when full performance did not

occur only because it intentionally prevented that performance, which is expressly prohibited by *Wolk* and its progeny.

The Court also found that Bel Air & Briney's "efforts in obtaining a cashier's check and placing phone calls to the Bank were merely preparations to perform and do not constitute part performance of the Bank's unilateral offer". This at least implies (correctly) that had Bel Air & Briney partly performed it would have prevailed, which contradicts the Court's other conclusion that full performance was required.

In any event, this finding is also erroneous because the Court would have concluded that Bel Air & Briney had at least begun to perform or to partly perform if it had applied the requisite five factors in *Knight* distinguishing that conduct from mere preparations to perform.

All of the material facts are undisputed. The trial Court committed three separate errors of law, any one of which requires this Court to reverse the Order granting the Bank's Motion for Summary Judgment. It erroneously concluded that (1) the law required Bel Air & Briney to deliver the cashier's check to the Bank before the latter revoked the contract; (2) the law allowed the Bank to benefit from its conduct that was the sole reason Bel Air & Briney did not deliver the check; and (3) Bel Air & Briney's conduct constituted "mere preparations" of performance rather than the beginning of, part, or full, performance.

DATED this 12th day of April, 2013.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 12, 2013, the original and one copy of the accompanying Brief of Appellant Bel Air & Briney were given to ABC Legal Messengers for delivery and filing on April 12, 2013, with the Court of Appeals, Division I. I also certify that on April 12, 2013, a copy of the Brief of Appellant was delivered by legal messenger to the attorneys for Respondent.

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