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NO. 74257-4

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BELLA'S VOICE, a Washington nonprofit corporation, JORDAN  
HOFFMAN-NELSON, and YVETTE HOFFMAN,

Appellants,

v.

VANISHING PRICES LLC, a Washington limited liability company,  
MICHAEL PATRICK BROWN, and TONI LYNN BROWN,

Respondents.

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BRIEF OF RESPONDENTS

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## **I. SUMMARY OF CASE**

Appellants Bella's Voice, Jordan Hoffman-Nelson, and Yvette Hoffman (collectively, "Bella's Voice" or "Appellants") appeal from the August 14, 2015 Memorandum Decision granting summary judgment on all claims to respondents Vanishing Prices LLC, Michael Brown, and Toni Brown (collectively, "Vanishing Prices"), the September 9, 2015 Order Denying Reconsideration, and the October 13, 2015 Judgment, all issued by the Superior Court of Washington for Snohomish County, the Hon. George Appel.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Vanishing Prices believes the issues pertaining to the assignments of error may best be stated as follows:

A. Whether the trial court properly considered a promissory note and a business sale agreement executed at the same time as part of the same contract.

B. Whether Civil Rule 56 permitted the trial court to consider undisputed extrinsic evidence to interpret the contract as a matter of law.

C. Whether there is any question of fact that the terms of the contract and the undisputed extrinsic evidence required Appellants to pay the full face value of the promissory note.

D. Whether there is any question of fact that the terms of the contract and the undisputed extrinsic evidence demonstrated that the issuance of the promissory note was supported by valuable consideration.

E. Whether the trial court properly concluded that a defense of fraud-in-the-inducement cannot be based on a representation that a promissory note would not be enforced.

F. Whether the trial court properly concluded that Appellants had failed to meet the burden of production imposed on them by Civil Rule 56 for any of their counterclaims.

G. Whether the trial court properly concluded that a corporation may be held liable under a promissory note whose makers are the corporation's officers "dba" the corporation.

H. Whether the trial court properly concluded that a judgment creditor represented by pro bono counsel can collect contractual attorney's fees.

### **III. COUNTERSTATEMENT OF THE CASE**

Through June 2014, Vanishing Prices, managed by the husband-and-wife team of Michael and Toni Brown, owned and operated a small thrift shop located at 4001 198th Street SW, Lynnwood, Washington (the "Business"). On July 1, 2014, Vanishing Prices sold the Business to Appellants for a purchase price of \$50,000. CP 321:24-26, 326:25-26.

Payment was in the form of an installment promissory note (the “Note”) that required \$500 monthly payments beginning in January 2015. *Id.* Appellants did not make the first payment on the Note in January and then later informed Vanishing Prices that they would not be making any payments on the Note. CP 327:4-8. Appellants continue to own and operate the Business and draw profits from it despite having never paid a penny for it. CP 328:1-2.

Vanishing Prices first advertised the sale of the Business in late May 2014. In one of two online advertisements, Vanishing Prices suggested it would consider donating the Business to a deserving nonprofit organization. Vanishing Prices never made an actual offer of this nature to Appellants. CP 327:11. In early June, the parties verbally agreed that Vanishing Prices would sell the Business to Appellants for \$50,000. CP 327:12-15. Negotiations for the transfer of the Business continued through June, though not all terms were agreed to until July 1 with the signing of the contract documents. The contract documents consisted of a Business Sale Agreement, the Note, a Bill of Sale, and an Assignment of Lease, all of which are included in the record at CP 392-340.

Vanishing Prices has never disputed the material events of July 1, 2015. On that day, Mr. Brown presented Appellants with the contract documents. Respondents objected to the Note, but Mr. Brown said that if

Respondents did not sign it, then Vanishing Prices would not proceed with the transaction. CP 155:11-13, 166:4-7. According to Respondents, they reluctantly agreed to sign the Note because they did not want to “forfeit the deal or the time and effort we had already spent in initiating the store’s transfer and pursuing our dream business.” CP 155:13-16, 166:7-10. The parties then proceeded to sign the contract documents, including the \$50,000 Note. CP 155:16-17, 166:10.

Vanishing Prices accelerated the remaining balance on the Note on March 13, 2015, and commenced this lawsuit on March 24 to enforce the Note. CP 343:23-24. On April 22 Appellants answered and counterclaimed that Vanishing Prices actually donated the Business and that the Note was legally unenforceable. Appellants’ causes of action were for breach of contract, fraud, conversion, tortious interference, violation of the Consumer Protection Act, and negligence.

#### **IV. ARGUMENT**

##### **A. The Standard of Review Is *De Novo*.**

The standard of review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. *Wash. Fed. v. Harvey*, 182 Wn.2d 335, 339 (2015). A court may grant summary judgment when the pleadings, affidavits, and depositions

establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 340.

Although Appellants attempt to raise a number of factual issues, none of these are material because, as explained below, even if all factual disputes are resolved in the light most favorable to Appellants, Vanishing Prices is *still* entitled to judgment as a matter of law.

B. The Terms of the Contract Unambiguously Show That Appellants Bought the Business for \$50,000 in Consideration.

Vanishing Prices agrees with Appellants that the July 1, 2014 contract is unambiguous. App. Br. 30. Thus, the trial court properly construed it on summary judgment.

Appellants quite clearly signed the Note in consideration for the purchase of the Business. Consideration requires a bargained-for exchange between the parties. Whether a contract is supported by consideration is a question of law and may be properly determined by the court on summary judgment. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 195 (1992). Instruments that are part of the same transaction, relate to the same subject matter, and are executed at the same time are read and construed together as one contract, even when they do not refer to one another. *Turner v. Wexler*, 14 Wn. App. 143, 146 (1973) (affirming summary judgment). This common-law principle has long

been used to harmonize promissory notes with the contracts of which they are a part. See *Edward A. Kemmler Memorial Found. v. 691/733 East Dublin-Granville Road Co.*, 584 N.E.2d 695, 1698-99 (Ohio 1992) (collecting cases). Courts have also held that when promissory notes were contradicted by written agreements executed at the same time, the unambiguous language of the notes prevailed over that of the contemporaneous agreements. E.g., *Jenkins v. Karlton*, 620 A.2d 894, 902 (Md. 1993) (parol evidence from a contemporaneous agreement was held inadmissible “to inject a condition not apparent on the face of the note”); *Leininger v. Anderson*, 255 N.W.2d 22, 25-26 (Minn. 1977) (“negotiable instruments stand by their own express terms”).

The written documents here, including the Note, constitute a single contract for consideration, as they are all dated July 1, 2014, and include mutual promises, including Appellants’ promise to pay \$50,000 and Vanishing Prices’ promise to convey the Business. The contract documents show without any evidence to the contrary that the promises contained in the Note and Business Sale Agreement were made in consideration of each other. Appellants have never contended that they signed the Note for some reason unrelated to the transfer of the Business.

The only discrepancy between the Note and the Business Sale Agreement is the payment amount: the Note sets the price of the Business

at \$50,000 whereas the Business Sale Agreement sets the price at \$10. However this difference is readily resolved simply by looking at the amounts and their placement in the contract documents. The \$10 price in the Business Sale Agreement is a nominal amount quite reasonably read as a placeholder.<sup>1</sup> The Note, on the other hand, serves no purpose other than to set the price and payment terms. Reading the sale price of the Business as \$10 would be manifestly unreasonable because it would fail to harmonize the contract documents by writing the Note out of the agreement completely.

C. Extrinsic Evidence of the Circumstances of the Signing of the Contract Shows Conclusively That Appellants Bought The Business for \$50,000 in Consideration.

The extrinsic evidence submitted by Appellants unambiguously confirms that Appellants purchased the Business in consideration for the \$50,000 face value of the Note.

Appellants repeatedly contend, without authority, that summary judgment cannot be based on a review of evidence extrinsic to the contract documents. App. Br. at 22-23, 26-27. This contention is simply wrong:

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<sup>1</sup> Contracting parties will frequently include a nominal recital of consideration in one instrument while placing the true contract price in another. *See, e.g., Kinne v. Lampson*, 58 Wn.2d 563, 567 (1961) (citing as example contracts referring to “one dollar and other valuable consideration”). Under Appellants’ legal theory, all such contracts would be unenforceable by summary judgment.

Washington courts have long held that trial courts may look at uncontroverted extrinsic evidence when construing ambiguities in contracts on summary judgment. *Lokan v. Assocs., Inc.*, 177 Wn. App. 490, 499 (Div. I 2013) (Dwyer, J.) (citing *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674 (1996)); *see also Transcontinental Ins. Co. v. Wash. Pub. Utils. Districts' Util. Sys.*, 111 Wn.2d 452, 457 (1988) (allowing courts to examine the “contract as a whole,” including “the circumstances of its making”). The cases cited by Appellants to do not disturb this rule, which is the settled law of the land. *E.g., Fishman v. LaSalle Nat'l Bank*, 247 F.3d 300, 303 (1st Cir. 2001); *Shepley v. New Coleman Holdings, Inc.*, 174 F.3d 65, 72 n. 5 (2d. Cir. 1999); *Continental Cas. Co. v. Northwestern Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005); *Penford Corp. v. Nat'l Union Fire Ins. Co.*, 662 F.3d 497, 505 (8th Cir. 2011); *Slawson v. Vintage Petroleum, Inc.*, 78 F.3d 1479, 1482 (10th Cir. 1996); *Norton v. Herron*, 677 P.2d 877, 880 (Alaska 1984).

Appellants' declarations state that Mr. Brown sprang the Note on Appellants the day before the transaction was consummated and demanded that they sign it or else the transfer of the Business was off. Vanishing Prices does not dispute this critical portion of Appellants' testimony. Appellants were free to walk away from the negotiations, but

instead they signed the Note because they knew if they refused, then Vanishing Prices would refuse to convey the Business. This is the essence of consideration.

The undisputed extrinsic evidence produced by Appellants also confirms that the purchase price of the Business was \$50,000, not \$10. Appellants contend that the Business Sale Agreement represented the terms of the transfer as the parties had orally agreed beforehand. If their supporting evidence is to be accepted as true, then the subsequent signing of the Note adjusted the purchase price from \$10 (the pre-Note purchase price, Appellants contend) to \$50,000 (the executed purchase price). Appellants never would have resisted signing the Note if the purchase price was still \$10 after they signed it.

Appellants argue that the transaction was a donation rather than a sale, in spite of their signatures on the Note, because of an alleged oral agreement in early June 2014 that Vanishing Prices would donate the Business. App. Br. at 10. Yet the law of Washington dictates that such extrinsic evidence may not be used to show an intention independent of a written instrument or to “vary, contradict, or modify the written word.” *Hulbert v. Port of Everett*, 159 Wn. App. 389, 400 (2011) (citing *Hearst Comm’n’s, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005)). Additionally, extrinsic evidence of a party’s subjective or unilateral intent

as to the contract's meaning is not admissible. *Watkins v. Restorative Care Ctr., Inc.*, 66 Wn. App. 178, 191 (1994), *Lynott v. National Union Fire Ins. Co.*, 123 Wn.2d 678, 684 (1994). This long-settled black letter law applies regardless of whether the written contract is fully integrated. *See DePhillips v. Zolt Constr. Co.*, 138 Wn.2d 26, 32-33 (1998) (“Where a partially integrated contract is involved, parol evidence may be used to prove the terms not included in the writing, provided, of course, that the additional terms are not inconsistent with the written terms.”).<sup>2</sup>

Accordingly, Appellants cannot argue that they were protected by an alleged oral agreement to accept the Business as a donation while admitting they later signed a \$50,000 promissory note in order to acquire the Business. This is the very sort of defense for which courts adopted the parol evidence rule. Vanishing Prices, like other contracting parties, has a right to rely on the written terms of the documents signed by Appellants. If there was some sort of oral agreement in June to donate the Business, then that agreement was both unenforceable for lack of consideration and modified by the written contract signed in July.

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<sup>2</sup> Vanishing Prices renews its objection to large portions of the declarations of Ms. Hoffman and Ms. Hoffman-Nelson as they constitute extrinsic evidence of these witnesses' subjective intent, or of oral terms that contradict the written terms of the contract. The settled law cited herein establishes that this evidence is not probative and must be excluded pursuant to ER 401 and ER 403.

D. Appellants' Fraud Defense Is Barred as a Matter of Law.

Appellants' fraud-in-the-inducement defense required them to prove with clear and convincing evidence: (1) a representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by Appellants; (6) Appellants' ignorance of its falsity; (7) Appellants' reliance on the truth of the representation; (8) Appellants' right to rely upon it; and (9) damages suffered as a result. *Stiley v. Block*, 130 Wn.2d 486, 505 (1996). Specifically as to element (8), this Court held in *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899 (2011) (Becker, J.), that, as a matter of law, a party alleging fraudulent inducement has no right to rely on an alleged oral statement that is contemporaneously or later contradicted by the written terms of the contract. *Id.* at 902.<sup>3</sup>

As here, the plaintiff in *Cornerstone* brought an action to enforce a promissory note. *Id.* at 904. The defendant alleged in his defense that the plaintiff had assured him that the note was just "paperwork" that would be used only for "internal purposes." *Id.* Yet the Court cited the general,

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<sup>3</sup> Appellants' reliance on *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158 (1994), is completely misplaced. In *Havens*, the Washington Supreme Court noted that courts may rule on justifiable reliance as a matter of law. *Id.* at 181. The court then proceeded to uphold the dismissal of plaintiff's misrepresentation claim because his reliance was not justifiable. *Id.* at 182.

longstanding rule that “a person has no right to rely on an oral representation that contradicts the unequivocal written evidence that demonstrates the falsity of the alleged representation.” *Id.* at 905. It followed, then, that summary judgment for the plaintiff was appropriate because the defendant had “no right to rely on an alleged oral promise not to enforce a contemporaneous written agreement.” *Id.* at 907.

Appellants’ theories are indistinguishable from *Cornerstone*. As a matter of settled law, their reliance on an alleged assurance by Mr. Brown that he would not enforce the Note was unreasonable and *cannot* be used to establish fraud. In addition, Appellants produced no evidence whatsoever of Mr. Brown’s knowledge of the alleged assurance’s falsity or any damages as a result of their reliance on it.

E. Appellants Failed To Meet Their Burden of Production To Support Any of Their Counterclaims.

Beyond fraud, there is no evidence (or even allegation) in the record to support any of Appellants’ causes of action. *See supra* p. 4. A breach of contract claim requires proof of offer, acceptance, and consideration, but Appellants produced no evidence of any of these elements. Fraud requires a false representation, but Appellants produced no evidence of false representation by Vanishing Prices, let alone one that Appellants relied on to their detriment. Conversion requires a deprivation

of something owned by the claimant, but Appellants produced no evidence that Vanishing Prices took anything that did not belong to it. Tortious interference requires a wrongful interference with a known contract or business expectancy, but Appellants produced no evidence of any such interference or business expectancy. A violation of the Consumer Protection Act requires an unfair or deceptive trade practice that affects the public interest, but Appellants produced no evidence of unfair or deceptive trade practices by Vanishing Prices, let alone anything affecting public interest. Negligence requires that the claimant prove duty, breach, and causation of damages, but Appellants produced no evidence supporting any of those elements.

Fundamentally, Appellants failed to show they were harmed in any way by the transaction consummated on July 1, 2014, or by the negotiations leading up to it. They continue to own and operate the Business. The only party harmed in this case is Vanishing Prices, which sold its thrift shop to a buyer that now refuses to make good on its promise to pay.

F. The Trial Court Properly Concluded That Bella's Voice Was Liable under the Note.

Appellants also make the hyper-technical and legally insufficient argument that judgment should not have been entered against corporate

appellant Bella's Voice because the individual appellants, who also happen to be the corporation's sole shareholders and officers, somehow intended to bind only themselves on the Note and not the corporation. This argument was never timely made, as by the time Appellants raised it the trial court had already rendered a final decision on the matter. The trial court's Memorandum Decision on summary judgment, entered August 14, 2015, stated that "Defendant signed the note," CP 92:19-20, and defined "Defendant" collectively as "Defendant [sic] Bella's Voice and Counterclaimants Jordan Hoffman-Nelson and Yvette Hoffman," CP 91:22-24. Appellant moved for reconsideration and did not challenge this aspect of Judge Appel's decision. Appellants were challenging the settled law of the case. They are now effectively seeking review of the trial court's refusal to re-reconsider the matter after having missed the 10-day deadline imposed by Civil Rule 59(b). They are also continuing to press a defense that they waived.

Appellants' argument fares no better on substantive grounds. Well-settled principles of agency law hold that a corporate founder may bind her business organization in contract, and that an agent may bind her principal while acting with express or implied authority. The case cited by Appellants, *Losh Family LLC v. Kertsman*, 155 Wn. App. 458 (2010) (Becker, J.), actually supports Bella's Voice's liability. In *Losh*, an

individual defendant signed a lease agreement under his own name (William Grover) “dba” the corporate defendant’s name (Grover International, LLC). The trial court entered judgment against *both* the individual and the corporation. On appeal, Mr. Grover challenged only his personal liability, arguing that liability only attached to the corporation because he had used the corporation’s signature block. This Court rejected this argument, holding that because Mr. Grover was doing business as the corporation, “[f]or the purposes of the lease, he and his business, Grover International, are one at the same,” *id.* at 466, and that the form of his signature did not alter this outcome, *id.* at 461.<sup>4</sup>

Here, the facts are essentially indistinguishable from *Losh*, but in reverse, and the “one-and-the-same” principle articulated in that case applies with equal force. For the purposes of the Note, individual appellants Jordan Hoffman-Nelson and Yvette Hoffman and corporate appellant Bella’s Voice are one and the same.

G. The Trial Court Properly Concluded That Vanishing Prices, Represented by Pro Bono Counsel, Was Contractually Entitled to an Award of Attorney’s Fees.

The customary rate for attorney’s fees is computed using the prevailing market rate. The fact that an attorney works pro bono does not

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<sup>4</sup> The Court also concluded that Mr. Grover’s argument was “essentially frivolous.” 155 Wn. App. at 468-69.

affect the trial court's allowance or calculation of reasonable attorney's fees. *Blair v. Washington State Univ.*, 108 Wn.2d 558, 570-71, 740 P.2d 1379 (1987); *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 160 (2006).

Here, the parties agreed that in the event of any dispute involving legal counsel, the prevailing party would be entitled to a recovery of its attorney's fees up to 15% of the outstanding balance in addition to costs. CP 330. Vanishing Prices was the prevailing party in this matter following the trial court's entry of a memorandum of decision granting summary judgment for the Plaintiff in the amount of the Note, and dismissing all of Appellants' counterclaims. At the time Vanishing Prices filed suit, the outstanding balance was \$50,000. Vanishing Prices was therefore entitled to its legal fees up to \$7,500, which in fact represents a 65% discount off the billable hours actually spent on this case.

Appellants are truly suggesting that litigants who are able to pay should have their attorney's fees reimbursed while attorneys who represent litigants unable to pay should be forced to remain unpaid. But *Blair v. Washington State University* has stood in this state for *decades* for the bedrock principle that attorneys who donate their time and effort to represent clients in need are entitled to compensation in situations where substantive law provides the same remedy to paying clients. This settled

law has stood the test of time in all courts of this country that value access to justice. In adopting this rule, the Washington Supreme Court cited a Seventh Circuit opinion that noted that challenges akin to Appellants' have been rejected in every single federal appeals court to have considered them. *Blair*, 108 Wn.2d at 571 (citing *Gautreaux v. Chicago Housing Auth.*, 690 F.2d 601, 613 (7th Cir. 1982)). This issue has been dead for *decades*.

Washington courts have never conditioned an award of attorney's fees to a party represented by pro bono counsel on the substantive basis for the award. Every court known to have considered the issue has accepted the *blanket* rule that the fact that an attorney may be either private, non-private, or pro bono does not affect an award of attorney's fees. Period. *See, e.g., Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 780 (citing "cases which recognize that attorney fees may be awarded to a party who received the assistance of pro bono counsel"); *Council House*, 136 Wn. App. at 160 ("[U]nless a statute expressly prohibits fee awards to pro bono attorneys, the fact that representation is pro bono is never justification for denial of fees."). A departure from this universal rule would create new law running directly contrary to public policy.

H. Vanishing Prices Is Entitled To Recover Its Attorney's Fees on Appeal.

Vanishing Prices believes this appeal is frivolous and brought for the purpose of delay. It accordingly seeks its fees on appeal pursuant to RAP 18.1(a), RAP 18.9(a), and RCW 4.84.330. The arguments made by Appellants here are in direct conflict with long-settled law and barely more than recycled versions of those made and summarily shot down at the trial court level. As a matter of equity, Appellants should not be entitled and compel Vanishing Prices and its counsel to expend limitless resources to enforce the judgment in Vanishing Prices' favor while Appellants continue to run and profit from the Business scot free.

**V. CONCLUSION**

Vanishing Prices respectfully requests that the Court apply settled law and affirm the trial court's orders.

Respectfully submitted this 24th day of February, 2016.

KARR TUTTLE CAMPBELL

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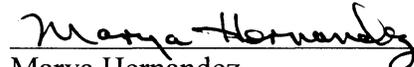
CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served the foregoing on the following counsel of record by the method indicated:

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Dated this 24<sup>th</sup> day of February 2016.

  
Marya Hernandez

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