

COURT OF APPEALS DIV I  
 STATE OF WASHINGTON  
 2016 OCT -4 PM 3: 14

No. 74774-6-I

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

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CAMBRIDGE DECISION SCIENCE,

Plaintiff/Respondent,

v.

JON MARKMAN and ELLEN MARKMAN, husband and wife, and the marital  
 community comprised thereof; and MARKMAN CAPITAL INSIGHT LLC,

Defendants/Appellants.

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MARKMAN CAPITAL INSIGHT LLC, a Washington limited liability  
 company,

Counterclaimant and Third-Party Plaintiff/Appellant,

v.

TREYTON THOMAS, A/K/A TREY THOMAS A/K/A TRAY THOMAS  
 A/K/A T.L. THOMAS A/K/A TRACY LEE THOMAS, an individual,  
 CAMBRIDGE DECISION SCIENCE, a foreign entity or trade name of Treyton  
 Thomas and TREADSTONE, a foreign entity or trade name of Treyton Thomas,

Third-Party Defendants/Counterclaimant Defendant/Respondents.

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**REPLY BRIEF OF APPELLANTS**

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**I. THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE “PARTIES ENTERED INTO A FINAL, COMPLETE, AND SIGNED SETTLEMENT AGREEMENT ON OCTOBER 15, 2015.”<sup>1</sup>**

When Thomas “returned the fully executed settlement” to Markman, Brief of Respondent (“Resp. Br.”) at 5, he sent it as an attachment to an email that said: “*Assuming you will do that*, the Settlement Agreement and Mutual Release with the strikeout co-initialed is attached.” CP 186 (emphasis added).<sup>2</sup> CDS does not deny that Markman never did “that” (*i.e.*, cross check addresses specified by Thomas) and never agreed to “do that.” CDS also does not deny that Thomas sent emails to Markman the day before, saying that the parties would “have no settlement” if Markman did not reply *that day* with his acceptance of Thomas’s counteroffer that he agree to double check addresses. CP 180; *see also* CP 179. It is undisputed that Markman did not reply that day (or any day) with an acceptance of Thomas’s counteroffer. CP 168-69. It also is undisputed that within the next few

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<sup>1</sup> CP 236 (capitalization added).

<sup>2</sup> Appellants use the same abbreviations in this reply brief as used in their opening brief: “Thomas” refers to T.L. Thomas (also known as Treyton Thomas, Trey Thomas, Tray Thomas, and Tracy Lee Thomas); “Plaintiff” or “CDS” refers to Cambridge Decision Science; “Markman” refers to Defendant Jon Markman.

days, Thomas and Markman exchanged emails about arbitrating their still-unresolved disagreement.<sup>3</sup> CP 191-95.

**A. Without An Accepted Offer, There Is No Contract.**

“Acceptance of an offer must be identical to the offer or no contract is formed.” *Steadman v. Green Tree Servicing, LLC*, No. C14-0854JLR, 2015 WL 2085565, at \*5 (W.D. Wash. May 5, 2015); *accord Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994); *Johnson v. Star Iron & Steel Co.*, 9 Wn. App. 202, 205, 511 P.2d 1370 (1973). Markman’s initial “acceptance” was not identical to the offer made by Thomas. Rather, he countered with a proposal that the draft agreement be modified to delete the requirement that he make future revisions to the customer list already provided. CP 167-68, 175; CP 35. Thomas responded with his own counteroffers. CP 167-71. These ended with Thomas’s counteroffer that Markman agree to double check specified addresses. *Id.* Markman did not agree. *Id.*

The Court can quickly dispose of CDS’s argument that “any issue over typographical error in two customer email addresses is not material,” Resp. Br. at 6, and the suggestion that Thomas did not view Markman’s modification of the draft agreement and his own counteroffers as material.

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<sup>3</sup> Markman denies that he or MCI had a joint venture with CDS or Thomas, but acknowledges that MCI had a business dispute with Thomas. CP 166-67.

Thomas indicated that if Markman did not agree to perform the cross-checks, “we have no settlement.” CP 180. This was *after* Markman sent the modified draft document back to Thomas and *after* he said he was not going to do any further tracking down of addresses or other information for Thomas. CP 182. The materiality of the new terms in Thomas’s counteroffer is proved by Thomas’s acknowledgment that without Markman’s agreement to those terms, “we do not have a settlement.” CP 179.<sup>4</sup>

Until an offer is accepted, there is no valid contract. *E.g., Veith v. Xterra Wetsuits, L.L.C.*, 144 Wn. App. 362, 366, 183 P.3d 334 (2008).

And when “the offeror specifies the manner of acceptance, no contract is formed if the specification is not followed.” *Steadman*, 2015 WL 2085565, at \*5; *see Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 536, 424 P.2d 290 (1967) (finding no contract formation because the “offer clearly specific[d] the time and manner in which acceptance ... was to be consummated” and the offeree had not complied with the specifications);

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<sup>4</sup> Thomas’s own words disprove Plaintiff’s current contention that the disagreement over proposed terms was not material. Thomas obviously considered it material. So, too, did Markman, as evidenced by his refusal to accede. But even without the evidence of Thomas’s and Markman’s views on the matter, the demand for Markman to perform cross-checks would have to be deemed a material modification because the new conditions could not be implied in Markman’s original offer. *See, e.g., City of Roslyn v. Paul E. Hughes Constr. Co.*, 19 Wn. App. 59, 64-65, 573 P.2d 385 (1978).

*Johnson v. Safeco Ins. Co. of Am.*, 178 Wn. App. 828, 316 P.3d 1054 (2013) (finding no contract formation because plaintiff’s putative acceptance did not meet the plain language of the offer’s requirements).

Markman did not accept Thomas’s counteroffer by the end of the day on October 15, 2015. Because Markman did not accept the counteroffer in the manner and by the time specified, the trial court should have found that Markman had rejected the counteroffer and that no agreement had been reached. Alternatively, at a minimum, it should have determined that there was a factual dispute precluding the entry of a judgment in Plaintiff’s favor. *See, e.g., Sea-Van*, 125 Wn.2d at 126, 881 P.2d 1035 (“Normally, the existence of mutual assent or a meeting of the minds is a question of fact.”). The court erred by not doing so.

**B. Extrinsic Evidence Is Admissible To Determine If An Agreement Was Reached.**

CDS tries to support the trial court’s conclusion that the parties entered into an enforceable agreement with the argument that “extrinsic evidence” (*i.e.*, the emails between Thomas and Markman) “does not defeat an integrated settlement agreement.” Resp. Br. at 1. But this argument improperly assumes the very proposition that is disputed, *i.e.*, that the parties entered into a final, integrated agreement. *See Bond v. Wiegardt*, 36 Wn.2d 41, 48-52, 216 P.2d 196 (1950). A party has to prove

that the agreement was made *before* it can rely on a term of that alleged agreement.

Even when a written instrument contains a merger clause (also referred to as an integration clause), the court may use extrinsic evidence “to determine whether the writing is actually intended to be the final expression of the agreement.” *Lopez v. Reynoso*, 129 Wn. App. 165, 170-71, 118 P.3d 398 (2005); *see Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 505, 761 P.2d 77 (1988) (acknowledging it is a “preliminary factual question” whether a written document is intended as a final expression of the terms of the parties’ agreement, and “the court must hear all relevant, extrinsic evidence, oral or written” to answer that question (citing *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986))); *see also R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 504, 903 P.2d 496 (1995) (observing that parol evidence rule does not bar the admission of extrinsic evidence “to show the situation of the parties and the circumstances under which the [contract] was executed”); *In re Estate of Catto*, 88 Wn. App. 522, 529, 944 P.2d 1052 (1997) (“In cases involving a written agreement, objective manifestations may be discovered from the agreement or the context which it was executed.”).

The contemporaneous emails in this case prove that the draft agreement’s merger clause is meaningless because Thomas and Markman

never mutually assented to an agreement containing that clause.<sup>5</sup> Contrary to CDS's argument, there is nothing improper about admitting and considering this extrinsic evidence. *See Bond*, 36 Wn.2d at 48-49, 216 P.2d 196 (explaining that "extrinsic evidence may be admitted to show that a writing in the form of a contract never became operative as a contract" and that it was "entirely proper" for respondents to introduce into evidence the modifying letter they sent back with signed copies of the proposed contract); *see also Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 946, 640 P.2d 1051 (1982) (acknowledging that "normal rules of contract law ... permit the introduction of parol evidence tending to show that a contract never became operative"); *Johnson*, 9 Wn. App. at 202-07, 511 P.2d 1370 (considering letters written by the parties to determine if a contract was formed). The extrinsic evidence provided by Markman and undisputed by CDS<sup>6</sup> defeats the claim that Thomas and Markman entered into an integrated settlement agreement.

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<sup>5</sup> In any event, the merger clause is not preclusive because it says that "prior negotiations are merged into this Agreement," CP 176, but says nothing about the accompanying email, or emails that were exchanged immediately afterwards, both of which show that no agreement actually was reached.

<sup>6</sup> CDS has never denied that the documents attached to Markman's declaration are true and correct copies of emails actually exchanged between Markman and Thomas in October 2015, both before and after the two allegedly entered into a final agreement.

**C. Florida Law Does Not Apply.**

Thomas and Markman never mutually assented to an agreement containing a governing law clause. Although paragraph 6.c in the draft settlement agreement specified that the “Agreement and attached Mutual Release” would be governed by Florida law, CP 176, the clause is irrelevant because Thomas and Markman never mutually assented to a final version of the agreement. Moreover, the clause does not say that the preliminary question of whether the parties ever mutually assented to all the terms of the agreement would be governed by Florida law. Accordingly, CDS is not helped by its citations to Florida law regarding merger clauses and the parol evidence rule. Resp. Br. at 12-13.

Moreover, CDS did not raise the potential application of Florida law in either its pleading, CP 1-4, or its motion to enforce the alleged settlement agreement, CP 25-29. It cited Washington law when it argued that the “parties” had reached a final, complete, and enforceable settlement agreement, and argued for Washington law to apply to its request for prejudgment interest. CP 28-29. Accordingly, CDS waived its right to rely on Florida law.<sup>7</sup> See CR 44.1, CR 9(k).

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<sup>7</sup> It is ironic that CDS cites *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), for the proposition that one cannot raise an issue for the first time in a reply brief, Resp. Br. at 16, when CDS did not argue for the  
(...continued)

**D. CDS's Argument That The Mutual Release Is Independently Enforceable Is Inconsistent With Its Argument That The Agreement Is Fully Integrated.**

The draft settlement agreement, *i.e.*, the document on which CDS relies, CP 175-77, specifically states that it, “together with the attached Mutual Release, is the entire Agreement of the Parties,” CP 176. Accordingly, if CDS were correct that this document is an “integrated settlement agreement,” Resp. Br. at 1, there would be no need for CDS’s argument that the “Mutual Release” is independently enforceable. (And it is worth noting that if the integrated settlement agreement were applicable, it provides that the “Mutual Release” will only “become effective upon the completion of the payment referenced in paragraph 1 above.” CP 176. It is undisputed that there has been no completion of the referenced payment.) But in any event, the whole debate is nothing more than a side show to the primary dispute over the trial court’s conclusion that “the parties entered into a final, complete, and signed settlement agreement on October 15, 2015,” that required Markman to pay “plaintiff” the principal sum of \$95,000, and the entry of a judgment incorporating that conclusion. CP 236, 328-29.

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(...continued)

application of Florida law until it filed its reply brief in support of its motion to enforce the alleged settlement agreement.

## II. MARKMAN PRESERVED HIS RIGHT TO TRIAL.

With emails that showed Markman and Thomas continuing to negotiate after October 15, 2015, over the terms of a proposed agreement, CP 175-86, and later emails that showed the two considering arbitration as an alternative to the proposed “private settlement option,” CP 188-98, Markman submitted evidence that proved he and Thomas never mutually assented to a contract containing identical terms. The emails are objective manifestations of intent. If that evidence is viewed as insufficient to prove as a matter of law that Markman and Thomas never entered into an enforceable contract, it certainly was more than sufficient to show that there was at least a factual issue as to the formation of a contract. *See, e.g., Sea-Van*, 125 Wn.2d at 126, 881 P.2d 1035 (observing that existence of mutual assent normally is a question of fact). That is especially the case when the evidence is read in the light most favorable to the nonmoving party, as is required here. *See, e.g., Condon v. Condon*, 177 Wn.2d 150, 161-62, 298 P.3d 86 (2013).

Given the evidence and arguments submitted in opposition to CDS’s motion to enforce the alleged settlement agreement, Markman undoubtedly raised an issue of fact and preserved his right to an evidentiary hearing, despite CDS’s argument to the contrary. Resp. Br. at 13-16. Markman pointed out to the trial court that a motion to enforce an

alleged settlement agreement, when based on affidavits or declarations, “is properly regarded as one for summary judgment.” CP 72 (citing *In re Marriage of Ferree*, 71 Wn. App. 35, 856 P.2d 706 (1993), and *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000)). And he argued that if the court failed to find that no agreement was reached, then there were disputed issues of fact that precluded entry of judgment in CDS’s favor. CP 77-78. Further, he quoted *Brinkerhoff*, 99 Wn. App. at 697, 994 P.2d 911, for the proposition that when a party relies on affidavits or declarations as support for a motion to enforce a settlement agreement, and the nonmoving party submits evidence raising a genuine issue of material fact, the “trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact.” CP 78. There was no waiver.

**III. IT WAS NOT HARMLESS ERROR TO ENTER JUDGMENT IN FAVOR OF AN ENTITY THAT DOES NOT EXIST AND THAT LACKS CAPACITY TO MAKE ANY LEGALLY BINDING COMMITMENTS.**

CDS admits there was an “incorrect designation of the plaintiff in this action,” but argues this admitted error was “harmless.” Resp. Br. at 17. That simply is not true. CDS has pointed to no authority supporting its assertion that it could “provide an appropriate satisfaction of judgment,” if

the judgment were paid. *Id.* at 18.<sup>8</sup> Indeed, CDS has pointed to no authority indicating that an unregistered trade name has the capacity to make a binding contract or enter into a legal commitment of any kind. Further, CDS has not provided any assurance that “T.L. Thomas,” the individual who allegedly signed the agreement that is in dispute, will not elect to bring his own action on the alleged contract.<sup>9</sup> Under these circumstances, CDS’s “harmless error” argument lacks all merit.

#### **IV. THE TRIAL COURT COMMITTED FURTHER ERRORS.**

In response to Markman’s argument that the trial court erred by entering a judgment against Ellen Markman, CDS argues that the court correctly entered judgment against “the Markmans and their marital community because Markman’s obligation is a community obligation.” *Id.* at 19. But Appellants never argued that the judgment, if it were correctly entered (and it was not), could not be entered against the marital community. Rather, Appellants’ argument was that no judgment should

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<sup>8</sup> Of course there is prejudice to parties when a judgment is entered against them and absent a judicial reversal, there is no way to obtain a legally binding release from that judgment.

<sup>9</sup> CDS has not even stated whether Thomas is its unidentified “principal.” And whether the “principal” (whomever or whatever it may be) *could* maintain an action to enforce Markman’s alleged obligations, Resp. Br. at 18, is beside the point—the undisputed fact is that he or it did not do so.

have been entered against Ellen Markman, individually, so as to subject her separate property to potential enforcement.

The case cited by CDS, *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 941 P.2d 16 (2006), supports Appellants' argument. The court acknowledged that "[u]sually, when a spouse's act creates a community liability, it is enforceable only against the community property and the acting spouse's separate property." 87 Wn. App. at 216, 941 P.2d 16. A community liability can be enforced against the separate property of the non-acting spouse only if the obligation is for a family expense such as food or shelter. *See id.* Here, CDS made no showing that the alleged community liability was for a family expense. Accordingly, it was error to enter a judgment against Ellen Markman.

Further, just as it was error to enter a judgment based on the alleged settlement agreement before determining whether the parties mutually assented to all the terms of that agreement, it was error to enter a judgment disposing of Markman's third-party claims and counterclaims before determining whether the alleged Mutual Release was separately agreed to or was part of the never-finally-agreed-to settlement agreement.

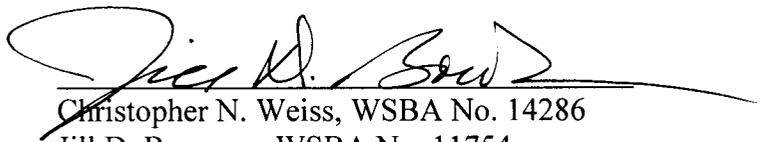
Finally, Appellants do not dispute that their assignments of error with respect to the matters of prejudgment interest, costs, and statutory attorneys' fees all hinge on the primary question of whether the trial court

erred in concluding as a matter of law that there was an enforceable agreement, which Markman breached. Because that conclusion was error, the secondary conclusions also constitute error.

## V. CONCLUSION

An unregistered trade name has no legal right to pursue a lawsuit, let alone obtain a judgment in its favor. Further, the undisputed emails between Thomas and Markman prove one of two things: Either they prove, as a matter of law, that no final agreement ever was reached, or they prove that there is a factual issue as to mutual assent. Whichever conclusion this Court reaches, the judgment entered by the trial court cannot stand. The judgment should be reversed and the matter remanded for (a) entry of judgment in Appellants' favor on CDS's contract claim and trial of Appellants' third-party claims and counterclaims, or (b) trial on all of the parties' claims.

Respectfully submitted this 4th day of October, 2016.



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### CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the date indicated below, a true and correct copy of the foregoing **Reply Brief of Appellants** was caused to be served upon the following parties in the manner indicated below:

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