

No. 75478-5-I

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

GENSCO, INC., a Washington Corporation, Respondent

v.

JASON JOHNSON and TRICIA JOHNSON, husband and wife and
their marital community, Petitioners; and, **PRECISE CONSTRUCTION
GROUP, LLC.**, a Wyoming limited liability company

BRIEF of APPELLANT

John Pierce
Attorney for Appellant's

Law Office of John Pierce, P.S.
505 W Riverside Ave., Ste. 518
Spokane, WA 99201
Tel: (509)210-0845
WSBA #: 38722

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A. ASSIGNMENTS OF ERROR

Assignment of Error

1. The trial court erred in granting an Order for Summary Judgment and the conclusions of law thereunder dated June 17, 2016 in favor of plaintiff, Gensco, Inc., and against defendants Jason Johnson and Tricia Johnson.

Issues Pertaining to Assignments of Error

Precise Construction Group, LLC ("Precise") applied for a wholesale account for the Spokane-based business with plaintiff Gensco, Inc. ("Gensco"), an HVAC supplier. The application for the account requested a desired credit limit of \$10,000. With the application, Jason Johnson, the appellant in this action, who was a minority member of the two-member Precise, agreed to act as guarantor of the requested credit line by executing a personal guarantee. Gensco approved the application and assigned an account to Precise. Gensco later opened additional accounts for Precise with credit limits over \$150,000, the source of the request for which was not identifiable by Gensco, without any authorization or further guarantee of Mr. Johnson.

1. Where documents are executed together, is a personal guarantee limited to the credit limit requested at the time of executing the personal guarantee absent any subsequent express consent to modify the guaranteed amount from the guarantor?
2. Where a personal guarantee is executed for a single account with a Creditor, does that guarantee extend to new accounts created by the same debtor and creditor absent any subsequent express consent to modify the guaranteed amount from the guarantor?

On March 4, 2014, Jason Johnson rescinded his personal guarantee, the rescission of which was accepted by Gensco. In September of the same year, Precision Construction Group, LLC executed a new promissory note, secured by a UCC security agreement in certain motor vehicles, titled "GENSCO Installment Note" in the amount of \$118,100.25. The account balances for all Precise accounts were transferred to the note, and the credit accounts were closed upon execution of the note.

3. If a creditor and debtor execute a new promissory note and installment agreement, with new terms, that does not incorporate or reference any prior agreement, and the result of which pays the balance of an open credit account that is subsequently closed, does a personal guarantee on original credit account transfer and continue under the new agreement without the express consent of the guarantor?

During the term of the account being open, Gensco had applied each payment to the oldest invoices. The note did not have any terms as to how payments would be applied, nor did it incorporate any prior agreements.

4. If a creditor has customarily applied all debtor payments from the inception of a credit account to the oldest invoices, does that course of business modify a payment term specified in the application allowing the Creditor to apply payments at its own discretion?

B. FACTS AND STATEMENT OF CASE

On October 18, 2011 appellant Jason Johnson submitted an application for credit with Gensco, the respondent, on behalf of Precise Construction Group, LLC ("Precise"), requesting a desired credit limit of \$10,000. CP, pgs. 28-29, 44. Mr. Johnson, was one of two managers, and minority owner of a 14.86% of an interest in Precise. CP pg. 18. Precise was a two-member limited liability company with Don Rock as the majority interest holder and second manager, who was also named as Purchasing Contact on the Credit application. CP pgs 18, 44

According to Sherry Roseboom, Regional Credit Manager for Plaintiff Gensco, the process required for setting up an account with Gensco was that the customer would submit a credit application to Gensco, which would in turn submit the application it to the accounting department and corporate office which would pull a credit report. CP pgs. 29, 49-53. The report was then reviewed by the Credit Manager who would then determine the credit worthiness of the customer. Id.

After review of the application, and at the request of Gensco, Mr. Johnson signed a personal guarantee for the requested credit line. CP pgs. 29, 46. On the same date Gensco issued a letter opening a credit account for Precise, with an initial credit limit of \$5000 and assigned Precise account number 44301. CP pgs. 29, 47. The Credit limit on the account

44301 was increased to \$15,000 on February 6, 2012. CP pg. 29 Gensco was unable to identify who requested the increase, nor did it document the specific circumstances for the increase. CP pgs. 30, 37-73

In 2012, Gensco opened at least three additional accounts for Precise Construction group: account number 44303, 44349, and 44350. Id. Account Number 44349 was opened on or about August 21, 2012 with an initial credit limit of \$100,000 that was later increased to \$150,000. Id. The same process occurred with the additional accounts, 44303, and 44350. Id.

Gensco was unable to identify who requested the accounts to be opened. CP pgs. 30, 57-63, 18. Gensco was unable to produce any contract, notice, consent, or agreement by Johnson to guarantee these additional accounts. Id. Each of these accounts was invoiced separately and received individual statements. CP pgs. 30, 57-63.

At some point after March of 2013, Gensco installed a new accounting system, in which the multiple individual accounts were calculated separately, but were modified to be listed a sub-accounts of 44301. CP pg. 30. No notice of this modification was sent to Precise nor Mr. Johnson. CP pgs. 30, 57-63, 18.

On March 4, 2014, Mr. Johnson rescinded his personal guarantee, the rescission of which was accepted by Gensco. CP pg. 31. At the time

that Jason Johnson's rescission was accepted by Gensco, the account balance for the Spokane store, account number 44301, was approximately \$4709.38. CP pg. 31.

Precise an additional payment in the amount of \$20,833.44 shortly after the rescission of Mr. Johnson's personal guarantee. Id.

On September 2, 2014, Precise's open credit accounts were closed by Gensco with a balance due of \$116,100.25. CP pg. 169. At the same time, Precise Construction Group, LLC executed a promissory note in the amount of \$118,100.25, secured by a UCC security agreement in certain motor vehicles, entitled "GENSCO Installment Note", for the entire account balance of all accounts held with Gensco. CP pgs. 31, 59. No record is available regarding the negotiation of the note, but the two drafts prior to the final executed note show that the signors of the note was modified from listing the members personally, to listing them solely in their capacity with the LLC. CP pgs., 31, 57-58. Upon execution of the note, Precise's credit accounts were closed with a \$0.00 balance. CP pg. 32. The installment note did not have any terms governing how payments were applied. CP pg. 59.

Precise made several payments under the Installment note. CP pg. 169. Furthermore, Gensco took possession of the motor vehicles which it sold and applied to the account balance. CP pgs. 89 - 92. "Because the

old open account had been closed," Gensco did not apply any payments made on the note, nor the value of the vehicles to the oldest invoices.¹ CP pg. 169. Instead, Gensco chose to apply the payments and value of vehicles to amounts due from Precise rather than those that it believed were guaranteed by Johnson in order to preserve Plaintiff's security/guarantee for payment against Johnson in the principal amount of \$32,295.42. CP pg. 169.

On July 15, 2015, Gensco filed suit against Precise as creditor, Mr. Johnson as Guarantor, and Mrs. Johnson in her capacity of Mr. Johnson's Spouse. CP pgs. 218-222 The Johnson's filed their Answer and Affirmative defenses on August 24, 2015. CP pgs. 209-217

On September 29, 2015, a Default Judgment was entered against Precise Construction Group L.L.C. CP pg. 169. Gensco then filed a Motion for Summary Judgment against the Johnsons. CP pgs. 166-177. At the first hearing for the summary judgment motion, the motion the court entered an Order of Continenence in order to allow the Johnsons adequate time to perform discovery in the matter. CP pgs. 138

In May of 2016, Gensco filed its second motion for summary judgment which was scheduled and heard in open court on June 17, 2016. CP pgs. 95-105. Pursuant to this hearing the court awarded Summary

¹ Quoting directly from Respondent/Plaintiff's Motion for Summary Judgment filed 11/04/2015.

Judgment to Gensco and against the Johnsons on all claims, in the total amount of \$49,325.56. CP pgs. 1-3. Appellants Jason Johnson and Tricia Johnson appeal the summary judgment and conclusions of law thereunder.

C. SUMMARY OF ARGUMENT

The issues before the trial court and this court are whether a personal guarantee can be extended to additional credit lines of the same debtor without the guarantor's consent; whether a personal guarantee can be extended to a new contract without the guarantor's consent; and, if it can, is the creditor obliged to use the same payment terms as modified during course of dealing between the parties absent any consent to modify them by the guarantor.

In this case, the personal guarantee in question was submitted with an application for a credit account with Gensco by Johnson. Under Washington law, when instruments are executed as part of one transaction, they should be considered together to ascertain the intent of the parties and the obligations actually and necessarily implied. And, the amount of the guarantor's liability is to be determined by the contract of guarantee. Johnson argues that the liabilities subject to his personal guarantee are limited to the amount of credit precisely applied for in the initial application with which he executed the personal guarantee.

Johnson further argues that the personal guarantee should not be applied to additional lines and extensions of credit granted to Precise by Gensco because he, as guarantor, did not consent to do so. Guarantee agreements are within the purview of the statute of frauds and must be in writing to be valid and enforceable. One party may not unilaterally modify a contract, mutual assent is required.

Finally, with respect to the personal guarantee, is the issue of whether the Installment Agreement executed by Precise, a new contract, containing separate and new terms, and that does not reference any prior agreements, is a novation and independent agreement, or merely an extension of credit. If any remaining liabilities still existed subject to the promissory note at the time that the installment agreement was executed between the debtor and creditor, they do not transfer to the new note absent the guarantors consent.

As the trial court found that the liabilities did remain at the time of the execution of the installment agreement, and as the trial court transferred the personal guarantee to a portion of liabilities under the installment agreement, Johnson argues that any payments made under the installment agreement should have been applied under the same terms as they were established by course of dealing under the original term of the credit agreement.

D. ARGUMENT

- 1. The trial court erred in its granting its order of summary judgment and the conclusions of law that the personal guarantee executed by Johnson, which was executed together and concurrently with the account application, was limited to the terms of the agreements interpreted together absent any subsequent express consent to modify the guaranteed amount from the guarantor.**

Summary judgment is only appropriate where, after reviewing all facts and reasonable inferences in the light most favorable to the Defendant, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law based on the facts presented. *Viking Properties Inc. v. Holm*, 155 Wn.2d 112, 119 (2005). "The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact." *Olympic Fish Prods. v. Lloyd*, 93 Wn.2d 596, 602 (1980).

In this matter, there was not an issue of the material facts as presented; the difference between the parties was the characterization and interpretation of those facts. Jason Johnson and Tricia Johnson, Appellants ("Johnson"), appeal the summary judgment order and judgment as inappropriate because after reviewing all facts and reasonable

inferences in the light most favorable to the Johnsons, the moving party was not entitled to judgment as a matter of law based on the facts presented.

A critical issue in determining whether a summary judgment is appropriate for a party in a guarantee dispute, is whether there was mutual assent by the parties to be bound by a guarantee. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 699 (1998).

Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party. *Wilson Court* at 699. Proper interpretation and construction of guarantee agreement is based upon same principles as those applied to contracts generally. *Id.* This includes applying objective manifestations test to asserted guarantee agreement. *Id.* Ultimately mutual assent is ordinarily a question of fact. *Id.*

A contract of guarantee, being a collateral engagement for the performance of an undertaking of another, imports the existence of two different obligations, one being that of the principal debtor and the other that of the guarantor. *Id.* at 707. Contracts to answer for the debt of another must be explicit, are strictly construed, and are to be given commercially reasonable construction *Id.* at 707.

The amount of the guarantor's liability is to be determined by the

contract of guarantee. *Western Const. Co., Inc. v. Austin*, 3 Wn.2d 58, 61 (1940). "When instruments are executed as part of one transaction, they should be considered together to ascertain the intent of the parties and the obligations actually and necessarily implied." *Lynch v. Higley*, 8 Wn.App. 903 (Div. 1 1973).

In this case, Johnson submitted a credit account application to Gensco on behalf of Precise Construction Group L.L.C. DBA The Water Heater Store and MEI, INC. on October 18, 2011. With the application, Johnson signed the Personal Guaranty that is the subject matter of this action. The credit application specifically lists the requested credit limit as \$10,000. On the same date that the credit account application was submitted to Gensco through its credit department, Gensco opened an account for Precise, No. 44301, with an initial credit line of \$5000. The credit limit on Account No. 44301 was raised shortly thereafter to \$15,000².

Because the guarantee was submitted as part of the application for a credit account, it is limited by the terms of that credit account. Any interpretation as to the breadth of the guarantee must include reference to the credit application with which it was filed.

²Gensco was unable to proffer evidence of any request from the applicant, or any documentation regarding the increase. CP pgs. 30, 57-63

2. The trial court erred in its granting its order of summary judgment and the conclusions of law that a creditor has the unilateral right to extend the personal guarantee of a guarantor to additional accounts without the express consent of a guarantor.

Guarantee agreements are within the purview of the statute of

Frauds. *See* RCW 19.36.010. RCW 19.36.010 provides in part:

In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) Every special promise to answer for the debt, default, or misdoings of another person;...

The statute of frauds requirements are not met unless the written and signed agreement is so complete in itself that parol evidence is unnecessary to establish any of its material elements. *Smith v. Twohy*, 70 Wash.2d 721, 725 (1967). Furthermore, partially written and oral collateral promises are considered oral for purposes of the statute of frauds if a material term must be established by parol evidence. *Le Marinel v. Bach*, 114 Wash. 651, 656 (1921).

If a guarantee is to be modified, mutual assent is required and one

party may not unilaterally modify a contract. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692 at 707. Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds. *Id.* Silence is not acceptance. *Id.*

In this matter, Johnson executed and submitted a personal guarantee when Precise initially applied for an account with Gensco. That application requested a limit of \$10,000.

In the deposition of Sherry Roseboom, Regional Credit Manager for Gensco, she stated that the process required for setting up an account with Gensco was that the customer would submit a credit application to Gensco, which would in turn submit the application to the accounting department and corporate office which would pull a credit report. The report was then reviewed by the Credit Manager who would then determine the credit worthiness of the customer.

Gensco later opened at least three additional accounts, each with their own account numbers, with a combined credit limit of over \$150,000. Gensco was unable to show any applications for the new accounts, nor was it able to positively identify who actually requested the accounts to be opened. Gensco failed to follow its own procedure when opening these accounts which increased the credit of Precise by over

1500%. Furthermore, Gensco failed to show evidence that it gave any notice to Johnson as guarantor, or that it sought his assent to guarantee the additional lines of credit as guarantor.

Gensco has argued that Johnson's personal guarantee was a "continuing personal guarantee" and that the language contained in the guarantee applies to any account opened by Precise, the applicant. CP

The text of the guarantee states: "THE GUARANTOR(S) UNCONDITIONALLY GURANTEES PROMPT PAYENT WHEN DUE OR UPON DEMAND THEREAFTER OF EVERY INDEBTEDNESS OR OBLIGATION THE APPLICANT HAS TO GENSCO, INC OF ANY KIND WHATSOEVER. This guarantee covers all existing and future indebtedness of the APPLICANT to GENSCO, INC. in the course of collecting obligations of the APPLICANT which are not paid when due."³

There is no question that the terms of the guarantee are explicit. But they must be read and interpreted within the context of the credit application with which the guarantee was submitted. *See Supra*.

The credit application does not limit the unconditional nature of the guarantee, nor does it limit future indebtedness that arises from the original account limit of \$10,000. For example, fees, interests, and other costs could increase the amount due under the guarantee beyond the

³ Emphasis contained in, and quoted quoted directly from terms of personal guarantee.

\$10,000 limit. But, as cited above, party may not unilaterally modify a contract. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692 at 707. Any extension of the guarantee to additional accounts and lines of credit must arise out of the intentions of the parties, requires a meeting of the minds, and requires the active consent of the guarantor. *Id.*

Mr. Johnson, the guarantor, applied for and guaranteed the original account for a limit of \$10,000. Johnson did not apply for the new credit accounts; he did not consent to guaranteeing the additional accounts; he did not get notice that there was any intent on the part of Gensco to apply his guarantee to the additional accounts; and, the additional accounts were not even in the same location that Johnson was working. Furthermore, at the time that Mr. Johnson's rescission was accepted by Gensco, the account balance for the Spokane store, Account No. 44301 was approximately \$4709.38. These invoices were paid with the subsequent payments made by Precise.

Because there was no written agreement, nor any implied or express consent of Johnson to extend his guarantee to the additional accounts, the trial court erred in extending the guarantee to the additional accounts and finding Mr. Johnson liable for past due accounts of Precise that in an amount greater than that which he guaranteed, and for accounts that he did not open. Because the outstanding balance on the original

account at the time of Johnson's rescission paid by subsequent payments made by Precise, Johnson has no liability to Gensco.

3. **The trial court erred in its granting its order of summary judgment and the conclusions of law that Johnson had remaining liability under his Personal Guaranty and the original credit account at the time the account was closed; that the Personal Guaranty should have been applied to a new promissory note and installment agreement that did not incorporate or reference any prior agreement, and the result of which paid the balance of an open credit account that is subsequently closed; and, for which Johnson did not grant any express consent in his personal capacity as the guarantor.**

A novation is commonly defined as the replacement of an unexpired contract by another contract reached through renegotiation, concurrent with the release of an original party from liability. *Fay Corp. v. BAT Holdings I, Inc.*, 646 F.Supp. 946, 949 (W.D.Wash. 1986).

"The doctrine of novation is so well understood that it hardly seems necessary to cite authorities to define it.

Novation means substitution. It may be either the

substitution of a new obligation for an old one between the same parties with intent to displace the old obligation with the new, or the substitution of a new debtor for the old one with intent to discharge the old debtor, or the substitution of a new creditor with intent to transfer the rights of the old creditor to the new." *Sutter v. Moore Inv. Co.*, 30 Wash. 333, 335-336 (1902).

In Washington, novation requires four essential elements: (1) A mutual agreement (2) among all parties concerned (3) for the discharge of a valid existing obligation (4) by the substitution of a new valid obligation or substitution of one party for another. *MacPherson v. Franco*, 34 Wash.2d 179, 182 (1949).

Gensco, on the other hand, argued that it was merely "extending the time of payment - not a novation citing *ONB v. Seattle Smashers* and *Columbia Bank v. New Cascadia Corp.* Extending the time of payment without consent of the surety operates to discharge the surety. *Lincoln v. Transamerica Inv. Corp.*, 89 Wash.2d 571, 574 (1978). "To determine the intent of the parties, the language of a guarantee agreement should receive a fair and reasonable interpretation reflecting the purpose of the agreement and the right of the guarantor not to have his obligation enlarged." *Old Nat. Bank of Washington v. Seattle Smashers Corp.*, 36 Wn.App. 688, 691

(Div. 1 1984) But, the right to extend time of payment can be exacted from the terms of the guarantee. *Id.* In, *ONB v. Seattle Smashers*, the original guarantee was for a small business loan, the payment time for which was extended. *Id.* at 690. In, *Columbia Bank v. New Cascadia Corp.*, the guarantee was for a corporate business loan, the due date for which was extended. *Columbia Bank, N.A. v. New Cascadia Corp.*, 37 Wn.App. 737, 738 (Div. 3 1984). In neither example was the original loan paid in full and the account closed after executing an entirely new agreement with new terms. *See generally* *Id.*, *ONB v. Seattle Smashers*.

A promissory note is a negotiable instrument governed under Article 3 of the UCC. *See generally*, RCW 62A.3 et al. A "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) Is payable on demand or at a definite time; and (3) Does not state any other undertaking or instruction by the person promising or ordering or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of

the benefit of any law intended for the advantage or protection of an obligor." RCW 62A.3-104. An instrument is a "note" if its a promise to pay. Id. And, a "promise" means a written undertaking to pay money signed by the person undertaking to pay. RCW 62A.3-103.

Here, the parties do not dispute the validity of the old credit agreement, or the new promissory note. Neither party disputes the fact that the open credit account, to which Johnson's personal guarantee was attached, was closed with a balance of \$0.00. And, the promissory note, entitled the "GENSCO Installment Agreement, meets four elements for novation; as it is a mutual agreement between GENSCO, Inc. and Precise Construction Group, LLC that discharged the obligation under the credit agreement (the "Value Received" under the promissory note) by substituting a new agreement per the terms of the promissory note and security agreement.

GENSCO could have extended the time for payment without executing the a new promissory note. Instead, GENSCO closed the account and entered into a separate promissory note and security agreement with Precise. GENSCO chose to convert an account to commercial paper which has new a separate terms from the account agreement. In every doubtful case the presumption should be against a continuing guarantee. *National Sur. Co. v. Campbell*, 108 Wash. 596, 601

(1919). Furthermore, the promissory note and security agreement were executed six months after Mr. Johnson's guarantee was rescinded. Jason Johnson has no liability to GENSCO under the "GENSCO Installment Agreement," and no liability for the account that was satisfied, in fully, by the novation and execution of that promissory note. In this case, the document entitled "GENSCO Installment Agreement" is not a mere extension of time to pay, it is separate commercial paper; and a negotiable instrument governed by the UCC.

Because the Installment Note is a new negotiable instrument with new and independent terms from the original credit application; and because Johnson gave no consent to be guarantor of the new commercial paper, if any liabilities remained against Johnson's personal guarantee, those were discharged with the execution of the new installment note.⁴

⁴ Johnson strongly contends that any liabilities of the personal guarantee were paid in full while the original credit account was still open and operational.

4. The trial court erred in its granting its order of summary judgment and the conclusions of law in finding that the payment terms under an initial agreement are not modified in the course of performance where a creditor which has customarily applied all debtor payments from the inception of a credit account to the oldest invoices.

Sales of goods are governed by Article 2 of the Uniform Commercial Code, enacted in the State of Washington as RCW 62A.2 et al. "Goods" include "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid." RCW 62A.2-105. All of the purchases by Precise Construction Group, LLC from the Plaintiff, GENSCO, Inc. were for goods and are governed by the Uniform Commercial Code - Sales, hereinafter referred to as the "UCC". *See* RCW 62A.2-101.

Terms set forth in a writing may be supplemented by course of performance. RCW 62A.2-202. A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) The other party, with knowledge of the nature of the performance and opportunity for

objection to it, accepts the performance or acquiesces in it without objection. RCW 62A.1-103. A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. *Id.* "Course of dealing may become part of an agreement either by explicit provision or by tacit recognition, or it may guide the court in supplying an omitted term." *Puget Sound Financial, L.L.C. v. Unisearch, Inc.*, 146 Wn.2d 428, 438 (2002) quoting Restatement of Contracts §223. Course of conduct over a long period of years, without protest or dissent on either side, must be held to be a practical construction of the meaning of the contract by the parties themselves which the courts are bound to recognize and enforce. *Bellingham Securities Syndicate, Inc. v. Bellingham Coal Mines, Inc.*, 13 Wn.2d 370, 381(1942).

Here, for the entire term that the account was opened, Gensco applied all payments to the oldest invoices. After Precise executed the installment agreement with Gensco, that did not, itself, contain any terms governing how payment were applied, Gensco chose to apply the payments and value of vehicles to amounts due from Precise rather than those that it believed were guaranteed by Johnson in order to preserve Plaintiff's security/guarantee for payment against Johnson. This fact

further illustrates the intent of Gensco and Precise the treat the installment agreement as a new and separate agreement rather than the extension of credit that Gensco argued before the trial court.

But, if any liabilities subject to the personal guarantee did survive, as the trial court concluded: the opening of new accounts without consent of the guarantor; payment in full after rescission of the Personal Guaranty; and, novation of the credit agreement into a commercial paper installment note, then the same payment terms as were applied throughout the term of the original account should have continued to be applied under the installment agreement reducing Johnson's liabilities under that note.⁵

⁵Johnson, of course, argues that any liability subject to the promissory note was discharged long before it reached this point.

E. CONCLUSION

The question before this court is whether a personal guarantee can be extended to additional credit lines of the same debtor without the guarantor's consent; whether a personal guarantee can be extended to a new contract without the guarantor's consent; and, if it can, is the creditor obliged to use the same payment terms as modified during course of dealing between the parties absent any consent to modify them by the guarantor.

Respectfully, it can not.

In Washington, guarantee contracts must be explicit and are strictly construed. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d at 705. They must also be interpreted in accordance with general rules of construction and the context in which the guarantee is signed. *Id.* "The liability of the guarantor cannot be enlarged beyond the strict intent of his contract." *Hansen Service, Inc. v. Lunn*, 155 Wash. 182, 191 (1930). And, in where there is any doubt, the presumption should be against a continuing guaranty. *National Sur. Co. v. Campbell*, 108 Wash. 596 at 601.

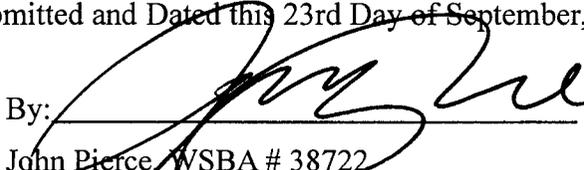
Where a personal guarantee is submitted with an application for credit, the terms of both documents define the parameters and extent of liability of the guarantee. Any modification to those parameters and liabilities must have the consent of the guarantor to be valid and

enforceable. In this case, because the guarantor gave not consent, nor was even given notice of the modifications and extensions by the Gensco, the personal guarantee does not extend to the additional accounts and extensions of credit granted to precise, and it sure does not survive the novation of the original credit agreement into the new and separate terms of a future promissory note and installment agreement.

Appellants Jason Johnson and Tricia Johnson request the following relief from this court:

To reverse the order, conclusions of law, and judgment as entered by the trial court; to dismiss all plaintiffs claims with prejudice; and, to grant attorney fees and costs to the Appellants as the prevailing party pursuant to the terms of the original credit agreement which states, in part, that the applicant "agrees to all costs of collection and/or litigation including attorney fees, and under RCW 4.84.330, that makes all such provisions are reciprocal, meaning that the prevailing party is entitled to fees even if the language of the clause grants fees only to one side.

Respectfully Submitted and Dated this 23rd Day of September,
2016.

By: 

John Pierce, WSBA # 38722
Attorney for Petitioner

Law Office of John Pierce, P.S.
505 W Riverside Ave., Ste 518
Spokane, WA 99201
Tel: (509)210-0845

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**SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH**

GENSCO, INC.,

Petitioner/Plaintiff(s),

vs.

PRECISE CONSTRUCTION GROUP LLC, et al.,

Respondent/Defendant(s).

**SNOHOMISH COUNTY
NO. 15-2-05175-8**

**COURT OF APPEALS
NO. 75478-5-I**

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DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington, that on this date, a copy of Appellant's BRIEF was served by the method below, and addressed to the following:

Mr. William H. Charbonneau	[<input checked="" type="checkbox"/>]	First Class Mail, Postage Pre-paid
Attorney at Law	[<input type="checkbox"/>]	Hand Delivered
120 W. Dayton, Suite B-6	[<input type="checkbox"/>]	Overnight Mail
Edmonds, WA 98020	[<input type="checkbox"/>]	Telecopy (Fax)

Dated this 23th day of September, 2016.

By: 
John Pierce, WSBA # 38722
Attorney for Defendants
LAW OFFICE OF JOHN PIERCE, P.S.
505 W Riverside Ave., Ste. 518
Spokane, WA 99201
Tel: (509) 210-0845
Fax: (509) 267-0814
e-mail: john@lawps.com

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STATE OF WASHINGTON