No. 364682

99080-8

(Spokane County Superior Court No. 16-2-00616-1)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DAVID CEBERT,

Appellant.

vs.

PATRICK KENNEDY and JANE DOE KENNEDY, a martial community, JOHN KENNEDY and JANE DOE KENNEDY, a martial community, AXTEL SCIENTIFIC, INC., a Nevada corporation, and MITIGATION OF DISEASE, INC., a Delaware corporation

Respondents,

PETITION FOR REVIEW BY THE SUPREME COURT

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Attorney for Appellant

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TABLE OF CASES AND AUTHORITY

I. **IDENTITY OF PETITIONER:** Appellant David Cebert, who was originally the plaintiff and had his claims dismissed based on the defendant Respondents' affirmative defense that the statute of limitations ran.

II. **CITATION TO COURT OF APPELLATE DECISION:**

Appellate court decision on the case 364682, rendered Jun 30, 2020. Motion for reconsideration filed July 20, 2020, and order denying reconsideration September 1, 2020.

III. **ISSUES PRESENTED FOR REVIEW**

(A) This Court held in *Macchia v. Savlino*, 64 Wn.2d 951, 955 (1964) that the "statute of limitation on amounts due under a contract for continuous service does not begin to run until the contract is terminated." emphasis added. Rather than following *Macchia,* the Court of Appeals held that the statute of limitations for this continuous service contract runs when the contract is first breached. Did the court of appeals contradict this

Court's ruling in *Macchia*, and if so is this now the correct standard for continuous service contracts?

The Court of Appeals clearly conflicted with this Court's decision in *Macchia*, and provided no good basis to set aside *Macchia*, especially when *Macchia* forwards Washington's policy of protecting employee wages.

(B) The legislature and this Court have determined the fraud statute of limitations begins to run when a party discovers fraud, or within the exercise of diligence should have discovered the fraud. RCW 4.16.080(4). *Strong v. Clark*, 56 Wn.2d 230, 232 (1960). This is a question of fact and not of law. *Young v. Savidge*, 155 Wn. App. 806, 823, 230 P.3d 222 (2010).

The Court of Appeals did not follow this rule. The Court of Appeals found the statute of limitations began to run upon the first misrepresentation and not on the date of discovery. The Appellant presented facts of continued misrepresentation that prevented discovery until well within the three-year timeline for the statute of limitations. The issue here is if the statute of

limitations truly starts at discovery, and if so can this be decided by a judge when there are sufficient issues of fact that discovery did not occur before the statute of limitations began to accrue?

The court of appeals erred by either deciding these facts, in contradiction to Washington's constitution and this Court's clear precedent, or the court of appeals applied the wrong law for starting the statute of limitations.

(C) Separate trials requires careful and cautions informed judicial discretion "to determine the application of the separation will manifestly promote convenience and/or actually avoid prejudice." *Brown v. Gen. Motor's Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965). The Court of Appeals allowed for the separation of trials to occur by summary judgment error, that the Court of Appeals even acknowledge in its decision to send the employment and quantum meruit claims back to trial. The issue is whether or not judicial discretion must be actually used to separate trials as this Court held in *Brown*, or can it be done purely based on judicial mistake?

IV. FACTS OF THE CASE[1]

A. Substantive Case Facts

In December of 2011 or January of 2012 the Respondent's John Kennedy, Patrick Kennedy, and Mitigation of Disease, Inc. (MODI) asked Mr. Cebert to work for them. *CP 234.* They offered Mr. Cebert stock in MODI and the presidency. *Id.* MODI is a company that held a patent pending application for a bioavailable mineral compound that helps with disease. *CP 376-412.*

In August of 2012 Respondent Patrick Kennedy sent out an investment document that showed Mr. Cebert in the role of the President for MODI. *CP 376-444.* This document showed the Appellant receiving a $70,000 salary and 600,000 shares in *MODI. CP 443; 393.* This document attached the patent

[1] Appellant's claims were dismissed on summary judgment, so all facts are stated in best light of the Appellant as required by the summary judgment standard.**

application to the investment documents, showing it was claiming to own the intellectual property on the bioavailable mineral compound. *CP 376-412.*

In October of 2012 Respondent Patrick Kennedy sent out another investment proposal for Axtel Scientific, which was to be a carbon copy of MODI.[2] *CP 446-486.* This investment proposal showed the Appellant receiving 600,000 shares of stock in Axtel. *CP 472.* The Appellant was working for and continued working for the Respondents at this time.

On March 29, 2013, Respondent John Kennedy sent an e-mail about MODI to the Appellant, David Cebert, and others that said, "Dave as President" was to take certain actions. *CP 534.* On April 10, 2013 Respondent John Kennedy sent an e-mail about MODI to the Appellant, David Cebert, stating they were looking to him for direction and guidance. *CP 536.* The Appellant continued to work for the Respondents at this time.

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[2] John Kennedy's deposition shows Axtel and MODI were treated similarly. CP 554-55; 561-62. Axtel filed bankruptcy in this matter and is not part of the decision. But the evidence allows the reasonable inference that MODI and Axtel are the same company, and they were both controlled and owned by the Kennedy brothers.

In May of 2013, Respondent Patrick Kennedy promised the Appellant an extra 400,000 shares in Axtel for all the work the Appellant was doing. *CP 238-239.*

In September of 2014, problems arose between the Respondents and the Appellant. The Appellant sent a resignation e-mail and asked that they honor their promise of stock to him. *CP 270-272.* Respondents refused to honor the stock request.

In October of 2014 Respondents demanded Appellant turn over certain data to them. *RP 276-278; 357.* Appellant refused since he had resigned.

B. Procedural Case Facts

Appellant started this case by serving it on May 7, 2015. *CP 19-23.* The claims were for contract, employment, quantum meruit, and fraud actions.[3] However this case was not filed at

[3] The original complaints contained Washington Securities Act violations, but these were dropped in the second amended complaint.

that time. Appellant acquired new counsel, who immediately filed the matter on February 16, 2016. *CP 1-15.*

In March of 2016 the respondents answered the complaint. This answer brought counterclaims for the Appellant not turning over data in October of 2014, and for letters that were sent out by another party to the Respondent's business partners.

Appellant deposed John Kennedy in May of 2017. During this deposition Respondent John Kennedy testified that he never had any intention of compensating the Appellant or making him president. *CP 561-563; 568-570.* Based on the deposition revelation, the Appellant again Amended the complaint to add specifics around fraud; that it was based on a promise made with no intention to perform. *CP 105-109.*

The Defendants' brought a summary judgment on April 27, 2018 arguing that the Appellant had violated the statute of limitations. This matter was set for trial on July 9, 2018. On June 22, 2018 the trial court entered summary judgment against the Appellant's claims. The trial court found that the Appellant's

claims accrued in 2012 and therefore the filing on February 16, 2016 violated the statute of limitations. *CP 1452-1454.*

The court sent this matter to trial on the counterclaims, and the jury found against the Appellant. *CP 1641-1646.* During the trial, the Appellant was instructed not to discuss his employment, fraud, or other claims with the jury. *RP 209-216; RP 289-290.* Despite this, the Respondents were allowed to bring in documents that referenced Appellant's "claims" and values he had hypothesized on those. *RP 289.* The trial court noted this put the Appellant in a "catch-22" but still allowed it. *RP 289.*

After the judgment was entered, Appellant filed an appeal about the summary judgment of his claims, and some aspects of the trial. The appellate court reversed summary judgment on the statutory employment claims and on quantum meruit. However, the court of appeals upheld the summary judgment on the fraud and contract claims stating that the Appellant could not pursue his claims to stock under those theories. *Opinion p. 8.* The Appellant requested reconsideration, citing the most of the errors

he cites here, and the court of appeals denied reconsideration. This matter is now ripe for review by this Court.

V. ARGUMENT

The Court of Appeals decision is in conflict with decisions of this Court in three areas. Per RAP 13.4(b)(1) these are grounds to accept review.

A. This Court Has Held That For Continuous Service Contracts The Statute Of Limitations Begins To Run Upon The Termination Of The Contract, And Not As The Court of Appeals Held, Upon The First Breach

The "statute of limitation on amounts due under a contract for continuous service does not begin to run until the contract is terminated." *Macchia v. Savlino*, 64 Wn.2d 951, 955, 395 P.2d 177, 179 (1964), emphasis added. In *Macchia,* this Court looked back to contract breaches over 11 years to award damages. *Id.* at 956. The Court of Appeals conflicts with *Macchia.*

The Appellant's contract in this case was one of continuous service to the Kennedy's and MODI. The Appellate Court even acknowledge that when it said, "Cebert's allegations state a case for continuing performance rather than a specific length of time...." *Opinion p. 7.* This performance was clearly services, meaning this was a contract for continuous services just like *Macchia.*

The evidence in this matter shows the Appellant resigned the continuous service contract in September of 2014. *CP 270-272.* This means that under *Macchia,* the statute of limitations would have run in September of 2017. Filing on February 16, 2016 would not have been past the statute of limitations. Especially as decided on summary judgment.

Instead of *Macchia,* the Court of Appeals relies on a construction contract case to make its ruling on the statute of limitations. *Opinion p.7-8; 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 572-573 (2006). This Court in *1000 Virginia Lt.d P'ship* addressed whether latent defects in

construction contracts were afforded the discovery rule under the contract breach statute of limitations. *Id.* at 574-590. *1000 Virginia Lt.d P'ship*'s decision of when the cause accrued for the statute of limitations is not a continuous service contract and should not have been followed in this matter.

As briefed in Appellant's Court of Appeals opening brief there was ample evidence that the continuous service contract did not end prior to the February 16, 2013 date. Clear evidence is in the March 29, 2013 e-mail in one of the Respondent's own words that asks Mr. Cebert to do services as "President" of MODI. *CP 534.* That provides sufficient evidence that the continuous service contract did not end prior to February 16, 2013. The Court of Appeals's decision is in direct conflict with this Court's decision in *Macchia* and review is appropriate.

B. <u>This Court And A Statute Mandate The Statute Of Limitations For Fraud Begins To Run Upon Discovery And That Is A Question Of Fact; The Court Of Appeals's Decision Conflicts With These Mandates</u>

1. This Court And The Legislature Have Stated The Statute Of Limitations Begins To Run When Fraud Is Discovered, Not When The First Misrepresentation Occurs

A fraud action accrues when the aggrieved party actually discovers, or in the exercise of due diligence could have discovered, the facts constituting fraud. RCW 4.16.080(4). *Strong v. Clark*, 56 Wn.2d 230, 232 (1960). "Mere suspicion of wrong is not discovery of fraud; the discovery contemplated is of evidentiary facts leading to a belief in fraud and by which the existence of fraud may be established." *Young v. Savidge*, 155 Wn. App. 806, 823, 230 P.3d 222 (2010), citing *Davison v. Hewitt*, 6 Wn.2d 131, 137, 106 P.2d 733, 736 (1940).

The fraud alleged in this case was the promise of the stock, and the presidency with its attendant benefits in order to induce the Appellant's labor. *CP 131*. If a party makes a promise to induce action, but has no intention of keeping it, that is a false representation of fact. *Markov v. ABC Transfer & Storage, Co.*, 76 Wn.2d 388, 95-396, 475 P.2d 535 (1969).

The false promises here were made in December of 2011, in August of 2012, in October of 2012, on March 29, 2013, and again in May of 2013. The record shows the Appellant relied on them as late as September of 2014. Then in May of 2017, Respondent John Kennedy testified in his deposition that he never had any intention of ever performing on those promises. *CP 561-563; 568-570.* This provides evidence that the fraud was not discovered until after September 2014 and even as late as May of 2017.

In contradiction of this Court's decisions, the Court of Appeals uses the date of the first false promise, and not the date of discovery for accrual of the statute of limitations. The Court of Appeals states, "[t]he material misrepresentation that [Mr. Cebert] alleged was the basis of his fraud claim that occurred four years before he filed his first fraud allegation." *Opinion p. 6.* This decision then states the statute of limitations began to run upon the first misrepresentation in 2011. This completely ignores evidence that the false representations occurred in writing as late

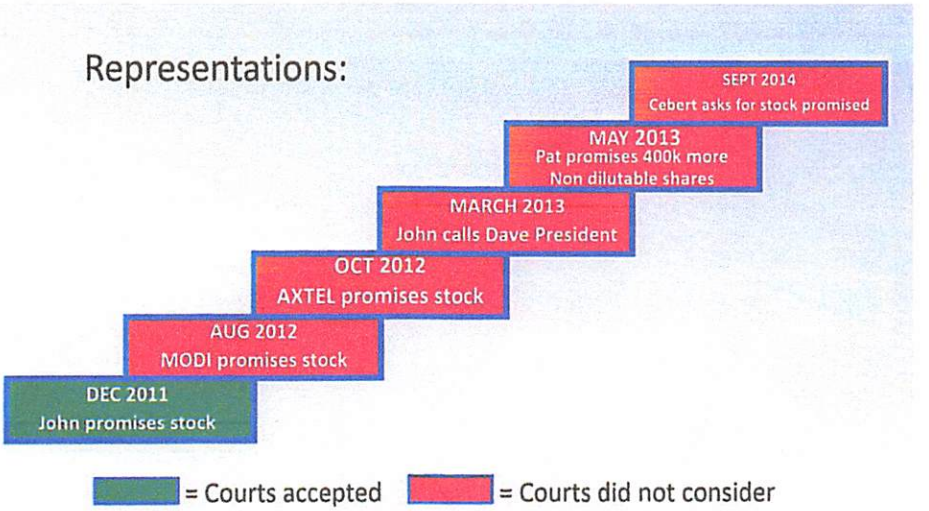
as March 29, 2013 and orally into May of 2013, with clear showing of no actual discovery as late as September of 2014.

The day of the first misrepresentation is not the statutory law or precedent by this Court. The rule is discovery, and the Court of Appeals' decision conflicts with this Court's decisions on the discovery of fraud starting the statute of limitations running.

2. If the Court of Appeals applied the correct discovery rule, then it weighed facts about the discovery which conflicts with clear decisions of this Court

The discovery of the fraud is a question of fact and not of law. *Young v. Savidge*, 155 Wn. App. 806, 823, 230 P.3d 222 (2010). When reviewing a summary judgment the court must consider all evidence in favor of the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368 (2015). At summary judgment a court does not weigh evidence because that is the role of the jury. *Davis v. Cox*, 183 Wn.2d 269, 289 (2015); *Jones v. DSHS*, 170 Wn.2d 338, 354, fn. 7 (2010).

This decision on the misrepresentation only looked at the 2011 phone call. However, the Appellant presented evidence of stock and presidency representations well past that date. These included (1) a writing in August 2012 that referenced both stock and the Presidency to the Appellant (*CP 376, 393, 443*), (2) a writing in November 2012 that referenced stock to the Appellant, (3) a writing on March 29, 2013 that refers to the Appellant as president of MODI (*CP 534)*, (4) an oral promise in May of 2013 of another1 400,000 shares of stock (*CP 239*), and (5) a the resignation e-mail by the Appellant that said he was still expecting performance on the stock promise *(CP 270)*. All of those are evidence of continuance of the misrepresentations that are the basis of fraud. Looking at all of these items in the best light of the Appellant creates a question of fact that the misrepresentation not only continued to occur after February 16, 2013 but also that it was not reasonably discoverable prior to that date. See the attached evidence of continued misrepresentation:



This decision also decides that the Appellant's claims of discovering no intention to perform on the presidency and its benefits in May of 2017 is not credible because the original complaint in 2015 and first amended complaint alleged fraud. This does not view the evidence in the best light of the Appellant

The original complaint does allege fraud around compensation for services, and this is true in the amended complaint. *CP 10, 30.* The second amended complaint though did allege the false representation of president of MODI with appropriate compensation, and no intention to perform. *CP 131.*

That second amendment was made after the May 2017 deposition of Respondent John Kennedy. Taken in the best light of the Appelant, this supports his claim of discovering no intent to perform on the president and compensation that comes with it was in May of 2017.

At best the 2015 complaint presents evidence that Mr. Cebert discovered the fraud in 2015. However, that would not create a statute of limitations problem since the Appellant filed the matter on February 16, 2016, less than three years from the discovery date.

This Court's decisions require the Court of Appeals to consider all the facts in the best light of the Appellant, under the discovery rule of RCW 4.16.080(4) to decide if there are issues for trial. The Court of Appeals either found facts not to be credible or ignored them in direct contradiction with *Keck*, *Davis*, and multiple other decisions. This warrants acceptance of review by this Court.

C. The Separation of Trials Should Be Based On Discretion

In *Brown v. Gen. Motor's Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965) this Court stated separate trials requires careful and cautions informed judicial discretion "to determine the application of the separation will manifestly promote convenience and/or actually avoid prejudice." In contradiction to this Court's statement in *Brown*, the Court of Appeals decided that counterclaims can be separated from each other under CR 42 but this does not require any judicial discretion for the separation. *Opinion p. 9.*

This decision does not contain any careful or cautious use of the judicial discretion to affirm the separation of trials. At trial the issue of Mr. Cebert's claims was brought up in a document. When Mr. Cebert pointed out that this required him talking about his claims, and would get a curative instruction on that, the trial court acknowledged this put in him in a "catch-22." *RP 289.* This

situation directly refers to the trial of the counter claims and Mr. Cebert discussing his claims as a contradictory trap on Mr. Cebert. That is evidence of a prejudice by not allowing the claims to be tried together.

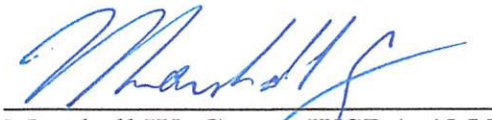
Along with this the Court of Appeals decision notes that leaving the current jury verdict in place, while trying the Appellant's claims against the Respondents could cause claim preclusion and res judicata issues. Opinion p. 12, *fn.* 11. This in itself should create concerns of fairness that the Appellant will not get his rights to trial by jury. Under this Court's decision in *Brown*, these issues must actually be weighed and decided.

VI. CONCLUSION

The Court of Appeals's decision conflicts with the decisions of this Court. This is true on the statute of limitations for the contract and fraud claims. Along with that, the Court of Appeals decision does not follow this Court's requirement of judicial discretion before trials are separated. Review is

appropriate per RAP 13.4(b)(1).

Respectfully submitted this 30 day of September, 2020



Marshall W. Casey, WSBA 42552
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 30 day of ~~July~~ Sept, 2020, I cause a true and correct copy of the foregoing document to be delivered via the Washington State Appellate Court's Secure Portal Electronic Filing System and via the following Method

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Counsel for Respondent: Gregg Smith		SENT VIA: Gregg.smith@painhamblen.com

Dated this on 30 of September, 2020.

Marshall W. Casey

Appendix

Renee S. Townsley
Clerk/Administrator

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CASE # 364682
David Cebert v. Patrick Kennedy, et ux, et al
SPOKANE COUNTY SUPERIOR COURT No. 162006161

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy (unless filed electronically) of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

DAVID CEBERT, an individual, Appellant, v. PATRICK KENNEDY and JANE DOE KENNEDY, a marital community, JOHN KENNEDY and JANE DOE KENNEDY, a marital community, AXTEL SCIENTIFIC, INC., a Nevada corporation, and MITIGATION OF DISEASE, INC., a Delaware corporation, Respondents.	)	No. 36468-2-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of June 30, 2020 is hereby denied.

PANEL: Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

REBECCA PENNELL
Chief Judge

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

DAVID CEBERT, an individual, Appellant, v. PATRICK KENNEDY and JANE DOE KENNEDY, a marital community, JOHN KENNEDY and JANE DOE KENNEDY, a marital community, AXTEL SCIENTIFIC, INC., a Nevada corporation, and MITIGATION OF DISEASE, INC., a Delaware corporation, Respondent.	)	No. 36468-2-III UNPUBLISHED OPINION

KORSMO, J. — David Cebert appeals from the dismissal at summary judgment of his claims against Mitigation of Disease, Inc. (MODI), et al., and subsequent jury verdicts in favor of the defendants on their counterclaims against Cebert. We largely affirm and grant the defendants attorney fees, but reverse portions of the summary judgment and remand for further proceedings.

FACTS

John Kennedy is a scientist living in Maryland and his brother, Patrick Kennedy, is a businessman living in Texas. Cebert lives in Spokane. Patrick[1] once served as vice president of a technology company started by Cebert. John developed a product that treats diseases in plants and animals. It was incorporated into a cream for human use and marketed under the brand name Accilion.

MODI was incorporated in Delaware on February 7, 2006, but did not hold its first board of directors meeting until February 14, 2012. John was elected president and chairman of the board, Patrick was elected chief executive officer, and Robert Fritzges was elected secretary and treasurer. The board's second meeting was March 5, 2012. Fritzges was appointed chief operating officer (COO). Cebert was in attendance at the second meeting, but had not been present at the first. MODI holds the U.S. patent for Accilion.

Kennedy and Fritzges formed Axtel Scientific, Inc. in 2012, with the intent of commercializing Accilion. MODI licensed the Accilion patent to Axtel. Les Hamasaki created the JW Kennedy Foundation (Foundation) to provide Accilion to patients in need. He funded the Foundation himself.

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[1] For clarity, we refer to the Kennedy brothers by their first names and use their surname to refer to them collectively. We omit the honorific "Mr." since all parties are male.

In a telephone call in late December 2011 or early 2012, John orally promised the presidency of MODI to Cebert.[2] The offer was never reduced to writing and was accepted in a January 2012 telephone conversation between the two men. The offer also called for Cebert to receive 600,000 shares of MODI as well as a monthly salary that would increase over time. However, the salary would not be paid until the company started making money. Cebert never received a paycheck from the company.

Cebert created a website, logo, and label for MODI. In August or September 2012, Cebert drafted a business plan that acknowledged that John was the president of MODI. On March 29, 2013, John sent an e-mail to Fritzges, Kennedy, and Cebert in which he referred to Cebert as president of MODI. On September 17, 2014, Cebert sent John and Patrick an e-mail in which he acknowledged the end of his involvement with Accilion, but expressed his willingness to repair the business relationship in the future.[3]

While working with MODI, Cebert collected and stored data from patient trials of Accilion in a database he created. John applied for a patent for Accilion in Russia. In October 2014, the Russian patent office informed John that if he did not submit

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[2] Because this issue was resolved on summary judgment, we state the facts in the light most favorable to plaintiff Cebert. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Much of this information comes from the deposition of Cebert. John testified in his deposition that he never intended Cebert to be president of MODI or be paid.

[3] Cebert treats September 17, 2014 as the last day of his employment with MODI. Clerk's Papers at 515.

experimental data by November 7, 2014, his patent application would be deemed abandoned. John in turn asked Cebert to provide him with the data Cebert had been tracking. Cebert did not turn over any data. On November 2, John again requested that Cebert provide him with the data. Cebert again failed to turn over any data. As a result, the patent deadline was not met. Subsequently, Fritzges informed Cebert that the patent application had been abandoned.

Cebert introduced his friend Mike Noder to Patrick. Noder paid Axtel $19,000 for a batch of Accilion. Noder then created Advanced Mineral Compounds, LLC (AMC), whose purpose was to distribute Accilion. In January 2015, counsel for AMC and Noder sent letters to Fritzges and Les Hamasaki. The letters asserted that AMC had exclusive rights to market, sell, and distribute Accilion. The letters instructed MODI, Axtel, and the Foundation to cease and desist from those activities. Cebert assisted Noder and his counsel in preparing the letters.

Cebert filed this lawsuit on February 16, 2016. He alleged fraud, breach of contract, promissory estoppel,[4] quantum meruit, and unlawful withholding of wages under RCW 49.48.010. The defendants filed counterclaims against Plaintiffs for fraud,[5] conversion, misappropriation of trade secrets, and tortious with business expectancy.

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[4] Cebert's promissory estoppel claim is not at issue on appeal.
[5] The court dismissed the fraud claim pursuant to CR 50.

The defendants eventually sought summary judgment on all of Cebert's claims, arguing that they were barred by the statute of limitations and the statute of frauds. The court concluded that the claims had all accrued in 2012 and were barred by the three year statute of limitations period. The case proceeded to jury trial on the defendant's counterclaims.

The jury found Cebert liable for conversion, misappropriation of trade secrets, and tortious interference with business expectancies. The jury also found that Cebert's misappropriation of trade secrets was willful and malicious. Pursuant to the verdicts, the court awarded the defendants $428,500 in compensatory damages, $15,000 in exemplary damages, and $191,582.50 in attorney fees.

Cebert timely appealed to this court.[6] A panel heard oral argument of the case.

ANALYSIS

Cebert challenges the dismissal of his claims at summary judgment as well as the judgment entered against him. We address first the propriety of the summary judgment before turning to his claims that the mandatory joinder ruling requires retrial of the defendants' case and his allegation that evidentiary errors also require a new trial.

[6] Due to Axtell filing for bankruptcy, Cebert's appeal was stayed against Axtell. Our commissioner denied Cebert's request to stay the remainder of the appeal. *See* Comm'r's Ruling (Mar. 25, 2019).

Summary Judgment

Cebert argues that questions of material fact exist concerning the accrual of his claims that require reversing the statute of limitations ruling. The defendants contend that the statute of limitations barred all of Cebert's claims and that the statute of frauds also barred them. After discussing the standards of review, we will briefly address the statute of frauds argument before turning to the individual causes of action.

When considering an appeal from a summary judgment order of dismissal, an appellate court will review the ruling de novo and consider the same evidence heard by the trial court, viewing that evidence in a light most favorable to the party responding to the summary judgment. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Id.*; *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000); CR 56(c).

A defendant moving for summary judgment on statute of limitations grounds must show an absence of fact as to when the claims accrued. *Malnar v. Carlson*, 128 Wn.2d 521, 530, 910 P.2d 455 (1996); *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 514, 983 P.2d 1193 (1999). "A cause of action accrues when a party has a right to apply to a court for relief." *Malnar*, 128 Wn.2d at 529.

RCW 4.16.080(3) provides a three year statute of limitations for claims based on express or implied contracts. RCW 4.16.080(4) provides for a three year statute of

limitations for claims based on fraud; the period does not begin to run until the fraud is discovered, or should have been discovered. Both parties agree that each of Cebert's causes of action is subject to a three-year limitations period.

Cebert's claims revolve around three promises: (1) Cebert would be president of MODI, (2) Cebert would receive shares of MODI, and (3) Cebert would receive a salary. None of these promises were in writing.

Defendants argue that because the agreement was expected to take more than one year to be performed, the statute of frauds requires dismissal of all claims. A contract that cannot be performed within one year is void unless in writing. RCW 19.36.010(1). "A contract for continuing performance that fails to specify the intended duration is terminable at will and is therefore outside of the statute of frauds." *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wn. App. 52, 73, 199 P.3d 991 (2008).

Cebert's allegations state a case of continuing performance rather than a specified length of time in which to serve as company president. Accordingly, the statute of frauds is inapplicable.

The remaining question is when each cause of action accrued. We address the contentions in the following order: (1) breach of contract, (2) fraud, (3) quantum meruit, and (4) wage withholding.

Breach of Contract. A cause of action for breach of contract accrues upon breach. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 577-578, 146 P.3d 423

(2006). The discovery rule does not generally apply. *Id.* at 578; *Kelly v. Allianz Life Ins. Co. of N. Am.*, 178 Wn. App. 395, 399, 314 P.3d 755 (2013).

By the March 2012 board meeting, Cebert knew that MODI was up and running, that John was serving as president, and that no shares of stock had been issued to him. The contract had been breached. Cebert filed this action four years later. It was untimely. The trial court correctly dismissed the breach of contract action.

The failure of the breach of contract theory removes the presidency and stock share issues from the case. The remaining theories all raise the question of whether Cebert was employed by MODI.

Fraud. A cause of action for fraud accrues when "the aggrieved party discovers or could have discovered all elements of the claim." *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 517, 63 P.3d 153 (2002). There are nine elements of a fraud claim:

> (1) a representation of existing fact, (2) that is material, (3) and false, (4) the speaker knows of its falsity, (5) intent to induce another to act, (6) ignorance of its falsity by the listener, (7) the latter's reliance on the truth of the representation, (8) her right to rely on it, and (9) consequent damage.

Baker Boyer Nat'l Bank v. Foust, 6 Wn. App. 2d 375, 381 & n.4, 436 P.3d 382 (2018).

In his 2017 deposition, John testified that he never intended to make Cebert president or compensate him. Cebert now cites the discovery of that information as the final piece of the puzzle that started the statute of limitations running. However, by then Cebert had already filed in 2016 both the initial complaint and an amended complaint that

each stated fraud as the first cause of action. He did not discover his basis for action at the 2017 deposition.[7] Instead, he had based it on the 2011 telephone promise and subsequent failure to pay a monthly salary.[8] The material misrepresentation that he alleged was the basis for his fraud claim that occurred four years before he filed his first fraud allegation.

The fraud claim was untimely filed. The trial court correctly dismissed the contention.

Quantum Meruit. This "is the method of recovering the reasonable value of services provided under a contract implied in fact." *Young v. Young*, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008). "[T]he elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work." *Id.* at 486.

We agree with Cebert that a question of fact exists concerning when this claim accrued. Cebert alleges that he performed work for the defendants at their request, expected to be paid for it, and defendants knew he expected to be paid. He was working up to his departure in the fall of 2014, and even after he left Kennedy sought patient trial information from him in support of the Russia patent application.

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[7] The deposition testimony is still useful information about Kennedy's intent.

[8] If he believed that payment was properly withheld until the company had a stable income, he has not identified the date when that occurred. If that has not yet been achieved, then payment is not even yet owing and the cause of action also fails for that reason.

Recovery under this cause of action depends upon work performed with expectation of pay. The evidence supports the view that, within three years of bringing his claim, Cebert performed work that both parties believed he would be paid for. Accordingly, a factual question exists that should have prevented summary judgment.

The trial court erred in dismissing this claim. We reverse.

Wage Withholding. Washington law makes it unlawful for an employer to withhold an employee's wages.

> When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him or her on account of his or her employment shall be paid to him or her at the end of the established pay period.

RCW 49.48.010.

Under this statute, Cebert's departure from the company in September 2013 meant that the paycheck for that period was due on the normal payment date. This claim was filed within three years of the termination of employment. Accordingly, the claim was timely as to at least the final paycheck.[9]

The trial court erred in granting summary judgment on this claim. Again, we reverse.

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[9] The parties have not briefed the topic of whether monthly pay became due and owing each month that it went unpaid. We therefore do not express any opinion concerning the potential application of the statute of limitations to any earlier pay periods under either of Cebert's surviving theories.

Compulsory Counterclaims

The first of the trial-related arguments concerns a contention that the defendants' counterclaims need to be retried since some of the plaintiff's claims now must go to trial. He cites no relevant authority in support of the argument.

CR 13(b) permits counterclaims that do not arise out of the same action as the plaintiff's claims to be pleaded and joined. In contrast, CR 13(a) requires a defendant to assert a counterclaim arising from the same transaction or occurrence that is the subject of plaintiff's claims. A defendant who fails to do so is barred from bringing the claim in a subsequent action. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 863, 726 P.2d 1 (1986). "The considerations behind compulsory counterclaims include judicial economy, fairness and convenience." *Id.* at 866.

CR 13 is a rule of *pleading* requirements, not of trial practice. Understandably, no case law has been cited by the parties suggesting that the wrongful separation into multiple trials of compulsorily joined claims requires a retrial. That is unsurprising since compulsory counterclaims may be tried separately. CR 42(b). Even if the claims were compulsory, a question we do not decide, they were not required to be heard together.[10]

[10] While Cebert's claims involved his time working for the defendants, their claims against him involved his activities after he terminated his relationship with them.

Cebert might still prevail if he could demonstrate that the wrongful summary judgment deprived him of the opportunity to fairly contest the counterclaims at trial.[11] He has not identified any evidence that was erroneously excluded because of the summary judgment nor made any effort to explain how he was prejudiced. He simply has not shown error.

This argument is without merit.

Evidentiary Arguments

Cebert next argues that the trial court twice erred in admitting evidence and also that the defendants did not establish damages. These claims, too, are without merit. After noting the standards governing review, we address each of the evidentiary challenges before turning to the evidentiary sufficiency claim.

This court reviews evidentiary rulings for abuse of discretion. *Hoskins v. Reich*, 142 Wn. App. 557, 566, 174 P.3d 1250 (2008). A court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Harmless error is not grounds for reversal. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Error is harmless unless it

[11] Any effort to apply res judicata or collateral estoppel at a second trial will have to carefully consider evidence that might not have been relevant at the first trial or that plaintiff would not have had a fair opportunity to develop.

affected the outcome of trial. *Id.* Improperly admitted evidence is harmless if it is cumulative of other evidence. *Reich*, 142 Wn. App. at 570.

Cease and Desist Letters. Cebert contends that the court erred in admitting the cease and desist letters authored by AMC's counsel. He argues that the letters were not relevant and also constituted hearsay.

Relevant evidence is admissible, while irrelevant evidence is not. ER 402. Evidence is relevant if it makes a material fact more or less probable. ER 401. These letters were relevant to show that AMC, assisted by Cebert, was interfering with MODI's efforts to market Accilion.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(a)-(c). Unless an exception applies, hearsay is inadmissible. ER 802.

The letters were not hearsay because they were not offered to prove the truth of the assertions therein (*i.e.*, that AMC had exclusive rights to market Accilion). Instead, they were offered to prove that the letters were sent. The letters did not constitute hearsay. The alleged error also was not prejudicial. The exhibits duplicated testimony of Cebert and other witnesses and could not have been prejudicial.

The trial court did not abuse its discretion.

Handwritten Notes. Cebert next argues that the court erred in admitting two notes written in his own hand that referenced his claims against the defendants. He argues the notes were not relevant because they related to his dismissed claims.

The exhibits were relevant to the defendants' claim that Cebert was attempting to extort money by withholding the patient data. Accordingly, they were properly admitted. In addition, the notes were not prejudicial. The jury knew that Cebert's claims had been resolved and they were directed not to speculate. "Jurors are presumed to follow the court's instructions." *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). Cebert was free to talk about the notes, but declined to do so.

Once again, the court did not abuse its discretion in admitting the evidence. There was no error.

Proof of Damages. The final evidentiary challenge is to the sufficiency of damages offered by the defendants. Cebert argues that there was no certainty that the patent would have been granted. However, the claim sought to recover the costs of duplicating the patient data and reapplying for the Russian patent. The evidence supported that claim.

"The purpose of tort damages is to place the plaintiff in the condition he would have been in had the wrong not occurred." *Kim v. O'Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 61 (2006). Claimant must prove damages with reasonable certainty. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993). "[O]nce the [plaintiff] establishes the fact of loss with certainty (by a preponderance of the evidence), uncertainty regarding the amount of loss will not prevent recovery." *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 715, 315 P.3d 1143

(2013) (alteration in original) (quoting *Lewis River*, 120 Wn.2d at 717). Whether plaintiff proved loss is a question of fact. *Id.*

The defendants proved their loss with reasonable certainty. They presented the e-mail from their patent attorneys explaining that their Russian patent application would be deemed abandoned if they did not submit patient data by November 7, 2014. John testified that they failed to meet that deadline. Cebert testified that Fritzges informed him that the patent had been abandoned. This evidence was sufficient for the jury to find that the defendants suffered a loss.

They also presented sufficient evidence of the damages suffered by abandoning the Russian patent application. John testified that he would have to spend years and money on conducting studies, collecting data, and reapplying for the patent in order to return the defendants to the position they were in when the patent was abandoned. They proved the fact of damages; that they did not prove their damages with exactitude does not bar recovery.

The evidence supported the Russia patent claim.

Attorney Fees

The respondents seek attorney fees on appeal in accordance with RCW 19.108.040. The statute permits an award of fees for willful and malicious misappropriation of trade secrets. In response to the jury's finding, the trial court awarded attorney fees to the defendants.

A party prevailing in a trade secrets case is entitled to attorney fees both at trial and on appeal. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 424, 58 P.3d 292 (2002). Here, the jury found that Cebert willfully and maliciously appropriated trade secrets. The defendants are thus entitled to their attorney fees for the successful defense of that claim on appeal. *Thola v. Henschell*, 140 Wn. App. 70, 90, 164 P.3d 524 (2007). However, the trade secrets attorney fee statute does not purport to authorize a fee award for other claims. We conclude that the defendants may recover only their attorney fees related to the trade secrets issue.

Our commissioner will consider a timely request for attorney fees. Any request should relate to the briefing of the trial issues rather than those related to the summary judgment proceedings.

Affirmed in part and reversed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A.C.J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

RCW 4.16.080

Actions limited to three years.

The following actions shall be commenced within three years:

(1) An action for waste or trespass upon real property;

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his or her official capacity and by virtue of his or her office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subsection shall not apply to action for an escape;

(6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his or her custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty, or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

[2011 c 336 § 83; 1989 c 38 § 2; 1937 c 127 § 1; 1923 c 28 § 1; Code 1881 § 28; 1869 p 8 § 28; 1854 p 363 § 4; RRS § 159.]

NOTES:

Reviser's note: Transitional proviso omitted from subsection (6). The proviso reads: "PROVIDED, FURTHER, That no action heretofore barred under the provisions of this paragraph shall be commenced after ninety days from the time this act becomes effective;".

M CASEY LAW

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Comments:

Amended to add the Appendix. Payment is being sent by check to the Supreme Court Clerk as discussed with that office yesterday.

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