Court of Appeals Cause No. 48233-9-II

NO: 94916-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM NEWCOMER, Respondent

v.

MICHAEL COHEN and JULIE MCBRIDE, Appellants

ANSWER TO PETITION FOR REVIEW

Talmadge/Fitzpatrick/Tribe
Philip A. Talmadge, WSBA #6973
phil@tal-fitzlaw.com

2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, Washington 98126
Telephone: (206) 574-6661
Facsimile: (206) 575-1397

Smith Alling, P.S.
Douglas V. Alling, WSBA #1896
doug@smithalling.com
Russell A. Knight, WSBA #40614
rknight@smithalling.com

1501 Dock Street
Tacoma, Washington 98402
Telephone: (253) 627-1091
Facsimile: (253) 627-0123

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. IDENTITY OF ANSWERING PARTY

Respondent William Newcomer.

II. STATEMENT OF THE CASE

A. Overview.

Cohen's petition for review is a repetition of the factual arguments made to and rejected by the jury and then repeated to and rejected by the Court of Appeals. The Court of Appeals' unpublished Opinion properly concludes that sufficient evidence was presented to the jury to support its verdict.

Cohen's arguments haven't improved with age. Cohen must now demonstrate a basis for review under RAP 13.4, which he cannot do. The arguments on questions of fact about the statute of limitations and the jury's calculation of damages have been resolved by the jury, and the Court of Appeals found sufficient evidence to support the jury's verdict.

Newcomer respectfully asks this Court deny the petition for review.

B. Restatement of relevant facts.

Cohen's petition for review contains a lengthy recitation of facts that repeats the facts he argued to the jury and Court of Appeals. Many of the issues he characterizes as undisputed, were in fact disputed factual questions the jury resolved.

Rather than repeat the facts here, Newcomer adopts the Facts section of the Court of Appeals' Opinion, which accurately describes the disputed facts presented to the jury. Op. pp. 2-14.

C. Procedural history.

The arguments Cohen makes in his petition for review have been repeatedly rejected.

On August 25, 2015, the trial court denied Cohen's motion for summary judgment seeking dismissal of Newcomer's Washington State Securities Act ("WSSA") claim. CP 716.

On September 15, 2015, at the close of Newcomer's case in chief, the trial court denied Cohen's motion for a directed verdict seeking dismissal of Newcomer's WSSA claim. CP 1579.

On September 21, 2015, the jury returned its verdict specifically finding that Newcomer brought this action within the relevant statute of limitations and finding that Cohen violated the WSSA in connection with all four sales of securities from Cohen to Newcomer. The jury awarded damages to Newcomer consistent with the evidence and the WSSA. CP 1659.

On October 9, 2015, the trial court entered findings of fact and conclusions of law and judgment on the verdict in favor of Newcomer. CP 1796.

On November 6, 2015, the trial court denied Cohen's motion for reconsideration, motion for judgment as a matter of law, and motion for a new trial. CP 2300.

On May 16, 2017, Division II of the Court of Appeals issued its unpublished Opinion affirming the trial court and judgment.

No party sought publication of the Opinion.

On July 28, 2017, the Court of Appeals denied Cohen's motion for reconsideration.

III. ARGUMENT

A. Cohen's argument that the Court of Appeals' Opinion "applies an actual notice standard, not an inquiry notice standard" to the Statute of Limitations is frivolous. The Opinion clearly applies the inquiry notice standard.

Cohen's petition for review argues that the Court of Appeals' Opinion "errs by not considering whether, as a matter of law, Newcomer was on 'notice of facts sufficient to prompt a person of average prudence to inquire further'" to trigger the statute of limitation. PFR p. 9 (quotation in original). Cohen argues that the Opinion "applies an actual notice standard, not an inquiry notice standard." *Id*.

Such a reading of the Opinion is objectively incorrect and frivolous. First, citing to Jury Instruction No. 14, the Opinion sets out the

undisputed inquiry notice standard to trigger the statute of limitations. It states:

> The determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury. We review factual determinations under a sufficiency of the evidence standard, that is, evidence to persuade a fair minded person of the truth of the declared premise.
>
> At trial, the court instructed the jury on the statute of limitations for WSSA claims:
>
> If one has notice of facts sufficient to prompt a person of average prudence to inquire further, the person is deemed to have notice of all facts which reasonable inquiry would disclose . . .
>
> Plaintiff has the burden of proof to show that he did not discover, or with exercise of reasonable care could not have discovered, the facts giving rise to his claims three years before January 13, 2014.

Op. pp. 15-16 (emphasis added, internal citations omitted).

The Opinion objectively sets out the inquiry notice standard. In doing so, the Court of Appeals cites to this court's opinion in *Winbun v. Moore*, 143 Wn.2d 206, 219, 18 P.3d 576, 582 (2001). *Winbun* makes clear that the "determination of when a plaintiff discovered or through the exercise of due diligence should have discovered the basis for a cause of action is a factual question for the jury." *Winbun*, 143 Wn.2d at 213. The role of an appellate court is simply to determine whether sufficient

evidence was presented to the jury that, if believed, supports the jury's verdict. *Id.* Contrary to Cohen's bold assertion, the Opinion in no way suggests an actual notice standard applies to the statute of limitations for a WSSA claim.

Next, the Opinion correctly analyzed the facts presented to the jury to determine whether sufficient evidence exists to support the jury's verdict under the inquiry notice standard. The Opinion recites the evidence that Cohen misrepresented his capital contribution up through the fall of 2013 – just a few months before the complaint was filed.

> The jury heard that Newcomer repeatedly inquired of Cohen who repeatedly failed to disclose that his initial $800,000 capital contribution was not fully made in cash. Cohen continued to misrepresent the character of his initial capital contribution as late as the fall of 2013, after Newcomer hired an attorney to investigate.

Op. p. 16.

The Opinion directly addresses the evidence presented to the jury that showed when Newcomer did inquire further, Cohen provided him with incomplete and misleading information. The Opinion provides, "In 2009, Newcomer received an accounting document of Point Ruston loans, but it excluded the interest-free loan at issue. Cohen failed to disclose that information until after litigation commenced." Op. pp. 16-17.

At trial, the undisputed evidence – presented by Cohen's own bookkeeper – showed that the accounting Cohen provided to Newcomer in 2009 was objectively false. RP 681. Cohen didn't provide the correct information until he was forced to do so in discovery in 2014, after the lawsuit was filed. *Id*. Therefore, when Newcomer did inquire further, Cohen continued to lie to Newcomer about his capital contribution.

With respect to the question of when Newcomer discovered or could have discovered Cohen's misrepresentations and omissions, the Court of Appeals acknowledged that "[t]he fact that Cohen presented contrary evidence does not mean that insufficient evidence supports the jury's verdict." Op. p. 17. The Opinion properly notes, "[w]e do not review a jury's credibility determinations. *Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 42, 931 P.2d 911 (1997)." Op. n. 17 (citation in original).

Because the Court of Appeals accurately set out the inquiry notice standard and conducted an analysis of the facts under it, this Court should decline Cohen's petition for review on the basis of Cohen's claim that the Court of Appeals applied an actual notice test.

B. Cohen's argument that Newcomer was on inquiry notice was rejected by the trial judge and jury. The Court of Appeals properly concluded that sufficient evidence was presented to the jury to support its verdict.

Cohen's second argument that "the Opinion also conflicts with Court of Appeals precedent by not ruling that Newcomer was on inquiry notice as a matter of law by October 2009" is not a basis for review by this Court. PFR p. 12.

Whether Newcomer exercised diligence to discover Cohen's misrepresentations and omissions is a question of fact. "Under the discovery rule, the statute of limitation for [security fraud] actions begins only when the aggrieved party discovers, or should have discovered by due diligence, the fact of fraud or securities fraud and sustains some actual damage as a result." *Ives v. Ramsden*, 142 Wn. App. 369, 385, 174 P.3d 1231 (2008) (italics removed). The question of whether the defrauded plaintiff exercised "due diligence is ordinarily a question of fact." *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000); *see also Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 500, 389 P.3d 617 (2016) ("[t]he diligence element of [the discovery rule] raises a question of fact"); *Alexander v. Sanford*, 181 Wn. App. 135, 169, 325 P.3d 341 (2014) ("Whether the discovery rule applies to toll the statute of limitations is a question of fact...") (quotes omitted); *Hipple v. McFadden*,

161 Wn. App. 550, 561, 255 P.3d 730, 735 (2011) ("The application of the discovery rule is generally a factual question.")

Courts "strongly presume the jury's verdict is correct." *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005). Still, Newcomer responds to Cohen's argument on disputed facts here in an abundance of caution.

Cohen's argument that Ex. 74, an October 14, 2009 email from Newcomer to Cohen, demonstrated that Newcomer was on inquiry notice is unpersuasive. The email does not concern the core misrepresentations Cohen made: 1) failing to invest $350,000 in cash as agreed, 2) secretly borrowing $360,000 to attempt to cover up the misrepresentation about the initial capital contribution, and 3) failing to disclose the $400,000 founder's fee. Instead, the October 2009 email addresses interest rates Cohen was charging, which was not an issue submitted to the jury. To the extent that the email is a request for information, it is undisputed that Cohen did not voluntary produce any information.

The jury's finding that Newcomer was not on inquiry notice is also supported by the evidence that when Newcomer did ask for additional information, Cohen continued to lie to him. A plaintiff's lack of knowledge of the fraud supporting a claim will be excused where the

plaintiff can demonstrate an impediment to his investigation. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998, 1005 (2000).

Here, when Newcomer attempted to inquire about the facts, Cohen continued to lie to him. In May 2009, Cohen provided Newcomer with a false accounting which again misrepresented Cohen's initial capital contribution, and hid the secret loan Cohen used to cover it up. RP 681. In October 2009, When Newcomer asked for an audit, Cohen failed to comply.

As late as the fall of 2013 – just a few months before the lawsuit was filed, Cohen again lied to Newcomer about his initial capital contribution. RP 588.

The inquiry before the Court of Appeals was whether the trial record contains evidence that when viewed in the light most favorable to the non-moving party, was sufficient to sustain the jury's verdict. *Indust. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990). The Court of Appeals properly concluded that Newcomer presented sufficient evidence. The fact that Cohen disagrees with that analysis cannot form the basis for review by this Court.

C. The damages the jury awarded are consistent with the WSSA regardless of whether Newcomer still owned the securities or had disposed of them at the time of trial.

Cohen's request that this Court accept review to clarify the legal effect of disposing of securities is based on his incorrect statement that the issue of ownership of securities was an undisputed fact at trial.

Under RCW 21.20.430, if a defrauded investor still owns the offending securities, he may sue for the consideration he paid for the securities, plus interest at eight percent per annum and attorney's fees. If the defrauded investor had disposed of the securities, he may sue for consideration he paid for the securities less the actual price he received when he sold or disposed of the securities, plus interest at eight percent per annum and attorney's fees. *See Garretson v. Red-Co., Inc.*, 9 Wn. App. 923, 929, 516 P.2d 1039 (1973).

At trial, the court instructed the jury:

> If you find for Plaintiff on the claims under the Washington State Securities Act, then you must determine the amount of damages, if any. If the Plaintiff still owns the security, the damages are the amount Plaintiff paid in connection with the purchase of the security. Plaintiff is not required to show that the untrue statement or omission actually caused them to incur losses.
>
> If the Plaintiff no longer owns the security, the amount of damages are the amount for which the security was initially purchased less the value of the security when Plaintiff disposed of it.

CP at 1654 (Instr. 15)[1];

The Court of Appeals' Opinion correctly notes that "Cohen does not argue that the instruction is an incorrect statement of the law." Op. p. 21. Instead, Cohen argued that the trial court's instruction to the jury should have only included the measure of damages where the investor no longer owns the security.

The Court of Appeals' Opinion concludes that the trial court did not err in giving the instruction because the instruction is a correct statement of law, was supported by the evidence and allowed each party to argue their theory of the case. Op. pp. 21-22. Evidence presented at trial showed a Newcomer owned a portion of the securities at the time of trial and had disposed of others. In giving the complete statutory measure of damages, the trial court noted:

> I am including the delineation between if you own it, as opposed to if you don't own it. I think it is consistent with the statute, and I think it's consistent with the practical effect of what we have here. We've got securities that he does own and then securities that he has disposed of. So, I think it's important, for clarification, to indicate that there's a difference between paragraphs 2 and 3 [of Instruction No. 15].

RP 1186 (emphasis added).

[1] The jury was not asked to calculate interest at eight percent (8%). By stipulation of the parties, the court awarded the proper interest upon presentation of judgment on the verdict.

The damages the jury awarded are consistent with the WSSA, regardless of whether he still owned the securities. For each sale of securities, the jury awarded Newcomer the consideration he paid for the security. Therefore, if he still owned the security, the damages were correct.

If he transferred the security to an entity, the damages were also correct. *See Garretson v. Red-Co., Inc.*, 9 Wn. App. 923, 929, 516 P.2d 1039 (1973) ("Our conclusion is that 'value of the security' in RCW 21.20.430(1) means the actual price which the purchaser receives for the resale of the stock, and the measure of his damage is the difference between the acquisition price and the resale price."); *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005), ("The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact."). Where the defrauded plaintiff transferred the security but received no payment for doing so, nothing should be subtracted from the price the plaintiff paid for the security when calculating damages.

Newcomer presented evidence that when a portion of the securities were transferred from his individual name to an entity he controlled, he did not receive any payment from the entity or any other source. RP 568. Therefore, even if the disputed issue of fact was undisputed as Cohen

believes, the jury's verdict is still consistent with the proper measure of damages. This factual argument cannot not the basis for review by this Court.

D. WSSA and RAP 18.1 provide for an award of attorney's fees in answering this petition.

RCW 21.20.430(1) provides for an award of reasonable attorney's fees and costs to a defrauded investor who prevails on a WSSA claim. "Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well." *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). The Court of Appeals awarded Newcomer his reasonable attorney's fees and costs incurred on appeal. Op. p. 24.

RAP 18.1(j), provides "If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. Therefore, Newcomer respectfully requests an award of attorney's fees and costs incurred in answering this petition.

IV. CONCLUSION

Cohen's petition for review does not meet any of the requirements of RAP 13.4(b) governing this Court's acceptance. Instead, Cohen's argument is a repetition of arguments based on questions of fact that have

been rejected eight times: Cohen's 1) motion for summary judgment, 2) motion for a directed verdict, 3) argument to the jury, 4) motion for reconsideration, 5) motion for a judgment as a matter of law, 6) motion for a new trial, 7) argument to the Court of Appeals, and 8) motion for reconsideration to the Court of Appeals.

Newcomer respectfully asks this Court to deny Cohen's petition for review and award him reasonable attorney's fees and costs incurred in answering the petition.

Respectfully submitted,

TALMADGE/FITZPATRICK/TRIBE
Philip A. Talmadge

SMITH ALLING, P.S.
Douglas V. Alling
Russell A. Knight

By: /s/ Russell A. Knight
Russell A. Knight
Attorneys for Respondent
WSBA No. 40614

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2017, I served a true and correct copy of the foregoing document upon counsel of record, via email to the following counsel of record:

Stellman Keehnel at *stellman.keehnel@dlapiper.com*

Andrew Escabar at *Andrew.escobar@dlapiper.com*

/s/ Lori Avery
Lori Avery, Paralegal to
Douglas V. Alling and Russell A. Knight

SMITH ALLING, P.S.

September 27, 2017 - 1:57 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94916-6
Appellate Court Case Title:	William Newcomer, et al. v. Michael Cohen, et al.
Superior Court Case Number:	14-2-05136-6

The following documents have been uploaded:

- 949166_Answer_Reply_20170927135425SC369712_0028.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was pldg answer to petition for review 09.27.17.pdf

A copy of the uploaded files will be sent to:

- alling@smithalling.com
- andrew.escobar@dlapiper.com
- lavery@smithalling.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- stellman.keehnel@dlapiper.com

Comments:

Sender Name: Julie Perez - Email: julie@smithalling.com
Filing on Behalf of: Russell Andrew Knight - Email: rknight@smithalling.com (Alternate Email:)

Address:
1501 Dock Street
TACOMA, WA, 98402
Phone: (253) 627-1091

Note: The Filing Id is 20170927135425SC369712