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No. 69432-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

HARRY and BETTY MAY CORLISS, husband and wife; TIMOTHY
CORLISS; and SCOTT CORLISS, as individuals and derivatively
on behalf of Washington Rock Quarries,

Plaintiffs/Appellants,

v.

LARRY P. HUGHES and JANE DOE HUGHES, husband and wife
and their marital community; HARRY HART and BETH HART,
husband and wife and their marital community,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL HEAVEY

BRIEF OF APPELLANT

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APPELLANT'S BRIEF
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I. ASSIGNMENTS OF ERROR

The trial court erred when it (1) granted Hughes' and Harts' Motions for Summary Judgment (CP 159 and CP 19, respectively); (2) denied Corlisses' Motion for Reconsideration (CP 589); (3) granted Hughes' motion for attorneys fees and costs (CP 584); and (4) granted Harts' motion for reasonable expenses (CP 779).

II. ISSUES PRESENTED

The trial court incorrectly determined that no genuine issues of material fact existed when the trial court granted Hughes' and Harts' motions for summary judgment. The trial court incorrectly decided as a matter of law that this action was barred because each Corliss had discovered facts more than three (3) years prior to February 8, 2012, the date of filing this case, that were sufficient to bar all of their independent causes of action. (CP 828) In addition, the trial court improperly awarded Hughes and Hart their attorneys fees and expenses pursuant to RCW 23B.07.400(4) which provides for an award only if the court finds that the proceeding was "commenced without reasonable cause." (CP 899; 901)

The issues presented on appeal are:

(1) Did the trial court err when it granted summary judgment dismissing all of the Corlisses' separate causes of action on the grounds that a September 2005 letter addressed to Harry Corliss provided each Corliss with facts sufficient to bar their

separate actions on the basis of the three-year statute of limitations?

(2) Did the trial court err when it granted summary judgment dismissing all of the Corlisses' separate causes of action on the grounds that the actions of John Carrosino, an alleged Corliss agent, provided each Corliss with facts sufficient to bar their action on the basis of the three-year statute of limitations?

(3) Did the trial court err again when it failed to find any genuine issue of material fact raised by Corlisses' motion for reconsideration?

(4) Did the trial court err when it awarded Hughes and Hart attorney fees and expenses pursuant to RCW 23B.07.400(4) which requires a finding "that the proceeding was commenced without reasonable cause."

The answer to each question is YES. Under the applicable standard for summary judgment, when all facts are construed in the light most favorable to each Corliss, summary judgment of dismissal was improper.

III. STATEMENT OF THE CASE

A. Washington Rock Quarries, Inc.'s Corporate Structure and Business Activity.

Years ago, Washington Rock Quarries, Inc.'s ("WRQ") stock was owned 50 percent by Harry Hart ("Hart") and 50 percent by a Mr. Duggan. (CP 453) In 1993, the Corlisses and Pat Hughes

("Hughes") purchased all of Mr. Duggan's WRQ stock. (CP 453) Mr. Duggan's WRQ shares were divided so the WRQ ownership became: Hughes - 25 percent; Tim Corliss ("Tim") - 12.25 percent; Scott Corliss ("Scott") - 12.25 percent; and Harry Corliss ("Harry") - 0.50 percent. After 1993 Hart continued to own the remaining 50 percent of WRQ's shares. (CP 453) These WRQ stock percentages have remained unchanged since 1993. (CP 453) Each Corliss owns his stock as an individual. The Corlisses do not own their stock through a partnership or in any other capacity. (CP 400 and 453)

Since 1993, Hart has been WRQ's President, and Hughes has been the Secretary/Treasurer. Hughes, Hart and Hart's wife have held three of the four WRQ Board of Director seats. (CP 453)

From 1993 to 2004, Harry was on WRQ's Board and Scott was WRQ's Vice-President. Harry's health and mental capacity started to deteriorate by 2004. As a result, Scott took his father, Harry's, place on WRQ's Board. (CP 453; 460)

WRQ has always been the lessee of the King Creek Pit (sand and gravel) and the Kapowsin Quarry (rock) (collectively "properties"). WRQ's only business is mining sand, gravel and rock at the properties and selling it to third parties. WRQ pays royalties to its landlord for the minerals removed from the properties.

International Paper ("IP") was the landlord and owned both properties until 2005. In June 2005 the properties were secretly purchased by Rainier Resources, LLC ("RR"). RR was formed in June 2005 by Hughes and Hart for the sole purpose of purchasing the properties. Next, Hughes and Hart secretly amended the King Creek lease between WRQ and RR (to the financial benefit of RR) (CP 361) and then they re-permitted the RR owned King Creek pit (CP 366) and charged WRQ for the costs of the re-permitting. (CP 457)

B. The Corlisses Sued Because a Corporate Opportunity was Wrongfully Usurped.

The gist of the Corlisses' action, brought on behalf of themselves and WRQ, is that Hughes and Hart wrongfully usurped a corporate opportunity by using RR to secretly purchase the properties from IP.¹ The Corlisses were never given any notice of the extended negotiations or the actual purchase. WRQ was never presented with the opportunity to purchase the properties nor were the material terms of this transaction ever disclosed to WRQ.

The lengthy details of Hughes' and Harts' secret scheme to usurp this corporate opportunity for themselves without offering or disclosing it to the Corlisses or WRQ were laid out in considerable detail for the trial court (CP 183-190; 400-408) and supported by

¹ The Corlisses' Complaint also alleged separate claims for negligent misrepresentation and breach of fiduciary duty. See CP 1.

detailed declarations. (CP 452; 462). Those facts will not be repeated in detail here because they were not contested at the trial court level.

The Corlisses presented the trial court with a compelling and unchallenged factual record, plus extensive legal authority, of an egregious violation of the corporate opportunity doctrine. Those facts, which create clear liability under the law, must be accepted as true at this stage of the proceedings. As such, the ultimate question for this court is whether Hughes and Harts' conduct should be effectively sanctioned and condoned by their effort to rely on the statute of limitations as a means to avoid clear liability.

C. The Trial Court's Ruling on Hughes' and Harts' Motion to Bar the Corlisses' Action.

Hughes and Hart each filed motions for summary judgment based on the three-year statute of limitations, RCW 4.16.090(4). (CP 19; 159) Hughes' motion focused on a September 2, 2005 letter written by Hughes and to a lesser extent on an inability to financially perform argument.² Harts' motion focused on the role of John Carrosino ("Carrosino"), an employee of Corliss Resources, Inc. ("CRI") and an alleged agent of each Corliss. Neither Carrosino nor CRI are parties to this action.

² Hughes' financially unable to perform argument was addressed in the Corlisses' response (CP 181) and the declarations of Robert Wagner (CP 474) and Jeff Sherwood (CP 467). Hughes' reply was silent on this issue and the argument was abandoned.

After the trial court granted Hughes' and Harts' motions, Corlisses filed a motion for reconsideration. (CP 589) This motion was supported by deposition excerpts attached to the declaration of Christopher Wright. (CP 600)

After the motion for reconsideration was denied, the trial court awarded Hughes and Hart attorney fees and expenses pursuant to RCW 23B.07.400. (CP 899; 901) The trial court never entered any findings of fact or conclusions of law. How the trial court justified or explained this permissive statute's predicate for an award of fees and expenses – "that the proceeding was commenced without reasonable cause" is completely unknown.

D. The Basis of Hughes' and Harts' Statute of Limitations Defenses.

All parties agree that the applicable statute of limitation is RCW 4.16.080(4) – action must be commenced within three (3) years from the date of discovery. This action was commenced on February 8, 2012. The actionable knowledge of each Corliss, if any, prior to February 8, 2009 is the determinative inquiry for this Court.

1. Hughes' September 2, 2005 Letter.

Hughes' motion relied on an untrue statement in a September 2, 2005 letter addressed only to Harry. The untrue statement read:

You should also be aware that I have purchased the gravel pit and the rock quarry from International Paper.³ (Emphasis added)

The properties were not purchased by Hughes. The properties were purchased by RR, a limited liability company owned 50 percent by Hart and 50 percent by Hughes. Hughes argued that his own untrue statement that was never seen by Tim or Scott gave each Corliss sufficient knowledge to trigger the statute of limitations.

2. The Role of Carrosino.

Hart's motion relied on a "casual representation" made to Carrosino at some undisclosed date and time in 2007 that "Pat [Hughes] purchased the pits." Hart argued that this "casual representation" gave each Corliss sufficient knowledge to trigger the statute of limitations. (CP 30)

IV. ARGUMENT

A. Standard for Review.

"The standard of review of an order of summary judgment is de novo and the appellate court performs the same inquiry as the trial court. The court considers the facts and the inferences from the facts in a light most favorable to the non-moving party. The court may [only] grant summary judgment if the pleadings, affidavits and

³ CP 150. Both properties were purchased, not by Hughes, but by RR. Hart was a 50/50 partner in RR.

depositions establish there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."⁴

A material fact is one on which the outcome of the litigation depends.⁵

B. Multiple Questions of Material Fact Exist

Questions of material fact abound with respect to whether the September 2, 2005 letter (CP 150) and/or the activities of John Carrosino triggered RCW 4.16.080(4).

1. Under RCW 4.16.080(4) the Question of When Each Corliss Knew or Should Have Known of the Secret Purchase is a Disputed Question of Material Fact Sufficient to Preclude the Entry of Summary Judgment.

As stated in *Sherbeck v. Lyman's Estate*:

By the express terms of RCW 4.16.080(4), a cause of action for fraud does not accrue 'until the discovery by the aggrieved party of the facts constituting the fraud.' Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. *Sanders v. Sheets*, 142 Wash. 155, 252 P. 531 (1927). The question of when an aggrieved party discovered or could have discovered such facts is one of fact.⁶ (Emphasis added.)

In *Ives v. Ramsden*,⁷ the trial court granted summary judgment based on RCW 4.16.080(4) and was reversed, just as the

⁴ *Jones v. Allstate Insurance Co.*, 146 Wn.2d 291 (2002). (Internal citations omitted.)

⁵ *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267 (1997).

⁶ *Sherbeck v. Lyman's Estate*, 15 Wn. App. 866, 552 P.2d 1076 (1976).

⁷ *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008).

trial court was reversed in *Crisman v. Crisman*,⁸ another analogous case. The *Ramsden* Court stated:

Ramsden's sole factual argument is that, in June 1996, Ives's son and daughter-in-law were "aghast" when they learned that Ives had invested in limited partnerships with Ramsden. But the trial court rejected this factual contention, finding that Ramsden offered no substantial evidence to support his theory that Ives or the Ives Estate's representative discovered the violations more than three years before he commenced the action in July 1999. **This is a credibility determination not subject to our review.** *Affordable Cabs*, 124 Wash. App. at 367, 101 P.3d 440....Undisputed trial evidence revealed that Ives's son did not investigate his father's investments until after he was appointed personal representative of the estate and, accordingly, could not have known whether the investments had actually damaged the estate until he completed his investigation.⁹

The *Ramsden* Court held that to discover a cause of action, Ives had to learn about the bad acts **and that damages had occurred**. To find that out, the Court said Ives' knowledge could not be obtained until Ives "completed his investigation."

Here, the above case law supports a reversal of the trial court's entry of summary judgment. The Corlisses **never had any knowledge** with which to commence, let alone complete, an investigation.

⁸ *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163 (1997).

⁹ *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008). (Emphasis added.)

Scott unequivocally testified that the first time he learned anything about the secret purchase of the properties was when he had coffee with Hart in April 2009 at Starbuck's in Puyallup. At that meeting Hart deceitfully told Scott that Hughes, and only Hughes, purchased the properties. According to Scott, RR was never mentioned. (CP 458)

Tim unequivocally testified that the first time he learned of Hughes and Harts' secret purchase was sometime after the Starbucks meeting when Scott told him. (CP 464)

Carrosino's unchallenged testimony is that he never told any of the Corlisses about the casual representation. (CP 623-624)

Considering all evidence in the light most favorable to the Corlisses, no knowledge existed until April of 2009 at the earliest. The commencement of this action was well within the three year statutory period set forth in RCW 4.16.080(4) because this action was filed in February 2012. The trial court should have denied the motions for summary judgment.

Scott, Tim and Carrosino's above referenced testimony must be accepted as true because a "credibility determination" is not part of a summary judgment determination. *Ramsden, supra*.

Under established Washington law, summary judgment cannot be granted against any Corliss unless the court determines that there are no questions of material fact. According to

Washington case law, all of the following are questions of fact when dealing with a statute of limitations defense:

- (1) "Under the discovery rule, the cause of action accrues, and the statute of limitation begins to run, when the plaintiff discovers or reasonably could have discovered all the essential elements of the cause of action."¹⁰
- (2) "This right to apply for relief arises when the plaintiff can establish each element of the action."¹¹
- (3) "The question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitation is ordinarily a question of fact."¹²
- (4) "[T]he determination of when a plaintiff suffered actual damages is a question of fact."¹³
- (5) "When the discovery rule applies, a "cause of action does not accrue until a party knew or should have known the essential elements of the case of action – duty, breach, causation, and damages."¹⁴
- (6) "Whether or not a plaintiff has exercised due diligence is generally a question of fact."¹⁵
- (7) "Again, Nick's duty to be diligent relies on the factual determination as to when Nick knew, or should have known, the elements of a cause of action. The question as to when Nick knew is a question of material fact that

¹⁰ *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997). (Citations omitted. Emphasis added.)

¹¹ *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000). (Emphasis added.)

¹² *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998). (Citations omitted. Emphasis added.)

¹³ *Hudson v. Condon*, 101 Wn. App. 866 (2000). (Emphasis added.)

¹⁴ *August v. U.S. Bancorp*, 146 Wn. App. 328, 190 P.3d 86 (2008). (Emphasis added.)

¹⁵ 16 Wash. Prac., Tort Law and Practice, §9.2, citing *August v. U.S. Bancorp*, 146 Wn. App. 328 (2008). (Emphasis added.)

cannot be resolved here. Conclusion. We reverse summary judgment because there are material issues of fact."¹⁶

All seven cases follow the rule that determining the applicability of the statute of limitations is a question of fact. Given the applicable standards for summary judgment stated in these seven cases, when genuine material facts are in dispute, summary judgment based on the time of discovery involving a statute of limitations defense is not proper. In the *August* case the Court reversed a trial court's grant of a summary judgment just like the appellate courts in *Crisman* and *Ramsden* did, and just like this Court should do now.

The record below establishes multiple questions of material fact that make summary judgment inappropriate. Among the relevant questions of material fact are: (1) what facts did **each** Corliss know about Hughes' and Harts' wrongful conduct; (2) when did **each** Corliss discover facts about the wrongful conduct; (3) were the facts **each** Corliss knew about the wrongful conduct sufficient to start the running of RCW 4.16.080 as to that particular Corliss; and (4) once **each** Corliss knew sufficient facts to put that Corliss on inquiry notice, did that particular Corliss exercise reasonable due diligence? Each of these fact inquiries must be made and decided separately and distinctly for **each** Corliss. Stated differently, even if one Corliss, like Harry Corliss, were deemed to

¹⁶ *August v. U.S. Bancorp*, 146 Wn. App. 328 (2008). (Emphasis added.)

have had knowledge prior to February 2009, that factual determination would not justify the dismissal of the separate claims of Scott and Tim.

Each Corliss owns his WRQ stock as an individual. No Washington case law supports the blanket proposition that the knowledge of the father, Harry, is imputed to his sons, Scott and Tim. Similarly, no case law supports the automatic right to impute the knowledge of a son to a brother or a father. The fact that the plaintiffs are related does not ease the required burden of proof that Hughes and Hart must satisfy to prevail on a statute of limitations defense: undisputed evidence that each plaintiff had the required knowledge prior to February 2009.

Under the evidence submitted to the trial court, Hughes and Hart failed to make the necessary showing. Here, there are clear questions of fact as to which Corliss knew what and when. In fact, based on the evidence submitted to the trial court a strong argument exists that Hughes and Hart failed to prove that any Corliss knew anything that would trigger the statute prior to February 2009.

Scott and Tim's sworn declarations, denying any knowledge of the purchase until after April 2009, in and of themselves, were sufficient to defeat Hughes' and Harts' motions for summary judgment. (CP 458; 464) However, even if this Court could find that

contrary to their declarations, both Scott and Tim had some information earlier than April 2009, other questions of fact would still exist – (a) what did they know?, (b) when did they learn it?, (c) how much relevant information did they learn?, (d) did they exercise due diligence in conducting an investigation? and (e) what was the result of that investigation? Given all of these unresolved material questions of fact the trial court erred in weighing the evidence and surmising that knowledge must have existed prior to February 2009.

C. Multiple Questions of Material Fact Exist Involving the September 2, 2005 Letter.

1. Who Actually Received the September 2005 Letter?

The only document Hughes, Hart and each Corliss ever jointly signed is a Buy-Sell Agreement dated June 10, 1993. (CP 576-583) This agreement, at Paragraph 13.2, contains the following instructions for providing notification:

Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be mailed by certified mail...addressed to the parties as follows:

Beth Hart	L.P. Hughes	Harry Corliss, Timothy
11716 141 st St. E.	8865 Overlake Drive	Corliss, Scott Corliss
Puyallup, WA 98374	Bellevue, WA 98004	P. O. Box 1019
		Auburn, WA 98002

While the September 2, 2005 letter (CP 150) was technically not a buy-sell notice, had Hughes followed the notification

instructions he previously agreed to and sent his letter via certified mail to each Corliss at the designated address, there would be no question about receipt by each Corliss. Hughes did none of those things. It is undisputed that Hughes didn't send the September 2, 2005 letter to either Tim or Scott. It is undisputed that Hughes didn't send the letter to the only P.O. Box in WRQ's corporate records for providing notice to each Corliss.

Instead of sending a letter to each Corliss and sending it to the address in the WRQ files, Hughes elected to only send the letter to a different address/post office box: P. O. Box 487, Sumner, WA 98390. There is no evidence in the record as to who lived, owned or worked at P. O. Box 487, Sumner, WA 98390.

Further, while Hughes' letter was apparently addressed to CRI, the letter does not bear a received date or any indication that it was delivered by anyone at CRI to any Corliss. As such, even if it were assumed that someone at CRI got the letter, receipt by CRI is not proof that Harry or any Corliss, let alone each Corliss received the letter after Hughes mailed it.

2. Harry Corliss Did Not See or Read the Letter.

Hughes and Hart presented no evidence that Harry Corliss ever received, saw or read the letter. (CP 150) It is their burden to do so. It is not up to the trial court to supply missing facts or to make presumptions of what the trier of fact should ultimately

decide. Under the circumstances of the mis-addressing of the letter, a reasonable inference can be drawn that Harry never received, saw or read the letter.

3. Harry Corliss's Poor Health Prevented Comprehension.

In 2005, Harry was not mentally capable of comprehending the letter. As Scott stated in his declaration:

48. Harry Corliss is my father. He is 87 years old. He is in extremely poor health. He lost an arm in an accident many years ago. He had at least two bad falls in 2004 and 2005. This is when his health started to seriously and rapidly decline. My father has been diagnosed with dementia, diabetes, a condition he ignored for years, and he has had at least one heart attack. He is not capable of carrying on a sustained conversation. Even when he attempts brief conversations, it is readily apparent he is not all there. He is forgetful and can often exhibit irrational behavior. (CP 460)

And as Scott testified in his deposition:

Q: Before you started the lawsuit, before you sued Mr. Hughes and Mr. Hart, did you talk to your dad and ask your dad, in words to the effect dad, did you receive this letter, even though I'm the salutary on this case, in this letter? It's addressed to you though. Did you look at this letter, which is Exhibit 64, did you ever ask you dad that before you sued Mr. Hart and Mr. Hughes.

A: I do not recall having a conversation like that with my dad.

Q: Why didn't you?

A: My dad is like talking to a five year old. (CP 663)

* * *

Q: How does it appear to you that your father is besieged with dementia?

A: He says things that are not correct. He repeats himself over and over and over again. He is confused a lot. (CP 659)

The above evidence was presented to the trial court and was not disputed by either Hughes or Hart. The above evidence raises a question of fact as to whether Harry could have comprehended the letter even if he did receive it. Harry's mental capability is 100% relevant when the issue is what and when, if ever, did Harry actually know about the secret purchase of the pits by Hughes and Hart. Further, Harry's mental ability to comprehend would be relevant to his ability to pass any information on to his sons. Scott and Tim's declarations and testimony make clear this did not happen.

4. In 2005 There is No Basis to Impute Any of Harry Corliss's Knowledge to Either Tim or Scott Corliss.

Even if it could be shown that Harry both read and comprehended the letter, there is no basis to impute Harry's knowledge to Scott or Tim.

Harry owned 0.50 percent of WRQ's stock compared to the 12.25 percent that Scott and Time each owned. Each Corliss owned his shares individually and not as partners or in any other type of joint ownership. As Scott stated in his declaration:

I officially replaced my father on the WRQ Board of Directors in June 2005 because of his bad health. Many months before this, I had taken the lead in performing most of my father's duties and tasks at CRI. In 2005, Harry Corliss was not in charge of the Corlisses' WRQ investment. (CP 460)

As indicated above, the rights of each Corliss have to be adjudged as if they had different last names and were not related because each Corliss has his own claims. Here, even if Harry received and read the letter, there is no evidence of any relationship that justifies imputing Harry's knowledge to Tim or Scott. A familial relationship is not sufficient for imputing knowledge.¹⁷

In the absence of case law allowing for the alleged knowledge of Harry to be imputed to Scott and Tim, Scott and Tim's affirmative denials (discussed below) of having ever seen or been told of the September 2005 letter creates a question of fact as to whether they knew or should have known of the letter prior to February 2009.

5. Tim or Scott Never Saw the Letter.

Hughes and Hart presented no evidence to the trial court that Tim or Scott ever saw the letter or were told of the letter prior to February 2009. If Hughes' imputed facts argument (Harry read the letter and Harry's knowledge is imputed to Tim and Scott) fails,

¹⁷ See *Ramsden*, 142 Wn.App. 369, 385 (refusing to treat children's negative reaction to investments by father as knowledge of the father that the investments were improper).

Hughes' entire September 2, 2005 letter argument fails as to Tim and Scott.

Scott flatly denied ever seeing the letter until after the lawsuit was filed:

Q: When people wrote to your father as the boss in 2005, wouldn't it be important for, in your estimation for your father or someone on his behalf to open the letters and read them?

* * *

A: I'm referring to my father as the boss as this – I don't know how to explain it. But I was using it in a lighthearted way that he was around the office, at times very confused. I'm not sure who opened his mail. I'm not sure if this letter even got opened. I don't know when this letter got opened, when it got read, if it got read. My dad at that time, I'm not sure he was even receiving that much mail. I really can't remember, but he was in the beginning stages of dementia, Alzheimer's. He was unhealthy. He was a very weak, tired, old man.

Q: The Exhibit 74 letter, when did you first see it?

A: I didn't see it until sometime in 2011 when we started going through our files and looking into this problem. (CP 682-683)

Tim, like Harry, was never deposed. The only evidence in the record regarding Tim's knowledge of the September 2005 letter is Tim's unchallenged declaration denying any knowledge of the purchase of the properties until late Spring of 2009. (CP 462) Specifically, Tim states in his declaration:

15. Scott Corliss was the first person who ever told me that the pits had been sold. Some time after April 2009, Scott told me he met with Hart and Hart told him that Hughes purchased the pits. Scott's conversation with me after April 2009 is the first time I ever had any knowledge or information from any source about the sale of the pits. (CP 464)

Hughes and Hart do not contend and have failed to prove that either Tim or Scott ever saw the letter. As a result, the letter cannot be the basis of dismissing the separate and independent claims of Tim and Scott.

6. Hughes' and Hart's Reliance on a False Statement Is Insufficient to Trigger the Statute of Limitations.

Hughes' September 2, 2005 letter states "I have purchased the gravel pit and rock quarry from International Paper." (CP 150)

Hughes' statement that was heavily relied upon by Hughes in seeking summary judgment, is false. The pits were purchased by RR and not by Hughes.

It is sheer speculation as to what action Harry (assuming receipt and comprehension) would have taken had he been told the truth – RR actually bought the properties and RR is owned 50 percent by Hughes and 50 percent by Hart.

If Harry received the letter and if Harry comprehended the letter, a reasonable inference could be drawn that Harry would not object to Hughes being the sole purchaser of the properties

because in Hughes own words, Harry Corliss is "my long time friend." (CP 113)

7. Hughes and Hart Failed to Prove there is No Question as to Any Material Fact with Respect to the Letter.

Whether the letter was sufficient to trigger the "discovery rule" and start the running of the three year statute as to each Corliss is a disputed question of material fact. As indicated by the *Ramsden* court, the "statute of limitations is an affirmative defense, and the burden is on the party asserting it, here [Hughes and Hart] to prove the facts that establish it."¹⁸ Hughes and Hart failed to carry their burden as the evidence presented to the trial court was insufficient to show an absence of genuine issues of material fact. As such, the trial court should not have granted summary judgment on the basis of the September 2005 letter.

D. Multiple Questions of Material Fact Exist With Respect to the Role of John Carrosino.

1. Carrosino was not an Agent for any Corliss.

Carrosino was employed by CRI from 2007 to May 2008. Carrosino was never employed by Tim, Scott or Harry Corliss. (CP 459) Between February 2004 and May 2012 Tim never worked for CRI. (CP 464)

¹⁸ *Ramsden*, 142 Wn.App. 369, 386.

By June 2005, Harry had been replaced on the CRI Board of Directors because he was in bad health. (CP 460) In 2007, when Carrosino came to work for CRI, Harry's health had declined even more. (CP 451, 656, 724)

Based on the record submitted to the trial court, there is no evidence at all that Harry or Tim ever had any contact or communication of any kind with Carrosino. In fact, there is a total lack of evidence that either Harry or Tim ever exercised any control over Carrosino. Under Washington law, in the absence of evidence of control Carrosino was not in a principal/agent relationship with Harry or Tim.

Further, no legal precedent was found and none was provided to the trial court that permitted the trial court to impute Carrosino's knowledge to CRI and then impute CRI's knowledge to Scott, who was a CRI employee. On that basis alone Carrosino should not be deemed Scott's agent for purposes of Scott's separately owned investment in WRQ.

It is well established that:

"The existence of a principal-agent relationship is a question of fact unless the facts are undisputed." The question of control or right of control is also one of fact for the jury. But if the facts are undisputed and, without weighing the credibility of the witnesses, there can be but one reasonable conclusion drawn from the facts, the nature

of the relationship between the parties becomes a question of law.¹⁹

Further,

[T]he plaintiff is entitled to the benefit of all reasonable inferences from her testimony. The law makes no presumption of agency; it is a fact to be proved. The burden of establishing agency rests upon the one who asserts it. **The question of an agency relationship is a question of fact unless no facts are in dispute and the facts are susceptible of only one interpretation in which case the relationship becomes a question of law.**²⁰

Hart and Hughes have the burden to demonstrate there are no facts in dispute regarding Carrosino being an agent for Scott. Hart and Hughes failed to meet their burden and therefore it was improper for the trial court to use Carrosino's alleged knowledge as a basis to trigger the running of the statute of limitations prior to February 2009.

2. Carrosino was not Controlled by any Corliss.

The only Corliss who arguably exercised any control over Carrosino was Scott. While employed by CRI, Carrosino was asked by Scott to value the WRQ stock.

The "manner of performance" rule is well established in Washington.

¹⁹ *O'Brien v. Hafer*, 122 Wn. App. 279, citing *Uni-Com N.W.*, 47 Wn. App. at 796 and *Baxter*, 10 Wn. App. at 898 (Emphasis added.); See also, *Kelsey Lane Homeowners Assoc. v. Kelsey Lane*, 125 Wn. App. 222, 236 (2005).

²⁰ *Blodgett v. Olympic Sav. and Loan Ass'n.*, 32 Wn. App. 116 (1982). (Emphasis added.) (Internal citations omitted.)

The lack of any evidence of Scott, Tim or Harry controlling the manner in which Mr. Carrosino performed his valuation exercise is fatal. As explained in *Baker v. Skagit Speedway, Inc.*, 119 Wn. App 807 (2003), one of the cornerstones of finding an agency relationship is control by the principal(s) over the alleged agent's manner of performance:

Control establishes agency only if the alleged principal controls the manner of performance.²¹

Similarly, the court in *Bloedel Timberlands Development, Inc. v. Timber Industries, Inc.*, 28 Wn. App. 669 (1981) explained the need for control over the manner of performance as follows:

Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. [Internal citations omitted] Instead, **control establishes agency only if the principal controls the manner of performance**, in this case the actual cutting.²² (Emphasis added.)

Based on the record before the trial court, all Scott ever asked Carrosino to do was to perform an analysis of what the WRQ stock was worth. It is undisputed that Scott never asked Carrosino to look into ownership of the properties because based on Scott's unchallenged testimony (which must be accepted as true for the

²¹ *Barker v. Skagit Speedway*, 119 Wn. App. 807, 814 (2003) (quoting *Stansfield v. Douglas County*, 107 Wn. App 1, 17, (2001), quoting, *Hewson Construction, Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823 (1984)).

²² *Bloedel*, 28 Wn. App. at 674.

purpose of a summary judgment motion) Scott never knew property ownership was an issue. (CP 459)

Carrosino was a Certified Public Accountant and financial specialist. (CP 459, 647) Scott had a limited education. (CP 459) As a result, Scott testified he never "made any effort to control the manner in which Mr. Carrosino performed his task" of helping value the WRQ stock. (CP 459) Control over the "manner of performance" must exist to create an agency relationship.

As Scott testified:

"Once Mr. Carrosino started his valuation assignment, I stayed totally out of his way. I never told Mr. Carrosino what to collect or how to collect it. I left all of that totally up to him. Mr. Carrosino operated totally independent from me and without direction, instruction or control by me. I never gave Mr. Carrosino any instructions or direction regarding what he should try and obtain or how he should obtain it." (CP 459)

Hart presented zero evidence that Scott, Tim or Harry had any control over Carrosino's performance of the WRQ stock valuation exercise. A reasonable inference can be drawn that Scott did not exercise control over Carrosino's manner of performance. At a minimum, whether Scott Corliss had the requisite control over the manner of Carrosino's performance necessary to create an agency relationship is a question of material fact.

For Tim and Harry, no question of fact exists as no evidence of any control by Tim or Harry was presented by Hughes and Hart.

Given the lack of evidence, it is clear that no agency relationship existed between them and Carrosino.

3. Carrosino's Efforts to Act as an Agent for Corliss Were Rejected by Hughes and Hart.

Carrosino attempted to call a WRQ shareholders meeting. (CP 606) Hughes and Hart refused to accept Carrosino's request for the meeting. Hughes and Hart took the position that Carrosino did not have the authority to act on behalf of the Corlisses and did not have the authority to call a meeting. (CP 606-607) Hughes' and Harts' conduct indicates that Hughes and Hart did not consider or treat Carrosino as an agent of the Corlisses. Hughes' and Harts' conduct is consistent with the Corliss' evidence before the trial court that Carrosino was not their agent for their individual/personal investment in WRQ.

Hughes and Hart should not be allowed to have it both ways. Carrosino cannot be an agent for the purpose of imputing knowledge to a WRQ shareholder, but not be an agent for the purpose of calling a WRQ shareholder meeting. Hughes and Hart should be bound by their contemporaneous conduct rejecting Carrosino's efforts to act as an agent.

At a minimum, the contemporaneous conduct of Hughes and Hart with respect to Carrosino's authority in 2007-2008 creates a

question of material fact as to the existence of an agency relationship.

4. Carrosino Could Not Affect the Legal Relations of the Corlisses or WRQ.

Another requisite for an agency relationship is where "a principal has a right to control the conduct of the agent **and the agent has a power to affect the legal relations of the principals.**"²³

It is undisputed that Carrosino did not have the power to "affect the legal relations" of any of the Corlisses. Carrosino was never asked or authorized to negotiate or enter into any agreement or contract on behalf of any Corliss. (CP 459 and CP 464) He was not asked nor did he have the authority to negotiate for or sell any of the Corlisses shares in WRQ. (CP 460 and CP 465) Because "[Carrosino] did not have the power to alter the legal relations between [the Corlisses] and any third person or [the Corlisses] and [himself],"²⁴ no agency relationship existed. Hughes' and Harts' evidence establishing Carrosino's ability to affect the legal relationship of the Corlisses is simply non-existent.

Once again, the best case for Hughes and Hart is that there is a question of material fact involving whether an agency relationship existed with Scott.

²³ *Moss v. Vadman*, 77 Wn.2d 396 (1969).

²⁴ *Zoda v. Eckert, Inc.*, 36 Wn. App. 292, 674 P.2d 195 (1983).

5. Carrosino Believed the Written Record Over the "Casual Representation" and Therefore Never Told Any Corliss There Had Been a Change in Property Ownership.

On May 8, 2007, Hart gave Carrosino the original leases for the properties. These leases showed International Paper and its predecessor, Champion Paper, as the lessor and ultimate land holder of the properties. (CP 232-243; 245-256) May 8, 2007 was just shy of two years after RR signed the secret purchase and sale agreement with IP for the properties. Hart never gave Mr. Carrosino any of the extensive documentation that showed that RR owned the properties. Hart never told Carrosino that RR owned the properties. (CP 488-491)

Mr. Carrosino was confused by the ownership information he read in the leases. On May 9, 2007, the day after receiving the leases, Carrosino telephoned Hart for clarification. Carrosino's declaration is unequivocal. Hart did not tell Mr. Carrosino that the ownership information in the leases was incorrect: "Mr. Hart did not tell me that the lease[sic] were incorrect." (CP 490) "Mr. Hart did not tell me that he and Mr. Hughes were the landlords." (CP 490)

In June 2007, Mr. Carrosino is still in the dark and is still seeking evidence of ownership. In Carrosino's June 6, 2007 email (CP 43; 618-619) Carrosino once again asks Hart for copies of any

purchase agreements and the leases. But Hart never gave Mr. Carrosino any of those documents. As Mr. Carrosino testified:

I never had the understanding or belief that Mr. Hart and Mr. Hughes were the owners to the real property on which the two pits operated by WRQ were located. I simply did not have tangible information to document the ownership of the underlying land that the leases were subject to. (CP 490)

At his deposition, Mr. Carrosino testified that he never knew who owned the property:

A: No. I -- I would look at the Web site, and I would gather information. And my recollection is that it had conveyances to who the particular landholders were. And, again, I think I made the comment here, again, when I asked Harry [Hart] to comment, he says, "Well, it only has the DNR permit facts on it." He says, "These are very old and not correct." So, again. I'm trying to ferret out, you know, who owns all this stuff. I don't even know if I've got the right leases. And I'm just not getting any quality information that would help me corroborate, you know, the material, Larry [Linville]. I mean, I'm unfortunately kind of an anal person, you know. I want to have documentation that's sound. And this is where I kept getting fed stuff where I'm leading myself to believe what is -- what is true here. (CP 444)

* * *

A: ...And so, again, I'm trying to work with Harry [Hart] here to get all the information so I can draw valid conclusions. And, you know, again, it's just taking a long time to get information. And then when I get it, it doesn't even tell, you know, who the lease is -- whose name it is. I don't even know whose name it is. I've got nothing telling me anything. And if there's any confusion in this whole exercise, this is where it all stems from. And I will say to my grave that this is the most confusing part of the documentation process is who actually or what was the

time frame in ownership of all this. This is the hardest part of that exercise. (CP 445)

* * *

A: ...So when I ask for tangible information and it's got IP and Champion's name on the lease, no one even took the time to modify the lease. And I'm looking at the information thinking that, well, maybe these guys are feeding me a crock of crap. So where's the tangible information? Where's the affirmative statement as to -- the first time I heard Rainier Resources was probably in the last, you know, 30 or 45 days. [June 2012] Never even heard that name before. So why is it that I have to pretend that I'm Columbo trying to get a bunch of information? That's -- that's the struggle here, okay? (CP 446)

* * *

Q: And your notes just say that you noted.

A: "It seems to me that you both noted." Okay. But I'm asking for the underlying leases. And then if that was the case, why didn't I get the leases? Why didn't I get the deal? And better yet, why didn't that information ever get conveyed to anybody well in advance of this? (CP 446)

The clear reasonable inference to be drawn from Carrosino's testimony is that Hart was being deceitful in his dealings with Carrosino.

Ultimately, Hart's deception, deceit and misrepresentations worked. Carrosino was deceived. His declaration states:

At no time in 2007 until I left in May 2008 did I tell Scott Corliss or any member of the Corliss family that either Mr. Hart, Mr. Hughes or a company owned by Mr. Hart and Mr. Hughes had purchased the real property on which the two pits operated by WRQ were located. I never told Scott Corliss or any member of the Corliss family that the

ownership of the real property had changed because all of the documents given to me by Mr. Hart and the subsequent clarification phone call with Mr. Hart on May 9, 2007 left me with the understanding that the ultimate land owners had not changed. Lastly, I was never made aware of the entity called Rainier Resources or provided documentation about this entity or its holdings. (CP 490)

Carrosino never told the Corlisses about the "casual representation" because he did not believe it:

Q: Did you ever talk to any of the Corlisses about your having received casual representations? And I'm not saying that in a mocking way. I'm only using the word "casual representations" because you feel -- and if you want to change that to a different word to make you feel more comfortable, that's okay. I'm just going on what I heard earlier that you felt there were casual representations by Pat or Harry that they were the landowners. And I want to know, did you ever pass that on either casually, directly, indirectly, some way to any of the Corlisses that, "Hey, I received some 'casual representations' from Pat and Harry that they are now the new owners of" --

A: I don't -- **I don't recall having represented or conveyed any of that information because it was irrelevant to what my focus was. My task was to come up with the value of the business, and, frankly, no one had any desire other than the fact to get to the chase of what the number potentially would be. That was the primary focus.** I didn't bother them with the trials and tribulations. That would have only fueled the fire between Scott's temper going up, and it didn't make any sense for me to try to be professional with Harry and then incite and have him call up and bitch. A lot of the noise that went on between Harry and I obtaining information I kept to myself. (CP 447)

* * *

Q: Well, what about like American Title, just getting a litigation report? Not a title report, but just a -- they call a property profile. It just tells you who owns the property.

A: With the access to the owner, I didn't think I -- I thought if I just asked the questions of the owner, I might get the answer.

Q: You would think. [!!!]

A: I still don't understand why there was so much cloak and dagger and deceit of sharing information with me. That's the thing that bothers me about this whole recollection is trying to get information was just awful. Just awful. And having to second-guess and double-check and verify even foot and cross-foot the information I'm getting because who knows whether or not it had been cooked or conceived. I mean, they were just a bad flavor of misrepresentation or untruthfulness. So my antennae were up pretty substantially. (CP 448)

* * *

Q: But not getting that information and -- or when you do get it, it's on the third or fourth time around of getting the wrong information, and then when you do get it, it's two months after you wanted to get it so you can never really keep moving on with a nice momentum to do your audit. Pick it up, put it down, wait, follow up, get this in, that in, where's this, back and forth. Why didn't you just -- I mean, not to say "just" -- go to the title company? Or say, "Scott, this is important stuff. We've got to know who owns the land. Can you figure that out?" Although, you're probably better at doing that than him. But just leaving Harry out of it, say, "Harry, forget it. I'll get it on my own. I'll do it on my own."

A: I didn't think about doing that. It's not my background. Maybe if I would have had a little more legal background

or more title, I would have done that. But, again, hopefully I could have relied on a request for valid information and just verified it and move forward.

Q: It's usually how most of your audits go, I would expect. Any conversations with the Corlisses that, "Hey, I am trying to get some information on the property ownership. It doesn't look like IP owns the land anymore. I'm going to be doing the audit without getting that information because I cannot get it from Harry"?

A: **No. The only thing I told Scott was that I'm still working on the valuation. I haven't completed it yet. I've got some missing information that I had to get from Harry, and I would update him on the valuation. And then once I had the valuation completed, this is what I shared with him. (CP 448)**

The only tangible evidence Hart ever gave Carrosino showed IP as the owner. Hart never gave Carrosino any documents (despite repeated requests) showing an owner other than IP. According to Carrosino he never had any reason to "tell Scott Corliss or any member of the Corliss family that either Mr. Hart, Mr. Hughes or a company owned by Mr. Hart and Mr. Hughes had purchased the real property on which the two pits...were located." (CP 490-491)

Mr. Carrosino had every reason to believe the ownership information in the leases given to him by Hart and not a "casual representation" made by Hart. At a minimum, the confusing and deceitful actions of Hart create an issue of material fact as to what Carrosino's knowledge was for purposes of imputing that

knowledge to the Corlisses. To hold otherwise would be to allow inquiry notice to exist as a matter of law based on one or two "casual representations" that are contradicted by other verbal statements, emails and binding leases provided to the alleged agent. As Mr. Carrosino accurately commented, he should not have been placed in the position of having to be "Columbo" to find the truth. (CP 446)

The "casual representation" to Carrosino of a change in property ownership came in the midst of months of futile attempts by Carrosino to get the current version of the leases for the properties. Carrosino wanted to determine the amount of royalty payments due under the leases in order to determine the value of WRQ. (CP 488; 742; 762) Who the royalty payments were made to and therefore who owned the property was irrelevant. The information Carrosino needed to value the WRQ stock was the amount of WRQ's royalty obligation, not to whom the obligation was owed.

It is undisputed that Carrosino was never asked by any Corliss to determine property ownership. It is also undisputed that Hart actively and deliberately concealed the truth about ownership from Carrosino. Instead of giving Carrosino the current version of the leases in response to Carrosino's repeated requests for the leases, Hart only provided the original leases. The original leases

showed IP and its predecessor, Champion Paper, as the owner of the properties. Hart never told Carrosino the truth or provided Carrosino with any documentation showing a change in property ownership.

Carrosino testified extensively about how he was deceived by Hart while attempting to obtain copies of the leases:

A: Why would I have to ask so many times for the tangible information and not get it?

Q: I agree. [!!!]

A: Why? Why did I never get the information I asked for? (CP 619)

* * *

Q: So it's a [casual] representation, it's basically sound waves, is what it is.

A: How you want to spin it from a legal perspective, that's up to you. I'm just telling you that, again, I never got the tangible information. I have to force the card here. If they're going to tell me that, then give me the damn paperwork, okay? Never got the damn paperwork.

Q: And you're pretty specific on the paperwork. It's not like you just asked, "Can I have some paperwork?" I mean, you're asking for the key stuff. "Show me the purchase and sale and show me the leases."

A: Correct. (CP 619-620)

* * *

Q: But the terms of the lease are a little bit more important. And we want to – and we've seen – well, how do you know what the terms of the lease are?

A: Never saw it. All he had were the old leases which were questionable as to whether they were the right leases or not. (CP 626)

Simply stated, the evidence when viewed in the light most favorable to the Corlisses establishes that Carrosino was never told the truth about who owned the properties. To impute knowledge of a change in property ownership to an alleged agent on the basis of a "casual representation" when the alleged agent was never provided with documents that showed the truth after repeated requests is wrong.

At a minimum, even if Carrosino is an agent, the evidence submitted to the trial court revealed numerous questions of material fact: (1) was the "casual representation" sufficient to put Carrosino on inquiry notice of a change in property ownership in the face of conflicting and apparently binding written documents and conflicting oral statements; (2) was the inquiry conducted by Carrosino reasonable, particularly in light of Hart's ongoing effort to deceive him; and (3) was it reasonable for Carrosino to conclude at the end of his investigation that the leases given to him were accurate and no change of ownership had occurred? Each of these unresolved and disputed factual questions is sufficient to preclude the entry of summary judgment.

E. Equitable Tolling Trumps the Statute of Limitations Under the Circumstances of this Case.

1. The Facts Support Equitable Tolling.

If this Court concludes that each Corliss knew about the purchase of the pits more than 3 years before February 2009, such that the statute of limitations applies, "equitable tolling" prevents application of the statute.

The record below lays out Hughes' and Harts' egregious conduct while usurping a corporate opportunity while aided and abetted by WRQ's attorney. Contrary to clearly established fiduciary duties, Hughes and Hart secretly purchased the properties when RR executed a Purchase and Sale Agreement in June 2005. (CP 314) Neither the fact of the sale to RR or Hughes' and Harts' activities or negotiations leading up to the sale were ever disclosed to the Corlisses. (CP 456; 464) After the sale, Carrosino, an alleged Corliss agent, was actively deceived about the true ownership details while he was engaged in an ongoing effort to value the WRQ stock. (CP 487-490)

2. The Legal Predicates for Equitable Tolling are Satisfied.

Corlisses recognize "equitable tolling" is not a doctrine of broad application and courts "should not extend it to a garden

variety claim of excusable neglect."²⁵ But this is not a case of "garden variety neglect." This is an extraordinary case of pervasive fraud and deception that continued for almost five years, where the wrongdoers were knowingly aided and abetted by WRQ's attorney.

Numerous courts acknowledge inherent judicial authority to toll statutory periods upon a finding of fraud, oppression or other equitable circumstances. (Numerous internal citations omitted.) Likewise, this court allows equitable tolling when justice requires.²⁶

The Washington State Supreme Court has repeated this rule:

Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it even though a statutory time period has elapsed.²⁷

Under Washington case law, equitable tolling has two elements:

The predicates for equitable tolling are bad faith, deception or false assurances by the defendant and the exercise of diligence by the plaintiff.²⁸

The first predicate of "equitable tolling" -- bad faith, deception -- has undoubtedly been satisfied. The circumstances

²⁵ *City of Bellevue v. Benyaminov*, 144 Wn. App. 755, 183 P.2d 1137 (2008).

²⁶ *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998); See also, *Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 888 P.2d 161 (1995); *Douchette v. Bethel School Dist.*, 117 Wn.2d 805, 818 P.2d 1362 (1991).

²⁷ *In Re Bond*, 165 Wn.2d 135, 196 P.3d 672 (2008); See also, *Trotzer v. Vig*, 149 Wn. App. 594, 203 P.3d 1056 (2009); *Thompson v. Wilson*, 142 Wn. App. 803, 175 Wn.3d 1149 (2008); *Graham Neighborhood Assoc. v. F.G. Associates*, 172 Wn.2d 1024, 268 P.3d 225 (2011).

²⁸ *Graham, supra*; *Millay, supra*; *Trotzer, supra*.

are a closely held corporation, no disclosure by fiduciaries of the underlying events pertaining to a corporate opportunity despite numerous opportunities to disclose, and WRQ's attorney actively aiding and abetting the fiduciaries' wrongful acts, followed by a deceitful cover-up when an alleged agent was seeking the true facts. The second predicate, "due diligence" is a clear question of fact. What would a reasonable man do under the same or similar circumstances?

3. If Carrosino is an Agent with Knowledge Imputable to the Corlisses, His Due Diligence Must Also Be Imputed to Them.

Equitable tolling is relevant to this case only if the statute has run. In order for the statute to run, Carrosino must be considered an agent for the Corlisses (unless the letter argument carries the day). If he is an agent, Carrosino without a doubt exercised due diligence in his efforts to get the leases and find out the truth about the ownership of the properties. At a minimum, the question of Carrosino's due diligence is one of fact.

Here, Mr. Carrosino's deposition testimony establishes substantial due diligence efforts in the face of continuing deceit, deception and concealment by Hart. Carrosino testified, "I feel like a mushroom, kept in the dark and fed bullshit." (CP 446)

This is not a garden variety case. There was an active effort to conceal the facts that would start the statute of limitations

running. There was due diligence by Carrosino, albeit unsuccessful, to discover the true facts. If the statute of limitations has run as a matter of law, equitable tolling should prevent its application.

F. Hughes and Hart Committed Other Bad Acts In Addition to Usurping the Corporate Opportunity to Purchase. The Trial Court Wrongfully Dismissed Those Separate Claims.

1. Hughes and Hart Secretly Amend WRQ's Lease

After the secret purchase of the properties in June 2005, Hughes and Hart secretly increased the amount of cash that would flow from WRQ to RR. A few days after the sale closed, WRQ and RR agreed to amend the King Creek lease. The amendment was conveniently signed by Hughes for RR and Hart for WRQ. The amendment obligated WRQ to pay RR \$1.50 per ton or 80 percent of the dump fee for all material hauled from off-site locations and dumped into the King Creek pit. (CP 361) This is called "backhauling."

In addition to backhaul creating a new source of revenue for RR at the expense of WRQ, this secret amendment had an added financial benefit to RR. The Washington State Department of Natural Resources ("DNR") mining permit required a pit reclamation plan. (CP 457) With the backhaul amendment in place, Hughes, Hart and RR could now fulfill DNR's reclamation requirements at literally no cost to them or RR. The pit would be filled by third

parties who paid a fee to WRQ for dumping into the pit and most of the backhaul fees paid to WRQ got passed on to RR.

It is undisputed the Corlisses were never provided with or notified of the amendment to the lease that obligated WRQ to pay RR for backhauled material. (CP 457; 464) The Corlisses and WRQ made a claim for and have been damaged by these wrongful acts. Neither Hughes' September 2, 2005 letter nor the interaction with Carrosino touched on the backhaul amendment. No evidence was ever presented that the statute of limitations was triggered for the backhaul amendment claim or that the statute had run.

Despite the complete lack of any evidence that the statute of limitations had expired as to this claim, the trial court nevertheless dismissed the entire Complaint. In doing so, the trial court erred in not treating this wrongful conduct as a separate action.

2. Hughes and Hart Secretly Re-Permitted and Expanded King Creek Pit

At the time of RR's secret purchase, the King Creek mining permit allowed mining activity to take place on only 68.8 acres of King Creek's 580 acre site. Hughes and Hart set about to get a new permit at WRQ's expense.

The financial benefit to RR of a new King Creek permit was millions of dollars. The new permit allowed mining an area five times bigger than the 68.6 acres allowed by the old permit. (CP

366) WRQ, not RR, paid for the costs incurred for the new permit. The Corlisses were never notified of any permitting activity at the King Creek Pit during the more than two years this permit work was in process. (CP 457; 464)

There was no letter, no email, no anything to let any of the Corlisses know that WRQ was paying for the cost of a permit that would enrich RR and provide RR with a much bigger revenue stream that could last for over 50 years. RR can easily terminate WRQ's lease at any time or RR can elect not to re-new WRQ's lease. In either case the Corlisses and WRQ will both be left out with nothing to show for WRQ's re-permitting efforts. (CP 457-458)

The trial court erred in dismissing the Corlisses' claims for damages associated with this improper conduct by Hughes and Hart. No evidence that the statute of limitations had run on this claim was ever presented to the trial court by Hughes or Hart.

3. The Trial Court Dismissed the Corlisses' Claims for Backhaul Amendment and Re-Permitting but Hughes and Hart Presented No Evidence of When Any Corliss Had Notice of Either of These Events

Both the backhaul amendment and re-permitting enriched RR at the expense of WRQ. The first time any Corliss found out about these separate and distinct wrongs was after February 2009. (CP 768-770)

Hughes attempted to defeat the Corlisses backhaul and re-permitting claims by arguing both of these activities benefited WRQ. Hart's motion was silent on both issues. Hart had testified that under the original lease WRQ had engaged in backhauling without compensation to the pit owner. (CP 765) Hart's motion apparently recognized that RR's permitting activities throughout 2009, coupled with the filing of this lawsuit in February of 2012 would make Corlisses' claim related to the re-permitting timely.

Hughes presented no evidence on the statute of limitation issue with respect to either of these separate claims: when did each Corliss receive sufficient notice to start the statute running for each of these separate wrongs. As such, the trial court erred in issuing a blanket dismissal of the Corlisses' entire Complaint.

G. Hughes and Hart are not Entitled to an Award of Fees and Expenses

1. Standard of Review for Entitlement to a Fee Award is a Question of Law

"When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable. Whether a party is entitled to attorney fees is an issue of law."²⁹

²⁹ *McGreevey v. Oregon Mut. Ins. Co.*, 30 Wn. App. 283 (1998).

This appeal is about entitlement to fees and not about reasonableness of fees. Entitlement presents a question of law and this Court's review must be de novo.³⁰

2. Hughes and Hart Cannot Show that the Corliss Action was "Commenced Without Reasonable Cause."

Hughes and Hart claim they are entitled to an award of fees on the basis of RCW 23B.07.400(4), which states:

On termination of the [derivative] proceeding, the court may require the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced without reasonable cause. (Emphasis added.)

The Corlisses did not commence this proceeding "without reasonable cause." The Corlisses presented the trial court with a compelling and unchallenged set of facts and extensive legal authority demonstrating that Hughes and Hart wrongfully usurped a corporate opportunity. The only impediment to the Corlisses' recovering a judgment against Hughes and Hart was the potential application of the statute of limitations. The Corlisses have demonstrated numerous genuine issues of material fact, coupled with applicable law, that should have defeated the limitation statute defense. However, even if the statute of limitation defense is not defeated, it is beyond comprehension to conclude that the

³⁰ *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App. 666, 285 P.3d 892 (2012).

Corlisses did not advance good faith, factual and legal grounds to defeat the statute defense.

"Reasonable cause" is synonymous with probable cause. Probable cause is defined as "a reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim."³¹ The Corlisses had "reasonable cause."

No Washington case interpreting RCW 23B.07.400(4) was found. The words "without reasonable cause" as used in subsection (4) could be interpreted by this Court to mean that RCW 23B.07.400(1) was violated – action was commenced by a non-shareholder; or RCW 23B.07.400(2) was violated – complaint was deficient. Neither instance is present here.

RCW 23B.07.400(4) states that the predicate for an award of fees is that the "proceeding is instituted without reasonable cause." That statute is analogous to RCW 4.84.185 which permits an award of fees if an action is "frivolous and advanced without reasonable cause." Both statutes use the identical words - "without reasonable cause."³²

A frivolous action has been defined as one that cannot be supported by any rational argument on the law or facts.

³¹ *Black's Law Dictionary* (9th Ed. 2009)

³² "An action is frivolous if it cannot be supported by any rational argument on the law or facts." *Eller v. East Spague Motors*, 159 Wn. App. 180 (2010); see also, *Clark v. Equinox Holdings, Ltd.*, 58 Wn. App. 125 (1989) which states, "A frivolous lawsuit has been defined as one that cannot be supported by any rational argument on the law or facts."

However allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, frivolous. The court below denied attorney's fees to Evergreen on the ground that the issue of entanglement was "debatable," which we take to mean that some rational argument based upon the law or facts could be made to support it.³³

The Corlisses have substantial factual and legal arguments to support their multiple responses to the statute of limitations argument. There were clearly "debatable" issues to be resolved by the trial court, even if the trial court ultimately decided those issues against the Corlisses.

Another analogous statute is RCW 60.08.080(5) which provides for an award of fees if the Court determines a "lien is frivolous and made without reasonable cause." This Court has interpreted this language by stating:

A case is not necessarily frivolous because a party ultimately loses on a factual or legal ground. Likewise, for a lien to be frivolous, the decision that the lien was improperly filed must be clear and beyond legitimate dispute. Because this lien presents debatable issues of law and fact, it does not satisfy the requirements of frivolous and without reasonable cause...³⁴

Hughes' and Harts' entitlement to a statute of limitations defense is not "clear and beyond legitimate dispute."

³³ *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn. App. 690, 723 P.2d 483 (1986) (Internal citations omitted.); *Daubner v. Mills*, 61 Wn. App. 678 (1991).

³⁴ *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.*, 85 Wn. App. 744, 934 P.2d 722 (1997).

The record shows each side had evidence supporting its position. And the more complex the underlying contractual relationship, the less appropriate it will be to conclude that a particular lien filing is frivolous.³⁵

The Corlisses presented the trial court with substantial evidence supporting a complicated set of facts.

The opinion in *Eller, supra*, examined the legislative history of RCW 4.84.185 and refers to "spite lawsuits such as are brought simply to harass and harangue." There has never been a hint that spite was the Corlisses' motive in this case. A similar legislative intent could be assigned to RCW 23B.07.400(4).

3. The Trial Court Failed to Enter Any Findings of Fact or Conclusions of Law Stating the Grounds or Basis for Its Fee Award.

It is absolutely impossible to tell how or why the trial court arrived at the conclusion that this proceeding was instituted "without reasonable cause." The trial court failed to enter any findings of fact or conclusions of law. That failure alone defeats a fee award.

Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Not only do we reaffirm the rule regarding an adequate record on review to support a fee award, **we hold findings of fact and conclusions of law are required to establish such a record.**³⁶

³⁵ *Gray v. Baungette Const.*, 160 Wn. App. 334 (2011) quoting *S.D. Dison v. Gaston Bros.*, 150 Wn. App. 87, 95 (2009).

³⁶ *Mahler v. Szucs*, 135 Wn.2d 398 (1998) (Internal citations omitted; emphasis added.) See also, *Deepwater Brewing v. Fairway Resources*, 152 Wn. App. 229 (2009); *Eagle Point Condominium v. Cay*, 102 Wn.

The trial court's orders awarding fees and expenses to Hughes and Hart failed to give any indication as to what reasoning the trial court used to conclude this action was instituted "without reasonable cause." (CP 899; 901) Even before the *Mahler* decision, that failure was fatal to an award of fees in a frivolous lien action.

The trial court here did not enter any findings of fact. Indeed, Exterior argues that the trial court erred by failing to enter an express finding that the lien was frivolous and without reasonable cause. Although the statute contains no requirement for entry of findings of fact and conclusions of law, their use would clearly be preferable for purposes of appellate review. At a minimum, the trial court's reasoning for entering the order should be clearly set out in the order itself.³⁷

Here, there were no findings of fact and no explanation in any order of the trial court's reasoning.

A remand is the usual remedy in the absence of findings of fact and conclusions of law. Rather than a remand, the Corlisses urge this Court to overrule the entire fee award as a matter of law even if the summary judgment orders are not reversed. The Corlisses presented clearly "debatable" issues of fact and law and did not commence this action without "reasonable cause."

App. 697 (2000); *Just Dirt v. Knight Excavation*, 138 Wn. App. 4009 (2007) **Error! Bookmark not defined.**

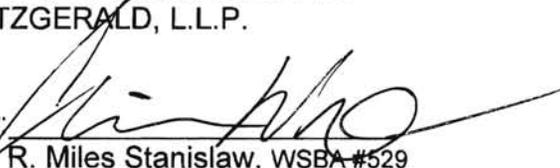
³⁷ *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.*, 85 Wn. App. 744, 934 P.2d 722 (1997).

IV. CONCLUSION

When all the facts are construed in the light most favorable to the Corlisses, issues of material fact exist that preclude the entry of summary judgment. This Court should reverse the trial court's orders granting summary judgment and remand with instructions that the trial court shall vacate the awards for fees and expenses.

Dated this 17th day of December, 2012.

WATT, TIEDER, HOFFAR &
FITZGERALD, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the 18th day of December, 2012, I caused true and correct copy of the BRIEF OF APPELLANT to be delivered to counsel in the manner indicated as follows:

<p>George W. Akers Montgomery Purdue Blankinship & Austin, PLLC 701 – 5th Avenue, Suite 5500 Seattle, WA 98104</p> <p><i>Attorney for Defendant Hughes</i></p>	<ul style="list-style-type: none"><input checked="" type="checkbox"/> Hand delivery/Messenger<input type="checkbox"/> Facsimile:<input type="checkbox"/> U.S. Mail, postage prepaid thereon<input type="checkbox"/> Email: akers@mpba.com
<p>Lawrence B. Linville Christian J. Linville Linville Law Firm PLLC 800 – 5th Avenue, Suite 3850 Seattle, WA 98104</p> <p><i>Attorneys for Defendants Hart/WRQ</i></p>	<ul style="list-style-type: none"><input checked="" type="checkbox"/> Hand delivery/Messenger<input type="checkbox"/> Facsimile: 206-515-0646<input type="checkbox"/> U.S. Mail, postage prepaid thereon<input type="checkbox"/> Email: llinville@linvillelawfirm.com clinville@linvillelawfirm.com

DATED this 18th day of December, 2012 in Seattle, Washington.

/s/ Lana Ramsey