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STATE OF WASHINGTON

Case No. 34446-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II *65*

JEROME C. IVES, as Personal Representative of the Estate of G. Jerome Ives,
PLAINTIFF/RESPONDENT,

v.

DAVID T. RAMSDEN and MICHELE L. RAMSDEN, and marital community composed thereof,
DEFENDANTS/APPELLANTS.

APPEAL FROM THE SUPERIOR COURT OF CLALLAM COUNTY
THE HONORABLE JUDGE KENNETH WILLIAMS, PRESIDING

AMENDED BRIEF OF APPELLANTS/*Cross-Resp.*

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III. ASSIGNMENTS OF ERROR

1. The trial court lacked jurisdiction to enter Finding 1.
2. The trial court lacked jurisdiction to enter Finding 2.
3. The trial court lacked jurisdiction to enter Finding 3.
4. The trial court lacked jurisdiction to enter Finding 4.
5. The trial court lacked jurisdiction to enter Finding 5.
6. The trial court lacked jurisdiction to enter Finding 6.
7. The trial court lacked jurisdiction to enter Finding 7.
8. The trial court lacked jurisdiction to enter Finding 8.
9. The trial court lacked jurisdiction to enter Finding 9.
10. The trial court lacked jurisdiction to enter Finding 10.
11. The trial court lacked jurisdiction to enter Finding 11.
12. The trial court lacked jurisdiction to enter Finding 12.
13. The trial court lacked jurisdiction to enter Finding 13.
14. The trial court lacked jurisdiction to enter Finding 14.
15. The trial court lacked jurisdiction to enter Finding 15.
16. The trial court lacked jurisdiction to enter Finding 16.
17. The trial court lacked jurisdiction to enter Finding 17.
18. The trial court lacked jurisdiction to enter Finding 18.
19. The trial court lacked jurisdiction to enter Finding 19.
20. The trial court lacked jurisdiction to enter Finding 20.

21. The trial court lacked jurisdiction to enter Finding 21.
22. The trial court lacked jurisdiction to enter Finding 22.
23. The trial court lacked jurisdiction to enter Finding 23.
24. The trial court lacked jurisdiction to enter Finding 24.
25. The trial court lacked jurisdiction to enter Finding 25.
26. The trial court lacked jurisdiction to enter Finding 26.
27. The trial court lacked jurisdiction to enter Finding 27.
28. The trial court lacked jurisdiction to enter Finding 28.
29. The trial court lacked jurisdiction to enter Finding 29.
30. The trial court lacked jurisdiction to enter Finding 30.
31. The trial court lacked jurisdiction to enter Finding 31.
32. The trial court lacked jurisdiction to enter Finding 32.
33. The trial court lacked jurisdiction to enter Finding 33. Finding 33 is not supported by substantial evidence, and does not support the trial court's conclusions.
34. The trial court lacked jurisdiction to enter Finding 34.
35. The trial court lacked jurisdiction to enter Finding 35.
36. The trial court lacked jurisdiction to enter Finding 36.
37. The trial court lacked jurisdiction to enter Finding 37. Finding 37 is not supported by substantial evidence, and does not support the trial court's conclusions.

38. The trial court lacked jurisdiction to enter Finding 38.
39. The trial court lacked jurisdiction to enter Finding 39.
40. The trial court lacked jurisdiction to enter Finding 40.
41. The trial court lacked jurisdiction to enter Finding 41.
42. The trial court lacked jurisdiction to enter Finding 42. Finding 42 is not supported by substantial evidence, and does not support the trial court's conclusions.
43. The trial court lacked jurisdiction to enter Finding 43. Finding 43 is not supported by substantial evidence, and does not support the trial court's conclusions.
44. The trial court lacked jurisdiction to enter Finding 44. Finding 44 is not supported by substantial evidence, and does not support the trial court's conclusions.
45. The trial court lacked jurisdiction to enter Finding 45. Finding 45 is not supported by substantial evidence, and does not support the trial court's conclusions.
46. The trial court lacked jurisdiction to enter Finding 46. Finding 46 is not supported by substantial evidence, and does not support the trial court's conclusions.

47. The trial court lacked jurisdiction to enter Finding 47. Finding 47 is not supported by substantial evidence, and does not support the trial court's conclusions.
48. The trial court lacked jurisdiction to enter Finding 48.
49. The trial court lacked jurisdiction to enter Finding 49.
50. The trial court lacked jurisdiction to enter Finding 50.
51. The trial court lacked jurisdiction to enter Finding 51. Finding 51 is not supported by substantial evidence, and does not support the trial court's conclusions.
52. The trial court lacked jurisdiction to enter Finding 52.
53. The trial court lacked jurisdiction to enter Finding 53. Finding 53 is not supported by substantial evidence, and does not support the trial court's conclusions.
54. The trial court lacked jurisdiction to enter Finding 54. Finding 54 is not supported by substantial evidence, and does not support the trial court's conclusions.
55. The trial court lacked jurisdiction to enter Finding 55. Finding 55 is not supported by substantial evidence, and does not support the trial court's conclusions.

56. The trial court lacked jurisdiction to enter Finding 56. Finding 56 is not supported by substantial evidence, and does not support the trial court's conclusions.
57. The trial court lacked jurisdiction to enter Finding 57. Finding 57 was unnecessary, and should not have been entered.
58. The trial court lacked jurisdiction to enter Finding 58. Finding 58 was unnecessary, and should not have been entered.
59. The trial court lacked jurisdiction to enter Finding 59. Finding 59 was unnecessary, and should not have been entered.
60. The trial court lacked jurisdiction to enter Finding 60. Finding 60 was unnecessary, and should not have been entered.
61. The trial court lacked jurisdiction to enter Finding 61. Finding 61 was unnecessary, and should not have been entered.
62. The trial court lacked jurisdiction to enter Finding 62. Finding 62 was unnecessary, and should not have been entered.
63. The trial court lacked jurisdiction to enter Finding 63. Finding 63 was unnecessary, and should not have been entered.
64. The trial court lacked jurisdiction to enter Finding 64. Finding 64 was unnecessary, and should not have been entered.
65. The trial court lacked jurisdiction to enter Finding 65. Finding 65 was unnecessary, and should not have been entered.

66. The trial court lacked jurisdiction to enter Finding 66. Finding 66 was unnecessary, and should not have been entered.
67. The trial court lacked jurisdiction to enter Finding 67. Finding 67 was unnecessary, and should not have been entered.
68. The trial court lacked jurisdiction to enter Finding 68. Finding 68 was unnecessary, and should not have been entered. Finding 68 is not supported by substantial evidence, and does not support the trial court's conclusions.
69. The trial court lacked jurisdiction to enter Finding 69. Finding 69 was unnecessary, and should not have been entered. Finding 69 is not supported by substantial evidence, and does not support the trial court's conclusions.
70. The trial court lacked jurisdiction to enter Finding 70.
71. The trial court lacked jurisdiction to enter Finding 71.
72. The trial court lacked jurisdiction to enter Finding 72.
73. The trial court lacked jurisdiction to enter Finding 73.
74. The trial court lacked jurisdiction to enter Finding 74. Finding 74 is not supported by substantial evidence, and does not support the trial court's conclusions.

75. The trial court lacked jurisdiction to enter Finding 75. Finding 75 is not supported by substantial evidence, and does not support the trial court's conclusions.
76. The trial court lacked jurisdiction to enter Finding 76. Finding 76 is not supported by substantial evidence, and does not support the trial court's conclusions.
77. The trial court lacked jurisdiction to enter Finding 77.
78. The trial court lacked jurisdiction to enter Finding 78. Finding 78 is not supported by substantial evidence, and does not support the trial court's conclusions.
79. The trial court lacked jurisdiction to enter Finding 79. Finding 79 is not supported by substantial evidence, and does not support the trial court's conclusions.
80. The trial court lacked jurisdiction to enter Finding 80.
81. The trial court lacked jurisdiction to enter Finding 81. Finding 81 was unnecessary, and should not have been entered.
82. The trial court lacked jurisdiction to enter Finding 82. Finding 82 was unnecessary, and should not have been entered. Finding 82 is not supported by substantial evidence, and does not support the trial court's conclusions.

83. The trial court lacked jurisdiction to enter Finding 83. Finding 83 is not supported by substantial evidence, and does not support the trial court's conclusions.
84. The trial court lacked jurisdiction to enter Finding 84. Finding 84 is not supported by substantial evidence, and does not support the trial court's conclusions.
85. The trial court lacked jurisdiction to enter Finding 85. Finding 85 is not supported by substantial evidence, and does not support the trial court's conclusions.
86. The trial court lacked jurisdiction to enter Finding 86.
87. The trial court lacked jurisdiction to enter Finding 87. Finding 87 was unnecessary, and should not have been entered. Finding 87 is not supported by substantial evidence, and does not support the trial court's conclusions.
88. The trial court lacked jurisdiction to enter Finding 88. Finding 88 was unnecessary, and should not have been entered.
89. The trial court lacked jurisdiction to enter Finding 89. Finding 89 is not supported by substantial evidence, and does not support the trial court's conclusions.

90. The trial court lacked jurisdiction to enter Finding 90. Finding 90 is not supported by substantial evidence, and does not support the trial court's conclusions.
91. The trial court lacked jurisdiction to enter Finding 91. Finding 91 is not supported by substantial evidence, and does not support the trial court's conclusions.
92. The trial court lacked jurisdiction to enter Finding 92.
93. The trial court lacked jurisdiction to enter Finding 93.
94. The trial court lacked jurisdiction to enter Finding 94. Finding 94 is not supported by substantial evidence, and does not support the trial court's conclusions.
95. The trial court lacked jurisdiction to enter Finding 95.
96. The trial court lacked jurisdiction to enter Finding 96.
97. The trial court lacked jurisdiction to enter Finding 97.
98. The trial court lacked jurisdiction to enter Finding 98.
99. The trial court lacked jurisdiction to enter Finding 99.
100. The trial court lacked jurisdiction to enter Finding 100.
101. The trial court lacked jurisdiction to enter Finding 101.
102. The trial court lacked jurisdiction to enter Finding 102. Finding 102 is not supported by substantial evidence, and does not support the trial court's conclusions.

103. The trial court lacked jurisdiction to enter Finding 103.
104. The trial court lacked jurisdiction to enter Finding 104. Finding 104 is not supported by substantial evidence, and does not support the trial court's conclusions.
105. The trial court lacked jurisdiction to enter Finding 105. Finding 105 is not supported by substantial evidence, and does not support the trial court's conclusions.
106. The trial court lacked jurisdiction to enter Finding 106. Finding 106 is not supported by substantial evidence, and does not support the trial court's conclusions.
107. The trial court lacked jurisdiction to enter Finding 107. Finding 107 is not supported by substantial evidence, and does not support the trial court's conclusions.
108. The trial court lacked jurisdiction to enter Finding 108. Finding 108 is not supported by substantial evidence, and does not support the trial court's conclusions.
109. The trial court lacked jurisdiction to enter Finding 109. Finding 109 is not supported by substantial evidence, and does not support the trial court's conclusions.

121. The trial court lacked jurisdiction to enter Conclusion 3. The trial court erred in entering Conclusion 3.
122. The trial court lacked jurisdiction to enter Conclusion 4. The trial court erred in entering Conclusion 4.
123. The trial court lacked jurisdiction to enter Conclusion 5. The trial court erred in entering Conclusion 5.
124. The trial court lacked jurisdiction to enter Conclusion 6. The trial court erred in entering Conclusion 6.
125. The trial court lacked jurisdiction to enter Conclusion 7. The trial court erred in entering Conclusion 7.
126. The trial court lacked jurisdiction to enter Conclusion 8. The trial court erred in entering Conclusion 8.
127. The trial court lacked jurisdiction to enter Conclusion 9. The trial court erred in entering Conclusion 9.
128. The trial court lacked jurisdiction to enter Conclusion 10. The trial court erred in entering Conclusion 10.
129. The trial court lacked jurisdiction to enter Conclusion 11. The trial court erred in entering Conclusion 11.
130. The trial court lacked jurisdiction to enter Conclusion 12. The trial court erred in entering Conclusion 12.

131. The trial court lacked jurisdiction to enter Conclusion 13. The trial court erred in entering Conclusion 13.
132. The trial court lacked jurisdiction to enter Conclusion 14. The trial court erred in entering Conclusion 14.
133. The trial court lacked jurisdiction to enter Conclusion 15. The trial court erred in entering Conclusion 15.
134. The trial court lacked jurisdiction to enter Conclusion 16. The trial court erred in entering Conclusion 16.
135. The trial court lacked jurisdiction to enter Conclusion 17. The trial court erred in entering Conclusion 17.
136. The trial court lacked jurisdiction to enter Conclusion 18. The trial court erred in entering Conclusion 18.
137. The trial court lacked jurisdiction to enter Conclusion 19. The trial court erred in entering Conclusion 19.
138. The trial court lacked jurisdiction to enter Conclusion 20. The trial court erred in entering Conclusion 20.
139. The trial court lacked jurisdiction to enter Conclusion 21. The trial court erred in entering Conclusion 21.
140. The trial court lacked jurisdiction to enter Conclusion 22. The trial court erred in entering Conclusion 22.

141. The trial court lacked jurisdiction to enter Conclusion 23. The trial court erred in entering Conclusion 23.
142. The trial court lacked jurisdiction to enter Conclusion 24. The trial court erred in entering Conclusion 24.
143. The trial court lacked jurisdiction to enter Conclusion 25. The trial court erred in entering Conclusion 25.
144. The trial court lacked jurisdiction to enter Conclusion 26. The trial court erred in entering Conclusion 26.
145. The trial court lacked jurisdiction to enter Conclusion 27. The trial court erred in entering Conclusion 27.
146. The trial court lacked jurisdiction to enter Conclusion 28. The trial court erred in entering Conclusion 28.
147. The trial court lacked jurisdiction to enter Conclusion 29. The trial court erred in entering Conclusion 29.
148. The trial court lacked jurisdiction to enter Conclusion 30. The trial court erred in entering Conclusion 30.
149. The trial court lacked jurisdiction to enter Conclusion 31. The trial court erred in entering Conclusion 31.
150. The trial court lacked jurisdiction to enter Conclusion 32. The trial court erred in entering Conclusion 32.

151. The trial court lacked jurisdiction to enter Conclusion 33. The trial court erred in entering Conclusion 33.
152. The trial court lacked jurisdiction to enter Conclusion 34. The trial court erred in entering Conclusion 34.
153. The trial court lacked jurisdiction to enter Conclusion 35. The trial court erred in entering Conclusion 35.
154. The trial court lacked jurisdiction to enter Conclusion 37. The trial court erred in entering Conclusion 37.
155. The trial court lacked jurisdiction to enter Conclusion 38. The trial court erred in entering Conclusion 38.
156. The trial court lacked jurisdiction to enter the judgment.
157. The trial court erred in denying Appellants' motion to dismiss for lack of jurisdiction.
158. The trial court erred in denying Appellants' motion to dismiss on the statute of limitations.
159. The trial court erred in entering judgment against Appellants.
160. The trial court erred in awarding interest to Respondent.
161. The trial court erred in awarding costs and attorney fees to Respondent.

162. The trial court erred in denying, in part, Appellants' motion to amend their answer to include the defense of failure to mitigate damages.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in failing to enforce Paragraph 2 of the Predispute Arbitration Agreement in the 1993 United Pacific Securities Client Data Form? (Assignments of Error 1-161.)
2. Did the trial court err in denying Appellants' motion to dismiss for lack of jurisdiction? (Assignments of Error 1-161.)
3. Are Respondents' claims barred by the statute of limitations? (Assignments of Error 104-111, 145-151, 158-61)
4. Did the trial court err in placing upon Appellants the burden of proof regarding the accrual of Respondents' claims under the discovery rule for purposes of the statute of limitations? (Assignments of Error 105-110, 145-151, 158-61)
5. Did the trial court err in applying the discovery rule for purposes of the statute of limitations? (Assignments of Error 104-111, 145-151, 158-61)
6. Were Jerry Ives liquid assets rendered illiquid by Appellants' actions in this case? (Assignments of Error 33, 51, 53-55, 68, 69, 94)
7. Did Jerry Ives suffer any damages as a result of the illiquidity of any of the investments offered to Jerry Ives by Appellant Dave Ramsden? (Assignments of Error 51, 54, 90, 126-28, 139-144, 155, 159-61)
8. Were the investments offered to Jerry Ives by Appellant Dave Ramsden unsuitable? (Assignments of Error 31, 37, 51-55, 68, 69, 83, 84, 87, 89, 91, 94, 103, 119-131, 134, 139-144, 155, 159-61)
9. Did the trial court err in calculating damages under RCW 21.20.430? (Assignments of Error 54, 126, 127, 155, 159-61)

10. Did the trial court err in awarding interest to Respondents?
(Assignments of Error 134, 139-43, 159, 160)

11. Did the 1995 promissory note contain a promise by Appellants to secure the note with a first deed of trust or to record the same?
(Assignments of Error 72-76, 79, 82, 135-143, 159-61)

12. Are Respondent's Consumer Protection claims barred by RCW 19.86.170? (Assignments of Error 88-91, 104, 134, 144, 155, 159-61)

13. Are Respondent's Consumer Protection claims barred by the doctrine of primary jurisdiction? (Assignments of Error 88-91, 104, 134, 144, 155, 159-61)

14. Did the trial court err in awarding attorney fees to Respondent?
(Pertains to Assignments of Error 155, 159-61)

15. Did the trial court err in denying Appellants' motion to amend their answer to conform to the evidence to include the defense of failure to mitigate damages? (Pertains to Assignment of Error 163).

V. STATEMENT OF THE CASE

A. Facts.

Appellants, David T. Ramsden and Michele L. Ramsden, are husband and wife. CP 722; CP 714. The Ramsdens, hereinafter Dave and Michele, reside in Sequim. CP 722; CP 714; RP I at 51¹. Dave worked as a law enforcement officer for Los Angeles County from 1967 to 1985. RP III at 49-50. In 1985, Dave retired from employment with Los Angeles County. RP II at 67-68. Dave is also a graduate of California College of

¹ The report of proceedings for February 13, 2003 is referred to herein as RP I. The report of proceedings for February 19, 2003 is referred to herein as RP II. The report of proceedings for February 27, 2003 is referred to herein as RP III. The report of proceedings for January 5, 2006 is referred to herein as RP IV.

Law. RP I at 108. Dave has never been licensed to practice law. RP I at 108.

In 1986, while in California, Dave became a registered securities salesperson. RP I at 51-52. Dave was registered by the National Association of Securities Dealers (NASD) as a Series VII securities salesperson. RP I at 52. Dave's securities license allowed him to be his own broker-dealer or to supervise other brokers. RP II at 85. Dave was never an investment advisor. RP II at 84. Dave is not a broker-dealer. RP I at 53. Although authorized under his registration to do so, Dave chose not to deal in stock and bond trades, or options futures or market accounts, or to handle discretionary accounts. RP II at 86; RP III at 39. Although not required by law to take continuing education courses, Dave nevertheless attended seminars. RP II at 89-90. As of the date of trial in this case, Dave's securities license was current. RP II at 86.

In 1987, Dave obtained employment with Titan Capital. RP I at 54. While at Titan Capital, Dave worked as an independent contractor, and was supervised by a principal of Titan Capital, who reviewed every sale of securities. RP I at 55-56. Titan Capital issued quarterly an approved list of investments, and Dave was prohibited from selling anything that was not on that list. RP I at 56. In addition to limited partnership interests, Dave sold mutual funds, variable annuities, and

insurance policies. RP I at 71. Dave left Titan Capital in March 1992. RP I at 54.

In 1988, Dave moved from California to Sequim. RP I at 62. Upon settling in Sequim, Dave became active in community organizations. RP I at 61-62. Approximately one-half of Dave's clientele in Sequim were retired persons. RP I at 64. Dave's income during his first year in Sequim was under \$50,000.00. RP I at 101.

As part of his due diligence as a securities salesperson, Dave visited the home offices of every limited partnership whose products were sold through Titan Capital, and inspected the limited partnership, and met the limited partnership's principals. RP I at 56-57. During his visits, Dave was allowed access to officers and other key personnel of the limited partnership. RP I at 58.

Dave typically marketed his services at educational meetings of 40 to 50 people, whom he invited to hear a presentation from a representative from an investment entity that he was marketing. RP II at 81. Dave would thereafter respond to inquiries for additional information made by persons who attended those meetings. RP II at 82.

As a matter of practice, on all limited partnership investments, Dave would read the client suitability requirements for that investment to the client, and would ask the client if the investment was suitable or not.

RP II at 12. Dave would also read to the client the risk and liquidity paragraphs from the investment prospectus. RP II at 12. Dave would also advise the client that there was no fixed income stream associated with the investment, and that the client could lose all of his money. RP II at 12. Dave would discuss with the client the degree of risk associated with a particular investment. RP II at 12. As an added precaution, Dave would have his clients certify in writing that they had read and understood the suitability rules. RP II at 81, 84. Consistent with his practice, Dave signed documents in connection with investments that he offered to G. Jerome Ives, wherein he certified that the investment was suitable for Mr. Ives, and that he had informed Mr. Ives of the liquidity and marketability of the investment. RP I at 69-70; EX 22; RP I at 73-74, EX 29. Dave was entitled to rely upon the answers provided by his client. RP I at 195-96.

Dave addressed diversity of investments by ensuring that the investments that he offered to Jerry Ives were diverse in their nature and that the oil and gas investments were geographically and geologically diverse. RP II at 83.

In a typical securities transaction, Dave would solicit to his client an offer to purchase an investment, and would then send the client's offer to Titan Capital for review and approval. RP I at 59-60. Such a sale was

not complete until the investment company had reviewed it and approved the sale. RP I at 60.

In April 1992, Dave obtained employment with United Pacific Securities. RP I at 54. Dave left United Pacific Securities in December 1996. RP I at 54. In November 2000, Dave stopped doing business, due to a cognitive disorder. RP I at 98, 99. Dave's cognitive disorder stems from his service in Vietnam in 1965. RP II at 70-71. In November 2000, Dave was declared to be totally and permanently disabled because of the cognitive disorder. RP II at 68. As a result of his disability, Dave was awarded disability compensation from Social Security and the Veterans Administration of approximately \$3,000.00 per month. RP II at 69. Dave also receives \$2,000.00 per month from his police and fire pension. RP II at 70.

Jerry Ives had worked in commercial refrigeration in California for many years. RP II at 94. In 1990, Jerry Ives received a decree of dissolution from the Clallam County Superior Court of his marriage. RP II at 95; EX 119. In the decree of dissolution, Jerry Ives was awarded his 1989 mobile home. *Ibid.* Jerry Ives had purchased that mobile home for \$31,900 in 1988. RP II at 96-97; EX 121. Also in the decree of dissolution, Jerry Ives was awarded his mutual funds with IDS, his 1985 Toyota pick-up, his 1986 5th-wheel trailer, his union pension, his

California State teachers pension, his gun collection, a note for \$31,700 payable by his stepson, Gary Clayburgh, secured by a deed of trust on California real property, and a promissory note of approximately \$30,000, payable by Kristen Ives. RP II at 105; EX 119.

On March 2, 1990, Jerry Ives executed a revocable trust agreement. RP II at 141; EX 33. In Article I of the trust agreement, Jerry Ives identified as his immediate family his two children, Jerome C. Ives and Kristen Ives, and a step-son, Gary Clayburgh. RP II at 141; EX 33. Article 8 of the trust agreement provided for a trust for the benefit of Jerry Ives' grandchildren and great-grandchildren. RP III at 35-36; EX 33.

On January 6, 1988, the value of Jerry Ives' mutual fund account at IDS was \$113,244.73. RP II at 98-99; EX 70. In January 1989, the value of Jerry Ives' account at IDS was \$103,835.21. RP II at 99; EX 71. In March 1989, Jerry Ives made two exchanges of \$10,000.00 each from his account at IDS. RP II at 99; EX 69. In May 1990, Jerry Ives transferred out \$40,000.00. RP II at 99; EX 111. In January 1992, the balance on Jerry Ives' account at IDS was \$12,750.71. RP II at 100; EX 112. Jerry Ives closed his account at IDS in late 1993. RP II at 200.

Jerry Ives presented himself to Dave as a retired gentleman of substantial means. RP I at 126. Jerry Ives worked with a certified financial planner in California, and a financial planner in Port Angeles.

RP I at 126, 128; EX 98-100. Jerry Ives lived in a nice double-wide mobile home in Sequim. RP II at 20-21.

In a client data sheet executed on March 3, 1989, Jerry Ives represented to Dave that the value of that mobile home was \$40,000. RP II at 21; EX 102. Therein, Jerry Ives also represented to Dave that his income in 1989 was \$31,000 per year. RP I at 122; EX 102. Therein, Jerry Ives also represented that the total value of his assets at that time was \$176,000, and that the net value of his assets was then \$160,000. EX 102.

Jerry Ives owned a Toyota 1-ton truck and a fifth wheel trailer. RP II at 24; EX 113. Jerry Ives also drove a 1988 Chevrolet Astro van. RP II at 24; EX 113. Jerry Ives owned an extensive gun collection. RP II at 25. Jerry Ives owned a coin collection. RP II at 26; EX 113, 114. Jerry Ives owned extensive book, tape and plate collections. RP II at 22-23, 26.

Dave offered through Titan Capital limited partnership interests in Southwest Oil and Gas Income Fund VIII-A. RP I at 99-100. On March 20, 1989, Jerry Ives placed an order with Dave to purchase for \$10,000.00 20 units of Southwest Oil and Gas Income Fund VIII-A. RP I at 62; EX 19. Dave's broker received an eight percent commission on that transaction, and paid Dave a portion thereof. RP I at 60-61. The Titan Capital specialty products order form signed by Jerry Ives recited that *"I/We are aware that this is a speculative investment that is subject to*

acceptance by the issuer or its representatives. I/We certify that we qualify for this investment with respect to minimum net worth and/or income tax liability as required by my/our state of domicile as specified in the offering circular.” RP III at 22-24; EX 19.

On March 9, 1989, Jerry Ives placed an order with Dave to purchase for \$10,000.00 40 units of a limited partnership investment, Phoenix Leasing Cash Distribution Fund III. RP I at 70; EX 22. The order form contained the same recital by Jerry Ives as did the order form for Southwest Oil and Gas Income Fund VIII-A. EX 22. On July 20, 1990, Jerry Ives placed an order with Dave to purchase for \$10,000.00, 100 units of a limited partnership investment, Windsor Park Properties 6. RP I at 72; EX 25. On April 15, 1991, Jerry Ives placed an order with Dave to purchase for \$5,000.00, 10 units of a limited partnership investment, Southwest Oil and Gas Income Program 10-B. RP I at 72-73; EX 26.

On December 29, 1993, Jerry Ives signed a client data form with United Pacific Securities. EX 27. The client data form contained a predispute arbitration agreement. Ex 27. Paragraph 2 of the predispute arbitration agreement provides, in pertinent part that “ *[t]he parties are waiving their rights to seek remedies in court, including the right to jury trial...*” EX 27. As a matter of practice, Dave read the predispute arbitration agreement to his clients. RP III at 20-21.

Also on December 29, 1993, Jerry Ives signed a subscription agreement to purchase for \$10,774.00 an investment, Texas Keystone 1993-317 Developmental Drilling Program. RP I at 73; EX 28, 29.

The foregoing investments were speculative in varying degrees. RP I at 78. The Southwest Oil and Gas investments were engaged in purchasing and selling existing production. RP I at 84-85. Southwest Oil and Gas offered its investments to pension funds, and was qualified. RP I at 79. Dave considered those investments to have the minimum risk of speculation. RP I at 85. The Phoenix Leasing investment involved leasing of equipment to corporations, and was considered a very low risk investment. RP I at 110. The Windsor Park investment involved purchasing, rehabilitating and selling mobile home parks, and was also considered to be low risk. RP I at 110-11.

The Texas Keystone investment that Dave offered to Jerry started out as a drilling program and changed to a production program. RP I at 112. Texas Keystone hit every well they anticipated. RP I at 112. The Texas Keystone wells were still flowing in 2003. RP I at 112. Dave purchased units of Texas Keystone, and was still receiving monthly distribution checks in 2003. RP II at 53.

Dave represented to Jerry Ives that the Southwest Oil and Gas and Texas Keystone investments that Jerry Ives purchased were illiquid. RP I

at 73-74; EX 30. Notwithstanding the disclaimers as to liquidity, those investments had features that affected their marketability. RP I at 75. The area in Pennsylvania where the Texas Keystone wells are located had a history of wells lasting 40 to 50 years. RP I at 74; RP II at 56. A secondary market also exists for oil and gas limited partnerships. RP I at 76-77. The Texas Keystone investment also had a buy-back clause. RP II at 57-62.

The investments that Dave offered to Jerry Ives by their nature had different suitability requirements. The Phoenix Leasing and Windsor Park investments were “public programs” with requirements of \$30,000 income and \$30,000 net worth. RP I at 109.

Dave offered Jerry Ives only half a unit in Texas Keystone for \$12,500.00, as with the Southwest Oil and Gas investments already in his portfolio, a half-unit was all that would be appropriate for Jerry Ives to own. RP I at 113. Dave contacted Texas Keystone, and it agreed to sell Jerry Ives a half-unit. RP I at 113.

In September 1992, Jerry Ives purchased variable life annuity investment with American Skandia Life. RP II at 37; EX 103. Jerry Ives paid \$20,000.00 for the investment. RP II at 38; EX 103. A small portion of the purchase price was taken annually to pay the annual premium on the insurance. RP II at 40. The remainder of the purchase price was vested.

RP II at 40. Jerry Ives could make immediate withdrawals on the annuity. RP II at 38. Dave received a commission of five percent of the purchase price, or \$1,000.00. RP II at 40. On December 15, 1997, following Jerry Ives' death, American Skandia Life paid the beneficiary, Mr. Clayburgh, the annuity proceeds in the amount of \$64,182.45. RP II at 35.

On August 12, 1994, Jerry Ives executed a membership application with Prepaid Legal Services. RP II at 28-29; EX 39. Jerry Ives had access to counsel through Prepaid Legal. RP II at 32.

Jerry Ives had a definite objective in investing, and his actions were consistent with his objective. Jerry Ives set up mutual fund accounts for his three grandchildren. RP II at 43, 48-52; EX 104-107. Jerry Ives' 1990 trust agreement also contemplated a trust for the benefit of his grandchildren and great-grandchildren. RP III at 35-36; EX 33.

In 1990, Dave was offered an opportunity to purchase a house in Sunland at a very favorable price. RP II p. 70. The owner of the house was in South Africa, and was in urgent need of money. RP II at 70. A neighbor, who was a realtor, was also attempting to put together an offer to purchase the house. RP II at 74. Dave made an offer of \$70,000 for the property, which was accepted by the owner. RP II at 75.

Dave borrowed \$30,000 of the funds used for the purchase of the house from a Mr. Vonderfecht. RP I at 85. Mr. Vonderfecht was not one

of Dave's clients. CP 470. Dave borrowed the remaining \$40,000 from Jerry Ives, and, on May 11, 1990, Dave and Michele executed a promissory note in that amount to Jerry Ives. RP I at 85-86; EX 7. Dave borrowed the money from Jerry Ives and Mr. Vonderfecht, as time was of the essence, and the opportunity to purchase the house at that price would have been lost in a very short time. RP II at 87. At that time, Dave had access to other sources of funding, as he was a veteran, and was then eligible for a Veterans Administration loan. RP I at 87, 102.

Dave's concern was that Jerry Ives receive a return not less than the amount that Jerry Ives would have received had he not made the loan to Dave. RP I at 86. Therefore, the May 11, 1990 promissory note recited that reimbursement was to be in the same number of shares as were sold, and in the same, or an agreed alternative, fund. EX 7. In addition, on May 11, 1990, Dave and Michele executed a deed of trust on their property to secure repayment of that note. RP I at 88; EX 8.

The term of the May 11, 1990 note was twelve months. RP II at 87; EX 7. At the end of the term, Mr. Vonderfecht wanted to be paid off. RP II at 76. Dave did not then have the funds to repay the May 11, 1990 note, but he could have refinanced the note with a loan from the Veterans Administration. RP I at 87-88. Instead, Dave refinanced the note with Jerry Ives. On February 15, 1991, Dave sent a letter to Pioneer Title

Company to pay off Mr. Vonderfecht and to record a deed of reconveyance of the May 11, 1990 promissory note and deed of trust. RP I at 88; EX 10. That letter also directed Pioneer Title to prepare a new note for \$72,000 secured by a deed of trust in favor of Jerry Ives. RP I at 88; EX 10. The letter called for the new note to carry an interest rate of twelve percent, and a term of May 11, 1990 to May 11, 1995. EX 10.

On February 19, 1991, Dave and Michele executed to Jerry Ives a modification of the 1990 note and deed of trust. RP I at 89; EX 11. The modification of the note was signed by Jerry Ives, provided for an amount of \$72,000.00, an interest rate of twelve percent, payments of \$500.00 per month from March 10, 1991, remaining interest due and payable on March 1, 1992, and the balance with all accrued interest due on or before May 11, 1995. EX 11. The remaining terms were unchanged, and the modification was recorded on February 20, 1991. EX 11. The 1991 modification of the note allowed the interest to accumulate. RP I at 92. By 1995, the balance on the note had increased to \$86,900.00. RP I at 92. The 1991 modification of the note came due in 1995. RP I at 92.

On July 1, 1995 Dave and Michele executed a new promissory note to Jerry Ives. RP I at 93; EX 14. Dave prepared the 1995 note, wherein Dave and Michele promised to pay Jerry Ives the sum of \$86,900 with eight percent interest from July 1, 1995, monthly payments of

\$996.74, and a due date of June 1, 2006. RP I at 93; EX 14. Dave and Michele agreed to the higher payments under the 1995 note and a ten year term in exchange for an eight percent interest rate. RP I at 115.

The 1995 note recited that it was secured by a deed of trust, but neither Dave nor Michele ever signed such deed of trust. RP I at 93-94.

Over the eleven year term of the 1995 note, Dave and Michele paid \$43,672.00 in interest. RP I at 94; EX 15. Dave and Michele were current in their payments on the 1995 note. RP I at 94-95; RP II at 79. Dave also repaid Jerry Ives \$2,000.00 for \$1,600.00 advanced by Jerry Ives in 1995 for dental work for Dave's daughter. RP I at 104-05; EX 16.

Dave borrowed money from individuals other than Mr. Vonderfecht and Jerry Ives, but he did not borrow money from other clients. RP II at 63, 66. Between 1995 and 2000, Dave borrowed between \$40,000 and \$50,000 from two other individuals. RP II at 64-65. In 2000, Dave borrowed \$150,000 at 7.37 percent, secured by a deed of trust on his house. RP I at 95-97. Dave borrowed the money because he was then without income, and wanted to consolidate debt. RP II at 73, 98. Dave had stopped doing business in 2000. RP I at 99.

Jerry Ives had a history of loaning money to family members. Jerry Ives' net worth statement for March 1989 disclosed loans to his family totaling \$84,405. RP II at 122; EX 1. Jerry Ives tied loans that he

made to his children to his IDS investment, as he had done with the May 11, 1990 note from Dave and Michele. RP II at 125, 136. Jerry Ives had loaned \$30,000 to Kristen Ives. RP II at 122-23; EX 1. Jerome C. Ives had no evidence that Kristen Ives had ever repaid that loan to Jerry Ives' estate. RP II at 125. Jerry Ives kept extensive notes and ledgers. RP II at 125-26. Jerome C. Ives had owed Jerry Ives \$8,813. RP II at 124; EX 1. Jerome Ives claims to have repaid that loan, but could not recall when. RP II at 127. Jerry Ives loaned \$13,892.00 to his grandson, John Ives. RP II at 128; EX 1. Jerome Ives claims to have purchased that loan from Jerry Ives, but did not recall when. RP II at 128. In 1989, Jerry Ives step-son, Gary Clayburgh, owed Jerry Ives \$31,700.00. RP II at 133; EX 1. Gary Clayburgh was not current on his loan. RP II at 133-34. Gary Clayburgh's note was secured by a deed of trust on California real property. RP II at 137-38; EX 4 at 2. As of October 13, 1996, the balance on Gary Clayburgh's debt to Jerry Ives had increased to \$45,814.67. RP II at 134; EX 45.

Jerry Ives initially did not disclose to Dave his loans to family members. RP III at 94. But by the time of his purchase of the Texas Keystone investment in 1993, Dave was aware that Jerry Ives had family loans. RP III at 100. Jerry Ives also reported \$361,000.00 on his December 29, 1993 client data form. EX 27.

B. Procedural History.

Jerry Ives died on June 19, 1996. EX 109. Jerry Ives died testate. EX 109. The residual beneficiaries of Jerry Ives' will were his two children, Jerome C. Ives and Kristen Ives, and his step-son, Gary Clayburgh. RP II at 108. On July 9, 1996, Jerome C. Ives, son of Jerry Ives, was appointed personal representative of the estate of Jerry Ives. RP II at 92; EX 109.

Upon his appointment as personal representative, Jerome Ives undertook to liquidate Jerry Ives' investments. On January 5, 1999, Jerome Ives liquidated Jerry Ives investment in Southwest Oil and Gas VIII-A for \$1,248.20. RP II at 110; Ex 82. On January 5, 1999, Jerome Ives liquidated Jerry Ives investment in Southwest Oil and Gas X-B for \$686.70. RP II at 112; EX 83. On July 12, 2002, Jerome Ives sold Jerry Ives investment in Texas Keystone for \$1,263.00. RP II at 112-13; EX 84, 116. On February 19, 1999, Jerome Ives sold Jerry Ives investment in Windsor Park for \$2,700.00. RP II at 114; EX 85.

Jerome Ives caused an investigation of Dave to be made by the NASD. RP III at 14-15. The NASD investigation resulted only in a letter of caution stating that Dave should have filed a form U-4 to put the NASD on notice of the complaint from Jerome Ives. RP I at 117; EX 125.

Jerome Ives also contacted the Washington State Department of Financial

Institutions regarding Dave. RP I at 118. In July 1999, as a result of its investigation, Dave entered into a consent order with the Department of Financial Institutions. RP I at 118; EX 80. Therein, the Department concluded that Dave had violated WAC 460-22B-090(7) by failing to have reasonable grounds for believing that the recommendations for the purchase, sale or exchange of a security were suitable in light of the customer's investment objectives, financial situation and needs in violation of RCW 21.20.702. EX 80 at 3-4. The Department further concluded that Dave violated WAC 460-22B-090(1) by engaging in the practice of borrowing money from a customer. EX 80 at 4. Dave neither admitted nor denied the Department's findings and conclusions. EX 80 at 1. Dave agreed to cease and desist from committing any future violations of RCW 21.20.702, WAC 460-22B-090(7) and WAC 460-22B-090(1). EX 80 at 4. Dave agreed to continue to fulfill his repayment obligations to Jerry Ives' estate, pursuant to the terms of the note, and to report his progress on payment to the Department within 15 days of each quarter. EX 80 at 4. The order recited that it was a complete and final resolution of all claims by the Department against Dave. EX 80 at 4.

On July 1, 1999, Jerome Ives filed a complaint against Dave for fraud, breach of fiduciary duties, imposition of trust, violation of the Washington Consumer Protection Act, and other remedies. CP 722.

Dave filed an answer and affirmative defenses, alleging, *inter alia*, that Jerome Ives' claims were barred by the statute of limitations and the doctrines of waiver and/or estoppel. CP 714, 717. On March 14, 2002, Dave's counsel filed a notice of intent to withdraw. CP 696. On August 13, 2002, Jerome Ives filed a lis pendens. CP 692.

The case came to trial on February 18, 2003. RP I. Dave moved to dismiss Jerome Ives' complaint on the ground that the action was precluded by Paragraph 2 of the Predispute arbitration agreement in the United Pacific Securities client data form... RP I 6-8, 10-11; EX 27. Paragraph 2 provides that “[*t*] parties are waiving their right to seek remedies in court including the right to jury trial.” EX 27. The trial court denied Dave's motion without prejudice. RP I at 12. In his closing argument, Dave renewed his argument that Jerome Ives' complaint was barred by reason of the predispute arbitration agreement in the 1993 client data form, and particularly, by reason of paragraph 2 thereof. RP III at 107-110; EX 27.

Dave also argued that Jerome Ives' claims were barred by the statute of limitations, RCW 4.16.200, as the claims were brought more than one year after the appointment of Jerome Ives as personal representative of the Estate of Jerry Ives. RP III at 105-06. Dave also argued that the statute of limitations regarding the securities claims

commenced to run against Jerry Ives in 1989, when he certified that the investments were suitable. RP III at 90, 93. Dave also argued that the rule against borrowing money from a client impaired his right to contract in violation of Article I, Section 10 of the Constitution. RP III at 95.

Jerome Ives testified as to a meeting that he attended with Dave at Jerry Ives' residence, which meeting occurred within a week after Jerry Ives' death on June 19, 1996, and before his funeral. RP II at 154-56. Jerome Ives and Dave discussed Jerry Ives' investments at that meeting. RP II at 156-57. Jerome Ives testified further that he attended a family meeting immediately after Dave left the first meeting. RP II at 165-66. Present at that meeting were Jerome Ives' daughter in law, the attorney who works for Oppenheimer, and his son, the MBA, who "*were really aghast*" that Jerry Ives was in limited partnerships, and advised Jerome Ives to get rid of them. RP II at 153-54, 165; RP III at 14.

Jerome Ives testified that he did not hire his counsel in this case until after the Department of Financial Institutions consent order had been executed in July 1999. RP III at 11-12. Jerome Ives counsel, Mr. Carlson, introduced his time sheets that disclosed that Mr. Carlson's initial client consultation with Jerome Ives occurred on October 9, 1998, that between October 16, 2004 and January 12, 1999, Mr. Carlson had one additional conference and three telephone conferences with Jerome Ives, and that

between June 16 and June 29, 1999, Mr. Carlson conducted legal research and drafted the complaint in this case. CP 266-67.

Mr. Carlson, acknowledged at trial that Jerry Ives suffered no damages from the illiquidity of the investments offered to him by Dave. *“The damages from the illiquidities appears not to have visited the victim during his lifetime.”* RP III at 83. Mr. Carlson also limited Jerome Ives’ claim regarding the promissory notes to the 1995 promissory note. RP III at 58. Mr. Carlson also acknowledged that Dave had testified to borrowing money from a client only on one occasion. RP II at 59. Mr. Carlson acknowledged that as Mr. Ramsden had made all the payments on the 1995 note, Jerry Ives’ Estate had not experienced a financial loss. RP III at 70.

On March 29, 2003, the trial court filed its memorandum opinion. CP 328. The trial court ruled that because of the professional relationship between Dave and Jerry Ives, any claim that Jerry Ives had against Dave survived his death, and passed to his personal representative. CP 336. The trial court concluded that there was no indication that Jerome Ives would have known that the alleged improper investments would have led to damages until he made inquiries into the value of those investments, which did not occur until he was granted letters testamentary and made appropriate inquiries. CP 338. The trial court concluded that as the action

was commenced within three years of the appointment of Jerome Ives as personal representative of Jerry Ives' estate, the three-year statute of limitations had not yet run. CP 338-39. The trial court also adopted the same reasoning with regard to the claim on the 1995 note. CP 341. The trial court therefore denied Dave's motion to dismiss on the statute of limitations. CP 341. The trial court also ruled that the defense on the predispute arbitration clause in the 1993 client data form had been waived by Dave by engaging in pretrial discovery. CP 341-43.

While noting that no Washington decision has addressed the fiduciary status of a securities sales person, the trial court nevertheless concluded that the Washington Administrative Code indicates that securities sales people are fiduciaries. CP 341. The trial court relied upon WAC 460-24A-220. CP 350. The trial court relied upon WAC 460-24A-220(6) in concluding that it was an unethical act for Dave to have borrowed money from a client. CP 354.

The trial court concluded further that the 1991 note for \$72,000 rendered 90 percent of Jerry Ives' investments illiquid, and rendered inappropriate the Texas Keystone investment. CP 355-56. The trial court concluded that the Texas Keystone investment was predicated upon inaccurate information supplied by Dave to meet Texas Keystone's

suitability requirements, and therefore Dave was subject to the civil penalties in RCW 21.20.430(1). CP 356-57.

The trial court also concluded that Jerome Ives acted reasonably in liquidating Jerry Ives' investments. CP 358.

The trial court concluded that it was an unethical practice for Dave to have borrowed money from his client, as it was prohibited by the fiduciary nature of Dave's relationship with Jerry Ives, or because the loan was an unsuitable investment. CP 359. Therefore, under RCW 21.20.430(1), the trial court added an additional \$1,200.00 as of May 11, 1991. CP 359. The trial court further concluded that under the discovery rule, the statute of limitations would not have run on any action in connection with the May 11, 1991 note. CP 359-60.

The trial court concluded that the 1995 note was voidable, as Dave was in breach of the note by not recording the deed of trust, and because the note was an unlawful arrangement in violation of the State Security Act's prohibition against loans between security salespersons and their clients. CP 362. The trial court imposed interest at 12 percent retroactively to July 1, 1995. CP 362. The trial court also imposed an equitable lien on Dave's residence. CP 362.

The trial court also awarded damages of \$10,000 under the Consumer Protection Act with respect to the Texas Keystone investment.

CP 370. The trial court also ruled that the elements of a claim under the Consumer Protection Act were also met with regard to the 1995 note, but as the note was the cause for the Texas Keystone investment to be unsuitable, the total amount of punitive damages under the CPA was limited to \$10,000.00. CP 370. The trial court also authorized an award of attorney fees to Jerome Ives. CP 370-71.

On October 24, 2005, Jerome Ives filed a notice of presentation of findings and judgment. CP On November 7, 2005, Mr. Carlson filed a declaration in support of award of attorney fees and costs. CP 255. On November 30, 2005, Dave filed objections to Jerome Ives' proposed findings, conclusions and judgment. CP 225. On December 17, 2005, Dave filed amended objections. CP 173. On December 29, 2005, Dave filed a motion to amend his answer to conform to the evidence. CP 150.

On January 5, 2006, the trial court held a hearing. RP IV. On January 25, 2006, the trial court entered findings of fact, conclusions of law, a judgment, and an order amending answer to conform to the evidence. CP 51; CP 47; 44. On February 16, 2006, Dave filed a notice of appeal from the trial courts' findings of fact, conclusion of law, judgment, and the trial court's denial of Dave's motion to dismiss.

VI. ARGUMENT

A. STANDARDS OF REVIEW

In reviewing the trial court's findings of fact, the Court determines whether substantial evidence supports the findings and whether the findings support the trial court's conclusions of law. *Hegwine v. Longview Fibre Company*, --Wn. App. --, 132 P.3d 789, 793 (2006). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *Ibid.*

Conclusions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *Hegwine v. Longview Fibre Company*, 132 P.3d 794. The trial court's ruling on a motion to dismiss is reviewed *de novo*. *Cutler v Phillips Petroleum*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Whether a claim is time barred is a legal question, which is reviewed *de novo*. *Pietz v Indermuhle*, 89 Wn. App. 501, 511, 949 P.2d 449 (1998). The trial court's determination of the legal consequences of a contract is reviewed *de novo*. *Martinez v. Miller Industries, Inc.*, 94 Wn. App. 935, 943-44, 574 P.2d 1261 (1999). Whether a particular act is unfair or deceptive for purposes of the Consumer Protection Act is reviewed *de novo* as a question of law. *Henery v. Robinson*, 67 Wn. App. 277, 290-91, 814 P.2d 670, *review denied*, 120 Wn.2d 1024, 844 P.2d 1018 (1993).

B. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS.

Error is assigned to the trial court's denial of Dave's motion to dismiss, to Findings 113, 118, to Conclusions 34 and 35, and to the judgment. CP 34-42; CP 68; CP 74-75; App. 1; CP 47-50; App. 2. Paragraph 2 of the predispute arbitration agreement in The United Pacific Securities, Inc. Client Data Form provides, in pertinent part that “ *[t]he parties are waiving their rights to seek remedies in court, including the right to jury trial...*” EX 27. Paragraph 2 is a forum selection clause. Forum selection clauses are enforceable in Washington, unless they are unfair or unreasonable. *Wilcox v Lexington Eye Institute*, 130 Wn. App. 234, 122 P.3d 729, 731 (2005); *Bank of America, N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001); *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997).

As explained in *Miller*, “*[a]bsent evidence of fraud, undue influence, or unfair bargaining power, courts are reluctant to invalidate forum selection clauses as they increase contractual predictability. (citations omitted).*” 108 Wn. App. 748. Further, as explained in *Miller*, “*...the party arguing that the forum selection clause is unfair or unreasonable bears a heavy burden of showing that trial in the chosen*

forum would be so seriously inconvenient as to deprive the party of a meaningful day in court.” Ibid.

Paragraph 2 of the predispute arbitration agreement constitutes a waiver of jurisdiction. In *Kysar v. Lambert*, 76 Wn. App. 470, 484, 887 P.2d 431, *review denied*, 126 Wash.2d 1019, 894 P.2d 564 (1995), this Court recognized that “*a choice-of-forum clause shows consent to personal jurisdiction...*” 76 Wn. App. 485. Conversely, Paragraph 2 compels just the opposite conclusion, that the parties waived the right to pursue claims against each other in court. It follows that the Court lacks jurisdiction over Defendants.

In Paragraph 27 of their answer, Dave alleged that “*Plaintiff’s claims are barred by the doctrine of waiver...*” CP 716. Paragraph 27’s use of the term “*waiver*” coincides with the use of that term in Paragraph 2 of the Predispute Agreement. EX 27. In his motion to dismiss, Dave argued that by reason of the predispute agreement, Jerry Ives had waived his right to proceed in Washington courts. RP I at 6-8. Dave also argued Paragraph 2 of the predispute agreement in his closing argument. RP III at 107. Thus, Dave adequately preserved the issue whether the parties waived jurisdiction under Paragraph 2 of the predispute arbitration agreement. *French v. Gabriel*, 116 Wn2d 584, 594, 806 P.2d 1234

(1991); *Davidheiser v Pierce Co*, 92 Wn. App. 146, 156, 960 P.2d 998, *review denied*, 137 Wn2d 1016, 978 P.2d 1097 (1999).

In Conclusion 35, the trial court concluded that Dave waived the right to rely upon the arbitration clause by engaging in discovery. CP 74. Dave's actions in engaging in discovery in this case do not constitute a waiver of the provisions of Paragraph 2 of the predispute arbitration agreement. In *Voicelink Data Services, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997), in affirming dismissal of the plaintiff's case, this Court concluded that the defendant, having preserved the defense of lack of jurisdiction in its answer, did not thereafter waive that defense by participating in discovery: 86 Wn. App. 626. A similar conclusion is warranted here

The trial court's Finding of Fact 113 and Conclusions of Law Nos. 34 and 35, while purporting to address the predispute arbitration agreement in the United Pacific Securities Client Data Form (EX 27), nevertheless fail to address the critical language of Paragraph 2 thereof, and are therefore in error.

In light of the foregoing, Finding 118 and Conclusions 34, 35, and the remaining findings and conclusions, and the judgment should be reversed, and the case should be dismissed, with prejudice.

C. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS ON THE STATUTE OF LIMITATIONS

Error is assigned to the trial court's denial of Dave's motion to dismiss on the statute of limitations. CP 341. Error is assigned to the trial court's Findings 104 105, 106, 107 108, 109, 110, 111. CP 66-67; App. 1. Error is assigned to the trial court's Conclusions 27-33. CP 74; App. 1. Error is assigned to the judgment. CP 47-50; App. 2. Dave raised the statute of limitations in his answer. CP 716.

In Findings 105, 106, 107, 108,109, 110, and Conclusions 27, 28, 29, 32, 33, the trial court erred when it placed upon Dave the burden of proving when Jerome Ives' claims accrued for purposes of the discovery rule. The law places upon Jerome Ives the burden of proving whether the facts constituting his claims were not nor could have been discovered within the applicable statute of limitations. *Douglass v Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000) (quoting *Interlake Porsche-Audi, Inc., v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597, review denied, 107 Wn.2d 1022 (1987)); *Sherbeck v. Estate of Lyman*, 15 Wn. App. 866, 868-70, 552 P.2d 1076 (1976).

The trial court also erred in applying the discovery rule. Under RCW 4.16.080(4), the statute of limitations does not commence to run on a claim for common law fraud until the aggrieved party discovers, or

should have discovered, the fact of fraud by due diligence and sustains some actual damage as a result therefrom. *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 283-84, 864 P.2d 17 (1993). As noted in *First Maryland Leasecorp*, “[i]n the typical fraud case, damages are not speculative at the time the fraudulent acts are discovered.” 72 Wn. App. 284 n.4.

Under the discovery rule, it is the fact of damage, and not its extent, that triggers accrual of the statute of limitations. *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998); *Hudson v Condon*, 101 Wn. App. 866, 875, 6 P.3d 615, *review denied*, 143 Wn.2d 1006, 21 P.3d 290 (2001). Nor does the discovery rule require Dave to prove that Jerome Ives understood all of the legal consequences of a claim. *Green v. A.P.C.*, 136 Wn.2d 95; *Reichelt v Johns-Manville Corp*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987). The law requires reasonable diligence on the part of Jerome Ives. *Ibid*.

In *First Maryland Leasecorp*, in reversing the trial court’s denial of the third party defendant’s motion to dismiss the third-party plaintiff’s fraud claim, the court concluded that the fraud claim accrued when the fact of damage was known, although the extent of damage was not known. 72 Wn. App. 285-86.

Similarly, in *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 658 P.2d 42, review denied, 89 Wn.2d 1012 (1983), in affirming summary judgment for a broker in an action by a purchaser of bonds, the court held that the purchaser's claim for fraud accrued on the date that the purchaser learned that bonds were not guaranteed by the State. 33 Wn. App. 842.

In June 1996, more than three years before he filed this action, Jerome Ives met with his family, including his daughter-in-law, a securities attorney, and his son, an MBA, and discussed Jerry Ives' investments. RP II at 154-56, 165-66; RP III at 14. Jerome Ives' daughter-in-law and son were aghast that Jerry Ives had invested in limited partnerships, and advised Jerome Ives to get rid of those investments. RP II at 154. Under *Douglass v Stanger, First Maryland Leasecorp, Green v. A.P.C., Reichelt v Johns-Manville Corp., Hudson v Condon, Interlake Porsche-Audi, Inc., v. Bucholz, Cahn v. Foster & Marshall, Inc.* and *Sherbeck v Estate of Lyman*. Jerome Ives' claim for fraud, if any, accrued at that meeting. The fact that Jerome Ives did not discover the full extent of his claimed damages until later did not toll the statute of limitations. *Green v. A.P.C.*, 136 Wn.2d 96. Findings 105, 106, 107, 108, 109, 110 are therefore not supported by substantial evidence, and Conclusions 27, 28, 29, 32, 33 are in error.

Under RCW 21.20.430(4)(b), an action must be commenced within three years of a securities violation, although the three-year period is tolled until the securities violation is discovered or should have been discovered. In *First Maryland Leasecorp*, the court concluded that if the defendant made any Securities Act misrepresentations, they were most likely made in 1979, and discovered by third party plaintiff no later than 1984, and, therefore the Securities Act claims were barred. 72 Wn. App. 288. In *Douglass v Stanger*, dismissal of the plaintiff's securities claim was affirmed on appeal, as the plaintiff failed to exercise due diligence in monitoring the progress of the shopping center development in which he had invested. By failing to take action within three years of the June 1996 meeting with his family members regarding Jerry Ives investments, Jerome Ives placed himself in the same position as the third party claimant in *First Maryland Leasecorp*, and the plaintiff in *Douglass*. Jerome Ives' securities claims are therefore time-barred.

Findings 102, 107, 108, 109, and Conclusions 12, 29, 33 rest upon the assumption that Dave violated a duty to Jerry Ives in borrowing money from him. CP 67, 71, 74; App. 1. As indicated *infra*, Dave violated no duty to Jerry Ives with regard to those loans. Findings 107, 108, 109 were therefore unnecessary, and should not have been made. *Roundup Tavern*,

Inc. v. Pardini, 68 Wn.2d 513, 516, 413 P.2d 820 (1966). Conclusions 12, 29 and 33 are therefore also in error.

In Findings 105, 106, 107, 110 and Conclusions 27, 28, 31, and 32, the trial court failed to address Jerry Ives' conduct in supplying false information regarding himself on the Texas Keystone subscription agreement. RP II at 12; RP III at 90-91; EX 29. Therein, Jerry Ives affirmatively represented himself to be an "*accredited investor*" with the net worth required for such an investment. EX 29. Findings 105, 106, 107, 110 are therefore not supported by substantial evidence, and Conclusions 27, 28, 31, and 32 are in error.

In Finding 111, the trial court found that Jerome Ives investigated his father's investments *after* he had been appointed personal representative. CP 67. Finding 111 is contradicted by Jerome Ives' testimony regarding the June 1996 meeting with Dave and the meeting with his family. RP II at 154-56, 165-66; RP III at 14. Finding 111 is therefore not supported by substantial evidence, and should be reversed.

Miles v Miles, 125 Wn. App. 64, 114 P.3d 671 (2005).

D. CHALLENGED FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND DO NOT SUPPORT THE TRIAL COURT'S CONCLUSIONS.

Error is assigned to the trial court's Findings 33, 37, 51, 68, 69, 94. CP 56, 58, 61, 64-65; App. 1. Finding 33 found that annuities have high

commission rates for the salesperson. CP 56. Dave testified that variable annuities often have commissions as low as three percent, and that the commission on the American Skandia annuity purchased by Jerry Ives was around three percent, due to Jerry Ives' age. RP II at 40; EX 103; RP III at 51. Finding 33 found that annuities are also illiquid, with early penalties for withdrawal. CP 56. Jerry Ives could make immediate withdrawals from his American Skandia annuity. RP II at 38. Mr. Carlson acknowledged that Jerry Ives had access to some of the \$20,000.00 that he paid for the American Skandia annuity. RP III at 68. Finding 33 is therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71.

Finding 37 found that Jerry Ives' purchases of the limited partnerships investments and the Skandia annuity constituted excessive trading due to their commission costs. CP 56; App. 1. The commission costs for the American Skandia Annuity were modest. RP II at 40; EX 103. Finding 37 is therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71.

Finding 51 found that Mr. Ives' December 29, 1993 purchase of the Texas Keystone limited partnership exhausted the last of his liquid funds, and left him with no emergency funds at age 80. CP 58; App. 1. Finding 94 found that at the time of his death, Jerry Ives had limited liquid

assets available to him. CP 64-65; App. 1. Findings 68 and 69 rest on the premise that the 1991 note rendered 90 percent of Mr. Ives' assets illiquid. CP 61; App. 1. Findings 51 and 94 overlook the \$20,000.00 in Jerry Ives' American Skandia annuity that he purchased in September 1992. RP II at 37; EX 103. Findings 51 and 94 overlook the fact that Jerry Ives could make immediate withdrawals from that annuity. RP II at 38; RP III at 68. Findings 51, 68, 69 and 94 overlook the \$31,700.00 note and deed of trust given by Jerry Ives' step-son, Gary Clayburgh, and the \$30,000.00 note from his daughter, Kristin. RP II at 105; EX 1, 4; 119. Findings 51, 68, 69 and 94 overlook Dave and Michele's 1991 note and deed of trust for \$72,000.00. EX 9, 11. Findings 51, 68, 69 and 94 overlook Jerry Ives' retirement income and social security income. EX 54, 55, 56, 57, 58. Findings 51, 68, 69 and 94 overlook Mr. Carlson's admission that Jerry Ives suffered no damages from illiquidity of his investments during his lifetime. RP III at 83. Findings 51, 68, 69 and 94 are therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Findings 51, 68, 69 and 94 therefore do not support Conclusions 1, 2, 4, 5, 6, 7, 8, 9, or 10. CP 69-71; App. 1.

Error is assigned to Findings 42 through 47. CP 57-58; App 1. In Findings 42, 43, and 44, the trial court failed to recognize that Jerry Ives provided detailed information in the Texas Keystone subscription

agreement, and had the subscription agreement notarized. EX 29. Finding 45 failed to address the testimony of Jerome Ives' securities expert, Scott Rhodes, who agreed that under NASD rules, a securities salesperson can accept a client's answers, unless patently false. RP II at 195-96. Finding 46 failed to recognize that "*speculation*" is circled under the heading of "*Investment Objectives*" on the United Pacific Securities Client Data Form. EX 27. Finding 47 failed to recognize Dave's testimony that he did not intentionally misrepresent the dollar amounts on the client data form. RP III at 39-40. Findings 42-47 are therefore not supported by substantial evidence, and should be reversed. . *Miles v Miles*, 125 Wn. App. 69-71. Findings 42 through 47 therefore do not support Conclusions 1, 2, 4, 5, 6, 7, 8, 9, 10. CP. 70-71; App. 1.

Error is assigned to Finding 53. CP 59; App 1. After purchasing the Texas Keystone investment, Jerry Ives retained liquid assets including \$20,000 in his American Skandia annuity, a \$31,700 note and deed of trust from his step-son, a \$30,000 note from his daughter, a \$72,000 note and deed of trust from Dave and Michele, his pensions and social security. EX 1, 4, 9, 11, 119. Jerry Ives also affirmatively misrepresented his financial information on the Texas Keystone subscription agreement. EX 29. Even assuming that Dave made any misrepresentations in connection with the Texas Keystone investment, Dave's conduct had little potential to deceive

substantial portion of the public, and was therefore neither unfair nor deceptive. *Henery v. Robinson*, 67 Wn. App. 277, 291, 834 P.2d 1091, review denied, 120 Wn.2d 1024, 844 P.2d 1018 (1003); *Segal Company v. Amazon.com.*, 280 F. Supp. 2d 1220, 1232-33 (W.D. Wa. 2003). Finding 53 is therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Finding 53 therefore does not support Conclusions 7, 8, 9, or 10. CP 69-71; App. 1.

Error is assigned to Finding 54. Mr. Carlson admitted that Jerry Ives suffered no damages from illiquidity of his investments during his lifetime. RP III at 83. The trial court characterized the specific amount of damages for the Texas Keystone Investment as “*somewhat speculative*” CP 369. Jerome Ives was required to prove such damages, and the amount thereof, with reasonable certainty. *Carlson v. Leonardo Truck Lines*, 13 Wn. App. 795, 799-803, 538 P.2d 130 (1975)

The trial court found that Jerome Ives’ claimed damages of \$15,958 fell between the range of damages of \$14,595 to \$16,431 in Exhibit 90. CP 369-70. Jerome Ives’ evidence of damages consisted of comparisons of the performance of Jerry Ives investments versus the performance of two indices. RP I at 178-186; EX 89-93. Under RCW 21.20.430(1), the measure of damages limited Jerome Ives to the amount that would be recoverable upon a tender, less the value of the security

when the buyer disposed of it, and interest at eight percent per annum from the date of disposition. *Garretson v. Red-Co, Inc.*, 9 Wn. App. 923, 927-929, 516 P.2d 1039 (1973); *Burgess v. Premier Corp.*, 727 F.2d 826 839 (9th Cir. 1984) Finding 54's calculation of damages in the amount of \$15,598 cannot be reconciled with RCW 21.20.430(1) or *Garretson*. That amount was arrived at when the Court considered Plaintiff's forecast of what a fair rate of return would have been during the same time on the same \$12,125 investment. CP 369-70. Under RCW 21.20.430(1), however, Jerome Ives may only recover the difference between the purchase price of that investment, \$12,125, and the sale price of \$1,263, or \$10,862. EX 84. Under RCW 21.20.430(1), there must also be subtracted therefrom "*the amount of any income received on the security*". Jerry Ives or his estate received returns totaling \$3,811.90 on Texas Keystone. EX 84. That amount must be subtracted from the \$10,862 difference for a net damage of \$7,050.10. Finding 54 is therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Finding 54 therefore does not support Conclusions 4, 5, 6, 7, 8, 9, or 10, CP 70-71; App. 1.

Finding 55 is premised on the sale of unsuitable securities. CP 59. Dave did not sell unsuitable securities to Jerry Ives. The Phoenix Leasing, Southwest Oil and Windsor Park investments were not unsuitable because

Jerry Ives retained sufficient liquid assets. CP 70. Jerry Ives likewise retained sufficient liquid assets after acquiring the Texas Keystone investment. EX 1, 4, 9, 11, 54, 55, 56, 57, 58, 119. Finding 55 is therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Finding 55 therefore does not support Conclusions 4, 5, 6, 7, 8, 9, or 10. CP. 70-71; App. 1.

Error is assigned to Findings 56 and 91. CP 59; App. 1. To the extent that Findings 56 and 91 rest upon WAC 460-22B.090(1), those findings are in error, as all three notes in question were executed before WAC 460.22B.909 became effective on August 20, 1995. Washington State Register 95-16-026; App. 4; RP IV at 22-24, 26. To apply WAC 460.22B.090(1) retroactively to any of the notes would violate *Washington Constitution Art. 1 Section 23*. (“No ... law impairing the obligations of contracts shall ever be passed.”); *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 541,546-47, 989 P.2d 1258), *review denied*, 141 Wash.2d 1006, 10 P.3d 1075 (2000), *cert. denied*, 543 U.S. 1000, 125 S.Ct. 605, 160 L.Ed.2d 458, (2004).

The trial court also relied upon WAC 460. 24A.220(6). App. 5. CP 354. The trial court’s reliance upon that regulation was inapposite, as WAC 460.24A.220 applies by its terms to investment advisers. Dave was never an investment adviser. RP II at 84. Findings 56 and 91 are

therefore not supported by WAC 460.24A.220.

After being qualified as an expert on rules for securities salesmen, Dave testified that NASD does not have a rule regarding loans between a broker and a client. RP II at 60; RP III at 95. Jerome Ives' securities expert, Scott Rhodes, did not testify as to any industry rule prohibiting a securities salesperson from borrowing money from a client. RP I at 150-206. Jerome Ives failed to produce any other evidence of such a rule. Findings 56 and 91 are therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Finding 56 and 91 therefore do not support Conclusions 12, 13, 14, 16, 21, 22, 23, 24, 25, or 26. CP. 71-74; App. 1.

Findings 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 81, 82, 87, 88 and Conclusions 12, 13, 14, 15, 16 address the 1990 and 1991 notes. CP 59-61, 63, 64, 71,72. Jerome Ives waived his claims regarding the 1990 and 1991 promissory notes. RP III at 58. Those findings and conclusions were therefore unnecessary, and should not have been made. *Roundup Tavern, Inc. v. Pardini*, 68 Wn.2d 516.

Error is assigned to Findings 74, 75, 76, 79, 82 and Conclusions 17 through 25. CP 62, 63, 72, 73; App. 1. The 1995 note contains no promise by Dave or Michele to provide that deed of trust. The note simply provides that “ [t]his Note is secured by a Deed of Trust, dated July

therefore not supported by WAC 460.24A.220.

After being qualified as an expert on rules for securities salesmen, Dave testified that NASD does not have a rule regarding loans between a broker and a client. RP II at 60; RP III at 95. Jerome Ives' securities expert, Scott Rhodes, did not testify as to any industry rule prohibiting a securities salesperson from borrowing money from a client. RP I at 150-206. Jerome Ives failed to produce any other evidence of such a rule. Findings 56 and 91 are therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Finding 56 and 91 therefore do not support Conclusions 12, 13, 14, 16, 21, 22, 23, 24, 25, or 26. CP. 71-74; App. 1.

Findings 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 81, 82, 87, 88 and Conclusions 12, 13, 14, 15, 16 address the 1990 and 1991 notes. CP 59-61, 63, 64, 71,72. Jerome Ives waived his claims regarding the 1990 and 1991 promissory notes. RP III at 58. Those findings and conclusions were therefore unnecessary, and should not have been made. *Roundup Tavern, Inc. v. Pardini*, 68 Wn.2d 516.

Error is assigned to Findings 74, 75, 76, 79, 82 and Conclusions 17 through 25. CP 62, 63, 72, 73; App. 1. The 1995 note contains no promise by Dave or Michele to provide that deed of trust. The note simply provides that “[t]his Note is secured by a Deed of Trust, dated July

1, 1995... ." EX 14. In contrast, Dave and Michele promised in that note: "...David T. Ramsden and Michele Ramsden... promise to pay to the order of G. Jerome Ives..."*Ibid.* The parties' prior course of dealing on the earlier deeds of trust did not obligate Dave and Michele to provide or record the deed of trust on the 1995 note. A third party provided both the 1990 and 1991 deeds of trust' EX 8; EX 10, 11. By not recording the deed of trust, Dave could not deduct the interest. It was incumbent upon Mr. Ives to protect his security in the 1995 note, if he indeed cared about it. *Key Bank v. NBD Bank*, 699 N. E. 2d 322, 327 (Ind. App. 1999) .

Finding 76, that there is no evidence that Jerry Ives knew that the trust on the 1995 note had not been recorded, is contrary to Jerry Ives intent. CP 62; App 1.

Finding 79 found that it was not possible to specifically enforce the 1995 note's term that it would be secured by a first deed of trust. CP 62-63; App. 1. The 1995 note provides that it is secured by "*a deed of trust.*" EX 14. By adding the requirement of a first deed of trust, the trial court violated the rule that a court "*not only should not, but it cannot, rewrite the clear agreement of the parties.*" *Warner v Design and Build Homes, Inc.*, 128 Wn. App. 34, 41, 114 P.3d 664 (2005).

Error is assigned to Finding 82. Dave approached Jerry Ives and Mr. Vonderfecht regarding a loan to help Dave acquire a house. RP II at

87. That loan, as well as the 1991 and 1995 loans, were not made in the Course of Dave's role as an investment professional. Findings 74, 75, 76, 79, 82 are therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Findings 74, 75, 76, 79, 82 therefore do not support Conclusions 17 through 25.

Error is assigned to Findings 83 and 84. CP 63; App. 1. The 1995 note was not an unsuitable investment for Jerry Ives, as it did not exhaust Jerry Ives' liquid assets. EX 1, 4, 54, 55, 56, 57, 58, 119. The 1995 note was the result of a negotiated exchange between Jerry Ives and Dave. RP 1 at 93, 115; EX 14. The 1995 note was the same kind of transaction as the \$31,700.00 note and deed of trust from Jerry Ives' stepson and the \$30,000.00 unsecured note from his daughter. EX 1, 4, 119. Findings 83 and 84 are therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Findings 83 and 84 therefore do not support Conclusion 13. CP 71-72: App. 1.

Error is assigned to Finding 85. CP 63; App. 1. The record fails to contain substantial evidence that before August 1995, a securities salesperson was prohibited from borrowing money from a client. Any retroactive application of the current rule against borrowing money from a client violates Washington Constitution Art. 1, §23. *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 546-47.

Error is assigned to Findings 87, 89. CP 64: App. 1. Dave did not borrow money from any client other than Jerry Ives. RP II at 63, 66. Therefore, Dave's actions in borrowing money from Jerry Ives did not have the capacity to deceive a substantial portion of the public. *Henery v. Robinson*, 67 Wn. App. 291. Findings 87, 89 are unsupported by substantial evidence, and should be reversed. *Miles*, 125 Wn. App. 69-71.

Error is assigned to Findings 78, 90. CP 62, 64; App. 1. The interest rate on the 1995 note was the result of a bargained-for exchange which was initiated by Jerry Ives, and was therefore both fair and reasonable under the circumstances. RP I at 93, 115. The 1995 note's interest rate of eight percent is the same rate in RCW 21.20.430(4)(b). Findings 78, 90 are therefore not supported by substantial evidence, and should be reversed. *Miles v Miles*, 125 Wn. App. 69-71. Findings 78, 90 therefore do not support Conclusions 21, 22, 23, 24, 25.

Error is assigned to Conclusions 12, 16 and 26. CP 71-74; App. 1. The notes were not securities. *Reeves v Ernst & Young*, 494 U.S. 56, 65, 108 L.Ed.2d 47, 110 S.Ct. 945 (1990) (“[T]ypes of notes that are not “securities” include “... the note secured by a mortgage on a home... (citation omitted)”). See also *Sauve v K. C. Inc.*, 19 Wn. App. 659, 668, 677 P.3d 599, *affirmed*, 91 Wn. 2d 698, 501 P.2d 1207 (1979)...

In Conclusion 17, by finding Dave and Michele in breach of a duty to provide the deed of trust for the 1995 note, the trial court, in effect, required them to engage in the unauthorized practice of law, contrary to *Bowers v. Transamerica Title Insurance Co.*, 100 Wn.2d 581, 590, 675 P.2d 193 (1983)

Conclusions 18, 19, 20 are in error. CP 72. Assuming, *arguendo*, that Dave had an obligation to provide security for the 1995 note, Dave and Michele's promise to pay Jerry Ives in that note was sufficient consideration to support the note. *Luther v. National Bank of Commerce*, 2 Wn.2d 470, 482-84, 98 P.2d 667 (1940); 17A Am. Jur. 2d Contracts § 122. Conclusions 21 -25 are therefore also in error. CP 73. The equitable lien and lis pendens are also in error. CP. 73; App. 1; CP 418-19; App. 2.

The lien of a mortgage may be waived by implication. *Bertram v. Bertram*, 8 BR 669, 671 (Bankr. N. D. Iowa 1981) ("*The lien of a mortgage may be waived or released by implication, and such implication arises where the parties act in a manner inconsistent with the continuation of such lien.*") Jerry Ives and his estate have accepted the Ramsdens' payments on the 1995 note for the past 10 years, during which time they could have obtained the deed of trust, had they chosen to do so. RP I at 94-95; RP II at 79. By accepting payments on the 1995 note for the past 10

years, Plaintiff has thereby waived any right to rescind the note. *Owens v. Matz*, 68 Wn.2d 374, 413 P.2d 368 (1966).

Error is assigned to Findings Nos. 88, 89, 90, 91, 104 and Conclusions Nos. 16, 26, 37 and Paragraphs 1d, 2d of the Judgment CP 64, 67; App. 1; CP 418-19; App. 2. Jerome Ives' CPA claim regarding the 1995 note is barred by RCW 19.86.170, as under Paragraph 2 of the Consent Order, that note constitutes a "*transaction[s] permitted by any other regulatory body or officer acting under statutory authority of this state...*", exempt under RCW 19.86.170. EX 80 at 4; *Vogt v. Seattle-First National Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991); *Miller v. U.S. Bank*, 72 Wn. App. 416, 420-21, 865 P.2d 536 (1994). Jerome Ives' CPA claim on the 1995 note is also barred by the doctrine of primary jurisdiction, by imposing greater penalties than deemed appropriate by the Securities Administrator in the Consent Order. *Miller v. U.S. Bank*, 72 Wn. App. 421-22. Conclusion 20 conflicts with Dave's obligation under the Consent Order to "*continue fulfilling his repayment obligation to the investor's estate, pursuant to the terms of the loan agreement...*" CP 72-73; EX 80 at 4. As in *Miller*, accelerating the 1995 note destroys the Consent Order as a regulatory tool.

E. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO AMEND THEIR ANSWER TO INCLUDE THE DEFENSE OF FAILURE TO MITIGATE DAMAGES.

Error is assigned to the trial court's order amending answer to conform to evidence. CP 44-46. App. 3. In December, 2005, Dave and Michele moved to amend their answer, pursuant to CR 15(b), to include the defense of failure to mitigate damages. CP 150-54. The trial court denied leave to amend to include that defense. CP 45.

The trial court's refusal to permit Dave and Michele to include the defense of failure to mitigate cannot be reconciled with either the language of CR 15(b), or Washington decisions interpreting that rule. CR 15(b) mandates that "*...the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits....*" CR 15(b) is to be construed and applied liberally. *Harding v. Will*, 81 Wn.2d 132, 136, 500 P.2d 91 (1972); *O'Kelley v. Sali*, 67 Wn.2d 296, 298, 407 P.2d 467 (1965); *Amende v. Pierce County*, 70 Wn.2d 391, 423 P.2d 634 (1967); *Anderson and Middleton Lumber Company v. Quinalt Indian Nation*, 130 Wn.2d 862, 878 n.55, 929 P.2d 379 (1996). Under CR 15(b) pleadings may, in the

discretion of the trial court, be amended to conform to the evidence at the conclusion of a trial, indeed even after judgment. *Harding v. Will*, 81 Wn.2d 136.

Under CR 15(b), Washington decisions permit an affirmative defense to be treated as if raised in the pleadings where the issue was tried by the implied consent of the parties and is substantial rights of a party have not been affected. *Bernsen v. Big Ben Rural Electric Cooperative, Inc.*, 68 Wn. App. 427, 842 P.2d 1047 (1993); *Department of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 504-05, 694 P.2d 7 (1985).

From the filing of Plaintiff's complaint on July 1, 1999, if not before, Jerome Ives knew that the deed of trust had not been recorded. Nothing prevented Jerome Ives, at any time after July 1, 1999, from requiring Dave and Michele to sign a deed of trust called for in the 1995 Promissory Note. Jerome Ives's failure to do so amounts to a failure to mitigate, thereby precluding relief based upon the failure to provide the deed of trust. *Snowflake Laundry v. MacDowell*, 52 Wn.2d 662, 673-74, 328 P.2d 684 (1958). . The trial court's denial of Dave and Michele's motion to amend their answer to include failure to mitigate damages therefore constituted an abuse of discretion.

F. THE TRIAL COURT ERRED IN AWARDING INTEREST.

Error is assigned to Conclusions 21, 24 and Paragraphs 1a, c, 2 of the Judgment. CP 72; App. 1; CP 48-49; App. 2. The trial court's award of interest at 12 percent interest fails to address the 2004 amendment to RCW 4.56.110(3). App. 4. RCW 4.56.110(3) is applicable to judgments entered after June 10, 2004. Laws of Washington 2004, Chapter 185, § 3. App. 4. The provisions of RCW 4.56.110(3) apply to a claim based on a violation of the Washington Securities Act. RCW 21.20.110(8). The trial court also erred in Paragraph 1a of the Judgment by awarding Jerome Ives interest on the original purchase price of \$12,125 for the Texas Keystone investment from February 27, 2002 to the date of the Judgment. CP 418; App. 2. *Colonial Imports v. Carlton Northwest, Inc.*, 83 Wn. App. 240-48, 921 P.2d 575 (1996); *Seattle First National Bank v. Washington Insurance Guaranty Insurance Association*, 94 Wn. App. 744, 760-65, 972 P.2d 1282 (1999).

G. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO RESPONDENT.

Error is assigned to Conclusion 37 and Paragraph 1e, 2e of the Judgment. CP 75; App. 1. CP 48-49; App. 2. Dave and Michele incorporate herein Paragraphs VI A through E, above.

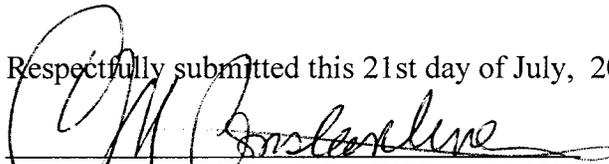
H. APPELLANTS REQUEST COSTS AND ATTORNEY FEES ON APPEAL.

Pursuant to RAP 14.1, Dave and Michele request an award of costs on appeal. Pursuant to RAP 18.1, RCW 4.84.330 and the 1995 note, Dave and Michele request an award of attorney fees on appeal. If Dave and Michele prevail on appeal on the 1995 note, an award of attorney fees is mandatory. *Singleton v Frost*, 108 Wn.2d 723, 727-28, 742 P.2d 1224 (1987).

VII. CONCLUSION

The trial court's findings, conclusions, judgment and award of costs and attorney fees should be, and Respondent's claims should be dismissed. Appellants should be awarded costs and reasonable attorney fees on appeal.

Respectfully submitted this 21st day of July, 2006.



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VIII. APPENDICES

1. FINDINGS OF FACT AND CONCLUSIONS OF LAW
2. JUDGMENT
3. ORDER AMENDING ANSWER TO CONFORM TO EVIDENCE
4. STATUTES:

RCW 4.16.080(4):

The following actions shall be commenced within three years: ...

(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;...

RCW 4.16.200:

Limitations on actions against a person who dies before the expiration of the time otherwise limited for commencement thereof are as set forth in chapter 11.40 RCW. Subject to the limitations on claims against a deceased person under chapter 11.40 RCW, if a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of the time and within one year from his death.

RCW 4.56.110(3):

Interest on judgments shall accrue as follows:...

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

RCW 4.84.330:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 19.86.170:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020: PROVIDED, FURTHER, That actions or transactions specifically permitted within the statutory authority granted to any regulatory board or commission established within Title 18 RCW shall not be construed to be a violation of chapter 19.86 RCW: PROVIDED, FURTHER, That this chapter shall apply to actions and transactions in connection with the disposition of human remains.

RCW 21.20.110(8):

(8) In any action under subsection (1) of this section, the director may enter an order requiring an accounting, restitution, and disgorgement, including interest at the legal rate under *RCW 4.56.110(3). The director may by rule or order provide for payments to investors, rates of interest, periods of accrual, and other matters the director deems appropriate to

implement this subsection.

RCW 21.20.430(1). :

Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010, 21.20.140 (1) or (2), or 21.20.180 through 21.20.230, is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

RCW 21.20.430(4) (b):

No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140 (1) or (2) or 21.20.180 through 21.20.230, or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care. No person may sue under this section if the buyer or seller receives a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.

5. ADMIMISTRATIVE REGULATIONS

WAC 460.22B.090:

The phrase 'dishonest or unethical practices' as used in RCW 21.20.110 (1)(g) as applied to salespersons, is hereby defined to include any of the following:

- (1) Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer;
- (2) Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are authorized in writing by the broker-dealer prior to

execution of the transaction;

(3) Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited;

(4) Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;

(5) Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered for the same broker-dealer, or for a broker-dealer under direct or indirect common control;

(6) Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account;

(7) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer;

(8) Executing a transaction on behalf of a customer without authorization to do so;

(9) Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders;

(10) Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account;

(11) Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit;

(12) Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, a final or preliminary prospectus, and if the latter, failing to furnish a final prospectus within a reasonable period after the effective date of the offering;

(13) Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:

(a) Effecting any transaction in a security which involves no change in the

beneficial ownership thereof;

(b) Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security;

(c) Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others;

(14) Guaranteeing a customer against loss in any securities account for such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer;

(15) Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such broker-dealer believes that such quotation presents a bona fide bid for, or offer of, such security;

(16) Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions of any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure;

(17) In connection with the solicitation of a sale or purchase of an OTC non-NASDAQ security, failing to promptly provide the most current prospectus or the most recently filed periodic report filed under Section 13 of the Securities Exchange Act, when requested to do so by a customer;

(18) Marking any order ticket or confirmation as unsolicited when in fact the transaction is solicited;

(19) Failing to comply with any applicable provision of the Conduct Rules of the National Association of Securities Dealers or any applicable fair practice or ethical standard promulgated by the Securities and Exchange Commission or by a self-regulatory organization approved by the Securities and Exchange Commission; or

(20) Any act or practice enumerated in WAC 460-21B-010.

The conduct set forth above is not inclusive. Engaging in other conduct such a forgery, embezzlement, nondisclosure, incomplete disclosure or misstatement of material facts, or manipulative or deceptive practices shall also be grounds for denial, suspension or revocation of registration.

WAC 460.24A.220:

A person who is an investment adviser or a federal covered adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. The provisions of this subsection apply to federal covered advisers to the extent that the conduct alleged is fraudulent, deceptive, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290). While the extent and nature of this duty varies according to the nature of the relationship between an investment adviser and its clients and the circumstances of each case, an investment adviser or a federal covered adviser shall not engage in unethical business practices, including the following:

(1) Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known by the investment adviser.

(2) Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within ten (10) business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

(3) Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account in light of the fact that an adviser in such situations can directly benefit from the number of securities transactions effected in a client's account. The rule appropriately forbids an excessive number of transaction orders to be induced by an adviser for a 'customer's account.'

(4) Placing an order to purchase or sell a security for the account of a client without authority to do so.

(5) Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party trading authorization from the client.

(6) Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment adviser, or a financial institution engaged in the business of loaning funds.

(7) Loaning money to a client unless the investment adviser is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment adviser.

(8) To misrepresent to any advisory client, or prospective advisory client, the qualifications of the investment adviser or any employees of the investment adviser, or to misrepresent the nature of the advisory services being offered or fees to be charged for such service, or to omit to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

(9) Providing a report or recommendation to any advisory client prepared by someone other than the adviser without disclosing that fact. (This prohibition does not apply to a situation where the adviser uses published research reports or statistical analyses to render advice or where an adviser orders such a report in the normal course of providing service.)

(10) Charging a client an unreasonable advisory fee.

(11) Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the adviser or any of its employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

(a) Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; and

(b) Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the adviser or its employees.

(12) Guaranteeing a client that a specific result will be achieved (gain or no loss) with advice which will be rendered.

(13) Publishing, circulating or distributing any advertisement which does not comply with Rule 206(4)-1 under the Investment Advisers Act of 1940.

(14) Disclosing the identity, affairs, or investments of any client unless required by law to do so, or unless consented to by the client.

(15) Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where

the investment adviser has custody or possession of such securities or funds when the adviser's action is subject to and does not comply with the requirements of Reg. 206(4)-2 under the Investment Advisers Act of 1940.

(16) Entering into, extending or renewing any investment advisory contract unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the adviser and that no assignment of such contract shall be made by the investment adviser without the consent of the other party to the contract.

(17) Failing to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information contrary to the provisions of Section 204A of the Investment Advisers Act of 1940.

(18) Entering into, extending, or renewing any advisory contract contrary to the provisions of section 205 of the Investment Advisers Act of 1940. This provision shall apply to all advisers registered or required to be registered under the Securities Act of Washington, chapter 21.20 RCW, notwithstanding whether such adviser would be exempt from federal registration pursuant to section 203(b) of the Investment Advisers Act of 1940.

(19) To indicate, in an advisory contract, any condition, stipulation, or provisions binding any person to waive compliance with any provision of the Securities Act of Washington, chapter 21.20 RCW, or of the Investment Advisers Act of 1940, or any other practice contrary to the provisions of section 215 of the Investment Advisers Act of 1940.

(20) Engaging in any act, practice, or course of business which is fraudulent, deceptive, or manipulative in contrary to the provisions of section 206(4) of the Investment Advisers Act of 1940, notwithstanding the fact that such investment adviser is not registered or required to be registered under section 203 of the Investment Advisers Act of 1940.

(21) Engaging in conduct or any act, indirectly or through or by any other person, which would be unlawful for such person to do directly under the provisions of the Securities Act of Washington, chapter 21.20 RCW, or any rule or regulation thereunder.

The conduct set forth above is not inclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure, or deceptive practices shall be deemed an unethical business practice. The federal statutory and regulatory provisions referenced herein shall apply to investment advisers and federal covered advisers, to the extent permitted by the National

Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290).

6. COURT RULES

RAP 14.1:

(a) When Allowed. The appellate court determines costs in all cases after the filing of a decision terminating review, except as provided in rule 18.2 relating to voluntary withdrawal of review.

(b) Which Court Determines and Awards Costs. Costs on review are determined and awarded by the appellate court which accepts review and makes the final determination of the case.

(c) Who Determines and Awards Costs. If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination. In all other circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a). A party may object to the ruling of a commissioner or clerk as provided in rule 14.6(b).

(d) Who Is Entitled to Costs. Rule 14.1 defines who is entitled to costs.

(e) What Expenses Are Allowed as Costs. Rule 14.3 defines the expenses which may be allowed as costs.

(f) How Costs Are Claimed - Objections. A party claims costs by filing a cost bill in the manner provided in rule 14.4. A party objects to claimed costs in the manner provided in rule 14.5.

RAP 18.1:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for hearing or submitted for consideration;

however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The response must be filed within 10 days after service of the affidavit upon the party. In a rule 18.14 proceeding, an answer to an affidavit of financial need may be served and filed at any time before oral argument. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Award Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. 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. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner

provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

7. OTHER

Laws of Washington 2004, Chapter 185, § 3:

"The rate of interest required by sections 1 and 2(3), chapter 185, Laws of 2004 applies to the accrual of interest:

"(1) As of the date of entry of judgment with respect to a judgment that is entered on or after June 10, 2004;

"(2) As of June 10, 2004, with respect to a judgment that was entered before June 10, 2004, and that is still accruing interest June 10, 2004.

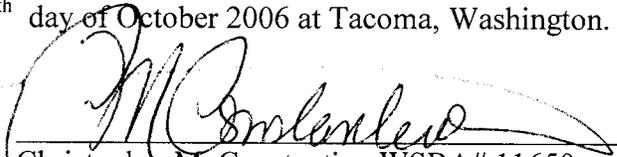
IX. CERTIFICATE OF MAILING

I, Christopher M. Constantine, hereby certify that on the 18TH day of October 2006, a true and correct copy of AMENDED BRIEF OF APPELLANT was served by first-class mail, postage pre-paid, upon Respondent Jerome C. Ives's counsel of record:

Carl J. Carlson
Carlson & Dennett, P.S.
Suite 2150
1601 Fifth Avenue
Seattle, Wa. 98101-1686

FILED
COURT APPEALS
06 OCT 18 PM 1:31
STATE BAR OF WASHINGTON
BY *MC*
COURT CLERK

Dated this 18th day of October 2006 at Tacoma, Washington.


Christopher M. Constantine WSBA# 11650
Attorney for Appellants Ramsden