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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION TWO OF THE STATE OF
WASHINGTON

SHARON D. ROSE, in her capacity as Personal Representative of
the Estates of Wilma D. Rose and Robert D. Rose, deceased

Appellant

v.

JOHN C. ZIMMERMAN, JR. and SUSAN LASALLE, husband
and wife and their Marital Community and FNM CORP., a
Washington corporation

Respondents

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR

A. Assignments of Error as to Findings of Fact and

Conclusions of Law: The Trial Court's only written findings of fact and conclusions of law as to the reasons for dismissing Plaintiff's complaint and denying Defendants' claim for attorney's fees and granting the Order of Dismissal on December 11, 2014, was a letter to Counsel dated December 11, 2014. Those Findings, Conclusions and Order, some of which are assigned as error, contained the following errors of law in the following particulars:

1. The Trial Court's Finding of Fact No.3 was in error in finding that Robert Rose's lack of contractual capacity expired when Sharon Rose obtained his power of attorney.

2. The Trial Court's Finding of Fact No. 8 was in error because in finding that the Rose Joint Venture Agreements created a "beneficial" interest in one-half of a twelve acre parcel. The Court relied on the testimony of John Zimmerman Jr. in violation of the Washington Deadman's Statute, R.C.W.5.60.030 as to transactions with a deceased person who cannot appear and testify at trial.

3. The Trial Court's Finding of Fact No. 10 was similarly in Error because it relied on the testimony of John C. Zimmerman, Jr. in violation of the deadman's statute, R.C.W. 5.60.030 to explain a

transaction identifying the disputed parcel's location and application to the Rose Joint Venture Agreements.

4. The Trial Court's Finding of Fact No. 11 was in error because no testimony at trial supported the finding that Sharon Rose became a member of the advisory group of Ashley Meadows Joint Venture in 2009 or that the advisory group was even formed prior to August 6, 2010. It was also error to find that the advisory group voted to oust John Zimmerman Jr. on February 4, 2010.

5. The Trial Court's Finding of Fact No. 12 was in error in finding that Sharon Rose was aware or should have been aware of the March 2010 lawsuit prior to it being filed. It was also in error in finding that Sharon Rose was aware of the settlement of the March 2010 lawsuit in May 2011 had any relevance to the issues decided by the Trial Court.

6. The Trial Court's Conclusion of Law No. 1 was in error because it held: (1) that the cause of action for conversion of the five acre parcel was barred by the statute of limitations under R.C.W. 4.16.080(2) when the law applies the discovery rule to cases of concealment or fraud as alleged by Plaintiff in her complaint; and (2) the merits of that issue were not before the Trial Court in the evidentiary hearing.

7. The Trial Court's Conclusion of Law No. 2 was in error for barring the estate's claim for the breach of fiduciary duty, because: (1) it held that the Rose's discovery was based on the receipt of the 2000 tax return which tax return was not submitted in evidence; (2) no evidence the Roses ever knew of the contents of that tax return; (3) No testimony given of the tax return having or been received by the Roses; and (4) no evidence of a title search by Attorney Stuart Morgan. In addition the Conclusion of Law was in error in the application of R.C.W. 4.16.200 to bar a claim of an estate against another person versus claims against a deceased person's estate which has been the law in this State since 1989 under R.C.W. 4.16.200.

8. The Trial Court's Conclusion of Law No. 3 was in error because even if the Conclusion was based on a Finding of Fact, which it was not, the March 1, 2011 date for accrual was inside the three year statute of limitations for breach of a fiduciary duty.

9. The Trial Court's Conclusion of Law No. 4 was in error for Concluding, contrary to his testimony, that Attorney Stuart Morgan had sufficient information to bring a cause of action for fraud and misrepresentation. The Trial Court also erred in the application of

R.C.W. 4.16.200 to bar a claim by an estate as stated in Assignment of Error No. 8. being ended one year after Robert Rose's death.

10. The Trial Court's Conclusion of Law No. 5 was in error because: (1) the merits of Plaintiff's claims based on the Consumer Protection Act were not in issue in the evidentiary hearing; (2) the failure to apply the discovery rule to the accrual of such claims; (3) the repeated error of the misapplication of R.C.W. 4.16.080; and (4) that the misappropriation claim was barred on March 1, 2012 when no evidence was submitted on which that Conclusion of law could have been based.

11. The Trial Court's Conclusion of Law No. 6 was in error in The Court's failing to recognize that the conveyance out of the development was fraudulently concealed and the discovery rule should have been applied as with the other equitable issues for the breach of an Express Trust.

12. The Trial Court's Conclusion of Law No. 7 was in error with the Court not recognizing two elements of the four required for res judicata were missing in that the causes of action in the 2010 lawsuit and the lack of any privity between the Roses and FNIG being instead in an adversarial relationship contrary to the requirements of law for res judicata to apply.

B. Issues Pertaining To Assignments Of Error

1. Whether the granting of a durable power of attorney sufficiently granted with capacity terminates the incapacity of the principal? (Assignment of Error No. 1)
2. Whether testimony as to the location of the disputed real property with the deceased persons, Robert and Wilma Rose, is a transaction that violates the Washington deadman's statute in R.C.W 5.60.030? (Assignment of Error No. 2 and 3)
3. Whether a finding of fact not supported by substantial evidence may serve as the basis for a conclusion of law and Order. (Assignments of Error No. 's 4, 5, 7, 9 and 10)
4. Whether the discovery rule should have been applied by the Trial Court to determine whether the statute of limitations barred Plaintiff's claims for conversion and breach of fiduciary duty for the concealment of the transfer of the disputed five acre parcel? (Assignment of Error No.6)
5. Whether R.C.W 4.16.200 terminates a not yet accrued cause of action by a deceased person's estate one year after death or is that statute applicable only to the claims against a deceased person's estate? (Assignments of Error No.'s 7, 9 and 10)
6. Whether the accrual of a cause of action for the breach of a

fiduciary for statute of limitations purposes is less than three years from the accrual of all elements of the claim? (Assignment of Error No. 8)

7. Whether a cause of action accrues for a breach of an express trust on the date of its execution or on the date the injured party reasonably discovers or should have discovered the breach due to the fraud or concealment of that breach? (Assignment of Error No. 11)

8. Whether the identity of causes of action and the privity of parties though not directly parties to the litigations must be proved by substantial evidence before a settlement of a concluded litigation may support a conclusion of law that res judicata applies to bar future litigation by persons on different issues against one or more of the settlement parties? (Assignment of Error No. 12)

The standard of review for all the issues on Assignments of Error No.' 4 and 5, is whether substantial evidence supported the Findings. With respect to Assignments of Error No.'s 2, 3, 6, 7, 8, 9, 10, 11 and 12 are a mixture of fact and law, the standard is that of error of law. Assignment of Error No. 1 is de novo.

III. STATEMENT OF THE CASE

A. Proceedings in the Trial Court: This action by Sharon Rose

as Personal Representative of the Estates of Wilma D. Rose and Robert D. Rose was originally filed on February 28, 2013 in Pierce County Superior Court. The Plaintiff's Third Amended Complaint for conversion, breach of express or constructive trust, breach of fiduciary duty, fraud and misrepresentation, quiet title, violation of the Washington Consumer Protection Act and Fraudulent Conveyance statute on May 28, 2014. (CP, pages 1-118) The Answer and Affirmative Defenses of Defendants John C. Zimmerman, Jr., Susan LaSalle and F.N.M. Corp to the Third Amended Complaint were filed on November 26, 2014 and the issues were joined. (CP, pages 122-118) The Trial Court limited the issues for the evidentiary hearing to whether the Plaintiff's claims were precluded by the applicable statutes of limitation and/or whether the doctrine of *res judicata* barred the Plaintiff's claims based on the May 2011 settlement agreement and subsequent dismissal with prejudice of all claims raised under Pierce County Superior Court cause number 10-2-07610-2 reported retrospectively in the Trial Court's Order of December 11, 2014. (CP, page 133) The Trial Court made Findings of Fact and Conclusions of Law in its ruling on December 11, 2014, following the evidentiary hearing held on December 2-4, 2014 (CP, pages 129-132); and dismissed Plaintiff's Complaint as well. (CP, page 133) A Notice of Appeal was filed to this Court on January 9, 2015. (CP, pages 134-140). A Designation of Clerk's

Papers was filed in the Trial Court on February 9, 2015. (CP, pages 141-147). The Verbatim Report of Proceedings was filed in the Trial Court and electronically filed with the Court of Appeals on April 6, 2015.

B. Statement of the Facts: Robert and Wilma Rose in their capacity as Trustees of the Rose Family Revocable Trust entered a joint venture agreement with F.N.M Corporation on January 1, 1999. The document reflected that F.N.M. Corporation's participation was executed by John C. Zimmerman, Jr., as its President and Wayne Semke as its vice president. (Ex. 13).

The Joint Venture Agreement stated that Robert and Wilma Rose owned six (6) acres of real property in Pierce County and that the Rose's acreage comprised six of twelve acres contributed to the joint venture. In fact the Roses owned no real property in Pierce County at the time which was confirmed by the testimony of John C. Zimmerman, Jr. (RP page 253, lines 12-19) The legal description of the six of twelve acres in the joint venture did not describe any particular parcel because it lacked a designation of section, township and range. (Ex. 13).

The 1999 joint venture agreement was followed by the January 1, 2000 Rose Joint Venture Agreement that recited that Port of Tacoma

III, owned 25 acres of real property in Pierce County although the trial Exhibit 14 contained no legal description. Both the January 1999 and 2000 Rose Joint Venture Agreements recited that Port of Tacoma III recited that Port of Tacoma III's real property in Pierce County, whether twelve or twenty-five acres was to be held in trust for the interest of Robert and Wilma Rose's contribution to the Joint Venture Agreements. (Ex.'s 13 and 14).

The twenty-five acres owned by Port of Tacoma III at the time of January 1, 2000 The Rose Joint Venture Agreement included tax parcel #042020305, hereinafter the "5 acre parcel" which was a portion of the lands and premises held in trust for the Rose family Revocable Trust and was a part of the 85 acre development known as Ashley Meadows. (Ex. 15). On June 27, 2000, Port of Tacoma III conveyed a partial interest in the "5 Acre Parcel" to F.N.M. Corp. and on July 24, 2000, Port of Tacoma III and F.N.M. Corp. by statutory warranty deed conveyed all of their interests in the "5 acre parcel" to John C. Zimmerman, Jr. and Susan LaSalle, husband and wife, which deed was recorded. (Included in Ex. 22) and (RP page 151, lines 10-13).

Robert Rose who made all the business decisions for the Rose family began showing diminished capacity as early as 1995. (Ex. 27). Sharon Rose, the Roses' daughter, became more involved with her

parents' affairs as Robert Rose's capacity to understand complex financial affairs diminished and in August 2004 took them to see Attorney Megan Farr for advice with respect to their financial and estate affairs.(RP page 64, line 23 to page 66, line 2) With these consultations , the Roses revoked their Rose Family Revocable Trust (Ex. 45), and on September 17, 2004 an amendment to the Rose Joint Venture Agreements was executed in which the Roses Trust was removed as a party to the trusts (Ex. 6) and Robert and Wilma Rose first became parties to the Rose Joint Venture Agreements individually.

Attorney Megan Farr testified that in her opinion at the time of her consultations when the Rose Wills, trust revocation and amendment to the Rose Joint Venture Agreements were executed, the Roses had testamentary capacity and contractual capacity to revoke the trust, sign a new power of attorney but did not seem to understand the transactions they had entered with John C. Zimmerman, Jr related to the Ashley meadows development so referred them to Attorney Stuart Morgan to investigate those concerns. (RP page 349, line 10 to page 350, line 3) The Roses granted a durable power of attorney to Sharon Rose sometime around the time the Roses executed their wills with Attorney Megan Farr (RP page 378 lines 7-17)

Attorney Stuart Morgan, after meeting with the Roses, investigated the Ashley meadows transactions, exchanged letters with John C. Zimmerman, Jr. and read into the record a statement from letter signed by John C. Zimmerman, Jr. dated December 22, 2004 (Ex. 29) in which Mr. Zimmerman expressed to Attorney Stuart Morgan,

“Bob is now incapable of making decisions on his own behalf. In my opinion, he crossed that line by June of 2004 and I have strongly urged to hand off control to somebody else.” (RP page 312, lines 15-19).

Mr. Morgan testified that Mr. Zimmerman’s observations were consistent with his own; that Robert Rose was not by then capable of making decisions on complex business transactions like the Rose Joint Venture Agreements. (RP312, line 7 to 313, line 14)

Mr. Morgan’s investigation including a visit to the site to talk to Wayne and Brad Semke two days before the law suit by the Plaintiff F.N.I G. who they represented (Ex. 44) and was told nothing about the Semke’s plan to file suit against John Zimmerman. (RP page 318, lines 16-22). The inquiries Stuart Morgan made of John Zimmerman in the correspondence when answered did not fully satisfy his concerns but would have answered his concerns if true (RP page 319, line23 to page 320, line 12) The responses , however, were not sufficient for him to

recommend a lawsuit, unless he would engage in speculation which he would not do. (RP page 330, line 2 to page 331, line 6).

In all John C. Zimmerman, Jr.'s responses to Morgan's inquiries there was no mention of the transfer of the 5 acre parcel out of the Rose Joint Venture investments. (RP page 332 line 18 to page 333, line 6).

John C. Zimmerman, Jr. testified over Plaintiff's counsel's objection as to the deadman's statute that the Roses got from him a K-1 notice from the year 2000 tax return of the Port of Tacoma III for the Joint Venture's share of the gain on the sale of the five acres to he and Susan LaSalle. (RP page 163, lines 11-23). Neither the tax returns and K-1 notice nor any admissible evidence was submitted into evidence that would have disclosed the transaction. There was no title report or searches ever obtained or made by Stuart Morgan in his investigations that potentially would have revealed the recorded deed of the five acre parcel to Mr. Zimmerman, Jr. in July of 2000. (RP page 325, lines 10-21)

John C. Zimmerman, Jr., testified over the objection of Plaintiff's counsel as to the deadman's statute, that he showed Robert and Wilma Rose the location of the 12 acre parcel included in the Rose Joint Ventures.(RP, page 227, line 8 to page 230, line 3)

The members of F.N.I.G and Ashley Meadows Joint Venture met on January 22, 2010 to discuss a proposed offer by an outside investor, Jay Hutton, to purchase or invest in the Ashley Meadows project. (RP page 371, line 12 to page 372, line 22) The meeting did not involve a discussion of the 5 acre property sale by Port of Tacoma III to John C. Zimmerman, Jr. and Susan LaSalle in July of 2000, the 2010 lawsuit or the transfer of the five acre parcel to John C. Zimmerman, Jr. and Susan LaSalle. (RP page 374, lines 4-17)

Sharon Rose on behalf of her parents was elected on August 6, 2010 to join an advisory group to Ashley Meadows Joint Venture. and the group did not hold meetings until August 10, 2010. (RP, page 360, line 12-21; RP, page 365, lines 5-10)

Sharon Rose knew only after attending the advisory group meetings that a lawsuit had been started by F.N.I.G. against the Zimmermans but knew little about it. (RP, page 128, lines 4-14)

During the advisory group meetings after August 10, 2010 she had a little knowledge about a dispute over the Zimmerman's house in the project.(RP, page 133 line 1 to page 134, line 24) She had knowledge the F.N.I.G. lawsuit was eventually settled but not until that occurred in May, 2011. (Ex.'s 33 and 34)

The F.N.I.G. v. Zimmerman law suit filed April 1, 2010 did not include the Roses or the Rose Joint Venture as parties, the issues raised in the lawsuit had nothing to do with the Rose Joint Venture, had nothing to do with the alleged misrepresentation to the Roses and the mediated settlement did not involve the Roses or Sharon Rose. It also did not include issues with respect to the 2000 conveyance of the five acre parcel to John Zimmerman, Jr. but rather the transfer of that parcel to John C. Zimmerman, Sr. (RP page 365, line 21 to page 367, line 14, Ex.'s 32, 33 and 34)

The positions of the Roses was adversarial to Wayne Semke, the Managing Partner of F.N.I.G., as illustrated by the Semke's failure to advise Stuart Morgan, the Rose's attorney on March 17, 2010 on being questioned as to the Roses' investment transactions that a lawsuit by F.N.I.G. was contemplated and filed on April 1, 2010. (RP page 318, lines 16-22; Ex. 32 and 44)

The Court found that although the Roses invested in F.N.I.G. they never had any managerial or voting control of that entity (CP pages 129-132, Finding of Fact No. 9) Robert Rose died after Wilma Rose did in 2006 on April 18, 2009. (CP pages 129-132, Conclusion of law No.'s 2 and 4).

IV. ARGUMENTS

A. Robert Rose and Wilma Rose acquired their individual obligation to the Rose Joint Venture Agreements on September 17, 2004 and Robert Rose as the only member of the Rose family making business decisions was unable to adequately manage their financial affairs no later than August, 2005, a condition that lasted until his death.

Robert Rose's diminished capacity to understand the transactions he had become involved with Mr. Zimmerman, Jr. existed to some extent before he and Wilma Rose executed the Rose Joint Venture Agreements on January 1, 1999 and 2000 as reflected in the testimony of Attorney W. Theodore Vander well and his letter admitted into evidence as Exhibit 27. Sharon Rose who thereafter became more involved with her parents' affairs took them to have consultations with the Farr Law Firm and Attorney Megan Farr who testified at the hearing that the Roses had testamentary and contractual capacity but could not understand enough of their transactions with Mr. Zimmerman so as to adequately manage their property or financial affairs for guardianship purposes. (RP, page349 line 10 to page 350, line 3).

Washington Statute R.C.W.11.88.010(1)(b) authorizes the Superior Court to appoint a guardian for a person based on a demonstrated inability to manage property or financial affairs. The case law in this state has so held in similar factual circumstances. *In re Guardianship of Bayer's*

Estate, 101 Wash. 694, 172 P. 842 (1918) (incapable of managing financial affairs); *In re Guardianship of Heuschele*, 34 Wn. 2d 414, 416, 208 P.2d 1167 (1949) (a relative had improperly dominated the affairs of the person). These cases support the conclusion reached by Attorney Megan Farr in her referral to Attorney Stuart Morgan to investigate further the financial and legal affairs of the Roses in October 2004. (RP page 349, line 10 to page 350, line 3) Even the Respondent John C. Zimmerman admitted in correspondence to Stuart Morgan that by June 2004, Robert Rose was incapable of making business decisions on his own behalf (RP page 312, lines 15-19). Attorney Morgan agreed with Megan Farr as to this inability. (RP page 312, line 1 to page 313, line 14). Based on this undisputed evidence, Robert Rose was disabled as that term is defined in R.C.W. 11.88.010(1)(b). No evidence was presented to show that his condition changed from June or August 2004 until the date of his death on April 18, 2009.

B. Due to the disability of Robert Rose after August 2004, the accrual of his causes of action were tolled for the commencement of action.

The accrual of causes of action that Robert and Wilma Rose had as individuals after September 17, 2004 were tolled by the application of R.C.W. 4.16.190 based on Robert Rose's demonstrated incapacity as

defined under R.C.W. 11.88.010(1)(b) as referenced in the tolling statute as we argued before. Therefore, unless the Trial Court was correct as we will argue to the contrary, that R.C.W. 4.16.200 terminated the tolling one year after Robert Rose's death on April 18, 2009 or April 18, 2010. Appellant's contrary argument will be addressed in the next section of this brief, but the tolling that occurred by his demonstrated incapacity to manage his financial affairs commenced as early as June but no later than August 2004. The case law interpreting R.C.W 4.16.190 is consistent with our position. *Rivas v. Overlake Hospital Medical Center*, 164 Wn. 2d 261, 1899 P. 3d 753 (2008)

C. The provisions of R.C.W. 4.16.200 do not govern when claims must be brought by a deceased person's estate, applying instead to claims brought against a deceased person's estate, whereas the Washington Survival statute, R.C.W. 4.20.046 does apply and has no specific statute of limitations so that Robert Rose's disability for tolling and accrual purposes was not terminated by his death.

The provisions and application by the Trial Court of R.C.W. 4.16.200 to conclude that the tolling by disability in Robert Rose terminated one year after his death was clearly mistakenly applied. The statute plainly states that the one year limitation period to bring claims after the death of a person applies only to actions against a deceased person, who dies before the expiration of the time otherwise limited for

commencement of actions as set forth in Chapter 11.40 RCW. The statute then states it is subject to the limitations on claims against a deceased person under Chapter 11.40 RCW. There is no mention of claims by a deceased person's estate that survive his death against others as is the present case by Plaintiff. Robert Rose is deceased and his Personal Representative brought the claim, not the other way around. The case law confirms this interpretation. See the holding in *Auguston v. Graham*, 77 Wn. App. 921, 895 P. 2d 20 (1995). And on the other hand, in the case of claims by a deceased person's estate, Washington's survival statute, R.C.W.4.20.046 provides that such claims survive to the personal representative whether or not such actions would have survived under the common law before the enactment of the statute. See the holdings in *Vail v. Toftness*, 51 Wn. App. 318, 753 P. 2d 553 (Div. 3, 1988); and in *Ives v. Ramsden*, 142 Wn. App.369, 384, 174 P. 3d 123 (Div. 1, 2008).

Accordingly, to the extent that the Trial Court's relied on R.C.W. 4.16.200 for its Conclusions of Law Numbers 2 (breach of fiduciary duty), 4 (fraud and misrepresentation) and 5 (violations of the Consumer Protection Act), those Conclusions are contrary to statute and case law and should be reversed.

D. The discovery rule should have been applied for Plaintiff's claims for conversion, breach of a fiduciary

**duty, fraud and misrepresentation and a violation of the
Consumer Protection Act.**

1. **Case law supports the application of the rule of discovery for accrual purposes.** The discovery rule applies for Plaintiff's claim of conversion for the transfer of the five acre parcel. *Crisman v. Crisman*, 85 Wn. App. 15, 931 P. 2d 163 (Div. 2, 1993). The same rule applies for the Plaintiff's causes of action for the breach of an express trust by statute, R.C.W. 11.96.060(1). This rule is confirmed by case law as well. *Gillespie v. Seattle First National Bank*, 70 Wn. App. 150, 855 P. 2d 680 (Div. 1, 1993); *August v. US Bancorp.*, 146 Wn. App. 328, 190 P. 3d 86 (Div. 3, 2008). Plaintiff's claims for fraud and misrepresentation also accrued within three years of their reasonable discovery. R.C.W. 4.16.080(4). The Trial Court concluded this correctly in Conclusion of Law No. 4. The testimony presented to the Trial Court showed clearly that John C. Zimmerman, Jr. withheld from his responses to Attorney Stuart Morgan's inquiries that he had caused the conveyance to himself of the five acre parcel in July of 2000 (RP page 332, line 18 to page 333, line 16), that concealment would have constituted fraud since he was a fiduciary by the Rose Joint Venture Agreement, he had an affirmative duty to disclose this material fact. *Crisman v. Crisman*, Id. at page 22. The Plaintiff's causes of action were brought within three years of this discovery.

The claims for a violation of the Consumer Protection Act must be brought within four years of the date of the reasonable discovery of all the elements of that cause of action, particularly when material information had been withheld. R.C.W. 19.86.120. *Alexander v. Sanford*, 181 Wn. App. 135, 151, 325 P.3d 341 (Div. 1, 2014). The merits of the Consumer Protection Act claim was not included in the issues to be decided at the evidentiary hearing so the Trial Court's questioning the merits of the claim in Conclusion of Law No. 5 was not appropriate or relevant to the decision on appeal. The Trial Court also incorrectly relied on the application of R.C.W. 4.16.200 which by our earlier argument was inapplicable except to the extent that the discovery rule for this claim was rejected in the sense that the Trial Court found that the statute of limitations expired in July of 2004. The Trial Court in reaching this Conclusion did not apparently consider that R.C.W 19.86.120 with respect to limitations of those claims merely states that such claims must be brought within four years of when the cause of action accrue but does not state whether the discovery rule applies or not. None of the reported cases say the discovery rule does not apply for those claims. Also, the fact of Mr. Zimmerman's withholding of that critical information in responses to Stuart Morgan's inquires ought to bring the discovery rule into effect regardless on the additional basis of

fraud and misrepresentation on which there was no dispute as to the application of the discovery rule.

2. Sharon Rose did not discover all the elements for her various causes of action until the earliest, August 10, 2010 in her meetings with the AMJV Advisory group which was within the time limits for bringing her claims for statute of limitation purposes.

Sharon Rose was elected on August 6, 2010 to the advisory board and began attending meetings after August 10, 2010. (RP, page 360, line 12-21; RP page 365, lines 5-10). There was no evidence in the record on which the Trial Court could have relied to make Finding of fact No. 11 that the advisory board was formed in 2009, that the advisory board voted on February 4, 2010 to oust John C. Zimmerman, Jr. after the January 22, 2010 concerning the viability of investments of the Roses in AMJV were raised, at a time when that group was not yet formed. Findings of fact must be based on substantial evidence and for Finding of Fact No. 11 with respect to that ouster, there was none. The decision based on unsupported findings must be reversed. *Miles v. Miles*, 128 Wn. App. 64, 114 P.3d 671 (Div. 2, 2005)

As to any earlier discovery by Sharon Rose, the Trial Court could not properly rely on the testimony of John C. Zimmerman, Jr. for the identity and location of the supposed 12 acre parcel which was not legally described because his testimony and explanations violated the Washington

deadman statute, R.C.W. 5.60.030 because that testimony concerned a transaction, equally barred as statements heard from a deceased person. *Estate of Lennon*, 108 Wn. App. 67, 29 P. 3d 1258 (2001). In this instance, Mr. Zimmerman tried to justify his definition of which 12 acre parcel was included in the Rose Joint Venture to his benefit (RP page 227, line 8 to page 230, line 2). This attempt is not permitted in evidence for the Roses as deceased persons are obviously unable to contradict his statement as to that transaction which is broadly defined as “the doing or performing of some business between the parties, or the management of any affair.”. *Estate of Lennon*, Id. at page 175-175.

Additionally there was no copy of the year 2000 tax return for the Rose Joint venture introduced in evidence and Mr. Zimmerman’s testimony (RP page 163, lines 3-23) trying to establish that he disclosed the gain of the sale was inadmissible evidence under R.C.W. 5.60.030. Without that inadmissible evidence, he cannot put the desired disclosures of his violations of the Joint venture Agreements in the minds of these two deceased persons for discovery rule purposes. Accordingly there was no evidence in the record to support the Trial Court’s Finding of fact No. 10 that the 12 acre parcel in the Joint Venture Agreements was a separate and distinct parcel though adjacent to the disputed 5 acre parcel.

As to the discovery of the basis for plaintiff's claims by the Stuart Morgan investigations prior to the August 2010 advisory group meetings, his testimony clearly showed that he received insufficient information to recommend a lawsuit (RP page 330, line 2 to page 331, line 6). This was contrary to the Trial Court's Finding of Fact No. 5 because the disclosure of the transfer of the 5 acre parcel was withheld by Mr. Zimmerman. (RP page 332, line 18 to page 333, line 6). He also testified that there was no title report, contrary to the Trial Court's finding and reliance on this point of discovery. (RP page 325, lines 10-21).

As to whether Sharon Rose knew or should have been aware prior to the August 2010 meetings of the AMJV Advisory Board of the 2010 F.N.I.G law suit, she did not learn of it through the efforts of Stuart Morgan after he met with the Semkes two days before the lawsuit was filed (RP page 318, lines 16-21) and no disclosures otherwise were made to Mr. Morgan by John C. Zimmerman, Jr. (RP page 318 to page 333, line 6).

The January 22, 2010 meeting Sharon Rose attended did not involve a discussion of the 5 acre parcel sale, the 2010 lawsuit prospect or the July sale to Mr. Zimmerman (RP page 374, lines 4-17). Therefore, her attending that meeting was no evidence sufficient supporting the Trial Court's Finding of Fact No. 12 that she should have been aware of the

lawsuit from that source and her knowledge of the settlement of that lawsuit in May of 2011 was within the time period allowed for claims after discovery.

In summary with respect to the discovery rule, there was simply no substantial evidence that Sharon Rose knew or by the exercise of reasonable diligence should have, as the Trial Court found, been aware of the existence of the 2010 lawsuit prior to the August 10, 2010 meetings of the AMJV Advisory Board when she did discover its existence. From then on, however, she was in her rights to bring her action within three years of that discovery for her claims for conversion, breach of a fiduciary duty, fraud and misrepresentation, breach of an express trust claims and within four years for the Consumer Protection Act claim.

E. The evidence presented on the record in this case did not justify the Trial Court in dismissing Plaintiff's causes of action based on the application of the doctrine of *res judicata* because the causes of action were not the same and the parties were not of the same quality of persons being adverse to each other.

In order for *res judicata* to bar a subsequent action after the conclusion by final judgment in a prior case there must be the concurrence of identity in four respects: (1) subject matter; (2) cause of action; (3) of persons and parties; and (4) the quality of the persons for and against whom the claim is made. *Northern Pacific By. Co. v Snohomish County*,

101 Wash. 686, 688, 172 P. 878 (1918). Some of the elements are similar between the two cases but most are not identical thereby obviating the application of *res judicata* to dismiss Plaintiff's complaint. The causes of action were not the same in that there are no allegations in the F.N.I.G complaint involving the disputed five acres transferred in 2000 except its subsequent sale on April 2, 2010 to John C. Zimmerman, Sr. (See Exhibit 32, the First Amended Complaint). None of the issues in the 2010 lawsuit involved the Rose Joint Venture, according to the testimony of John C. Zimmerman, Sr., a Defendant in the action. (RP page 365, line 21 to page 367, line 14). The persons were not the same except that Robert Rose held a 9.75% interest in F.N.I. G., the Plaintiff who brought the action on behalf of Ashley Meadows Joint Venture but the Roses never had any managerial or voting control (Un challenged Finding of Fact No. 9) It is hard to make a case that the Roses with such a minor interest would qualify as the same quality of persons if technically in some degree of privity as holding a minor interest in F.N.I.G., who was acting primarily for AMJV and the Roses interest gets even more distant to the purpose of the action. On similar facts the Supreme Court in *Northern Pacific By. Co. v Snohomish County*, *Id* at page 689 held that since the Respondents' interest was adverse to both parties involved in the prior lawsuit as they are adverse in this case (Roses' Estate originally sued both in this action),

that *res judicata* was no bar, nor should it be here. The principle behind the doctrine is to preclude re-litigation that prevents the corrosive disrespect to the judicial system if the same matter was twice litigated to different results. *Hilltop Terrace Homeowner's Association v. Island County*, 126 Wn. 2d 22, 891 P. 2d 29 (1995). Based on the dissimilarity between the two cases compared here, *res judicata* as a basis for the dismissal should be reversed.

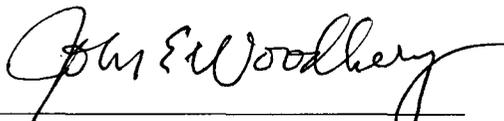
V. CONCLUSION

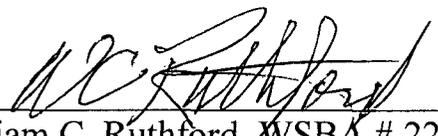
Since the causes of action in the 2010 F.N.I.G. lawsuit against the Zimmermans were totally different and did not involve any of the disputes between the Defendants in that action and the Estates of Robert and Wilma Rose, *res judicata* cannot apply to bar the present action. The remaining issues on appeal are to be determined from the record before this Court by whether the Trial Court's failure to see or to misconstrue the evidence presented at trial that Sharon Rose, after her father Robert Rose became incapacitated by August 2004, did not know nor could not have reasonably determined prior to August 2010 all the facts on which she was entitled to bring her action. The evidence in the record before this Court on appeal, did not put that knowledge into her perception or the

perceptions of her attorneys prior to August, 2010, especially since Mr. Zimmerman continued to withhold the critical piece of information that he had caused Port of Tacoma III to convey to himself the key parcel of 5 acres included in the joint venture with the Roses. The Trial Court offered no statutory or case law for Conclusion of Law No. 1 that Sharon Rose's appointment as attorney in fact for her parents after Robert Rose became disabled, somehow terminated the tolling effects of R.C.W. 4.16.190. The claims in this action were all timely filed on February 28, 2013 within the three or four year applicable allowed times for statute of limitations purposes. The Trial Court's decision to the contrary should be reversed and the case remanded to Pierce County Superior Court for trial.

Respectfully submitted this 21st day of May, 2015.

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