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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL A. COHEN, *et. al.,*

Appellants,

v.

WILLIAM NEWCOMER, *et. al.*,

Respondents.

**AMENDED REPLY BRIEF OF
APEX APARTMENTS I TIC, LLC,
APEX PENTHOUSE CONDOS, LLC
AND NEWCOMER APEX I TIC, LLC**

Jack B. Krona Jr. (WSBA #42484)
Law Offices of Jack B. Krona Jr.
6509 46th St. NW
Gig Harbor, WA 98335
(253) 341-9331
j_krona@yahoo.com

Attorney for Appellants:
Apex Apartments I TIC, LLC, Newcomer Apex I TIC, LLC and Apex Penthouse Condos, LLC.

REPLY BRIEF

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I. Objection to Newcomer's Unsupported "Facts" and Statement of the Case

The Apex Entities established in their Opening Brief that the *Newcomer* Judgment in the securities case cannot legally bind the Apex Entities, the Apex Entities' other members, or the Apex Entities' creditors, because none was a party to the *Newcomer* Judgment. The *Newcomer* Judgment did not award equitable rescission (or any equitable relief at all). Moreover, Newcomer did not seek or obtain monetary relief or equitable relief relating to the purchase or sale of his interest in Newcomer TIC or Apex Condos. Thus, the Superior Court's ruling that, as a matter of law, the *Newcomer* Judgment rendered the Apex Entity operating agreements void is both legally and factually erroneous. Newcomer glosses over these fundamental problems with the Superior Court's CR 54(b) judgment and misstates the record in his appellate brief.

The "record on review" consists of the "report of proceedings" and the "clerk's papers."[1] A party's "statement of the case" must include a non-argumentative statement of facts and procedural history and "reference to the record must be included for each factual statement."[2] Because this is an appeal from a summary judgment, the court reviews the "material submitted

[1] RAP 9.1.

[2] RAP 10.3(a)(5).

for and against a motion for summary judgment in the light most favorable to the party against whom the motion is made."[3] Newcomer's appellate brief violates these rules, which is reason enough to rule in favor of the Apex Entities.

For example, Newcomer purports to "adopt" the "facts recited by the Court in *Newcomer v. Cohen*, 199 Wn. App. 1003, 2017 WL 2154358 (2017)," which is an unpublished appellate decision in the appeal from the judgment in the securities case.[4] Newcomer cites no authority that he may "adopt the facts" recounted in an unpublished appellate decision in which that court was required to review the evidence in a light most favorable to Newcomer. Then Newcomer improperly argues these unsupported facts in a light most favorable to himself, *i.e.*, the movant.

The Court *in this case* is required to review the record before it and construe all evidence in favor of the non-movant Apex Entities.[5] The Apex Entities were not parties to the previous securities-case judgment. The unpublished decision Newcomer "adopts" did not purport to make any fact-

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[3] *See Lamon v. McDonnell Douglas Corp.,* 91 Wn.2d 345, 588 P.2d 1346 (1979).

[4] *Newcomer v. Cohen*, 199 Wn. App. 1003, 2017 WL 2154358, at *7 (2017).

[5] The Apex Entities, consistent with their opening brief, are Appellants Apex Apartments I TIC, LLC ("Apex TIC"), Newcomer Apex I TIC, LLC ("Newcomer TIC") (collectively the "TIC Entities") and Apex Penthouse Condos, LLC ("Apex Condos"). This reference does not include Apex Apartments, LLC ("Apex Apartments") or Apex Apartments II, LLC ("Apex II"), or any other limited liability company other than the actual parties to this wind-up proceeding.

findings akin to those made in conjunction with findings of fact and conclusions of law under CR 52(a)(1). Likewise, the principles of collateral estoppel do not support Newcomer's argument that the Apex Entities are bound by the facts of any previous case. The Apex Entities request that this Court ignore the numerous argumentative factual representations in Newcomer's appellate that are not supported by the record or, in most cases, even by a cite to record at all. The relevant facts are the facts cited in the Apex Entities' Opening Brief, which are set forth with proper references to the record in compliance with RAP 10.3(a)(5). Because this Court is reviewing a summary-judgment grant, the Court is required to construe these facts in a light most favorable to the Appellants—not Newcomer.[6]

As one key example of a misstatement of the record in this case, Newcomer loosely represents in his Introduction and in his Statement of the Case that the securities trial involved "four separate sales of securities," *i.e.*, the capital contributions that Newcomer made to the "Apex Entities" and the contributions he made to the "Apex project." (New. Br. 1, 7.) On page 4, Newcomer further represents that "[a]ll Apex Entities were the subject of the securities case." (New. Br. 4.)

The record affirmatively shows, however, that the damages

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[6] *See Loeffelhoh v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

Newcomer sought in the securities trial were based solely on cash contributions Newcomer made to two specific companies—Apex Apartments, LLC and Apex Apartments II, LLC—and were not based on any contribution (be it monetary, property, or membership units) Newcomer made to Newcomer TIC or Apex Condos. (*Compare* Apex Br. 6-13, 17-26.) This distinction is important because Newcomer's entire argument is based on the unsupported, implied premise that there was a finding in the securities trial that he made contributions to Newcomer TIC and Apex Condos, which is simply false. Again, the Court is required to view the record on this issue in a light most favorable to Appellants, and therefore must disregard Newcomer's unsupported arguments based on this unsupported premise.

None of the Apex Entities were parties to the securities-case judgment and Newcomer did not sue over any contribution he made to Newcomer TIC or Apex Condos. Instead, Newcomer based his securities-trial case solely on contributions he made to Apex Apartments, LLC and Apex Apartments II, LLC. (*E.g.*, CP709-14, CP718, CP816-17.) In fact, Newcomer specifically represented to the securities-trial court that of the contributions he was suing over, $800,000 and $272,997 were "put in" to "Apex I" in 2005 and 2006, before Newcomer TIC or Apex Condos existed. (CP816.) "And then, in December of 2008, a capital call for $910,000 was

made, and that appears to have gone to Apex II, so that would not have gone into the TIC entity." (CP816.) Importantly, Apex Condos was not even formed until 2010. So, Apex Condos could not have received any of the investments at issue in the securities trial. (CP498-501, CP1269-1274, CP1392, CP1412.) Overall, Newcomer cites no evidence whatsoever that he contributed any money to either Newcomer TIC or Apex Condos that was the subject of the securities trial. To the contrary, while the judgment and verdict in the securities trial were based on Newcomer's monetary investments, he obtained interests in Newcomer TIC and Apex Condos by contributing equity value in real property that was not included in the judgment and verdict in the securities case. (CP248, CP1254-55, CP1269-70, CP1631-32¶¶2-3, CP2272¶¶2-3.) Thus, Newcomer's entire appellate brief is based on a false premise and unsupported facts, and, consequently, he has not presented any reason to affirm the erroneous summary judgment entered by the Superior Court.

II. Reply to Newcomer's Arguments

A. Newcomer failed to prove that any relevant LLC Agreement is an agreement "entered into in violation of the WSSA."

Newcomer's first argument is that "a contract entered into in violation of the WSSA cannot be enforced." (New. Br. 10.) Newcomer argues for a "plain language" interpretation of RCW 21.20.430(5)—a

statutory defense that he did not base his summary-judgment motion on—to affirm the Superior Court's judgment. (New. Br. 10.) Newcomer waived reliance on Section 430(5) by failing to plead it, disclose the defense in discovery, or raise it in a summary-judgment motion. (Apex. Br. 33-39.)

Nevertheless, even to the extent Newcomer is entitled to rely on Section 430(5), that statute does not bar any claim the Apex Entities are making in this dissolution proceeding. (*Compare* New. Br. 10-19 *with* Apex. Br. 39-50.)

Section 430(5) provides that "no person" who has "engaged in the performance of any contract in violation of this chapter," may "base any suit" on "*the* contract." Newcomer represents that, "it is undisputed that the Apex Apartments LLC Agreement is a contract and was entered into in violation of the WSSA." (New. Br. 11.) However, the Apex Entities are not suing under the Apex Apartments, LLC agreement, which does not and cannot govern those entities. Operating agreements govern the relationship of the member, the manager, and the specific limited-liability company, not the relationship between the members, the managers, and *different* companies, even if the companies are affiliated or closely held.[7]

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[7] *See* RCW 25.15.18 (the operating agreement governs: "(a) Relations among the members as members and between the members and the limited liability company; and (b) The rights and duties under this chapter of a person in the capacity of manager.").

Newcomer represents in his appellate brief that it is "undisputed"[8] that every capital contribution he made that was the subject of the securities judgment was made to "Apex Apartments, LLC." (New. Br. 4.) That is simply impossible, as Newcomer admits he withdrew from Apex Apartments, LLC in 2008. (New. Br. 3.) Rather, as confirmed by the record, Newcomer's investments in 2008 and 2009 were contributions to Apex Apartments II, LLC. (CP637-39, CP683; *compare* Apex Br. 6-13, 17-26.) Even if all Newcomer's investments had been to Apex Apartments, LLC, that company is not a party to this case. The Apex Entities are not basing suit on the Apex Apartments, LLC operating agreement, and they were not parties to the securities judgment.

Apex TIC, Newcomer TIC, and Apex Condos are not "Cohen" and are separate legal entities under the law.[9] Furthermore, no court or jury has

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[8] This fact *is* disputed. Newcomer could not have made capital contributions to Apex Apartments, LLC, after the date in which ***he admits he withdrew as a member from that company***. (*E.g.*, CP157-58, CP907, CP1251-53.) Moreover, the record evidence shows that after he withdrew from Apex Apartments, LLC, he made his capital contributions to Apex Apartments II, LLC. (CP683.) Newcomer acquired his interest in Newcomer TIC and Apex Condos with separate and distinct consideration during separate "split-off" reorganizations. (*E.g.*, Apex Br. 22-23.)

[9] *See, e.g.*, RCW 25.15.061(3) ("A limited liability company formed under this chapter is a separate legal entity and has a perpetual existence."); RCW 25.15.801(2); ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."); *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 188, 207 P.3d 1251 (2009) (noting that Washington limited liability company is a separate legal entity, "the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.").

found that Apex TIC, Newcomer TIC, or Apex Condos—or the LLC agreements governing these companies—violated WSSA. Instead, Cohen allegedly made the omission underlying the securities judgment in 2005 before these companies even existed. Thus, Apex TIC, Newcomer TIC, and Apex Condos cannot be "persons" who have "made or engaged in the performance of any contract in violation of" WSSA.

Nevertheless, Newcomer's argument simply *assumes* that Cohen is the alter ego of every Apex Entity without conclusive proof or even a pleading supporting this assumption. Newcomer did not allege in any pleading or move for summary judgment on the issue of Cohen being an alter-ego of the Apex Entities, let alone prove this issue as a matter of law. Under RCW 25.15.061, a court may not disregard the independent form of a limited-liability company without "considering the factors and policies set forth in established case law with regard to piercing the corporate veil." Yet Newcomer did not brief the elements of alter ego or veil piercing in any brief to the Superior Court or in his appellate brief.[10] (New. Br. 10-35.) Every company in this case was formed for legitimate business reasons, and no evidence shows otherwise, let alone provides reason to disregard these distinct legal entities. (*E.g.*, Apex Br. 6-9, 12-13.)

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[10] *See* RAP 2.4(a) & 12.1(a).

There are three contracts relevant to the Apex Entities: the operating agreements of Apex TIC, Newcomer TIC, and Apex Condos. None of these three contracts are the Apex Apartments, LLC operating agreement, *i.e.*, the operating agreement governing the security Newcomer sued over in the securities case. Newcomer has admitted that the Newcomer TIC and Apex Condos operating agreements were separate contracts supported by separate consideration from the capital contributions he sued over in the securities case. (*See, e.g.*, CP152, CP1244-55, CP1388; Apex Br. 5-9, 43-50.) The Court is required to give the Apex Entities the benefit of every reasonably inference supported by the record, including Newcomer's concession under oath that the contracts at issue in this case were supported by consideration separate from the contributions he made to Apex Apartments, LLC. (*E.g.*, CP248, CP1254-55, CP1269-70, CP1631-32¶¶2-3, CP2272¶¶2-3.)

Newcomer has also failed to show at *any point in his appellate brief* or at *any point in his summary-judgment motion* that any one of the *relevant* contracts was entered "in violation of WSSA," or that the underlying securities judgment makes this finding. (*Compare* New. Br. 10-35 *with* Apex. Br. 19-26.) Thus, Newcomer failed to show that any contract at issue "was made or engaged" in violation of WSSA, *even if* Cohen were deemed to be the alter ego of any Apex Entity. (*See, e.g.*, CP703, CP712-14, CP719-22.)

The Superior Court separately ruled that the parties seeking to enforce the operating agreements, including Apex TIC and Apex Condos, are "separate entities with independent identities" as a matter of law. (CP2597.) Newcomer did not appeal this finding.[11] There is no basis in the current record or procedural posture of this case to conclude that the enforcement of the Apex TIC, Newcomer TIC, or Apex Condos operating agreements by these separate entities is barred by Section 430(5). (*E.g.*, Apex Br. 43-50.)

Thus, the CR 54(b) judgment should be reversed and the innocent non-parties to the *Newcomer* Judgment. The Apex Entities, Ken Thomson, Jess Thomsen, Inc., and AMC Family, LLC—none of whom violated any WSSA provision—should be allowed to enforce Newcomer's capital-contribution liability in this case.

B. Interpreting Section 430(5) consistent with its plain language will not create "absurd results."

Despite initially arguing for an interpretation of Section 430(5) based on its plain language, Newcomer argues that it should be construed in his favor to avoid "absurd results." (New. Br. 16.). Newcomer argues that "Cohen's form-over-function argument would allow a defrauding party to avoid liability by merely creating a successor entity." (New. Br. 16.)

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[11] *See* RAP 2.4(a) (procedure to initiate a cross-appeal).

This argument is frivolous in the context of this case.

First, the statute expressly provides for a party to recover a money judgment if the security is "disposed of," and rather than Cohen avoiding liability, Newcomer received a judgment for over $4,000,000 in the securities case.[12]

Second, the money judgment did not encompass any finding that the TIC Entities or Apex Condos were "successor entities" to Apex Apartments, LLC. To the contrary, the securities judgment *precludes* that finding precisely because it was for a money judgment based on damages, and not rescission.[13] The doctrine of *res judicata*, merger, and bar, prevent Newcomer from changing or expanding the relief he received in the securities trial. Consequently, the Superior Court committed reversible error when it effectively reformed and expanded the securities-case judgment. (Apex Br. 17-26, 28-33.)

Third, Newcomer did not allege in any pleading or attempt to prove as a matter of law in his summary-judgment motion that the TIC Entities and Apex Condos are "successor" entities to Apex Apartments, LLC. Newcomer did not even attempt to do so in his appellate brief. (New.

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[12] *See* RCW 21.20.430(1) (a securities purchaser may sue 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.").

[13] *See* RCW 21.20.430(1).

Br. 16.) Neither the TIC Entities nor Apex Condos are "successor" entities to Apex Apartments, LLC, and there has been no finding or even briefing on whether they could be deemed successor entities, or the alleged legal effect of a finding that the TIC Entities or Apex Condos were successors to Apex Apartments, LLC.

Newcomer also argues that the "change in entity form does not ratify the fraudulent conduct," or result in a "waiver" of compliance with WSSA, and that Section 430(5) does not require that the party seeking its protection receive "rescission." (New. Br. 17.) The Apex Entities have never argued otherwise. Newcomer's argument is both a red herring and strawman.

The Apex Entities' argument is that: (1) Newcomer did not receive rescission in the securities case; (2) Newcomer failed to timely assert Section 430(5) as an affirmative defense; (3) the Apex Entities did not violate WSSA, and no judgment shows otherwise; (4) the Apex Entities are seeking to enforce their own operating agreements, rather than a contract made in violation of WSSA; and (5) innocent members who were not parties to the underlying securities judgment are seeking to enforce the operating agreements in the dissolution proceeding. In other words, the Apex Entities assert that Section 430(5) is not properly before the Court as a defense and, even if it were, the plain language of the statute does not bar the Apex Entities from enforcing their own operating agreements. Newcomer has

failed to show anything to the contrary.

C. WSSA provides for "rescission" or "damages" but not both.

WSSA allows a plaintiff to receive "rescission" *or* "damages," but not both.[14] The only relief Newcomer received in the securities case was a money judgment, attorneys' fees, costs, and interest, *i.e.*, "damages." (CP897-900.) Newcomer did not receive "rescission." (CP897-900.) In his response, Newcomer conflates the remedy of rescission with "rescissionary damages"—which are not mentioned in RCW 21.20.430(1)—and misstates the record. (New. Br. 19.)

"Rescission" is a form of equitable relief that results in the "unmaking of a contract."[15] In contrast, "damages" is an award of "pecuniary compensation" or a "sum of money" awarded to a person as compensation for injury.[16] "Rescissionary damages" is a descriptive term for one measure of damages calculated as the actual purchase price minus the value at time of disposal, plus interest, regardless of a plaintiff's actual losses.[17] Rescissionary damages are sometimes awarded where actual contract rescission in unavailable.[18] These damages replace rescission as a

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[14] *See* RCW 21.20.430(1).
[15] *See, e.g.*, *Kriegel v. Donelli*, No. 11 CIV. 9160, 2014 WL 2936000, at *15 (S.D.N.Y. June 30, 2014).
[16] *See* BLACK'S LAW DICTIONARY 389 (6th Ed. 1991).
[17] *See* BLACK'S LAW DICTIONARY 392 (6th Ed. 1991).
[18] *See id.*

remedy when rescission might otherwise be warranted, but is not practicable,[19] *i.e.*, when the voiding of a contract is not a valid form of relief.[20] RCW 21.20.430(1) requires a court to award damages and *not rescission* to a plaintiff who "no longer owns the security."

Here, Newcomer received a money judgment for damages only. The doctrines of *res judicata*, merger, and bar preclude Newcomer from arguing that he received "rescission" when he, in fact, received only a money judgment. (*See, e.g.*, Apex Br. 27-33.) The fact that he did not receive rescission in the securities case precludes him from arguing in this case that the Newcomer TIC and Apex Condos operating agreements were rescinded or that they were effectively the same security he sued over in the securities case. The Superior Court committed reversible error when it expanded the relief Newcomer received in the securities judgment and effectively awarded him *rescission of contracts that were not even at issue in the securities case*. The Superior Court was not authorized to reform or expand the securities judgment in this fashion and committed reversible error when it did so.

D. Newcomer was not "divested" of his interests in the Apex Entities by making a "tender" to Cohen.

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[19] *See id.*

[20] *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, 36 Misc. 3d 328, 343, 935 N.Y.S.2d 858, 869 (Sup. Ct. 2012); *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1072 (Del. Ch.), *aff'd*, 840 A.2d 641 (Del. 2003).

Newcomer argues that because he allegedly "tendered" his interest in "all Apex Entities," he "divested himself" of "any interest in the Apex Entities." (New. Br. 20.) This argument is unsupported and contrary to the summary-judgment record.

Whether Newcomer made a tender of any interest in Apex Apartments, LLC—let alone any Apex Entity—is *at best* a disputed issue of fact. (Apex. Br. 32.) At the December 23, 2016 summary-judgment hearing the Superior Court correctly noted that Newcomer did not have the relevant securities (*i.e.*, the LLC membership units) to tender back when the Securities Case went to trial when it denied Newcomer's motion for partial summary judgment the second time.[21] (RP57, Dec. 23, 2017.) The Superior Court's observation is the only conclusion consistent with the money judgment Newcomer received in the securities case.[22]

Because Newcomer did not present evidence of any tender in the securities case, no judgment granted Newcomer rescission of *any* security interest. Newcomer received instead a money judgment for damages connected to the purchase price of a security he no longer owned—his

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[21] "At that time Mr. Newcomer apparently didn't have a share. They were transferred to an entity, so he didn't have anything to tender back." RP57 at lines 6-8.

[22] *See* RCW 21.20.430(1) (the remedy for a violation when the buyer no longer owns the security is money damages; if the buyer owns the security, the remedy is rescission).

membership units in Apex Apartments, LLC—at the time he filed suit in the securities case. Newcomer was not "divested" of his interest in Newcomer TIC or Apex Condos and no evidence shows otherwise.

E. The CR 54(b) Judgment is overbroad.

The Superior Court committed reversible error by declaring that the "Apex Apartments, LLC operating contract is void," and that this renders every other operating agreement at issue unenforceable as to Newcomer. (CP2606.) There is no basis for Eckstein Investments, LLC ("Eckstein") and RB&F Property Management, LLC ("RB&F") to argue that the judgment bars enforcement of the operating agreements as to them as well. (Eckstein & RB&F Br. 16.) Even if Newcomer is correct that the Superior Court judgment applies "as to Newcomer only," it would still bar numerous innocent third parties, including the Apex Entities and their members, from enforcing their contractual rights against Newcomer. The judgment is clearly overbroad and requires reversal for the reasons stated in the Apex Entities' Opening Brief. (Apex. Br. 43-50.)

F. Newcomer failed to timely raise any statutory defense.

Newcomer argues that he did not waive his right to assert an RCW 21.20.430(5) defense by failing to timely assert it because he: (1) allegedly "timely briefed" the issue; (2) cannot legally waive it; and because (3) "Cohen and Apex invited error." (New. Br. 26.) These arguments are

meritless. The Apex Entities consistently objected to Newcomer making unraised defenses at the first opportunity and the record shows Newcomer raised the issue late, after discovery was all but over, and after he filed his motion for summary judgment.

Litigation defenses are waivable if a party fails to timely assert them. CR 8 requires a party to plead its affirmative defenses, including defenses based on *res judicata*, fraud and illegality (*i.e.*, RCW 21.20.430(5)) in a timely manner. CR 9 requires all averments of fraud or mistake, and the circumstances constituting fraud or mistake, to be stated with particularity. These rules are designed to avoid surprise and trial by ambush.[23] Thus, the requirement to plead affirmative defenses is only excused if the failure to plead the defense does not cause surprise or impair a party's substantial rights.[24]

Here, on March 4, 2016, the Superior Court entered an Order Amending Case Schedule in this case. (CP2892.) The Order set May 23, 2016 as the deadline to confirm the "Joinder of Parties, Claims and Defenses." (CP2892.) Under Pierce County Local Rule 19(b), "no additional claims or defenses may be raised" after this date, "unless the court orders otherwise for good cause and subject to conditions as justice

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[23] *See Hogan v. Sacred Heart Medical Center*, 101 Wn. App. 43, 54-55, 2 P.3d 968 (2000).
[24] *Id.*

requires." Newcomer does not have an answer on file that pleads affirmative defenses. This deadline has never been amended, and Newcomer did not provide good cause to avoid the impact of this rule.[25] (CP2892.)

In late August 2016, the parties deposed Newcomer. (CP2892.) Newcomer never disclosed his statutory defense in that deposition or in his interrogatory responses.[26] (*E.g.*, CP1321-26, CP1367-68.)

On November 4, 2016, the parties stipulated to a new trial date and to entry of an amended case schedule. (CP2891.) The Superior Court entered an amended case schedule based on the parties' stipulation. (CP2891.) The November 4, 2016 Order Amending Case Schedule did not revive the deadline to assert new claims or defenses. (CP2891.)

The Superior Court's February 14, 2017 Decision is based on Newcomer's November 18, 2016, Motion for Partial Summary Judgment. (CP2606.) Newcomer based his summary-judgment motion on discrete and

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[25] *See Donald B. Murphy Contractors, Inc. v. King Cty.*, 112 Wn. App. 192, 200, 49 P.3d 912, 916 (2002).

[26] In this case—contrary to virtually every representation he made to the securities-case trial judge about where his investments went—Newcomer swore under oath that every single cash contribution he made to the project went to Apex Apartments (and that he made no contributions *at all* to Apex II) even though he withdrew from Apex Apartments well before his final cash contribution. (CP1321-24, CP1367-68.) The difficulties inherent in forcing this Superior Court to retry the evidence in the securities case are precisely why the doctrines of res judicata, merger and bar prevent Newcomer from obtaining new remedies for the claims in the other trial.

limited grounds *that did not include an affirmative defense of illegality* based on RCW 21.20.430(5). (CP1035.) Thus, Newcomer did not move based on—let alone "show"—that he was entitled to relief under RCW 21.20.430(5), as required by CR 56.

On December 23, 2016, January 6, 2017, and January 9, 2017, the Superior Court conducted three summary-judgment hearings on various summary-judgment motions. (CP2891.) The issues included whether the members are obligated by the operating agreements to comply with a capital call made in 2015, and whether the members have any non-frivolous defenses to capital-call liability. (CP2891.)

Newcomer moved based solely on the factual and legal misrepresentation that, "as a result of the Securities Fraud trial and recession [*sic*] he received, Newcomer is no longer a member of any apex entity." (CP1035.) The Superior Court described the grounds Newcomer moved on as "narrow," *i.e.*, his claim that the *Newcomer* Judgment granted him "rescission," and that, "Newcomer is no longer a member of any Apex Entity and cannot be compelled to make a capital contribution." (CP1035, 1041-43.) The Apex Entities cross-moved for summary judgment on this issue because the *Newcomer* Judgment—on its face—did not rescind any Apex Entity operating agreement. (CP1642-50.)

Newcomer first raised RCW 21.20.430(5) as a specific statutory

defense to his capital-call liability on January 19, 2017, in a supplemental brief supposedly limited to whether the *Newcomer* Judgment expressly granted "rescission" of his interest in any Apex Entity. (CP2341.) This was the *first time* in this case Newcomer asserted RCW 21.20.430(5) as a defense. This left the Apex Entities a mere three business days and only five pages to respond to an affirmative defense that Newcomer never raised previously in: (1) any live pleading; (2) any discovery response; (2) in his motion for partial summary judgment; (3) in his reply to motion for partial summary judgment; (4) at any hearing; or (5) in his January 3, 2017 Motion for Reconsideration. (CP2258-65.) The Apex Entities expressly objected to this late notice in their five-page response. Granting summary judgment against the Apex Entities on this issue based on an unpleaded RCW 21.20.430(5) statutory defense deprived them of a fair opportunity to: (1) conduct discovery on the issue when it deposed Newcomer and issued written discovery; (2) build a summary-judgment record or attack facts relevant to this ground; and (3) demonstrate that there were disputed material facts underpinning the Court's Decision.

On February 10, 2017, after the appellants had already complained of Newcomer's failure to file his affirmative defense, Newcomer belatedly moved for leave to assert previously undisclosed affirmative defenses. (CP2736-50.) The Apex Entities opposed this motion, as the deadline for

Newcomer to assert defenses had long-since expired. (CP2799, CP2891-93.)[27] Newcomer's attempt to plead this new affirmative defense, after the fact, confirms his original pleadings are insufficient.

Moreover, the Superior Court did not grant Newcomer leave to amend the scheduling order to assert untimely affirmative defenses. No "good cause" exists to amend the scheduling order to allow defenses that were or should have been known to Newcomer when the Apex Entity counterclaims were filed. The Apex Entities conducted discovery, disclosed witnesses, and retained experts based on the state of the pleadings and claims and defenses that were pending at the pleading deadline, but did not have the opportunity to conduct discovery on the new issue. Newcomer did not timely assert this defense and the Apex Entities were prejudiced by his failure to timely assert this defense. The Court should deem this defense waived as a matter of law.

F. This Court lacks appellate jurisdiction over his putative "alternative grounds" for affirmance.

Newcomer argues that this Court may affirm the judgment based on the alternative grounds that the operating agreements at issue do not

[27] *See Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000) (affirmative defenses are waived unless affirmatively pleaded, asserted in a 12(b) motion, or tried by the express or implied consent of the parties); CR 8(c) (requiring parties to affirmatively plead certain defenses, including fraud, illegality, and "any other matter constituting avoidance or affirmative defense").

authorize enforcement of a capital call based on contract interpretation. (New. Br. 32-33.) The Superior Court denied both parties' summary judgment on this issue after ruling that the operating agreements were ambiguous and that the determination of the intent of the contracting parties required resolving fact issues at trial. (*E.g.*, RP112-13 (Apr. 8, 2016), RP67-71 (Dec. 23, 2016).) This Court does not have appellate jurisdiction over this interlocutory summary-judgment order and it is not an alternative ground to affirm.[28]

G. The Apex Entities did not "acquire knowledge" of any securities violation that would bar enforcement of their respective operating agreements.

As a threshold matter, Eckstein and RB&F did not move for summary judgment and did not even have an answer on file at the time the summary-judgment motions were filed. Thus, because Eckstein and RB&F did not raise their arguments before the trial court, they have waived any arguments for appeal. Nevertheless, they argue for the first time on appeal that the Apex Entities' operating agreements cannot be enforced because the Apex Entities "acquired knowledge" of a securities violation through Cohen. (Eckstein and RB&F Br. 11-15.)

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[28] *See, e.g., Maybury v. City of Seattle*, 53 Wn.2d 716, 336 P.2d 878, 881-883 (1959).

By its plain terms, RCW 21.20.430(5) applies only to a successor "who has acquired any purported right *under any such contract* with knowledge of the facts by reason of which *its* making or performance was in violation." The reference to "such contract" means a successor is only barred from enforcing the *same* contract violating WSSA. Because the securities in this case are governed by entirely different contracts than the securities at issue in the securities trial, the Superior Court committed reversible error by applying RCW 21.20.430(5) to bar the Apex Entities' claims in this dispute. (*See, e.g.*, Eckstein and RB&F Br.13 (arguing contracts violating WSSA are "void as to the parties *to the contract*") (emphasis added).)

Furthermore, although Eckstein and RB&F claim that Cohen's knowledge can be attributed to the Apex Entities under agency law, they failed to brief the agency issue below or in their appellate brief. They cannot raise this argument for the first time on appeal. Regardless, Eckstein and RB&F have not provided the trial court with evidence that the elements of agency are met. Even if this issue were properly before the Court, knowledge of an agent will be imputed to the principal only where it is relevant to the agency and the matters entrusted to the agent.[29] For

[29] *See* RESTATEMENT (SECOND) OF AGENCY § 268, comment c (1958).

imputation to occur, the knowledge must relate to the subject matter of the agency, *and the agent must have acquired it while acting within the scope of his or her authority* to the principal.[30]

Eckstein and RB&F not only failed to brief this issue before the trial court, they failed to point to any evidence that Cohen obtained any knowledge of a securities violation relating to the Apex TIC or Apex Condos operating agreement while he was acting as an agent for the Apex TIC, Newcomer TIC, or Apex Condos. The alleged "omission" Newcomer sued over in the securities case occurred before Newcomer was even a member of Apex Apartments, LLC. Apex TIC, Newcomer TIC, and Apex Condos were not in existence when the alleged omission occurred. ***Cohen could not have been acting as an agent of Apex TIC, Newcomer TIC, and Apex Condos in the scope of his agency before these entities even existed and no evidence shows he acquired any knowledge of a securities violation while he was acting as an agent for Apex TIC, Newcomer TIC, or Apex Condos.***

Finally, although Eckstein and RB&F claim Cohen's knowledge can be attributed to the Apex Entities, they do not deny, and therefore concede,

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[30] *See, e.g.,Peck v. Siau,* 65 Wn.App. 285, 291, 827 P.2d 1108 (1992); *American Fidelity and Cas. Co. v. Backstrom,* 47 Wn.2d 77, 82, 287 P.2d 124 (1955); *Bond v. Weigardt,* 36 Wn.2d 41, 54, 216 P.2d 196 (1950); *L.J. Dowell, Inc. v. United Pac. Cas. Ins. Co.,* 191 Wn. 666, 681, 72 P.2d 296 (1937); 3 Am.Jur.2d, *Agency* § 281 (1986).

that Ken Thomsen and Jess Thomsen, Inc. are independent third parties entitled to enforce their contractual rights against the in the dissolution proceeding. (*See* New Br. 25 ("[A] judgment binds only those who are parties to the action . . . or those who are in privity with such parties.") (quoting *La Fray v. City of Seattle*, 12 Wn.2d 583, 588, 123 P.2d 345 (1942)). Eckstein and RB&F's cursory attempt to rebut this argument are not worthy of serious debate. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."[31] They also waived any procedural objections to the appearances by Ken Thomsen and Jess Thomsen, Inc. on appeal because they did not raise any objections before the Superior Court. "[B]ecause [Respondents] failed to preserve these issues, [they] cannot raise them for the first time on appeal."[32]

III. Conclusion and Relief Sought

This Court should reverse the summary judgment and remand the case with instructions to grant summary judgment to the Apex Entities on Newcomer's affirmative defense, along an award of their costs and fees.

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[31] *See West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012).

[32] *See State v. Pearsall*, 156 Wn. App. 357, 361, 231 P.3d 849 (2010).

Signed December 5, 2017:

Jack B. Krona Jr. (WSBA #42484)
Law Offices of Jack B. Krona Jr.
6509 46th St. NW
Gig Harbor, WA 98335
PH: (253) 341-9331
j_krona@yahoo.com

CERTIFICATE OF SERVICE

On this December 5, 2017, I hereby certify under penalty of perjury that I caused the above document to be served on the following parties:

Counsel for Plaintiff, Russell Knight, Smith and Alling, PS, 1501 Dock Street, Tacoma, WA 98402, by e-mail by agreement;

Counsel for Defendants Michael Cohen and Jane Doe Cohen, Stellman Keehnel, Andrew R. Escobar, DLA Piper, LLP (US), 701 Fifth Avenue, Suite 7000, Seattle, WA 98104-7044, by e-mail by agreement;

Co-Counsel for Defendants Apex Penthouse Condos, LLC, and Apex Apartments I TIC, LLC, Steven Willock, 5219 N Shirley Street. Ste. 100 Ruston, WA 98407-6599, by e-mail by agreement;

Counsel for AMC Family LLC and Jess Thomson, Inc., Scott Edward Blinks, 345 NW Pacific Ave, PO BOX 867, Chehalis, WA 98532-0867, by and e-mail by agreement;

Counsel for Bill Donahoe and Entrust Northwest, LLC, David S. Kurruish, 7016 35th Ave. NE, Seattle, WA 98115-59127, by e-mail by agreement;

Counsel for Eckstein Investments, LLC, and **RB&F Property Management LLC** Ingrid L.D. McLeod of Davies Pearson, P.C., PO Box 1657, Tacoma, WA 98401-1657, by e-mail by agreement; and,

Washington State Court of Appeals Division II 950 Broadway, Suite 300, Tacoma, WA 98402, by e-mail at coa2filings@courts.wa.gov

Law Offices of Jack B. Krona, Jr., Esq.

By _____
Jack B. Krona Jr., Esq.
WSBA# 42484

LAW OFFICES OF JACK B. KRONA JR.

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