

NO. 50247-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

WILLIAM NEWCOMER,

Respondents,

vs.

MICHAEL COHEN,

Appellants.

**BRIEF OF RESPONDENTS ECKSTEIN INVESTMENTS,
LLC AND RB&F PROPERTY MANAGEMENT, LLC**

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I. INTRODUCTION

Eckstein Investments, LLC and RB&F Property Management, LLC were two of the three “minor” investors in the Apex Apartments project, which was spearheaded and managed by Michael Cohen. Eckstein Investments and RB&F Property Management each invested \$249,296 in the Apex Apartments project,¹ making such investments directly to an entity known as Apex Apartments, LLC.

As manager of the Apex Apartments project, Mr. Cohen was a proponent of creating multiple entities throughout the life of the apartment development project and transferred assets between such entities for his administrative convenience. Eventually, Mr. Cohen created and managed five limited liability companies related to the Apex Apartments project investment: (1) Apex Apartments, LLC; (2) Apex Apartments I TIC, LLC; (3) Newcomer I TIC, LLC; (4) Apex Apartments II, LLC; and (5) Apex Penthouse Condos, LLC (“the Apex Entities”).

¹ While tangential to the issue before the court, Eckstein Investments and RB&F Property Management note that the Apex Entities overstates the trial court’s January 9, 2017 order as determining that “the property the *Original Members contributed [as] capital contributions* to the Apex I partnership was worth at least \$4,250,000.” Br. of Appellant Apex at 46 (emphasis added); CP at 2272. Instead, the trial court determined that “[t]he equity value of ‘Building A’ was at least \$4,250,000 at the time of the initial capital contribution to Apex Apartments I TIC, LLC and Apex Newcomer I TIC, LLC, less any other liens or encumbrances beyond the principal debt to Wells Fargo.” CP at 2272 at ¶¶1-2; *see also* CP at 1180 at ¶¶1-2. The court denied the Apex Entities’ request for a determination that the “value of the ‘initial capital contributions’ to Apex Apartments I TIC, LLC and Apex Newcomer I TIC, LLC “equals the value of the improve real property known as ‘Building A’ at the time it was transferred.” *Id.*

The Apex Entities had “critical cash-flow problems” and the two multi-family buildings that were developed during the course of the project were sold in 2014. But after the sale of the Apex Entities’ real property, neither Eckstein Investments nor RB&F Property Management received any return on their investments whatsoever.

Instead, after the Apex Entities’ properties were sold, fellow investor, William Newcomer, obtained a judgment against Mr. Cohen based on Mr. Cohen’s violations of the Washington State Securities Act (“WSSA”) related to the Apex Apartments project (“the Securities Case”). This court recently affirmed the outcome of the Securities Case in *Newcomer v. Cohen*, noted at 199 Wn. App. 1003, 2017 WL 2154358 (2017).

Thereafter, Mr. Newcomer commenced this lawsuit against Mr. Cohen and two of the Apex Entities related to a promissory note that they made and that is held by Mr. Newcomer. In the course of this suit, in his capacity as manager of the Apex Entities, Mr. Cohen filed a Third-Party Complaint seeking additional capital contributions from the members of the Apex Entities to resolve what Mr. Cohen alleges are insider debts of the Apex Entities, owed primarily to Mr. Cohen himself or to other entities that he controls. Along with Mr. Newcomer, Eckstein Investments and RB&F Property Management oppose the Apex Entities’ theory that they can be compelled to make any additional investment to the Apex Entities.

Before trial on Mr. Newcomer's claim under the promissory note and the Apex Entities' Third-Party Complaint, however, five significant procedural matters occurred: (1) Mr. Newcomer moved for summary judgment, Eckstein Investments and RB&F Property Management joined in Mr. Newcomer's motion for summary judgment, and the Apex Entities cross-moved for partial summary judgment; (2) Eckstein Investments and RB&F Property Management filed a separate securities fraud case against Mr. Cohen;² (3) after extensive briefing, including briefing specifically requested by the trial court regarding the effect of Mr. Newcomer's judgment against Mr. Cohen in the Securities Case, and a total of three lengthy oral arguments, the trial court in this cause summarily dismissed the Apex Entities' Third-Party Complaint against Mr. Newcomer; (4) Eckstein Investments and RB&F Property Management moved for summary dismissal of the Apex Entities' Third-Party Claim for additional capital contributions against them;³ and (5) the Apex Entities and Mr. Cohen sought and obtained leave under CR 54(b) and RAP 2.2(d) to pursue an interlocutory appeal of the trial court's order dismissing the

² This court may take judicial notice that Eckstein Investments and RB&F Property Management, LLC's securities case against Mr. Cohen is pending under Pierce County Superior Court Cause No. 17-2-04595-6.

³ See *Supplemental Designation of Clerk's Papers* filed October 12, 2017.

Apex Entities' Third-Party Complaint against Mr. Newcomer and staying trial-court level proceedings pending this interlocutory appeal.

Thus, trial court level proceedings are stayed pending this court's review of the court's summary dismissal of the Apex Entities' Third-Party Complaint against Mr. Newcomer under RCW 21.20.430(5). Because the plain language of RCW 21.20.430(5) mandates this result, this court should affirm and should further hold Mr. Newcomer's judgment against Mr. Cohen in the Securities Case also bars the Apex Entities' Third-Party Claim against Eckstein Investments and RB&F Property Management under the broad language of RCW 21.20.430(5).

II. JOINDER

Eckstein Investments and RB&F Property Management join fully in the Brief of Respondent William Newcomer filed in this interlocutory appeal.⁴ Eckstein Investments and RB&F Property Management write separately to address only the Apex Entities' and Mr. Cohen's legal arguments regarding the interpretation and application of RCW 21.20.430(5), which impact Eckstein Investments and RB&F Property Management's interests in this case.

⁴ As the court file in this matter is already voluminous, Eckstein Investments and RB&F Property Management joins in and incorporates by reference all facts and arguments presented by Respondent William Newcomer and do not separately set forth a statement of facts.

III. ARGUMENT

A. *Standard and Scope of Review*

Appellate courts review orders granting summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). An appellate court will affirm a summary judgment order if it concludes there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); CR 56(c). A fact is material if the outcome of the litigation depends on it. *Kitsap Bank v. Denley*, 177 Wn. App. 559, 568, 312 P.3d 711 (2013).

Although in reviewing a summary judgment motion Washington courts consider the facts in the light most favorable to the nonmoving party, the nonmoving party bears the burden of establishing that there are specific facts in dispute. *Seven Gables Corp. v. MGM/US Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). The nonmoving party cannot satisfy this burden with mere allegations, speculation, argument, or conclusory statements that material facts are in dispute. *Baldwin v. Sisters of Providence in Wash, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); *see also Seven Gables*, 106 Wn.2d at 13. Issues of statutory interpretation are issues of law and, as such, are properly resolved on summary judgment.

See Dep't of Ecology v Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *see also* CR 56.

In reviewing summary judgment orders, appellate courts “will consider *only evidence and issues called to the attention of the trial court. . .*” and conduct the same inquiry as the trial court. RAP 9.12; RAP 2.4(a)-(b). An appellate court may affirm summary judgment, however, on any ground supported by the appellate record. *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011).

Here, the Apex Entities and Mr. Cohen attempt to expand the breadth of the issue now before the court by speculating regarding the hypothetical impact of the trial court’s summary dismissal of the Apex Entities’ Third-Party Complaint for additional capital contributions against Mr. Newcomer on “innocent third parties,” like the Apex Entities, other members of the Apex Entities, and supposed creditors of the Apex Entities. These arguments are beyond the scope of this court’s review under RAP 2.2 and RAP 9.12. Indeed, the issue before the court is narrow: did the trial court correctly dismiss the Apex Entities’ Third-Party Complaint against William Newcomer based on Mr. Newcomer’s judgment against Mr. Cohen in the Securities Case? Because Mr. Newcomer’s judgment against Mr. Cohen in the Securities Case bars both

Mr. Cohen and the Apex Entities from basing any suit for additional capital contributions on the Apex Entities' Operating Agreements under RCW 21.20.430(5) as a matter of law, this court should affirm the trial court's summary dismissal of the Apex Entities' Third-Party Complaint against Mr. Newcomer.

This court should further hold that RCW 21.20430(5)'s broad statutory prohibition against Mr. Cohen and the Apex Entities from basing any suit on the Apex Entities' Operating Agreements extends to bar Mr. Cohen and the Apex Entities from basing any suit for additional capital contributions under the Apex Entities' Operating Agreements against Eckstein Investments and RB&F Property Management.

B. *Statutory Interpretation Framework*

In analyzing statutes, Washington courts strive to “ascertain and carry out the legislature’s intent.” *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). Where statutory language is plain and unambiguous, Washington courts must “give effect to [its] plain meaning as an expression of legislative intent[.]” and do not modify the language under the guise of statutory interpretation. *Id.* (Internal citations omitted); *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). Indeed, “[w]here a statute is unambiguous, a court assumes the legislature means what it says and *will not engage* in statutory construction past the

plain meaning of the words[]” and assume that the legislature “meant exactly what it said” *Anderson v. Dussault*, 181 Wn.2d 360, 369, 333 P.3d 395 (2014)(quoting *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004)(emphasis added)); *Burton v. Lehman*, 153 Wn.2d 416, 424, 103 P.3d 1230 (2005); *see also Shoop v. Kittitas Cnty.*, 149 Wn.2d 29, 36, 65 P.3d 1194 (2003).

In determining whether a statute’s meaning is plain, Washington courts give each word in the statute its “common and ordinary meaning, unless the word is ambiguous or otherwise defined by the statute.” *Crystal Mountain, Inc. v. State*, 173 Wn. App. 925, 932, 295 P.3d 1216 (2013). In determining the meaning of an undefined statutory term, courts “may consult a dictionary to determine the plain meaning of an undefined term.” *Id.* Further, when a statute does not define a term *and* the term’s meaning depends on the circumstances in which it is used, the court interpreting the term must examine the subject, context, and purpose of the statute.” *Id.* at 933-34 (emphasis added). Additionally, our courts “discern a statute’s plain meaning from indicia of legislative intent *in the statute.*” *Id.* (Emphasis added).

Here, the language of RCW 21.20.430(5) is plain and unambiguous on its face. Accordingly, in analyzing RCW 21.20.430(5), this court must effect its plain meaning as an expression of legislative intent and need not

examine extrinsic evidence of legislative intent or otherwise engage in statutory construction.

C. *The plain language of RCW 21.20.430(5) bars the Apex Entities from basing any suit against members of the Apex Entities, including its Third-Party Complaint, on the Apex Entities' Operating Agreements.*

The Washington State Securities Act (the “WSSA”) is codified at chapter 21.20 RCW and is a remedial statute with a primary purpose of “protect[ing] investors from speculative or fraudulent schemes of promoters.” *Cellular Engineering, Ltd. v. O’Neill*, 118 Wn.2d 16, 23, 820 P.2d 941 (1991). As a remedial statute, Washington courts interpret the WSSA “broadly to effectuate [its] purpose.” *Id.* Indeed, our courts liberally interpret the WSSA in order to “suppress the evil and advance the remedy.” *Go2Net, Inc. v. Freeyellow.com, Inc.*, 126 Wn. App. 769, 783, 109 P.3d 875 (2005). As set forth in RCW 21.20.430(5), violations of the WSSA may result in civil consequences for sellers of securities, buyers of securities, and control persons. RCW 21.20.430(1)-(3).

Indeed, as one consequence of a WSSA violation, RCW 21.20.430(5) operates to prevent enforcement contracts made in violation of the WSSA by securities violators and by those who acquired their interest in the contract with knowledge of the violation. It provides:

No person who has ***made or engaged*** in the performance of any contract ***in violation of any provision of this chapter***

or any rule or order hereunder, *or 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, may base any suit on the contract.* Any condition, stipulation, or provision binding any person acquiring any security to *waive compliance with any provision of this chapter or any rule hereunder is void.*

RCW 21.20.430(5) (emphasis added).

The Washington State Supreme Court has applied the plain language of RCW 21.20.430(5) as mandatory and prohibiting any person who has violated the WSSA from basing a suit on the underlying contract. *O'Neill*, 118 Wn.2d at 36-37. Indeed, the *O'Neill* Court specifically held that contracts governing the relationship between a company and its investors and that constitute securities sold in violation of the WSSA *cannot form the basis for any lawsuit* by the company. *Id.* The *O'Neill* Court based this holding on the plain language of RCW 21.20.430(5), concluding that the statutory mandate that “[n]o person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule hereunder . . . [prohibited the company from] bas[ing] any suit on the contract.” *Id.* (quoting RCW 21.20.430(5)).

Here, a jury has already found that Mr. Cohen violated the WSSA in connection with Mr. Newcomer’s investment in the Apex Apartments project and this court has already affirmed that result. CP at 890-900; *Newcomer v. Cohen*, noted at 199 Wn. App. 1003 (2017). Thus, the Apex

Entities concede that: “The Superior Court correctly ruled in its Decision that, under RCW 21.20.430(5), ‘no person who has made or engaged in the performance of any contract in violation of any provision of this chapter . . . may base any suit on the contract.’” Br. of Appellant Apex at 39 (omission in original).

Despite this accurate concession regarding the plain meaning of a *portion* of RCW 21.20.430(5), the Apex Entities urge this court to ignore an entire clause of RCW 21.20.430(5). RCW 21.20.430(5) actually states:

No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or 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, may base any suit on the contract. . . .

(Emphasis added). Because Washington courts interpret statutes to “give effect to . . . [their] plain language without adding or subtracting from it[,]” this court should reject the Apex Entities’ and Mr. Cohen’s invitation to read a clause out of RCW 21.20.430(5). *See Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 302, 381 P.3d 95 (2016).

It is undisputed that Mr. Cohen is also the promoter, control person, and initial and current manager of the Apex Entities. *See Newcomer v. Cohen*, noted at 199 Wn. App. 1003 at *1-2, 4. Thus, any rights the Apex Entities may have in the Apex Entities’ Operating Agreements were

acquired with knowledge of the facts surrounding Mr. Cohen's WSSA violations. Consequently, one consequence of Mr. Cohen's violations of the WSSA to the Apex Entities is to prevent the Apex Entities from basing any suit on the Apex Entities' Operating Agreements under the plain language of RCW 21.20.430(5).

Although the Apex Entities and Mr. Cohen cite to the 1970 Supreme Court case *Mills v. Electric Auto-Lite Co.*, which analyzed the federal "base no suit" securities statute, 15 U.S.C. § 78cc(b), the *Mills* Court concurred that the plain statutory language declares that contracts made in violation of security statutes are "void as regards the rights of the violator and knowing successors in interest. . . ." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386-87, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970) (emphasis added). Indeed, the *Mills* Court specified that, under 15 U.S.C. § 78cc(b), "the guilty party," which would include both the securities violator and knowing successors, are "precluded from enforcing the contract against an unwilling innocent party." *Id.*

Moreover, in its holding that federal securities law precludes persons who violate the securities acts and their knowing successors from enforcing the underlying contracts against an innocent party, the *Mills* Court relied on *Eastside Church of Christ v. Nat. Plan, Inc.*, 391 F.2d 357, 362-63, (5th Cir. 1968); see *Mills*, 396 U.S. at 387, n.9. The *Eastside*

Church Court held: “Under the *voiding* provision of [15 U.S.C. § 78cc(b)], it is sufficient to show merely that the prohibited transactions occurred and that the [other parties] were in the protected class.” *Id.* Thus, the contracts violating the securities act were *void* as to the parties to the contract. *Id.*

The trial court’s analysis of RCW 21.20.430(5) is consistent with the statute’s plain language, the Washington State Supreme Court’s *O’Neill* decision, the *Mills* Court’s and the *Eastside Church* Court’s analysis of 15 U.S.C. § 78cc(b), and with state courts that have had occasion to analyze their counterparts to RCW 21.20.430(5). *Supra*; *see also Girdwood Min. Co. v. Comsult, LLC*, 329 P.3d 194 (Alaska 2014); *Securities America, Inc. v. Rogers*, 850 So.2d 1252, 1258 (Alabama 2002); *Connecticut Nat’l Bank v. Giacomi*, 242 Conn. 17, 67, 699 A.2d 101 (1997); *Criticare Sys., Inc. v. Sentek, Inc.*, 159 Wis.2d 639, 652, 465 N.W.2d 216 (Wisconsin 1990). Thus, this court should affirm and hold that the Apex Entities is barred by the plain language of RCW 21.20.430(5) from basing any suit, including this Third-Party Complaint for additional capital contributions, on the Apex Entities’ Operating Agreements against any member of the Apex Entities.

D. *The Apex Entities' and Mr. Cohen's arguments speculating about hypothetical effects of the statutorily-required dismissal of the Apex Entities' Third-Party Complaint on "innocent third parties" lack merit.*

The Apex Entities and Mr. Cohen make extensive arguments regarding the hypothetical effect of the statutorily-required dismissal of the Apex Entities' Third-Party Complaint on "innocent third parties," which this court should soundly reject. *See* Br. of Appellant Apex at 39-42; Br. of Appellant Cohen at 29-29, 37-38. For instance, Mr. Cohen and the Apex Entities argue that "innocent third parties" like supposed creditors Ken Thomsen and Jess Thomsen, Inc. "are seeking to enforce [Mr.] Newcomer's capital-contribution liability" and muse that the court's summary dismissal "allow[s Mr.] Newcomer to escape the capital contribution obligations he *owes* to the other investors" *Id.* The Apex Entities' and Mr. Cohen's arguments must fail for four primary reasons.

First, the Apex Entities' and Mr. Cohen's arguments regarding the rights of "innocent third parties" are wholly speculative and fail to cite to any portions of the appellate record. Br. of Appellant Apex at 42; Br. of Appellant Cohen at 28-29.

Second, any obligation for members of the Apex Entities to make an additional capital contribution is an undecided issue and, if this case were remanded, would remain in dispute for trial. *See* CP at 2266-2269.

Third, the Apex Entities assume that Ken Thomsen and Jess Thomsen, Inc. are parties to this proceeding but that is not quite correct. *See* Br. of Appellant Apex at 42. Specifically, Ken Thomsen and Jess Thomsen, Inc. filed purported Cross-Claims and counterclaims a mere two weeks before the trial court determined that the Apex Entities' Third-Party Complaint against Mr. Newcomer should be summarily dismissed but these non-parties failed to first request or obtain leave to intervene in this matter. CP at 2719-23; *see also* CP at 2595-2599.

Fourth, the Apex Entities' Operating Agreements provide: "**16.10 Creditors.** None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditors of the Company." CP at 213, 475.

Accordingly, this court should reject the Apex Entities' and Mr. Cohen's unsupported, hypothetical arguments regarding the broad impact on "innocent third parties" of the trial court's narrow decision summarily dismissing the Apex Entities' Third-Party Complaint against Mr. Newcomer.

E. *The Apex Entities' cursory request for an award of attorney fees and costs on appeal should be rejected.*

The Apex Entities make a cursory request for an award of appellate attorney fees and costs. Br. of Appellant Apex at 50. This request should

be rejected because the Apex Entities have no legal basis for an award of attorney fees and costs. *See id.* Moreover, the Apex Entities even failed to comply with the mandates of RAP 18.1 in making this request because they failed to devote a “section” of their opening brief to this request.

IV. CONCLUSION

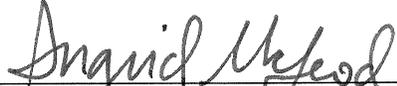
Under the plain language of RCW 21.20.430(5), Mr. Cohen, as an adjudicated violator of the WSSA, and the Apex Entities, entities that Mr. Cohen promoted, formed, and managed *with knowledge of the facts* underlying his own violations of the WSSA, are precluded from bringing any suit on the Apex Entities Operating Agreements against any members of the Apex Entities. As such, this court should affirm the trial court’s summary dismissal of the Apex Entities’ Third-Party Complaint for additional capital contributions against Mr. Newcomer. This court should further hold that RCW 21.20.430(5) also bars Mr. Cohen and the Apex Entities from basing any suit for additional capital contributions under the Apex Entities’ Operating Agreements against Eckstein Investments and RB&F Property Management.

Alternatively, because this court may affirm summary judgment on any ground supported by the record, this court may also affirm based on the plain language of the Apex Entities’ Operating Agreements, which precludes the Apex Entities from seeking additional capital from members

and on which basis Mr. Newcomer, Eckstein Investments, and RB&F Property Management also moved for summary judgment.⁵

DATED this 13th day of October, 2017.

DAVIES PEARSON, P.C.



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⁵ See Br. of Respondent Newcomer at § III(H).

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed the foregoing document with the Washington State Court of Appeals II by using the CM/ECF system, and via the following in the manner indicated:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of October 2017, in Tacoma, Washington.

DAVIES PEARSON, P.C.


Deborah A. Holden, Legal Assistant

DAVIES PEARSON, P.C.

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