

NO. 338070

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
APR 12, 2016
Court of Appeals
Division III
State of Washington

JAMES DARLING, an individual,

Appellant,

LAWRENCE BROWN a married individual
and, BRIAN MAIN a married individual and
as members of RED TOWER, LLC, a limited
liability company

Plaintiffs

V.

GREGORY D. JEFFEREYS, and KIMBERLEY
JEFFEREYS, a married couple, POACHER'S ROCK,
LLC, a limited liability company,

Defendants

AUBLE & ASSOCIATES, INC., a domestic corporation,
SCOT D. AUBLE, and JANE DOE ABULE, a married couple,
Respondents

GRANT PERSON and JANE DOE PERSON, a married couple,
SCOTT PERSON, an individual, SONRISE LAND LLC,
a limited liability company, and NAI BLACK REALTY
COMPANY, a domestic corporation, and ERIC SATCHJEN, an
individual and WORKLAND WITHERSPOON a domestic
corporation.

Defendants

BRIEF OF RESPONDENTS AUBLE AND ASSOCIATES, INC., AND SCOT D. AUBLE
AND JANE DOE AUBLE

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	6
A. Standard of Review.....	6
B. Summary Judgment of Dismissal was proper because there was no casual connection between the Respondents' appraisals and Darling's alleged damages.....	6
C. Darling did not rely on the appraisals, so the trial court properly dismissed Darling's claims for fraud and negligent misrepresentation.....	8
D. Darling's real estate transactions did not have a public impact, so the trial court properly dismissed Darling's Consumer Protection Act claims.....	11
E. Darling's claims are barred by the statutes of limitation.....	12
V. CONCLUSION.....	15
Certificate of Service.....	16

TABLE OF AUTHORITIES

Cases	Page
<i>All Star Gas, Inc. v. Bechard</i> , 100 Wn. App. 732, 740, 998 P.2d 367 (2000).....	7
<i>Bainbridge Citizens United v. Wash. State Dep't. of National Res.</i> , 147 Wn. App. 365, 371, 198 P.3d 1033 (2008).....	6
<i>Brummett v. Washington's Lottery</i> , 171 Wn. App. 664, 675, 288 P.3d 48 (2012) (rev. den. 176 Wn.2d 1022, 297 P.3d 707 (2013))	7, 8
<i>Chelan County Deputy Sheriffs' Ass'n. v. County of Chelan</i> , 109 Wn.2d 282, 302 n 6, 745 P.2d 1 (1987).....	15
<i>Costa v. Neimon</i> , 123 Wis.2d 410, 366 N.W.2d 896 (1985).....	10
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 809, 828 P.2d 549 (1992).....	11
<i>Crowe v. Gaston</i> , 134 Wn.2d 501, 514, 951 P.2d 1118 (1998)....	8
<i>ESCA Corp v. KPMG Peat Marwick</i> , 135 Wn.2d 820, 826, 959 P.2d 651 (1998).....	7, 8
<i>Gross v. City of Lynnwood</i> , 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).....	6
<i>Hangman Ridge Training Stables v. Safeco</i> , 105 Wn.2d 778, 785, 719 P.2d 531 (1986).....	7, 11
<i>Hughes v. Holt</i> , 140 Vt. 38, 40-41, 435 A.2d 687, 688-9 (1981)...	10
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 379, 972 P.2d 475 (1999).....	9
<i>Mossman v. Rowley</i> , 154 Wash. App. 735, 740, 229 P.3d 812 (2009).....	6

<i>Robinson v. Avis Rent A Car System, Inc.</i> , 106 Wn. App. 104, 121-2, 22 P.3d 818 (2001) (rev. den. 145 Wn.2d 1004 (2001))....	9
<i>Schaaf v. Highfield</i> , 127 Wn.2d 17, 896 P.2d 665 (1995).....	9, 10
<i>Washington Optometric Assn. v. Pierce County</i> , 73 Wn.2d 445, 448, 438 P.2d 861 (1968).....	14-15
<i>Young v. Key Pharmaceuticals</i> , 112 Wn.2d 216, 225, 770 P.2d 182 (1989).....	8, 11
<i>1000 Virginia Limited Partnership v. Vertex Corp.</i> , 158 Wn.2d 566, 575, 146 P.3d 423 (2006).....	13, 14

Statutes

RCW 4.16.080(2)	13
RCW 4.16.080(4)	13
RCW 19.86	12
RCW 19.86.120	13
RCW 18.140.005	11, 12
RCW 19.86.093	12
RCW 19.86.093(1) or (2)	12
RCW 19.86.093(1)-(3)	12
RCW 19.86.093(3)	12

Court Rules

CR 56 (e).....	12
RAP 10.3(g).....	11

I. INTRODUCTION

In April 2014 Appellants filed two lawsuits against numerous defendants including Respondents Auble and Auble & Associates, Inc., seeking damages from two real estate transactions that closed in 2008. Respondents' motion for summary judgment of dismissal was granted by the trial court because applicable statutes of limitation had expired. The trial court also dismissed Appellants' claims for violation of the Consumer Protection Act because the transactions had no public impact. Appellants have appealed only that portion of the trial court ruling regarding statutes of limitation.

II. ASSIGNMENTS OF ERROR

1. The trial court's order of dismissal was proper because Appellants failed to raise material issues of fact with regard to causation.
2. The trial court's order dismissing Appellants' claims for fraud and negligent misrepresentation was proper because Appellants did not rely on Respondents' alleged misrepresentations.
3. The trial court properly dismissed Appellants' claims for violation of Consumer Protection Act because there was no public impact.
4. The trial court properly dismissed Appellants' claims because they were barred by the statutes of limitation.

III. STATEMENT OF THE CASE

The Superior Court actions giving rise to this appeal arose from two real estate transactions that closed in 2008. More than six years later, Plaintiffs filed two separate actions on April 2, 2014, which were

consolidated. CP 1-20; 106-24. Appellants James Darling and Red Tower LLC are the two remaining plaintiffs, collectively referred to as “Darling”.

In the Complaint filed under Spokane County Superior Court cause number 14-2-01148-7, Darling sought damages from the transaction whereby Red Tower, LLC, an entity owned by the plaintiffs including Darling, acquired a 50 percent interest in two parcels of property located at the Ridpath Hotel campus in Spokane, Washington. The parcels have been denominated as Units 1 and 2. See plaintiffs’ Complaint at ¶ 2.12; CP 8. According to the Complaint, Darling paid \$651,920.00 for the 50 percent interest. Complaint at ¶ 2.13; CP 8.

Darling obtained financing for the purchase from the Bank of Whitman. Complaint at ¶ 2.12; CP 8. Before the transaction closed, the Bank of Whitman hired Scot Auble of Auble & Associates, Inc., to appraise Units 1 and 2. Complaint at ¶ 2.9; CP 7.

In his written appraisal dated February 22, 2008, Mr. Auble concluded that the fair market value of the entire fee simple interest of Units 1 and 2 was \$890,000. See Complaint ¶ 2.9; (CP 7); Darling Deposition Exhibit 24 at p. 3 (CP 152). To be clear, Mr. Auble appraised the entirety of Units 1 and 2, **not** just the 50 percent share acquired by Darling for \$651,920.00.

In his deposition Darling testified that he did not see Mr. Auble’s appraisal until after the transaction had closed. Darling depo at p. 165; CP 134. Darling agreed that the person or entity who hires an appraiser is the appraiser’s client, and it is the client who has the right to rely on the appraisal. Darling Depo at p. 213 (CP 135); 239-40 (CP 140).

The \$651,920 paid by Darling for 50 percent of Units 1 and 2 implies a total value of over 1.3 million dollars for all of Units 1 and 2, substantially more than the \$890,000 value stated in Mr. Auble's report. When deciding to purchase the 50 percent interest in Units 1 and 2, Darling did not rely on Mr. Auble's appraisal because Darling had not seen it. Rather, Darling relied upon other members of his investment group, not Respondents, when determining the price for the 50 percent interest in Units 1 and 2. Darling depo at pp. 234-35; CP 139.

The second real estate transaction pertained to a third parcel of property at the Ridpath Hotel campus in Spokane, Washington. In that transaction, Darling (and others) acquired Unit 3 of the Ridpath "Y" Building (hereinafter Unit 3) for a purchase price of \$340,000. See plaintiffs' Complaint under Spokane County Superior Court cause number 14-2-01149-5 at ¶ 2.11; CP 113.

Darling obtained financing for Unit 3 from Community Coastal Bank, which hired Mr. Auble and Auble & Associates to appraise the property. Complaint at ¶2.11; CP 113. In his appraisal dated January 18, 2008, Mr. Auble concluded that the fair market value of Unit 3 was \$235,000, or \$105,000 more than Darling agreed to pay. Darling Depo at p. 216-17 (CP 136); Exhibit 13 at p. 3 (CP 144).

In his deposition Darling testified that he did not see Mr. Auble's appraisal for Unit 3 until after the transaction closed on February 8, 2008. Darling depo p. 213-14; CP 135-6; 222; (CP 138). But before closing, Darling "probably" knew the appraised amount, and undisputedly knew that Unit 3 did not appraise for the amount he and the others had agreed to pay. Darling depo at p. 216

ll. 2-6; CP 136. Even though Darling knew that the purchase price was more than the appraised value, Darling proceeded with the transaction. Darling depo at pp. 216-17; CP 136. Darling's deliberate decision to pay more than the appraised value was based upon his own business judgment. Darling depo at pp. 217-18; (CP 136-7); 223-4; (CP 138).

Darling alleged that he lost money in both transactions because of the defendants, including the Respondents. *

Darling alleged numerous theories against Auble and Auble & Associates, Inc., about Unit 3. The common thread throughout is that the appraised value of Unit 3 was higher than its actual value. Darling alleged that defendants, including Respondents Auble and Auble & Associates, Inc. fraudulently concealed the actual, lower value of Unit 3. See Complaint ¶ 3.12; CP 115-16. The same, alleged misrepresentation is the basis of Darling's claims for outrage (Complaint ¶ 3.17) (CP 116); violation of the Consumer Protection Act (Complaint ¶ 3.19) (CP 117); Civil Conspiracy (Complaint ¶3.21) (CP 117-18); negligent misrepresentation (Complaint ¶ 3.28); CP 120; and negligence (Complaint ¶ 3.30); CP 121.

Darling's deposition testimony establishes that the Unit 3 transaction was completed before he had seen Mr. Auble's appraisal, so Darling could not have relied on it. Regardless, Darling testified that he was aware before the closing that the

* In his deposition Darling acknowledged that after the transactions closed, Spokane and the entire country experienced one of the most catastrophic declines in property values in history. Darling's lawsuits attribute his ensuing losses to respondents (and other defendants) without regard to historical events beyond their control. Darling depo at p. 97; CP 133. See § IV B, *infra*.

appraised value was lower than the purchase price, but Darling bought the property anyway.

Darling's claims against Auble and Auble & Associates, Inc., arising from the purchase of Units 1 and 2 are based on allegations similar to those regarding Unit 3. Specifically, Darling alleged that the actual value of Units 1 and 2 was less than the appraised amount and that the actual, lower value of the property was concealed from him by defendants, including Respondents Auble and Auble & Associates, Inc. This theory appears in Darling's claim for fraud (Complaint ¶ 3.12) (CP 10-11); outrage (Complaint ¶ 3.17) (CP 11); violation of the Consumer Protection Act (Complaint ¶ 3.19) (CP 12); Civil Conspiracy (Complaint ¶ 3.21) (CP 13); negligent misrepresentation (Complaint ¶ 3.28) (CP 15); and negligence (Complaint at ¶ 3.30); (CP 16). However, Darling did not see the appraisal for Units 1 and 2 until after the transaction had already closed, so he could not have relied on it.

In opposition to Respondents' motion to dismiss, which relied on Darling's own sworn deposition testimony, Darling submitted a declaration which states in pertinent part that "I relied on the properties appraising within reason to make decisions to buy the properties." CP 44. This statement contradicted his sworn deposition testimony. Furthermore, it is immaterial. See § IV C, *infra*.

The trial court granted Respondents' motion for summary judgment on the basis of the applicable statutes of limitation. The Court also dismissed Darling's claims for violation of Washington's Consumer Protection Act because the transactions did not have a public impact. (CP 101-4).

Although not part of the trial court's stated reasons for dismissal, the trial court properly dismissed Darlings' claims because there was no evidence of reliance or causation, which are essential elements of Darling's theories.

IV. ARGUMENT

A. Standard of Review.

The standard of review of an order granting summary judgment of dismissal is de novo. *Mossman v. Rowley*, 154 Wash. App. 735, 740, 229 P.3d 812 (2009).

B. Summary Judgment of Dismissal was proper because there was no causal connection between Respondents' appraisals and Darling's alleged damages.

The trial court granted the motion of Auble and Auble & Associates to dismiss on the basis of statutes of limitation and the absence of public impact in Darlings' claims for breach of the Consumer Protection Act. (CP 101-4). However, dismissal was also appropriate because there was no causal connection between the tortious acts Darling complained of and Darling's alleged damages. The Court of Appeals should affirm the trial court decision if there is a basis in the record for sustaining that decision and regardless of whether the trial court relied on that basis. *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978); *Bainbridge Citizens United v. Wash. State Dep't. of National Res.*, 147 Wn. App. 365, 371, 198 P.3d 1033 (2008) (When questions of law which are subject to de novo review are involved, an Appellate Court is not confined to the legal issues and theories argued by the parties, but may

sustain a trial court ruling on any ground, even if the trial court did not consider it).

In his deposition Darling admitted there was no causal connection between the appraisals and the transactions. He and his fellow investors decided to purchase Unit 3 without seeing the appraisal and even though they knew that the value in Mr. Auble's report was less than the purchase price they paid. With regard to Units 1 and 2, Darling testified that he did not see the appraisal until after the transaction closed. He and his fellow investors reached an agreement regarding the purchase price before Mr. Auble appraised the property, and Darling and his fellow investors closed the transaction without seeing Mr. Auble's report.

Each of Darling's theories of recovery require evidence of a causal connection between the tortious act alleged and the damages claimed. *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (Fifth element in a CPA claim is a causal connection between the unfair or deceptive act and the alleged damages); *ESCA Corp v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (A party claiming negligent misrepresentation must prove it reasonably relied on a misrepresentation, and that its reliance caused pecuniary loss); *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 675, 288 P.3d 48 (2012) (rev. den. 176 Wn.2d 1022, 297 P.3d 707 (2013)) (Ninth element of common law fraud is damage resulting from—caused by—plaintiff's reliance on a misrepresentation of material fact); *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000); (Plaintiff must prove that a combination of persons accomplished—caused—the outcome complained of);

Crowe v. Gaston, 134 Wn.2d 501, 514, 951 P.2d 1118 (1998)
(Fourth element of a negligence claim is proximate cause between a breach of duty and the alleged damages).

Because Darling did not see the appraisals before closing, there was no causal connection between them and Darlings' alleged damages. Accordingly, the claims against Auble and Auble & Associates, Inc., were properly dismissed. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)
(Summary judgment should be granted if a plaintiff fails to make a sufficient showing of material issues of fact on an essential element of his prima facie case).

C. Darling did not rely on the appraisals, so the trial court properly dismissed Darling's claims for fraud and negligent misrepresentation.

Darling's deposition testimony also established that he did not rely on the appraisals, which is a necessary element of claims for fraud and negligent misrepresentation.

One of the essential, nine elements of common law fraud is that the plaintiff relied on the truthfulness of defendant's material misrepresentation of an existing fact. *Brummett, supra*, at p. 675. Similarly, in a claim for negligent misrepresentation, the plaintiff must prove that he justifiably relied on false information from the defendant. *ESCA Corp., supra*, at p. 826.

In his deposition Darling testified that he did not see either of Mr. Auble's appraisals until after the transactions had closed. With regard to Unit 3, although he did not have the appraisal, Darling "probably" knew the appraised amount before closing, and

certainly knew that the appraised value of the property was less than what he and the other plaintiffs agreed to pay.

In opposition to Respondents' motion to dismiss, Darling submitted a declaration which states in pertinent part that "I relied on the properties appraising within reason to make decisions to buy the properties." But in his deposition Mr. Darling repeatedly testified that he had not seen the appraisals before closing, and "probably" knew the appraised amount for Unit 3. Thus, Mr. Darling's declaration attempted to create a material issue of fact by impeaching his prior deposition testimony, which is impermissible. See *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 121-2, 22 P.3d 818 (2001) (rev. den. 145 Wn.2d 1004 (2001)); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999).

Regardless of the impermissible contradictions in Darling's declaration, the declaration is immaterial. In *Schaaf v. Highfield*, 127 Wn.2d 17, 896 P.2d 665 (1995), the Supreme Court held that an appraiser's duty can be owed to purchasers of property, and not just lenders who hire them. But *Schaaf* also explains why Mr. Darling's declaration was immaterial and why summary judgment was proper.

The plaintiff in *Schaaf* brought suit against an appraiser hired by the Veteran's Administration to appraise a residence purchased by the plaintiff. The appraisal did not disclose the existence of a leaky roof. The appraiser's motion for summary judgment was granted by the trial court, and the plaintiff appealed.

The Supreme Court decided that the appraiser owed a duty of care to the purchaser even though the purchaser did not hire the appraiser. Despite recognizing a duty of care, the Court affirmed summary judgment of dismissal because the plaintiff did not rely on the appraisal.

The plaintiff's complaint alleged that he had offered a lower price for the home because he knew it was sixteen years old and thought the house might need a new roof. Thus, he knew before he bought the house that it might need a new roof, so he could not blame the appraiser for failing to disclose the leaking roof. "Even more compelling evidence that Schaaf did not rely on the appraiser's report is his admission in a letter that he did not even see the appraisal report until sometime after April 1991, more than a year *after* he bought the house. Thus, he could not possibly have directly relied on the report at the time of the purchase." *Id.* at pp. 30-31. (emphasis in original).

In *Schaaf, supra*, the Supreme Court declined to follow *Costa v. Neimon*, 123 Wis.2d 410, 366 N.W.2d 896 (1985), which held that a purchaser's reliance on an appraisal could be inferred from the V.A.'s acceptance of a loan. Rather, the Court followed *Hughes v. Holt*, 140 Vt. 38, 40-41, 435 A.2d 687, 688-9 (1981), which held there was no reliance where the plaintiff did not see the appraisal before closing. *Schaaf, supra*, at p. 31.

Like the plaintiff in *Schaaf, supra*, Darling did not see either appraisal until after the transactions had closed. According to *Schaaf*, Darling did not rely upon the appraisals as a matter of law. Darling's declaration, which suggests that he relied on the properties "appraising within reason," but without seeing the appraisals, is an argument expressly rejected by the Supreme Court; a purchaser's reliance cannot be based upon or inferred from the fact that the loan funded and the transaction closed. Accordingly, Mr. Darling's declaration was immaterial, and the trial court properly dismissed Darling's claims for fraud and negligent misrepresentation for lack of reliance.

D. Darling's real estate transactions did not have a public impact, so the trial court properly dismissed Darling's Consumer Protection Act claims.

According to Darling's brief, the trial court's dismissal on the basis of the statute of limitations "is the only issue being appealed by Mr. Darling" Appellant's brief at p. 8. Darling has not assigned error to the dismissal of his claims for violation of Consumer Protection Act for lack of public impact, so the Court should not review that trial court decision. RAP 10.3(g). Furthermore, Darling has not briefed the issue, so the Court should not consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Even if this Court decides to consider the issue, the trial court properly dismissed Darling's claims for violation of the Consumer Protection Act for lack of public impact.

An essential element of a claim for violation of Washington's Consumer Protection Act is that the alleged unfair or deceptive act or practice impacted the public interest. This element is satisfied by an express statutory mandate, or in the alternative, evidence that there are additional plaintiffs who have been or will be injured in exactly the same fashion as the plaintiff. "Ordinarily a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest." *Hangman Ridge, supra*, at p. 780.

The allegations of Darling's Complaints pertain to two private transactions between a small group of persons which did not impact the public interest. Accordingly, Darling's Consumer Protection Act claims were properly dismissed. *Young, supra*.

In opposition Darling cited RCW 18.140.005, a statute regulating

appraisers, for the proposition that it satisfies one of the three ways to prove the public impact requirement outlined in RCW 19.86.093(1)-(3). But this is incorrect; RCW 18.140.005 does not expressly incorporate or reference RCW 19.86, nor does it contain a “specific legislative declaration of public interest impact.” Thus, RCW 18.140.005 does not satisfy either RCW 19.86.093(1) or (2).

In an attempt to satisfy the requirement of RCW 19.86.093(3), Mr. Darling suggested that the disputed appraisals injured others or had the capacity to injure others. But because Darling did not see the appraisals until after the transactions had closed, even he was not injured by the appraisals. Moreover, Darling submitted no evidence that the appraisals, which were limited to two parcels of property, were of interest to anybody other than the parties to the transactions, and there was no evidence that anybody else even knew of the appraisals or their contents. Accordingly, the appraisals lacked the requisite public impact pursuant to RCW 19.86.093(3).

Darling’s trial court opposition referred to other lawsuits involving other appraisals by Mr. Auble. See response at p. 8, ll. 20-22; CP 32. However, transactions involving other, unrelated parcels or appraisals had no relevance to the specific appraisals at issue in Darling’s lawsuits. Accordingly, they were irrelevant, inadmissible, and not properly before the trial court. CR 56(e).

E. Darling’s claims are barred by the statutes of limitation.

Mr. Auble prepared his appraisals in January and February 2008, and the transactions closed in 2008. In April 2014, more than six years later, Darling filed suit, alleging in numerous theories

of liability that the appraisals were inaccurate and misleading. Mr. Darling saw the appraisal for Unit 3 in 2008 and the appraisal for Units 1 and 2 in 2010. Darling Depo at pp. 244 (CP 90). Darling argues that his claims did not accrue until April 2011 when he had a conversation with Marshall Casey, a Spokane attorney. Darling did not suggest what, if anything, Darling did between the 2008 closings and his conversation with Mr. Casey to learn why he had lost money on the transactions.

The statute of limitations for negligence, fraud, negligent misrepresentation and civil conspiracy is three years. See RCW 4.16.080(2); 080(4). The statute of limitations for violation of the Consumer Protection Act is four years. RCW 19.86.120. Generally, an action accrues immediately when the wrongful act occurs. *1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006) (citations omitted).

Darling argues that the statutes of limitation did not begin to run until April 2011 when he was told by Mr. Casey that Darling should seek legal representation. Darling suggests that this conversation triggered the statutes of limitation for his claims, including those against Respondents. Appellants' Brief at pp. 12-13. Anticipating the statute of limitations defense, Darling made similar allegations in his complaints. See complaints at ¶ 2.15 (CP 8); ¶ 2.13 (CP 113).

In his deposition Mr. Darling was asked about his April 2011 conversation with Mr. Casey and the information Mr. Casey had obtained. According to Darling, the information obtained by Mr. Casey consisted of handwritten notes from defendant Grant Person which Mr. Casey obtained in April 2011. See Darling deposition at pp. 241-42 (CP 89-90). But Darling admitted that Mr. Person's notes "didn't say

anything” about Auble or Auble & Associates. *Id.* at p. 242 (CP 90). Darling also agreed that the totality of information he had about Auble & Associates were Mr. Auble’s appraisals which were written in January and February 2008 before the transactions closed. *Id.* at pp. 242 ll. 23-243 ll. 1 (CP 90).

In opposition to Respondents’ motion for summary judgment, Darling submitted a declaration from Mr. Casey which refers to “a similar pattern” of transactions in which former defendant Gregory Jeffereys purchased properties for low amounts and then assigned his interests to subsequent buyers for higher amounts. See Declaration of Marshall Casey at ¶ 4. CP 46-8. Mr. Casey’s declaration made no reference to appraisals by Respondents as part of this perceived “pattern.”

Thus, Darling “discovered” no new facts about claims against Respondents from his conversation with Mr. Casey or from Mr. Person’s notes. Mr. Darling agreed that Mr. Auble’s appraisals are the factual basis of his claims against Respondents, and Mr. Casey’s comments had nothing to do with Darlings’ claims against Respondents, which necessarily accrued when the appraisals were written. *1,000 Virginia, supra.*

Finally, Darling attempts to manufacture a question of fact by suggesting that the trial court’s statements at the summary judgment hearing about the correctness or incorrectness of Mr. Auble’s appraisals were contradictory with its decision to dismiss the case on the basis of the statutes of limitation. However, the court’s comments did not rise to the level of a finding of fact or conclusion of law. Even if they did, they would be superfluous. Because the issues were decided on summary judgment, the Court reviews the records de novo. *Washington*

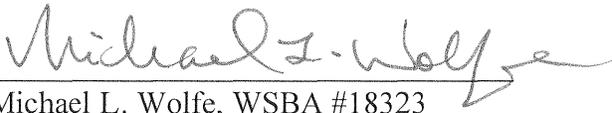
Optometric Assn. v. Pierce County, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). *Chelan County Deputy Sheriffs' Assn. v. County of Chelan*, 109 Wn.2d 282, 302 n. 6, 745 P.2d 1 (1987). Regardless, it is a non-sequitur to suggest that a potential question of fact about the correctness of the disputed appraisals somehow dictated when Darling's claims accrued, and when the statutes of limitation ran.

V. CONCLUSION

The trial court properly granted Respondents' motion for summary judgment of dismissal, and the trial court order of dismissal should be affirmed.

DATED this 12 day of April, 2016.

RANDALL | DANSKIN, P.S.

By: 
Michael L. Wolfe, WSBA #18323
Attorneys for Respondents Auble, and
Auble & Associates, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 12 day of April, 2016, addressed to the following:

<u>Attorneys for Appellants:</u> Drew D. Dalton Drew Dalton, P.S. 320 S. Sullivan Road Spokane Valley, WA 99037	<input type="checkbox"/> Hand Delivered <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Email Transmission
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Michael L. Wolfe