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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 364682

(Spokane County Superior Court No. 16-2-00616-1)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

DAVID CEBERT,

Appellant.

vs.

PATRICK KENNEDY and JANE DOE KENNEDY, a martial community, JOHN KENNEDY and JANE DOE KENNEDY, a martial community, and MITIGATION OF DISEASE, INC., a Delaware corporation

Respondents,

APPELLANT'S BRIEF

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I. INTRODUCTION

Mr. Cebert had worked for the Kennedys for over two years based on representations of compensation, but the Kennedys had never intended to pay or compensate him. Mr. Cebert's brought claims for wages, fraud, and contract against the Kennedys and MODI (hereafter, jointly called "the Kennedys").¹ The trial court dismissed Mr. Cebert's claims two weeks before trial, and ordered the Defendants' counterclaims to trial.

The reason for the trial court's dismissal was the trial court held the statute of limitations barred Mr. Cebert's claims since his case was not filed until February 16, 2016.² This was done in a summary judgment motion.

The trial court was wrong to dismiss Mr. Cebert's claims because the evidence showed Mr. Cebert did not quit working for the Kennedys until September 17, 2014. As will be shown in the analysis, there is clear case law that continuous service contract claims only begin to accrue on the date of termination of the service. Also as will be shown in the analysis the legislature mandated a duty to pay all wages once an

¹ MODI is wholly owned by the Kennedy brothers according to John Kennedy's testimony. There is another related company of Axtel that the Kennedy brothers also started, and John Kennedy testified he is not sure its difference from Axtel. However, ² This matter had been served on May 7, 2015, but for some reason Mr. Cebert's prior counsel never filed it.

employment relationship is terminated, and that only becomes actionable at the termination of the employment relationship. Because of this the statute of limitation did not run on Mr. Cebert's wage and contract claims until at least September 17, 2017, well after this matter was filed on February 16, 2016.

The trial court was also wrong on the fraud claims being barred by the statute of limitations. The Kennedy brothers represented to Mr. Cebert that he would have a paid position with MODI, even the presidency, which came with 600,000 shares of stock and a salary of \$62,000 per year. As late as March 29, 2013 John Kennedy called Mr. Cebert part of the "governing force of MODI," and stated "David as President should..." start certain activities. John Kennedy testified in his deposition that he never had any intention of performing on these promises, or giving Mr. Cebert a paid position.

It is fraud to make a promise to induce action, when you have no intention of performing on the promise. As shown in later analysis, the statute of limitations for fraud is three years from discovery. Since the promises made to Mr. Cebert were confirmed as late as March 29, 2013 the earliest this statute of limitations could have run was March 29, 2016 which is well after the February 16, 2016 date this matter was filed. The trial court wrongly dismissed the fraud claim.

The Kennedys compulsory counter claims were for fraud, conversion, trade secret violations, and tortious business interference. These were based on Mr. Cebert not giving them “data” he had collected during his employment causing them to lose a patent in Russia. Prior to trial and at trial John Kennedy only speculated they had lost the Russian patent, but never could confirm the loss since his lawyers were still looking into it.

Two and a half weeks after dismissing Mr. Cebert’s claims (June 22, 2019), the counterclaims against Mr. Cebert went to trial (July 9, 2019). As noted by the trial court this “totally changes the whole dynamics of the trial.” One of the large issues at trial was how to keep the jury from speculating on Mr. Cebert’s dismissed claims. The Kennedys though continually argued, even in closing that they were just the counterclaimant thus referring to Mr. Cebert’s claims.

There were other errors with the trial on the counter claims. As a whole though, Mr. Cebert was prejudiced by the dismissal of his claims and not being able to present the full case to the jury. The jury awarded damages against Mr. Cebert. In the entry of judgment the trial court determined MODI was the prevailing party on misappropriation of trade secrets and awarded another \$191,582 in attorney fees against Mr. Cebert.

Mr. Cebert appealed this matter on November 26, 2018. He

requests this court to overturn the incorrect dismissal of his claims, and order this matter back to trial so the jury can hear his claims with the Kennedys' counterclaims.

II. ASSIGNMENT OF ERROR

Appellant assigns error to the following items:

1. It was error to dismiss on summary judgment Mr. Cebert's claims of wages, contract, fraud, and quantum meruit based on the statute of limitations.
2. It is error to separate compulsory counter claims without the use of discretion under CR 42(b), even if it is done by an erroneous grant of summary judgment against Mr. Cebert's claims.
3. It was error to allow in the letters sent by Mr. Noder's attorneys to come into evidence. Those letters were only relevant based on un-pled claims of conspiracy or vicarious liability. The letters were also hearsay. This error was prejudicial to Mr. Cebert.
4. It was error to allow in Mr. Cebert's note on his "claim" when the court had already ordered Mr. Cebert not discuss his claims, and advised the jury not to speculate on those claims.
5. It was error to allow the Kennedys damages based on losing the Russian patent, when the Kennedys never produced evidence the Russian

patent was lost.

III. STATEMENT OF FACTS

A. Substantive Facts- Kennedy Brother Representations, and Mr. Cebert's Employment

In the early part of 2012, January or February, Patrick Kennedy asked Mr. Cebert to join the team at Mitigation of Diseases, Inc. (hereafter "MODI"). *CP 235, 4/27/18 Schroeder Declaration, Exhibit 5, p 28-36.*³ John Kennedy, Patrick Kennedy's brother, had developed a bioavailable mineral (hereafter "BAM") that he had a patent pending on and had assigned to MODI. *CP 372-409, 4/27/18 Schroeder Declaration, Exhibit 21, p 1-36.*

In the beginning of 2012 Mr. Cebert was involved in creating a website for MODI, developing promotional material, and one of the key three people the investment broker Lamia Idris was allowed to talk with about MODI. *CP 579-581; RP 723-725.* Mr. Cebert even participated in the second director's meeting for MODI. *CP 259-260; 4/27/18 Schroeder Declaration, Exhibit 7.*

Around March to July of 2012 Mr. Cebert participated with Patrick

³ Mr. Schroeder's declaration was split into two parts in the clerks papers since it is over 300 pages long. The clerks paper is attempted to be referenced, but the exhibit and page is also added to make sure it is identified.

Kennedy in negotiating an agreement to distribute MODI in Mexico through a company owned by Mr. Stone. *CP 581-591*. Mr. Cebert would also work with Patrick Kennedy and Mr. Stone from about September of 2012 and into 2013 to figure out how to logistically execute the distribution agreement. *CP 591-600; RP 725-729*.

In August of 2012 MODI was looking at a capital investment through the Williams group. *CP 372-409, 4/27/18 Schroeder Declaration, Exhibit 21*. During this process, Patrick Kennedy sent Mr. Cebert a document showing him as President of MODI, receiving 600,000 shares and making \$62,000 per year. *CP 386; 437, 4/27/18 Schroeder Declaration, Exhibit 21, page 17 of agreement and two pages from the end*. The full document said John Kennedy was to be President immediately after the investment, but could appoint the officers after that as he saw fit. *CP 376, 4/27/18 Schroeder Declaration, Exhibit 21, page 3 of agreement*.

Between August of 2012 and March of 2013 Mr. Cebert requested his friend, Mr. Noder help out with the company. *RP 730-731*. Mr. Noder prepaid \$19,000 for a batch of the BAM. *RP 732*. This was used to produce the first packaged product of BAM and a fulfillment center. *RP 733-735*.

In October of 2012 the Kennedy brothers created a separate

company, Axtel.⁴ John Kennedy never really knew why this was a separate company, at least as late as his deposition in May of 2017. *CP 554-55; 561-562*. At trial John Kennedy would testify that Axtel was formed with the similar purpose as MODI, both to somehow hold the BAM patent. *RP 198-199*.

The Kennedy brothers continued to see Mr. Cebert as a part of the team developing MODI. This can be seen in two e-mails of John Kennedy in March of 2013. *CP 535; 537, 5/14/18 Casey Declaration, Exhibits A, B*. The first one is where John Kennedy says they are looking to Mr. Cebert for direction and guidance. *CP 535, 5/14/18 Casey Declaration, Exhibits A*. The second is on March 29, 2013 where John Kennedy includes Mr. Cebert in the “governing force of MODI” and says “Dave as president...” *CP 537, 5/14/18 Casey Declaration, Exhibits B*.

On April 1, 2013 the Kennedy brothers used Axtel to license the plant side of the BAM patent to another company, ZGSI. *CP 538-545, 5/14/18 Casey Declaration, Exhibits C*. The Kennedy brothers had all the royalties from this agreement diverted to them rather than going to wages. *CP 541, 5/14/18 Casey Declaration, Exhibits C, section 4 (B)*.

Up until August of 2014 Mr. Cebert worked with Mr. Noder to develop distribution channels of the BAM to healthcare providers in the

⁴ The appeal against Axtel has been stayed. Axtel is not brought up for any other purpose than to make sure this court has a good understanding of its place here.

United States. *CP 560-561; RP 760-764.* The product would be put together by Patrick Kennedy and shipped to Mr. Cebert, who would then get it to the customers. *CP 560-561*

Relationships between the Kennedys and Mr. Cebert began to get strained and Mr. Cebert resigned on September 17, 2014. *RP 770-771; CP 268; 271, 4/27/18 Schroeder Declaration, Exhibits 9 and 10.* In the e-mail, Mr. Cebert asked the Kennedys to honor his agreement for stock based on his work. *CP 271, 4/27/18 Schroeder Declaration, Exhibit 10.*

When John Kennedy was deposed in May of 2017 he would reveal that from the very beginning he never intended to pay Mr. Cebert, make him president, or give him any paid position in the company. *CP 562-564; 569-571; 5/14/18 Casey Declaration, Exhibit F (John Kennedy Deposition), pages 75-77; 89-90.* John Kennedy testified that he had told this to Patrick Kennedy early on in the matter. *Id.*

B. Substantive Facts- Data Collection and Post Employment

Demand For Data

John Kennedy was the scientist for MODI and on the BAM. *CP 535; 537, 5/14/18 Casey Declaration, Exhibits A, B.* John Kennedy never directed Mr. Cebert on scientific experiments, control groups, or scientific data collection. *RP 347.*

Mr. Cebert though started data collection for marketing the BAM. *RP 774-775*. In October of 2012 he put together a database to collect information on the effectiveness of the BAM. *RP 745-749*. In that process Mr. Cebert asked for the Kennedys and Mr. Fritzges to share their information with him so it could go into the database. *RP 748*.

Neither John Kennedy nor Mr. Fritzges shared any information with Mr. Cebert. *RP 649; 748-749*. Patrick Kennedy sent some e-mails to Mr. Cebert about information, but Mr. Cebert did not find them helpful to put into the database. *RP 748-749*.

Mr. Cebert populated the database with the information of his friends and family. *RP 748-754*. He stopped using it though when Mr. Noder started working with healthcare providers, and instead Mr. Cebert asked healthcare providers to give him the information. *RP 757; 763*.

In June of 2013 Mr. Cebert used the database information to put together a marketing pitch on the BAM. *RP 324-329; 754-757*. The pitch was used to healthcare providers in order to get them interested in the BAM. *Id.*

In August of 2014 Mr. Cebert worked with Don Hungerford, who Mr. Cebert believed was a naturopath, to develop information on the BAM. *RP 348-351*. Mr. Hungerford provided information to Mr. Cebert over the phone, and it was put into an Excel spreadsheet. *RP 348-351*. Mr.

Cebert then e-mailed the spreadsheet to a Dr. John Freeman at NASA, and copied both Patrick Kennedy and John Kennedy in the e-mail. *RP 348-351.*

After Mr. Cebert quit, John Kennedy asked Mr. Cebert for data to support the Russian patent. John Kennedy, the scientist, was looking to Mr. Cebert to provide him the scientific data to support the Russian patent. *RP 276-278; 357.*

C. Substantive Facts- Cease and Desist Letters By Mr. Noder

In 2015 Mr. Noder's attorneys sent out cease and desist letters to people doing business with Axtel. *RP 876-879.* Mr. Cebert never directed the sending of these letters, nor is mentioned in the letters. *RP 878-879.* The letters are on behalf of AMC, Mr. Noder's company, and Mr. Cebert owns no stock and has no control over AMC. *RP 875-876.*

D. Procedural Facts of the Lawsuit

On May 7, 2015 Mr. Cebert's former counsel at Dunn & Black caused this lawsuit to be served on the Kennedys, MODI, and Axtel. *CP 19-23.* The complaint alleged contract, quantum meruit and estoppel claims. *CP 1-15.* Dunn & Black did not file these claims.

Mr. Cebert hired Mr. Casey, and Mr. Casey filed the claims on

February 16, 2016. *CP 1-15*. Discovery then progressed on the matter.

On November 22, 2017 Mr. Cebert amended his complaint to add claims of fraud. *CP 124-136*. This was based on the Kennedy brothers' representations in August of 2012 and March of 2013 that Mr. Cebert would be paid and even have the position of president. *CP 105-121*. In his deposition, John Kennedy testified that from the very beginning he never had any intention of giving Mr. Cebert a paid position or of making him president. *CP 562-564; 569-571; 5/14/18 Casey Declaration, Exhibit F (John Kennedy Deposition), pages 75-77; 89-90*.

On April 27, 2018 the Kennedys moved to dismiss Mr. Cebert's claims based on the affirmative defense of statute of limitations. *CP 166-191; 192-499*. The court heard argument on this, and granted summary judgment on June 22, 2018, with the order entered June 29, 2018. *RP 76-92; CP 1310-1314, 1452-1455*.

Trial started on July 9, 2018. Both sides raised motions in limine about Mr. Cebert's dismissed claims, and there was a fair amount of discussion of how to list Mr. Cebert as plaintiff or defendant. *CP 1317-1319; 1323-1330*. The court ruled that if Mr. Cebert brought up his claims at trial then the jury would be instructed that the court had dismissed the claims. *RP 127; 212*. The court, with the approval of the parties, instructed the jury that Mr. Cebert's claims were "resolved" and this was

the trial of the Kennedys, Axtel, and MODI's counterclaims against him.

Id.

After a two-week trial the jury returned verdicts against Mr. Cebert of conversion, trade secret violations, and tortious interference. *CP 1641-1646*. Mr. Cebert then filed bankruptcy. Following that Axtel, but not the Kennedys or MODI, declared bankruptcy. Mr. Cebert agreed with all the parties to lift the bankruptcy stay so the judgment on this matter could be entered and this appeal could go forward.

At judgment MODI made a motion for \$257,865 of attorney fees, claiming it was the prevailing party based on the jury findings. *See MODI judgment added in new designation of clerks' papers*. The court awarded \$191,582 in attorney fees based on MODI being the prevailing party from the jury verdict. *See MODI motion on July 31, 2018 added in new designation of clerks' papers*. The court then entered judgments against Mr. Cebert, and Mr. Cebert appealed them to this court.

IV. ARGUMENT

(A) Mr. Cebert's claims were not barred by the statute of limitations and should have gone forward to trial. (B) Mr. Cebert should be allowed to try his claims along with the Kennedys' counterclaims based on them being logically related. (C) There were significant errors in the

trial of the counter-claims such that on its own that trial should be reversed. Because of this Mr. Cebert requests his claims be reinstated, the counter claim judgment be reversed, and the whole case remanded for a new trial.

A. Mr. Cebert's Claims Were Not Barred By the Statute of Limitations

This Court reviews summary judgment de novo, engaging in the same inquiry as the trial court. *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 599, 337 P.3d 1131, 1133 (2014). In this process all facts and reasonable inferences are construed in the best light of the non-moving party, here Mr. Cebert. *Id.* The trial court wrongly weighed facts, and wrongly granted summary judgment based on the statute of limitations.

The statute of limitations only begins to run when a party has a right to apply to a court for relief. *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221, 1230 (1976). The party moving for summary judgment based on the statute of limitations has the burden of proving when the statute of limitations began to run. *Haslund*, 86 Wn.2d at 620-21. This includes showing that there is no genuine issue of fact on when the statute of limitations began to run. *Malnar v. Carlson*, 128 Wn.2d 521,

530, 910 P.2d 455, 459 (1996).

Malnar was a partnership dissolution with a claim based on the right of accounting, which does not begin to run until the partnership is dissolved. *Id.* at 523; 530. The plaintiff's claim was dismissed for the statute of limitations based on the partners having a fight, and the court of appeals holding the partnership dissolved at that point with the statute accruing. *Id.* at 528. The Supreme Court held that this was an error since there was evidence in the record of it dissolving when the plaintiff sent a letter in regards to disputed matters, and the defendants disclaimed the partnership. *Id.* at 530-532. Since summary judgment required taking facts in the light most favorable to the nonmoving party, the facts about the partnership dissolving later created a factual issue for the jury of when the statute of limitations began to run. *Id.* at 532.

Mr. Cebert brought claims of fraud, un-paid wages, breach of contract, and unjust enrichment/ quantum meruit. The trial court incorrectly weighed evidence and found facts in summary judgment to decide when the statute of limitations ran. *CP 1310-1314; 1452-1455.* Mr. Cebert presented evidence for each claim that it did not begin to accrue until after February 16, 2013, thus meaning the statute of limitations did not run before February 16, 2016. These facts should have been viewed in the best light of Mr. Cebert, but the trial court did not do

this. Instead the trial court weighed facts and made its own decision on the statute of limitations. Because there are facts for trial on the statute of limitations, summary judgment should not be granted.

1. The Statute of Limitations on Fraud Did Not Run Till Way

Past February 16, 2016

A fraud action accrues when the aggrieved party discovers, or in the exercise of due diligence should have discovered, the facts of fraud, and sustains some actual damage as a result. *Young v. Savidge*, 155 Wn. App. 806, 823, 230 P.3d 222, 230 (2010). Mere suspicion of the wrong is not enough, but it requires “evidentiary facts leading to a belief in the fraud and by the existence of the fraud may be established.” *Id.* The issue of when a party could have, or did discover material facts for fraud is a question of fact and not of law. *Id.*

The fraud in this case comes from Kennedys’ representations that Mr. Cebert would be paid, and be given the paid position of president. Those representations or promises rise to level of fraud if they are made with the purpose of deception and with no intention to perform. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 396, 457 P.2d 535, 539 (1969). Thus the evidence of fraud in this matter consists of two items:

(1) the representation made with purpose to deceive, and (2) proof of no intent to perform.

The Kennedy brothers represented to David Cebert that he would be president of MODI with the attendant salary of \$62,000 and 600,000 shares of stock. *CP 386; 437, 4/27/18 Schroeder Declaration, Exhibit 21, page 17 of agreement and two pages from the end.* John Kennedy continued this representation when he asked Mr. Cebert to provide the executive role of direction and guidance to MODI. *CP 535, 5/14/18 Casey Declaration, Exhibits A.* John Kennedy confirmed the representation on March 29, 2013 where he included Mr. Cebert as a governing force for MODI, and called him President. *CP 537, 5/14/18 Casey Declaration, Exhibits B.* The President role was represented as a paid position with stock, and that representation was made as late as March 29, 2013.

This means based solely on the first item of the representations made, Mr. Cebert's fraud claims would not run until three years from those representations, or March 29, 2016.

The proof of no intent to perform though came in May of 2017 when John Kennedy stated that from the very beginning he had no intention of making Mr. Cebert president, compensating Mr. Cebert or giving Mr. Cebert any position with compensation. *CP 562-564; 569-571;*

5/14/18 Casey Declaration, Exhibit F (John Kennedy Deposition), pages 75-77; 89-90. John Kennedy testified that he conveyed this to his brother Patrick early on. *Id.* This second element was not discovered, and likely was not discoverable until John Kennedy was under oath. This means Mr. Cebert's fraud claims would not have had all the evidence until that time, and thus did not run until May 1, 2020.

The discovery of all of the elements of fraud claim are clear in the record, because Mr. Cebert amended the complaint once fraud was discovered. *CP 105-121.* Prior to John Kennedy's deposition there was insufficient evidence of the fraud, but after it there was no longer "mere suspicion," and based on that the complaint was amended and the fraud claim added accordingly.

In disregard of this evidence the trial court found that because John Kennedy was president and never performed on his promise to make Mr. Cebert president or give him a paid position, the fraud was discoverable early on. *CP 1311; RP 81-83.* This completely discounted the fact that John and Patrick Kennedy retained the power to appoint a new executive officer and president any time. It also disregarded the representations of John Kennedy of the March 29, 2013 e-mail that called Mr. Cebert part of the "governing force" of MODI, disclaimed John Kennedy from that "governing force" and then asked Mr. Cebert to take action as "President."

CP 537, 5/14/18 Casey Declaration, Exhibits B. Continuing fraudulent representations create an issue of fact for the statute of limitations not beginning to run until that date, and not running until March 29, 2016. Summary judgment should be reversed on fraud since there are issues of fact on when the fraud was discoverable.

2. The Wage Claims Statute of Limitations Did Not Run Until September 17, 2017

“When an employee ceases work for an employer,” the employer must pay wages due at the end of the established pay period. RCW 49.48.010, emphasis added. This is a remedial statute and is to be liberally interpreted in order to protect employee wages and ensure payment. *Allen v. Dameron*, 187 Wn.2d 692, 705, 389 P.3d 487, 493 (2017).

Wage claims generally have a three-year statute of limitations. *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837, 991 P.2d 1126, 1133 (2000), *opinion corrected on denial of reconsideration*, 1 P.3d 578 (Wash. 2000). A claim for wages under RCW 49.48.010 does not accrue until the employee has ceased working for the employer. *Pope v. Univ. of Washington*, 121 Wn.2d 479, 489, 852 P.2d

1055, 1061 (1993), *amended*, 871 P.2d 590 (Wash. 1994). See also *Escobar v. Baker*, 814 F. Supp. 1491, 1507 (W.D. Wash. 1993).

The *Pope* court specifically noted that RCW 49.48.010 is not applicable to an employee until the termination of the employment relationship. *Pope*, 121 Wn.2d at 489. The *Pope* court overturned a summary judgment for the employee, noting that because the employment relationship had not been terminated there was no claim under the statute. *Id.* Based on *Pope*, it is clear that wage claims under RCW 49.48.010 do not begin to accrue until the employment relationship is terminated.

Mr. Cebert presented evidence that he quit on September 17, 2014. *RP 770-771; CP 268; 271, 4/27/18 Schroeder Declaration, Exhibits 9 and 10.* That is evidence of the employment relationship terminating at that time. The Kennedys provided evidence that they never paid him, even up until September 17, 2014. However, that does not mean the employment relationship was terminated, since non-payment of wages can continue during the employment relationship.

Since Mr. Cebert's wage claim under RCW 49.48.010 was not actionable until the first pay period after September 17, 2014 it did not begin to accrue until that date. With a three-year statute of limitations this would not have run until after September 17, 2017, well after this matter was perfected on February 16, 2016.

The trial court made a factual finding that the Mr. Cebert's wage claim began to run in 2012 "upon the non-receipt of the first paycheck. *CP 1311; RP 81*. This is an incorrect application of RCW 49.48.010, which *Pope* states does not begin to run until the termination of the employment relationship. Like the partnership agreement analyzed in *Malnar, supra*, there are letters showing Mr. Cebert did not terminate his employment until September 17, 2014. The trial court erred in the interpretation of law, and in finding facts on the employment claim. Summary judgment should be denied and this should be reversed.

3. Mr. Cebert's Contract Claims Did Not Run Until Mr. Cebert Quit

The "statute of limitations on amounts due under a contract for continuous service does not begin to run until the contract is terminated." *Macchia v. Salvino*, 64 Wn.2d 951, 955, 395 P.2d 177, 179 (1964). The *Machia* case was an employment contract case where the general manager had not been paid during the nine-year contract, but brought a contract claim after the termination of his services. *Macchia*, 64 Wn.2d at 955. The *Macchia* court noted that because the services were terminated on December 31, 1960, then the claims were timely filed on March 20, 1962. *Id.*

The evidence here is that Mr. Cebert continued his work until September 17, 2014, and any contract he had would have been a continuous service contract like the one in *Macchia*. Since the continuous service contract ended on September 17, 2014 and is an oral contract the statute of limitations would not run until September 17, 2017. Since this matter was perfected on February 16, 2016 the statute of limitations did not bar the contract claims.

Again the trial court incorrectly weighed facts to find the statute of limitations accrued on August 2012. *CP 1311; RP 78-81*. The law is a continuous service contract does not begin to accrue until the contract is terminated. Again, Mr. Cebert presented evidence that he terminated the contract on September 17, 2014. This means summary judgment should not have been granted and the trial court should be reversed.

4. Mr. Cebert's Quantum Meruit Claim Did Not Run Until September 17, 2017

Quantum meruit consists of (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work. *Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258, 1263 (2008). It is a subsection of unjust enrichment. *Id.* Unjust enrichment is a three-year statute of

limitations. *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837–38, 991 P.2d 1126, 1133 (2000), *opinion corrected on denial of reconsideration*, 1 P.3d 578 (Wash. 2000).

Mr. Cebert was unable to find cases on point of when quantum meruit begins to run for continuous employment agreements. However, our courts have compared unjust enrichment, of which quantum meruit is a subset to employment claims. *Seattle Prof'l Eng'g Employees Ass'n*, 139 Wn.2d at 837–38. Our courts have also compared quantum meruit to quasi-contract claims. *Fetty v. Wenger*, 110 Wn. App. 598, 601, 36 P.3d 1123, 1125 (2001), *as amended on denial of reconsideration* (Mar. 27, 2002). Based on these the principals of wage claims under RCW 49.48.010, and continuous service contracts (see *Macchia, supra.*) should equally apply here.

Just like the contract analysis above, Mr. Cebert continued in the service of the Kennedys until September 17, 2014. The Kennedys and MODI accepted Mr. Cebert's labor without objection up until September 17, 2014. The evidence also shows the Kennedy's demanded Mr. Cebert's services as late as October of 2014 by requesting "data." By doing this Mr. Cebert had a right to be paid for these services based on quantum meruit, and therefore his statute of limitations did not begin to run until as late as September 17, 2017.

The trial court analyzed quantum meruit less than the other claims. *CP 1312; RP 84*. However, here the trial court still weighed facts to say this ran when Mr. Cebert did not receive his first paycheck. *RP 84*. There are facts in the record that Mr. Cebert did not quit until September 17, 2014 and requested stock at that time. This means summary judgment should not have been granted and the trial court should be reversed.

5. Mr. Cebert Was Denied His Right to Trial By Jury On Disputed Material Facts

Mr. Cebert presented written communications showing the representation of the Presidency was made as late as March 29, 2013. Mr. Cebert presented written communications that he resigned on September 17, 2014. These are facts that the fraud and employment claims began to accrue on those dates; facts a jury could reasonably rely on to rule for Mr. Cebert about when the statute of limitations ran.

In contrast the Kennedys tried to impeach Mr. Cebert, and will likely try this again. As Mr. Cebert's counsel told the trial court, impeachment of a fact is an issue for trial and not summary judgment. *RP 21*. Credibility is an issue for trial. *RP 21*.

The trial court improperly weighed credibility and found fact in summary judgment. Mr. Cebert was entitled to have his evidence viewed

in the light most favorable to him, and is entitled to that now. *Club Envy of Spokane, LLC*, 184 Wn. App. at 599.

The weighing of evidence was a violation of Mr. Cebert's right to a trial by jury. *Davis v. Cox*, 183 Wn.2d 269, 289, 351 P.3d 862, 871 (2015), *abrogated by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wn.2d 392, 423 P.3d 223 (2018) ("At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts."). Mr. Cebert asks this court to reverse the trial court and give him his constitutional right to a trial by jury on these issues of disputed fact.

B. Mr. Cebert Should Be Afforded a New Trial To Test His Claims Against the Kennedys' Counterclaims

(1) Because the Kennedys' counterclaims were compulsory to Mr. Cebert's claims, the verdict on those claims should be remanded and those claims retried with Mr. Cebert's claims. (2) MODI's judgment rests upon a finding it is a prevailing party, which can only be found in relation to Mr. Cebert's claims and therefore requires retrial with Mr. Cebert's claims. (3) A retrial of both claims and counter claims together is the only fundamentally fair resolution.

**1. The Kennedys' Claims Are Compulsory
Counterclaims and Should Be Retried With Mr. Cebert's Claims**

Claims and compulsory counterclaims should be tried in the same matter. CR 13(a); *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 866, 726 P.2d 1, 7 (1986). A plaintiff is not even allowed to voluntarily dismiss his/her claim as a matter of right once counterclaims have been served and if the counterclaims cannot be “independently adjudicated.” CR 42(a)(3). Counterclaims can only be separated for trial by a court order under CR 42(b). CR 13(i).

Separation of claims and trials is not to be done liberally or indiscriminately. *Brown v. Gen. Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461, 464 (1965). Separation of claims and trials requires “carefully and cautiously” informed judicial discretion to determine “the application of the rule will manifestly promote convenience and/or actually avoid prejudice.” *Brown v. Gen. Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461, 464 (1965).

Both Mr. Cebert and the Kennedys claims arise out of the work Mr. Cebert did for the Kennedys. The Kennedys claims to “data” was solely based on their claim that Mr. Cebert collected the “data” for them. Mr. Cebert’s claims arise out of all the work he did for them, including the collection of data for marketing purposes. As such the claims meet the

logical basis test for mandatory counter-claims put forward in *Schoeman*, 106 Wn.2d at 866.

No court has exercised discretion to separate Mr. Cebert's claims from the counterclaims. Instead the separation was done by the improper application of the statute of limitations in summary judgment. While the court noted this "totally changes the whole dynamics of the trial" (*RP 85-86*) that is hardly the careful and cautious exercise of judicial discretion required for separation of claims and trials. Therefore Mr. Cebert's claims should be remanded with the Kennedys' and MODI's counterclaims for a re-trial together. Without that, the claims would have been separated without the required exercise of judicial discretion under CR 42(b).

Mr. Cebert's claims would have been tried at the same time as the Kennedys and MODI's counterclaims but for the erroneous dismissal under the statute of limitations defense. The trial court never exercised discretion to separate these claims or trials. Because of this Mr. Cebert's claims should be returned to the trial court with the Kennedys and MODI's claims. Otherwise it would leave these the claims and mandatory counterclaims in separate trials, when no court has carefully and cautiously made the decision to separate these trials.

2. MODI's Judgment Cannot Stand Against Mr.

Cebert's Claims Since It Rests on MODI Being The "Prevailing Party"

MODI was awarded attorney fees based on being the prevailing party. *See MODI motion on July 31, 2018 added in new designation of clerks' papers.* This was allowed under RCW 19.108.040, which states "the court may award reasonable attorney's fees to the prevailing party." For purpose of attorney fees, the prevailing party is the one who has a net positive judgment at the end of the case. *Moritzky v. Heberlein*, 40 Wn. App. 181, 183, 697 P.2d 1023, 1024–25 (1985).

In *Moritzky* the trial court awarded attorney fees under RCW 60.04.130 based one party prevailing under that statute, even though the other party had prevailed for a higher amount in contract. The *Moritzky* court noted that the statute only allowed fees to the prevailing party, rather than a party successful under the statute. The *Moritzky* court held that this awarded fees to the net judgment holder based on the entire case and not just that one claim. *Moritzky*, 40 Wn. App. at 183.

In *Moritzky* the defendant had brought compulsory counter claims of breach of contract and obtained more on those than the plaintiff who claimed under RCW 60.04.130. This court in *Moritzky* held that the recovery from the competing claims had to be compared to each other to determine the "prevailing party" under the statute. Then the party with the

net judgment on the entire case would be the prevailing party rather than the party who succeeded under the statutory provision. *Moritzky*, 40 Wn. App. at 183.

Equally so, Mr. Cebert has a right to try his claims against the Kennedys for the purpose of the “prevailing party” determination. This will allow the same jury to determine who is the “prevailing party” under RCW 19.108.040.

3. Fundamental Fairness and Justice Requires The Retrial of the Counter-claims With Mr. Cebert’s Claims

As acknowledged by the trial court, the dismissal of Mr. Cebert’s claims “totally changes the whole dynamics of the trial.” *RP 85-86*. How the jury was instructed about Mr. Cebert’s claims and what could be brought up a trial was a large part of pretrial discussion. *RP 94-96; 98-104; 116-117*. Prior to trial the court ruled that there would not be any mention of Mr. Cebert’s claims. *RP 117*. Even the Kennedys counsel said about documents based on this, “It’s going to be a mess when we get there, I wanted you to know.” *RP 117 line 18-20*.

Regardless of that order, the jury was instructed that Mr. Cebert had claims, and they had been resolved. *RP 127; 212*. Regardless of this the jury heard about claims in notes of Mr. Cebert (*RP 209-216; 289-290*),

the Kennedys' counsel brought them up with Mr. Noder (*RP 885*), and the Kennedys' counsel brought up the fact that they were sued first, and thus Mr. Cebert's claims in closing (*RP 965*).

The fact that Mr. Cebert brought claims, and the Kennedys counterclaimed was a key part of the Kennedys trial strategy. (*RP 965*). The fact Mr. Cebert was not allowed to talk about his improperly dismissed claims prejudiced him to the jury.

Our courts are places for just determination of actions. CR 1. Mr. Cebert has a right to have the jury hear the whole story before it decides liability, and this did not occur because his claims were improperly dismissed. As noted earlier, separate trials are ordered to avoid prejudice, not to create it. *Brown*, 67 Wn.2d at 282. Here Mr. Cebert was thrown into a separate trial by an error of the trial court on summary judgment; Mr. Cebert suffered prejudice due to this. Justice would be the jury hearing all the claims together, and not just the Kennedys' story.

C. The Errors In Trial Of The Counterclaims Would Alone Be Reason to Reverse the Judgments And Retry the Counterclaims

The trial court erred in the counterclaim trial in three specific ways. The substantial errors that require reversal are (1) the admission of documents that were related to un-pled claims of conspiracy/vicarious

liability, and formed the basis of the tortious interference judgment; (2) the admission of Mr. Cebert's notes about his dismissed claims that encouraged the jury to speculate about those claims; and (3) the Kennedys were allowed to claim damages for the loss of the Russian patent, when they never proved it was actually lost. All of these are significant errors that require a new trial.

1. Admission of the cease and desist letters

This court reviews admission of evidence for abuse of discretion. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879, 890 (2008). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Driggs v. Howlett*, 193 Wn. App. 875, 897, 371 P.3d 61, 72 (2016). "When a trial court makes an erroneous evidentiary ruling, the question on appeal becomes whether the error was prejudicial, for error without prejudice is not grounds for reversal." *Id.* at 903.

The attorneys for Michael Noder drafted cease and desist letters to certain business partners of the Kennedys. These letters were the foundation of the Kennedys claims for tortious business interference, as can be seen in their closing argument. *RP 981*. These letters were let in over objections of relevancy and hearsay. *RP 226-27*. The trial court's basis for letting them in was because Mr. Cebert and others "received"

them. *RP 511, line 7*. This was an improper reason for admitting these documents before the jury.

a. These Letters Were Only Relevant Based On Unpled Claims of Civil Conspiracy/ Vicarious Liability

A complaint must identify the legal theory upon which the plaintiff seeks relief. *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 854, 313 P.3d 431, 443 (2013). While the Kennedys pled Mr. Noder did wrongful acts, they never pled any basis that Mr. Cebert should be liable for those wrongful acts. *CP 137-158*.

Washington does recognize a legal theory that “an actionable civil conspiracy exists if two or more persons combine to accomplish an unlawful purpose or combine to accomplish some purpose not in itself unlawful by unlawful means.” *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 528, 424 P.2d 290, 295 (1967). At no time was such a conspiracy pled. Along with this, no other forms of vicarious liability by Mr. Cebert for Mr. Noder’s actions were ever pled.

Since the letters came from Mr. Noder and his attorneys, the letters bear no relevance to what Mr. Cebert would be liable for, his own actions. Had senders of the letters been Mr. Cebert’s counsel, or had civil

conspiracy been pled, then Mr. Cebert could be liable for them. But without the showing of one, or the pleading of the other the letters were not more likely to bear on Mr. Cebert's liability.

This irrelevance without conspiracy can be best seen in the Kennedys' closing where they had to argue, "Cease and desist letters went out, but maximum leverage on my client to cave in, give into Mike Noder and David Cebert..." *RP 982*. If Mr. Cebert could be held responsible for the letters without conspiring with Mike Noder, then there would be no reason to bring them both up. The Kennedys had to argue Mr. Noder in closing because the letters are irrelevant to Mr. Cebert alone being liable.

By deciding the letters were relevant, the trial court let in the unpled claim of civil conspiracy. This was incorrect since the Kennedys never pled the theory of civil conspiracy, nor any other claim to make Mr. Cebert liable for the actions of Mr. Noder.

b. These Letters Were Hearsay

The letters were drafted by Mr. Noder's counsel, and offered for the truth that Mr. Noder threatened to sue the Kennedys' business partners if they kept doing business with the Kennedys. *RP 510*. That is clearly an out of court statement, made by a declarant (Mr. Noder's counsel), offered for the truth of the matter asserted (the threat of a lawsuit is made). ER

801. ER 802 does not allow this.

These letters would have been admissible as the statement of a co-conspirator if it had been pled. ER 801(d)(2)(v). But no pleading of conspiracy was ever done.

The trial court allowed these letters because Mr. Cebert received them. *RP 511, line 7*. That is an error since receiving hearsay is not an exception to hearsay.

This error was prejudicial because the sole basis of the claim for tortious interference was Mike Noder's counsel sending these letters. *RP 982*

2. The Court Allowed Speculation on Mr. Cebert's Dismissed Claims

The trial court entered a motion in limine that Mr. Cebert's claims were not to be brought up at trial. As discussed before, this hampered Mr. Cebert's ability to put on his full case and present all the facts to the jury. His claims for wages, employment, and the false representations of the Kennedys were not allowed to be explained or tried to the jury.

Regardless of this, the trial court allowed in a note from Mr. Cebert about his claims without the ability for Mr. Cebert to talk about those claims. The document was a hand written note that said "sufficient

evidence that supports the claim” and later \$750 million. This was objected to because it called the jury to speculate about what Mr. Cebert’s claims were, but Mr. Cebert was not allowed to talk about his claims. *RP* 209-216; 289-290; 487-488. Mr. Cebert had to testify about the document without being able to testify about his claims. The court even noted that this put Mr. Cebert in a “catch 22” but was letting them in anyway. *RP* 289. This was an abuse of discretion.

The Kennedys then argued in closing that Mr. Cebert thought his claim was worth \$750 million. *RP* 974. As noted by this court in *Driggs*, giving the jury a false impression based erroneous evidentiary ruling makes an error harmful. *Driggs*, 193 Wn. App. at 904. Here the Kennedys implied that Mr. Cebert’s claims were related to the data, and his \$750 million should some how be related to the data. *RP* 974. The full harm was restricting Mr. Cebert from talking about his claims, but giving the jury the note to speculate about those claims.

3. The Kennedys’ Never Proved Damage Of Russian Patent

Loss

Regardless of evidence of duty and breach, a party cannot recover unless they prove they suffered damages. *Arden v. Forsberg & Umlauf, P.S.*, 189 Wn.2d 315, 329, 402 P.3d 245, 252 (2017). This is particularly

true for trade secrets, which by statute only allows “actual loss” caused by misappropriation. RCW 19.108.030. Without proof of damages, the claims should be dismissed. *Arden*, 189 Wn.2d at 329.

The Defendants failed to ever prove they even lost the Russian patent, which was their entire claim for damages. Prior to trial John Kennedy put in a declaration that he did not know whether or not the pending Russian patent was lost. *CP 840* (“In summary, whether the pending Russian patent is lost, I do not know.”); *RP 366*. At the time of trial John Kennedy was still asking his attorneys to look into whether or not the Russian patent was actually lost, but did not have actual information on whether or not they ever lost the Russian patent. *RP 366-367*.

The entire claims on data hinged on losing the Russian patent. *RP 232*. Even in closing the damages requested was to “pursue the Russian patent again.” *RP 977*. If the Russian patent has never been lost, then it does not need to be “pursued again” and there is no damage in this matter.

Mr. Cebert brought summary judgment on the damages because there was no proof of damages since there was no proof of loss of the Russian patent. *CP 502-512*. The court denied summary judgment even though the Defendants could not show the Russian patent was actually lost.

At trial, John Kennedy again testified that he had only speculation on whether or not the Russian patent was lost. Mr. Cebert brought a CR 50 motion at that time. *CP 1611-1615*. Again the court denied this.

It was an error to allow the claims to go forward against Mr. Cebert without proof of damages, and in particular actual damages. The Kennedys had the burden of proving they lost the Russian patent, and they completely failed because apparently it was too hard to have their attorneys look into that. Their claims for damages, based purely on speculation they lost the Russian patent, should have been dismissed in summary judgment, and definitely at the resting of their case.

These errors in the counter-claim trial are sufficient on their own to create prejudice to Mr. Cebert that requires reversal of judgments and trial.

CONCLUSION

A jury should hear the whole story of Mr. Cebert's claims based on compensation promised by the Kennedys, and fraud in the Kennedys never intending to perform on those promises. The trial court robbed Mr. Cebert of his right to a trial by jury when the trial court impermissibly weighed facts and misapplied law to strike those claims based on the statute of limitations. Mr. Cebert should have a right to try those claims and asks this Court to reverse the trial court.

Along with that, Mr. Cebert is entitled to that same jury hearing the whole story of his claims when it decides the Kennedys' counterclaims. Separation of trials can cause prejudice, and certainly did here. This is why the rules mandate a judicious use of discretion before separate trials are done. The only reason two separate trials occurred was because the trial court incorrectly issued a summary judgment and not based on judicial discretion. The same jury should hear the entire case, and that is what Mr. Cebert requests.

Mr. Cebert requests this court to overrule the trial court and remand the entire case for a new trial.

Respectfully submitted this 8 day of August, 2019

M Casey Law, PLLC


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Attorney for Mr. Cebert

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the ___ day of August, 2019, I cause a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following court reporters and counsels of record:

<u>Counsel for Respondent:</u> KSB Litigation, P.S. 221 N. Wall Street, Ste 210 Spokane, WA 99201	SENT VIA: <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Hand delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
<u>Counsel for Respondent:</u> Gregg Smith Paine Hamblen 717 W. Sprague Avenue, # 1200 Spokane, WA 99201	SENT VIA: <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Hand delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Email

Dated this on 8 of August, 2019.



Larisa Yukhno-Legal Assistant
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