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A. ASSIGNMENTS OF ERROR

- 1) The Trial Court erred in granting the Defendant Kenneth B. Cook's Motion to Dismiss for Failure to State a Claim Under CR 12(b)(6), and entering final judgment in favor of Cook, dismissing Kinneys' claims with prejudice. (CP 418-420; CP 531-533)
- 2) The Trial Court erred in ruling that the July 2000 transaction at issue in this case did not constitute a sale of securities such as would warrant the protection of the Washington State Securities Act ("WSSA"), specifically RCW 21.20.010. (CP 418-420)
- 3) The Trial Court erred in ruling that the three (3) year statute of limitations bars this litigation. (CP 420)

B. ISSUES

- 1) Whether the Trial Court erred in ruling that the July 2000 transaction did not constitute a sale of securities such as would warrant the protection of the WSSA. (Assignments of Error 1 and 2)
- 2) Whether the Trial Court erred in ruling that the three (3) year statute of limitations bars this litigation. (Assignments of Error 1 and 3)

C. STATEMENT OF THE CASE

This case arises from a July 2000 transaction between the plaintiffs, Clark E. Kinney and Barbara E. Kinney (the "Kinneys"), and the defendant Kenneth B. Cook ("Cook"). (CP 3-9)

On July 26, 2000, the Kinneys paid Cook \$266,534.06 for their 50% interest in Freedom Truck Centers, Inc., formerly known as Spokane Freightliner, Inc. (hereinafter the "Corporation"). (CP 6) This transaction came upon the heels of a judgment entered against Cook in Spokane County Superior Court for a February 1997 transaction in which it was determined that Cook violated the Washington State Securities Act (the "WSSA"). (CP 4-9; CP 418)

1) The February 1997 Transaction

The Kinneys and Cook first formed Spokane Freightliner, Inc. and entered into business together as equal 50% shareholders in December 1993. (CP 4) The parties agreed that the Kinneys would borrow \$225,000 from Cook and then contribute that amount to the Corporation in exchange for a 50% interest in the Corporation. (CP 4) The Kinneys executed a Promissory Note and Pledge Agreement evidencing the \$225,000 loan, the terms of which granted Cook and his then-wife, Judith Cook, a security interest in the Kinneys' 50% interest. (CP 4)

On February 26, 1997, Cook acquired the Kinneys' shares in the Corporation in exchange for cancellation of certain obligations and debts, including the Promissory Note and Pledge Agreement, officer receivables and withdrawals, and personal guarantees. (CP 4-5; CP 35; CP 41-42, CP 304) The circumstances of the acquisition was the subject of a lawsuit filed in the Superior Court of Spokane County, entitled *Clark E. Kinney and Barbara E. Kinney v. Kenneth B. Cook and Spokane Truck Centers, Inc.*, No. 98-205964-2. (CP 5)

The lawsuit arose from Cook's acquisition of the shares by misrepresenting the Corporation's financial condition and the shares' fair market value. (CP 3-11) A jury verdict was entered against Cook finding, in part, that in acquiring the shares, Cook made untrue statements of material fact, thereby violating Section 21.20.010 of the WSSA. (CP 5)

The Judgment Upon Verdict was entered on July 11, 2000. (CP 40-45) Under the terms of the Judgment, and pursuant to Section 21.20.430(2) of the WSSA, the Kinneys would recover shares in the Corporation upon tender of the consideration received for the shares. (CP 5; CP 40-47) The Promissory Note and Pledge Agreement were therefore reinstated. (CP 41-42) Cook was returned to the position of

secured party and retained possession of the stock certificate evidencing the pledged shares. (CP 41-42)

2) The July 2000 Transaction

The Judgment Upon Verdict forced Cook to share ownership in the Corporation. (CP 313; CP 69) On July 12, 2000, only one day after the Judgment was entered, Cook delivered to the Kinneys a Notice of Default demanding payment in full on the Promissory Note. (CP 6) The Kinneys were forced to either pay the amount demanded for the 50% interest in the Corporation, or not be shareholders in the Corporation. (CP 305)

Based upon the corporate records and information disclosed to them, the Kinneys paid the amount demanded by Cook for the 50% interest in the Corporation. (CP 6-7; CP 305) On July 26, 2000, the Kinneys paid \$266,534.06 in full satisfaction of the Promissory Note. (CP 6) Cook's security interest was then terminated, and Cook delivered the stock certificate representing the 50% interest to the Kinneys. (CP 6)

More than one year after the July 2000 transaction, the Kinneys learned that Cook again failed to disclose accurate records and information that would have disclosed the extent of the Corporation's liabilities and obligations incurred after the February 26, 1997 fraudulent acquisition and before the payment of \$266,534.06 in 2000 by the Kinneys. (CP 6-9)

Only after Cook forced the Corporation into bankruptcy in 2001, did Cook finally disclose the true financial condition of the Corporation. (CP 6-9)

On February 6, 2001, Cook filed an Involuntary Chapter 11 Petition initiating *In re Freedom Truck Centers, Inc.*, Case No. 01-00871-K17. (CP 7-8) On August 15, 2001, Cook filed the Plan of Reorganization Proposed by Kenneth B. Cook and Disclosure Statement for Plan of Reorganization Proposed by Kenneth B. Cook. (CP 8) In the Disclosure Statement Cook disclosed for the first time that in 2000, the Corporation had been made the guarantor of a \$4.5 million loan. (CP 8)

On January 6, 2000, when Cook was in sole control of the Corporation, Cook signed an All Encompassing Guaranty (the "Guaranty"). (CP 8; CP 305) Under the terms of the Guaranty, the Corporation guaranteed a \$4.5 million loan made by Mercedes Benz Credit Corporation to Select Credit & Leasing, LLC, a limited liability company owned solely by Cook. (CP 8; CP 305)

Cook did not disclose the Guaranty in connection with the July 2000 transaction. (CP 6-9) Instead, Cook intentionally withheld accurate corporate records and financial information that would have made this disclosure. (CP 6) The Kinneys therefore had no knowledge of the

Guaranty and paid Cook the demanded \$266,531.06 for their 50% interest in the Corporation. (CP 6)

On August 4, 2000, the parties held a meeting of the Corporation's Board of Directors. (CP 7) At the meeting, Cook demanded the Kinneys sign personal guarantees by which they would act as co-guarantors on various corporate loans. (CP 7) Cook again failed to disclose the \$4.5 million Guaranty, and again withheld accurate corporate records and financial information that would have disclosed the Guaranty. (CP 7)

Had Cook accurately disclosed the financial picture of the Corporation in July and August 2000, the Kinneys would not have paid the amount demanded and would not have agreed to personally guarantee the Corporation's obligations, all of which were necessary steps for the Kinneys to reacquire their 50% interest in the Corporation. (CP 7)

3) The Filing of this Lawsuit

The Kinneys commenced this action in order to recover damages incurred from Cook's actions, conduct, misrepresentations and omissions in connection with the July 2000 transaction. (CP 8-9) The Kinneys' filed their Complaint for Damages for Securities Violations on April 30, 2003. (CP 3-11)

In the Complaint, the Kinneys outlined Cook's actions undertaken in connection with the July 2000 transaction which constitute a violation of Section 21.20.010 of the WSSA. (CP 3-11) These actions include failing to disclose the existence of the \$4.5 million debt, and failure to reflect the Guaranty on the Corporation's books, records, financial statements or other accountant's reports. (CP 3-11)

4) The Defendant's Motion to Dismiss

On June 6, 2003, Cook filed Defendant's Motion to Dismiss for Failure to State a Claim under CR 12(b)(6). (CP 66-67) The motion was filed not on the basis that Cook did not misrepresent or otherwise conceal the Corporation's true financial condition. (CP 22-83) Instead, Cook argued the July 2000 transaction was not a sale of securities warranting the protection of the WSSA. (CP 22-83)

After a hearing on October 3, 2003, the Trial Court issued a Memorandum Opinion deciding the following three issues: (1) whether or not Cook is a "seller" of securities as defined by RCW 21.20.005; (2) whether a sale of securities occurred; and (3) whether or not the three year statute of limitations bars Kinneys' claims. (CP 418-420).

The Trial Court answered the first issue by holding "Cook's acts [in forming the Corporation in 1993 and in the exchange of shares of stock

for Kinney's promise to pay] were a substantially contributive factor in that sale thus Cook does fit within the definition of a "seller" pursuant to the WSSA." (CP 419)

In answering the second issue, the Trial Court stated:

A sale is defined as "...disposition of a security or interest in a security for value..." RCW 21.20.005(10). A security is defined as a "...note, stock, ...[or] evidence of indebtedness.... RCW 21.20.005(10) [sic]. The WSSA expressly includes the term "note" within the definition of security and establishes a presumption that a note is a security. *State v. Argo*, 81 Wn.App. 552, 562, 915 P.2d 1103 (1996). That presumption may be rebutted by showing that the note strongly resembles one of the types of notes that do not fall within the definition of a security. *Argo*, at 562-63. Washington courts utilize the "family resemblance" test to determine whether a note qualifies as a security. *Douglas v. Stanger*, 101 Wn.App. 243, 252, 2 P.3d 998 (2000). In *Douglas*, Douglas gave Stanger \$23,000.00 in exchange for a promissory note and investment agreement which promised an ownership interest in certain property and development. *Douglas* citing *Reves v. Ernest [sic] & Young*, 494 U.S. 56 (1990), defines a note as a security if it "provides money for a profit-making business, is commonly traded for investment, and the investor expects to profit from the business. *Douglas*, at 252. Application of the "family-resemblance" test in that case resulted in a finding of the existence of material issues of fact as to whether or not that note fell under the WSSA.

The promissory note in this case does not resemble the type of note that falls within the definition of a security. The promissory note issued here was part of a commercial transaction and originated in order to evidence a loan from Cook to Kinney in 1993. The calling of the note in 2000 and the subsequent payment of the note do not constitute a sale of securities such as would warrant the protection of the WSSA.

(CP 419) The Trial Court then answered the third issue by holding “[t]he only sale of securities occurred in 1993. Thus, the three (3) year statute of limitations bars this litigation.” (CP 420)

This appeal primarily concerns the second issue, specifically, whether the July 2000 transaction constitutes a sale of securities warranting the protection of the WSSA. (CP 418-420)

D. ARGUMENT

The Trial Court erred in granting the Defendant Kenneth B. Cook’s Motion to Dismiss for Failure to State a Claim Under CR 12(b)(6), and entering final judgment in favor of Cook, dismissing Kinneys’ claims with prejudice.

- 1) The Trial Court erred in granting the Defendant’s Motion to Dismiss because the proper CR 12(b)(6) standards were not applied.

This matter is before this Court on the Trial Court’s grant of the defendant’s motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6). On appeal, the Superior Court’s ruling on such a motion is a question of law, and is reviewed de novo. Fondren v. Klickitat County, 79 Wn.App. 850, 854, 905 P.2d 928 (1995).

The plaintiff’s factual assertions are accepted as true. Bravo v Dolsen Companies, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). To prevail on a CR 12(b)(6) motion, a defendant has the burden of establishing “beyond doubt that the plaintiff can prove no set of facts, consistent with

the Complaint, which would entitle the plaintiff to relief.” Id.; Fondren, 79 Wn.App. at 854.

A motion to dismiss should be granted sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits. Id. Usually, dismissal is granted only in the unusual case in which plaintiff includes allegations that show on the face of the Complaint that there is some insuperable bar to relief. Id. The motion should be denied if the plaintiff can assert any hypothetical factual scenario that gives rise to a valid claim, even if the facts are alleged informally for the first time on appeal. Id.; *see also Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

As the following discussion demonstrates, the Complaint sets forth a claim upon which relief can be granted under the WSSA. The defendant has not proven beyond a doubt that there are no facts, consistent with the Complaint, that would entitle the Kinneys to relief. The Trial Court erred in granting Defendant Kenneth B. Cook’s Motion to Dismiss for Failure to State a Claim Under CR 12(b)(6).

- 2) The Trial Court erred in ruling that the July 2000 transaction did not constitute a sale of securities such as would warrant the protection of the WSSA.

Section 21.20.010 of the WSSA provides:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

The Trial Court ruled that the July 2000 transaction was merely a part of a commercial transaction which originated in order to evidence a loan from Cook to the Kinneys in 1993. (CP 419) The Trial Court therefore held that Cook's omission of the \$4.5 million Guaranty in connection with the July 2000 transaction was not a violation of the WSSA because the transaction does "not constitute a sale of securities such as would warrant the protection of the WSSA." (CP 419) This ruling is contrary to applicable law.

- (a) The July 2000 transaction is a sale of a security within the WSSA as the WSSA is construed broadly to afford the maximum protection.

Section 21.20.005(10) of the WSSA provides the following definition:

“Sale” or “sell” includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. “Offer” or “offer to sell” includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. . . .

Because a security can take on an infinite number of forms, the WSSA provides the following non-exhaustive list of transactions falling within the definition of a security:

“Security” means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture; voting-trust certificate; certificate of deposit for a security; fractional undivided interest in an oil, gas, or mineral lease or in payments out of production under a lease, right, or royalty; charitable gift annuity; any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof; or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any security under this

subsection. This subsection applies whether or not the security is evidenced by a written document.

RCW 21.20.005(12)(a).

Washington courts look to federal law to determine the meaning of the term “security” under the Washington Act. State v. Argo, 81 Wn.App. 552, 558, 915 P.2d 1103. The United States Supreme Court has stated that the definition of a security “embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money of others on the promise of profits.” Id. at 558-559, *citing* S.E.C. v. W. J. Howey Co., 328 U.S. 293, 299 (1946).

In determining whether an investment constitutes a security, “form should be disregarded for substance and the emphasis should be on economic reality.” Argo, 81 Wn.App. at 559, *citing* Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); *see also* Sauve v. K.C., Inc., 91 Wn.2d 698, 701, 591 P.2d 1207 (1979). The securities acts are remedial in nature and are designed to protect investors from speculative or fraudulent schemes of promoters. Accordingly, both Washington and federal courts apply a broad definition to the term “security.” Argo, 81 Wn.App. at 559, *citing* S.E.C. v. Glenn W. Turner Enters., 474 F.2d 476, 480-81 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973); Cellular Engineering, Ltd. v. O’Neil, 118

Wn.2d 16, 23, 820 P.2d 941 (1991); State v. Philips, 108 Wn.2d 627, 631, 741 P.2d 24, *review granted* 107 Wn.2d 1024, *aff'd* 108 Wn.2d 627, 741 P.2d 24 (1987); *see also* McClellan v. Sundholm, 99 Wn.2d 527, 533, 574 P.2d 371 (1978); Hines v. Data Line Systems, 114 Wn.2d 127, 145, 787 P.2d 8 (1990) (The State Securities Act is to be broadly construed in order to maximize protection for the investing public).

The federal courts define a security as “a contract, transaction or scheme whereby a person invests his [or her] money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.” ITO Corp. v. Prescott, Inc., 83 Wn.App. 282, 291, 921 P.2d 566 (1996) (*citing* the *Howey* test as adopted in S.E.C. v. W. J. Howey Co., 328 U.S. 293 (1946)).

Washington courts apply a modified *Howey* test, defining a security as (1) an investment of money (2) in a common enterprise and (3) the efforts of the promoter or a third party must have been fundamentally significant ones that affected the investment’s success or failure. ITO Corp., 83 Wn.App. at 291, *citing* Cellular Engineering, Ltd., 118 Wn.2d at 26-31.

The WSSA has a different purpose than the federal statute, in that it endeavors to protect investors, not just the integrity of the marketplace.

Accordingly, the Washington statute is more broadly construed. Hoffer v. State, 113 Wn.2d 148, 152, 776 P.2d 963 (1989), *citing* Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 125-26, 744 P.2d 1032, 750 P.2d 254 (1987). In this case, the Trial Court did not disregard the form of the transaction to examine its true substance.

In substance, the July 2000 transaction was a disposition of a 50% interest in the Corporation in exchange for payment of \$266,534.06. The economic reality is clear. The Kinneys would not have been shareholders in the Corporation if they had not paid the amount demanded by Cook. The fact that payment was made under the terms of a promissory note and pledge agreement is not dispositive. The WSSA is broadly interpreted to protect investors from the myriad of schemes that can be used to obtain an investor's money on the promise of profits. The July 2000 transaction is one of these schemes. If Cook had disclosed that he had financially crippled the Corporation by causing it to guarantee his \$4.5 million personal loan, the Kinneys would not have paid \$266,534.06 for their 50% interest in the Corporation.

After losing the first litigation, Cook tricked the Kinneys into paying him \$266,534.06 for a 50% interest in a corporation that he had impossibly hobbled with a \$4.5 million loan guarantee and therefore knew

was bankrupt. Cook obtained the Kinneys' money by concealing the Corporation's true financial condition. This is precisely the type of scheme from which the WSSA is designed to protect investors.

As a result of Cook's concealment, the Kinneys invested their money in a common enterprise with the expectation of receiving profits. Instead of receiving profits, however, the Kinneys lost their entire investment. This loss was the direct result of Cook's secretly causing the Corporation to guarantee his \$4.5 million personal loan and otherwise draining all of the cash from the Corporation for his personal benefit. Clearly, Cook's efforts were fundamentally significant in affecting the Corporation's failure and the Kinneys' loss of their investment.

The July 2000 transaction satisfies the modified *Howey* test. The Trial Court erred in ruling the transaction does not constitute a sale of security warranting the protection of the WSSA.

(b) The July 2000 transaction is a sale of security within the WSSA as the note is a security.

Cook's emphasis on the promissory note used to evidence the July 2000 transaction is a red herring. In substance and effect, the July 2000 transaction was a transfer of securities in exchange for valuable consideration. The promissory note was merely a vehicle in which payment for the security was made.

In Reves v. Ernst & Young, 494 U.S. 56 (1990), *aff'd*, 507 U.S. 170 (1993), the United States Supreme Court set forth the “family resemblance test” for purposes of determining when a note is a security within the meaning of the Securities Act of 1933.

Because a “note” is one of the items listed in the Act’s definition of security, there exists a presumption that a note is a security. Id. at 64-66. That presumption may be rebutted by a showing that the note strongly resembles one of the following types of notes that do not fall within the definition of a security:

- (1) notes delivered in connection with consumer financing;
- (2) notes secured by a home mortgage;
- (3) short term notes secured by a lien on a small business or its assets;
- (4) notes evidencing a “character” loan to a bank customer;
- (5) short term notes secured by an assignment of accounts receivable;
- (6) notes which simply formalize an open account debt incurred in the ordinary course of business; and
- (7) notes evidencing loans by commercial banks for current operations.

See Argo, 81 Wn.App. at 562-63, *citing* Reves, 494 U.S. at 65. The above notes are used in commercial transactions as opposed to investments, and thus do not require the regulatory protections of the securities acts. Id.

In State v. Argo, Division I of the Washington Court of Appeals applied the Reves analysis and stated:

If a note is not sufficiently similar to one of the above seven items to rebut the presumption that it is a security, the determination of whether the note should be added to the list

of those that do not constitute securities is based on the following four factors: (1) the motivations of the parties; (2) the plan of distribution; (3) the reasonable expectations of the investing public; and (4) the existence of a regulatory scheme which reduces the risk of investment.

Id. at 563.

Division III of the Washington Court of Appeals recently applied the Reves “family resemblance test” in the case of Douglass v. Stanger, 101 Wn.App. 243, 252, 2 P.3d 998 (2000). The Court reviewed the dismissal of a claim for securities fraud on the basis that the transaction, which was evidenced by a note and investment agreement, was not a security under the WSSA.

As this Court explained, the Reves analysis begins with the presumption that a note—any note—is a security. Id. at 252, *citing* Reves, 494 U.S. at 64-65. The burden is on the defendant to rebut that presumption. Id. The defendant must provide evidence to meet the following four considerations of the family resemblance test:

First, why did the seller and buyer enter into the transaction? Specifically, is the purpose of the transaction to raise money for a business enterprise? Or is it, instead, for consumer goods or some other noncommercial reason? Second, is the note commonly traded for speculation or investment? Third, we look at the reasonable expectations of the investing public? What are the economic realities? Fourth, and finally, we look at whether another regulatory scheme significantly reduces the risk associated with the note and investment

agreement and thereby renders application of the securities act regulation unnecessary.

Id. at 252-253.

Washington's policy considerations must be added to the analysis of these considerations. Id. at 254. The primary policy of the WSSA is "to protect investors." Id. The Douglass court explained:

And so we construe the Act liberally. Given this liberal construction of the Securities Act and given the *Reves*' rebuttable presumption that every note is a security, Mr. Douglass has raised an issue of fact as to whether the note . . . constitute[s] a security under the WSSA.

Id. (citations omitted), *see also* Philips, 108 Wn.2d at 631.

As the following discussion demonstrates, the Trial Court erred in its analysis of the considerations of the family resemblance test under Washington law.

- (i) The purpose of the July 2000 transaction was to raise money for the business enterprise.

In Douglass, this consideration was resolved by the fact that under the terms of that deal, Douglass would receive a 40% ownership interest in the business enterprise in exchange for \$23,000. The plaintiff was promised and expected ownership and profit. Douglass, 101 Wn.App. at 253.

Similarly, the July 2000 transaction in this case involved the Kinneys paying \$266,534.06 in exchange for a 50% ownership interest in the Corporation. It is undisputed that had the Kinneys not paid the money, they would not have been shareholders. Moreover, the Kinneys paid the money based on inaccurate financial statements leading them to expect they would receive profits and that their ownership in the Corporation was secure. Cook has not provided any evidence that this is simply a short-term note for a non-commercial purpose.

(ii) The July 2000 transaction contemplates a speculative investment.

Analyzing this consideration, the Douglass Court noted that some securities by their very nature are commonly traded for speculation or investment and are, therefore, beyond argument, securities. Id. at 253. But the reach of the securities acts does not stop with the obvious or the common place. Id. The purpose of the WSSA is to protect investors no matter the form of the investment or whether the investment is one that is commonly traded. *See* Argo, 81 Wn.App. at 559; *see also* Hoffer, 113 Wn.2d at 152.

Although the investment in Douglass was not commonly traded for speculation or investment, it nonetheless, contemplated a speculative venture. Id. Moreover, nothing precluded Douglass from selling, assigning, or encumbering his interest. Id.

The speculative nature of the July 2000 transaction is squarely within this second consideration. Although the transaction is not one that is commonly traded, it is undisputed that it contemplated a speculative nature. The Kinneys paid the amount demanded in contemplation of being shareholders in the Corporation. Further, there is no evidence that the Kinneys were precluded from selling, assigning, or encumbering their interest.

(iii) The July 2000 transaction created the expectation of ownership in the Corporation and receipt of profits.

The economic reality of the July 2000 transaction is that the Kinneys paid \$266,534.06 for 50% ownership interest in the Corporation. The decision to pay and enter into the speculative venture was based on financial statements disclosed to them by Cook. Because of these financial statements, the Kinneys believed the Corporation was financially sound, and therefore expected to receive a profit on their 50% ownership interest. This consideration is resolved in favor of the Kinneys' position.

- (iv) There is no other regulatory scheme significantly reducing the risk associated with the July 2000 transaction.

Cook has presented no evidence of any other regulatory scheme that would significantly reduce the risk associated with the July 2000 transaction and his failure to disclose the Corporation's true financial condition in connection with such transaction. The facts of this case fall squarely within the regulations and protection of the WSSA.

- (c) The determination of whether the July 2000 transaction rises to the level of a security is a question of fact.

Regardless of the outcome under the Reves family resemblance test, the determination of whether a note or investment agreement rises to the level of a security is a question of fact. Douglass, 101 Wn.App. at 246. The Trial Court therefore erred when it held as a matter of law that the July 2000 transaction was not a security under the WSSA. This question must be determined by the trier of fact, and cannot be resolved under CR 12(b)(6).

- 3) The Trial Court erred in its ruling that the three year statute of limitations bars this litigation.

As fully set above, the July 2000 transaction is a sale of security. This litigation arose from Cook's concealment of the \$4.5 million Guaranty in connection with that transaction. The Kinneys did not learn

of the Guaranty until Cook filed his Disclosure Statement for Plan of Reorganization on August 15, 2001. (CP 8)

Section 21.20.430(4)(b) of the WSSA provides:

No person may sue under this section . . . more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care.

...

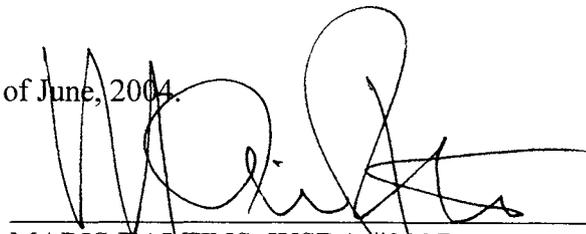
The statute expressly tolls the 3-year statute of limitation period until the securities violation is discovered or should have been discovered in the exercise of reasonable care. First Maryland Leasecorp v. Rothstein, 72 Wn.App. 278, 287, 864 P.2d 17 (1993).

The Kinneys filed their Complaint for Damages for Securities Violations on April 30, 2003, well within the three year limitation period. The Trial Court therefore erred in its ruling that the statute of limitations has expired.

E. CONCLUSION

The Kinneys request that the Trial Court's actions be reversed and that this matter be remanded to the Trial Court for proceedings which would allow the Kinneys to fully and fairly present their claims.

DATED this 7th day of June, 2004.

A handwritten signature in black ink, appearing to read "Maris Baltins", written over a horizontal line.

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