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STATE OF WASHINGTON

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SUPREME COURT NO. 78128-1

BY C. J. MERRITT

(COURT OF APPEALS, DIVISION III, NO. 22704-9-III)

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KENNETH B. COOK,  
a single man,

Petitioner,

v.

CLARK E. KINNEY, and BARBARA E. KINNEY,  
individually and the marital community,

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENTS – CLARK E. KINNEY  
and BARBARA E. KINNEY

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**A. ISSUES PRESENTED FOR REVIEW**

The following issues are presented for review: whether the Complaint of Clark and Barbara Kinney (the “Kinneys”) states a claim for which relief may be granted, and whether the Court of Appeals erred in reversing the trial court’s dismissal of the Kinneys’ suit under Civil Rule 12(b)(6).

**B. STATEMENT OF THE CASE**

The facts and procedures relevant to the issues presented for review are set forth in the record in the Court of Appeals and the Answer to Petition for Review, and are incorporated herein by reference.

**C. ARGUMENT**

The Kinneys hereby supplement their Argument on the issues presented for review as follows:

1. The Complaint states a claim for which relief may be granted.

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.” Fondren v. Klickitat County, 79 Wn.App. 850, 854, 905 P.2d 928 (1995); Bravo v. Dolsen Companies, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

A complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery. Hoffer v. State, 110 Wn.2d 415, 421, 755 P.2d 781 (1988), *aff'd in part on recon.*, 113 Wn.2d 148, 776 P.2d 963 (1989). The motion 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. Fondren, 79 Wn.App. at 854. The undisputed facts in the Kinneys' Complaint set forth a claim upon which relief can be granted under the WSSA.

2. The Court of Appeals did not err in reversing the trial court's dismissal under Civil Rule 12(b)(6).

Kenneth B. Cook ("Cook") is attempting to avoid the statutory liability of the Washington State Securities Act ("WSSA") by shifting focus away from the economic realities of the July 2000 transaction and dressing the facts in an attempt to disguise the transaction as a mere commercial transaction.

In substance and effect, the July 2000 transaction is a sale of a security subject to the protections of the WSSA. It was on that date that the Kinneys made the investment decision to pay Cook \$266,534.06 for a

50% interest in Freedom Truck Centers, Inc., formerly known as Spokane Freightliner, Inc. (hereinafter the “Company”). (CP 6)

It was also on that date that Cook, not content with the jury’s verdict finding him in violation of the WSSA, acted to defraud the Kinneys. If Cook’s actions, as he suggests, were merely undertaken in reaction to the jury’s verdict, he need have only disclosed the fact that the Company guaranteed a \$4.5 million loan of Cook’s wholly-owned limited liability company. The Kinneys would not have agreed to invest their money in a bankrupt company. Instead, Cook concealed the guarantee so that when the Kinneys examined the Company’s books and records, they had no knowledge of the debt. (CP 6-7; CP 305) It was not until after Cook took the Kinneys’ money and forced the Company into bankruptcy that he finally disclosed the existence of the guarantee on August 15, 2001. (CP 7-8) The WSSA is designed to protect investors from this conduct.

The purpose of the WSSA was recently reiterated in the case of GO2NET, Inc. v. FREEYELLOW.COM, Inc., \_\_\_\_ Wn.2d \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_, 2006 WL 2798328 (Sept. 28, 2006):

. . . The “primary purpose” of the Act is “to protect investors from speculative or fraudulent schemes of promoters.” The Act “is remedial in nature and has as its purpose broad protection of the public.” When interpreting

this “remedial legislation,” the court is “guided by the principle that ‘remedial statutes are liberally construed to suppress the evil and advance the remedy’”. Describing one of “the evils” to be suppressed, the antifraud provision makes it “unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly . . . [t]o 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.”

GO2NET, Inc. v. FREEYELLOW.COM, Inc., \_\_\_\_ Wn.2d \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_, 2006 WL 2798328 (Sept. 28, 2006), ¶ 10, *citing* Cellular Engineering, Ltd. v. O’Neill, 118 Wn.2d 16, 23, 820 P.2d 941 (1991); McClellan v. Sundholm, 89 Wn.2d 527, 533, 574 P.2d 371 (1978); Kittilson v. Ford, 23 Wn.App. 402, 407, 595 P.2d 944 (1979) (quoting 3C. Dallas Sands, *Statutes and Statutory Construction* § 60.01 (4<sup>th</sup> ed. 1973)), *aff’d*, 93 Wn.2d 223, 608 P.2d 264 (1980); RCW 21.20.010(2). *See also* Douglass v. Stanger, 101 Wn.App. 243, 254, 2 P.3d 998 (2000).

The WSSA has a different purpose than that of the federal statute, in that it endeavors to protect investors, not just the integrity of the marketplace. *See* Hoffer v. State, 113 Wn.2d 148, 152, 776 P.2d 963 (1989). Accordingly, the WSSA is more broadly construed. Id.

The WSSA defines the term “sale” or “sell” as including every contract of sale of, contract to sell, or disposition of, a security or interest

in a security for value. RCW 21.20.005(10). These terms, however, are not limited to their common law meanings. Northland Capital Corp. v. Silver, 236 U.S.App.D.C. 390, 396, 735 F.2d 1421, 1427 (1984). Courts have not allowed common-law technicalities, which may pose traps for the unwary and opportunities for the unscrupulous, to stand in the way of finding a statutorily cognizable “purchase” or “sale.” Id.

The “purchase and sale” requirement should therefore be read flexibly in order to effect the securities laws’ remedial purposes. *See In re Am. Cont’l Corp./Lincoln Sav. and Loan Sec. Litig.*, 49 F.3d 541, 543 (9<sup>th</sup> Cir. 1995), *citing* Madison Consultants v. FDIC, 710 F.2d 57, 61 (2d Cir. 1983); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 798 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970), *rev’d in part*, 490 F.2d 332 (2d Cir. 1973); Vine v. Beneficial Fin. Co., 374 F.2d 627, 634 (2d Cir. 1967), *cert. denied*, 389 U.S. 970 (1967). The anti-fraud goals of securities laws should not be frustrated by the presence of “novel or atypical transactions.” *See In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.*, 49 F.3d at 544, *quoting* Madison Consultants, 710 F.2d at 61, *quoting* Crane Co., 419 F.2d at 798.

The fact that the July 2000 transaction involves the existence of a promissory note does not remove this transaction from the protections afforded under the WSSA and excuse Cook's conduct. In this case, the security transferred was the 50% interest in the Company. In substance and effect, the note served only as the medium by which payment was made for that security. Cook would have this Court promote form over substance and declare the July 2000 transaction to be a mere commercial transaction. Such a declaration would be a misinterpretation of the clearly established remedial purpose of the WSSA, and would, in effect, reward the very person from whom the WSSA is designed to protect investors.

Cook further argues that he should not be held liable for his actions because title to the securities did not directly transfer from him. This argument is a disingenuous assertion of the "strict privity" approach, which wholly ignores firmly established Washington precedent.

This Court expressly rejected the "strict privity" approach in favor of a "substantial factor-proximate cause" analysis. Herrington v. Hawthorne, CPA, P.S., 111 Wn.App. 824, 830, 47 P.3d 567, *amended on denial of recon.*, 53 P.3d 1019 (2002), *citing* Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 130-31, 744 P.2d 1032

(1987), *opinion amended*, 750 P.2d 254 (1988); *see also* Hoffer, 113 Wn.2d at 152. Motivated by a desire to protect as many investors as possible, Washington courts look beyond the facade from whom title was transferred to hold an individual liable as a seller under the WSSA if his acts were a “substantial contributive factor” in the transaction. *See Id.*

Cook’s suggestion that he was a mere bystander following the jury’s verdict completely ignores the undisputed facts as set forth in the Complaint. While in sole control of the Company, Cook had the Company guarantee his \$4.5 million loan. Upset with the jury’s verdict, Cook concealed the guarantee, and demanded the Kinneys pay him \$266,534.06 for their 50% interest in the Company. Cook only disclosed the guarantee after he had successfully dispossessed the Kinneys of their money under the guise that the Company was financially stable and that they would receive future profits on their investment. (CP 5-8; CP 40-47; CP 305)

The facts alleged in the Complaint set forth a claim upon which relief can be granted under the WSSA. The statute of limitations for bringing an action thereunder is “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.” RCW 21.20.430(4)(b). The three-year statute of limitations is expressly tolled until the securities violation is discovered or should have been discovered in the exercise of reasonable care. *See First Maryland Lease Corp v. Rothstein*, 72 Wn.App. 278, 287, 864 P.2d 17 (1993). The Kinneys filed their Complaint on April 30, 2003, well within the three-year limitation period. The Court of Appeals did not err in reversing the trial court’s dismissal under Civil Rule 12(b)(6). The decision of the Court of Appeals should accordingly be affirmed.

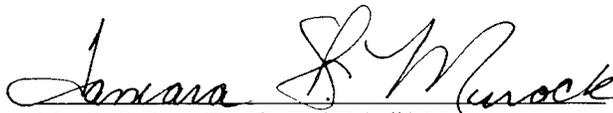
3. The Kinneys are entitled to an award of fees and costs incurred on review should they prevail.

Pursuant to Title 14 of the Rules of Appellate Procedure and RAP 18.1, the Kinneys request an award of their attorney fees and costs incurred on review. *See* RAP 14.1 – 14.6. As victims of a violation of Section 21.20.010 of the WSSA, the Kinneys may recover their attorneys’ fees and costs. *See* RCW 21.20.430(1).

**D. CONCLUSION**

Based upon the foregoing, the Complaint of Clark and Barbara Kinney states a claim for which relief may be granted, and the Court of Appeals did not err in reversing the trial court's dismissal under Civil Rule 12(b)(6).

DATED this 6<sup>th</sup> day of October, 2006.

A handwritten signature in cursive script, appearing to read "Tamara W. Murock".

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