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No. 69432-4-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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HARRY and BETTY MAY CORLISS, husband and wife; TIMOTHY  
CORLISS; and SCOTT CORLISS, as individuals and derivatively  
on behalf of Washington Rock Quarries,

Plaintiffs/Appellants,

v.

LARRY P. HUGHES and JANE DOE HUGHES, husband and wife  
and their marital community; HARRY HART and BETH HART,  
husband and wife and their marital community,

Defendants/Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE MICHAEL HEAVEY

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REPLY OF APPELLANTS

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## I. Introduction

“The question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitations is ordinarily a question of fact. The defendants [Hughes and Hart] here bore the initial burden of showing the absence of an issue of material fact.”<sup>1</sup> (Citations omitted.)

The Corlisses' opening brief presented numerous questions of material fact. Hughes and Hart have not argued that the questions the Corlisses presented are not material.<sup>2</sup> Hart has admitted that the Corlisses have raised questions of fact: “both of these arguments indeed raise questions of fact...”<sup>3</sup> Drawing all reasonable inferences in favor of the Corlisses, reasonable minds could easily conclude that one or more of the Corlisses did not gain the required knowledge to start the running of the statute of limitation until after February 2009. This is not a reasonable minds could reach but one conclusion case.

## II. Respondents Have Misstated the Case.

Hughes spins a story about (a) why Hughes and Hart bought the properties; (b) why Rainier Resources was formed and used to make the purchase; and (c) the Corlisses being bad partners who

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<sup>1</sup> *Green v. A.P.C.*, 136 Wn.2d 87 (1998). (Emphasis added.)

<sup>2</sup> Hughes and Hart quote numerous snippets from cases that do not involve the discovery rule.

<sup>3</sup> Brief of Respondents Harry Hart and Beth Hart, p. 2, Sec. B.

reneged on a promise to loan money.

The truth, as reasonably seen by the Corlisses, is far different. This Court is once again referred to the “Facts Supporting WRQ and Corlisses’ Entitlement to Recovery” that were presented to the trial court. (CP 183-190, 213-398, 452-460, 462-465) The record below lays out an egregious scheme whereby Hughes and Hart secretly purchased the properties. Then several years later, Hart deceitfully concealed that fact from Carrosino.

Not once do Hughes or Hart contend or even suggest that they ever disclosed the material terms of the deal to any Corliss prior to Rainier Resources, LLC (“RR”) secretly purchasing the properties. Hughes and Hart had a legal duty and a fiduciary duty to disclose the material terms and they utterly failed to do so.

Hughes and Hart attempt to: (1) divert the Court’s attention on irrelevant issues which are all easily dispelled or lead to questions of material fact; and (2) gloss over valid claims to which no statute of limitation defense exists:

1. The alleged loan incident. Hughes’ version of a loan negotiation is flatly denied by Scott. The negotiations never culminated in a promise by any Corliss and were completely unrelated to the properties. (CP 454-455) As such, even if Hughes’ version was accepted it does not allow Hughes and Hart to usurp a corporate opportunity.
2. Scott’s alleged mistake as to when Scott replaced Harry on WRQ’s Board. Hughes argues that Scott is “innocently mistaken” about when he took over affairs for his father and

became a WRQ director. Hughes suggests the Court should look to the WRQ minutes and discard Scott's testimony under oath that the meeting minutes are wrong. Scott is not innocently mistaken. The minutes are not reliable. (CP 457, 460) Scott was deposed for more than one and a half days and Hughes' response makes no reference to any testimony where Scott acknowledged an "innocent mistake." In fact, on this point Hart agrees with Scott.<sup>4</sup>

3. The Backhaul Amendment Claim. Hughes glosses over the backhaul amendment as if it was no big deal. The reality is the backhaul amendment creates a brand new, potentially huge source of revenue for RR. The backhaul amendment obligated WRQ to pay RR \$1.50 for every ton of material brought from off-site and dumped into the King Creek Pit. (CP 361-363, 457) But for the amendment all of the backhaul revenue would have remained with WRQ. It is undisputed that none of the details of the backhaul amendment were ever disclosed to any Corliss or Carrosino. Hughes and Hart gloss over the backhaul amendment because they have no argument that the statute of limitation ran as to this separate claim.
4. The Re-Permitting Claim. The Corlisses were never told anything about the enormous re-permitting effort that WRQ was paying for – enlarging the permit for RR's pit from 68.8 acres to 580 acres. (CP 216, 366) Hughes and Hart gloss over this claim and act as if it doesn't exist. They have no argument that the statute of limitations ran as to this claim. Nor do they claim that any Corliss or Carrosino was ever told about this re-permitting activity. The re-permitting issue is not whether Scott generally believed it is good business practice to expand and extend permits whenever possible. The issue is did Hughes and Hart breach their legal and fiduciary duties by failing to disclose the re-permitting activity that benefitted RR and was being carried out at WRQ's expense. Hughes

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<sup>4</sup> See Brief of Respondent Hart at pg. 8: "[I]t appears from around 2004 on, Scott assumed his father's role as manager of the Corliss' WRQ investment."

and Hart have no argument that the statute of limitation ran as to this separate claim.

The trial court failed to construe every fact in the light most favorable to the non-moving party, the Corlisses and derivatively WRQ. When all facts are construed in their favor, including all reasonable inferences, it cannot be said as a matter of law that any (let alone all) of their claims against Hughes and Hart are time barred.

### **III. Argument in Reply**

#### **A. Hughes and Hart Have Failed to Carry Their Burden That There is No Genuine Issue of Material Fact .**

“The party moving for summary judgment bears the burden of demonstrating there is no genuine dispute as to any material fact.” “A material fact is one upon which the outcome of the litigation depends in whole or in part.” “In determining whether a genuine issue of material fact exists, we must view all facts and all reasonable inferences in the light most favorable to the non-moving party.”<sup>5</sup>

Hughes and Hart have elected to make presentations that attempt to persuade this Court that it is more likely than not that Hughes and Hart will prevail at trial.

An example is Hughes’ treatment of Harry’s mental capacity vis-a-vis his ability to comprehend Hughes’ September 5, 2005

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<sup>5</sup> Boguch v. Landover Corp., 153 Wn. App. 595 (2009)

letter. Hughes argues that mental incapacity must be proven by clear, cogent and convincing evidence. That may be the standard of proof required at trial. The very authority Hughes relies on states as follows:

The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract at issue. **In applying this rule, however, it must be remembered that contractor capacity is a question of fact to be determined at the time of the transaction.**<sup>6</sup>

According to Hughes' own authority, Harry's mental capacity or lack thereof is a genuine issue of material fact. Even if clear and convincing evidence is the summary judgment standard, Hughes and Hart presented no evidence that Harry was of sound mind.

**B. The Corlisses' Claims Are Not Derivative Only. The Corlisses, Individually, Have Claims For Breach of Fiduciary Duty And Negligent Misrepresentation.**

Each Corliss has an independent right of action against Hughes and Hart. The Corlisses' claims are separate and distinct from WRQ's derivative claim for usurpation of a corporation opportunity.

Hughes and Harts' concealment of the facts relating to the purchase, the backhaul amendment and re-permitting give rise to

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<sup>6</sup> *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101 (1942).

claims for breach of fiduciary duty and negligent misrepresentation.

Each Corliss has the right to sue Hughes and Hart for breach of fiduciary duty.<sup>7</sup> That claim was alleged in Paragraph 17 of the Complaint:

17. Defendants continuously breached their fiduciary duties to WRQ, Harry Corliss, Timothy Corliss and Scott Corliss, inter alia, by failing to disclose the corporate opportunity, by placing themselves in an adversarial position to the interests of WRQ, failing to deal fairly or in good faith, failing to make full and fair disclosure of relevant information, and thereby proximately causing monetary damage in an amount to be proven at trial. (CP 5)

Here, as directors and officers, Hughes and Hart were required to discharge their duties to Scott, Tim and Harry in good faith, and to deal with them fairly.<sup>8</sup> Hughes and Hart failed to do so.

Numerous Washington cases hold that shareholders in closely held companies such as WRQ owe one another fiduciary obligations.<sup>9</sup> Majority shareholders in closely held corporations owe

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<sup>7</sup> The elements of a breach of fiduciary duty action are: (1) a fiduciary relationship giving rise to a duty of care; (2) an act or omission by the fiduciary in breach of the standard of care; (3) damages; and (4) evidence that the damages were proximately caused by the fiduciary's breach of the standard of care. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002); 29 Wash. Prac., *Wash. Elements of an Action* §12:1 (2011-2012 ed.).

<sup>8</sup> See, RCW 23B.08.300; RCW 23B.08.420; *Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.3d 622 (2007).

<sup>9</sup> See, *Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.2d 622 (2007) (reversing trial court's determination that shareholders of a closely held company owed no fiduciary duties to each other); *Arneman v. Arneman*, 43 Wn.2d 787, 264 P.2d 256 (1953) (reversing trial court and holding that siblings who were the

fiduciary duties to the minority shareholders.<sup>10</sup>

Each Corliss also has the right to sue Hughes and Hart for negligent misrepresentation.<sup>11</sup> That claim was alleged in the Complaint:

22. Defendants negligently misrepresented through silence, actions and statements to the Corlisses, that WRQ was continuing as it always had – as a lessee of gravel pits - without timely notice or advice of purchase or permitting activities.<sup>12</sup> (CP 6)

Hughes and Hart are liable for negligent misrepresentation for failure to make the full disclosure required by a fiduciary.<sup>13</sup>

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sole shareholders in a closely held company had fiduciary obligations); *Hay v. Big Bend Land Co.*, 32 Wn.2d 887, 897, 204 P.2d 488 (1949) (explaining that "[t]he principle that a majority of the stockholders must, at all times, exercise good faith toward the minority stockholders is well recognized").

<sup>10</sup> See, *Fiederlein v. Boutselis*, 952 N.S.2d 847, 860 (Ind. Ct. App. 2011); *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 381 (Minn. 2011); *McLaughlin v. Schenck*, 220 P.2d 146, 155 (Utah 2009); *Walta v. Gallego Law Firm, P.C.*, 40 P.2d 449, 456-57 (N.M. 2001). These cases, among many others, adopt the rationale that shareholders in closely held corporations "**are more realistically viewed as partners**" and therefore "**owe each other duties analogous to partners in a partnership.**" See e.g., *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 236, 241 (Ind. 2001); *Pointer v. Castellani*, 918 N.E.2d 805, 808 (Mass. 2009). (Emphasis added.)

<sup>11</sup> The elements of negligent misrepresentation are: (1) the supply of information for the guidance of others in their business transactions that was false; (2) with knowledge that the information supplied would be relied upon; (3) negligence in obtaining or communicating the false information; (4) actual reliance on the false information; (5) with the reliance being reasonable; and (6) the false information proximately caused the claimed damages. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007); *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002).

<sup>12</sup> Unlike a claim for fraud, the pleading requirements for negligent misrepresentation do not require each element of the claim to be specifically pled.

<sup>13</sup> *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 161-62, 744 P.2d 1032 (1987) (adopting Rest. 2nd Torts as the standard governing claims for

There is no question that Hughes and Hart failed to fully and timely disclose material information. This failure constitutes negligent misrepresentation for which each Corliss had a valid and separate cause of action.

The facts supporting each of the Corlisses' individual claims were set forth at length for the trial court. (CP 188-190, 597-598, 765, 768-779)

The Washington case law is summarized as follows:

Washington law follows the Restatement rule that imposes liability when one fails to reveal material facts within one's knowledge when there is a duty to speak. A failure to speak in the face of such a duty is, in effect, a representation of the nonexistence of a fact that is not disclosed. Stated another way, when a duty to disclose exists, the suppression of a material fact is tantamount to an affirmative misrepresentation.

Fraudulent concealment is "a species of fraud." While silence by itself is not actionable, silence becomes actionable when either the defendant uses a trick or artifice to prevent an adversary from discovering the truth, or where the defendant has a duty to speak and fails to do so.

The existence of a duty to speak is a question of law. Once the determination is made that a legal duty exists, the JURY'S FUNCTION is to decide whether the facts come within the scope of such duty.<sup>14</sup> (Emphasis added.)

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negligent misrepresentation); *Boonstra v. Stevens-Norton, Inc.*, 64 Wn.2d 621, 625, 393 P.2d 287 (1964); *Oates v. Taylor*, 31 Wn.2d 898, 903-904, 199 P.2d 924 (1948).

<sup>14</sup> 16 Wash Prac., Tort Law and Practice, §18.7 Fraud (3<sup>rd</sup> Ed.) – Silence and fraudulent concealment.

The fiduciary duty owed by Hughes and Hart to WRQ and the individual Corlisses created a duty to make full and timely disclosures and to *speak the truth*.

On repeated occasions, Hughes, Hart and WRQ's attorney, Mr. Akers, failed to disclose: (a) any of Hughes and Hart's secret efforts to buy the two pits; (b) the secret negotiations leading up to the purchase of the pits; (c) the secret purchase of the pits; (d) the secret formation of RR; (e) the secret permitting activities paid for by WRQ and benefiting RR; and (f) the secret amended lease that created backhaul revenues for RR. Under the law, the suppression of these material facts by Hughes and Hart is tantamount to fraud.

In *Hudson v. Condon*, a case between partners, the Court stated:

The relationship between partners is fiduciary in nature and imposes a duty on the partner not only to refrain from making false statements to the copartner, but also to abstain from any concealment that pertains to the partnership business. Here, the alleged concealment and misrepresentation underlying the Hudsons' claims of breach of fiduciary duty are tantamount to constructive fraud. Consequently, the RCW 4.16.080(4) discovery rule for fraud applies. (Internal citations omitted.)<sup>15</sup>

Because each Corliss has his own separate claims for breach of fiduciary duty and negligent misrepresentation, a separate discovery rule analysis must be done for each Corliss for

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<sup>15</sup> *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000). (Emphasis added.); See also, *Crisman v. Crisman*, 85 Wn. App. 15, 931 P.2d 163 (1997).

each of their separate causes of actions.<sup>16</sup> If the September 5, 2005 letter argument carries the day, only Harry Corliss can be deemed to have knowledge. If the Carrosino imputed knowledge argument is persuasive, then Carrosino's knowledge can only be imputed to Scott. (CP 633-634) (See discussion, *infra*.)

**C. Each Corliss Appealed the Dismissal of Each of Their Individual Claims.**

Hughes' argument that dismissal of the Corlisses' individual claims was not challenged on appeal makes no sense. The trial court entered a blanket, omnibus Order Granting Summary Judgment and dismissing with prejudice the entirety of the Corlisses' Complaint. (CP 828-830) There was no "portion" of the Order from which to appeal as Hughes suggests. The entry of and the entirety of the Order was appealed. Each of the Corlisses first two assignments of error begin with the identical words "Did the trial court err when it granted summary judgment dismissing **all** of the Corlisses' **separate causes** of action..."

Corlisses complied with RAP 10.3.

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<sup>16</sup> There is no evidence of any agency relationship between the family members. To the extent Hughes and Hart are attempting to claim such a relationship existed, it is simply the argument of counsel as no facts establishing an agency between the family members is in the record, unless being family members establishes an agency relationship.

**D. The Recording of Conveyance Documents Did Not Provide Notice To Any Corliss.**

For the purpose of notice to any Corliss, it does not matter that conveyance documents showing transfer of title to RR may have been recorded. The rule is:

The recording of an instrument is constructive notice only to those parties acquiring interests subsequent to the filing and recording of the instrument. The recording of an instrument does not constitute notice to an antecedent in the chain of title...<sup>17</sup>

Under the law, the recording of instruments did not give constructive notice to any Corliss or WRQ. Respondents cite no authority to support their notice argument.

Even if the recording could be construed as notice, the notice that would have been given was that RR, not Hughes and/or Hart, purchased the properties. RR's certificate of formation did not disclose that Hughes and Hart were the owners of RR. (CP 292-293)

Whether or not reasonable due diligence included the necessity of checking the public record under the circumstances of this case is a question of fact. Carrosino was only tasked with valuing the WRQ stock. Valuation is a task that did not require Carrosino to know who owned the property. The controlling lease

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<sup>17</sup> *Hendrich v. Davis*, 75 Wn.2d 456 (1969); see also, *Hedlund v. Brellenthin*, 520 F. Supp. 81 (1981); *Aberdeen Federal Sav. & Loan Assn. v. Hanson*, 58 Wn. App. 773 (1990); *Hauf v. Johnston*, 105 Wn. App. 807 (2001).

reciting the royalty payment amount, not the actual ownership, is what was relevant to Carrosino's valuation task. (See discussion, *infra.*) As Carrosino stated:

7. After the meeting, I followed up with a request to Mr. Hart for the delivery of the requested documents. On April 27, 2007 I sent an email to Mr. Hart that reminded him of my prior request. My email included a request for copies of the leases for both the King Creek and Kapowsin Pits that were operated by WRQ. The email stated:

In addition, I would like to request copies of the two leases that support the royalty arrangements between WA Rock and the ultimate land holders.

A true and correct copy of the email is attached as **Exhibit B**. The copy includes some underlining. I do not recall if I made the underlines or not.

8. Information on the pits and WRQ's right to operate the pits was important to understanding and valuing WRQ's business for the purpose of any potential sale of shares. (CP 487-488)

Noticeably absent from the information requested by Carrosino for his valuation of WRQ is identification of the owner of the underlying land. Carrosino does not request the identity of the owner because to value WRQ's stock one only needs to know the **CURRENT** royalty payments required by WRQ's **CURRENT** lease.

Because ownership of the underlying property was irrelevant to valuing WRQ, would a reasonable man like Carrosino have checked the public records when knowledge of ownership was

irrelevant to his task? Or would a reasonable man accept that the lease given to him by Hart (the person in the best position to know the truth and tell the truth after Carrosino's several attempts to seek the truth) was the controlling lease for the purposes of his valuation exercise? Different people could reach different conclusions. The Corlisses themselves had no reason to check the public records because it is undisputed that Carrosino never told any Corliss about the "casual representation" about property ownership that had no relevance to Carrosino's attempt to place a value on WRQ's stock.

**E. Hughes' authorities are not controlling and easily distinguished.**

In *Bay City*, the appellate court, after a trial on the merits, stated:

It is impossible for us to believe after carefully reading this record, that either S.M. Anderson Sr. or S.M. Anderson, Jr. ever intended to cover up the way this deal was taken care of, or to keep it from the trustees of the corporation....The entire transaction was handled openly and aboveboard.

The *Bay City* facts are the exact opposite of the facts in this case where nothing was open or above-board. There was no breach of fiduciary duty or constructive fraud in the *Bay City* case, so the discovery rule was never even an issue.

In *Interlake*, Kreybig was a shareholder, officer, director and sales manager for Interlake. There was no question about Kreybig's mental capacity like there is with Harry. In 1979, Kreybig

knew that Bucholz had sold the Porsche 906 for \$40,600 in March 1979 and, in fact, [Kreybig] was present when the race car left the premises in a trailer. He [Kreybig] further knew that the 906 sale was not recorded in the log that he, as sales manager, kept of all vehicle sales.

In other words, after a trial on the merits, the court found that Kreybig, in his role as an active officer and manager of Interlake, engaged in Interlake's day to day operations, had contemporaneous, personal knowledge of all the salient details of the transaction at issue. Therefore, Kreybig's contemporaneous knowledge gained from his day to day operation of Interlake was imputed to Interlake and the statute began to run in 1979 when Kreybig personally learned the facts.

Interlake is completely different from this case. Harry, even if found as a matter of undisputed fact to be of sound mind, was not involved in the day to day operations of WRQ. Harry, unlike Kreybig, had no contemporaneous knowledge of any of the salient details that constituted Hughes and Harts' constructive fraud and breach of fiduciary duty. All that Harry ever got was an after-the-fact untrue letter.

Considering the questions of fact regarding Harry's mental

capacity, whether Harry even got the letter<sup>18</sup> and what role (if any) that Harry had on WRQ's board<sup>19</sup>, it would be a perverse result to impute Harry's alleged knowledge to WRQ and bar the rights of Scott and Tim to get relief. This is especially true where Harry owned only 0.50% of the WRQ stock. Such a rule, if adopted and applied, could likely lead to shenanigans. Disclosure of improper conduct could be made to the most disinterested shareholder for the purpose of manufacturing a statute of limitations defense against the rights of other minority shareholders. Given the questions regarding Harry's mental capacity, Mr. Hughes likely knowledge of Harry's diminished capacity as Harry's longtime friend, and the end of Harry's role as an officer of WRQ, one could reasonably conclude that manufacturing a statute of limitations defense is exactly what happened in this case.

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<sup>18</sup> It is undisputed that neither Tim nor Scott ever saw the September 5 letter. It is undisputed that there is no evidence in the record that Harry ever received the letter. There is no citation to any authority that receipt by a corporation is receipt by the addressee at the corporation. Even if authority did exist, there is more than ample evidence in the record from which the Court could infer that Harry's mental condition prevented him from comprehending the letter. In fact, at this point the evidence about Harry's mental health is clear and convincing because Hart and Hughes have presented no contravening evidence. And if Harry did comprehend the letter, the letter was a lie – Hughes did not purchase the property. It is, as Hughes suggests, pure speculation as to what a mentally competent Harry would have done if his friend told him the truth. But it is speculation created by Hughes failure to tell his friend in poor mental health the truth.

<sup>19</sup> It is undisputed that none of the Corlisses were involved in the day to day operations of WRQ.

*Allen*, like *Interlake*, involved another scenario of contemporaneous knowledge. Mrs. Allen's husband was murdered by two parolees in 1979. The murderers were captured, put on trial and convicted of murder in May 1982. There was regional newspaper coverage of the convictions. In October 1985, six years after her husband's death, Mrs. Allen brought a wrongful death action against the State. Obviously, Mrs. Allen had contemporaneous knowledge in 1979 of the fact that created the wrongful death action – her husband's murder. "The record reflects that Beverly Allen's attempts to discover the facts surrounding her husband's death were minimal." Besides brief contact with the sheriff's office, "the record reveals she made no other attempt to discover what happened until 1985."

The Corlisses did not have contemporaneous knowledge like Mrs. Allen. The *Allen* case did not involve a deceitful effort to hide the truth like Harts' dissembling with Carrosino. Finally, the *Allen* case did not involve RCW 4.16.080(4).

**F. Material Questions of Fact Exist Regarding (1) the Existence and Scope of Carrosino's Alleged Agency Role; and (2) Carrosino's Knowledge That Can Be Imputed to the Corlisses.**

Hart admits that Corlisses have raised questions of fact with respect to (1) "whether Carrosino was an agent of any Corliss;" and (2) "whether or not Carrosino ever acquired [inquiry] notice that

Hughes and Hart purchased the pits.”<sup>20</sup> Reasonable minds could reach different conclusions on either of these questions of fact.

1. Carrosino was not the agent of the Corlisses and if he was his scope was limited to valuation of WRQ, not determining ownership of the pits.

Hart relies on emails written by Carrosino in an effort to establish that Carrosino was an agent for the Corlisses. Hart’s argument that Carrosino’s emails needed to disavow an agency relationship and say I [Carrosino] am acting “on behalf of less than all three Corlisses” is without merit. Hart’s argument has no legal support.

It is undisputed that the Carrosino emails do not state who Carrosino is working for. None of the Carrosino emails, in substance or effect, claim that “I, Carrosino, am acting on behalf of Scott and Tim and Harry.” The emails are silent as to who (if anyone) Carrosino is working for.

Under Washington law the existence or non-existence of agency “may not be proven by the declarations of the alleged agent.”<sup>21</sup> While it is true that agency may be proven by the direct testimony of an agent, emails are not direct testimony. Emails are out of court declarations, i.e. inadmissible hearsay. Emails carry no

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<sup>20</sup> Brief of Respondent Hart, p. 2, ¶B.

<sup>21</sup> *Ford v. United Bhd. of Carpenters*, 50 Wn.2d 832, 315 P.2d 299 (1957).

more weight than any other type of out of court hearsay declaration that acknowledges or denies the existence of an agency.<sup>22</sup>

Equally lacking in merit is Hart's argument that Carrosino was "acting on behalf of the Corlisses' entire 25 percent investment in WRQ." An agent acts for a principal, not for an "investment." An "investment" is not a principal.

There is no evidence that either Tim or Harry ever knew that Carrosino was valuing WRQ's stock. No such evidence was offered by Hart because Carrosino never spoke to Harry or Tim about his valuation task. It is undisputed that neither Harry nor Tim ever authorized Carrosino to value the WRQ stock or to determine ownership of the properties. Harry and Tim never authorized Carrosino to do anything.

To be an agent, one is retained by the principal and directed to take actions on behalf of the principal. With respect to Harry and Tim, these essential facts simply do not exist. There is no evidence of "consent by [Harry or Tim] that [Carrosino] shall act on [their] behalf." Such a showing is mandatory for the establishment of an agency relationship.<sup>23</sup>

Hart attempts to argue that Scott had Tim and Harry's authority to direct Carrosino. In short, Hart is claiming Scott was the

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<sup>22</sup> *Lumber Mart v. Buchanan*, 69 Wn.2d 658, 419 P.2d 1002 (1966).

<sup>23</sup> *Moss v. Vadman*, 77 Wn.2d 396, 463 P.2d 159 (1969).

agent of Tim and Harry. For that argument to be true there would have to be evidence of “consent by [Harry and Tim] that [Scott] shall act on [their] behalf.” Just like there is no evidence that Tim or Harry made Carrosino their agent, there is no evidence that Tim or Harry made Scott their agent. There is not a single piece of paper or any verbal communication proffered by Hart to support the Scott was Tim and Harry’s agent argument. There is no evidence that Tim or Harry even knew that Scott had asked Carrosino to value the WRQ investment.

Hart’s argument that “the Corlisses needed to provide a mere scintilla of evidence that Scott acted *without* his brother’s and father’s authority” is wrong. Hart (as the party asserting agency) had the burden of proof to establish agency.<sup>24</sup>

Moreover, Hart’s argument on the need for evidence ignores Tim’s declaration:

17. From February 2004 to May 2012, I did not work for Corliss Resources, Inc.
18. At no time in 2007 to 2008 did I authorize John Carrosino to act as my agent with respect to WRQ or any of my other personal interests or investments. (CP 464)

Thus, even if it was the Corlisses responsibility to provide a “mere scintilla” of evidence that Carrosino was not authorized to act as the

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<sup>24</sup> *Id.*

agent of all of the Corlisses, the Corlisses did so.

Hart's argument about control and the ability to affect legal relations being superfluous is without merit. Those two factors are fundamental to determining whether an agency relationship exists.<sup>25</sup> The language quoted by Hart actually supports the Corlisses' position by stating that a key characteristic that distinguishes agency from all other fiduciary relationships is the continuous subjection of the agent to the will of the principal.<sup>26</sup> Thus control over the agent is anything but a superfluous.

2. Even if Carrosino was the agent for all Corlisses, Carrosino's alleged knowledge of the ownership of the pits cannot be imputed to Corlisses.

Assuming arguendo that Carrosino was the agent for Scott, and that Scott was the agent for Harry and Tim, the alleged knowledge of Carrosino regarding the ownership of the properties cannot be imputed to the Corlisses. Ownership of the properties was not relevant or necessary to Carrosino's valuation task. The most that can be said about Carrosino's task and authority is that while an employee of CRI, Carrosino was asked by Scott to determine a value of WRQ stock. To perform that specific valuation task Carrosino did not need information regarding the ownership of the properties. The amount of the current royalty payment (not the

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<sup>25</sup> See Brief of Appellant, pg. 21 – 28.

<sup>26</sup> *Zoda v. Eckert*, 36 Wn. App. 292 (1983).

payee's identity) is a key component of WRQ's stock value.

As explained by the *Roderick Timber Co. v. Willapa Harbor Cedar Products, Inc.*, 29 Wn. App. 311 (1981):

[T]he knowledge of the agent will be imputed to the principal only where it is relevant to the agency and the matters entrusted to the agent. *Philipp Lithographing Co. v. Babich*, 27 Wis.2d 645, 135 N.W.2d 343 (1965); Restatement (Second) of Agency § 268, comment c (1958).

Comment c at 585 states:

The principal is not bound by a notification directed towards an agent whose duties or apparent duties have no connection with the subject matter to which the notification relates. It must be given to one who has, or appears to have, authority in connection with it, either to receive it, to take action upon it, or to inform the principal or some other agent who has duties in regard to it . . .

The reason for this rule is that it would be unreasonable to impute knowledge to an employer from an employee who would not likely pass such knowledge along.<sup>27</sup>

When the scope of the agency is limited and the relevancy of an alleged notice to the scope of the agency is disputed, a question of fact to be resolved by the jury exists.<sup>28</sup>

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<sup>27</sup> *Roderick Timber Co. v. Willapa Harbor Cedar Products*, 29 Wn. App. 311, 316-17, 627 P.2d 1352 (1981).

<sup>28</sup> *Goodman v. Boeing Company*, 75 Wn. App. 60, 85-86 (1994).

The facts of this case are no different from *Roderick* or *Goodman*. The existence and scope of Carrosino's agency are disputed. Whether Carrosino needed to know who owned the properties to determine WRQ's value is disputed. According to Carrosino, who owned the properties was not what he needed to know to value WRQ. What he needed to know and what he worked so hard to extract from Hart was the current amount of the royalty payments owed by WRQ under the leases. These disputed facts are for a jury to decide.

Carrosino's declaration establishes that ownership of the properties was not relevant to Carrosino's efforts to place a value on WRQ stock as requested by Scott. The "casual representation" and email information is not relevant or necessary to the one task Carrosino had – valuation of WRQ. At a minimum, even if Carrosino was Scott's agent, the Corlisses have raised genuine questions of material fact as to (a) the relevancy of ownership of the properties and (b) to the scope of the alleged agency. Summary judgment based upon "imputed knowledge" is not proper in this case.

In this case it is undisputed that Carrosino did not pass along to any Corliss any knowledge about ownership of the properties.

To summarize, more than one conclusion can be reached on the questions of (a) whether Carrosino was the agent of Tim and

Harry; (b) what knowledge Carrosino acquired that should be imputed to Scott; and (c) whether Carrosino could reasonably believe the ownership representation made to him because of the deceit perpetrated by Hart.

**G. This case meets the criteria for equitable tolling.**

This case is ripe for the application of equitable tolling. There was both bad faith deception and due diligence.

Hughes' September 5, 2005 letter which is relied upon to trigger the statute of limitations did not tell the truth. In addition, left unexplained is why wasn't a letter or notice of some kind announcing the purchase of the properties also sent to Scott and Tim? They were each owed a fiduciary duty by Hughes and Hart, each entitled to notice, and each owned 12.25 percent of the WRQ stock compared to Harry's .50 percent. If the answer is because Harry was Hughes long-time friend, then it can be reasonably inferred that Hughes knew of Harry's poor mental condition. The failure of Scott and Tim to get any notice of the usurped corporate opportunity, even after the fact, is evidence in and of itself of deception. Equity should not allow a wrongdoer to benefit from his lack of candor to a fiduciary with respect to what was said (the untrue letter) and to whom it was said (silence as to Tim and Scott). The first predicate for the application of equitable tolling has been met.

Besides the letter, the other arguable trigger to the statute of limitation is Carrosino's alleged knowledge. If Carrosino is deemed to have sufficient knowledge to trigger a requirement for due diligence, Carrosino surely exercised due diligence in trying to find out the truth. Hart engaged in more deception. He concealed the truth about the leases from Carrosino when Carrosino was doing due diligence. When the party asserting the statute of limitations as a defense undertakes an active effort to conceal the facts relating to the underlying wrong, that party has practiced deception and should not be entitled to the benefit of the statute of limitations.

Whether there was bad faith and deception and whether there was due diligence as required by the equitable tolling doctrine are questions of fact. The Corlisses have made a prima facie showing on each of the required elements to obtain the benefit of the doctrine of equitable tolling and to have that issue decided at trial.

**H. The Trial Court's Award of Attorney Fees is Clearly Erroneous.**

Clear error permeates the trial court's award of attorney fees. Neither Hughes nor Hart address the threshold question – does this case present “debatable questions of law and/or fact?”

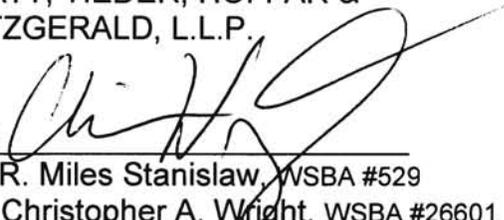
Nor do Hughes or Hart address the trial court's failure to enter findings of fact or conclusions of law or enter an order that

explains the trial court's reasoning to satisfy the statutory predicate to a fee award that this action was commenced without reasonable cause.

Instead, Hughes and Hart implicitly argue that if the defendant is granted a summary judgment (because the trial court determines there is no genuine issue of material fact) dismissing an action brought under RCW 23B.07 et seq., the defendant is automatically entitled to an award of fees. A determination that there is no genuine issue as to any material fact is far different from a determination that the action was brought without reasonable cause. And, even if this Court does not reject that attempt, there still is no excuse offered for the trial court's failure to provide any explanation justifying an award of fees based on a "without reasonable cause" standard. The award of fees should be reversed.

Dated this 15th day of March, 2013.

WATT, TIEDER, HOFFAR &  
FITZGERALD, L.L.P.

By: 

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Attorneys for Appellants

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the 15th day of March, 2013, I caused true and correct copy of the APPELLANTS' REPLY BRIEF to be delivered to counsel in the manner indicated as follows:

<p>George W. Akers Montgomery Purdue Blankinship &amp; Austin, PLLC 701 – 5<sup>th</sup> Avenue, Suite 5500 Seattle, WA 98104</p> <p><i>Attorney for Defendant Hughes</i></p>	<ul style="list-style-type: none"><li><input checked="" type="checkbox"/> Hand delivery/Messenger</li><li><input type="checkbox"/> Facsimile:</li><li><input type="checkbox"/> U.S. Mail, postage prepaid thereon</li><li><input type="checkbox"/> Email: <a href="mailto:akers@mpba.com">akers@mpba.com</a></li></ul>
<p>Lawrence B. Linville Christian J. Linville Linville Law Firm PLLC 800 – 5<sup>th</sup> Avenue, Suite 3850 Seattle, WA 98104</p> <p><i>Attorneys for Defendants Hart/WRQ</i></p>	<ul style="list-style-type: none"><li><input checked="" type="checkbox"/> Hand delivery/Messenger</li><li><input type="checkbox"/> Facsimile: 206-515-0646</li><li><input type="checkbox"/> U.S. Mail, postage prepaid thereon</li><li><input type="checkbox"/> Email: <a href="mailto:llinville@linvillelawfirm.com">llinville@linvillelawfirm.com</a> <a href="mailto:clinville@linvillelawfirm.com">clinville@linvillelawfirm.com</a></li></ul>

DATED this 15th day of March, 2013 in Seattle, Washington.

/s/ Lana Ramsey