Case No. 34446-7-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

JEROME C. IVES, as Personal Representative of the Estate of G. Jerome Ives,
PLAINTIFF/RESPONDENT,
v.
DAVID T. RAMSDEN and MICHELE L. RAMSDEN, and marital community composed thereof,
DEFENDANTS/APPELLANTS.

APPEAL FROM THE SUPERIOR COURT OF CLALLAM COUNTY
THE HONORABLE JUDGE KENNETH WILLIAMS, PRESIDING

APPELLANTS' REPLY BRIEF

Cross-Resp

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I. ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS.

Jerome Ives argues that the Predispute Arbitration Clause is not a forum selection clause. BR at 17. To the contrary, The Predispute Arbitration Agreement, of which Paragraph 2 is a part, is "*in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.*" *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974). *See also, Rodriguez v Shearson American Express, Inc.,* 490 U. S. 477, 485, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989).

Mr. Ives misplaces reliance upon *Voice Link Data Services, Inc. v. Datapulse, Inc.,* 86 Wn. App. 613, 937 P.2d 1158 (1997) BR at 17. Nothing in *Voice Link* prohibits enforcement of Paragraph 2 of the Predispute Arbitration Agreement.

Jerome Ives relegates Paragraph 2 of the Predispute Arbitration Agreement to a footnote, apparently in the hope that this Court will overlook it. BR at 17 n.6. This Court cannot ignore Paragraph 2. Instead, the Court is required to give meaning to each and every word of the parties' agreement. *Allstate Insurance Co. v. Huston*, 122 Wn. App. 530, 542 n. 29, 94 P.3d 358 (2004); *Diamond "B" Constructors, Inc. v. Granite Falls School Dist.,*, 117 Wn. App. 157, 165 n. 10, 70 P.3d 966 (2003);

Ball v. Stokely Foods, Inc., 37 Wn.2d 79, 83, 221 P.2d 832 (1950). Therefore, the Court is required to give meaning to each and every word of Paragraph 2 of the Predispute Agreement. EX 27.

Paragraph 2 of the Predispute Arbitration Agreement means exactly what it says: "[*t*]*he parties are waiving their rights to seek remedies in court, including the right to jury trial...*" EX 27. Such unambiguous language must be enforced. *Warner v. Design & Build Homes, Inc.*, 129 Wn. App. 34, 40-41, 114 P.3d 664 (2005).

Jerome Ives argues, without citation to authority, that "'[*j*]*urisdiction' and 'venue' have no role in arbitration.*" BR at 17. Mr. Ives' unsupported argument should not be considered. RAP 10.3(a)(6) ("*The brief of the appellant or petitioner should contain... argument in support of the issues presented for review, together with citations to legal authority...*"); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

Citing former RCW 7.04.030[1], Jerome Ives argues that Dave was required to make a motion to stay the proceeding in the trial court and refer it to arbitration. BR at 17. Jerome Ives presents no authority that

[1] If any action for legal or equitable relief or other proceedings be brought by any party to a written agreement to arbitrate, the court in which such action or proceeding is pending, upon being satisfied that any issue involved in such action or proceeding is referable to arbitration under such agreement, shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in accordance with the agreement.

former RCW 7.04.030 applies to an agreement such as that found in Paragraph 2 of the Predispute Arbitration Agreement. Nor does Jerome Ives explain why Dave should be required to stay a proceeding in the trial court if, in paragraph 2 of the Predispute Arbitration Agreement, the parties have waived their right to seek remedies in court.

Jerome Ives argues that Dave did not raise the arbitration clause in his Answer. BR at 18. Jerome Ives fails to recognize that in Paragraph 27 of their Answer, Dave alleged that "*Plaintiff's claims are barred by the doctrine of waiver...*" CP 716. Paragraph 27's use of the term "*waiver*" coincides with the use of that term in Paragraph 2 of the Predispute Arbitration Agreement. EX 27. Jerome Ives also fails to address that in his motion to dismiss, Dave argued that by reason of the Predispute Arbitration Agreement, Jerry Ives had waived his right to proceed in Washington courts. RP I at 6-8. Jerome Ives also fails to address that Dave also argued Paragraph 2 of the Predispute Arbitration Agreement in his closing argument. RP III at 107. Jerome Ives' argument that Dave waived his right to rely upon Paragraph 2 of the Predispute Arbitration Agreement therefore must fail. *French v. Gabriel,* 116 Wn2d 584, 594, 806 P.2d 1234 (1991).

Steele v. Lundgren, 85 Wn. App. 845, 935 P.2d 791 (1980) is distinguishable from this case in that the defendant in *Steele* did not assert

a defense of mandatory arbitration until twelve months had passed from the commencement of the lawsuit in that case. Here, in contrast, Dave's Answer was filed on October 4, 1999, only three months after Jerome Ives filed his Complaint. CP 714. More fundamentally, *Steele* did not involve any contractual provision similar to paragraph 2 of the Predispute Arbitration Agreement. *Steele* is therefore not controlling here.

Equally distinguishable is *Peterson v. Klinkert*, 56 Wn.2d 313, 252 P.2d 1025 (1960). The arbitration clause at issue in *Peterson* bears no resemblance to the Paragraph 2 of the Predispute Arbitration Agreement at issue in this case. Nor is there any indication in *Peterson* as to when the appellant first raised the issue of the arbitration clause in that case. Here, in contrast, Dave timely raised waiver in his Answer. CP 716.

Jerome Ives likewise misplaces reliance upon *Lake Washington School District v Mobile Modules Northwest*, 28 Wn. App. 59, 621 P.2d 791 (1980). BR at 18. In *Lake Washington School District*, the trial court's order denying the defendant's motion to stay proceedings pending arbitration was reversed on appeal. Division I of this Court concluded that waiver was peculiarly fact-specific, that waiver could not be found absent conduct inconsistent with any other intention but to forego a known right, that much of the delay by the defendant in requesting arbitration was not chargeable to the defendant, that the defendant's limited use of discovery

was not inconsistent with its right to compel arbitration, and that the defendant's three-month delay in moving to compel arbitration did not amount to waiver of the right to compel arbitration. 28 Wn. App. 61-64.

Nothing in *Lake Washington School District* supports the trial court's Conclusion of Law 35. In *Lake Washington*, the Court held that time which had elapsed due to the conduct of one party was held not to be evidence of waiver by the other party. 28 Wn. App. 63. In this case, while the trial court found in Finding 117 that the trial had twice been continued, the trial court did not find any part of that delay attributable to Dave. CP. CP 68.

Jerome Ives argues that Dave waived paragraph 2 of the Predispute Arbitration Agreement by engaging in discovery. BR at 18. Jerome Ives, as did the trial court, fails to address the defense of waiver in Paragraph 27 of Dave's Answer. CP 716. Jerome Ives fails to address that in *Lake Washington School District*, by engaging in discovery, the defendants did not thereby waive the affirmative defense of failure to arbitrate. 28 Wn. App 63. Jerome Ives also fails to address this Court's opinion in *Davidheiser v Pierce Co*, 92 Wn. App. 146, 960 P.2d 998, *review denied*, 137 Wn2d 1016, 978 P.2d 1097 (1999). In *Davidheiser*, this Court concluded that by having preserved in its answer the affirmative defense of insufficiency of service, Pierce County did not thereafter waive that

defense by engaging in discovery. 92 Wn. App 156. Jerome Ives likewise fails to address that in *Voice Link*, the defendant's participation in discovery did not constitute a waiver of its rights under the forum selection clause in that case. 86 Wn. App. 625-26. The trial court's Conclusion 35 therefore cannot be reconciled with *Lake Washington School District, Davidheiser,* or *Voice Link*

Jerome Ives argues that the parties cannot, by contract between themselves, deprive a court of personal jurisdiction. BR 19. Mr. Ives misplaces reliance upon *Washington Local Lodge No. 104 v. International Brotherhood of Boilermakers*, 28 Wn.2d 536, 183 P.2d 804 (1947). *Washington Local* involved the authority of the court to inquire into a financial controversy in a voluntary association. 28 Wn.2d 544-45. The case at bar involves no similar issue. *Washington Local* involved no language similar to that in Paragraph 2 of the Predispute Arbitration Agreement.

To the extent that *Washington Local* has any application here, it must be read in light of subsequent Washington decisions which routinely enforce forum selection clauses. *Voice Link, supra*; *Keystone Masonry, Inc. v. Garco Construction, Inc.*, --Wn. App. --, 147 P.3d 610 (2006); *Oltman v. Holland America Line USA, Inc.*, --Wn. App. --, 2006 WL 3544740 (2006); *Wilcox v Lexington Eye Institute*, 130 Wn. App. 234, 122

P.3d 729, 731 (2005); *Bank of America, N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91 (2001).

Jerome misplaces reliance upon *Bremen v. Zapata Off-Shore, Inc.*, 407 U. S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1973). BR at 19.[2] In *Bremen,* the district court, denied the defendant's motion to stay proceedings, despite a choice of forum clause which provided that any dispute arising must be heard before the London Court of Justice, and assumed jurisdiction over the entire case. The Court of Appeals affirmed, concluding that the parties' choice of forum clause violated public policy.

The Supreme Court reversed. The Court viewed the jurisdiction of the district court narrowly in the face of a choice of forum clause. "*The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.*" 407 U.S. 12. The Court concluded that the choice of forum clause should be given full effect, as the parties to such a complex international transaction desired a neutral forum to resolve disputes, that the clause was freely negotiated by the parties, that there was no evidence of fraud or overreaching, that the clause was central to the

[2] The U.S. Supreme Court has limited the application of *Bremen* in diversity cases, opting in favor of 28 U.S.C. § 1404 (a). *Stewart Organization, Inc. v. Ricoh Corporation*, 487 U.S. 22, 28-29, 101 L. Ed. 2d 22, 108 S. Ct. 2239 (1988). *See also,* C. Wright, A. Miller, E. Cooper 14D Federal Practice & Procedure Jurisdiction 3d § 3803.1

parties' goals, that the clause did not violate public policy, and that the chosen forum was not inconvenient to the parties. 407 U.S. 12-19. In *Bremen*, the Court also rejected the argument that the choice of forum clause should not be construed to provide an exclusive forum. 407 U.S. 20. Thus, under *Bremen*, the only jurisdiction the court had over the choice of forum clause in that case was to enforce it.

In light of the foregoing, Finding 118 and Conclusions 34, 35, and the remaining findings and conclusions, and the judgment should be reversed, and the case should be dismissed, with prejudice.

B. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS ON THE STATUTE OF LIMITATIONS

Jerome Ives argues that the statute of limitations accrued no earlier than July 9, 1996, the date of his appointment as personal representative of the Estate of Jerry Ives. BR at 21-22. Washington decisions reject the date of appointment of a personal representative as the date of accrual of a cause of action. *Dodson v. Continental Can Co.,* 159 Wash. 589, 294 P. 265 (1930). In *Dodson*, the Washington Supreme Court concluded that a rule measuring accrual of a cause of action based upon the date of appointment of a personal representative was inherently unreliable. 159 Wash. 596 (" '*...If the persons who are the designated beneficiaries of the right of action created may choose their own time for applying for the*

appointment of an administrator and consequently for setting the statute running, the two-year period of limitation so far as it applies to actions for wrongful death might as well have been omitted from the statute... '.(quoting Reading Co. v Koons, 271 U.S. 58, 70 L. Ed. 835 46 S. Ct. 405 (1926). *See also, Developments in the Law Statutes of Limitation,* 50 Harvard Law Review 1177, 1209 (1950)

Here, as in *Dodson,* it was within Jerome Ives' power to select the date of his appointment as personal representative of the Estate of Jerry Ives. Therefore, as in *Dodson*, that date did not mark the accrual of the Estate of Jerry Ives' claims against Dave.

White v. Johns-Manville Corp., 103 Wn.2d 344, 693 P.2d 687 (1985) does not compel a contrary conclusion here. While extending the discovery rule to claims under the wrongful death and general survival statutes, the Court in *White* distinguished *Dodson* as a pre-discovery rule decision, but did not alter *Dodson*'s rejection of the date of appointment of a personal representative as the date of accrual of an estate's cause of action. 103 Wn.2d 348-49. Therefore, *Dodson* compels rejection of Jerome Ives' argument.

Jerome Ives dismisses, without authority, Dave's remaining arguments on the statute of limitations. BR at 22. Mr. Ives' unsupported

argument should not be considered. RAP 10.3(a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives provides no counter argument to Dave's argument that the trial court erred in Findings 105, 107, 108,109, 110, and Conclusions 28, 29, 32, 33, by placing upon Dave the burden of proving when Jerome Ives' claims accrued for purposes of the discovery rule. BA at 46. Jerome Ives provides no authority on that issue contrary to *Douglass v. Stanger*, 101 Wn. App. 243, 2 P.3d 998 (2000), *Interlake Porsche-Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 728 P.2d 597, *review denied*, 107 Wn.2d 1022 (1987) or *Sherbeck v. Estate of Lyman*, 15 Wn. App. 866, 552 P.2d 1076 (1976).

Apart from his failed argument that the statute of limitations accrued upon his appointment as personal representative, Jerome Ives presents no contrary argument to Dave's argument that the trial court misapplied the discovery rule. BA at 42-48. Jerome presents no authority contrary to *First Maryland Lease Corp. v. Rothstein*, 72 Wn. App. 278, 864 P.2d 17 (1993), *Green c. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998), *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615, *review denied*, 143 Wn.2d 1006, 21 P.3d 290 (2001), *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1937) or *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 658 P. 42, *review denied*, 89 Wn.2d 1012 (1983).

Jerome Ives offers neither argument nor authority contrary to Dave's argument regarding Finding of Fact 111. BA at 49. Finding 111 is contradicted by Jerome Ives' testimony regarding the June 1996 meeting with Dave and the meeting with his family. RP II at 154-56, 165-66; RP III at 14. Finding 111 is therefore not supported by substantial evidence, and should be reversed. *Miles v. Miles*, 125 Wn. App. 64, 114 P. 3d 671 (2005).

C. CHALLENGED FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND DO NOT SUPPORT THE TRIAL COURT'S CONCLUSIONS.

Finding 33 provides, in pertinent part, that "[*a*]*nnuities have high commission rates for the salesperson.*" CP 56. Jerome Ives argues that it is immaterial whether annuities have high commissions. BR at 24. As Jerome Ives fails to cite any authority in support of his argument, Mr. Ives' unsupported argument should not be considered. RAP 10.3(a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives argues that a commission of five percent on the Skandia annuity sold to Jerry Ives was high by any standard. BR at 25. Once again, Jerome Ives' failure to support his argument with any authority or citation to the record precludes its consideration. RAP 10.3 (a) (5), (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives argues that there was no evidence that Jerry Ives could immediately make withdrawals from his Skandia Annuity. BR at 25. Jerome Ives overlooks the following evidence:

> Q: Well. Ordinarily annuities have time limits on how soon you can make withdrawals; do they not?
> A: This was immediate.

RP II at 38.

Jerome Ives attempts to minimize Mr. Carlson's closing argument in which he acknowledged that "Perhaps *Mr. Ives may have had access to some of that $20,000.*" RP III at 68; BR 25 n. 13. Mr. Carlson's acknowledgement is binding upon Jerome Ives. ER 801 (d) (2) (iii), (iv)[3]; *City of Seattle v. Richard Brockman Land Co.,* 8 Wn. App. 214, 215-16, 505 P.2d 168 (1973).

Jerome Ives offers a definition of liquidity, but once again fails to support his argument with citation to authority. BR at 25. Jerome Ives argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives offers text from various websites to explain the term "annuity date". BR 26 n. 14. Jerome Ives fails to provide any citation to

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[3] *A statement is not hearsay if-- ...The statement is offered against a party and is ...(iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party,*

the record for those websites. Jerome Ives argument should therefore not be considered. . RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809. Jerome Ives' citation to such sources outside the record amounts to an impermissible attempt to supplement the record without compliance with RAP 9.11 (a)[4]. Jerome Ives' cited references should therefore not be considered. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593-94, 849 P.2d 669 (1993). The websites cited by Mr. Ives address the term "annuity date" as it relates to an insurance annuity. The Skandia Annuity purchased by Jerry Ives, however, was not an insurance annuity, but instead was a variable annuity, which is a completely different investment vehicle. EX 103; RP II p. 39. . Jerome Ives' citation to those websites therefore warrants sanctions under RAP 10.7.[5]

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[4] The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

[5] If a party submits a brief that fails to comply with the requirements of Title 10, the appellate court, on its own initiative or on the motion of a party, may (1) order the brief returned for correction or replacement within a specified time, (2) order the brief stricken from the files with leave to file a new brief within a specified time, or (3) accept the brief. The appellate court will ordinarily impose sanctions on a party or counsel for a party who files a brief that fails to comply with these rules.

Jerome Ives argues that Dave's challenges to Findings 51, 68, 69. and 94, all of which address the issue of liquidity, are irrelevant because the trial court awarded damages on the Texas Keystone limited partnership because it was unsuitable for Jerry Ives, and that illiquidity is just a factor in determining whether an investment is unsuitable. BR at 27 n. 15. Once again, Jerome Ives fails to support his argument with either citation to the record or authority. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809. To the extent that it merits consideration here, Jerome Ives' argument conflicts with Conclusion 1, in which the trial court concluded that the Texas Keystone limited partnership investment was unsuitable in part because it caused the last of Jerry Ives' significant liquid funds to become illiquid. CP 68.

Jerome Ives argues that Dave and Michele's 1995 promissory note (EX 14) supports the trial court's Findings 51, 68, 69, and 94. BR at 27. Jerome Ives mischaracterizes the note by stating that it was not due and payable for 10 years. *Ibid.* In fact, the 1995 note was payable on the first day of each month in monthly installments of $996.74, commencing on August 1, 1995, and continuing until June 1, 2006. EX 14. Dave and Michele were current on their payments under the 1995 note. RP I at 94; RP II at 79. In Finding 80, the trial court found that as of the time of trial

Dave to be current on his monthly payments under the 1995 note. CP 63. The trial court did not find the 1995 note to be illiquid. Jerome Ives' argues that Jerry Ives could not have quickly and without cost converted the 1995 note to cash, but fails to cite to the record or authority. BR 27. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Mr. Carlson acknowledged in his closing argument that "[*t*]*he damages from the illiquidities appears not to have visited the victim during his lifetime. There's no evidence that he actually had a medical emergency, needed a new car, wanted to take a trip or needed access to the cash right then and there.*" RP III at 83. Mr. Carlson's acknowledgement is binding upon Jerome Ives. ER 801 (d) (2) (iii), (iv); *City of Seattle v. Richard Brockman Land Co.,* 8 Wn. App. 215-16. Findings 51, 68, 69, and 94 cannot be reconciled with Mr. Carlson's admission.

Finding 51 and Conclusion 1, that the Texas Keystone limited partnership was an unsuitable investment for Jerry Ives, are premised exclusively upon the fact that it exhausted Jerry Ives' liquid assets when he was 80 years old. CP 58, 68. As stated in the trial court's memorandum opinion, "*It goes without saying that the investment in Texas Keystone was an unsuitable investment for Mr. Ives. It depleted any*

emergency funds which he might have needed when he was 80 years of age." CP 356). However, according to Mr. Carlson, Jerry Ives suffered no damages from illiquidity of his investments during his lifetime, and, therefore, his estate has no claim for such damages against Dave under RCW 4.20.046[6], as that statute preserves only those claims that Jerry Ives could have maintained had he not died. *Woolridge v Woolett*, 96 Wn.2d 566, 662-63, 638 P.2d 566 (1981). It follows that Jerome Ives claim for the sale of the Texas Keystone limited partnership fails to state a claim upon which relief can be granted. RAP 2.5 (a) (2).[7]

Jerome Ives argues, regarding Finding 53, without citation to authority, that even if Jerry Ives had liquid assets after purchasing the Texas Keystone limited partnership interest, that Dave's conduct would still have constituted an unfair or deceptive act or practice, etc. BR at 31. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

In his discussion of Finding 53, Jerome Ives fails to address *Henery v. Robinson*, 67 Wn. App. 277, 291, 834 P.2d 1091, *review denied*, 120 Wn. 2d 1024, 844 P.2d 1018 (1003). In *Henery*, this Court ruled that

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[6] All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section...

[7] [A] party may raise the following claimed errors for the first time in the appellate court: ... failure to establish facts upon which relief can be granted,

"[*a*]*n appellate court will review the determination of whether a particular act is unfair or deceptive as a question of law.*" 67 Wn. App. 290.

Under *Henery,* "[*t*]*o be unfair or deceptive, conduct must have a tendency to deceive a substantial portion of the public.*" 67 Wn. App. 291. In Finding 51, the trial court found that the sale of the Texas Keystone limited partnership was unsuitable because it exhausted Jerry Ives liquid assets at a time when he was 80 years old. CP 58. Under the trial court's finding, the sale became unsuitable only because of the peculiar circumstances of Jerry Ives. The same limited partnership interest, if sold to another member of the public, could have been a suitable investment. Nor does the fact that Dave engaged in commercial transactions with others indicate that his activities have the potential for deceiving a substantial portion of the public. *Segal Company v. Amazon.Com*, 280 F. Supp. 2d 1229, 1233 (W. D. Wa. 2003). Thus, as in *Henery* and *Segal*, Jerome Ives failed to establish that the sale of the Texas Keystone limited partnership interest was an unfair or deceptive act.

The trial court's Finding 54, that Dave's recommendation of the Texas Keystone limited partnership interest to Jerry Ives caused injury to his business or property cannot be reconciled with Mr. Carlson's acknowledgment that Jerry Ives did not suffer damages from the illiquidity of that investment. RP III at 83. Jerome Ives is bound by Mr. Carlson's

acknowledgement. ER 801 (d) (2) (iii), (iv); *City of Seattle v. Richard Brockman Land Co.*, 8 Wn. App. 215-16.

Jerome Ives offers no argument in support of Finding 55.

Jerome Ives characterizes Finding 56 as a statement of the law. BR 34. If so, then Finding 55 is reviewable *de novo*. *Hegwine v. Longview Fibre Company*, 132 Wn. App. 546, 556, 132 P. 3d 789 (2006). Jerome Ives cites to the website of the North American Securities Administrators Association in support of Finding 56. BR at 34. That website should not be considered, as it is another attempt by him to evade compliance with RAP 9.11(a). *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 593-94. Jerome Ives' citation to such matters outside the record warrants sanction under RAP 10.7. Jerome Ives' reliance on an unidentified SEC rule adopted in 2003 and NASD Notice to Members 03-62 is misplaced. BR at 34-35. Neither authority establishes whether securities industry standards in effect in Washington on July 1, 1995 made it unethical for a securities salesperson to borrow money personally from a client. Jerome Ives reliance upon Consent Order (EX 80) is misplaced, as the order explicitly provides that Dave neither admits nor denies the findings and conclusions stated therein, and the order was entered without a hearing. EX 80.

Jerome Ives indulges in speculation that the trial court could have concluded that WAC 460-22B-090 was merely declarative of existing industry standards. BR at 36. Jerome Ives cites no part of the record or any authority to support such an argument. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives avoids any discussion of Dave's argument that to apply WAC 460-22B.090 to the promissory note executed on July 1, 1995 violates constitutional prohibition against impairment of the obligation of contracts. Washington Constitution Art. I § 23; *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 541, 546-47, 989 P.2d 1258, *review denied*, 141 Wn.2d 1006, 10 P.3d 1075 (2000), *cert. denied*, 543 U.S. 1000, 125 S. CT. 605, 160 L. Ed. 2d 458 (2004).

Jerome Ives' argument concerning Findings 74, 75, 76, 79, and 82 is unsupported by authority (BR at 37), and should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Dave's objections to Findings 74, 75, 76, 79, 82 and Conclusions 17 through 25 are based upon the language of the 1995 promissory note. EX 14. BA at 56-57. That note contains no language that obligates Dave or Michele to provide a deed of trust, let alone a first deed of trust. *Ibid.*

Jerome Ives points to no language in that note that obligates Dave or Michele to provide or record the deed of trust, or that the deed of trust securing the note is a first deed of trust. BR at 37-38. The Court must enforce the promissory note as written, not as Jerome Ives wishes it were written. *Warner v. Design and Build Homes, Inc.*, 128 Wn. App. 34, 41, 114 P.3d 664 (2005).

The trial court, as does Jerome Ives, apparently overlooked that Jerry Ives had experience with notes and deeds of trust, having taken such instruments from his relatives in connection with loans that he made to them. RP II at 128; EX 1; RP II at 137-38; EX 4 at 2.

Jerome Ives misplaces reliance upon Dave's two prior loans with Jerry Ives. BR at 37-38. Both the 1990 note and the 1991 note simply recite that "[*t*]*his note is secured by a DEED OF TRUST*". EX 7, 9. Neither note required Dave to provide the deed of trust or required that the deed of trust must be a first deed of trust. *Ibid.*

In entering Finding 82, the trial court, as does Jerome Ives, overlooked the character of the transaction between Dave and Jerry Ives. Dave's solicitation of a loan from Jerry Ives to purchase a home in Sequim bears no resemblance to the other financial transactions between Dave and Jerry. The purpose of that loan was to enable Dave to take a personal opportunity to obtain the property at a reduced price. RP II at 73-74. The

loan was accomplished with none of the paperwork that characterized the investments purchased by Jerry Ives through Dave. EX 27, 29.

Apart from citing Finding 81, Jerome Ives cites no part of the record or any authority in support of Finding 82. BR at 39. Finding 81 found only that Dave offered the loans as investments. CP 63. Finding 81 contains nothing to support Finding 82's finding that the loans were offered by Dave in his role as an investment professional. Finding 82 is therefore not supported by substantial evidence, and should be reversed. *Miles v. Miles*, 125 Wn. App. 64, 114 P.3d 671 (2005).114 P.3d 671 (2005).

In support of Findings 83 and 84, Jerome Ives advances his earlier failed arguments that the Skandia annuity and the personal loans were not liquid assets. BR at 39-40. To the contrary, Jerry Ives had access to the $20,000 in cash in his Skandia annuity. RP III at 68. The 1995 promissory note yielded Jerry Ives $996.74 in cash per month. EX 14. The 1995 promissory note was therefore not unsuitable, as having rendered Jerry Ives illiquid.

Jerome Ives argues that an investment need not exhaust an investor's liquid assets in order to be unsuitable, and that illiquidity is just one factor to be considered. BR at 40. Jerome Ives overlooks that his expert, Scott Rhodes, testified that the 1995 promissory note was

unsuitable because it was illiquid, but did not mention other factors RP I at 175/22-176/1.

Consideration of other factors does not render the 1995 promissory note unsuitable. The 1995 promissory note was not unsuitable for a person of Jerry Ives' age or financial circumstances, as that note produced a monthly payment nearly twice that of the payment under the 1991 modification of the 1990 note. EX 14, 11. The monthly payment on the 1995 note, together with Jerry Ives' other assets and sources of income, were adequate to meet Jerry Ives' needs during his lifetime. As noted by Mr. Carlson, "*There's no evidence that he actually had a medical emergency, needed a new car, wanted to take a trip or needed access to the cash right then and there.*" RP III at 83. It is uncontroverted that Dave made every payment on the note. RP III at 70.

The 1995 note was not inconsistent with Jerry Ives' investment objectives. In 1993, Jerry Ives represented that his investment objectives on the United Pacific Securities Client Data Form were "*speculation*" and "*income*". EX 27. The 1995 note produced substantial income for Jerry Ives. EX 14. The ten year term of that note coincided with Jerry Ives' efforts to leave his estate in trust to his grandchildren, great grandchildren and to charity. RP III at 35-36; EX 33.

In support of Finding 84, Jerome Ives argues, without citation to the record or to authority, that concentration of Jerry Ives' assets into a single investment was contrary to the rules of prudent investment diversification, and that the note bore below-market interest rates, exposing Ives to uncompensated risk. BR at 40. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

In support of Finding 84, Jerome Ives argues that the 1995 promissory note to Dave was high risk. BR at 40. Mr. Ives' argument is undermined by the fact that Dave made every payment on the 1995 note. RP III at 70.

Jerome Ives fails to support his argument concerning Finding 85 with either authority or citation to the record. BR at 40-41. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Finding 85 lacks substantial evidence to support it. Dave testified, as an expert on rules for securities sales persons, that NASD does not have a rule regarding loans between a broker and a client. RP II at 60, RP III at 95. Jerome Ives' securities expert, Scott Rhodes, did not testify as to any rule prohibiting a securities salesperson from borrowing money from a client. RP I at 150-206. Jerome Ives failed to produce any other evidence

of such a rule. WAC 460-22B-090 does not provide such evidence with respect to the 1995 promissory note, as that regulation was not effective until after the note was executed. To apply WAC 460-22B-090 to the 1995 promissory note will violate Washington Constitution Art. I § 23; *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 546-47. Finding 85 should therefore be reversed.

In his argument in support of Finding 87, Jerome Ives once again fails to address *Henery v. Robinson*, *supra.* BR at 41-42. In *Henery*, the plaintiffs' CPA claim failed because the defendant's statement, that the plaintiffs could "get into" a trailer for $500 down was made only once. 67 Wn. App. 291. The plaintiff therefore failed to establish a statement with the capacity to mislead a substantial portion of the public. *Ibid.* Dave's actions in borrowing money from Jerry Ives for a personal reason, was never again repeated with another client. RP II at 63, 66. Dave's actions in borrowing money from Jerry Ives therefore likewise lacked the capacity to mislead a substantial portion of the public. Finding 87 therefore is not supported by substantial evidence, and Jerome's Consumer Protection claim regarding the 1995 promissory note must also fail.

The fact that Dave engaged in commercial transactions with others does not indicate that his activities have the potential for deceiving a

substantial portion of the public. *Segal Company v. Amazon.Com*, 280 F. Supp. 2d 1233.

Jerome Ives argues, without citation to authority, that the fact that Dave had only borrowed from one client does not negate the evidence cited by Mr. Ives in support of Finding 87. BR at 41-42. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Findings 78 and 90 are not supported by substantial evidence. Dave testified that "*I agreed to have a shorter term on the note with higher payments so that the note could not exceed ten years in return for lowering the interest rate to 8 percent, which was still at or above the current rates in the area at the time, not Seattle, but here.*" RP I at 115. The interest rate on the 1995 promissory note was thus the result of a bargained for exchange. The interest rate is the same rate as that in RCW 21.20.430 (1) (b).

Jerome Ives offers no authority in support of Findings 78 and 90. BR at 47-48. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Conclusions 12, 16 and 26 are premised upon Dave's notes to Jerry Ives being securities. If Jerome Ives is to recover under RCW Chapter

21.20 for Dave's 1990 and 1995 notes to Jerry Ives, he must first establish that those notes were securities under that chapter. Conversely, if the promissory notes executed by Dave to Jerry Ives were not securities, then Jerome Ives has no claim under RCW 21.20 in connection with those notes. But the trial court entered no finding that any of the notes were securities. The absence of such a finding constitutes an implied negative finding against Jerome Ives on that issue. *Penberthy Electromelt International, Inc. v. United States Gypsum* Co., 38 Wn. App. 514, 518-19, 686 P.2d 1138 (1984).

Dave is not precluded from raising before this Court the issue whether Dave's promissory notes to Jerry Ives were securities, for if they are not securities, then Jerome Ives fails to state a claim under the Washington State Securities Act regarding the notes. RAP 2.5 (a) (2) *supra.*

Jerome Ives' arguments against *Reeves v. Ernst & Young*, 494 U.S. 56, 108 L. Ed. 2d 47, 110 S. Ct. 945 (1990) must fail. BR at 46. Washington courts routinely look to federal cases in interpreting the WSSA. *See, e.g., Helenius v Chelius*, 131 Wn. App. 421, 448, 120 P.3d 954 (2005).

The "family resemblance" test adopted in *Reeves* was followed in *Douglass v. Stanger,* 101 Wn. App. 243, 252-53, 2 P.3d 998 (2000). In

Douglass, the Court adopted *Reeves'* categorical exceptions from the definition of a security:

> ***"[T]ypes of notes that are not 'securities' include*** 'the note delivered in consumer financing, ***the note secured by a mortgage on a home,*** the short-term note secured by a lien on a small business or some of its assets, the note evidencing a "character" loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business.' " *Reves,* 494 U.S. at 65, 110 S.Ct. 945 (citing *Exchange Nat'l Bank v. Touche Ross & Co.,* 544 F.2d 1126, 1138 (2d Cir.1976)). (Emphasis added).

101 Wn. App 253 n. 1.

Dave's 1990 and 1991 notes were notes secured by a mortgage on Dave and Michele's home. EX 7, 8. 9. 11. Those notes are therefore categorically exempt from the definition of a security under the WSSA. *Stanger*, 131 Wn. App. 253 n.1. Dave's 1995 promissory note recites that it is secured by a deed of trust. EX 14. Dave's 1995 promissory note is therefore also categorically exempt from the definition of a security under the WSSA. *Stanger, supra.*

Alternatively, Dave's 1995 promissory note is exempt under the factors adopted in *Reeves* and *Stanger.* 101 Wn. App. 252-54. The 1995 promissory note was not commercially motivated. Unlike *Stanger*, there

was no investment agreement between Dave and Jerry Ives. Nor did Dave's 1995 promissory note involve a shopping center development, such as in *Stanger*. Instead, Dave's 1995 promissory note was part of the transaction in which Jerry Ives loaned money to Dave so that he could purchase a house. RP I at 70, 74, 75, 85, 86, 87, 88, 93. Dave's 1995 promissory note was never traded. Instead, it remained an asset of Jerry Ives' estate upon his death. EX 31. And, unlike the investment contract in *Stanger*, the 1995 promissory note did not entitle Jerry Ives to anything beyond the payment of the principal amount of the note with the stated interest. EX 14. Jerry Ives gained no interest in the property purchased by Dave and Michele with the money borrowed from Jerry Ives. In contrast, in *Stanger*, the investment contract in that case gave the expectation of return beyond simply interest from a promissory note. 131 Wn. App. 253-54. Thus, under the factors discussed in *Reeves* and *Stanger*, Dave's1995 promissory note is not a security.

In *Stanger*, the Court added an additional factor to the factors discussed in *Reeves*: protection of the investor. 131 Wn. App. 254. That factor is not present here, Jerry Ives is dead and Dave and Michele have fully paid the 1995 promissory note.

Jerome Ives misplaces reliance upon *Kinney v. Cook*, 130 Wn. App. 436, 123 P.3d 508 (2005). BR at 45. Dave's notes to Jerry Ives bear no resemblance to the corporate loan guarantees at issue in *Kinney.*

Dave's notes to Jerry Ives are not securities for another reason. In *Sauve v. K.C. Investments, Inc.*, 19 Wn. App. 659, 677 P.2d 599, *affirmed,* 91 Wn.2d 698, 501 P.2d 1207 (1979), the court distinguished between a "*risky loan*" and "*risk capital*". 19 Wn. App. 668. ("*We agree that where the borrower has shown... a "risky loan" instead of "risk capital" ... that the transaction will not involve a "security.* (citations omitted)"). Jerome Ives fails to make any distinction between a risky loan and a security under the WSSA.

Jerome Ives fails to provide either argument or authority in response to Dave's argument on Conclusion 17. BR at 47. Conclusion 17 penalizes Dave and Michele for failing to engage in the unauthorized practice of law, contrary to *Bowers v Transamerica Title Insurance Co.,* 100 Wn. 2d 581, 590, 675 P.2d 193 (1983).

Jerome Ives argues that the trial court's Conclusions 18 and 19 is supported by a partial failure of consideration. BR 47 n. 20. But in its Conclusions 18 and 19, the trial court did not conclude that there was a partial failure of consideration. CP 72. Jerome Ives misplaces reliance upon a dissenting opinion in *Shook v. Scott*, 56 Wn.2d 351, 367, 353 P.2d

431 (1980). BR 47 n. 20. *Shook* does not aid Jerome Ives, as in that case, the trial court's order of rescission of a contract to purchase land was reversed on appeal. 56 Wn. 2d 359-60.

Equally misplaced in Jerome Ives' reliance upon *Capital Savings & Loan Assn. v. Convey*, 175 Wash. 224, 27 P.2d 136 (1933). BR at 47 n. 20. In *Capital Savings*, the cold storage building purchased by the defendant suffered a partial collapse. The trial court's order granting rescission of that purchase was reversed on appeal, and the case was remanded with instructions to allow the defendant an abatement of $1,500 on the purchase price. 175 Wash. 229-30. The partial collapse of the building in *Capital Savings* has no parallel under the facts of this case. Nor does the abatement of the purchase price in *Capital Savings* bear any resemblance to the trial court's acceleration of Dave's 1995 promissory note in this case. *Capital Savings* is therefore not controlling here.

Jerome Ives argues that the trial court's acceleration of Dave's 1995 promissory note and the trial court's Judgment awarding an equitable lien and the lis pendens are moot. BR at 48. Once again, Jerome Ives fails to support his argument with authority. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives responds to Dave's argument that Jerome Ives has waived the right to rescind Dave's 1995 promissory note by accepting payments on the note for 10 years by arguing that accepting monthly payments is not inconsistent with simultaneously seeking to enforce the lien. BR at 48-49. Once again, Jerome Ives fails to support his argument with authority. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

In response to Dave's argument Findings Nos. 88, 89, 90, 91, 104 and Conclusions Nos. 16, 20, 26, 37 and Paragraphs 1d, 2d of the Judgment, Jerome Ives mischaracterizes Dave's argument by claiming that Dave contends that the Consumer Protection Act is preempted because securities sales are within a regulated industry. BR at 49. Dave makes no such argument. Instead, Dave argues that, by virtue of Paragraph 2 of the Consent Order[8] Dave's 1995 promissory note constitutes a "*transaction*" permitted by any other regulatory body or officer acting under statutory authority of the State of Washington, and therefore is exempt under RCW 19.86.170.

Jerome Ives argues that Washington decisions permit plaintiffs to pursue CPA claims arising from securities transactions. BR 49-50. While

[8] EX 80 at 4.

that may be true as a general proposition, it begs the question whether Dave's 1995 promissory note is a "transaction" permitted by any other regulatory body or officer within the meaning of RCW 19.86.170.

Jerome Ives misplaces reliance upon *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 795 P.2d 1143 (1990), *Reeves v Teuscher*, 881 F.2d 1495 (9th Cir. 1989), and *Burgess v. Premier Corp.*, 727 F.2d 826 (9th Cir. 1984). BR at 49-50. Neither *Schmidt* nor *Reeves* nor *Burgess* involved any issue whether a transaction was exempt under RCW 19.86.170.

Jerome Ives correctly argues that to be exempt under RCW 19.86.170, the activity must be affirmatively and specifically permitted. BR at 50. Jerome Ives, however, fails to recognize that Dave's 1995 promissory note is just such an activity by reason of Paragraph 2 of the Consent Order. EX 80 at 4.

Jerome Ives argues that Dave's 1995 promissory note is not exempt because the Securities Division did not approve the note until after the fact. BR at 50. Once again, Jerome Ives fails to support his argument with authority. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Contrary to Jerome Ives argument, it is Jerome Ives, not Dave, who misreads *Vogt v. Seattle First National Bank*, 117 Wn. 2d 541, 817 P.2d 1364 (1991) and *Miller v. U.S. Bank*, 72 Wn. App. 416, 865 P.2d 526 (1994). BR at 50. In *Vogt*, the Court did not decide on the ground of federal preemption. 117 Wn. 2d 553-54. Instead, the Court in *Vogt* ruled on the grounds of primary jurisdiction. 117 Wn.2d 554-57. The Court analyzed three factors:

> 1. The administrative agency has the authority to resolve issues that would be referred to it by the court;
> 2. The agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and
> 3. The claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that the danger exists that judicial action would conflict with the regulatory scheme. (Footnotes omitted).

117 Wn. 2d 554.

Similarly, in *Miller v. U. S. Bank*, the Court employed the same three factors in concluding that the plaintiff's Consumer Protection claim was barred by the doctrine of primary jurisdiction. 72 Wn. App. 421-22.

Applying the same factors to the case at bar compels the same conclusion as in *Miller*: Jerome Ive's CPA claims regarding Dave's note with Jerry Ives are barred by the doctrine of primary jurisdiction. The

Securities Division has the authority to resolve issues referred to it by the trial court. Under RCW 21.20.110, the Securities Division may investigate and take action against dishonest or unethical practices in the securities or commodities business[9]; may impose fines[10]; may order an accounting, restitution, and disgorgement, including interest at the legal rate[11]; and may charge costs, fees, and other expenses.[12] As in *Miller*, given the pervasive level of regulation of the securities industry[13], the Securities Division is uniquely qualified to regulate and resolve disputes between securities salespersons and their customers. Finally, the trial court's challenged findings, conclusion and judgment are in direct conflict with Paragraph 2 of the Consent Order. EX 80 at 4. Therefore, as in *Miller*, Jerome Ives' CPA claim regarding Dave's notes with Jerry Ives are barred by the doctrine of primary jurisdiction.

D. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION TO AMEND THEIR ANSWER TO INCLUDE THE DEFENSE OF FAILURE TO MITIGATE DAMAGES.

Jerome Ives once again fails to support with authority his argument regarding the trial court's denial of Dave and Michele's motion to amend their answer to conform to the evidence. BR at 52. Jerome Ives'

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[9] RCW 21,20.110 (1) (g).
[10] RCW 21,20.110 (4)
[11] RCW 21,20.110 (8)
[12] RCW 21,20.110 (7)
[13] WAC Ch. 460.

argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

E. THE TRIAL COURT ERRED IN AWARDING INTEREST.

In Paragraph 1a of the Judgment, the trial court calculated interest on the damages for the Texas Keystone investment from February 27, 2002, until the date of judgment, January 25, 2006. CP 48. Neither the trial court nor Jerome Ives have provided any explanation for awarding interest during the astonishing delay of 1427 days February 27, 2002, and the entry of judgment. Washington decisions do not permit a party to reap a windfall on interest by unreasonably delaying entry of a judgment. *Colonial Imports v. Carlton Northwest*, 83 Wn. App. 240-48, 921 P.2d 575 (1996); *Seattle First National Bank v. Washington Insurance Guaranty Insurance Association*, 94 Wn. App. 744, 760-65, 972 P.2d 1282 (1999). Nor can Paragraph 1a's calculation of interest from February 27, 2002 be reconciled with Finding 54, which found that Jerome Ives was entitled to interest at 8 percent on the purchase price of the Texas Keystone investment from February 18, 2003. CP 59. Jerome Ives offers no contrary argument or authority. The trial court's award of interest for that period therefore constitutes reversible error.

F. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS TO RESPONDENT.

In Conclusion 37, the trial court identified three grounds for its award of attorney fees to Jerome Ives: RCW Chapter 21.20, RCW Chapter 19.86, and Dave's 1995 promissory note. CP 75. As set forth in Paragraphs VI A through E of Dave and Michele's opening brief, and as set forth in Paragraphs A through E, above, the trial court's award of attorney fees to Jerome Ives is unsupportable.

RCW CH. 21.20 does not provide a basis for an award of attorney fees to Jerome Ives, because the court lacked jurisdiction over the parties under Paragraph 2 of the Predispute Agreement, because there was no violation of the WSSA with regard to the Texas Keystone investment, and because Jerome Ive's securities claims are barred by the statute of limitations. RCW 21.20 does not provide a basis for an award of attorney fees to Jerome Ives with regard to Dave's note to Jerry Ives because of Paragraph 2 of the Predispute Agreement, and because those notes are not securities, and because no provision of RCW Chapter 21.20 applies to Dave's borrowing money from Jerry Ives.

RCW Chapter 19.86 does not provide grounds for award of attorney fees to Jerome Ives with regard to either the Texas Keystone investment or Dave's notes to Jerry Ives because of Paragraph 2 of the

Predispute Agreement, and because Jerome Ives failed to establish all of the elements of a prima facie case under the CPA with regard to either the Texas Keystone investment or Dave's notes to Jerry Ives.

Dave's 1995 promissory note does not provide grounds for an award of attorney fees to Jerome Ives because of Paragraph 2 of the Predispute Agreement, and because there was no breach of any of those notes by Dave or Michele.

G. APPELLANTS REQUEST COSTS AND ATTORNEY FEES ON APPEAL.

Pursuant to RAP 14.1, Dave and Michele request an award of costs on appeal. Pursuant to RAP 18.1, RCW 4.84.330 and the 1995 note, Dave and Michele request an award of attorney fees on appeal. If Dave and Michele prevail on appeal on the 1995 note, an award of attorney fees is mandatory. *Singleton v Frost*, 108 Wn.2d 723, 727-28, 742 P.2d 1224 (1987).

II. RESPONSE TO CROSS-APPEAL

A. RESPONDENT IS NOT ENTITLED TO RECOVER ON THE OTHER SECURITIES CLAIMS.

As set forth in Paragraph I A above, Jerome Ives' claims may not be heard in this Court pursuant to Paragraph 2 of the Predispute Agreement. As set forth in Paragraph I B above, Jerome Ives' securities claims are barred by the statute of limitations.

Jerome Ives argues that the trial court erred in concluding in conclusion 3 that Jerry Ives investments in the Phoenix Leasing Cash Distribution Fund III, the Southwest Oil & Gas Investment Fund VIII, the Windsor Park Properties 6, and Southwest Oil & Gas Investment Fund XB were not unsuitable because Jerry Ives had sufficient liquidity for his circumstances following purchase of each such investment. BR at 54-57. Jerome Ives' claims regarding those investments are based upon the NASD Suitability Rule. BR at 55 and App 2. Jerome Ives provides no authority that a violation of the NASD Suitability Rule gives rise to a civil claim for damages. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

The sole authority cited by Jerome Ives in his cross-appeal, apart from his request for attorney fees, is *In Re: Jack Stein*, an unreported disciplinary proceeding before the National Association of Securities Dealers (NASD). BR at 57-60. Jerome Ives' citation to such unpublished authority is improper. RAP 10.4 (g), (h)[14]; *Johnson v Allstate Insurance Co.,* 126 Wn. App. 510, 519-20, 108 P.3d 1273 (2005); *Dwyer v. J.I.*

[14] (g) Citation Format. Citations should conform with the format prescribed by the Reporter of Decisions pursuant to GR 14(d). The format requirements of GR 14(a)-(b) do not apply to briefs filed in an appellate court.
(h) Unpublished Opinions. A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports.

Kislak Mortgage Corp., 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 445, 473, 45 P.3d 594 (2002).

Assuming, *arguendo*, that the NASD Suitability Rule provides a basis for a civil claim, Jerome Ives argues that the trial court erred by focusing on the liquidity factor. BR at 56. Jerome Ives fails to provide authority that the trial court could not consider just liquidity, or that the court was required to make its determination based upon all factors. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives argues that the trial court erred in concluding that Jerry Ives had sufficient liquidity following purchase of each of the investments listed in Conclusion 3. BR at 60-62. Jerome Ives overlooks Mr. Carlson's acknowledgment that Jerry Ives suffered no damage from illiquidity. RP III at 83. Mr. Carlson's acknowledgement is binding upon Jerome Ives. ER 801 (d) (2) (iii), (iv); *City of Seattle v. Richard Brockman Land Co.*, 8 Wn. App. 215-16. If Jerry Ives suffered no damages from illiquidity, then Jerome Ives is not a person aggrieved by the trial court's decision, and is not entitled to seek review. RAP 3.1 ("*Only an aggrieved party may seek review by the appellate court.*").

Jerome Ives argues that high commission securities were not suitable for Jerry Ives. BR at 62. Jerome Ives fails to support his argument with authority. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives alludes to a world of alternative investments that did not take 8% off the top. BR at 62. Jerome Ives fails to provide any reference to the record. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives argues that the limited partnerships failed to provide regular income. BR at 63-64. Jerome Ives fails to support his argument with authority. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809.

Jerome Ives argues that the limited partnerships were selected to enable Dave to pocket a rich 8% commission every time he foisted one of them off on the trusting elderly Mr. Ives. BR at 64. Jerome Ives fails to provide either citation to the record or authority to support his argument. Jerome Ives' argument should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 809. Jerome

Ives fails to identify which investment paid an 8 percent commission, who paid the commission or who received the commission. Dave testified that, with regard to the Southwest Oil and Gas Income Fund VIII-A, Dave's broker received an eight percent commission and paid Dave a portion thereof. RP I at 60-61. Jerome Ives' argument is therefore patently misleading and warrants sanctions under RAP 10.7. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 593-94.

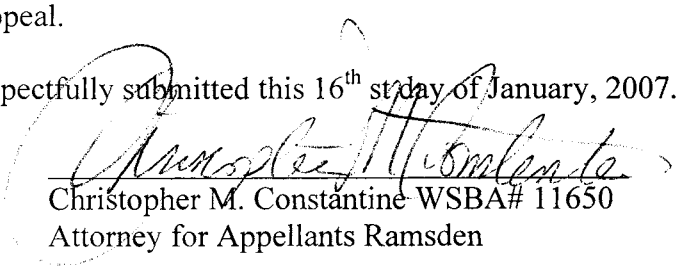
B. RESPONDENT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES OR COSTS ON APPEAL.

Jerome Ives' request for attorney fees and costs on appeal should be denied. As more fully set forth in Paragraph 1F above, neither RCW Chapter 21.20, RCW Chapter 19.86, nor Dave's 1995 promissory note support an award of attorney fees or costs to Jerome Ives on appeal.

II. CONCLUSION

The trial court's findings, conclusions, judgment and award of costs and attorney fees should be reversed, and Respondent's claims should be dismissed. Appellants should be awarded costs and reasonable attorney fees on appeal.

Respectfully submitted this 16th st day of January, 2007.



Christopher M. Constantine WSBA# 11650
Attorney for Appellants Ramsden

III. CERTIFICATE OF MAILING

I, Christopher M. Constantine, hereby certify that on the 17th day of January 2007, a true and correct copy of APPELLANTS' REPLY BRIEF was served by first-class mail, postage pre-paid, upon Respondent Jerome C. Ives's counsel of record:

Carl J. Carlson
Carlson & Dennett, P.S.
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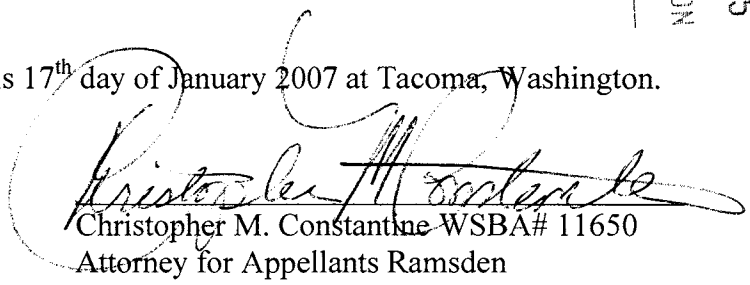
Dated this 17th day of January 2007 at Tacoma, Washington.



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Reply Brief Ramsden.kl