FILED
JUN 02 2016
WASHINGTON STATE
SUPREME COURT

SC#93183-6

NO. 72597-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Cause No. 08-2-00035-1)

FILED
May 19, 2016
Court of Appeals
Division I
State of Washington

STANLEY SMITH,

Appellant,

vs.

TERRY MARTIN and M&M TECHNOLOGIES, INC.,

Petitioners/Respondents.

PETITION FOR REVIEW

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Bethany C. Allen, WSBA #41180
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May 19, 2016

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I – INTRODUCTION

After a five-day trial, the trial court entered sixty-two (62) findings of facts. See Appendix C. On appeal, Mr. Smith made two specific assignments of error, titled assignments A and B. See Appendix H. In his Assignment of Error A, Smith assigned error to "paragraphs" 3.21, 3.22, 3.23 and 3.24 of CP 125. In his Assignment of Error B, Smith assigned error to "paragraphs" 3.09, 3.45, 3.47, 4.02 and 5.03 of CP 125.

Assuming for the purposes of this appeal, Smith correctly appealed the trial court's findings of facts 3.09, 3.21, 3.22, 3.23, 3.24, 3.45, 3.47, 4.02 and 5.03, and he did not, Smith failed to assign error to more than fifty (50) other findings of fact, including, but not limited to: 1) M&M Technologies (M&M) and Stan Smith's (Smith) April 11, 2007, License Agreement is a valid contract, F/F 3.01; 2) M&M and Smith's April 11, 2007, Option Agreement is a valid contract, F/F 3.02; 3) the License Agreement and Option Agreement are enforceable agreements, F/F 3.06, 3.07; 4) the terms of the Agreements were negotiated after full disclosure of Martin and M&M to Smith of all information known to them regarding the SEC matter, F/F 3.19; 5) neither Martin nor M&M engaged in any action that prohibited M&M from enforcing the April 11, 2007 Agreements, F/F 3.04; 6) on May 28, 2007, Smith was aware of the SEC

Complaint, F/F 3.40; 7) an Agreement prepared by Smith after May 28, 2007, demonstrated that Smith was still willing to go forward with the Agreements, F/F 3.41; and, 8) M&M prevailed on its breach of contract claims against Smith, F/F 4.01.

The Court of Appeals decision failed to accept the unchallenged findings of the trial court as verities and is in clear conflict with the decisions of this Court. *Mueller v. Wells*, 185 Wn.2d 1, 367 P.3d 580 (2016).

After failing to accept the unchallenged findings as factually true, the Court of Appeals decision erroneously decided the 2007 Agreements are void. This legal conclusion, ignores the following unchallenged findings of fact: 1) on March 28, 2007, M&M had fully disclosed all information known by Martin and M&M related to the SEC matter, F/F 3.19; 2) on March 15, 2007, Martin and M&M disclosed to Smith that it was the subject of an SEC investigation, while not yet a relief defendant, both may be made a relief defendant, and both may be required to repay the government a yet undetermined amount of money, F/F 3.18; 3) neither Martin nor M&M were in bad faith, F/F 4.04; 4) neither Martin nor M&M were involved in fraud, F/F 4.05; and, 5) Smith was fully informed of the SEC matters before signing the contracts, what Smith was told about the

SEC matter was true, and if Smith needed additional information he had the duty to contact the SEC, F/F 4.06.

Presently, this Court holds that a contract is void only if a warranty, statement or representation involves a "false and fraudulent misrepresentation." *Devenny v. Automobile Owners' Interinsurance Ass'n of Washington*, 124 Wash. 453, 214 P. 833 (1923). If *Devenny* is no longer the law in Washington, this Court, not the Court of Appeals should change the law.

On appeal, Smith's attempt to challenge any finding of fact is procedurally incorrect. RAP 10.3(g). After his assignment(s) of error, the term "finding of fact" cannot be found in Smith's Opening Brief. Smith's Statement of Facts and Argument sections contain no reference to any finding of fact. Smith's conclusion simply reads "the trial court's finding that M & M did not breach paragraph 12.1(g) of the License Agreement should be reversed . . ." The Court of Appeals decision references only finding 3.22 in footnote 30, at page 9, as "Finding of Fact 3.22, Clerk's Papers at 14."

The Court of Appeals decision relies on evidence which not before the trial court, Exhibit 38. While Exhibit 38, may be the SEC's Complaint, there is no evidence the document was in existence prior to its service upon Martin in May 2007. Smith offered and the trial court admitted the document for the limited purpose of notice, in May, to Martin of an SEC claim. Exhibit 38 is otherwise an inadmissible hearsay document.

Notwithstanding, the Court of Appeals made its own, unsupported, "findings of fact" that (1) the Complaint constituted a "claim" that Martin and M&M were obligated to disclose to Smith in April of 2007, when the parties executed their contracts; and (2) the failure to disclose had "a material adverse effect" on Smith. Each of such Court of Appeal's "findings of fact" ignores the trial court's unchallenged findings of fact, including F/F 3.40 and 3.41. In making such "findings of fact" the Court of Appeal also ignored this Court's holding in *Mueller v. Wells*, 185 Wn.2d 1, which forbids appellate courts from making findings of fact.

II – IDENTITY OF PETITIONER(S)

Petitioners M&M Technologies, Inc. ("M&M"), a Washington corporation, and Terry Martin ("Martin") are the persons filing the petition. Petitioners were the Respondents in the Court of Appeals.

III – CITATION TO THE COURT OF APPEALS DECISION

On February 8, 2016, the Court of Appeals issued its published opinion, *Martin v. Smith*, 192 Wn.App. 527, 368 P.3d 227 (Div. 1, 2016).

Appendix A. On April 19, 2016, Petitioners'/Respondents' Motion for Reconsideration was denied. Appendix B.

IV - ISSUES PRESENTED FOR REVIEW

1. May the Court of Appeals ignore unchallenged findings of fact, which are verities on appeal, which contradict with the only two findings addressed and reversed? [No.]

2. May the Court of Appeals void a contract for a breach of warranty without a finding of fraud or an intent to deceive, as required by *Devenny*? [No.]

3. May the Court of Appeals act as a fact finder, and consider evidence that is not part of the record, Exhibit 38, to establish that a "claim" existed prior to the execution of the Agreements? [No.]

V – STATEMENT OF THE CASE

In early 2007, M&M needed cash. Its business plan disclosed that M&M projected, for 2007, operating costs and expenses of $28,000,000, to develop and market its EVERSEAL Technology. M&M projected a loss of $22,000,000 for 2007. RP 247:14–248:2. The business plan also projected the need for $39,000,000 in 2008, with an expected loss of $13,670,000. Exh. 32; RP 306:21–308:5. Martin gave Smith copies of M&M's business plan. *Id.*

In March of 2007, Smith and M&M began discussing terms and conditions of a business relationship in the development and marketing of the EVERSEAL Technology. CP 8, 13; F/F 3.16, 3.17; RP 68, 145-46; Exh. 1, 2, 3. On March 15, 2007, before Smith paid any money to M&M, M&M and Smith . . .

> met and discussed their pending business arrangement{s) and certain confidential intellectual property. At this meeting the following information was disclosed to Smith:
>
> A. M&M Technologies was subject to an investigation by the Securities and Exchange Commission (SEC) regarding its business relationships with GEM Manufacturing, Inc. (GEM), Mac Stevenson and/or International Fiduciary Corporation, S.A (IFC).
>
> B. M&M Technologies, while not a relief defendant at the time, had the potential of becoming a relief defendant in the SEC action;
>
> C. The interruption of M&M Technologies' business relationship with GEM, caused by the SEC investigation, had created a cash flow problem or crunch for M&M Technologies; and,
>
> D. M&M Technologies may be required to repay the U.S. government an undetermined amount.

CP 13; F/F 3.18. Smith did not assign error to F/F 3.18. App. Opening Brief. These findings are verities on appeal. They are supported by substantial evidence. RP 208-09, 218:10-15, RP 355-56; Exh. 22.

Between March 2007 and April 11, 2007, Smith and M&M prepared, drafted, and discussed a number of documents, including a *Letter of Intent*, *Confidentiality Agreement*, and *Share Certificate*. Exh. 7, 12, 29. On April 11, 2007, Smith and M&M signed a *License Agreement.* The *License Agreement* required Smith to pay M&M FIVE MILLION DOLLARS ($5,000,000) upon signing the *License Agreement*. Exh. 1. Smith paid M&M only $500,000. CP 15; F/F 3.25; RP 280-289; Exh. 10. In April of 2007, Smith informed M&M that Smith's family "were billionaires" and the remaining $4,500,000 could and would be paid immediately ("very quickly"). RP 175-76, 169:21 – 170:1.

On April 11, 2007, Smith and M&M also signed an *Option Agreement.* Exh. 2. Smith paid $100,000 for the options. CP 15; F/F 3.27; Exh. 2; RP 171. Smith never exercised any options granted. CP 15; F/F 3.29. The *Option Agreement* provided that M&M would not be required to return the $100,000 to Smith.[1]

The *License Agreement* contained the following warranty or representation: "the Warranting Party is not presently the subject of, nor the proponent of, any claim that would have a material adverse effect on the other Party." Exh. 1. On April 11, 2007, neither M&M nor Martin

[1] "7.1 Upon termination of the Option Agreement, other than as a result of the exercise of the Option: . . . M&M . . . shall not be required to return to SS any amounts paid by SS to M&M . . . pursuant to the Option Agreement. . . . 8. . . .In no event shall either Party be liable to the other Party for indirect, incidental, consequential, exemplary or punitive damages for any breach of any provision of this Agreement or rising out of the relationship established by this Agreement." Exh. 2.

had any knowledge of any Complaint or summons being issued in any court against them. RP 174:7-11.

In May of 2007, Martin was notified of a SEC claim against him and M&M. RP 173:13-21, 259:17. When he was served with the SEC Complaint, Martin advised Smith of the claim. RP 173. Smith offered the trial court no evidence of an SEC Summons or Complaint as of April 11, 2007. Exhibit 38, as offered and admitted, does not establish that an SEC Complaint (claim) existed on April 11, 2007. Exhibit 38 was offered and admitted "for the limited purpose of notice" to Martin, in May 2007, of a claim.

> MR. SHEPHERD: Well, they've -- in their trial brief, I read their trial brief differently than that argument whether he had notice or not. It depends on whether the suit was actually in existence at this time.
> THE COURT: It seems to me if someone is aware a Complaint is or may be filed, they have some notice, and I think that's the issue before this Court, whether there's notice or not, and what kind of notice it is.
> MR. SHEPHERD: Yeah.
> THE COURT: Which you can address with redirect.
> **MR. KARLBERG: All right. All right. With that in mind, is Exhibit 38 admitted for the limited purpose of notice?**
> **THE COURT: I will admit it for limited purposes.**

RP 262. (Emphasis added.) Smith did not appeal the trial court's ruling on the limited relevancy of Exhibit 38. RP 262; Appendix H. On May 28, 2007, Smith's CPA told him that the SEC had filed a federal lawsuit against M&M. CP 16; F/F 3.40; RP 88:3-10. After learning of the SEC Complaint from Martin and his CPA, Smith did not complain to M&M or Martin about the SEC matters. In 2007, Smith did not attempt to rescind or void the *License Agreement* or any other agreement.

In another finding that was not assigned error on appeal, the trial court determined that Smith's actions after May 28, 2007, demonstrated that Smith (through NuPower) was willing to go forward with the agreements. CP 16; F/F 3.41; Exh. 6. On June 1, 2007, Smith, in violation of the *License Agreement*, assigned his rights and interests in the EVERSEAL Technology to NuPower Technologies, LLC (NuPower). *Id.* The *License Agreement* provided that the agreement could not be assigned without the prior written consent of M&M. Ex. 1, ¶ 19.1. Martin, on behalf of M&M, refused to approve the assignment. Martin asked Smith to delete paragraph 3 of the assignment before M&M would approve the assignment(s) to NuPower.[2] Exh. 6; RP 172:10-21.

The *Research, Development & Testing Agreement* (the *R&D Agreement*) required Smith to begin making monthly payments to M&M of $110,000. Exh. 3. On appeal, Smith did not assign error to any of the

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[2] "M&M Technologies hereby acknowledges the assignment as set forth herein, accepts the same and aggress that it will hereafter look only to Assignee for performance of the obligations set forth in the Documents." Exh. 6 ¶ 3. See Appendix F.

trial court's findings of fact related to the *R&D Agreement*. App. Opening Brief. The *R&D Agreement* was a valid and enforceable agreement. CP 10, 12; F/F 3.02, 3.08. Smith made no payment on the *R&D Agreement*. CP 16; F/F 3.36. Smith repudiated the *R&D Agreement* on October 1, 2007. CP; 17; F/F 3.44; Ex. 24. As of October 2007, Smith owed M&M $660,000 on the *R&D Agreement*. Before April 11, 2007, and after disclosing the $56 million needed in the next two years and $35 million in expected losses, M&M believed Smith understood the importance of Smith's $5,000,000 immediate payment and $110,000 monthly payments. RP 306:21-308:5.

Between June 1, 2007, and October 1, 2007, Smith, did not write, call or complain to M&M about the SEC Complaint against M&M. In October of 2007, NuPower sued M&M and Martin. Exh. 24. In its Complaint, NuPower admitted Smith had an obligation to pay M&M $110,000 per month under the *R&D Agreement*. Exh. 24 ¶ 2.3. NuPower alleged that Smith had a verbal agreement with M&M which modified the *R&D Agreement*. *Id.* In its Complaint, NuPower alleged Smith's $600,000 payed to M&M was pursuant to the *R&D Agreement*. Exh. 3, ¶ 2.1. At trial, Smith testified that the NuPower's allocations of payments on the *R&D Agreement* was not true. RP 471:19-472:19.

In its Complaint, NuPower falsely alleged that the SEC had secured a judgment against M&M for $25,008,472.41, that M&M's assets were seized by the SEC, and that Martin was involved in fraud. Exh. 24, ¶ 2.6. At trial, Smith admitted that NuPower had no basis to make any of these false allegations. RP 484:1-485:10.

NuPower's Complaint disclosed that NuPower intended to market securities (NuPower stock) to raise the money due to M&M from Smith. Exh. 24 ¶ 2.6. As of June 1, 2007, Smith had not asked either his accountant or lawyer if Smith's plan to solicit investors through NuPower would be a violation of Washington or federal law. RP 487:17-488:7; Exh. 13. NuPower's Complaint did not seek to rescind, revoke or void any contract. To the contrary, NuPower's Complaint alleged the execution of and binding effect of three contracts, a breach of those contracts by M&M, and a right to damages for the alleged breaches. Exh. 24, ¶¶ 2.1, 3.1, 10.

On January 4, 2008, M&M sued Smith for breach of all three Agreements. CP 43, 47 ¶¶ 19, 20. In its Complaint, M&M alleged that Smith and NuPower were wrongfully attempting to acquire or exert ownership or control over the EVERSEAL Technology. CP 47 ¶ 21. On April 1, 2008, Smith and NuPower answered and counterclaimed against

M&M and Martin. CP 70. Smith's counterclaims included an allegation of breach of contract. Smith, in a verified pleading, alleged the agreements the Court of Appeals voided were valid contracts, breached by M&M, for which Smith was entitled to damages. *Id.*

In December 2011, Smith testified that in 2011 NuPower "owned" M&M's EVERSEAL Technology. RP 66:7-67:22; Exh. 9, 25; Appendix G. At that time, Smith owed M&M more than $10,000,000.

In their 2008 counterclaim, Smith and NuPower alleged as follows regarding <u>their</u> breach of contract/warranty claim:

- that M&M breached the three Agreements **"when they failed to meet their end of the bargain in developing the product, producing marketing material, applying invested funds into M&M Technologies, Inc. and the technology and being a solvent entity capable of securing investment funding."**
- that M&M had breached the claim warranty **by its "failure to disclose the pending claim and investigation."**

CP 77 ¶¶ 4.1, 5.1. (Emphasis added.)

As discussed above, at page 5, Smith did not assign error to F/F 3.18. Also, Smith did not assign error to trial court's finding of fact that prior to April 11, 2007, M&M and Martin had fully disclosed to Smith all information they knew regarding the SEC investigation. CP 14; F/F 3.19. This finding is supported by substantial evidence. RP 208-09, 355-56; Exh. 22. The fact of M&M's full disclosure is a verity on appeal. Smith's breach of contract allegations were related to alleged fraud and intentional or negligent misrepresentation regarding the SEC investigation. CP 70. Smith did not assign error to the trial court finding that the information provided by M&M placed a duty on Smith to conduct his own inquiry into the status of the SEC investigation if he had any concerns. CP 19; F/F 4.06(D). Again, this finding is a verity on appeal.

Three months after Smith's answer and counterclaim's were filed and served, M&M, and three other relief defendants, settled the SEC Complaint against the four of them for $633,867.19 collectively. Exh. 23. At that time, Smith owed M&M more than $6,000,000.

VI – ARGUMENT[3]

In the trial court, Smith did not argue that his breach of the warranty claim, if successful, voided any contract. To the contrary, Smith argued it was Smith's fraud claim that allowed the trial court to void the contracts. RP 520. In the trial court, Smith did not argue that his breach of the warranty claim, if successful, made any contract voidable. To the contrary, Smith argued to the trial court it was Smith's misrepresentation claim that made the contract(s) voidable. RP 528-530.

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[3] The criteria governing acceptance of review by this Court are set forth in RAP 13.4(b).

Smith, in closing, did not argue the law or facts the Court of Appeals relied on in its Decision; instead, Smith argued credibility. Smith argued that in order to believe the SEC matter was fully disclosed, the trial court would need to determine Smith a fool. RP 529-30. Smith argued that he was not a fool and if M&M had disclosed the SEC investigation, Smith would have understood the significance of the SEC investigation and he would not have "done the deal." *Id.*

Smith's above arguments failed at the trial court level. Until 2011, Smith made no effort to void the agreements. Smith's efforts were spent attempting to retain the full benefits of the agreements for his corporation, NuPower, while avoiding any personal liability for his obligations under the agreements. He was not successful, so at trial years later, under fraud and misrepresentation, he attempted to void the agreements.

Smith and NuPower, on appeal, did not assign error to F/F 4.06, where the trial court specifically found:

> 4.06 With regard to **Smith's claims of fraud and misrepresentation the Court finds specifically** that:
>
> A. Martin and M&M Technologies informed Smith of all they knew about the SEC action at the time of the disclosures and at the time of the contracting;
>
> B. A fact cannot be false if it is true, and when the SEC matters were disclosed by Martin and M&M Technologies the facts, as disclosed, were true;

> C. Martin and M&M Technologies provided all the information they had, including the business plan, the SEC investigation, and their need for immediate money; . . . .

F/F 4.06; CP 18-19. (Emphasis added.) These findings, which are verities on appeal, are supported by substantial evidence. RP 208-09, 355-56; Exh. 22. "Unchallenged findings of fact are verities on appeal." *In re A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015).

> When the trial court enters findings of fact and conclusions of law, our review is limited to determining if the findings of fact are supported by substantial evidence and if the findings of fact support the conclusions of law. *Douglas v. Visser,* 173 Wash.App. 823, 829, 295 P.3d 800 (2013). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the declared premise. *Id.* We review all reasonable inferences in the light most favorable to the prevailing party. *Jensen v. Lake Jane Estates,* 165 Wash.App. 100, 104, 267 P.3d 435 (2011). Though the trier of fact is free to believe or disbelieve any evidence presented at trial, we do not hear or weigh evidence, find facts, or substitute our opinions for those of the trier of fact. *Id.* at 105, 267 P.3d 435. Unchallenged findings of fact are verities on appeal. *Id.*

Top Line Builders, Inc. v. Bovenkamp, 179 Wn.App. 794, 803-04, 320 P.3d 130 (Div. 1, 2014). In his opening brief, Smith appealed only findings 3.21, 3.22, 3.23 and 3.24, calling them paragraphs and without assigning any specific assignment of error to any. Appendix H. Smith's argument regarding any finding was: "the trial court's finding that M&M did not breach paragraph 12.1(g) of the License Agreement should be reversed . . ." App. Opening Brief, 17. The Court of Appeals incorrectly determined that the trial court's conclusions of law were erroneous while finding that only one trial court finding of fact, 3.22, was not supported by substantial evidence. This is error.

> [T]he appellate court's role is to review findings supporting the conclusions the trial court *did* reach, not to look for evidence supporting an alternate conclusion the court *could have* reached. Wells does not challenge any of the trial court's findings or offer any evidence disputing the presence of the *Dean* factors, but selectively restates the trial court's findings to support her alternative theory for Barnes' will. While Wells' story may be persuasive in isolation, we must defer to the weight given to all the evidence by the trial court and its credibility assessment that the facts Wells points to do not balance the scales against the overwhelming evidence of undue influence.

Mueller v. Wells, 185 Wn.2d 1, 15-16, 367 P.3d 580 (2016). On appeal, Smith is not allowed to make new arguments, use evidence not offered or admitted for the truth of the matter asserted, or fail to appeal over 50 findings of fact which support the trial court's conclusions of law and succeed. If the trial court erred, and it did not, Smith invited the error. Under the doctrine of invited error, a party who sets up an error at trial cannot claim it as error on appeal. *Angelo Property Co., LP v. Hafiz*, 167 Wn.App 789, 823, 274 P.3d 1075 (Div. 2, 2012).

1. **The contents of Exhibit 38 were improperly considered by the Court of Appeals in conflict with Washington Supreme Court precedent.**

Trial Exhibit 38 was offered for the limited purpose to show that Martin and M&M received notice, in May, of an SEC Complaint. It could not be considered by the trial court or the Court of Appeals to establish that a claim existed prior to April 11, 2007.

> As recently stated in 5 K. Tegland, Wash.Prac., *Evidence* § 23, at 86-87 (3rd ed. 1989):
>
> > In many trial situations, evidence may be admissible for one purpose but inadmissible for another purpose. Hearsay, for example, may be inadmissible to prove the truth of the matter asserted but admissible for the more limited purpose of proving notice, state of mind, or the like.
>
> (Footnote omitted.) Here, the evidence was used for the limited purpose of explaining the basis for Mr. Tillett's statement to the police, not to prove the truth of the matter asserted.

State v. Lass, 55 Wn.App. 300, 303-04, 777 P.2d 539 (Div. 3, 1989).

Exhibit 38 could not be considered by the trial court or the Court of Appeals to establish that the Complaint had a material adverse effect on M&M's ability to perform its obligations under the *License Agreement.* Exhibit 38, including the alleged date, signature or any other content, was not offered under any hearsay exception. When offered only for notice, it is not hearsay because it is not offered for the truth of the matter asserted.

State v. Williams, 85 Wn.App. 271, 280, 932 P.2d 665 (Div. 2, 1997). The Court of Appeals published decision incorrectly relies upon facts not before the trial court and not in the record on appeal.

A trial court cannot be found in error by the Court of Appeals for failing to find a fact that was not part of the record or in evidence. "We first note the oft-repeated rule that cases on appeal are decided only from the record, and '(i)f the evidence is not in the record it will not be considered.' State v. Wilson, 75 Wn.2d 329, 332, 450 P.2d 971, 973 (1969)." *Grobe v. Valley Garbage Service, Inc.*, 87 Wn.2d 217, 228-29, 551 P.2d 748 (1976). Again, Smith did not take exception to the limited purpose and did not appeal the trial court evidentiary ruling.[4] If the record is insufficient to raise a legal question, the court cannot reverse on that issue. *Fransioli v. Brue*, 4 Wash. 124, 129, 29 P. 928 (1892).

2. The Court of Appeals decision incorrectly relies on *Miller* and is in conflict with *Devenny*.

In the trial court, Smith did not brief or argue the case erroneously relied upon by the Court of Appeals. *Miller v. Commercial Union Assurance Co.*, 69 Wash. 529, 125 P. 782 (1912). Smith did argue that the

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[4] In fact, Smith knowing it was inadmissible hearsay, only offered Exhibit 38 for notice.

warranty, which as written, required the SEC Complaint to "have a material adverse effect" on Smith. In closing Smith argued:

> This could have been brought as a simple breach of warranty case, one that didn't require evidence of failure to disclose, didn't require the Court's assessment of credibility. The Court would just have to determine the meaning of the word "claim" meant in the context of the warranty language of paragraph 12 . . . . The Court could have just looked at whether the SEC's assertion that, that M&M as the relief defendant rose to the level of a claim. Did the SEC claim have a material adverse effect on Mr. Smith? . . . . If so, what's the remedy or the measure of damages?

RP 515-516. Smith then argued that he brought the fraud and misrepresentation claims to avoid the contract. RP 520, 528.

Miller was decided well before the Restatement (Second) of Contracts. It has been limited to its facts. *Devenny v. Automobile Owners' Interinsurance Ass'n of Washington*, 124 Wash. 453, 214 P. 833 (1923). *Devenny*, after examining *Miller*, held in order to void a policy for breach of warranty, the representation must not only be false, but also be intended to deceive. *Id.* at 454. *See also*, *Brigham v. Mutual Life Ins. Co. of New York*, 95 Wash. 196, 199, 163 P. 380 (1917). Washington common law changed well before the Restatement (Second) of Contracts. In 1918, the weight of authority held that a party to a contract cannot, in the absence of fraud, void or rescind a contract; one's remedy is damages. *Sevier v. Hopkins*, 101 Wash. 404, 407-06, 172 P. 550 (1918).

VII – CONCLUSION

The result on appeal is a published decision that is contrary to the well-reasoned and sound decisions of this Court. The published opinion expresses two flawed concepts (1) that the Court of Appeals may rely on evidence that is not part of the record and (2) that the Court of Appeals may ignore unchallenged findings of fact that are verities on appeal. Further, it allows courts to void agreements for breach of representations or warranties without a finding of fraud or deceit. The published decision, which instructs trial courts to void negotiated written contracts upon a breach of warranty, without a finding of fraud or deceit, will create chaos in contract litigation.

For the foregoing reasons, this Court should accept review in this matter, reverse the Court of Appeals, Division One, and affirm the trial court's findings of fact and conclusions of law.

DATED THIS 19th day of May 2016.

Douglas R. Shepherd

Douglas R. Shepherd, WSBA #9514
Bethany C. Allen, WSBA #41180
Kyle S. Mitchell, WSBA #47344
Of Attorneys for Petitioners

DECLARATION OF SERVICE

I, Jen Petersen, declare that on May 19, 2016, I caused to be served a copy of the foregoing: **Petition for Review,** in the above matter, on the following person, at the following address, in the manner described:

Kenneth Karlberg, Esq.	(X) U.S. Mail
Karlberg & Associates, PLLC	( ) Fax
909 Squalicum Way, Suite 110	( ) Messenger Service
Bellingham, WA 98225	( ) Personal Service
ken@karlberglaw.com	(X) Email

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of May, at Bellingham, Washington.

JCPeterson

Jen Petersen

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRY MARTIN, an individual, and M & M TECHNOLOGIES, INC., a Washington corporation, Respondents, v. STANLEY SMITH and JANE DOE SMITH, husband and wife; and KERRY SIMSHAUSER and JANE DOE SIMSHAUSER, husband and wife, Appellants. --- NUPOWER TECHNOLOGIES, INC., Third Party Plaintiff, v. TERRY MARTIN, an individual, and M & M TECHNOLOGIES, INC., a Washington corporation, Third Party Defendants.	No. 72597-1-I DIVISION ONE PUBLISHED FILED: February 8, 2016

Cox, J. – Stanley Smith appeals the trial court's dismissal of his breach of warranty counterclaim against M & M Technologies Inc. He argues that M & M breached the express warranties in two agreements with him. Specifically, he argues that M & M was the subject of a material adverse claim by the Securities and Exchange Commission (SEC) at the time M & M warranted otherwise. He is correct. We reverse.

This is a commercial dispute between M & M and Smith over a license agreement and option agreement, both of which are dated April 11, 2007. Prior to the execution of these agreements, M & M became aware of an investigation by the SEC of a "Ponzi scheme" involving an entity known as International Fiduciary Corporation (IFC). The SEC informed Terry Martin, a principal of M & M, that it believed IFC paid M & M with funds from the Ponzi scheme. There was no indication that either Martin or M & M was involved in the scheme, only that they had received funds from the scheme.

In February 2007, the SEC sent a letter informing Martin and M & M that its staff was considering recommending them as relief defendants in its lawsuit against IFC in the federal district court in Virginia. The letter also stated that the SEC might seek disgorgement of investor funds they received from IFC. In March 2007, the SEC's assistant director further corresponded with Martin and M & M concerning its investigation.

After these communications with the SEC, in March 2007, Smith met with Martin and M & M's accountant, Craig Forhan, to discuss a pending business arrangement involving licensing of M & M technology to Smith. At this meeting, Martin and Forhan disclosed to Smith that the SEC was investigating M & M and provided him with the SEC letters concerning its investigation. They also informed him that M & M had a cash flow problem. After this meeting, Smith loaned M & M $200,000.

By its First Amended Complaint dated April 9, 2007, the SEC named Martin, M & M, and others not involved in this litigation as "relief defendants" in an action in the U.S. District Court for the Eastern District of Virginia. According to this complaint, the "relief defendants" possessed illegally obtained investor funds or assets acquired from IFC. The relief sought against the relief defendants appears to be limited to return of these funds. A copy of this complaint was admitted as an exhibit in the trial of this action.

In April 2007, M & M and Smith entered into three agreements, all of which are dated April 11, 2007. The License Agreement between M & M and Smith provides for licensing of certain property in three states. The Option Agreement between M & M and Smith provides for licensing of property in other states. The Research, Development and Testing Agreement between M & M and Smith provides for certain services. The parties changed Smith's $200,000 loan, and the interest owed, into a down payment towards the license agreement.

As part of the license agreement, M & M warranted that it was not presently the subject of any claim that would have a material adverse effect on Smith. A similar provision is contained in the option agreement. "Claim" is not defined in either agreement.

In May 2007, Smith learned that M & M had been named as a relief defendant in the federal court action in Virginia. That same month, M & M and Martin were served with process in that litigation.

After Smith failed to meet his obligations under the license and option agreements, Martin and M & M commenced this action against Smith for breach of contract. In response, Smith asserted several counterclaims, including breach of warranties under the license and option agreements.

After a bench trial, the court decided that Smith failed to prove there was a breach of the warranties in the two agreements. The court also found against Smith on other claims that he asserted.

Smith appeals.

BREACH OF WARRANTIES

Smith's sole argument on appeal is that the license and option agreements are void because M & M breached the warranties stated in the agreements.[1] Specifically, he argues that M & M was the subject of a material adverse claim by the SEC as of the date of both agreements. Accordingly, Smith claims he is entitled to relief. We agree.

"When the trial court has weighed the evidence, our review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law."[2] Substantial evidence "exists so long as a rational trier of fact could find the necessary facts were shown by a preponderance of the evidence."[3]

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[1] Appellant's Opening Brief at 13; Appellant's Reply Brief at 8.

[2] Prostov v. Dep't of Licensing, 186 Wn. App. 795, 819, 349 P.3d 874 (2015).

[3] In re Welfare of A.W., 182 Wn.2d 689, 711, 344 P.3d 1186 (2015).

"'We will not disturb findings of fact supported by substantial evidence even if there is conflicting evidence.'"[4] Additionally, unchallenged findings are verities on appeal.[5] We review de novo the trial court's conclusions of law.[6]

Washington courts "follow the objective manifestation theory of contracts."[7] When interpreting an agreement, we focus on the agreement's objective manifestations to ascertain the parties' intent.[8] "We impute an intention corresponding to the reasonable meaning of the words used."[9] The parties' subjective intent is irrelevant if we can ascertain their intent from the words in the agreement.[10]

We give words "their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent."[11] We interpret only what was written in the agreement, not what the parties intended to write.[12]

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[4] Cummings v. Dep't of Licensing, 189 Wn. App. 1, 11, 355 P.3d 1155 (2015) (internal quotation marks omitted) (quoting McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012)).

[5] A.W., 182 Wn.2d at 711.

[6] In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014).

[7] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

[8] Id.

[9] Id.

[10] Id. at 504.

[11] Id.

[12] Id.

Additionally, "[a] contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings."[13] We "will not read ambiguity into a contract 'where it can reasonably be avoided.'"[14]

In Berg v. Hudesman,[15] the supreme court "recognized the difficulties associated with interpreting contracts solely on the basis of the 'plain meaning' of the words in the document."[16] Interpreting a contract "involves 'one person giving a meaning to the symbols of expression used by another person.'"[17] The supreme court adopted the "context rule" and recognized that the parties' intent "cannot be interpreted without examining the context surrounding an instrument's execution."[18]

Since Berg, the supreme court has further explained the "context rule." It explained "that surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of specific words and terms used' and not to

[13] GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074, review denied, 181 Wn.2d 1008 (2014).

[14] Id. (internal quotation marks omitted) (quoting Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995)).

[15] 115 Wn.2d 657, 801 P.2d 222 (1990).

[16] Hearst Commc'ns, Inc., 154 Wn.2d at 502.

[17] Id. (alternation in original) (internal quotation marks omitted) (quoting Berg, 115 Wn.2d at 663).

[18] Id.

'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'"[19]

"When the parties by the terms of their contract expressly stipulate that a representation shall be regarded as material, it ceases to be a representation only, and becomes a warranty."[20] "'Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract.'"[21] For a warranty, "'the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself.'"[22] "'Therefore the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way to the risk or the loss.'"[23] "'A warranty must be strictly true.'"[24]

Claim

A threshold issue is the meaning of the word "claim" in the warranty provisions of the agreements. They both state:

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[19] Id. at 503 (emphasis omitted) (quoting Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999)).

[20] Miller v. Commercial Union Assur. Co., 69 Wash. 529, 534, 125 P. 782 (1912).

[21] Id. (quoting Emlin McClain, Fire Insurance, in 19 CYCLOPEDIA OF LAW AND PROCEDURE 565, 683 (William Mack ed., 1905)).

[22] Id. (quoting McClain, supra, at 683).

[23] Id. (quoting McClain, supra, at 683).

[24] Id. at 535 (quoting Poultry Producers' Union v. Williams, 58 Wash. 64, 66, 107 P. 1040 (1910)).

> Each party (the "Warranting Party") warrants and represents to the other Party that . . . the Warranting Party is not presently the subject of, nor the proponent of, any ***claim*** that would have a material adverse affect [sic] on the other Party.[25]

Neither agreement defines the word "claim." But there does not appear to be any dispute that both warranties are effective as of the dates of the agreements: April 11, 2007. Likewise, there is no dispute that the SEC request for return of funds M & M received from IFC is one that "would have a material adverse [effect] on [Smith]."[26] In its oral decision, the trial court also stated that "[i]f such a claim existed, it would be a material claim that might have a material adverse effect on [Smith] . . . ."[27] And neither party in this appeal challenges this observation by the trial judge.

The primary dispute between the parties is over the meaning of the word "claim" in section 12.1(g) of the license agreement warranty and section 5.1(g) of the option agreement warranty. Because this term is undefined in the agreements, we turn to Black's Law Dictionary for a definition, which defines claim as, among other things:

> A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.[28]

Another dictionary gives the word a similar meaning:

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[25] Trial Exhibit 1, p. 7 (emphasis added); accord Trial Exhibit 2, p. 6.

[26] Id.

[27] Report of Proceedings (the court's oral decision) (July 22, 2014) at 11.

[28] Claim, BLACK'S LAW DICTIONARY, 301 (10th ed. 2014).

> [s]omething claimed in a formal or legal manner [or] [t]he sum of money demanded.[29]

With these definitions in mind, we turn to the question whether substantial evidence supports the trial court's finding on the claim issue. The court found as follows:

> [A]t the time of the signing of the contracts, a SEC claim against M & M Technologies, as a relief defendant for $550,000, was an inchoate potential claim only, and no amended complaint naming M & M Technologies as a relief defendant had been filed or served by the SEC.[30]

A close reading of these definitions shows that they include a demand for money. Notably, the definitions say nothing to limit a claim to the filing of a lawsuit. Thus, we conclude that a claim may be asserted in a complaint (whether or not filed).

Nothing in these definitions restricts a claim to something asserted in a complaint (whether or not filed). This is particularly important here because the plain words of the warranties make no reference to either a "filed claim" or a "lawsuit." Rather, the warranties simply state the word "claim."

Applying these definitions of claim to the facts of this case, we conclude that the SEC had a claim against M & M as of the April 9, 2007 date of its First Amended Complaint. The SEC's First Amended Complaint, a copy of which was admitted into evidence, states a demand for return of "illegally obtained investor funds" from IFC that M & M and others possessed.

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[29] THE AMERICAN HERITAGE DICTIONARY, 350 (5th ed. 2015), https://www.ahdictionary.com/word/search.html?q=claim.

[30] Finding of Fact 3.22, Clerk's Papers at 14.

At oral argument in this court, M & M argued that the context of the negotiations between the parties requires that we conclude that the word "claim" in the warranties must mean "filed claim." We disagree.

First, the plain words of the warranties state "claim," not "filed claim." We know of no authority that permits us to add words to the agreements that M & M drafted in the guise of this court construing these documents. Rather, our task is to interpret only what was written in the agreement, not what the parties (or the drafter) intended to write.[31]

Second, under Hearst Communications, Inc. v. Seattle Times Co., "surrounding circumstances and other extrinsic evidence are to be used 'to determine the meaning of specific words and terms used' and not to 'show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'"[32] The context of the parties' negotiations cannot be used to modify the word claim in the warranty provisions of the two agreements.

For these reasons, we reject M & M's attempt to add words to the agreements that are not there.

The trial court characterized the SEC's actions as "an inchoate potential claim only."[33] This appears to have been based on the evidence that the SEC was investigating the Ponzi scheme prior to the date of the agreements.

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[31] Hearst Commc'ns, Inc., 154 Wn.2d at 504.

[32] Id. at 503 (emphasis omitted) (quoting Hollis, 137 Wn.2d at 695-96).

[33] Clerk's Papers at 14.

We need not address whether a claim by the SEC existed during its investigation. That is because the record is clear that as of April 9, 2007, the date of the SEC's First Amended Complaint, the investigation had ripened into a SEC claim for return of the investor funds that M & M received from IFC.

In short, there is no substantial evidence to support the finding that there was "an inchoate potential claim only" by the SEC as of the April 11, 2007 date of the agreements.[34] To the contrary, there is substantial evidence that a claim by the SEC existed when the warranties in the agreements were executed. That evidence is the First Amended Complaint dated April 9, 2007.

Warranties and Representations

The next question is whether there was a breach of the warranties of the agreements. We hold that there was.

The supreme court stated the law on warranties and representations in Miller v. Commercial Union Assurance Co.[35] As that case states, "the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way" to the warranted matter.[36] Miller also states "'[a] warranty must be strictly true.'"[37]

Here, the documents before us clearly state that the text pertaining to warranties is just that. They are not mere representations. Thus, the falsity of

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[34] Id.

[35] 69 Wash. 529, 125 P. 782 (1912).

[36] Id. at 534.

[37] Id. at 535 (quoting Poultry Producers' Union, 58 Wash. at 66).

the warranties that there were no claims at the time the agreements were executed must void the agreements.

It is not legally significant whether the warranted matter is material. In any event, we have the unchallenged observation by the trial court that the existence of a claim by the SEC against M & M would be material. That observation makes sense under the circumstances of this case.

Whether the warranties are affected by M & M's apparent lack of knowledge of the SEC's First Amended Complaint when the parties executed the warranties is an issue that the parties do not completely address on appeal. The trial judge appears to have relied on the fact that neither party knew of the First Amended Complaint until sometime in May 2007. But that is analytically immaterial under the case authority we have located.

Jeffery v. Hanson involved a contract for the sale of a tractor.[38] Sidney Jeffery sought to buy a tractor from Virgil Pague.[39] Jeffery agreed to buy the tractor if it were warranted to be 90 percent new and never used in salt water.[40] Pague signed a statement stating: "'I hereby make statement that [the tractor] is 90% new and has never been in salt water. I make this statement based upon facts given to me by the seller from whom I purchased this bulldozer and to the best of my knowledge believe that this statement is true.'"[41]

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[38] 39 Wn.2d 855, 239 P.2d 346 (1952).

[39] Id. at 856.

[40] Id.

[41] Id. at 856-57.

As it turned out, the tractor "was not as warranted when delivered to Jeffery."[42] In the suit that followed, the trial court entered a judgment against Pague, concluding that Pague's statement was a warranty and that he breached the warranty.[43]

Pague appealed, arguing that the statement was not a warranty.[44]

The supreme court concluded that the statement was a warranty, stating that it was "a positive statement of the condition of the tractor," and that Pague could not "escape" by relying on the statement's language.[45] The court specifically stated that Pague could not rely on the fact that the statement "was based upon facts given to him by his vendor, and that he believed it to be true to the best of his knowledge."[46] Most importantly, the court stated:

> The source of his information is not material. He affirmed a fact regarding the equipment, and he did so to meet [Jeffery's requirements] before the sale. It was not sales talk or an expression of his opinion, nor was it intended to be. It tended to and did induce the sale, and Jeffery relied upon it as Pague knew he would. It meets the requirements of an express warranty set forth in the statute . . . .[47]

Accordingly, the supreme court affirmed the judgment.[48]

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[42] Id. at 857.

[43] Id.

[44] Id.

[45] Id.

[46] Id. at 857-58.

[47] Id. at 858.

[48] Id. at 859.

Here, following Miller and Jeffery, we must conclude that the warranties in this case are not affected by the fact that M & M did not know of their falsity as of the date of making the warranties. It does not matter that it only learned of the falsity in May 2007. The case law is clear that what is material is the truth or falsity of the warranty when made. On this record, the warranties were clearly false when made: April 11, 2007.

Because the warranties were false, the agreements are void. Smith is entitled to appropriate relief due to the breach of the express warranties. Because the parties have not fully briefed on appeal the extent of relief, we remand with directions to the trial court to address that question.

We reverse the judgment and remand with these instructions.

Cox, J.

WE CONCUR:

Trickey, J

Dwyer, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TERRY MARTIN, an individual, and M & M TECHNOLOGIES, INC., a Washington corporation, Respondents, v. STANLEY SMITH and JANE DOE SMITH, husband and wife; and KERRY SIMSHAUSER and JANE DOE SIMSHAUSER, husband and wife, Appellants.	No. 72597-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondents, Terry Martin and M & M Technologies, Inc., have moved for reconsideration of the opinion filed in this case on February 8, 2016. The panel hearing the case has called for an answer from appellants Stanley Smith and Kerry Simshauser. The court having considered the motion and appellants' answer has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied. The request that this court reconsider its decision to remand this case for further proceedings is also denied.

Dated this 19th day of April 2016.

FOR THE PANEL:

Cox, J.

Judge

APPENDIX C

SCANNED

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FILED IN OP[illegible] COURT
9-12 2014
WHATCOM COUNTY CLERK
By BH
Deputy

IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

TERRY MARTIN, an individual, and M&M TECHNOLOGIES, INC., a Washington corporation, Plaintiffs, vs. STANLEY SMITH and JANE DOE SMITH, husband and wife; and KERRY SIMSHAUSER and JANE DOE SIMSHAUSER, husband and wife, Defendants.	**Cause No: 08-2-00035-1** **THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW**
NUPOWER TECHNOLOGIES, Inc. Third Party Plaintiff, vs. TERRY MARTIN, an individual, and M&M TECHNOLOGIES, INC., a Washington corporation, Third Party Defendants	

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This matter came before the undersigned judge for trial on July 14, 2014. Trial was concluded on July 22, 2014.

Plaintiffs and Third Party Defendants, Terry Martin individually (Martin) and M & M Technologies, Inc., a Washington Corporation (M & M Technologies) appeared and were represented by their attorney, Douglas R. Shepherd of the firm Shepherd and Abbott.

Defendants Stanley Smith, and his wife, (Smith) and Third Party Plaintiff NuPower Technologies, Inc., a Washington Corporation (NuPower) appeared and were represented by their attorney Kenneth Karlberg of Karlberg & Associates PLLC.

Defendant Kerry Simshauser, and his wife, (Simshauser) appeared pro se and Plaintiffs moved to dismissed Simshauser, without prejudice, at the beginning of the trial. The Court, having heard no objection from any party, dismissed defendants Simshauser, without prejudice, before taking any testimony.

The Court having previously issued an oral ruling on July 22, 2014, enters the following findings of fact and conclusions of law.

I – FINDINGS OF FACT

1. Parties.

1.01 Plaintiff Martin is an individual, residing in Whatcom County, Washington, and all times relevant to this matter was over the age of 18 and fully competent to sign any and all documents at issue in this matter. Martin founded M & M Technologies, Inc., and is the President and majority shareholder of M & M Technologies, Inc.

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1.02 Plaintiff M & M Technologies is a Washington corporation, and has paid all dues and fees to the state of Washington necessary to maintain this action.

1.03 Defendants Smith are individuals and are residents of Kitsap County, Washington. Smith is the sole shareholder and President of NuPower Technologies, Inc.

1.04 Defendant NuPower is a Washington corporation and has paid all dues and fees to the state of Washington necessary to maintain this action.

2. Jurisdiction and Venue.

2.01 This action arises out of a series of agreements entered into by M & M Technologies and Smith, which agreements were made in Whatcom County, Washington and involved performance by both M & M Technologies and Smith in Whatcom County, Washington.

2.02 Plaintiff Martin resides in Whatcom County, Washington.

2.03 Plaintiff M & M Technologies resides and does business in Whatcom County, Washington.

2.04 By stipulation, defendant NuPower agreed to personal jurisdiction and venue in this Court.

3. Facts.

3.01 On April 11, 2007, M & M Technologies and Smith entered into a valid contract, titled *License Agreement Between M & M Technologies, Inc. and Stanley Smith.*

3.02 On April 11, 2007, M & M Technology and Smith entered into a valid contract, titled *Option Agreement Between M & M Technologies, Inc. and Stanley Smith.*

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3.03 On April 11, 2007 M & M Technologies and Smith entered into a valid contract, titled *Research, Development & Testing Agreement Between M & M Technologies, Inc. and Stanley Smith.*

3.04 In various pleadings, Smith and NuPower have alleged, and in certain testimony have claimed improper, undisclosed, and/or inequitable motives or acts on the part of Martin and/or M & M Technologies in statements, representations or discussions with Smith leading up to Smith's execution of all three contracts. While M & M Technologies was in a difficult if not desperate financial position in April of 2007, and Martin and M & M Technologies likely pushed fairly hard to get what they wanted, Martin and M & M Technologies did not engage in any action that prohibits M & M Technologies' enforcement of the three agreements as drafted.

3.05 In various pleadings, Martin and M & M Technologies have alleged, and in certain testimony have claimed undisclosed or improper motives or acts by Smith before and after April 11, 2007. While the role of Simshauser in this matter is very curious, and potentially his testimony could have benefited or hurt either side, I am unable to determine what role, if any, Mr. Smith had in the actions complained of by M & M Technologies, and I do not find that Mr. Smith was attempting to or intended to steal confidential intellectual property belonging to M & M Technologies.

3.06 The April 11, 2007 *License Agreement Between M & M Technologies, Inc. and Stanley Smith* is an enforceable agreement supported by consideration.

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3.07 The April 11, 2007 *Option Agreement Between M & M Technologies, Inc. and Stanley Smith* is an enforceable agreement supported by consideration.

3.08 The April 11, 2007 *Research, Development & Testing Agreement Between M & M Technologies, Inc. and Stanley Smith* is an enforceable agreement supported by consideration.

3.09 M & M Technologies has not breached any of the three (3) agreements referenced above.

3.10 Smith has repudiated all three agreements.

3.11 On or about March 15, 2007, Smith loaned M & M Technologies $200,000.00.

3.12 The terms of the loan were not properly documented, although there were some discussions regarding the ability for Smith to double or triple his money in two to four months.

3.13 Except for some handwritten notes on a stock certificate, there is no document containing sufficient information for this Court to determine the terms and conditions of the original loan.

3.14 No terms or conditions of the loan were documented because the parties, very early on, changed the discussion and converted the loan to an initial payment of $200,000 toward the funds due M & M Technologies from Smith for the *License Agreement*. The loan conversations were subsumed by the *License Agreement*.

3.15 Were this a claim or action by Smith to recover the $200,000 "loaned" or for interest on that loan, it would fail. There is no enforceable loan

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agreement. There is no promissory note. No testimony or exhibits provide sufficient terms and conditions to enforce such a loan.

3.16 On March 14, 2007, the day before the alleged "loan," Smith signed a Confidentiality Agreement, which Agreement demonstrates that the day before paying the $200,000, Smith was contemplating purchasing some rights in confidential intellectual property belonging to M & M Technologies.

3.17 The initial $200,000 paid by Smith to M & M Technologies, was clearly converted by M & M Technologies and Smith into part of the $5,000,000 due M & M Technologies from Smith upon execution of the *Licensing Agreement.*

3.18 On March 15, 2007, before Smith paid M & M Technologies $200,000, Martin, Smith and Craig Forhan, accountant for M & M Technologies, met and discussed their pending business arrangement(s) and certain confidential intellectual property. At this meeting the following information was disclosed to Smith:

A. M & M Technologies was subject to an investigation by the Securities and Exchange Commission (SEC) regarding its business relationships with GEM Manufacturing, Inc. (GEM), Mac Stevenson and/or International Fiduciary Corporation, S.A (IFC).

B. M & M Technologies, while not a relief defendant at the time, had the potential of becoming a relief defendant in the SEC action;

C. The interruption of M & M Technologies' business relationship with GEM, caused by the SEC investigation, had created a cash flow problem or crunch for M & M Technologies; and,

D. M & M Technologies may be required to repay the U.S. government an undetermined amount.

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3.18A M & M Technologies had an immediate need for another business relationship and made that known to Mr. Smith regarding licensing of the confidential intellectual property and/or research, testing and evaluation of the confidential intellectual property.

3.19 On March 28, 2007, after full disclosure by M & M Technologies to Smith of all information known by Martin and M & M Technologies regarding the SEC matter, M & M Technologies and Smith signed a three (3) page Letter of Intent, which letter outlined the points discussed by them regarding the potential terms and conditions of a Licensing Agreement and Research and Development Agreement.

3.20 Sometime after March 28 but before April 11, 2007, M & M Technologies provided Smith with M & M Technologies' business plan for marketing the patented technology, which business plan disclosed an expected loss of more than $37,000,000 in the first three years and potential significant profits thereafter.

3.21 Smith's claims in this matter rely upon paragraph 12.1(g) of the *License Agreement* and 5.1(g) of the *Option Agreement,* which both read: "the warranting Party (M & M Technologies) is not presently the subject of, nor the proponent of, any claim that would have a material adverse effect on the other Party (Smith)."

3.22 At the time of the first disclosures regarding the SEC on March 15, 2007, and at the time of the signing of the contracts, a SEC claim against M & M Technologies, as a relief defendant for $550,000, was an inchoate potential claim only, and no amended complaint naming M & M Technologies as a relief defendant had been filed or served by the SEC.

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3.23 M & M Technologies had no duty to warn of the potential claim under any contract provision. M & M Technologies correctly warranted that there was no actual claim against it by the SEC.

3.24 ~~Smith~~ It was disclosed to Smith what Martin and M & M Technologies actually knew, for the warranting provision to be violated there needed to by an actual claim and there was not.

3.25 The *Licensing Agreement* required Smith to pay $5,000,000. Before his breach and repudiation of the contract, Smith paid $500,000 as follows:

A. $200,000 on March 16, 2007;

B. $150,000 on April 11, 2007;

C. $80,000 on April 24, 2007; and

D. $70,000 on May 4, 2007.

3.26 Smith paid nothing on the *Research, Development & Testing Agreement*, which Agreement required $110,000 per month for six years beginning as soon as Smith paid the $5,000,000 due M & M Technologies on the *License Agreement*.

3.27 Smith paid $100,000 for the *Option* Agreement, granting Smith on a state by state basis, the option to license the technology in the other 47 states not listed in the *Licensing Agreement* upon the payment of $2,000,000 per state.

3.28 Smith never exercised any rights provided in the April 11, 2007, *Option Agreement*.

3.29 Other than signing the *Option Agreement* and paying $100,000, Smith took no further action to trigger the Options contained in the *Option Agreement*.

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3.30 Stricken

3.31 Stricken

3.32 Stricken

3.33 Smith agreed, under paragraph 7.1(c) of the *Option Agreement* that M & M Technologies shall not be required to return to Smith any amounts paid by Smith to M & M Technologies pursuant to the *Option Agreement*.

3.34 Smith has not paid the balance of the $4,500,000 owing on the *License Agreement*.

3.35 Smith is in material breach of the *License Agreement*.

3.36 Smith has made no payment on the *Research, Development & Testing Agreement*.

3.37 Stricken

3.38 On May 4, 2007, Smith proposed, in writing, that the *Option Agreement* be amended whereby Smith would have the exclusive rights for the other 47 states for $6,000,000 instead of $94,000,000 as called for in the *Option Agreement*.

3.39 The May 4, 2007 Smith proposal was not accepted by M & M Technologies.

3.40 On May 28, 2007, Smith was advised by his CPA that M & M Technologies had been named a relief defendant in the SEC matter.

3.41 The *Assignment Agreement* demonstrates that Smith, after learning that M & M Technologies was a relief defendant in the SEC action, was willing to go forward with the deal under his corporation NuPower.

3.42 Smith's attempt to assign his rights and obligations in the three contracts to his corporation NuPower failed because it was not agreed to or

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consented to by M & M Technologies.

3.43 Because the assignment was not effective, NuPower has no rights in any of the contracts and has no basis for any legal claims against Martin or M & M Technologies.

3.44 If Smith was not in material breach of all three (3) contracts before October 1, 2007, Smith and NuPower's filing and service of its Complaint in the Kitsap County Superior Court, was intended by Smith as a repudiation of all three contracts and was a material breach of ~~all three contracts~~ the License Agreement.

3.45 M & M Technologies, by stipulation at the beginning of trial seeks no additional damages against Smith, except M & M Technologies' right to keep the $500,000 paid toward the *License Agreement* and the $100,000 paid for the *Option Agreement*.

3.46 Stricken

3.47 M & M Technologies is entitled to retain the first $250,000 paid toward the *License Agreement* and the $100,000 paid for the *Option Agreement*.

3.48 Stricken

3.49 Stricken

3.50 Neither Smith nor NuPower have any right, title, or interest in any one of the three April 11, 2007 contracts: *License Agreement; Option Agreement;* or *Research, Development & Testing Agreement* or any right title or interest in any of the technology, patents or intellectual property described therein.

3.51 Each party is responsible for their own reasonable attorney fees incurred in this matter.

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3.52 M & M Technologies is entitled, pursuant to statute, to its court costs and expenses incurred in this matter.

4. Claims

4.01 M & M Technologies has prevailed on its breach of contract claim against Smith on the *License Agreement*. Smith has materially breached the *License Agreement*.

4.02 Smith has not prevailed on his breach of warranty claim against M & M Technologies. Neither M & M Technologies nor Martin have breached any express or implied warranty provided to Smith in any contract.

4.03 Smith has not prevailed on his misrepresentation claim against Martin or M & M Technologies. Neither M & M Technologies nor Martin have intentionally or negligently misrepresented any material fact to Smith.

4.04 Smith has not prevailed on his breach of implied good faith claim against Martin or M & M Technologies. Neither M & M Technologies nor Martin were involved in bad faith in their business relationship(s) with Smith.

4.05 Smith has not prevailed on his fraud claim against either Martin or M & M Technologies. Neither M & M Technologies nor Martin were involved in any fraud upon Smith.

4.06 With regard to Smith's claims of fraud and misrepresentation the Court finds specifically that:

A. Martin and M & M Technologies informed Smith of all they knew about the SEC action at the time of the disclosures and at the time of the contracting;

B. A fact cannot be false if it is true, and when the SEC matters were disclosed by Martin and M & M Technologies the facts, as disclosed, were true;

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C. Martin and M & M Technologies provided all the information they had, including the business plan, the SEC investigation, and their need for immediate money; and

D. Even assuming Martin and M & M Technologies withheld any key SEC information during their negotiations with Smith, they told Smith about the SEC investigation and Smith had a duty to do further inquiry if he had any concerns or unanswered questions about the SEC investigation of M & M Technologies.

5. Remedies.

5.01 The Court has not been asked to and has not attempted to determine whether or not, in equity, the liquidated damage provision is a reasonable forecast of fair damages and whether the provision is appropriate because the harm caused by the breach is likely incapable or very difficult of accurate estimation.

5.02 Because M & M Technologies has selected to keep only the payments made pursuant to other terms of the two contracts, the Court has not been asked or attempted to determine if forfeiture or liquidated damages are mutually exclusive remedies requiring M & M Technologies to make a selection.

5.03 The liquidated damage provision of the *License Agreement* allows M & M Technologies to retain the additional $250,000 of the payments made by Smith.

II - CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this proceeding.

2. Smith failed to prove any claim advanced against Martin. Any and all claims against Martin are dismissed with prejudice and with costs awarded in favor of Martin.

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3. Smith failed to prove any claim advanced against M & M Technologies. Any and all claims against M & M Technologies are dismissed with prejudice and with costs awarded in favor of Martin.

4. M & M Technologies established that Smith materially breached the *License Agreement.*

5. Smith, by filing the NuPower Complaint in Kitsap County Superior Court, indicated in writing his intent to M & M Technologies of his repudiation of the *License Agreement, Option Agreement* and the *Research, Development & Testing Agreement.*

6. Under the *License Agreement* $250,000 paid by Smith was non-refundable and M & M is entitled to keep $250,000 paid by Smith pursuant to Section 13.1.

7. Smith has terminated and forfeited his rights under the *Option Agreement.*

8. Under the contract, M & M Technologies is entitled to keep the $100,000 paid for the *Option Agreement.*

9. Smith has no right, title or interest in any patents or intellectual property of M & M Technologies.

10. NuPower has no right, title or interest in any patents or intellectual property of M & M Technologies.

11. Under the liquidated damage clause in the *License Agreement,* M & M Technologies is entitled to an additional $250,000 of liquidated damages. M & M Technologies is entitled to keep the additional $250,000 paid by Smith in satisfaction of its liquidated damages claim.

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12. Smith has fully satisfied ~~they~~ the damages awarded in this matter. Smith is responsible for statutory costs. DRS/KLK

DONE IN OPEN COURT THIS 12 day of September 2014.

JUDGE CHARLES R. SNYDER

Presented by:
SHEPHERD and ABBOTT

Douglas R. Shepherd, WSBA #9514
Attorneys for Martin and M & M Technologies

Copy Received:
KARLBERG & ASSOCIATES, PLLC

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APPENDIX D

Case No. 72597-1-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

STANLEY SMITH,

Appellant,

v.

TERRY MARTIN and M&M TECHNOLOGIES, INC.,

Appellees.

APPELLANT'S OPENING BRIEF

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Attorney for Appellant

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INTRODUCTION

When are government demands for the disgorgement of ill-gotten funds from a Ponzi scheme a "claim?" The appellant, Stan Smith, seeks reversal of the trial court's determination that formal demands issued to M & M Technologies, Inc. ("M & M")(pre-formation of the License Agreement and related agreements) by the Securities and Exchange Commission ("SEC") for the disgorgement of ill-gotten funds was not a "claim" against M & M for purposes of Paragraph 12.1(g) of the parties' License Agreement. CP P1. Specifically, paragraph 12.1(g), entitled "WARRANTIES AND REPRESENTATIONS," provides:

> Each Party (the "Warranting Party") warrants and represents to the other Party that:
>
> (g) the Warranting Party is not presently the subject of . . . any claim that would have a material adverse affect on the other Party.

CP P1. M & M's principal, Terry Martin, admitted unequivocally that if the SEC demand had risen to the level of a "claim," the SEC claim would have had a material adverse effect on M & M, and by extension, Mr. Smith. RP 268-274. However, Mr. Martin maintained that the SEC claim was not yet a "claim" under paragraph 12.1(g). RP 273. His testimony was undisputed.

The trial court determined, however, that the "SEC claim against M & M Technologies, as a relief defendant for $550,000, was an inchoate potential claim" only and therefore M & M had not breached Paragraph 12.1(g). CP 125 at ¶¶ 3.21-3.24. The trial court's determination was an error of law. For the SEC's claim to be a "claim" under paragraph 12.1(g), M & M did not need to formally be named as a relief defendant in the on-going Ponzi scheme litigation by the SEC. *Cf. Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991)("A 'claim' is a demand for compensation"); *Safeco Title Ins. Co. Gannon*, 54 Wn. App. 330, 335, 774 P.2d. 30 (1989)("'Claim' ordinarily means a demand . . . for damages . . ."); RCW § 4.92.100 (pre-suit claim against State of Washington must be presented to the Office of Risk Management as precondition of filing suit).

The trial court's ruling should be reversed and judgment should be entered in Mr. Smith's favor in the amount of $600,000, plus pre-judgment and post-judgment interest. As a matter of law, M & M breached paragraph 12.1(g), which rendered the License Agreement null and void, *Miller v. Commercial Union Assurance Co.*, 69 Wash. 529, 125 P.2d 782 (1912); *Clausing v. De Hart*, 83

Wn. 2d 70, 515 P.2d 982 (1973), and entitled Mr. Smith to the return of his investment and applicable interest.

I. ASSIGNMENTS OF ERROR

Mr. Smith assigns error to the trial court's Findings of Fact and Conclusions of Law. CP 125.

Specific assignments of error are:

A. The trial court erred as a matter of law by ruling that the word "claim" in paragraph 12.1(g) of the License Agreement did not encompass the SEC's claim against M & M because suit had not yet been filed against M & M. CP 125 at ¶¶ 3.21-3.24.

B. The trial court erred as a matter of law by ruling that M & M has not breached the License Agreement and was entitled to retain all funds paid by Mr. Smith to M & M. CP 125 at ¶ 3.09, 3.45, 3.47, 4.02 and 5.03, Conclusions of Law 3, 6, 8, and 11.

Issues pertaining to these assignments of error are:

A. The language of Paragraph 12.1(g) is an affirmative representation and warranty that, if untrue, voids the License Agreement. *Cf. Miller v. Commercial Union Assurance Co.,* 69 Wash. 529, 125 P.2d 782 (1912);

Clausing v. De Hart, 83 Wn. 2d 70, 515 P.2d 982 (1973).

> Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract, while in case of a warranty the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself. Therefore the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way to the risk or the loss.
>
> * * *
>
> "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done; it must be literally performed." 1 May, Insurance (4th ed.), § 156.

Miller at 534-5 (citations omitted).

B. In the absence of a specific definition of "claim" in the License Agreement, the trial court must construe "claim" in paragraph 12.1(g) according to its plain meaning, which is a demand for money or other assertion of a legal right (or is an ambiguous terms that must be construed against the drafter, M & M). *Olympic S.S. Co. v. Centennial Ins. Co.,* 117 Wn.2d 37, 52, 811 P.2d 673

(1991); *Safeco Title Ins. Co. Gannon*, 54 Wn. App. 330, 335, 774 P.2d. 30 (1989); RCW § 4.92.100; RP 228, 300—302, 423-424.

II. STATEMENT OF FACTS

The appellant, Stan Smith[1], is a former construction worker and rehabilitation counselor turned residential real estate landlord, who entered into a series of inadvisable transactions with M & M Technologies, Inc. ("M & M") in March and April, 2007 that were beyond his experience and expertise. RP 364-365, 370-372.

Between December 4, 2006 and April 11, 2007 (the date the License Agreement was executed), Mr. Martin and M & M learned that they were the subjects of investigation by the SEC into a Ponzi Scheme operated by an entity, IFC, and several individuals, one of whom, Mac Stevenson, was a business colleague of Mr. Martin at GEM Technology. CP P18-21, 26, D27, 33-38, 41; RP 154-158, 251-271. The exchanges between Mr. Martin and the SEC and the financial records of M & M and CD2E, an investment entity wholly-owned by Mr. Martin, show that Mr. Martin, M & M and CD2E collectively received over $2 million from IFC's illicit criminal

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[1] Mr. Smith's testimony at trial was made difficult because he suffers from Miniere's Disease and could not concentrate for extended periods.

activities, not including approximately $300,000 paid directly to Mr. Martin as "consulting fees."[2] RP 188-200. Further, as of March 13, 2007, Mr. Martin was notified by the SEC that M & M was likely to be named as a "relief defendant" (along with CD2E and Mr. Martin, individually) and that the SEC intended to disgorge the ill-gotten funds (including $550,000 paid directly by IFC to M & M). The SEC thereafter filed suit against Mr. Martin, M & M and CD2E on April 9, 2009, which ultimately led to an agreed settlement on July 16, 2008 for the repayment of in excess of $630,000. CP P18-21, 26, D27, 33-38, 41; RP 177-178.

At the heart of this appeal is the interpretation of the word "claim" in paragraph 12.1(g) of the License Agreement entered into on April 11, 2007. CP P1. Mr. Smith was unaware of the SEC allegations against M & M, or the likely impacts on M & M's operations, and he was unaware the M & M was "broke."[3] RP 203-207. When Mr. Smith agreed on March 15, 2007 to loan $200,000 to M & M on a short term basis (4-6 months), the purpose of the

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RP 366-370.

[2] Mr. Martin testified that he didn't know the nature of IFC's business, but acknowledged that he provided $300,000 in consulting fees without knowing. RP 188-190.

[3] Mr. Martin was earlier notified by phone on December 4, 2006, such that he was aware of the potential disgorgement issue due to IFC's payment of $550,000 to M & M, which he later confirmed by reviewing M

loan, according to Mr. Martin's representations to Mr. Smith, was that M & M was buying a business and needed to show "cash on hand" for the transaction to close.[4] The agreement was that Mr. Smith's funds were not to be disbursed; they were to remain in M&M's account. RP 392-393. For this reason, M&M simply secured the loan by pledging one share of M&M with handwritten notations and no formal promissory note was ever executed. CP D29; RP 215-218. Unbeknownst to Mr. Smith, however, instead of holding his $200,000 in M & M's account, M & M used the funds immediately to pay M & M's payroll, to repay shareholder loans to M&M (*e.g.*, Mr. Martin's shareholder loan) and to extend loans to key shareholders. The loan proceeds were all but fully disbursed by April 1, 2007.[5] RP 218-219, 222-223.

Shortly after the loan was made by Mr. Smith—even as his funds were being disbursed in breach of their understanding—Mr. Martin approached Mr. Smith with a business proposition to help M&M conduct certain research and development ("R&D") and

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& M's bank statements were indeed received by M & M. RP 192-200.

[4] M & M agreed to repay $200,000 plus an additional $200,000 because the purported business transaction that he was closing was very lucrative.

[5] Mr. Smith is deeply religious, and his judgment was clouded by Mr. Martin, who represented himself as a man of faith and then played on Mr. Smith's faith by appealing to Mr. Smith as fellow Christian. RP 336, 393-394. Instead of "trust and verify," Mr. Smith simply trusted.

ultimately to license any products that proved to be marketable from R&D. Until that point in time, M & M had never sold a single commercial product to the public in over 10 years of existence. RP 246-247. Lack of sales notwithstanding, Mr. Martin's pitch to Mr. Smith was that M & M is prepared to repay the loan, but he wanted Mr. Smith to consider a "once in a lifetime" opportunity that M &M and Martin pitched in M & M's 2006 business plan as generating gross profit of over $200,000,000 in Year 1. CP D32. In essence, Mr. Martin and M & M did not have the funds to repay Mr. Smith, so Mr. Martin dangled a financial carrot in front of Mr. Smith to avoid having to disclose that Mr. Smith's funds were gone.

For personal and religious reasons, Mr. Smith agreed to help M&M develop a marketable product. The initial letter of intent between the parties was executed on March 28, 2007 and the subsequent R&D, License and Option agreements (collectively, "Agreements") were executed on April 11, 2007. Mr. Martin and Mr. Smith met, reviewed and discussed the Agreements, their scope and intended purpose, etc. During these meetings, Mr. Martin confirmed repeatedly that the successful completion of R&D to develop an actual product was a precursor, *i.e.*, a condition precedent, to any license rights that was being granted under the

Agreements. RP 409-422. The payments to be made at the time of signed were characterized as "deposits" for when R&D efforts proved to be successful. RP 98-100. Mr. Smith, whose experience was in real estate, not technology, indicated that he was uncomfortable signing without consulting with an attorney. However, instead of encouraging Mr. Smith to have the Agreements independently reviewed, Mr. Martin recommended a local counsel, Mr. Edwin Hubbard, who thereafter represented all parties in the transaction. RP 70-71. Mr. Smith did not learn until after the fact that Mr. Hubbard had performed legal services for M & M and that Mr. Martin had studied under Mr. Hubbard's tutelage to become a lawyer.[6] RP 299-303.

Between April 11 and May 4, 2007, Mr. Smith transferred $400,000 in additional funds to M&M as a deposit against future license fees if R&D resulted in a marketable product. RP 409-422. By separate oral agreement, the parties subsequently agreed to hold and use the additional $400,000 for R&D purposes once Mr. Smith/NuPower provided specifications/performance criteria for

[6] Mr. Smith has since filed a malpractice suit against Mr. Hubbard for *inter alia* failing to disclose conflicts of interest, etc., and for not explaining aspects of the Agreements that may appear to be different from the oral understandings between the parties.

their intended market application.[7] Again, however, as with the earlier $200,000, the later funds were disbursed and out of M&M by June 1, 2007. RP 282-290. In the interim, of course, Mr. Martin and M&M were served with the SEC's complaint against them as "relief defendants." In fact, by June 1, 2007, Mr. Martin and M&M had prepared and filed answers to the SEC complaint, but they failed to disclose even these latest developments to Mr. Smith. RP 266-267. Instead, they waited until all of Mr. Smith's funds were paid into M&M and then disbursed. In short, Mr. Martin and M&M raced to disburse the funds before the SEC acted on its threats to disgorge M&M's assets.

ARGUMENT

I. Standard of Review

This Court reviews the trial court's decision *de novo* for error of law in the interpretation of paragraph 12.1(g) and whether M & M breached. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 557, 586, 167 P.3d 1125 (2007).

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[7] The R&D process was stopped dead in its tracks when Mr. Smith learned of the SEC filing on May 28, 2007. Mr. Smith could not raise funds, nor could he invest further funds in R&D through M&M while the likelihood of disgorgement was looming.

II. The License Agreement Is Void Because M & M Breached Its Representation and Warranty in Paragraph 12.1(g).

A. The Import of Representations and Warranties.

Representations and warranties in the formation of contracts have special legal significance. In *Miller v. Commercial Union Assurance Co.*, 69 Wash. 529, 125 P.2d 782 (1912), this Court explained the significance in detail as follows:

> When the parties by the terms of their contract expressly stipulate that a representation shall be regarded as material, it ceases to be a representation only and becomes a warranty. Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract, while in case of a warranty the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself.
>
> Black's Law Dictionary defines "representation" as a statement of fact which was made to induce another to enter into a contract. Typically, representations are statements that a party has examined, considered, and believes to the best of his or her knowledge to be true. These statements generally represent the existence of past or present facts.
>
> *   *   *
>
> A "warranty", on the other hand, is a promise that a certain fact is or will be true. These warranties will, in most cases, be guaranteed for a period of time. A warranty protects against loss if the promised statements turn out not to be true.
>
> *   *   *

> Ordinarily a misrepresentation of the assured will not affect the validity of a policy unless it is material to the risk or, by the terms of the application and policy, has become an affirmative warranty. When the parties by the terms of their contract expressly stipulate that a representation shall be regarded as material, it ceases to be a representation only, and becomes a warranty.
>
> Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract, while in case of a warranty the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself. Therefore the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way to the risk or the loss.
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> * * *
>
> In _Poultry Producers' Union v. Williams_, 58 Wash. 64, 66, 107 Pac. 1040, 137 Am. St. 1041, we said:
>
> "A warranty must be strictly true. _Rice v. Fidelity & Deposit Co._, 103 Fed. 427. A representation need only be substantially true. _Missouri K. & T. Trust Co. v. German Nat. Bank_, 77 Fed. 117. 'The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate.' _Rice v. Fidelity & Deposit Co., supra_."

Miller, 69 Wash. at 534-5 (citations omitted); *Clausing v. De Hart,* 83 Wn. 2d 70, 515 P.2d 982 (1973).

B. The Ordinary Meaning Of The Word "Claim."

Paragraph 12.1(g), entitled "WARRANTIES AND REPRESENTATIONS," provides:

> Each Party (the "Warranting Party") warrants and represents to the other Party that:
>
> (g) the Warranting Party is not presently the subject of . . . any ***claim*** that would have a material adverse affect on the other Party.

CP P1 (emphasis added). Because the License Agreement does not define "claim" and it was drafted by M & M, CP P1; RP 228, 300--302, the word "claim" must therefore be given its plain and ordinary meaning, and to the extent that it may be ambiguous, the ambiguity must be construed against the drafter, M & M. *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991); *Safeco Title Ins. Co. Gannon*, 54 Wn. App. 330, 335, 774 P.2d. 30 (1989). *Berg v. Hudesman,* 115 Wn.2d. 657, 801 P.2d 222 (1990); *Hearst Communications, Inc. v. Seattle Times, 154 Wn.2d 493, 115 P.2d 262 (2005).*

The ordinary meaning of "claim" is a demand for compensation. *Olympic,* 117 Wn.2d at 52; *Safeco,* 54 Wn. App. At 335. Black's Law Dictionary further defines "claim" as:

1. A legal assertion; a legal demand; Taken by a person wanting compensation, payment, or reimbursement for a loss under a contract, or an injury due to negligence.
2. Amount a claimant demands.

Known or unknown, Mr. Martin and M & M warranted that no such "claim" existed at the time of execution of the License Agreement. The only legal determination for the trial court to rule upon, therefore, was whether the undisputed facts, *i.e.*, the SEC investigation, its demand letters to M & M and Mr. Martin, and the filing of an Amended Complaint on April 9, 2007—all of which transpired before the License Agreement was signed by the parties—constituted a "claim" for purposes of paragraph 12.1(g). CP P18-21, 26; CP D27, 33-38, 41.

The trial court determined that "SEC claim against M & M Technologies, as a relief defendant for $550,000, was an inchoate potential claim" only, and therefore M & M had not breached paragraph 12.1(g). CP 125 at ¶¶ 3.21-3.24. This determination was an error of law. Essentially, the trial court adopted a narrow interpretation of "claim" and equated "claim" with "lawsuit." The substantial weight of the undisputed evidence establishes that the SEC had clearly made a claim against M & M, as a relief defendant in the Ponzi scheme litigation, for $550,000 (and M & M indeed settled by paying the demanded amount). CP P18-21, 26, D27, 33-38, 41; RP 177-178. The mere fact that M & M was not *served* with the Amended Complaint until a few weeks after the signing of the License Agreement is legally immaterial and inconsequential. M & M and Mr. Martin knew, upon reviewing M & M's bank records in December 2006, that the SEC's claim had merit, *i.e.*, the $550,000 had been received by M & M directly from IFC and thus, M & M's being named as a relief defendant was inevitable. RP 192-195.

CONCLUSION

For the foregoing reasons, the trial court's finding that M & M did not breach paragraph 12.1(g) of the License Agreement should be reversed and judgment should be entered in favor of Mr. Smith in the amount of $600,000, plus pre-judgment interest.

Respectfully submitted this 21st day of April, 2015.

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909 Squalicum Way, Suite 110
Bellingham, WA 98225
360-325-7774
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify under penalty under the laws of the State of Washington that on April 21, 2015, I caused a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF to be delivered by Email and U. S. Mail (1st Class) to the following:

Douglas Shepherd
Shepherd & Abbott
2011 Young St., Suite 202
Bellingham, WA 98225

Kenneth L. Karlberg

APPENDIX E

federal district court, you file the proposed amended complaint with a motion in fact to be able to have an amended complaint and a summons issued, and this was filed with a motion to be able to file and serve which motion was heard after the 11th, so this is an incomplete document. It's misrepresenting the facts just because it's dated.

THE COURT: Well, it's merely a complaint.

MR. SHEPHERD: But it has a nine. They're going to rely upon the date that the complaint was filed on the 9th of April, if the Court has seen their brief, and in fact, the motion to be able to file and serve the complaint was filed on the 9th.

THE COURT: Of May or April?

MR. SHEPHERD: Of April.

MR. KARLBERG: Yeah, the --

MR. SHEPHERD: The order allowing an amended complaint was after April 11th, and the service was in May.

THE COURT: Yes, I understand that. I want to understand the distinction.

MR. SHEPHERD: The Court understands, so it's an incomplete document.

THE COURT: I think the issue here is whether or not he had notice, not whether the document was formally filed with the court.

MR. SHEPHERD: Well, they've -- in their trial brief, I read their trial brief differently than that argument whether he had notice or not. It depends on whether the suit was actually in existence at this time.

THE COURT: It seems to me if someone is aware a complaint is or may be filed, they have some notice, and I think that's the issue before this Court, whether there's notice or not, and what kind of notice it is.

MR. SHEPHERD: Yeah.

THE COURT: Which you can address with redirect.

MR. KARLBERG: All right. All right. With that in mind, is Exhibit 38 admitted for the limited purpose of notice?

THE COURT: I will admit it for limited purposes.

MR. KARLBERG: All right. Thank you.

(Defendants' Exhibit Number 38 admitted into evidence.)

THE CLERK: Defendants' Exhibit 39 is marked.

(Defendants' Exhibit Number 39 is marked for identification.)

Q. (By Mr. Karlberg) Mr. Martin, I'm handing you what's been marked Exhibit Number 39. Would you take a moment to review the exhibit?

A. Yes, sir.

Q. All right, and would you confirm for the record that all of the pages of this exhibit have M & M production numbers at the bottom from discovery?

APPENDIX F

TRIAL EXHIBIT 6

ASSIGNMENT AGREEMENT

THIS AGREEMENT is made as of this 1st day of June, 2007, by and between Stanley Smith ("Assignor"), NuPower Technologies, LLC, a Washington limited liability company ("Assignee") and M&M Technologies, Inc. ("M&M Technologies") (collectively the "Parties").

WHEREAS Assignor has entered into a License Agreement with M&M Technologies dated April 11, 2007 (the "License Agreement"); and

WHEREAS Assignor has entered into an Option Agreement with M&M Technologies dated April 11, 2007 (the "Option Agreement"); and

WHEREAS Assignor has entered into a Research, Development and Testing Agreement (the "RD&T Agreement") with M&M Technologies dated April 11, 2007; and

WHEREAS Assignor provided M&M Technologies with a certain Letter of Intent dated May 4, 2007 (the "LOI"); and

WHEREAS at all times during the negotiation and preparation of the License Agreement, the Option Agreement, the RD&T Agreement and the LOI (collectively the "Documents"), Assignor intended to form an independent business entity that would undertake the Assignor's contractual rights, interests and obligations as set forth in the Documents;

NOW, THEREFORE, in consideration of Assignor's assignment and Assignee's receipt thereof, and M&M Technologies acknowledgement and acceptance thereof, which consideration is acknowledged by all Parties as to receipt and adequacy, the Parties agree as follows:

1. Assignor hereby assigns all of its rights, interests and obligations as set forth in the Documents to Assignee.

2. Assignee hereby accepts assignment of Assignors rights, interests and obligations as set forth in the Documents and agrees to perform the same.

3. M&M Technologies hereby acknowledges the assignment as set forth herein, accepts the same and agrees that it will hereafter look only to Assignee for ~~performance of the obligations set forth in the Documents.~~

ASSIGNOR:	ASSIGNEE:	M&M Technologies
Stanley Smith	Stanley Smith, Manager NuPower Technologies, LLC	Terry Martin Title:________

APPENDIX G

A. And I can't recall if I had any of the other attorneys do any of the other ones.

Q. Do any of your companies own things -- own property other than real estate?

A. One of them did own things other than real estate.

Q. What company was that?

A. Nupower.

Q. And what-- Is Nupower still in existence?

A. As far as I know, yes, sir.

Q. And what does it own?

A. It owns the everseal technology.

Q. Does it have any other assets?

A. Not that I know of.

Q. Did Nupower ever have any cash in it, any money?

A. Yes, sir.

Q. And where did that money come from?

A. I believe I put the money into that.

Q. And how much money did you put into Nupower when you started it?

A. I don't remember how much money has been in the company.

Q. And have there been any other owners other than you or investors in Nupower other than yourself?

A. Not that I can remember. I'd have to go back and look at it.

APPENDIX H

Wn. 2d 70, 515 P.2d 982 (1973), and entitled Mr. Smith to the return of his investment and applicable interest.

I. ASSIGNMENTS OF ERROR

Mr. Smith assigns error to the trial court's Findings of Fact and Conclusions of Law. CP 125.

Specific assignments of error are:

A. The trial court erred as a matter of law by ruling that the word "claim" in paragraph 12.1(g) of the License Agreement did not encompass the SEC's claim against M & M because suit had not yet been filed against M & M. CP 125 at ¶¶ 3.21-3.24.

B. The trial court erred as a matter of law by ruling that M & M has not breached the License Agreement and was entitled to retain all funds paid by Mr. Smith to M & M. CP 125 at ¶ 3.09, 3.45, 3.47, 4.02 and 5.03, Conclusions of Law 3, 6, 8, and 11.

Issues pertaining to these assignments of error are:

A. The language of Paragraph 12.1(g) is an affirmative representation and warranty that, if untrue, voids the License Agreement. *Cf. Miller v. Commercial Union Assurance Co.,* 69 Wash. 529, 125 P.2d 782 (1912);

APPENDIX I

RAP 10.3(g)

Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

APPENDIX J

RAP 13.4(b)

Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

DOUGLAS SHEPHERD LAW OFFICE PS

May 19, 2016 - 11:39 AM

Transmittal Letter

Document Uploaded: 725971-Petition for Review.pdf

Case Name: Terry Martin & M&M Technologies v. Stanley Smith, et al.
Court of Appeals Case Number: 72597-1

Party Respresented: Respondent
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): ________
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _______

Comments:

The filing fee will be hand delivered this afternoon to the Court of Appeals.

Sender Name: Jen Petersen - Email: jen@saalawoffice.com

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