No. 93335-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 72818-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON and KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENTS, LLC, and SHELL LA PAZ, LLC; NORTHLAND CAPITAL LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC; and P.R.E. ACQUISITIONS, LLC,

Petitioners,

v.

GRAHAM & DUNN, P.C.,

Respondent.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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A. Identity of Petitioners and Court of Appeals Decision.

Petitioners John and Kristine Norton individually and derivatively on behalf of Larco-Bolivar Investments, LLC; Shell La Paz, LLC; Northland Capital LLC; NDG-Brycon, LLC; and P.R.E. Acquisitions, LLC (collectively "the Nortons") lost over $10 million in a Ponzi scheme perpetrated and concealed by the client of respondent Graham & Dunn, PC. The firm lent substantial assistance to Jose Nino de Guzman – the firm's client and the scheme's architect. The Nortons did not – and could not – learn of Graham & Dunn's active role in the scheme until other investors, hostile to the Nortons, filed a lawsuit in 2012 lawsuit that revealed critical evidence.

The Court of Appeals affirmed the trial court's dismissal of the Nortons' claims on summary judgment, holding that the Nortons either knew of their claims, or should have, by September 2009, shortly after de Guzman's Ponzi scheme was revealed. The Court of Appeals denied the Nortons' timely motion to publish its April 18, 2016 decision (Appendix A) on June 6, 2016 (Appendix B).

B. Issues Presented for Review

1. Did the Court of Appeals improperly conflate the standards for imposing liability against the party committing a fraud and against the party's lawyers for aiding and abetting the fraud, by

holding that the Nortons had notice of their claims against the lawyers who represented the architect of a Ponzi scheme before the Nortons discovered that the lawyers gave their client substantial assistance in fostering and then concealing the fraud?

2. Did the Court of Appeals erroneously impute to the Nortons the knowledge of an attorney they had spoken with once, where that attorney was duty-bound under RPC 1.7 and 1.9 not to share any knowledge with the Nortons because he owed his primary allegiance to an investor committee with whom the Nortons had "irreconcilable conflicts of interest?"

C. Statement of the Case.

1. The Nortons lost over $10 million to Jose Nino de Guzman, who orchestrated an elaborate Ponzi scheme with the active assistance of his counsel, Graham & Dunn.

In 2008, John Norton ("Norton"), his wife Kristine, and their investment companies, Northland Capital, LLC, and P.R.E. Acquisitions, LLC, invested over $10 million with Jose Nino de Guzman ostensibly for the purchase and development of real estate in Peru. (CP 490-93) De Guzman defrauded the Nortons and numerous other investors through his companies NDG Investment Group, LLC, and Grupo Innova, SA, as well as LLCs formed for the alleged development projects, diverting funds from later investors to

pay off earlier investors and to fund his extravagant lifestyle. (CP 4, 466-67, 519) Graham & Dunn, serving as counsel for de Guzman and his companies, knew of de Guzman's scheme and substantially aided it by advising de Guzman how to conceal his fraud from investors and regulators, and by drafting documents it knew contained false representations, *e.g.*, LLC agreements and securities filings. (CP 283, 341, 417, 508-09, 518-19)

De Guzman's scheme started unraveling in early January 2009, when Norton and his partner in P.R.E., William Prater, confronted de Guzman about an unauthorized purchase of property, and arranged for a meeting with de Guzman and his Graham & Dunn attorney, Nicolas Drader. (CP 493-94, 511-12) After the meeting, Drader drafted a Memorandum of Understanding (MOU) that limited de Guzman's authority and required him to engage an accounting firm and forfeit his ten percent interest in P.R.E. (CP 124-26, 494)

By June of 2009, Norton and other investors had discovered de Guzman's fraud. (CP 139-44, 153, 495) In June 2009, Norton discussed with a "Steering Committee" of defrauded investors their common goal of coordinating a litigation strategy for recovering investments. (CP 495) Norton sat in on an interview conducted by the Steering Committee with attorney Stephen Sirianni before the

Committee retained him – the one and only time Norton and Sirianni spoke. (CP 496) Norton paid part of Sirianni's fee to perform a preliminary investigation of the Ponzi scheme, focusing primarily on the role of U.S. Bank, whose employees profited from de Guzman's scheme. (CP 496)

Conflicts immediately arose between the Nortons, who had lost far more than any other investor, and the Steering Committee. Those conflicts were reflected in a July 2, 2009, email in which Steering Committee investors stressed "Per our legal counsel: As to Norton, no one is giving up rights [against him]" and that "Norton could . . . argue that some of the LLC investors money is his" – *i.e.*, that recovery by Norton would come at the expense of Steering Committee investors. (CP 999)

In July 2009, Graham & Dunn produced to lawyers representing whistleblowing NDG employees documents, which were forwarded to Sirianni; Norton never saw these documents because he was asked to leave the Steering Committee. (CP 156, 169, 171, 188-89, 496, 715) On August 25, 2009, the Nortons were refunded their share of Sirianni's fee and on September 9, 2009, the Steering Committee sent a letter confirming Norton's departure because of "irreconcilable conflicts of interests . . . and our inability

to resolve them." (CP 500-02) A year later, a Steering Committee attorney accused Norton of criminal conduct as a "business partner" and "coconspirator" of de Guzman. (CP 1325)

2. After learning of Graham & Dunn's active involvement in de Guzman's scheme in July 2012, the Nortons sued Graham & Dunn in April 2013.

In July 2012, fourteen lawsuits were filed against Graham & Dunn by NDG investors, including a lawsuit by former Steering Committee investors called the "*Aggen* suit." (CP 497, 517-54) The *Aggen* suit relied heavily on internal Graham & Dunn documents, including a previously undisclosed "smoking gun" November 2008 email in which Graham & Dunn counseled NDG that it would be a "**HUGE issue**" if its "**violation of various state and federal securities laws**" were known and thus, in order to avoid letting the "**cat[] out of the bag**," NDG should conceal its violations by paying for the silence of an employee with intimate knowledge of de Guzman and NDG's fraud. (CP 518-19 (emphasis in original)) The *Aggen* complaint also alleged that in the January 2009 meeting "NDG, de Guzman, and Graham & Dunn were negotiating to pay off the P.R.E. investors." (CP 542)

Norton first learned that Graham & Dunn had knowingly assisted de Guzman in concealing the Ponzi scheme when the *Aggen*

complaint was filed. The firm had consistently denied any wrongdoing and had concealed critical documentary evidence, omitting the November 2008 email from its July 2009 production. (CP 497, 549; *see also* CP 548 ("Graham & Dunn had been actively concealing NDG's misrepresentations from investors and the authorities")) Moreover, unbeknownst to the Nortons, Graham & Dunn had secretly negotiated an agreement with the *Aggen* plaintiffs to toll the three-year statute of limitations. (CP 565)

The Nortons filed suit against Graham & Dunn on April 11, 2013, relying on the revelations in *Aggen*. (CP 1-29) The Nortons' claims included aiding and abetting fraud and misrepresentation, and violations of the Securities Act of Washington. (CP 19-26)

3. The Court of Appeals affirmed the trial court, holding that the discovery rule did not toll the limitations period on the Nortons' claims.

The trial court dismissed the Nortons' claims on summary judgment as barred by the three-year statute of limitations. The trial court rejected the Nortons' argument that their claims were timely under the discovery rule, "under which the cause of action accrues when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action." (CP 717-28) *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575-

76, ¶ 10, 146 P.3d 423 (2006).). The trial court stated that "the Nortons' statutes of limitations [were] triggered no later than September 2009." [Order at 8]

On April 18, 2016, the Court of Appeals affirmed the trial court in an unpublished decision, and on June 6, 2016, it denied the Nortons' motion to publish. (App. A-B) The Court of Appeals held that the Nortons discovered, or should have discovered, their claims by September 2009, because (1) the Nortons knew they had been defrauded by de Guzman during Graham & Dunn's representation of de Guzman, and (2) because Sirianni briefly represented the Steering Committee, and thus the Nortons had constructive knowledge of the documents sent to Sirianni. (App. A 12-17)

D. Argument Why Review Should Be Granted.

1. The Court of Appeals decision confuses the standard for establishing an attorney's liability for aiding a client's fraud. (RAP 13.4(b)(4))

The Court of Appeals erroneously held that because the Nortons had knowledge of their claims against de Guzman, they also had knowledge of their claims against his lawyer, conflating the distinct standards for imposing liability on a party guilty of fraud and an attorney who represents that party. This Court should grant review under RAP 13.4(b)(4) because the public should have clear

guidance on when a fraud victim will be deemed to have knowledge of a claim against an attorney.

It is an unfortunate reality that an attorney's provision of legal services may unwittingly assist a client's fraud or other wrongdoing. Attorneys are professionally obliged to advise those who may be guilty of wrongdoing, RPC 1.2(d) and Comments 9-10, and this Court has sharply limited an attorney's liability to non-clients for their actions in the representation of a client. *See Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) (establishing multi-factor test to determine whether attorney owes duty to non-client); *see also McKasson v. State*, 55 Wn. App. 18, 29, 776 P.2d 971 ("an attorney acting within the scope of his employment as attorney is immune from liability to third persons for actions arising out of that professional relationship") (quotation omitted), *rev. denied*, 113 Wn.2d 1026 (1989).

Thus courts require more than unwitting assistance to impose liability on attorneys for the tortious conduct of their clients and do so only when an attorney "knows that [their client's] conduct constitutes a breach of duty and gives substantial assistance or encouragement" to the client in breaching that duty. Restatement (Second) of Torts § 876 (1979) (cited with approval in *Martin v.*

Abbott Labs., 102 Wn.2d 581, 596, 689 P.2d 368 (1984)).[1] This Court should clarify that a non-client must have notice that an attorney knew of the client's misconduct and substantially aided it before the statute of limitations begins to run on the non-client's claim against the wrongdoer's attorney.

The three-year statute of limitations on the Nortons' claims[2] only begins to run "when the plaintiff discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action." *1000 Virginia Ltd. P'ship*, 158 Wn.2d at 575-76, ¶ 10. The Court of Appeals confused the distinct elements for client and attorney liability by repeatedly equating Norton's knowledge of *de*

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[1] Other courts refuse to impose liability on attorneys stemming from their client's wrongdoing unless the plaintiff can meet the requirements of the Restatement. *See, e.g., Spinner v. Nutt*, 417 Mass. 549, 631 N.E.2d 542, 546 (1994) ("An allegation that the trustees acted under the legal advice of the defendants, without more, is insufficient to give rise to a claim that an attorney is responsible to third persons for the fraudulent acts of his clients."); *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 44, 652 N.W.2d 756, 774 (2002) ("The substantial assistance requirement carries with it a condition that the lawyer must actively participate in the breach of a fiduciary duty."); *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 46 A.D.3d 400, 402, 849 N.Y.S.2d 510, 512 (2007) ("Plaintiffs fail to allege any facts from which it could be inferred that [the attorneys] not only had actual knowledge of a breach of fiduciary duty by the fund but also rendered 'substantial,' rather than inadvertent, assistance to the fund"), *aff'd*, 12 N.Y.3d 553, 910 N.E.2d 976 (2009).

[2] RCW 21.20.430(4)(b) (securities fraud); RCW 4.16.080(4) (negligent misrepresentation, aiding and abetting fraud, and conspiracy to commit fraud); RCW 4.16.080(2) (breach of fiduciary duty and professional malpractice).

Guzman's fraud with knowledge of wrongdoing by *Graham & Dunn*, mistakenly holding that "the statute of limitations began [to run] when Norton discovered or should have discovered . . . *the fraud.*" (App. A 12 (emphasis added))

For example, the Court of Appeals relied on a March 11, 2009, email from Prater to Norton stating de Guzman was "running a financial house of cards" and thus reasoned that the Nortons had notice of their claims against Graham & Dunn because Norton had discovered "the inappropriate nature of Mr. de Guzman's business dealings in both the U.S. and Peru." (App. A 13; *see also* App. A 17 ("The undisputed record shows Norton knew in March 2009 that he had lost more than $9 million in a Ponzi scheme")) While the Nortons discovered that they had been damaged by de Guzman's fraud in the spring of 2009, they did not learn of Graham & Dunn's active role in that fraud until July 2012.

The Court of Appeals erroneously held that the Nortons knew they had claims against Graham & Dunn because they listed Graham & Dunn along with virtually every business associate of de Guzman as potential "recovery opportunities." (CP 148-49; App. A 13 & n.20) Had the Nortons believed there was a reasonable basis for suing Graham & Dunn, they would have done so, just as they sued other

aiders and abettors whom they initially listed as potential "recovery opportunities." (CP 497) The fact that the Nortons earlier pursued others on that list confirms that they diligently and aggressively sought to recover their losses from those business associates the Nortons knew had actually aided and abetted de Guzman. That they included Graham & Dunn on their list but did not immediately sue the firm underscores that while Norton was aware of de Guzman's fraud and the potential liability of others, he did not believe he had a basis for suing Graham & Dunn until after the *Aggen* lawsuit was filed.

The Court of Appeals effectively held that if a defrauded party even suspects an attorney may have aided his client's fraud, the client is on notice of claims against the attorney, regardless of whether that party possesses any evidence of the attorney's active assistance, further blurring the line between claims against a client and those against an attorney. "Mere suspicion of wrong is not discovery of the fraud, nor is it a clue" that must be followed to assert a claim against the perpetrator of the fraud. *Davison v. Hewitt*, 6 Wn.2d 131, 137,

106 P.2d 733 (1940).[3] And "mere suspicion of fraud" is certainly insufficient to put a victim on notice that the perpetrator's lawyer actively aided the wrongdoing. For instance, in the *Aggen* suit, the trial court held that Graham & Dunn was entitled to a "qualified privilege" that required the plaintiffs to establish the firm "acted outside the scope of the attorney-client relationship" before it could be liable "for assisting a person's breach of duty to a third party." (CP 515, 619-26, 871 (citing Restatement (Second) of Torts § 876))

The Court of Appeals cited evidence available to the Nortons in 2009 showing, at most, Graham & Dunn's unwitting, not knowing, assistance of de Guzman's fraud – evidence that *supports* the Nortons' belief they had no basis for suing Graham & Dunn. For instance, the fact that Graham & Dunn continued to draft organizational documents and "do new deals" (App. A 7, 13) is entirely innocent *unless* one also knows that Graham & Dunn did so with knowledge of de Guzman's fraud. *See Disciplinary Proceeding Against Botimer* 166 Wn.2d 759, 772, ¶ 27, 214 P.3d 133 (2009)

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[3] *See also Price v. State*, 96 Wn. App. 604, 980 P.2d 302 (1999) (parents did not have notice of their claims against DSHS despite suspicion that DSHS had failed to supply information they requested), *rev. denied*, 139 Wn.2d 1018 (2000); *Nelson v. Schubert*, 98 Wn. App. 754, 762, 994 P.2d 225 (2000) (plaintiff's "belief that [defendant] had killed her daughter had no evidentiary value" without supporting evidence and thus did not begin running of limitations period).

(attorney's signature on false tax return is not perjury unless attorney knows return is false at the time he signs it); *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 412 (3d Cir. 2003) (claim against attorneys could proceed because plaintiff alleged attorneys "knew th[e] deed to be false when they prepared it"). The *Aggen* court denied summary judgment to Graham & Dunn only because a reasonable jury could find the firm continued to draft documents "while *knowing* of NDG activities." (CP 865 (emphasis added))

The Court of Appeals also confused the import of emails produced to Sirianni in July 2009, all of which show Graham & Dunn urging its client to comply with applicable securities laws by supplying missing information. (App. A 13) For example, a May 21, 2008, email from Drader to a NDG employee states "[d]ue to lack of receipt of info from NDG . . . . you are in violation of your obligations under the securities laws." (CP 686, cited at App. A 14) The Court of Appeals spends three pages quoting these emails, but it nowhere explains how they put the Nortons on notice that Graham & Dunn knew de Guzman was stealing investor funds or that it stepped outside its legitimate role as an advisor by actively assisting de Guzman's theft. Further, "no authority . . . imputes liability upon

counsel when an injury is caused primarily by the client's failure to follow the attorney's advice." *Hines v. Data Line Sys., Inc.*, 53 Wn. App. 283, 292, 766 P.2d 1109 (1989), *reversed on other grounds by* 114 Wn.2d 127, 787 P.2d 8 (1990).

The Court of Appeals also mistakenly relied on Graham & Dunn's failure to file "Form Ds," required by the SEC to confirm securities are exempt from registration. (App. A 13-14; *see* 17 CFR § 230.503) As Graham & Dunn argued in *Aggen*, the absence of Form Ds established only that "NDG was slow to provide the information necessary to complete the forms," not – as was actually true – that Graham & Dunn purposefully delayed filing the forms and left information out to deceive regulators. (CP 607)[4] It is one thing to know an attorney failed to file a Form D; it is another to know the attorney did so to assist the cover up of his client's fraud.

Stripping away the evidence erroneously relied on by the Court of Appeals, the November 2008 email is not simply "additional evidence." (App. A 17) It is the *only* evidence from which Norton could learn that Graham & Dunn actively participated in the Ponzi scheme and its cover up by advising de Guzman to pay an employee

[4] Graham & Dunn's argument in *Aggen* is entirely inconsistent with its position in this case, and further demonstrates the lengths to which Graham & Dunn went to cloak its aid of de Guzman's fraud.

for his silence because it "**would be a HUGE issue for you if these violations were publically known.**" (CP 519 (emphasis in original)) By contrast, all of the documents disclosed by Graham & Dunn in July 2009 support – as Graham & Dunn intended – its assertion that it gave good faith advice to a client to comply with securities laws. The Nortons could not have reasonably learned that Graham & Dunn knew of de Guzman's fraud and substantially aided and concealed it until July 2012, when they obtained the November 2008 email.

The Court of Appeals equated knowledge of a Ponzi scheme with knowledge that the perpetrator's attorney lent the scheme substantial assistance. That cannot be the law. This Court should grant review and hold that the Nortons did not have notice of their claims against Graham & Dunn until they learned that Graham & Dunn knew of de Guzman's fraud and actively aided it.

2. The Court of Appeals erroneously imputed to the Nortons the knowledge of an attorney they spoke with once and who was subject to "irreconcilable conflicts of interest." (RAP 13.4(b)(4))

The Court of Appeals also erroneously held the Nortons had notice of their claims based on documents produced to the attorney retained by the Steering Committee, Stephen Sirianni, ignoring

Norton had spoken with Sirianni but once and that "irreconcilable conflicts of interest" resulted in Norton's immediate removal from the committee. Such a fleeting relationship has never been the basis for imputing an attorney's knowledge to a layperson. But even if Sirianni and the Nortons had a brief attorney-client relationship, Sirianni's ethical obligations when faced with clients whose interests so obviously conflicted required him to end the joint representation and to withhold information gained during the course of it. This Court – the final arbiter of the Rules of Professional Conduct – should accept review under RAP 13.4(b)(4) and hold the Nortons cannot be charged with the knowledge obtained by the Steering Committee through its attorney Sirianni.

No precedent supports the Court of Appeals' holding that, by virtue of their short relationship with Sirianni through the Steering Committee, the Nortons are deemed to know all Sirianni may have known but never communicated to them. Norton spoke with Sirianni only once – when he sat in on an interview conducted by the Steering Committee before it retained counsel. (CP 496) Norton then paid a portion of a fee to fund Sirianni's preliminary investigation of U.S. Bank, not Graham & Dunn, but that money was quickly refunded. (CP 496, 501-02) The existence of an attorney-

client relationship is a question of fact. *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). This Court should reverse the Court of Appeals' erroneous holding that *as a matter of law* the Nortons knew everything Sirianni knew.[5]

If Sirianni's brief relationship with the Nortons was formal "representation" (as the Court of Appeals apparently believed), then his professional and ethical obligations forbid his sharing with the Nortons the very knowledge the Court of Appeals imputed to them. There is no dispute the Nortons were excluded from the Steering Committee because of an irreconcilable conflict. Under RPC 1.7(a)(2), an attorney cannot jointly represent clients if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." And "[i]f a conflict arises after representation has been undertaken,

[5] Graham & Dunn cited *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978), below to argue "the attorney's knowledge is deemed to be the client's knowledge." (CP 50; Resp. Br. 20) That case nowhere states such a sweeping rule, and instead held a client was bound by her attorney's actions at a settlement hearing because the attorney "took affirmative steps to bind the client." *Mitchell v. Kitsap County*, 59 Wn. App. 177, 184, 797 P.2d 516 (1990) (distinguishing *Haller*); *see also Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC*, 52 F. Supp. 3d 1162, 1168 (W.D. Wash. 2014) (distinguishing *Haller* and holding attorney's knowledge could not be imputed to client as a matter of law).

the lawyer ordinarily must withdraw from the representation." RPC 1.7, Comment 4.

After an attorney withdraws, under RPC 1.9(c), the attorney is thereafter precluded from "us[ing] information relating to the representation to the disadvantage of the former client" or "reveal[ing] information relating to the representation" except as the RPCs allow. This rule prohibits sharing with one former co-client information gained during a joint representation if it will harm another former co-client. *See Disciplinary Proceeding Against Botimer*, 166 Wn.2d 759, 769-70, ¶¶ 21-22, 214 P.3d 133 (2009) (attorney violated RPC 1.9 by submitting declarations outlining one co-client's business operations in suit by other co-clients).

The Court of Appeals erred in imputing knowledge to the Nortons that Sirianni was duty bound not to share because of "irreconcilable conflicts of interest" between the Nortons and the Steering Committee investors. (CP 500) The Steering Committee's conflicts were Sirianni's conflict as well – any disclosure by Sirianni that aided the Nortons' recovery would have harmed the Steering Committee, because "Norton could . . . argue that some of the LLC investors money is his." (CP 999) As a July 2, 2009, email confirms, these conflicts were known to Sirianni at the same time he began

receiving documents regarding Graham & Dunn's conduct. (CP 999 ("Per our legal counsel: As to Norton, no one is giving up rights.")) Nonetheless, the Court of Appeals held the Nortons knew of Graham & Dunn's "attempt . . . to exploit a loophole in federal law" because "documents [were] produced to Sirianni and the Steering Committee." (App. A 16)

The Court of Appeals decision unfairly charges plaintiffs with knowledge of facts they cannot obtain. Under this Court's precedent, the discovery rule requires a plaintiff to exercise reasonable diligence to discover a cause of action. *1000 Virginia Ltd. P'ship*, 158 Wn.2d at 575-76, ¶ 10. Reasonable diligence cannot include convincing attorneys to violate their ethical obligations by disclosing information harmful to a former client.

The Court of Appeals likewise erred in faulting "Norton [for] never ma[king] any effort to obtain the documents from the Steering Committee" and not taking up the Steering Committee on its "offer[] to cooperate," again ignoring the irreconcilable conflicts of interest. (App. A 16-17) Once they parted ways, the Steering Committee viewed Norton not as an ally, but as someone de Guzman "paid off" and attempted to impose criminal liability on him as de Guzman's "partner" and "coconspirator." (CP 542, 1325) This Court should

grant review and hold that any information obtained by Sirianni cannot be imputed to the Nortons, or, at a minimum, that what the Nortons learned from Sirianni is a factual issue that must be resolved by a jury.

E. Conclusion.

This Court should accept review, reverse the Court of Appeals, and remand for trial of the Nortons' claims.

Dated this 6th day of July, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 6, 2016, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

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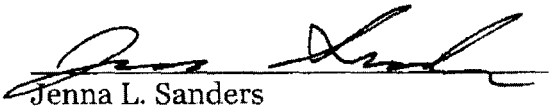
DATED at Seattle, Washington this 6th day of July, 2016.



Jenna L. Sanders

193 Wash.App. 1023
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

John **NORTON** and Kristine **Norton**, individually, and derivatively on behalf of Larco–Bolivar Investment, LLC and Shell La Paz, LLC; Northland Capital, LLC, individually, and derivatively on behalf of NDG–Brycon, LLC; and P.R.E. ACquisitions, LLC, Appellants,

v.

GRAHAM AND DUNN, P.C., a Washington professional corporation, Respondent.

No. 72818–1–I.

April 18, 2016.

Appeal from King County Superior Court; Hon. Beth M. Andrus, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

SCHINDLER, J.

*1 John and Kristine **Norton**, individually and derivatively on behalf of Larco–Bolivar Investment LLC and Shell La Paz LLC; Northland Capital LLC, individually and derivatively on behalf of NDG–Brycon LLC; and P.R.E. Acquisitions LLC (collectively, **Norton**) appeal summary judgment dismissal of claims against **Graham** & Dunn PC as barred by the three-year statute of limitations. Because the undisputed record shows **Norton** knew or in the exercise of due diligence should have known the facts to timely file claims against **Graham** & Dunn alleging violation of the Washington State Securities Act (WSSA), chapter 21.20 RCW; and aiding and abetting fraud, we affirm.

NDG Investments

John **Norton** owned a majority interest in Snelson Companies Inc. (Snelson). In early 2000, **Norton** hired business consultant William Prater "to evaluate my company and its performance and operations to see if I could improve its efficiency." According to **Norton**, Prater worked for Snelson "off and on" until 2006 or 2007.

Jose Luis Nino de Guzman Jr. is a former U.S. Bank employee and Peruvian national. In 2006, de Guzman left U.S. Bank to establish an investment company to engage in real estate development in Peru, NDG Investment Group LLC (NDG). Beginning in 2007, Prater worked as a business consultant for de Guzman and NDG. De Guzman planned to sell membership interests in limited liability companies (LLCs) to investors and use the money to purchase property for designated real estate projects in Lima, Peru. De Guzman formed Grupo Innova SA to act as the local real estate developer for NDG in Lima. The investors would receive the net proceeds after the development projects were sold.

On May 9, 2007, de Guzman and NDG retained the law firm of **Graham** & Dunn PC to form LLCs for designated real estate projects in Peru. In 2007, **Graham** & Dunn formed the first Delaware LLC for Arequipa LLC, a plan to develop a condominium project in Lima, Peru. In December 2007, NDG began selling membership interests in Arequipa LLC to investors.

In 2008, Prater suggested **Norton** and his business associates "consider investing in some of the projects" de Guzman was "putting together." According to **Norton**, "Prater provided us with contact information of the appropriate representatives of NDG, their website and other information to facilitate our review." The NDG website stated that de Guzman founded NDG and Grupo Innova to develop "high quality housing, while also providing sustainable opportunities for American investors." The NDG website also identified **Graham** & Dunn as one of its "Partners" providing "all NDG legal work in the US." **Norton** said that according to the "promotional and investment materials," investor "returns of approximately 35 to 50% were to be expected

and would be paid when the project was built out and sold, typically in 14 to 18 months."

Norton decided to purchase a membership interest in Larco–Bolivar Investment LLC (Larco–Bolivar LLC). Larco–Bolivar LLC planned to develop a commercial building in Lima, Peru. **Norton** signed the March 19, 2008 Larco–Bolivar LLC "Limited Liability Company Agreement" (LLC Agreement). The LLC Agreement states **Graham** & Dunn prepared the LLC Agreement and was acting as legal counsel "for the Company only." The LLC Agreement states the membership interests were not registered under federal or state securities laws and "[t]he availability of any exemption from registration must be established by an opinion of counsel."

> *2 *Federal Law Disclosure and Limitations.* The Membership Interests have not been registered under federal or state securities laws. Membership Interests may not be offered for sale, sold, pledged, or otherwise transferred unless so registered, or unless an exemption from registration exists. The availability of any exemption from registration must be established by an opinion of counsel, whose opinion must be satisfactory to [NDG].

On May 3, **Norton** wired $200,000 to U.S. Bank "to purchase our membership interest in Larco–Bolivar."

In spring 2008, **Norton** and Prater formed an investment company, Northland Capital LLC (Northland). **Norton** and Prater each owned a 50 percent interest in Northland. The partners agreed Prater would identify investments, **Norton** would fund the investments, and they would "split the profits."

After months of negotiation, on July 2, 2008, **Norton** sold Snelson for $76.4 million. On July 3, **Graham** & Dunn formed Shell La Paz LLC to develop a commercial building in Lima, Peru. **Norton** decided to invest in Shell La Paz LLC. **Norton** signed the July 3, 2008 Shell La Paz LLC Agreement and wired $500,000 to U.S. Bank to purchase his membership interest in the LLC.

On July 14, 2008, **Graham** & Dunn formed NDG–Brycon LLC to develop low cost housing real estate projects in Peru. On July 15, Northland wired $500,000 to U.S. Bank to purchase a 50 percent membership interest in NDG–Brycon LLC resulting in a "ten percent (10%)" ownership interest in Brycon International.

Graham & Dunn formed four more LLCs for de Guzman and NDG in 2008. On August 18, **Graham** & Dunn formed NDG–Brycon 2 LLC "to purchase an interest in Brycon International for the purpose of developing real estate projects in Peru." On September 2, **Graham** & Dunn formed Los Alamos Residential LLC "to fund development of a townhome complex in the Surco district of Lima." On November 5, **Graham** & Dunn formed Grau Residential LLC "to fund development of a 42–unit condominium in the Miraflores district of Lima." And on December 18, **Graham** & Dunn formed Jorge Chavez LLC "to fund development of a 39–unit condominium in the Miraflores district of Lima."

Graham & Dunn advised de Guzman and NDG that the LLCs were exempt from registration under Securities and Exchange Commission (SEC) Rule 506 of Regulation D if the membership interests were sold only to accredited investors, and a "Form D" was filed within 15 days after the first sale of securities with a balance sheet or financial statement by an independent accountant.

P.R.E. Acquisitions LLC

Toward the end of July 2008, **Norton**, Prater, and de Guzman agreed to form P.R.E. Acquisitions LLC (P.R.E.) to act as a "land bank" for the NDG and Grupo Innova real estate development projects.

> The concept was that P.R.E. would be given a markup on the land purchase and the LLCs would be guaranteed a price they could depend upon for the development and not be exposed to the rapidly raising prices in the marketplace in Peru. The general expected turnover on each land investment was 8 to 12 weeks, with no individual PRE investment to be tied up for more than 6 months.

*3 **Graham** & Dunn formed P.R.E. as a Washington LLC. The Agreement designates de Guzman as the manager with responsibility for identifying and purchasing property that P.R.E. would "hold while the projects were planned by Grupo Innova and the funds

were being raised in the U.S. by NDG." Northland owned 90 percent and de Guzman 10 percent of P.R.E.

Memorandum of Understanding

From the end of July through the beginning of November 2008, Northland wired approximately $9.8 million from P.R.E. to Grupo Innova in Peru to fund the purchase of properties for El Derby LLC, Los Alamos Residential LLC, El Incario LLC, and Grau Residential LLC.

In January 2009, **Norton** and Prater met with de Guzman in Peru to discuss the status of the P.R.E. investments. De Guzman admitted that without consulting **Norton** and Prater, he sold Los Alamos Residential LLC and used the funds to buy other properties.

> [De Guzman] represented (confessed) that he had sold Los Alamos Residential, LLC to the NDG development LLC and had used those funds to buy other properties he felt would be advantageous to P.R.E. (Malecon 28th of July, Juan de Arona 1, Juan de Arona 2, Javier Prado, Jorge Chavez and Casa Grande). Mr. de Guzman verbally provided details as to the properties purchased.

Norton and Prater acknowledged de Guzman "may have had the authority to do what he did ... [s]ince he was the manager of P.R.E." but made clear "he did not have the approval of the primary investor (Northland)," and "expressed our disappointment and concern over his poor judgment." De Guzman "assured [**Norton** and Prater] that it would not happen again."

After returning to the United States, Prater, **Norton**, and **Norton's** attorney James Hadley at Ryan Swanson & Cleveland met with NDG investors and employees Darin Donaldson and Glenn Fulton on January 22, 2009 to discuss entering into a memorandum of understanding (MOU) to protect Northland's investment in P.R.E.

Following the meeting, **Norton** sent an e-mail to Prater with "comments & suggestions." In addition to requiring de Guzman to resign as the manager of P.R.E., **Norton** stated he must forfeit his 10 percent claim to "all PRE transactions (old and new) as a penalty." **Norton** asked Prater to e-mail him "a copy of the PRE operating agreement as well as any addendums, including the one changing the Manager and adding the funding protocols," and to "[k]eep me posted every step of the way." **Norton** also said his attorney may have other suggestions. "[M]y attorney ... is thinking about this situation both as my advisor and related to his own interests. He may have some other suggestions. If so I will forward."

On January 23, 2009, **Norton** sent Prater an e-mail about other provisions that should be included in the MOU. Specifically, requiring de Guzman to transfer financial authority to Fulton and Donaldson, requiring **Graham** & Dunn to cooperate with **Norton's** attorneys "on a drop-in or ongoing basis," and requiring de Guzman to disclose all financial and real property assets by January 31, 2009.

*4 On January 23, de Guzman, Donaldson, **Norton**, and Prater asked **Graham** & Dunn attorney Nicolas Drader to draft the MOU. De Guzman agreed to reimburse P.R.E. for legal expenses.

During the January 23 meeting, de Guzman admitted he used P.R.E. funds to purchase property in Peru "other than those that Northland Capital had intended to be purchased." **Graham** & Dunn attorney Drader acted as counsel for NDG, and **Norton's** lawyers at Ryan, Swanson & Cleveland represented **Norton** and Northland. Drader testified, in pertinent part:

> **Graham** & Dunn acted as counsel for NDG in connection with this work. The law firm of Ryan, Swanson & Cleveland acted as counsel for Northland Capital and **Norton**.... Darin Donaldson at NDG took primary responsibility for drafting a "Liquidation Plan" to be attached as an exhibit to the MOU, which would describe the process by which De Guzman's misuse of P.R.E.'s funds would be remedied.

According to Drader, other provisions were later added to protect Northland and **Norton** including confirmation of "the status of ownership of the Peruvian properties" and requiring NDG "to engage [bilingual accountant] PricewaterhouseCoopers to conduct a forensic review of the expenditure of P.R.E.'s funds."

> The MOU required De Guzman to personally guarantee any losses incurred as a result of his misuse of P.R.E.'s funds. It also required NDG to pay Northland Capital's expenses associated with De Guzman's misuse of P.R.E.'s funds, and required De Guzman to forfeit his interest in P.R.E., leaving Northland Capital as P.R.E.'s sole member. It also required NDG and De Guzman to use Peruvian counsel to confirm the status of ownership of the Peruvian properties, and required NDG to engage PricewaterhouseCoopers to conduct a forensic review of the expenditure of P.R.E.'s funds. Finally, the MOU required that De Guzman's signing authority over all project-related bank accounts be transferred to Donaldson and Fulton.

NDG paid **Norton** $110,000 for his legal fees.

Discovery of the Ponzi Scheme

After entering into the MOU, NDG employees Donaldson and Fulton attempted to determine the status of the development projects and financing for each of the LLCs. Donaldson and Fulton provided Prater and **Norton** with information about the LLC investments. **Norton** and his lawyers "continued to review information obtained through cooperation with officers of NDG." According to **Norton**, he and his attorney "continued to discover ... the inappropriate nature" of de Guzman's business dealings in the United States and Peru. [1]

On March 11, 2009, Prater sent **Norton** an e-mail stating de Guzman admitted to Fulton that he was "running a financial house of cards" and diverting investor funds.

> [Fulton] has confirmed that [de Guzman] has admitted to have been running a financial house of cards. The so called "Mystery Account" has been used by [de Guzman] to raise money from unsuspecting investors in a variety of ways. Generally he has been concealing limited partnerships between one investor and NDG with about one year terms and about a 50% profit component. [Illegible] [De Guzman] states that the financial liability to NDG is about $2.5 million and there are a couple of dozen individuals involved.
>
> *5 [De Guzman] has used these funds in a variety of ways. These have ranged from financing his personal extravagant lifestyle to repaying investors in previous deals. Very sad and I wish it was not true. The number of disclosures from [de Guzman] keep growing and none are good. He has proven himself to be a very accomplished liar and con man.

On April 10, 2009, Lane Powell PC attorney Christopher Wells on behalf of NDG investor employees Darin Donaldson, Glenn Fulton, and Philip Boos sent a letter to **Graham** & Dunn attorney Drader demanding "Grupo Innova/NDG/De Guzman" provide documents by April 14 including "[t]itle reports on each LLC's real property," bank loan documentation on construction "described in each LLC's offering memorandum," cancelled checks, wire transfer records, and proof of ownership interests in NDG–Brycon LLC and NDG–Brycon 2 LLC. [2] The letter asks NDG to maintain all business records including electronic documents. "Please assist with any requirements to preserve email on NDG's servers, and tell us what steps NDG has already taken to preserve records." The letter also states the NDG employees retained Blank Law + Tech to copy the contents of employee computer hard drives and asks NDG to "preserve copies of all NDG and related LLC records at **Graham** and Dunn." The letter states the employees plan to report to the investors and "will be meeting with them after April 21." **Norton**'s attorneys, Ryan Swanson & Cleveland attorney Hadley and Roger D. Mellem, are specifically identified as recipients of the letter.

Steering Committee

After Donaldson, Fulton, and Boos disclosed the fraud to the other NDG investors, a group of investors formed a "Steering Committee" to recover funds. **Norton** agreed to join the Steering Committee.

On June 11, 2009, **Norton** sent an e-mail to his attorney at Ryan Swanson & Cleveland expressing concerns about the Steering Committee's proposed allocation for the recovery of assets. **Norton** identifies a number of "Recovery Opportunities" in an attached "Allocation Worksheet"—"I've also updated the content and the

format of the attached worksheet for your review. I know we need to discuss all this more." **Norton** specifically identifies "Claim Against [U.S. Bank]," "Claim Against [**Graham** & Dunn]," "Claim Against [De Guzman] & NDG," and "Claim Against Innova or Ownership of Innova" as Recovery Opportunities.

Norton participated in the decision to retain Sirianni Youtz Meier & Spoonemore (Sirianni) to represent the Steering Committee in the effort to recover investment funds. **Norton** paid $24,000 as his portion of the fee to retain Sirianni. On July 2, 2009, the Steering Committee sent an "NDG Recovery–Update" e-mail to the investors and answered some "common questions" including the status of **Norton** as an owner of Northland and P.R.E. "Per [Sirianni]: As to **Norton**, no one is giving up rights, which means the status quo is preserved. **Norton** could-with or without an agreement-argue that some of the LLC investors [']money is his."

*6 On July 1, NDG employees produced "NDG and LLCs files and records" to Sirianni. The NDG files included e-mails from **Graham** & Dunn. On July 8, de Guzman waived attorney-client privilege and instructed **Graham** & Dunn to provide all of the requested documents including e-mails, internal memoranda, and attorney-client correspondence. On July 9, NDG sent Sirianni "CDROMs that were received from **Graham** and Dunn." On July 17, **Graham** & Dunn produced copies of additional e-mails located in the "MS Outlook folders" of individuals at the law firm who worked on "NDG Investment Group L.L.C. matters."

On August 25, 2009, Sirianni returned the $24,000 retainer to **Norton**. On September 9, the "Steering Committee for NDG Recovery Efforts" sent a letter to **Norton** and his attorneys at Ryan Swanson & Cleveland. The letter states irreconcilable conflicts of interest preclude proceeding "as a group" but if **Norton** decides to "file a suit that parallels ours[,] ... our respective groups and lawyers will cooperate to the extent possible to seek and maximize recoveries." The letter states:

> September 9, 2009
>
> Ryan, Swanson & Cleveland, PLLC
>
> Mr. Roger D. Mellem
>
> c/o Mr. John **Norton**
>
> 3rd Avenue, Suite 3400
>
> Seattle, WA 98101–3034
>
> Re: Mr. John **Norton**
>
> NDG Recovery Efforts
>
> Dear Mr. **Norton**,
>
> Due to irreconcilable conflicts of interest that have developed and our inability to resolve them, we have recognized that we cannot proceed as a group. The investor group that we represent cannot include Mr. **Norton**, Mr. Hadley, and Northland Capital, LLC or affiliated entities. We know that you are well represented and your attorneys may wish to file a suit that parallels ours. We will be obtaining new counsel for our group. We trust that our respective groups and lawyers will cooperate to the extent possible to seek and maximize recoveries. We are returning your contribution in full; we are making no deduction for legal fees already incurred.

Norton and his attorneys did not cooperate with the Steering Committee or seek to obtain copies of the documents that NDG and **Graham** & Dunn produced to Sirianni. Instead, **Norton** pursued recovery of funds in Peru and filed a lawsuit in the United States against U.S. Bank, de Guzman, and NDG and a lawsuit against Prater.

Lawsuit against U.S. Bank, De Guzman, and NDG and Lawsuit against Prater

On October 14, 2010, **Norton** individually and derivatively on behalf of Larco–Bolivar LLC and Shell La Paz LLC; Northland individually and derivatively on behalf of NDG–Brycon LLC; and P.R.E. (collectively, **Norton**) filed a lawsuit against U.S. Bank, de Guzman, and NDG for breach of fiduciary duty and violation of the Washington State Securities Act (WSSA), chapter 21.20 RCW. **Norton** alleged de Guzman and NDG committed fraud, negligent misrepresentation, and breach of contract. **Norton** alleged claims against U.S. Bank for negligently hiring, retaining, or supervising employees; unjust enrichment; violation of the Washington Consumer Protection Act, chapter 19.86 RCW; and aiding and abetting fraud, breach of fiduciary duty, and conversion. During discovery, U.S. Bank subpoenaed

records Sirianni had obtained on behalf of the Steering Committee.

*7 In July 2011, the Unites States District Court Western District of Washington charged de Guzman with multiple counts of wire fraud and money laundering.

On August 15, 2011, **Norton** and Northland filed a lawsuit against Prater alleging fraud; negligent misrepresentation; violation of the WSSA; and aiding and abetting fraud, breach of fiduciary duty, and conversion. After Prater filed for bankruptcy, the court stayed the lawsuit.

The Aggen Lawsuit against ***Graham & Dunn***

On July 23, 2012, more than 80 NDG investors, many of whom were members of the Steering Committee, filed a lawsuit against **Graham** & Dunn, *Angela Aggen, et al. v. Graham & Dunn, P.C.*, King County Superior Court Cause No. 12–2–25058–8 SEA (the *Aggen* Lawsuit).[3]

The complaint (the *Aqqen* Complaint) alleged **Graham** & Dunn violated the WSSA, "which prohibits fraudulent or deceitful acts in connection with the offer, sale, or purchase of any security;" aided and abetted NDG in committing fraud and concealing misrepresentation; aided and abetted breach of fiduciary duty; and engaged in conspiracy to commit fraud and breach fiduciary duty.

The *Aqqen* Complaint cites the NDG and **Graham** & Dunn websites in describing the relationship between **Graham** & Dunn and NDG.

> Because of its extensive work with NDG, **Graham** & Dunn was described on NDG's website as one of NDG's "Partners." The NDG website also indicated that **Graham** & Dunn "[p]rovides all NDG legal work in the US," and featured a photo of a **Graham** & Dunn attorney with De Guzman. NDG's sales personnel touted **Graham** & Dunn's reputation in soliciting investors, frequently telling investors that **Graham** & Dunn was NDG's corporate counsel with respect to its securities offerings.
>
> ... **Graham** & Dunn touted its work for NDG on its website as well. The **Graham** & Dunn attorney in charge of the NDG relationship described his work for NDG as assisting "with respect to joint venture arrangements for the development and sale of various residential and mixed use condominium projects in Lima, Peru."[4]

The Complaint describes the January 23, 2009 meeting with **Norton**, Prater, Donaldson, and de Guzman at the office of **Graham** & Dunn when de Guzman admitted he used the funds from P.R.E. to purchase other property and the parties entered into the MOU.

> 1. The January 23, 2009 meeting at **Graham** & Dunn's offices.
>
> 108. In January 2009, certain investors (who were also investors in P.R.E., and who are not among the Plaintiffs in this case) became concerned about possible misdirection of funds by De Guzman. A meeting was held at the offices of **Graham** & Dunn on January 23, 2009 at which De Guzman was confronted by a representative of the P.R.E. investors and by De Guzman's own employees. With a **Graham** & Dunn attorney and paralegal in attendance, De Guzman admitted to fraud—specifically, paying funds belonging to Grau Residential, LLC to P.R.E. (purportedly to purchase the Grau property from P.R.E.), but then using those funds for unauthorized purposes. There was no confusion about what De Guzman was confessing. **Graham** & Dunn's timesheets for January 23, 2009 expressly acknowledge a "Meeting with Nino De Guzman ... regarding mis-use of funds and related issues." At the conclusion of that meeting, **Graham** & Dunn prepared a memorandum of understanding on behalf of De Guzman, personally, that would remove De Guzman as a member of P.R.E., and would transfer certain NDG corporate authority from De Guzman to other NDG employees.
>
> *8 109.... None of the investors was told that their funds had been misused, or that NDG, De Guzman, and **Graham** & Dunn were negotiating to pay off the P.R.E. investors.

The *Aggen* Complaint alleged that following an internal investigation, NDG employees discovered de Guzman and **Graham** & Dunn "had caused Los Alamos Residential, LLC to pay more than $655,000.00 to P.R.E. for the purchase of a property that P.R.E. *never owned* and never conveyed to Los Alamos Residential, LLC."[5]

> 110. [T]he three NDG employees who had attended the January 23 meeting at **Graham** & Dunn's offices became seriously concerned about De Guzman's misuse

> of investor funds and took it upon themselves to conduct a confidential internal investigation of the use of NDG investor funds. Shortly thereafter, those employees ("*the Whistleblowers*") concluded that fraud had occurred, contacted state and federal authorities, and retained counsel.
>
> 111. Among other things, the Whistleblowers discovered that De Guzman and **Graham** & Dunn had caused Los Alamos Residential, LLC to pay more than $655,000.00 to P.R.E. for the purchase of a property that P.R.E. *never owned* and never conveyed to Los Alamos Residential, LLC. Indeed, it was a **Graham** & Dunn attorney—acting well outside the role of an attorney performing routine professional services—who directed NDG's Director of Operations to wire those funds to P.R.E., despite the fact that the Los Alamos project had not yet been fully subscribed and there was no documentation to support the supposed purchase of the property. Those funds were never returned, and the investor/members of Los Alamos Residential, LLC were not told that the funds had been lost. [6]

The *Aggen* Complaint alleged that in addition to the LLC Agreements, NDG provided investors with a "Private Placement Memorandum" (PPM) describing the investment opportunity in the LLC, "the Peruvian real estate market[,] and the proposed building projects." The Complaint alleged the PPM stated that on advice of counsel, NDG planned to rely on the SEC exemption of "Section 4(2) and Rule 506 of Regulation D."

> NDG intended to rely upon an exemption from the registration requirements of the federal securities laws by complying with the provisions of Section 4(2) and Rule 506 of Regulation D adopted by the SEC thereunder. Indeed, on **Graham** & Dunn's advice, NDG specifically represented to investors that "NDG Investment Group offers and sells investments under exemptions from registration applicable to non-public offerings. No offer or solicitation will be made to any person except in full compliance with such exemptive provisions."

The *Aqqen* Complaint alleged **Graham** & Dunn "knew that statement was false."

> Both NDG and **Graham** & Dunn were well aware that *not one* of NDG's offerings complied with the exemptive provisions of Regulation D. And yet, despite knowing that NDG was in continuous violation of the securities laws throughout 2008, **Graham** & Dunn continued to form new limited liability companies for NDG. [7]

***9** The *Aggen* Complaint cites a number of attorney-client e-mails that were produced to Sirianni in July 2009 to allege that **Graham** & Dunn failed to comply with the SEC exemption. Specifically, that "**Graham** & Dunn was unable to file Form D with the SEC because NDG was not providing the firm with the required list of investors for each deal." Nonetheless, despite knowing NDG did not comply with the SEC exemption to file the Regulation D exemption, the Complaint alleged **Graham** & Dunn continued to form LLCs and "do new deals" for NDG throughout 2008.

The *Aqqen* Complaint alleged **Graham** & Dunn later intentionally filed the Form D for the LLC projects on March 13, 2009 to take advantage of a change in the law and conceal the first date of sale. "[W]hen it made the state filing on March 13, **Graham** & Dunn purposely omitted the date of first sale in an attempt to conceal the fact that the forms were being filed late." [8] The Complaint alleged the "gambit—*i.e.*, omitting the date of first sale from the state regulatory filing in the hope that DFI would not notice—failed almost immediately," and "[s]hortly after receiving the filing, DFI contacted **Graham** & Dunn requesting information regarding the date of first sale for the various deals." The Complaint alleged that when it became apparent that **Graham** & Dunn's involvement in "NDG's fraud throughout 2008 was about to come to light," the attorney e-mailed de Guzman on April 23 stating, " '[I]t remains absolutely critical that the ownership structure for each of your entities is duly evidence [sic] in your files and matches what was disclosed in your private placement memorandum.' " [9]

The *Aggen* Complaint also quotes a portion of a November 14, 2008 e-mail from **Graham** & Dunn to NDG that suggests NDG retain an employee to avoid disclosure of the failure to comply with federal and state securities laws. As quoted in the *Aggen* Complaint, the e-mail states:

> "As you know, **we continue to be in violation of various state and federal securities laws with respect**

> **to most of our deals** ... Although my instincts tell me that [NDG Vice President for Business Development Nathan Hoerschelmann] will not take it upon himself to disclose NDG's failures to the authorities or to NDG's investors, this causes a great deal of concern. We will, of course, incorporate a confidentiality agreement within the separation agreement that is being drafted. Unfortunately, the confidentiality agreement will only be worth anything so long as it is honored—because, as soon **as the "cat's out of the bag,"** our ability to enforce this agreement really doesn't help us much. Because **this would be a HUGE issue for you if these violations were publicly known,** you may want to consider whether it makes sense to maintain Nathan's employment until the violations can be remedied." [10]

Norton Lawsuit against Graham & Dunn

On April 11, 2013, John and Kristine **Norton**, individually and derivatively on behalf of Larco–Bolivar Investment LLC and Shell La Paz LLC; Northland Capital LLC, individually and derivatively on behalf of NDG–Brycon LLC; and P.R.E. Acquisitions LLC (collectively, **Norton**) filed a lawsuit against **Graham** & Dunn, King County Superior Court Cause No. 13–2–16205–9 SEA. The lawsuit asserted the same claims against **Graham** & Dunn as in the *Aggen* Complaint-violation of the WSSA; aiding and abetting NDG and de Guzman in committing fraud, misrepresentation, and breach of fiduciary duty; engaging in a conspiracy to commit fraud; negligent misrepresentation; breach of fiduciary duty; and professional negligence.

***10** The **Norton** complaint alleged **Graham** & Dunn facilitated the "Ponzi scheme" by forming the LLCs for NDG in 2007 and 2008, breached its duty to "prepare and timely file Form D" with the SEC," and filed "falsified Form Ds."

> **Graham** & Dunn knew and repeatedly confirmed to NDG that it was aware of the failure of NDG and **Graham** & Dunn to file Form Ds for the NDG LLCs, including the LLCs in which the **Nortons** invested: Larco–Bolivar, Shell La Paz, and NDG–Brycon.
>
> ... **Graham** & Dunn's omissions, made knowingly and intentionally by **Graham** & Dunn, were material violations of the securities laws. If **Graham** & Dunn had insisted on filing a Form D for any of the Peru Investment Companies it formed, investors like the **Nortons** and Northland would have known that the Peru Investment Companies were all woefully undersubscribed and thus incapable of funding the developments NDG promised they would complete.
>
> ....
>
> ... In March 2009, ... in a desperate attempt to assist Nino de Guzman, **Graham** & Dunn furiously filed the missing Form Ds for the Plaintiff Companies.... **Graham** & Dunn filed falsified Form Ds *one day* before a change in federal law look place. This change required Form Ds to be filed electronically on March 13, 2009 and thereafter. The electronic filing would require disclosure of the date of the first sale for each transaction, something **Graham** & Dunn and Nino de Guzman wanted desperately to avoid. **Graham** & Dunn filed the Form Ds on March 12, 2009 in paper form and did not disclose the date of the first sale of each investment.
>
> ... **Graham** & Dunn never filed a Form D for NDG–Brycon. In its required Washington state filings, **Graham** & Dunn also omitted the date for the first sale of investments in NDG–Brycon, which caused the Washington State Department of Financial Institutions to contact **Graham** & Dunn and demand that **Graham** & Dunn file the appropriate information. [11]

Norton alleged he was "wholly unaware of the underlying facts of this lawsuit until July 2012" when the *Aggen* Complaint was filed.

> In the July 2012 lawsuits, the plaintiffs explain in depth **Graham** & Dunn's role in Nino de Guzman's schemes. It was only then that Plaintiffs discovered the depths of **Graham** & Dunn's participation in the NDG and Nino de Guzman schemes.... [S]ome of the NDG employees presumably had constant communication with **Graham** & Dunn, but they were not fully aware of the collusion between **Graham** & Dunn and Nino de Guzman. Simply put, **Graham** & Dunn very effectively concealed its role in the NDG scheme.

Graham & Dunn asserted as an affirmative defense that the three-year statute of limitations barred the claims. [12]

Aggen Lawsuit Summary Judgment Order

On March 12, 2014, **Graham** & Dunn filed a motion for summary judgment dismissal of the claims alleged in the *Aggen* Lawsuit. On July 3, 2014, the court entered a 27–page "Order Granting In Part and Denying In Part Defendant's Motion for Summary Judgment." The court dismissed the negligence and legal malpractice claim because the LLC Agreements make clear **Graham** & Dunn is not acting as the attorney for the investors. The court also dismissed the conspiracy and aiding and abetting breach of fiduciary duty claims.

***11** The court denied summary judgment dismissal of the claim against **Graham** & Dunn alleging conspiracy to commit fraud or aiding and abetting fraud. The court denied summary judgment dismissal of claims under the WSSA because there were genuine issues of material fact about whether **Graham** & Dunn is a "seller."

> A reasonable jury could find that the law firm provided business advice on what rates of return to offer to investors to maximize NDG's profits; drafted offering memoranda with the representation that the offering was exempt from registration while knowing of NDG activities that could jeopardize that exemption; drafted the LLC agreements and subscription agreements reaffirming the existence of the exemption; ... advised NDG to pay Northland money raised from investors in the Los Alamos project after de Guzman admitted to misusing monies received from Northland; and advised NDG employees to continue to solicit investors for the Los Alamos project to replenish the funds paid out to Northland. A reasonable jury could also find that **Graham** & Dunn's role was as significant as the role played by de Guzman or other NDG employees because the law firm drove the pace of the new LLCs offerings with full knowledge that NDG was in violation of securities laws on earlier offerings and by advising NDG employees to hide these violations from investors, the SEC and the DFI. This evidence, when viewed in the light most favorable to Plaintiffs, creates a genuine issue of material fact as to whether **Graham** & Dunn's actions were a substantial contributive factor in NDG's securities sales.

The court specifically addressed the dispute about whether the failure to file Form Ds was "a material fact that should have been disclosed by NDG to investors," and concluded the "failure to file Form Ds on earlier LLC offerings was a material fact."

> The parties dispute whether NDG's failure to file Form Ds was a material fact that should have been disclosed by NDG to investors. **Graham** & Dunn correctly notes that under federal law, the failure to file a Form D does not automatically lead to the loss of the federal registration exemption....
>
> The **Graham** & Dunn securities lawyer, Bart Bartholdt, testified that he has never allowed a client to sell securities without complying with the Regulation D time limit. Drader advised NDG that having to disclose the securities violations could lead the DFI to require NDG to return investors' money to them. Drader also allegedly advised NDG employees to hide the securities law violations from the authorities and investors. This evidence could convince a reasonable jury that NDG's failure to file Form Ds on earlier LLC offerings was a material fact that could have affected investor's decisions to buy, sell or hold the securities.

But the court notes **Graham** & Dunn presented compelling evidence that de Guzman "duped everyone."

> Ultimately, a fact-finder may not find Plaintiffs' witnesses credible. **Graham** & Dunn has presented compelling evidence that de Guzman was so charismatic and his Ponzi scheme so sophisticated that he duped everyone, including

> the **Graham** & Dunn attorneys. The jury may also find that NDG's failure to file the Form Ds and the theoretical loss of a securities registration exemption were not, in fact, significant risks and the disclosure of these facts would have had no impact on the Plaintiffs' decision to buy into the Peruvian LLCs. But this Court cannot make that credibility call on summary judgment.

***12** In a separate order, the court granted **Graham** & Dunn's motion to dismiss "all claims of Plaintiffs Clarus Investment 9, LLC and Clarus Investment 10, LLC" in the *Aggen* Lawsuit as barred by the statute of limitations. The court ruled the three-year statute of limitations governed the "state securities claims, the aiding and abetting claims and the conspiracy claims," and the Clarus plaintiffs "knew or should have known of a possible claim against Defendant **Graham** & Dunn by October 2008."

In September 2014, shortly before the scheduled trial, the *Aqqen* plaintiffs reached an agreement with **Graham** & Dunn to settle their claims.

Graham & Dunn Motion for Summary Judgment Dismissal in Norton Lawsuit

On October 9, 2014, **Graham** & Dunn filed a motion for summary judgment dismissal of **Norton's** lawsuit as barred by the three-year statute of limitations. **Graham** & Dunn asserted the three-year statute of limitations governed the claims alleged in the April 11, 2013 lawsuit.

Graham & Dunn argued the evidence established **Norton** invested significant funds in NDG real estate projects; in March 2009, **Norton** knew de Guzman was engaged in a Ponzi scheme; in a June 2009 e-mail to the Steering Committee, **Norton** identified claims for recovery against **Graham** & Dunn as well as U.S. Bank; and **Norton** had access to the information produced to Sirianni.

Graham & Dunn submitted more than 35 exhibits in support of the motion for summary judgment including the March 11, 2009 e-mail from Prater to **Norton** stating de Guzman defrauded investors; [13] e-mails from **Norton** to the Steering Committee; e-mails showing that in July 2009, the Steering Committee attorney obtained copies of NDG and **Graham** & Dunn documents including e-mails, correspondence, memoranda, billing records, and attorney notes; excerpts from **Norton's** deposition; and the September 9, 2009 letter from the Steering Committee to **Norton** offering to cooperate with **Norton**. **Graham** & Dunn also submitted the complaint **Norton** filed against U.S. Bank, de Guzman, and NDG; the complaint against Prater; and pleadings showing **Norton** later recovered $6 million from an arbitration award he obtained in Peru and $750,000 from property sold in Peru.

In opposition, **Norton** submitted a declaration, excerpts from his deposition, and pleadings from the summary judgment motion in the *Aggen* Lawsuit.

In his declaration, **Norton** admits identifying **Graham** & Dunn as a potential defendant in a June 2009 e-mail to the Steering Committee.

> I included **Graham** & Dunn in an email to the Steering Committee listing all potential defendants, and in my statement explaining my role with NDG, Northland, and P.R.E. to the Peruvian authorities (*see* Peterson Declaration Ex. 37), only because there was a possibility that we might discover the lawyers, and anyone else who conducted business with Nino de Guzman, had participated in and assisted with Nino de Guzman's actions.

Norton admits he knew the Steering Committee attorney Sirianni "received some documents from **Graham** & Dunn," but states he "never saw the documents sent to Sirianni." After leaving the Steering Committee in September 2009, he and his legal team pursued the recovery of assets in Peru and filed lawsuits in the United States against U.S. Bank, de Guzman, NDG, and Prater.

> ***13** I continued to focus on the recovery of potential assets in Peru and entered into negotiations directly with Grupo Innova as a creditor via my legal teams in Seattle and Lima. I also sued Nino de Guzman and U.S. Bank, Nino de Guzman's former employer, because

> it allowed, perpetuated, and profited from Nino de Guzman's laundering of investor funds and transfers of massive amounts of investor money to his own personal accounts. I also sued Prater for his breaches of his duties to me as my financial advisor.

Norton argued the fraud and WSSA violation claims against **Graham** & Dunn did not accrue until the *Aggen* Complaint was filed on July 23, 2012. **Norton** asserted **Graham** & Dunn did not show he had access to documents implicating **Graham** & Dunn before the *Aggen* Complaint was filed in July 2012. **Norton** claimed he did not know **Graham** & Dunn "was an active and willing participant" in the fraud or violated the WSSA until the plaintiffs filed the *Aqqen* Complaint on July 23, 2012. **Norton** argued he did not discover evidence of **Graham** & Dunn's role until the *Aqqen* Complaint disclosed the contents of the November 14, 2008 e-mail between **Graham** & Dunn attorney Drader and de Guzman.

In reply, **Graham** & Dunn argued there was no evidence **Norton** exercised due diligence in obtaining information that formed the basis for the allegations in the *Aqqen* Complaint including the documents produced to Sirianni and the Steering Committee. **Graham** & Dunn asserted the allegations in the *Aqqen* Complaint also showed **Norton** could have obtained the same information from NDG employees and the NDG and **Graham** & Dunn files, including the November 14, 2008 e-mail that was "later discovered in NDG's files."

> For example, Plaintiffs offer no evidence that they sought to obtain the information gathered by their lawyers, the Sirianni firm. Plaintiffs offer no evidence that they sought to obtain information from the Steering Committee investors, despite knowing that those investors were gathering evidence to pursue claims against [**Graham** & Dunn]. Plaintiffs offer no evidence that they sought to obtain information from NDG or its employees Glenn Fulton, Darin Donaldson, and Phil Boos. And yet Plaintiffs sued every other potential defendant listed in **Norton's** June 11, 2009 email within three years. [14]

In support, **Graham** & Dunn identified the allegations in the *Aggen* Complaint that explicitly rely on documents produced to Sirianni in July 2009. The declaration comparing the *Aggen* Complaint allegations and the documents produced to Sirianni states, in pertinent part:

> Exhibit 1 Email dated January 24, 2008 quoted in paragraph 100 (first bullet point) of the Complaint for Damages dated June 22, 2012 filed in *Aggen, et al. v. Graham & Dunn, P.C.*, King County Superior Court No. 12–2–25058–8 SEA [(the *Aggen* Lawsuit)].
>
> EXHIBIT 2 Email dated January 28, 2008 quoted in paragraph 100 (second bullet point) of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].
>
> *14 EXHIBIT 3 Email dated April 1, 2008 quoted in paragraph 100 (third bullet point) of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].
>
> EXHIBIT 4 Email dated May 21, 2008 quoted in paragraph 100 (fourth bullet point) of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].
>
> EXHIBIT 5 Email dated July 16, 2008 quoted in paragraph 100 (fifth bullet point) of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].
>
> EXHIBIT 6 Email dated February 9, 2009 attaching the voicemail quoted in paragraph 114 of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].
>
> EXHIBIT 7 A true and correct copy of the transcript of the voicemail dated February 9, 2009 quoted in paragraph 114 of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].
>
> EXHIBIT 8 Email dated March 3, 2009 quoted in paragraph 117 of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].

EXHIBIT 9 Email dated March 10, 2009 quoted in paragraph 119 of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].

EXHIBIT 10 Email dated April 23, 2009 quoted in paragraph 127 of the Complaint for Damages dated June 22, 2012 filed in [the *Aggen* Lawsuit].

The court granted the motion to dismiss **Norton's** lawsuit with prejudice.

Norton Lawsuit Summary Judgment Order

The court ruled **Norton's** claims were barred by the statute of limitations. The court concluded **Norton** knew about the Ponzi scheme in March 2009, knew **Graham** & Dunn represented de Guzman and formed the LLCs, and identified **Graham** & Dunn by June 2009 "as a possible source of recovery" and did not act with due diligence to pursue his claims against **Graham** & Dunn. The "Order Granting Defendant's Motion for Summary Judgment" states, in pertinent part:

> [T]he **Norton** Plaintiffs knew of de Guzman's Ponzi scheme by March 2009, at the latest. They knew that **Graham** & Dunn had represented de Guzman, the LLCs in which they had invested, and PRE by that date as well. The **Norton** Plaintiffs immediately began investigating avenues for recovering losses, and by June 2009 they had identified **Graham** & Dunn as a possible source of recovery. They joined the investor steering committee and contributed money to retain counsel to assist in recovery efforts against **Graham** & Dunn. By mid-July 2009, the steering committee's attorney had received a copy of **Graham** & Dunn files, including most of the emails between Nick Drader and de Guzman that formed the basis for securities and fraud claims alleged in the *Aqqen* complaint. Based on the record before this Court, the **Norton** Plaintiffs had a significant amount of information about **Graham** & Dunn's activities and ample time to analyze this information by at least September 2009, which was when the steering committee and the **Norton** Plaintiffs chose to go their separate ways.

***15** The court concluded that by September 2009, **Norton** knew or should have known the facts to support a claim against **Graham** & Dunn for aiding and abetting fraud and violation of the WSSA. The court concluded the November 14, 2008 e-mail from Drader to de Guzman "may have provided additional support," but the record established **Norton** had "ample evidence on which to base a claim under the WSSA before July 2012" and "a significant amount of information about **Graham** & Dunn's activities and ample time to analyze this information by at least September 2009."

> The Court concludes that while this email may have provided additional support for a securities fraud or aiding and abetting fraud claim, the **Norton** Plaintiffs had ample evidence on which to base a claim under the WSSA before July 2012.... Most of this evidence was available to the **Norton** Plaintiffs by September 2009. Indeed, the facts the **Norton** Plaintiffs alleged in Paragraphs 30–40, 42–43, and 47–48, of their complaint were based on information **Graham** & Dunn had produced or information that was publicly available by July 2009.

The court also notes that **Norton** "provided the Court with no explanation for why, through reasonable investigation, [he was] unable to access the November 2008 email on which [he relies]."

For the first time in his motion for reconsideration, **Norton** argued the court should equitably toll the statute of limitations. The court denied the motion for reconsideration.

Norton appeals summary judgment dismissal of the lawsuit against **Graham** & Dunn and denial of the motion for reconsideration.

Appeal of Summary Judgment Dismissal of the WSSA and Aiding and Abetting Fraud Claims

Norton contends the court erred in granting summary judgment dismissal of his claims for violation of the WSSA and aiding and abetting fraud. **Norton** does not dispute and we agree the three-year statute of limitations applies to these claims against **Graham** & Dunn. *See* RCW 21.20.430(4)(b) (securities fraud); RCW 4.16.080(4) (aiding and abetting fraud).[15] **Norton** contends there are material issues of fact as to whether he knew or should have known the facts to support the claims against **Graham** & Dunn for violation of the WSSA and aiding and abetting fraud. **Norton** argues he did not learn the extent of **Graham** & Dunn's involvement in the scheme until the plaintiffs filed the *Aggen* Complaint quoting the November 14, 2008 e-mail.

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Neighborhood All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011). We view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn.App. 137, 147, 279 P.3d 500 (2012).

A defendant moving for summary judgment has the initial burden to show the absence of any genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the defendant meets this initial showing, the burden shifts to the plaintiff to set forth specific evidence establishing a genuine issue of material fact. *Young*, 112 Wn.2d at 225 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

***16** The plaintiff cannot meet its burden by relying on speculation or "mere allegations, denials, opinions, or conclusory statements" to establish a genuine issue of material fact. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn.App. 736, 744, 87 P.3d 774 (2004) (citing CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988)). While we construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, if the plaintiff fails to make a showing sufficient to establish the existence of a material issue of fact, summary judgment is proper. *Young*, 112 Wn.2d at 225.

The discovery rule operates to prevent the commencement of the running of the statutory period until the time the claimant knows or should have known the facts giving rise to his claim. *Reichelt v. Johns–Manville Corp.*, 107 Wn.2d 761, 769, 733 P.2d 530 (1987). "A cause of action will accrue on that date even if *actual* discovery did not occur until later." *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992).[16] The discovery rule does not require knowledge of the existence of a legal cause of action or "smoking gun" proof of the essential facts. *Reichelt*, 107 Wn.2d at 769; *Beard v. King County*, 76 Wn.App. 863, 868, 889 P.2d 501 (1995).

The discovery rule delays the start of the statute of limitations period "only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action." *Allen*, 118 Wn.2d at 758. Here, the statute of limitations began when **Norton** discovered or should have discovered through the exercise of due diligence the facts of the fraud or securities fraud and sustained actual damage as a result. *Ives v. Ramsden*, 142 Wn.App. 369, 384–85, 174 P.3d 1231 (2008); *Allen*, 118 Wn.2d at 758; *Reichelt*, 107 Wn.2d at 772.

"An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken." *Beard*, 76 Wn.App. at 868. " '[W]hen a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm.' " *Clare v. Saberhagen Holdings, Inc.*, 129 Wn.App. 599, 603, 123 P.3d 465 (2005) (quoting *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998)); *Allen*, 118 Wn.2d at 758. " '[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.' " *Clare*, 129 Wn.App. at 603[17] (quoting *Green*, 136 Wn.2d at 96); *see also Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909).

The plaintiff bears the burden of proof that facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period. *Clare*, 129 Wn.App. at 603. In applying the discovery rule, we use an objective standard and consider when a reasonable person in **Norton's** position exercising due diligence would have discovered the facts of violation of the WSSA and aiding and abetting securities

fraud. *See In re Estates of Hibbard.* 60 Wn.App. 252, 259, 803 P.2d 1312 (1991). When the plaintiff should have discovered the wrongful act is ordinarily a question for the trier of fact. *Ruff v. County of King,* 125 Wn.2d 697, 703, 887 P.2d 886 (1995). However, where reasonable minds can reach but one conclusion, application of the discovery rule may be determined as a matter of law. *Ruff,* 125 Wn.2d at 703–04.

*17 **Norton** filed his lawsuit against **Graham** & Dunn in April 2013. Reasonable minds can only conclude that by at least September 2009, **Norton** knew or through the exercise of due diligence should have known the facts to support a claim against **Graham** & Dunn for violation of the WSSA and aiding and abetting fraud.

Norton knew **Graham** & Dunn drafted the LLC Agreements for the NDG real estate projects. There is no dispute that in late January 2009, de Guzman admitted he misused P.R.E. funds. **Graham** & Dunn drafted the MOU between **Norton**, Prater, and de Guzman in January 2009. **Norton** was represented by his attorneys at Ryan Swanson & Cleveland. [18]

There is no dispute Prater informed **Norton** in a March 11, 2009 e-mail that de Guzman was engaged in a Ponzi scheme. The e-mail states, in pertinent part:

> [Fulton] has confirmed that [de Guzman] has admitted to have been running a financial house of cards.... [De Guzman] has used [investor] funds in a variety of ways. These have ranged from financing his personal extravagant lifestyle to repaying investors in previous deals. Very sad and I wish it was not true. The number of disclosures from [de Guzman] keep growing and none are good. He has proven himself to be a very accomplished liar and con man.

The record shows that after entering into the MOU and receiving the March 11, 2009 e-mail from Prater, **Norton** and his attorneys "continued to review Information obtained through cooperation with officers of NDG." **Norton** testified that he and his attorneys "continued to discover, over an extended period of time, the inappropriate nature of Mr. de Guzman's business dealings in both the U.S. and Peru."

After joining the Steering Committee, **Norton** sent an e-mail in June 2009 that identifies claims against **Graham** & Dunn and U.S. Bank.

> The monies already returned to the U.S. have to be claimed against the U.S. defendants and Innova should be held accountable for the money they retained and used. *In turn the "Innova" monies returned from Peru to the U.S. should be added to the U.S. claim against [de Guzman]/NDG/ [**Graham** & Dunn] and U.S. Bank, as those funds were mishandled/misused "after" they returned to the US.* [19]

In a statement **Norton** prepared in August 2010, he describes his participation in the Steering Committee and states the Steering Committee "investigation and recovery effort" focused primarily on U.S. Bank and **Graham** & Dunn.

> I had originally invested in a U.S. recovery investor fund that was put together by the Steering Committee to finance an investigation and recovery effort, primarily focused on the responsibility of U.S. Bank and NDG's attorneys **Graham** & Dunn, a law firm in Seattle. [20]

There is no dispute that in July 2009, the attorney representing the Steering Committee obtained documents including e-mails between NDG and **Graham** & Dunn that show **Graham** & Dunn did not comply with the securities law exemption and the requirement to file a Form D throughout 2008.

*18 Under state and federal securities law, the seller must file a Form D within 15 days of the first sale of a security. 17 C.F.R. § 230.503(a)(1); WAC 460–44A–503(1). The record shows securities forms are public documents and the DFI database allows "the public ... to determine whether or not any filings have been made on behalf of an issuer."

The e-mails show that despite knowing NDG was not in compliance with securities regulations during 2008 and into 2009 and knowing there were accounting discrepancies, **Graham** & Dunn continued to form additional LLCs for NDG.

For example, in a May 21, 2008 e-mail from **Graham** & Dunn attorney Drader to NDG Vice President Nathan Hoerschelmann, Drader states NDG is "in violation of your obligations under the securities laws."

> Again, it is critical we get these [membership] rosters and signature pages in a timely manner, but I don't believe we have received hardly any of them back.
>
> 504, 505 and 506 are the Sections of Regulation D under which certain parties are able to claim an exemption from "registration". We are typically exempt under 506. Notwithstanding the exemption from "registration" we are still required to file a Form D in each of our offerings with both the SEC and each of the States in which we sell securities—and this Form D is required to be filed within 15 days of the day you first accept money. Due to lack of receipt of info from NDG, however, **Graham** & Dunn has not been able to make these filings. Thus, you are in violation of your obligations under the securities laws.

In a July 16, 2008 e-mail to de Guzman, **Graham** & Dunn attorney Drader reiterates the failure to comply with "Blue Sky filings" is "a major issue."

> As you know, your Blue Sky filings are not being processed in a timely manner because NDG has not been timely providing us the list of the members in order to get the filings processed. These filings need to be made within 10 days of the day you first receive any money but very few have been made at all due to our lack of info. Sorry to be so blunt, but as I've said before, this is a major issue.

In a transcribed February 9, 2009 voicemail message from NDG Director of Operations Donaldson to **Graham** & Dunn attorney Drader, Donaldson says he is "concerned ... the numbers aren't adding up" and it "looks like [de Guzman] may have taken more money than we were supposed to for NDG–Brycon."

> Hey Nick [Drader], Darin Donaldson here.... I wanted to let you know I sent you an email with regards to the documentation I truly do have, uhm, for NDG–Brycon.... I have yet to hear or get any confirmation on the true membership roster for NDG–Brycon, LLC since that, uh, was an entity that only [de Guzman] had involvement on. Uhm, just so you know, I did not include [de Guzman] on my last response because I was addressing concerns, uhm, regarding the lack of, uh, communication that I have from him. I did not want to kind of throw him under the bus with you ... but, uh, I'm just, uhm, a little concerned regarding this stuff and the fact that I'm thrown in the middle of all of this when I really had no involvement on the initial fundraising or documenting of, of NDG–Brycon. Uhm I'm, I'm only a scribe in this and I truly want there to be a record of that because, uh, I'm not sure what's going on here, but the numbers aren't adding up. It looks like [de Guzman] may have taken more money than we were supposed to for NDG–Brycon, or uhm, maybe I just have documentation that, uhm, doesn't accurately reflect the dollar amounts invested.

***19** The documents show Drader was aware that there was a $1.85 million shortfall for the Arequipa LLC that involved "a Peruvian developer that is not part of the Arequipa, LLC." In a March 3, 2009 e-mail to NDG employee Fulton, Drader states that the $1.85 million was provided by a Peruvian developer.

> [De Guzman] confirmed on the phone that the [accounting] is correct. The $1.85MM gap was

> provided by a Peruvian developer that is not part of the Arequipa, LLC. Instead, they are getting development fees out of the deal as a third party contractor. Per [de Guzman], this has been documented in a Peruvian contract.

The April 23, 2009 e-mail from **Graham** & Dunn to Fulton, Donaldson, and de Guzman states DFI requested **Graham** & Dunn "provide them with the date of first sale and a Uniform Consent to Service of Process in connection with the Reg D filings filed in Washington." **Graham** & Dunn asked Fulton to "sign each consent" on behalf of NDG.

> We have been requested by the Department of Financial institutions to provide them with the date of first sale and a Uniform Consent to Service of Process in connection with the Reg D filings filed in Washington. In connection therewith, we prepared a Uniform Consent to Service of Process ("Form U–2") for each of the following entities:
>
> Shell La Paz LLC
>
> Los Alamos Residential, LLC
>
> Grau Residential, LLC
>
> El Golf Residential, LLC
>
> Jorge Chavez, LLC
>
> Arequipa, LLC
>
> Del Solar Residential, LLC
>
> NDG–Brycon, LLC
>
> NDG–Brycon2, LLC
>
> Ejercito Residential, LLC
>
> Larco–Bolivar Investment, LLC
>
> Residencial Casuarinas, LLC
>
> Please sign each consent on behalf of NDG Investment Group L.L.C ., as Executive Vice President–Peru Projects, and return the originals to us at your earliest convenience.

In another e-mail dated April 23, 2009 from Drader to de Guzman and Fulton, Drader states NDG "significantly missed the filing deadlines" for the LLCs.

> NDG significantly missed the filing deadlines for each of the below filings. As a reminder, **Graham** & Dunn had repeatedly advised that the Form D filings had to be done within 15 days of the date that you first accepted money for each of these transactions.
>
> ....
>
> Shell La Paz LLC
>
> Los Alamos Residential, LLC
>
> Grau Residential, LLC
>
> El Golf Residential, LLC
>
> Jorge Chavez, LLC
>
> Arequipa, LLC
>
> Del Solar Residential, LLC
>
> NDG–Brycon, LLC
>
> NDG–Brycon2, LLC
>
> Ejercito Residential, LLC
>
> Larco–Bolivar Investment, LLC
>
> Residencial Casuarinas, LLC.

Drader advises de Guzman and Fulton that the State "may require NDG to go back to each of your investors on the below transactions and offer to rescind the offering (i.e. refund their money)," but suggests "a wait-and-see approach."

> At this point, we are almost certain the State of Washington (Dept of Financial institutions) *will* come back with a response as to how NDG might be penalized for this. As one of the "worst case scenario" possibilities, the State may require NDG to go back to each of your investors on the below transactions and offer to rescind the offering (i.e. refund their money). As I'm sure you don't currently have the

> capital to do that, we would need to try to negotiate with the State for an alternative resolution. However, rather than focus on the worst-case scenario, we should probably take a wait-and-see approach to see how the state will respond. [21]

***20** Drader then states, "In the meantime, it remains absolutely critical that the ownership structure for each of your entities is duly evidence in your files and matches what was disclosed in your private placement memorandum."

In an April 27, 2009 e-mail from Fulton's attorney at Lane Powell to Drader, the attorney seeks clarification about the steps taken to comply with the SEC exemption.

> We are in receipt of an email dated April 23, 2009 from ... your office, to Glenn Fulton, with copies to Jose Nino de Guzman, Darin Donaldson and yourself....
>
> Prior to counseling our client regarding [**Graham** & Dunn]'s request, we want to be sure that we understand your position on these items. Please advise whether it is your counsel to NDG that it must provide this information to state regulators at this time. Please also advise as to whether similar information was provided to state regulators at the time of the consummation of securities offerings for the LLCs. In our experience, the Form U–2 is most commonly provided to state regulators at the time of filing a Form D. Was the Form D filed with respect to securities offerings by the LLCs within the 15–day period required under state law? If not, when was it filed? Also, please advise as to why the Form U–2 was not filed at the time of the initial Form D filing.

In response, Drader concedes the Form Ds did not "disclos[e] the date when securities were first sold." The April 27, 2009 e-mail from Drader to the attorney at Lane Powell states, in pertinent part:

> NDG was aware that they were required to file a Form D for each private placement within 15 days of the first sale of securities, but they did not meet the deadline. The information required for filing the various Form Ds was received by **Graham** & Dunn in February / March of 2009, and the Form Ds / U–2s were filed at that time without disclosing the date when securities were first sold.

In a May 12, 2009 e-mail to Drader, the Lane Powell attorney states the NDG employees will not comply with the request to submit a Form U–2.

> We represent Glenn Fulton, Darin Donaldson and Phil Boos. We have received a copy of your request to Mr. Fulton that he execute Forms U–2 Consent to Service of Process, provide dates of the first sales of securities in connection with certain prior securities offerings, and provide information regarding an outstanding subscription agreement for an offering by NDG–Brycon, LLC.
>
> Given the substantial uncertainty which now exists regarding the status of prior private placements of securities in NDG-sponsored offerings, please be advised that our client is not currently in a position to comply with your request. Should you feel that a response to the Washington Department of Financial Institutions is appropriate, we recommend that you obtain any necessary authorizations or signatures from Mr. Jose Nino de Guzman.

The first time **Graham** & Dunn filed Form D for the NDG LLCs was on March 31, 2009, more than 14 months after forming Arequipa LLC and more than 2 months after forming the last LLC, Jorge Chavez LLC. The documents produced to Sirianni and the Steering Committee show the attempt of **Graham** & Dunn to exploit a loophole in federal law in March 2009 that would have allowed de Guzman to hide violations of securities laws. When NDG Vice President Fulton asks Drader for an extension on revising the LLC Agreement for Arequipa LLC "because there are quite a few mistakes for folks to digest here and several new contracts to execute," Drader responds it is "not possible to extend.... The date is due to federal legislation."

***21** Although **Norton** identified claims against **Graham** & Dunn in June 2009 and in September 2009, the Steering Committee expressly offered to cooperate with **Norton** and his attorneys in pursuing litigation. **Norton** never made any effort to obtain the documents from the Steering Committee or pursue claims against **Graham** & Dunn.

Instead, **Norton** and his legal team successfully pursued recovery efforts in Peru, and in the United States, **Norton** filed a lawsuit against U.S. Bank, de Guzman, and NDG in 2010 and filed a lawsuit against Prater in 2011.

Nonetheless, **Norton** argues that because there is no evidence he "saw the documents sent to Sirianni," he had no reason to believe **Graham** & Dunn violated the WSSA or aided and abetted the Ponzi scheme.

> I never saw the documents sent to Sirianni, and never had direct communication with him outside the initial interview. I have never heard from any source that Sirianni's investigation uncovered information which would have altered my impression at the time that **Graham** & Dunn were acting appropriately to correct Nino de Guzman's mismanagement. I had no reason to believe Sirianni had any knowledge regarding **Graham** & Dunn's wrongdoing, and no such wrongdoing was conveyed to me from Sirianni.

Contrary to **Norton's** assertion that the discovery rule tolls the statute of limitations because he did not actually see the documents produced to Sirianni, the discovery rule requires him to use due diligence to discover the basis for his cause of action. *Reichelt*, 107 Wn.2d at 772. A cause of action accrues when a plaintiff, through the exercise of due diligence, knows or should have known the relevant facts. *Allen*, 118 Wn.2d at 758. The undisputed record shows **Norton** knew in March 2009 that he had lost more than $9 million in a Ponzi scheme and in June 2009, **Norton** identified claims against **Graham** & Dunn.

Next, **Norton** claims he did not discover **Graham** & Dunn violated the WSSA or aided and abetted the Ponzi scheme until the plaintiffs filed the *Aggen* Complaint in July 2012. **Norton** relies heavily on the excerpts from a November 14, 2008 e-mail quoted in the *Aqqen* Complaint to argue there is a genuine issue of material fact as to whether he knew or should have known the factual basis for the WSSA and aiding and abetting fraud claims against **Graham** & Dunn. **Norton** asserts the e-mail was "*the* piece of evidence that demonstrated **Graham** & Dunn's active participation in the Ponzi scheme and its cover up."[22] We agree with the trial court that while the **Graham** & Dunn e-mail provides additional evidence, the undisputed record establishes **Norton** knew or through the exercise of due diligence should have known facts to support claims against **Graham** & Dunn for violation of the WSSA and aiding and abetting fraud by September 2009. The record shows that instead of pursuing claims against **Graham** & Dunn, **Norton** filed lawsuits against U.S. Bank and Prater and pursued recovery in Peru that resulted in obtaining $6 million in arbitration.

***22** In addition, as the trial court correctly notes, **Norton** provided "no explanation for why, through reasonable investigation, [he was] unable to access the November 2008 email on which [he relies]."

The case **Norton** relies on, *Price v. State*, 96 Wn.App. 604, 980 P.2d 302 (1999), is distinguishable. In *Price*, parents sued the Department of Social and Health Services (DSHS) for failing to disclose critical information about their adopted child. *Price*, 96 Wn.App. at 610–11. After repeated inquiries, DSHS provided the complete file to the parents 14 years after the adoption. *Price*, 96 Wn.App. at 607–10. The file revealed information that would have affected the parents' decision to adopt. *Price*, 96 Wn.App. at 610–11. DSHS moved for summary judgment arguing the parents knew or should have known DSHS failed to provide all of the child's records and the parents' continued inquiries showed they suspected DSHS of wrongdoing. *Price*, 96 Wn.App. at 611–12. The court dismissed the lawsuit against DSHS as barred by the statute of limitations. *Price*, 96 Wn.App. at 612. We reversed. *Price*, 96 Wn.App. at 619. We concluded the complete file provided critical evidence of proximate cause. *Price*, 96 Wn.App. at 616–17. Here, unlike in *Price* and contrary to **Norton's** assertion, the November 14, 2008 email is not the critical piece of evidence necessary to assert claims against **Graham** & Dunn for violation of the WSSA and aiding and abetting fraud.

Denial of Motion for Reconsideration

As an alternative and separate ground for reversal, **Norton** argues equitable tolling warrants tolling of the statute of limitations and the court erred in denying his motion for reconsideration.

"Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Inst.*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005). "A trial court abuses discretion when its decision is based on untenable grounds or reasons." *Wilcox*, 130 Wn.App. at 241.

Washington courts "allow[ ] equitable tolling when justice requires." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). "[E]quitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations." *Millay*, 135 Wn.2d at 206. A court may apply equitable tolling when there is "bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay*, 135 Wn.2d at 206.

Because **Norton** did not exercise due diligence, the court did not abuse its discretion in denying **Norton's** motion for reconsideration. *See Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 812–13, 818 P.2d 1362 (1991) (declining to equitably toll a statute of limitations where the plaintiff "had ample opportunity and time to pursue" claims).

***23** We affirm summary judgment dismissal of the lawsuit against **Graham** & Dunn as barred by the statute of limitations.

WE CONCUR: LAU, and DWYER, JJ.

All Citations

Not Reported in P.3d, 193 Wash.App. 1023, 2016 WL 1562541, Blue Sky L. Rep. P 75,132

Footnotes

1 **Norton** testified, in pertinent part:

> Mr. Prater and I, along with my legal team at Ryan Swanson & Cleveland, PLLC in Seattle, continued to review information obtained through cooperation with officers of NDG and continued to discover, over an extended period of time, the inappropriate nature of Mr. de Guzman's business in both the U.S. and Peru.

2 The letter identifies the money the NDG employees invested in the LLCs.

1. Philip Boos: $25,000 in NDG–Brycon 2, LLC, which is not among the Innova Affidavit twelve; Mr. Boos' parents, however, have also invested $50,000 in NDG–Brycon 2, LLC plus another $225,000 in two of the twelve LLCs in the Innova Affidavit, Ejercito Residential, LLC (Ejercito payout is past due) and Grau Residential, LLC;
2. Glenn Fulton: $50,000 in NDG–Brycon 2, LLC and $25,000 in Los Alamos Residential, LLC; and Mr. Fulton's parents and grandfather have collectively invested $540,000 in five of the twelve Innova LLCs, plus $50,000 in NDGBrycon 2; and
3. Darin Donaldson: $13,000 in Los Alamos Residential, LLC; $60,000 paired with Matt Pelchat and invested in Ejercito Residential, LLC through Utilis Investment Group, LLC (Ejercito payout is past due); Mr. Donaldson's mother, brother and sister-in-law have invested another $100,000, in Los Alamos Residential, LLC and Grau Residential, LLC.

3 The complaint states that in February 2012, **Graham** & Dunn agreed to extend the statute of limitations to file the *Aggen* Lawsuit by approximately six months.

4 Alteration in original.

5 Emphasis in original.

6 Emphasis in original.

7 Emphasis in original.

8 The Complaint alleged:

> **Graham** & Dunn filed Form D for the LLC Projects on March 13, 2009—more than 14 months late for the first transaction at issue (Arequipa, LLC) and more than two months late for the last transaction at issue (Jorge Chavez, LLC). By filing on the last possible day before the change in federal law was to take effect, **Graham** & Dunn succeeded in hiding the date of first sale from the SEC. However, the same was not true of the corresponding filing with the Washington State Department of Financial Institutions ("DFI"). The applicable Washington State regulation required disclosure of the date of first sale.

9 Alterations in original.

10 Some alteration in original, boldface in original.

11 Emphasis in original.

12 In November 2013, de Guzman pleaded guilty to the federal charges of wire fraud and money laundering. At his sentencing on December 5, 2013, the court imposed "Special Conditions of Supervision" including restitution in the amount of $18,321,209.07 "due immediately."

13 The March 11, 2009 e-mail states, in pertinent part:

> [Fulton] has confirmed that [de Guzman] has admitted to have been running a financial house of cards.... [De Guzman] has used [investor] funds in a variety of ways. These have ranged from financing his personal extravagant lifestyle to repaying investors in previous deals. Very sad and I wish it was not true. The number of disclosures from [de Guzman] keep growing and none are good. He has proven himself to be a very accomplished liar and con man.

14 Footnote omitted.

15 **Norton** also does not dispute the three-year statute of limitations governs breach of fiduciary duty and professional malpractice, RCW 4.16.080(2); and conspiracy and negligent misrepresentation, RCW 4.16.080(4).

16 Emphasis in original.

17 Alteration in original.

18 On January 23, 2009, **Norton** sent an e-mail concerning the need for additional provisions for the MOU.

> Add clause to require [de Guzman] to transfer all financial authority to [Fulton] and [Donaldson] and remove his signing authority from all bank and trust accounts, as we discussed today. Also get written confirmation from all financial institutions and lawyers when this is accomplished, as appropriate.
>
> Add acceptance of and cooperation with any Northland, Prater and/or **Norton** auditors (attorneys, accountants, etc.) either on a drop-in or ongoing basis by [Peruvian attorney] Rebaza, [PricewaterhouseCoopers], **Graham** & Dunn, etc. Full disclosure / transparency required.
>
> In conjunction with item # 2, [de Guzman] to provide a current detailed financial statement listing all personal & financial assets and real property by January 31, 2009 sufficient to file a lien on his holdings, if and when required. [De Guzman] should disclose any and all claims on his assets and an affidavit he will not dispose of any asset until this matter is dealt with.
>
> Add requirement for NDG representative (not [de Guzman]) to provide specified written status reports (email) on any and all action plans, specifically Exhibit A [Liquidation Plan], every other day. Any change in the Liquidation Plan should require written notice and concurrence prior to implementation.
>
> ....
>
> I spoke with Jay Hadley this pm and he is expecting Glenn[Fulton]'s call.

19 Emphasis added.

20 In his declaration in opposition to summary judgment, **Norton** explains:

> I included **Graham** & Dunn in an email to the Steering Committee listing all potential defendants, and in my statement explaining my role with NDG, Northland, and P.R.E. to the Peruvian authorities ... only because there was a possibility that we might discover the lawyers, and anyone else who conducted business with Nino de Guzman, had participated in and assisted with Nino de Guzman's actions.

21 Emphasis in original.

22 (Emphasis in original.) **Norton** did not submit a copy of the November 2008 e-mail. **Graham** & Dunn contends the record shows "[a] number of other emails between **Graham** & Dunn and NDG relating to the late Form D filings—including the November 14, 2008 email **Norton** makes so much of—were in the NDG employees' computer hard drives preserved by Blank Law + Tech."

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN NORTON and KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENT, LLC and SHELL LA PAZ, LLC; NORTHLAND CAPITAL, LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC; and P.R.E. ACQUISITIONS, LLC,	)	No. 72818-1-I
	)	DIVISION ONE
	)	
	)	
	)	
	)	
	)	
	)	ORDER DENYING MOTION
Appellants,	)	TO PUBLISH
	)	
v.	)	
	)	
GRAHAM AND DUNN, P.C., a Washington professional corporation,	)	
	)	
Respondent.	)	

Appellants John and Kristine Norton, Larco-Bolivar Investment LLC, Shell La Paz LLC, Northland Capital LLC, NDG-Brycon LLC, and P.R.E. Acquisitions LLC filed a motion to publish the opinion filed on April 18, 2016 in the above case. Respondent Graham & Dunn PC filed an answer to the motion. A majority of the panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion to publish the opinion is denied.

DATED this 16th day of June, 2016.

For the Court:

Judge