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No. 69636-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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B. DAVID THOMAS, Respondent  
v.  
ZINAIDA AND VICTOR BOSSERDT, Appellant  
SUPERIOR COURT  
King County No. 07-2-29212-8SEA

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**AMENDED BRIEF OF APPELLANT**

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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## I. ASSIGNMENT OF ERRORS

A. The Trial Court erred by failing to set forth any findings of fact and conclusions of law for the basis of their ruling on the Third-Party Defendant's Motion for Summary Judgment on November 23, 2011. Docket No. 131.

B. The Trail Court erred by granting the Thomas's motion for summary when there are genuine issues of material facts still in dispute.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Whether the Trial Court erred by granting the Thomas's motion for summary when there are genuine issues of material facts still in dispute?

## III. STANDARD OF REVIEW

This Court reviews a grant or denial of summary judgment de novo. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2005). Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002).

## IV. SUMMARY OF ARGUMENT

The Trial Court granted the Respondent's Motion for Summary Judgment on November 23, 2011. In their ruling the Court held that the statute of limitation period for the Appellants causes of action had run. See Docket No. 131. However, in their ruling, the Court did not make any findings of facts or conclusions of law setting forth the factual and legal basis for their ruling. See Docket No. 131. Specifically, the Court failed to identify which statute of limitation period had run.

The Appellants did not discover the Respondent's possible involvement in this case until after the Washington State Department of Financial Institutions entered their Statement of Charges and Notice of Intent to Enter an Order to Cease and Desist to Charge Costs and to Impose Fines on July 23, 2008 which the Appellants received notice of in August of 2008. Before that ruling, the Appellants did not have any knowledge that the Respondent also violated state and federal securities laws. The Appellants filed this action before the running of the applicable statute of limitation periods and as a result, the Trial Court erred in granting the Respondents Motion for Summary.

#### V. STATEMENT OF THE CASE

Nonna Verd filed this action initially on September 6, 2007 to obtain an accounting and to dissolve Runar, Inc. and King Pastry and Deli, Inc. See Docket No. 1. Shortly after that, the Appellants filed a counterclaim against the Plaintiff Nonna Verd, alleging that the Plaintiff violated the Washington State Securities Act (WSSA), Federal Securities Acts, committed fraud, misrepresented material facts in a stock purchase transaction and that she breached the Stock Purchase and Sale Agreement. See Court Docket Number 16. On July 17, 2007, the Appellants sent a letter to the FBI describing the activities of Nonna Verd. The FBI forwarded a copy of that letter to the Washington State Department of Financial Institutions (DFI). On November 24, 2008, the action was stayed because the Appellants filed a bankruptcy petition. See Docket No. 45. On July 23, 2008, the DFI issued a Statement of Charges and Notice of intent to enter an Order to Cease and Desist, To Charge Costs and to Impose Fines and at that time ordered Nonna Verd and her agents to stop engaging in actions that violated State and Federal Securities

laws. See Docket No. 139. It was also later discovered that B. David Thomas assisted Nonna Verd in drawing up papers to issue securities to Aida Kitoyan and was aware of Stock transactions involving TIRBA, Inc. (Tamara Babadzhanova) See Docket No. 139. It was not until August, 2008, at the earliest, that the Appellants discovered that Mr. Thomas was potentially liable for his actions centering around the Stock Purchase and Sale Agreements signed on or about September 25, 2006. See Docket No. 138.

June 24, 2010, the Trial Court granted Appellants' motion to remove the stay, and allowed the Respondent to be added to the action as a Third-Party Defendant.

On July 30, 2010, within three years of the DFI issuing their Statement of Charges and Notice of intent to enter an Order to Cease and Desist, To Charge Costs and to Impose Fines, when the Appellants discovered the Respondent's potential and/or likely culpability, the Appellants served the Respondent. See Docket No. 139.

On August 19, 2011, the trial Court denied the Respondent's motion for summary judgment ruling that there is a genuine issue as to a material fact as to whether Mr. Thomas was a seller under the WSSA. See Court Docket Number 104.

After the Court's ruling, the Respondent's filed a motion for reconsideration and that motion was also denied on September 12, 2011. See Court Docket Number 109.

On November 23, 2011, the Trial Court granted the Respondent's motion for summary judgment stating that the statute of limitations had run barring the Appellants' claims against the Respondent. See Docket No. 131.

On November 7, 2012, the Trial Court entered a judgment in favor of Appellants' against Nonna Verd, the Plaintiff, for violation of the Washington State Securities Act, The Federal Securities Act and the Washington State Consumer protection act in the

amount of \$684,134.36, and for attorney's fees in the amount of \$17,500. This appeal was filed on November 30, 2012.

## VI. STATEMENT OF ISSUE

1. Whether this Court should deny the Respondent's motion for summary judgment when the Appellants added the Respondent within three years after they discovered that he was involved in assisting Ms. Verd in perpetrating the actions that are the subject of this case?

## VII. ARGUMENT AND AUTHORITY

### A. Summary Judgment Is Not an Appropriate Disposition Where there are Materials Facts in Dispute

Summary judgment is only proper if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civil Rule 56(c). The Court considers the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party. *Stansfield v. Douglas County*, 107 Wn. App. 1, 27 P.3d 205 (2001). Once the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth adequate specific facts that sufficiently rebut the moving party's contentions and disclose an existence of a material issue of fact. *Drombrowsky v. Farmers Ins. Co.*, 84 Wn. App. 245, 253 928 P.2d 1127 (1996). Any doubts as to the existence of a material fact are resolved against the moving party. *Voorde Poorte v. Evans*, 66 Wn. App. 358, 361, 832 P.2d 105 (1992). Summary Judgment is only proper if reasonable persons could

reach only one conclusion from all the evidence. *Hansen v. Friend*, 118 Wn. 2d 476, 485, 824 P.2d 483 (1992). The trial court may not engage in the weighing of the evidence therein, but the Court can only consider if the materials submitted with the motion and in response thereto are admissible for the purposes of the summary judgment hearing. See *Smith v. Acme Paving Company*, 16 Wn. App. 389, 393, 558 P.2d 811; *Vacova Co. Ferrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991) and *Wagers v. Goodwin*, 92 Wn. App. 876, 964 P.2d 1214 (1998).

## B. Statute of Limitations

### 1. The Discovery Rule

In *McLeod v. Northwest Alloys, Inc.*, 90 Wash.App. 30, 969 P.2d 1066 (1998), the Court held that, "in applying the discovery rule, a cause of action accrues when the claimant knew, or should have known the essential elements of the cause of action". *Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992). "The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action." *Id.* The cause of action accrues when the claimant knows, or should have known the relevant facts, "whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action." *Id.* An aggrieved party need not know the full amount of damage before a cause of action accrues, only that some actual and appreciable damage occurred. *Gazija v. Nicholas Jerns Co.*, 86 Wash.2d 215, 219, 543 P.2d 338 (1975). See *McLeod at*1070 (1998).

In this case, it was not until the DFI issued their Statement of Charges and Notice of intent to enter an Order to Cease and Desist, To Charge Costs and to Impose Fines on

July 23, 2008, that the Appellants learned about the potential culpability of the Respondent, Thomas. See Docket No. 139. The DFI Statement outlines a scheme of fraud conducted by Verd and her agents whereby many victims lost hundreds of thousands of dollars through the use of stock transaction and promissory notes, fraud and promises of repayment. Once this discovery was made, the Appellants added the Respondent to this action within the relevant statute of limitations periods that are set forth below. Respondent Thomas claims that Appellant should have known that Thomas had culpability on July 17, 2007 when Dan Harris researched Verd's scheme of fraud. However, Appellant had no information that Thomas was involved until July 23, 2008 when DFI completed their investigation. In addition, the issue of when Appellant knew or should have known of Thomas's involvement is a question of fact that is in dispute. The Trial Court has never ruled on this critical issue and has never made findings of fact or conclusions of law on this issue.

## 2. State Securities Actions

RCW 21.20.430(4)(b) states that:

(4)(a) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(b) No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140 (1) or (2) or 21.20.180 through 21.20.230, or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care. No person may sue under this section if the buyer or seller receives a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.

As set forth above, it was not until the DFI issued their findings on July 23, 2008, that they discovered that liability extended to the agents of Ms. Verd, which in this case was the Respondent. The Appellants served the Third Party Complaint on the Respondent on July 30, 2010 within three years of discovering that he was possibly liable in this action. Therefore the statute of limitations was tolled within three years of the discovery of the Respondent's possible culpability in this case and his motion must be denied.

### 3. Fraud

RCW 4.16.080(4) states that:

An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;...

It was not until after the DFI issued their findings on July 23, 2008 and the discovery of these findings in August 2008 that the Appellants discovered that liability extended to Mr. Thomas. Thomas was the Registered Agent for King Pastry and Deli Inc. and therefore should have received US mail from the IRS indicating that the company owed taxes. Thomas failed to disclose these tax liabilities and therefore participated in the fraud. More importantly he failed to disclose the IRS liens to Appellant. The Appellants served the Third Party complaint on Mr. Thomas on July 30, 2010 within three years of discovering that he was possibly liable in this action. Therefore the statute of limitations was tolled within three years of the discovery of the Respondent's potential culpability in this case and the motion must be denied.

### 4. Federal Securities Actions

Under 28 USC § 1658:

(a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c (a)(47)), may be brought not later than the earlier of—

- (1) 2 years after the discovery of the facts constituting the violation; or
- (2) 5 years after such violation.

The Appellants served this action on Mr. Thomas on July 30, 2010, well within the five year period set forth under 28 U.S.C. § 1658 as set forth above. Therefore, they tolled the statute of limitations for this claim and Mr. Thomas' motion must be denied.

C. On August 19, 2011, This Court Already Ruled that Mr. Thomas was Potentially a Seller under the WSSA.

On August 19, 2011, the trial Court denied the Respondent's motion for summary judgment ruling that there is a genuine issue as to a material fact as to whether Mr. Thomas was a seller under the WSSA. See Court Docket Number 104. After the Court's ruling, the Respondent's filed a motion for reconsideration and that motion was also denied on September 12, 2011. See Court Docket Number 109. Now for the third time, the Respondent is asking the Court to determine that he was not a seller under the WSSA when in fact this Court has already ruled on that issue.

The Respondent is disregarding this Court's order by continuing to seek the same relief, which this Court has properly reviewed and denied on two prior occasions. In addition, the Appellants relied on the Respondent to draft an agreement that was neither misleading nor fraudulent and he breached that duty by failing to verify information that proved to be false and misleading. See Docket No. 139. Whether a party's conduct is a substantial contributive factor depends upon:

(1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant's conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time.

*Haberman v. WPPSS*, 109 Wn.2d 107, 131, 744 P.2d 1032, 750 P.2d 254 (1987). “This test necessarily involves many factual issues that cannot be resolved on this CR 12(b)(6) motion. Determination of the Auditor's status as a seller under RCW 21.20.430(1) requires the development of more facts. Therefore, we conclude that the State could still possibly be held liable as a "seller" under RCW 21.20.430(1).” *Hoffer v. State*, 110 Wn.2d 415, 430, 755 P.2d 781 (1988). Just as the Supreme Court held in *Hoffer*, that factual issues can not be resolved in that motion, this Court has already made the same ruling. See Court Dockets Nos. 104 and 109. The Appellants simply ask this Court to uphold their own ruling and deny this repetitive motion for summary judgment.

D. The Court Issued a Summary Judgment Order without Making Findings of Facts and Conclusions of Law.

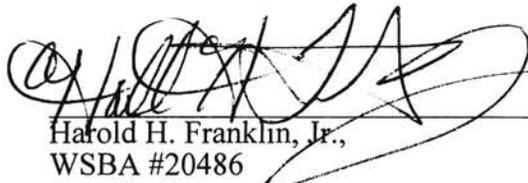
On November 23, 2011, the Trial Court issued a Summary Judgment Order dismissing the claims against the Respondent. However the Court did so without making Findings of Fact and Conclusions of Law. Although Civil Rule 52 allows the Court to disregard the necessity to create Findings of Fact and Conclusions of Law, Judicial Fairness requires that the Court indicate its Findings and Conclusions of Law based upon the Evidence Relied Upon. This was not completed. In particular, the Court had already ruled, in August of 2011, that Respondent was involved in the selling of securities. The

Securities and Exchange Act of 1934 allows for a five year statute of limitations. In plain language, this requires that Appellants file their action against the Respondent within five years of the sale of securities. Without the Court making Findings of Fact and Conclusions of Law regarding the latest ruling, the Court is operating in a vacuum without basis and with the perception of bias.

#### VIII. CONCLUSION

All the causes of action asserted by the Appellants were filed within the proper time frames set forth in the statutes enumerated above and therefore the Respondent's motion for summary judgment must be denied.

Respectfully Submitted this 10th day of May, 2013.

  
Harold H. Franklin, Jr.,  
WSBA #20486  
Appellants

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STATE OF WASHINGTON

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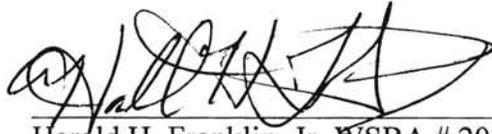
Respondent.

NO. 69636-0-1

DECLARATION OF SERVICE

On May 1, 2013, I delivered a true and correct copy of the Motion to File an Amended Appellants' Brief and a copy of the Amended Brief to Terrance Cullen and Jeffrey Kestle at Forsberg & Umlauf, P.S. at 901 Fifth Avenue Suite 1400, Seattle, WA 98164.

DATED this 16<sup>th</sup> day of May, 2013.



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**DECLARATION OF SERVICE**

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