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DIVISION II

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NO. 37541-9-II

STATE OF WASHINGTON

BY *SW*  
COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

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MATTHEW SMITH COMPANY, INC.,

Petitioner/Respondent

v.

DONALD C. CHILL

Respondent/Appellant

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RESPONDENT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **A. Assignments of Error 1 and 2**

Mr. Chill's first and second assignments of error present the same central issue: Was the arbitration award subject to confirmation? Nothing on the face of the award shows that the arbitrators awarded on a matter not submitted for arbitration. To the contrary, the face of the award reflects that the arbitrators awarded a remedy authorized by the substantive law governing the unquestionably arbitrated claim. That being so, the trial court properly confirmed the award, and properly denied Mr. Chill's motion for reconsideration.

### **B. Assignments of Error 3, 4 and 5**

Mr. Chill's third, fourth and fifth assignments of error all relate to the findings and conclusions underlying the entry of the judgment. The issues raised in these assignments are: (1) whether the findings are supported by the record, and (2) whether the findings support entry of a CR 54(b) judgment. Because Mr. Chill's claims could not be joined in the proceeding to confirm the arbitration award, CR 54(b) findings were not required for the judgment to be final and appealable. Even if findings were required, the Superior Court's findings were sufficient to support

entry of the judgment, and those findings were supported by the record.

**C. Assignment of Error 6**

In his sixth assignment of error, Mr. Chill contends that the Superior Court erroneously authorized a writ of attachment against Mr. Chill's half interest in community property. The issues presented by this assignment are: (1) whether Mr. Chill's obligation to MSC is a debt, and (2) whether third parties were entitled to notice and hearing before the writs of attachment issued. Mr. Chill's liability to MSC arose from a violation of the Securities Act. A violation of that Act constitutes a community tort. Even if the violation is a separate liability, that liability can be collected out of the violator's share of community property. For these reasons, the trial court properly issued the writs of attachment. Because the writs do not impair a property interest, and third parties can challenge the writs after the fact, third parties were not entitled to notice of the hearing on the motion for the writ of attachment.

**II. STATEMENT OF THE CASE**

MSC rejects Mr. Chill's statement of the case because it discusses evidence that has no bearing on the issues on appeal, and which bears only on the merits of the claims decided by the arbitrators. Here is a statement

that focuses on the pertinent proceedings and evidence:

**A. The Stock Purchase**

On December 12, 2006, Donald Chill agreed to sell 100 percent of the stock of Charles Prescott Restoration, Inc. (CPR), to Matthew Smith. The terms of the sale were memorialized in a "Counter Offer to Purchase Agreement." CP 247-252. Under those terms, the purchase price was \$4,000,000, to be paid partly in cash and partly in the form of promissory notes given to Mr. Chill by Mr. Smith. CP 247. The "Counter Offer" also contemplated that Mr. Chill would enter a covenant not to compete, and a "seven year (84 month) compensation package \* \* \*." CP 249, at ¶ 3.1.19.

On January 3, 2007, Mr. Chill approved a "Compensation Plan for Earn-Out Agreement." CP 253-255. Under that plan, Mr. Smith agreed to give Mr. Chill an additional \$1,000,000 promissory note (the "\$1MM Note). CP 253, at ¶ 1.

On May 23, 2007, the stock purchase closed, with Matthew Smith Company, Inc. (MSC), being substituted as the buyer. On that date, MSC and Mr. Chill signed a Stock Purchase Agreement (SPA). CP 20-54. Also on that date, Mr. Smith and MSC gave Mr. Chill a \$1,300,000 promissory note (CP 412-413); a \$500,000 promissory note (CP 416-417); and a

\$1,000,000 promissory note (CP 18-19). That is also the date that Mr. Chill entered a commercial lease with MSC and CPR. CP 399-411.<sup>1</sup>

**B. The Arbitration Agreement and Demand For Arbitration**

The SPA contains this arbitration clause:

Except as otherwise provided in Section (e)19.15(e), any controversy or claim arising out of this Agreement will be settled by arbitration in the City of Vancouver, Clark County, Washington. CP 48.

On June 28, 2007, MSC sent Mr. Chill and his attorney a Notice of Intent to Arbitrate. CP 140. The notice specified that MSC was seeking rescission of the SPA. On October 23, 2007, MSC notified Mr. Chill's attorney that MSC was pursuing a claim based on violations of the Washington State Securities Act within the arbitration. CP 141. The attorneys had previously discussed that issue. *Id.*

**C. The Arbitration and Award**

MSC's claims were arbitrated between December 3<sup>rd</sup> and 6<sup>th</sup>, 2007. CP 115. Before the hearing, Mr. Chill submitted an arbitration brief in which he repeatedly asserted that the \$1MM Note was part of the consideration given for the stock purchase. On page 61, that brief asserts

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Numerous other documents and agreements were signed on the same date, but are not in the record.

that MSC's total obligations were \$5 million. CP 475. On page 108, that brief relates that MSC agreed to pay \$937,000.000 more than the \$4,063,000 appraised value of CPR. CP 480. This \$5,000,000 purchase price included the \$1MM Note. On page 111, Mr. Chill's brief asserts that Smith "did not disclose the entirety of this transaction to" the bank that financed the down payment because Smith did not disclose the existence of the \$1MM Note. CP 481. On pages 132-33, Mr. Chill asserted that if the arbitrators found that he breached the SPA, he was entitled to offset all of the notes payable, including the \$1MM Note, from the damages. CP 483-84. On page 149, Chill asserts that Smith violated the Securities Act by not disclosing the \$1MM Note to the lender that financed the down payment. CP 485.

On December 19, the arbitrators issued an order finding that "defendant violated the Washington State Securities Act in connection with the Stock Purchase Agreement dated May 23, 2007," and granting rescission. CP 115. On January 27, 2008, the arbitrators issued a final award that cancelled the "\$500,000 note, the \$1,300,000 note and the \$1,000,000 note." CP 103. The award also cancelled "[a]ll contracts between plaintiff and defendant that were entered in connection with the

Stock purchase Agreement \* \* \*. CP 103-107.

**D. Superior Court Proceedings Relating to Confirmation**

On January 29, 2008, MSC moved the Clark County Superior Court to confirm the arbitration award. CP 1-3. Mr. Chill responded by filing a motion to modify or vacate the award, which he supported with evidence extrinsic to the arbitration agreement and award. CP 55-66; 11-54. Mr. Chill subsequently submitted substantial additional briefs and extrinsic evidence in support of the motion to vacate and in opposition to the motion to confirm. CP 154-156; 174-209; 210-426.

**E. Superior Court Proceedings Relating to Writ of Attachment**

While the dispute concerning confirmation of the award was ongoing, MSC filed a motion seeking a writ of attachment against Mr. Chill's properties in Washington. CP 67-74. The motion and supporting documents related these facts:

CPR was in the business of repairing buildings that had been damaged by fire, smoke, water, ice or wind. CP 68. The vast majority of the work performed by CPR was paid for by property insurers. *Id.* Shortly after the stock purchase closed, MSC discovered that, for the two years preceding the close, CPR had derived most of its revenues from a single

insurer – Mutual of Enumclaw – on claims that were adjusted by a single adjuster – Bob Lowrie. CP 69; 87. MSC also learned that Mr. Lowrie had received significant “gifts” from CPR. CP 93. The gifts included home improvements, a least one gun, auto repairs, trips, and at least \$6,000 in legal fees. *Id.* MSC also learned that Enumclaw had terminated Lowrie shortly before Chill offered to sell CPR. CP 87.

These discoveries prompted MSC to begin reviewing the CPR job files. That review disclosed that CPR was able to increase the profit margins on the Lowrie jobs by submitting invoices for work that was not performed, and materials that were not provided, by CPR. CP 74-75. Mr. Lowrie justified the billings to his employer by using false “competitive” estimates that were created by CPR. *Id.* The competing estimates were prepared under the letterhead of disaster restoration companies other than CPR. *Id.* However, the estimates were created on the CPR computers, and transmitted by CPR to Lowrie. Because the competing estimates were always higher than the estimates prepared by CPR, Enumclaw was led to believe that the CPR estimate was competitive and reasonable, and therefore agreed to pay the CPR billings. *Id.*

CPR also justified billings by sending Enumclaw forged

subcontractor invoices. CP 88. On projects that were billed on a time and material basis, Enumclaw required CPR to support the billing with actual invoices for subcontracted labor. CPR would bill for work that was not performed, or would increase the amount of the bill, by generating a false subcontractor invoice on a CPR computer and then submitting the false invoice to Enumclaw. Although the invoices were generated on a CPR computer, they bore the name of a company other than CPR. *Id.*

A spreadsheet that cross referenced the forgeries was presented. CP 560-62. Declarations from subcontractors whose invoices were forged were also presented. CP 586-610.

After MSC demanded arbitration, Mr. Chill invested at least \$1.8MM into a house in Florida, and represented that he had established residency there. CP 70. Mr. Chill owns several properties in Washington, and had entered contracts to sell two of those properties after his dispute with MSC arose. *Id.* The escrows for these sales were opened at the same date and time. *Id.* Mr. Chill had not expressed any willingness to pay the award, he rejected an offer to mediate all of the pending claims and disputes, and he continues to resist MSC's claims. *Id.*

In addition to the claim asserted by MSC, Mr. Chill has been sued

by Mutual of Enumclaw. It's complaint alleges \$4,000,000.00 of damages arising from fraudulent conduct by Mr. Chill. Mr. Chill has also been sued by Wachovia Small Business Capital. It's fraud claim alleges damages of approximately \$2,000,000. CP 70.

**F. The Superior Court Rulings, Orders and Judgment**

On February 22, 2008, the Superior Court granted MSC's motion for a writ of attachment. CP 678-680. After additional rounds of briefing and the submission of additional evidence, the Superior Court issued a ruling denying the motion to vacate, and granting the motion to confirm. CP 676-677. Mr. Chill moved for reconsideration of that ruling. CP 697-698. After denying that motion, the Superior Court entered an order confirming the arbitration award and denying the motion to vacate. CP 699. The court then entered findings and conclusions to support entry of a judgment. CP 705-706. The judgment was entered on March 14, 2008. CP 707-709.

**III. ARGUMENT**

Collectively, Mr. Chill's assignments of error challenge the confirmation of the arbitration award, the entry of a judgment on the award, and the scope of a writ of attachment. As explained below, there

was no error, and this court should affirm.

**A. Combined Response to First and Second Assignments of Error**

Mr. Chill's first and second assignments of error present the same central issue: Did the trial court err by confirming the arbitration award? Mr. Chill contends that the trial court should have modified the award to omit cancellation of the \$1MM Note and other collateral contracts between MSC and Mr. Chill. Because nothing on the face of the award shows that the arbitrators made an award on a matter not submitted for arbitration, the trial court properly confirmed the award, and properly denied Mr. Chill's motion for reconsideration.

**1. Scope of Review**

Mr. Chill contends that a *de novo* standard of review applies to these assignments of error based on the authority of *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc.*, 138 Wn.App. 203, 213, 156 P.3d 293 (2007). The issue in that case was whether a dispute was arbitrable. That dispute arose out of a motion to compel arbitration that was governed by the Federal Arbitration Act. In that context, this court concluded that arbitrability is a question of law that is reviewed *de novo*.

Mr. Chill's claim of error is based on RCW 7.04A.240(1)(b), which allows an arbitration award to be modified if the arbitrator made an award on a matter that was not submitted. Because there has already been an arbitration, this court's scope of review is narrowly circumscribed.

A court's limited authority to confirm, vacate, modify, or correct an arbitration award arises from statute. *Hanson v. Shim*, 87 Wash.App. 538, 545, 943 P.2d 322 (1997); *see also Davidson v. Hensen*, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998). “[J]udicial review of an arbitration award is limited to the face of the award. In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.” *Davidson*, 135 Wash.2d at 118, 954 P.2d 1327. A court cannot review “the evidence before the arbitrator nor the merits of the case.” *Beroth v. Appollo Coll., Inc.*, 135 Wash.App. 551, 559, 145 P.3d 386 (2006); *see also Davidson*, 135 Wash.2d at 119, 954 P.2d 1327. This court's inquiry “is limited to that of the court which confirmed, vacated, modified or corrected that award.” *Barnett v. Hicks*, 119 Wash.2d 151, 157, 829 P.2d 1087 (1992).

A court can modify the award only if “[t]he arbitrator has made an award on a claim not submitted to the arbitrator and the award may be

corrected without affecting the merits of the decision upon the claims submitted.” RCW 7.04A.240(1)(b); *see also Luvaas Family Farms v. Ferrell Family Farms*, 106 Wash.App. 399, 404 n. 8, 23 P.3d 1111 (2001). “To determine whether an issue was presented to the arbitrators, the reviewing court examines the face of the award in light of the arbitration agreement, the demand for arbitration, and any documents reflecting that demand.” *Luvaas Family Farms*, 106 Wash.App. at 404.

The application of these rules is illustrated by the decision in *Boyd v. Davis*, 127 Wash.2d 256, 897 P.2d 1239 (1995). That case arose out of an agreement to sell an ophthalmological practice. That sale was memorialized through five simultaneously executed documents: an Asset Sale Agreement, an Employment Agreement and Covenant Not to Compete, a Security Agreement, a Lease Agreement, and an Option Agreement. The dispute was submitted to arbitrator, who issued an award that voided only some of the contracts. Based on a review of the evidence submitted in the arbitration, the Superior Court concluded that all of the agreements were a single indivisible contract that must be wholly rescinded. That being so, the Superior Court vacated the award. Division I reversed and reinstated the award. The Supreme Court affirmed

Division I, explaining that the determination whether the multiple agreements constituted a single indivisible contract was a question for the arbitrator. Because nothing on the face of the award revealed that the arbitrator's decision was erroneous, the Superior Court had no basis to vacate the award.

In the present case, the face of the arbitral award alone does not exhibit an erroneous rule of law or a mistaken application of law. Therefore, no support exists for Petitioner's position that the arbitrator exceeded his power within the meaning of RCW 7.04.160(4) when he rendered the award. Thus, that award cannot be disturbed. 127 Wash.2d at 263.

**2. The Remedies Awarded Are Authorized by The Securities Act**

MSC demanded arbitration of a Securities Act claim. CP 141. The arbitrators found that Mr. Chill violated that Act. CP 115. Under RCW 21.20.430(1), a seller who violates the anti-fraud provisions of the Act "is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security \* \* \*." In short, the defrauded buyer is entitled to rescind the purchase, and to get back what was given for the security. *Helenius v. Chelius*, 131 Wash.App. 421, 432, 120 P.3d 954 (2005), *rev. den.* 158 Wash.2d 1026, 152 P.3d 347 (2007).

The goal of rescission is to restore contracting parties to the position they were in before the contract was formed. *Hornback v. Wentworth*, 132 Wash.App. 504, 513, 132 P.3d 778 (Wash.App. Div. 3 2006), *rev. granted* 158 Wash.2d 1025, 152 P.3d 347 (2007). In *Willener v. Sweeting*, 107 Wash.2d 388, 397, 730 P.2d 45 (1986), the court explained:

The solution should attempt to restore parties to the relative positions they would have occupied if no contract had ever been made. The circumstances of each case largely determine what is necessary for one party to do to put the other in status quo.

The Securities Act authorizes a tribunal to order return of the consideration paid for a security. This remedy encompasses both monetary and non-monetary consideration. Indeed, it would be no remedy at all if a defrauding seller of a security could avoid the remedial provisions of the Securities Act by demanding non-monetary consideration for the sale, such as notes. It follows that the arbitrators had authority to cancel any contract that would not have existed but for the stock purchase.

Precedent for this remedy is found in *Kaas v. Privette*, 12 Wn.App. 142, 143, 529 P.2d 23 (1974). In that case, the trial court found a Securities Act violation. To effect rescission of the sale, the trial court ordered cancellation of the notes that were given for the security. The

cancellation of the notes was within the broad, remedial, power of the court.

As explained above, this court's review is limited to the arbitration demand, documents that reflect that demand, and the face of the award. The face of the award discloses that the arbitrators found a Securities Act violation. Because cancellation of contracts given for a security is an authorized remedy for a Securities Act violation, the award could not be disturbed unless something on its face disclosed that the \$1MM Note and other cancelled contracts were *not* part of the consideration for the securities. The arbitration award specifies that "[a]ll contracts between plaintiff and defendant that were entered in connection with the Stock Purchase Agreement" are cancelled. CP 103-104. This statement confirms that the arbitrators only cancelled contracts that were part of the consideration for the stock purchase. Because nothing on the face of the award discloses that the \$1MM Note and other collateral contracts were *not* consideration given for the securities, the face of the award does not disclose that the arbitrators awarded on a matter that was not submitted. That being so, the trial court properly confirmed the award.

### 3. The Parties Agreed to Arbitrate a Securities Act Claim

Mr. Chill contends that the arbitration agreement in the SPA is not broad enough to encompass disputes based on the \$1MM Note or other collateral contracts. This argument is refuted by *Keen v. IFG Leasing Co.*, 28 Wash.App. 167, 174, 622 P.2d 861 (1980), which recognized that an arbitration clause that applied to all controversies must be broadly construed. *Accord Hanson v. Shim*, 87 Wash.App. 538, 550, 943 P.2d 322 (1997). Nevertheless, this court need not determine whether the arbitration agreement applies to disputes based on alleged breaches of the collateral contracts because the parties did not arbitrate any such dispute.

MSC did not demand arbitration of any claim or dispute arising out of the \$1MM Note or collateral contracts. MSC demanded arbitration of a Securities Act claim. That being so the question is not whether a dispute involving a breach of one of the collateral contracts would be arbitrable. Rather, the question is whether the Securities Act claim was arbitrable. Mr. Chill does not dispute that it was. Because the Securities Act claim was subject to arbitration, and the remedy awarded was authorized by the substantive law governing that claim, this appeal presents no arbitrability issue.

This is what distinguishes these cases from cases like *Nelson v. Westport Shipyard, Inc.*, 140 Wn.App. 102, 163 P.3d 807 (2007), and *Tracer Research Corp. v. National Environmental Services Company*, 42 F.3d 1292 (9<sup>th</sup> Cir. 1994). In each of those cases, the question presented was whether a discreet claim was subject to a contractual arbitration agreement. Conversely, those cases did not involve a situation where a party to an arbitration challenged an award of an authorized remedy for an arbitrable claim. Because these facts were not before those courts, *Nelson*, *Tracer* and the other like cases cited by Mr. Chill are inapposite.

Perhaps the clearest answer to Mr. Chill's argument is found in the controlling statute. RCW 7.04A.240(1)(b) provides that a court can modify the award only if "[t]he arbitrator has made an award on a *claim* not submitted to the arbitrator \* \* \*." The *claim* that was submitted to the arbitrators was based on the Securities Act, and that is the *claim* that the arbitrators resolved. The award was based on that *claim*. Because the arbitrators made an award on the *claim* that was submitted, there is no basis for modifying the award.

In sum, MSC did not demand arbitration of any claim or dispute for a breach of a collateral agreement. That being so, the arbitrability of

such a claim is not at issue, and Mr. Chill's authorities concerning the scope of the arbitration agreement and integration of the contracts are all inapposite.<sup>2</sup>

**4. The Arbitration Notice Clearly Demanded Recission**

Mr. Chill asserts that the arbitrators could not cancel the \$1MM Note or collateral contracts that were not referenced in the demand for arbitration. This assertion is based on RCW 7.04A.230(f), which provides that an arbitration award can be vacated if "[t]he arbitration was conducted without proper notice *of the initiation* of an arbitration as required in RCW 7.04A.090." (Emphasis added.) The latter statute provides:

(1) A person *initiates* an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by mail certified or registered, return receipt requested and obtained, or by service as authorized for the initiation of a civil action. The notice must describe the nature of the controversy and the remedy sought. (Emphasis added.)

The first sentence of this statute describes how an arbitration is *initiated*: by notice delivered as agreed, through service authorized for use

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Mr. Chill's arguments about the scope of the integration clause also miss the mark. In *Boyd*, the court explained that the determination whether multiple contracts constitute a single agreement is for the arbitrators. *Boyd*, 127 Wash.2d at 252. Likewise, determining the affect of an integration clause is for the arbitrators.

in civil action, or by certified mail. The second sentence specifies the required content for the notice. RCW 7.04A.230(f) provides that the improper *initiation* of an arbitration can be grounds for vacating an award. This means an award can be vacated if the notice is not properly delivered. But nothing in that statute says that an award can be vacated if the content of a notice is deficient.

This only makes sense. A person who has received notice of the initiation of an arbitration can pursue discovery to clarify any uncertainty concerning the scope of the arbitration or the relief requested. Conversely, a person who does not receive notice of the initiation of an arbitration may join the proceeding too late to protect his or her interests. Because Mr. Chill's objection is based on the content of the notice, rather than how it was delivered, RCW 7.04A.230(f) does not support his request.

The notice provided by MSC also satisfied the requirements of RCW 7.04A.090. MSC's arbitration demand notified Mr. Chill that MSC was seeking the remedy of rescission. That remedy has well-defined contours: the goal of rescission is to restore the status quo; to return the parties to the positions that they were in before a transaction was consummated. *Willener*, 107 Wash.2d at 397. It follows that a demand

for rescission is a request that anything given in a transaction be returned, including any notes or contractual consideration.

Nothing in RCW 7.04A.090 requires a demand for arbitration to specify the precise relief requested. If a claim seeks damages, a mere request for “damages” will suffice. Likewise, if a claim seeks rescission, a request for “rescission” will suffice. If a recipient to an arbitration demand wants to know exactly what damages are being sought, or exactly what a party who has demanded rescission wants returned, there are discovery processes available to obtain that information.

MSC’s arbitration notice did not specify that MSC was seeking to cancel the \$1,300,000 and \$500,000 notes, or that MSC wanted back the cash it gave for the securities. The award granted this relief.

Nevertheless, Mr. Chill does not contend that the arbitrators lacked authority to cancel those other notes, or compel repayment of the cash he received. His failure to challenge these parts of the award constitutes a tacit admission that he had sufficient notice of what the arbitrators could award to effect a rescission.

Even if an arbitration notice is insufficient, that is not grounds for vacating an arbitration award unless the notice operated “so as to prejudice

substantially the rights of a party to the arbitration proceeding.”

RCW 7.04A.230(f). Mr. Chill claims that he was prejudiced by the arbitration notice because he would have filed a motion to stay the arbitration had he known that MSC was seeking to arbitrate a dispute concerning the \$1MM Note and the collateral contracts.

As explained above, MSC did not demand arbitration of a claim based on the \$1MM Note or collateral contracts. MSC did not assert that Mr. Chill breached the note or any collateral contract. MSC asserted that Mr. Chill breached the Securities Act. That claim was unquestionably arbitrable. Because there was no basis to stay the Securities Act claim, a motion to stay would have been pointless. Mr. Chill’s loss of an opportunity to bring a pointless motion is not prejudice at all, let alone substantial prejudice.

Even if arbitration involved a claim based on the \$1MM Note or a collateral contract, and that dispute was not subject to arbitration, the arbitration could only be stayed as to that dispute. The arbitration of the Securities Act claim would have continued and resulted in the same remedy that was included in the award. Thus, Mr. Chill fails to identify any prejudice, let alone “substantial” prejudice.

## 5. MSC Did Not Waive Arbitration Rights

After MSC demanded arbitration, Mr. Chill filed a lawsuit against MSC in the Superior Court based on alleged breaches of the collateral contracts. CP 716-719. Because MSC did not seek to compel arbitration of those breach of contract claims, Mr. Chill contends that MSC waived any right to arbitrate those claims.

Assuming Mr. Chill is correct, that would not require vacation or modification of the arbitration award. That award was based on a Securities Act claim. Mr. Chill does not contend that MSC waived the right to arbitrate the Securities Act claim. Indeed, it would be incongruous, if not absurd, to contend that a litigant who has demanded, and is vigorously pursuing, arbitration of a claim forfeits the right to continue that arbitration by not seeking to compel arbitration of other claims later asserted by a common adversary.

A “waiver” is defined as the voluntary and intentional relinquishment of a known right. *Ross v. Harding*, 64 Wash.2d 231, 391 P.2d 526 (1964); MSC’s demand for, and pursuit of, arbitration of a Securities Act claim does not in any way signify the relinquishment of a right to arbitrate that claim. To the contrary, these acts signify, in the

strongest possible way, a desire to preserve the right of arbitration. Thus, as a legal and factual matter, MSC did not waive the right to arbitrate its Securities Act claim.

Again, Mr. Chill does not contend otherwise. But even if had, Mr. Chill's objection would have been too late. RCW 7.04A.070(2) allows a person to apply to a court for an order to stay an arbitration if there is no valid agreement to arbitrate. RCW 7.04A.230(1)(e) provides that a party can seek to vacate an arbitration award if there was no agreement to arbitrate, "unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing \* \* \*." Read together, RCW 7.04A.070(2) and RCW 7.04A.230(1)(e), require a party who disputes the validity of an arbitration agreement to bring that issue to the attention of the court before the arbitration hearing begins.

This only makes sense. A party should not be allowed to put his adversary through the cost and expense of an arbitration hearing if the validity of the arbitration agreement is in dispute. Nor should a party be allowed to gamble on the outcome of an arbitration and then, if disappointed, challenge the validity of the arbitration agreement. Because

Mr. Chill raised no objection to arbitrating the Securities Act claim before the arbitration hearing, he cannot now contend that MSC waived the right to arbitrate that claim.

Conversely, if Mr. Chill was not barred from seeking to compel arbitration on the basis of waiver, he should have done that after he claims to have first received notice that MSC was seeking to rescind the \$1MM Note and collateral contracts. According to Mr. Chill, he first obtained that notice on January 8, 2008. The arbitrators did not issue the award until January 27, 2008. In the interim, Mr. Chill made no effort to stop the arbitration.

A party who does not seek to pursue a right when there is an opportunity to do so cannot establish that the loss of that right was prejudicial. Mr. Chill had 19 days to seek a stay after he claims to have first learned that MSC was seeking rescission of the \$1MM Note and collateral contracts. His failure to do so within that time precludes him from proving harmful error.

In sum, because MSC did not waive arbitration of its Securities Act claim, and the award conferred a remedy authorized by the Securities Act, Mr. Chill's waiver argument must be rejected. Because these parties

did not arbitrate Mr. Chill's breach of contract claims, it does not matter if MSC waived the right to arbitrate those claims. An arbitration award based on a claim properly submitted to arbitration cannot be vacated because the parties to the arbitration have other disputes between them that may not be arbitrable.

To be sure, the cancellation of the \$1MM Note and the collateral contracts moots Mr. Chill's breach of contract claims. He cannot prove a breach of a contract that has been voided. Nevertheless, voiding a contract to remedy a Securities Act violation is not the same thing as adjudicating a claim for breach of the voided contract. The arbitrators voided the collateral contracts to remedy a Securities Act violation. Because MSC did not waive arbitration of that claim, the awarded remedy must stand.

**6. The Arbitrators' Determinations of Law and Fact are Unreviewable**

Mr. Chill asserts that the arbitrators lacked authority to determine arbitrability. That being so, he contends that the "language concerning jurisdiction in the arbitration award is entitled to no weight."

It is unclear how these assertions relate to the issues before this court. What Mr. Chill appears to be saying is that the court should not give any deference to the arbitrators' determination of arbitrability. As

explained above, Mr. Chill did not dispute that the Securities Act claim was arbitrable, does not dispute that, and it is now too late for him to do so. Because the arbitrators only ruled on the Securities Act claim, arbitrability is not an issue.

Mr. Chill may be concerned that this court will defer to the arbitrators' determination that a dispute concerning the \$1MM Note was arbitrable. There was no such determination by the arbitrators. What they determined was that cancellation of that note was an authorized remedy for the Securities Act violation.

The rule has long been that "arbitrators, when acting under the authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts and, unless the award on its face shows adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified." *Cohen v. Graham*, 44 Wash.App. 712, 717, 722 P.2d 1388 (1986), *review denied*, 107 Wash.2d 1033 (1987). The arbitrators unquestionably had "jurisdiction" over the Securities Act claim, and they applied the substantive law as they understood it to the facts as they found them. Nothing on the face of the award reveals any statutory basis for

modification or vacation of those actions. Mr. Chill cannot evade this court's limited scope of review by characterizing the arbitrators' determinations of law and fact as a questions of arbitrability.

**7. There Was No Reason to Reconsider**

Mr. Chill's final argument in support of reversal of the confirmation order is that the trial court improperly considered evidence extrinsic to the arbitration agreement and award to determine that the arbitrators had authority to cancel the \$1MM Note and the collateral contracts. Mr. Chill based his motion for reconsideration on CR 59. CP 697. That rule authorizes a party to seek a new trial for specified grounds. Proceedings to confirm, vacate or modify an arbitration award are not equivalent to a trial. Such proceedings are strictly limited to review of the face of an award, and cannot address the merits of a dispute. Thus, CR 59 does not authorize reconsideration of a motion to confirm, modify or vacate an arbitration award.

CR 60(b) authorizes motions to reconsider an order. However, Mr. Chill did not file any such motion. He sought reconsideration of a "ruling." Because there is no authority for that request, the Superior Court did not err in denying it.

Any error in that court's ruling was also invited and harmless.

Mr. Chill invited the error by submitting substantial portions of the arbitration record to support his motion to vacate or modify, and by relying on that evidence to support his arguments. In his motion to vacate or modify, Mr. Chill expressly reserved "the right to present further evidence on this [arbitrability] issue when the court has resolved pending questions concerning the confidentiality of the arbitration proceeding." CP 60.

After the Superior Court ruled that the arbitration was not confidential, Mr. Chill submitted substantial evidence presented in the arbitration. *See* CP 210-426. He then relied on that evidence to support his arguments concerning arbitrability. *See* CP 197-204.<sup>3</sup>

Mr. Chill contends that the Superior Court's erroneously based its ruling on that extrinsic evidence. If the Superior Court based its decision on extrinsic evidence, Mr. Chill invited that action. Because Mr. Chill invited that action, this claim of error is not reviewable. *See City of Seattle v. Patu*, 147 Wash.2d 717, 720, 58 P.3d 273 (2002) (doctrine of invited error prevents parties from benefitting from an error they caused).

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In response to Mr. Chill's submissions and arguments, MSC submitted rebuttal evidence. However, MSC urged the Superior Court to limit its review to the arbitration agreement and face of the award. CP 120-121.

Any error was also harmless. This court must “affirm the trial court if proper legal grounds exist, in spite of the fact that it may have based its decision upon an erroneous reason.” *Portland Ass'n of Credit Men v. Earley*, 42 Wash.2d 273, 277, 254 P.2d 758 (1953). For the reasons previously explained, nothing on the face of the award justified vacating or modifying it. That being so, the award was subject to confirmation, and this court must affirm, even if the Superior Court strayed too far into the arbitration record to resolve the issues presented.

**B. Combined Response to Assignments of Error 3, 4 and 5**

Mr. Chill’s third, fourth and fifth assignments of error all relate to the findings and conclusions underlying the entry of the judgment. Mr. Chill combines his arguments on these related assignments. MSC does likewise.

**1. Preliminary Considerations**

These assignments of error are directed at reversing a judgment on the basis that there are unresolved claims still pending against these parties in Clark County Superior Court Case No. 07 2 03749 1 (hereinafter “Mr. Chill’s Lawsuit”). In his lawsuit, Mr. Chill is suing MSC for breaching the contracts that the arbitration award cancelled. CP 716-719. The

cancellation of the underlying contracts moots Mr. Chill's claims. The Superior Court so recognized. CP 706.

In addition to being moot, Mr. Chill's Lawsuit is an action separate and distinct from the arbitration between Mr. Chill and MSC. Mr. Chill repeatedly announces in his brief that he in no way agreed to submit his contract claims to arbitration. As explained in response to the preceding assignments of errors, the arbitration did not concern Mr. Chill's breach of contract claims. Because Mr. Chill's claims were not arbitrated, his action is a distinct proceeding from the arbitration. Likewise, the special statutory proceeding to confirm the arbitration award was distinct from Mr. Chill's Lawsuit. The two cases even have different numbers.

The separation between the two proceedings is significant because CR 54(b) only comes into play "[w]hen more than one claim for relief is presented *in an action*", and a judgment disposes of fewer than all of those claims. This language is unambiguous. It limits the application of CR 54(b) to a judgment in a single action involving multiple claims. Conversely, the rule does not apply when a judgment disposes of all of the claims presented in a discreet action.

In *Angelo v. Angelo*, 142 Wash.App. 622, 639, 175 P.3d 1096 (2008), this Division concluded that a CR 54(b) certification is unnecessary if claims that remain pending in the trial court could not have originally been brought in the same action as the claims on the appeal. Mr. Chill's breach of contract claims could not have been asserted in the confirmation proceeding. Thus, a CR 54(b) certification was not required, and all of these assignments of error are moot.

Even if the requirements of CR 54(b) governed the entry of a judgment on the arbitration award, Mr. Chill fails to demonstrate that he preserved these alleged errors. Nothing in the appellate record reflects that Mr. Chill objected to the Superior Court's findings and conclusions. Mr. Chill also did not designate that decision in his Notice of Appeal as required by RAP 2.4(a). Because Mr. Chill fails to show that his arguments against the findings and conclusions were preserved, and because the subject rulings were not designated in the Notice of Appeal, these assignments of error are not reviewable.

**2. The Superior Court's Findings Are Supported by Evidence**

Mr. Chill challenges the Superior Court's finding that MSC and Mr. Chill "entered into an agreement to submit all claims arising under

their Stock Purchase Agreement to binding arbitration.” CP 705. The evidentiary support for this finding could not be stronger. The arbitration agreement unambiguously expresses that “any controversy or claim arising out of this Agreement will be settled by arbitration in the City of Vancouver, Clark County, Washington.” CP 48.

Mr. Chill asserts that the finding could be construed to suggest that “there was some other arbitration agreement between the parties.” An appellant cannot overturn a finding by proffering an untenable interpretation. Because this finding is clear, and supported by the evidence, it is not erroneous.<sup>4</sup>

Mr. Chill also challenges the third finding, which expresses that the trial court confirmed the arbitration award, and the fourth, which expresses that the contracts underlying Mr. Chill’s separate claims were cancelled by the arbitration award and judgment. Both of these facts are also supported by the evidence. Mr. Chill does not contend otherwise. He instead reasserts that the arbitrators did not have authority to cancel the collateral contracts, and that the Superior Court erred in confirming the

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The Superior Court was not asked to determine whether there were other arbitration agreements between the parties. That being so, there would have been no reason to make such a finding. Because the issue was never presented, and not pertinent to the issues before the Superior Court, that court did not address or decide that issue.

award. These arguments are derivative of the arguments underlying the first and second assignments of error. Unless Mr. Chill prevails on those, he cannot prevail on these. MSC's response to these arguments are contained in the response to the first and second assignments of error, which MSC incorporates by reference.

### **3. There Was Good Reason Not to Delay Judgment**

A trial court's entry of a CR 54(b) judgment is reviewed for an abuse of discretion. *Lindsay Credit Corp. v. Skarperud*, 33 Wash.App. 766, 772, 657 P.2d 804 (1983). The factors that a court should consider in exercising that discretion are:

(1) [T]he relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal. *Id.*

Applying those factors here, there was no abuse of discretion.

With respect to the first factor, there is no overlap between the Securities Act claim that was resolved by the arbitrators and Mr. Chill's breach of contract claims. The Securities Act claim adjudicated the issue

of whether Mr. Chill misrepresented or concealed facts to induce the sale of securities. The facts and law that bear on the resolution of those questions have no bearing on whether contracts arising from the sale were breached.

Even if there was some overlap between the claims in the two actions, this appeal will finally determine whether Mr. Chill's breach of contract claims are moot. That being so, an immediate appeal of the arbitration judgment is warranted. There is no reason these parties should be put through the time and expense of motions to dispose of moot claims. Thus, the relationship between the claims in the separate actions justifies an immediate appeal of the arbitration judgment.

With respect to the second factor, the questions on appeal are no longer before the Superior Court. This appeal arises from a judgment in a special statutory proceeding. The Superior Court resolved all issues presented in that proceeding. Mr. Chill's Lawsuit does not present any of the same issues.

The third factor also justifies the entry of a final, appealable judgment. Nothing that will occur in Mr. Chill's Lawsuit will moot the need for review of the issues presented by this appeal. No matter what

happens in Mr. Chill's Lawsuit, the issues he raises in this appeal would remain, and his incentive to appeal would not abate.

This appeal will not delay the trial of Mr. Chill's claims. To the contrary, it will expedite the resolution of those claims. Even if the trial court had not entered a judgment, it entered an order confirming the arbitration award. CP 699-700. That order cancelled the contracts underlying Mr. Chill's claims. Unless this court reverses the order confirming the arbitration award, Mr. Chill's claims cannot proceed. Thus, entry of an appealable judgment was necessary to finally resolve Mr. Chill's Lawsuit. Of course, this court should not vacate the award for all of the reasons previously discussed. Nevertheless, because only this appeal can determine whether Mr. Chill's claims can proceed, this factor weighs in favor of entry of an appealable judgment.

The foregoing discussion partially addresses the fifth factor, which concerns the practical effects of allowing an immediate appeal. Another important practical effect appears in the Superior Court's fifth finding that "[t]here is evidence in the record indicating that Donald C. Chill has left this jurisdiction and moved to Florida, and has received substantial monetary assets in Florida, which he has not tendered to Matthew Smith

Company, Inc. in satisfaction of the arbitration award.” CP 706. Based on this unchallenged finding, the court concludes that “delay would unreasonably impede Petitioner’s right to seek satisfaction of the judgement herein.” *Id.*

These are not trifling considerations. MSC obtained a significant award against Mr. Chill, and there is considerable evidence that he is seeking to place his assets beyond MSC’s reach. This is not a case where a prevailing litigant has an abstract concern about collectability of a judgment. This is a case where the losing litigant was actively placing assets out of reach to avoid paying the judgment. Mr. Chill’s conduct in this regard is reprehensible, and should not in any way be facilitated. The “practical effect” of giving MSC a judgment was to temper Mr. Chill’s efforts to avoid his obligations. This “practical effect” weighs heavily in favor of the immediate entry of judgment.

Mr. Chill contends that a Superior Court would be justified in delaying entry of judgment to facilitate offsetting judgments. Although delaying the entry of judgment for this purpose may not constitute an abuse of discretion, there is no requirement that a trial court delay entry of judgment for that purpose. In short, whether to delay entry of judgment to

facilitate a possible offset is within the sound discretion of a Superior Court.

Also, this reason for delay holds no weight here because there will not be, and cannot be, a judgment to offset unless this appeal proceeds and this court reverses. As previously explained, the order confirming the arbitration award cancels the contracts underlying Mr. Chill's claims. That being so, Mr. Chill cannot proceed with his claims unless he secures reversal of the order confirming the arbitration award. Because an offsetting judgment cannot possibly arise unless, among other things, Mr. Chill prevails in this appeal, there was no reason to delay entry of judgment to facilitate any offset.

In sum, Mr. Chill cannot pursue his claims unless this court reverses the order confirming the arbitration award, and that cannot happen without this appeal. This court should not reverse. Nevertheless, because the issues presented by this appeal must be resolved to bring finality to Mr. Chill's claims, the trial court properly entered judgment. The entry of judgment was also proper to facilitate efforts to stop Mr. Chill from placing his assets beyond the reach of his creditors.

**C. Response to Sixth Assignment of Error**

In his sixth assignment of error, Mr. Chill contends that the Superior Court erroneously authorized a writ of attachment against Mr. Chill's half interest in community property because Mr. Chill's obligation to MSC is a debt. Mr. Chill is wrong about that; a Securities Act violation does not create a debt; such a violation constitutes a tort. At a minimum, such a violation creates a liability that is recoverable from a spouse's share of community property.

**1. A Securities Act Violation Does Not Create a "Debt"**

Mr. Chill contends that a Securities Act violation creates a "debt" that is not recoverable from community property. He bases this argument on *First National Bank of Juneau v. Estus*, 185 Wash. 174, 52 P.2d 1243 (1936), and *Achilles v. Hoopes*, 40 Wn.2d 664, 245 P.2d 1005 (1952).

Those cases involved efforts to collect promissory notes, which were clearly debts. The issue presented in each of those cases was whether the subject debt was community or separate property. The answer to that question depended on the character of the property financed with the debt. MSC is not seeking to collect on a promissory note; it is seeking to collect a judgment based on a Securities Act violation. Neither *Hoopes* or *Estus*

says anything to support Mr. Chill's assertion that a Securities Act violation creates a debt.

"In ordinary understanding, the term 'debt' is an obligation resting upon contract, either express or implied." *Commercial State Bank v. Curtis*, 7 Wash.2d 296, 298, 109 P.2d 558 (1941). The arbitration award was based on a Securities Act violation, not a breach of contract. Thus, under this definition, the award is not a "debt".

In *Caplan v. Sullivan*, 37 Wash.App. 289, 293, 679 P.2d 949 (1984), the court stated that the term "debt" can also "refer to a sum of money owed which is fixed and certain." Every judgment fixes an amount of money owed. But some separate judgments are collectible out of a judgment debtor's share of community property. See *Keene v. Edie*, 131 Wash.2d 822, 935 P.2d 588 (1997). Thus, for purposes of the community property exemptions, a judgment, standing alone, cannot be a "debt." Rather, only if the judgment is based on a debt, such as a promissory note, does the judgment retain the character of a debt.

MSC did not recover an award on a contract, note or on liquidated financial obligation. Because MSC did not sue on a debt, its award and judgment are not a debt.

## 2. Mr. Chill Committed a Tort

MSC's claim against Mr. Chill was based on RCW 21.20.430(1).

That is the only provision of the Securities Act that provides a civil remedy for a person who is wrongfully induced to purchase a security. The remedy is the same for every disgruntled buyer: the defendant "is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security \* \* \*." RCW 21.20.430(1). Liability under this statute extends to the seller, and to "every partner, officer, director or person who occupies a similar status or performs a similar function of such seller \* \* \*." RCW 21.20.430(3).

In *Haley v. Highland*, 142 Wash.2d 135, 12 P.3d 119 (2000), the Court recognized that a person who is liable for a Securities Act violation is a "tortfeasor." In that case, Highland was the director of a company that sold securities to Haley. At the time of the sale, Highland knew that the company had engaged in conduct that would subject it to significant tax liabilities, but Highland did not disclose that information to Haley. After Haley's purchase, the value of his shares dropped. Haley sued, and recovered a judgment on a Securities Act claim based on RCW 21.20.430.

Haley subsequently sought to collect that judgment from Highland's share of community property. The Supreme Court concluded that Haley could do so if Highland's separate property was insufficient to cover the judgment. In doing so, the Court repeatedly referred to Highland as a "tortfeasor." At the start of its analysis, the Court framed the issue:

The principal issue presented by this case is whether the judgment against Highland, a married person, for *tortious conduct* that occurred before his marriage may be enforced against his one-half interest in community personal property if his separate property is insufficient to satisfy the claim. *Id.*, at p. 142 (Emphasis added).

The Washington Supreme Court does not decide hypothetical or abstract questions. The issue in *Haley* was whether a separate tort judgment can be collected out of the tortfeasor's subsequently acquired community property. That issue would have been hypothetical and abstract if Highland was not a tortfeasor. Thus, recognizing that Highland was a tortfeasor was necessary to the decision in *Haley*.

The judgment against Highland was based on a Securities Act violation. Highland was a tortfeasor. It follows that Highland's Securities Act violation constituted a tort. There is only one civil remedy available under the Securities Act. That remedy does not change form or scope for different violators. It is the same for all. Thus, a Securities Act

violation either is, or is not, a tort in all cases. Because the Washington Supreme Court has characterized the Securities Act violation as a tort, any person who is liable for selling a security in violation of that Act must be a tortfeasor. That includes Mr. Chill.

The *Haley* court's treatment of a Securities Act violation as a tort is consistent with federal court treatment of claims under analogous federal statutes. The federal courts have characterized securities fraud claims as torts. *See, e.g., In re Exxon Mobil Corp. Securities Litigation*, 500 F.3d 189, 201, (3<sup>rd</sup> Cir. 2007); *List v. Fashion Park, Inc.*, 340 F.2d 457, 463 (2d Cir.), *cert. denied*, 382 U.S. 811, 86 S.Ct. 23, 15 L.Ed.2d 60 (1965). In *Stevens v. Abbott, Proctor and Paine*, 288 F.Supp. 836, 844 (D.C.Va. 1968), the court observed that "[t]he principle cause of action, however, is primarily one in tort, based on fraud, and it has been held that the appropriate statute of limitations in such an instance should be that which is placed by State statute relating to same." In *Holdsworth v. Strong*, 545 F.2d 687, 694 n. 3 (10<sup>th</sup> Cir. 1976), *cert. denied*, 430 U.S. 955, 97 S.Ct. 1600 (1977), the court recognized that "[t]he 10b-5 wrong is in nature and character a statutory tort in that it inflicts an injury of the same nature as a common law tort. The 10b-5 definitions are taken from the

common law deceit definitions.”<sup>5</sup>

The evidence submitted in support of the writ showed that CPR, through Mr. Chill, derived income by committing insurance fraud, which exposed CPR to significant liabilities and rendered the stock of the company valueless. Mr. Chill did not disclose these problems to MSC. These facts are squarely analogous with those in *Haley*. Following that decision, Mr. Chill is a tortfeasor.<sup>6</sup>

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Mr. Chill contends that an anti-fraud claim under the Securities Act is not a tort because causation is not an element of such a claim. Federal courts construing analogous provisions of federal law have concluded otherwise. The federal courts hold that proximate cause is an element of a Securities Act claim. *See Ambassador Hotel Co., Ltd. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1025 (9th Cir.1999) (“The plaintiff must prove both actual cause [‘transaction causation’] and proximate cause [‘loss causation’]”). To prevail on a Securities Act claim a plaintiff must prove reliance. *Hines v. Data Line Systems, Inc.*, 114 Wash.2d 127, 134, 787 P.2d 8 (1990). A causation requirement is inherent in the concept of reliance. If a person has not relied on a misrepresentation, the misrepresentation has not caused a loss. Regardless whether causation requirement, *Haley* settles the issue of whether a Securities Act violation is a tort.

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Not only is a Securities Act violation a tort, it is a community tort. In *Haley*, the court observed:

Highland's securities fraud violation is not a separate tort because of the nature of his conduct. Rather, it is separate because he was unmarried during the period when his tortious activity occurred. 142 Wash.2d at 143.

If a Securities Act violation was not otherwise a community tort, there would have been no reason for this statement.

### 3. A Securities Act Violation Creates a Liability That Is Collectable Out of Community Property

Even if Mr. Chill is not a tortfeasor, his obligation did not arise from a debt. This can mean only that there is a type of liability that is neither tort-based or contract-based.

Mr. Chill is liable to MSC because he breached a statutory obligation not to misrepresent material facts about the securities he was selling. This statutory liability is analogous to a tort liability. Just as a tortfeasor violates a duty imposed by law apart from a contract, so does a person who violates the Securities Act. Similarly, the victim of a Securities Act violation stands in the same position as a person who has been victimized by a misrepresentation-based tort; both have paid too much for something because of a misrepresentation by the seller.

Because a Securities Act violation is analogous to common law misrepresentation-based torts, and causes the same type of injury, a victim of a Securities Act violation should have the same rights to collect a judgment as a victim of a tort. In *Nichols Hills Bank v. McCool*, 104 Wash.2d 78, 88, 701 P.2d 1114 (1985), the Court explained that a tortfeasor's share of community property is subject to execution because "the countervailing interest of compensating an innocent tort victim was

sufficiently strong to override the interest in protecting the marital community.” *Accord deElche v. Jacobson*, 95 Wn.2d 237, 622 P.2d 835 (1980), Those same considerations justify overriding the interest in protecting the marital community to compensate the innocent victim of a Securities Act violation. Indeed, the interest may be even stronger.

The “primary purpose” of the Act is “to protect investors from speculative or fraudulent schemes of promoters.” *Cellular Eng'g, Ltd. v. O'Neill*, 118 Wash.2d 16, 23, 820 P.2d 941 (1991) (emphasis added). The Act “is remedial in nature and has as its purpose broad protection of the public.” *McClellan v. Sundholm*, 89 Wash.2d 527, 533, 574 P.2d 371 (1978) (emphasis added). When interpreting this “remedial legislation,” the court is “guided by the principle that ‘remedial statutes are liberally construed to suppress the evil and advance the remedy.’ ” *Kittilson v. Ford*, 23 Wash.App. 402, 407, 595 P.2d 944 (1979) (quoting 3 C. DALLAS SANDS, STATUTES AND STATUTORY CONSTRUCTION § 60.01 (4th ed.1973)), aff'd, 93 Wash.2d 223, 608 P.2d 264 (1980).

*Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wash.2d 247, 253, 143 P.3d 590 (2006). Considering the public policy underlying the Securities Act, and the parallels between a Securities Act violation and a common law misrepresentation-based tort, a Securities Act violation, like a common law tort, creates a liability that is recoverable from the violator’s share of

community property even if a Securities Act violation is not a tort.<sup>7</sup>

#### 4. No Due Process Violation

Mr. Chill also contends that the writ must be vacated because the Superior Court violated the due process rights of his spouse. Mr. Chill asserts that Ms. Chill had ownership interests in some of the attached property. That being so, he contends that she was entitled to notice and an opportunity to be heard before the writs issued.

Mr. Chill's argument proceeds from the erroneous premise that the writ of attachment impairs Ms. Chill's property interest. The order granting the writs specifies that the attachment only applies to Mr. Chill's half interest in community property. CP 679. The writs reference the order. CP 689. That being so, the writs are subject to the order, and do not reach beyond Mr. Chill's interest in community property.

Even if the order and writs were silent about the reach of the attachment, a co-owner's interest in attached property is fully protected by RCW 6.17.170, which provides:

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In *McCool*, the Court refused to extend *Keene* to allow collection of a voluntarily incurred debt out of community property, concluding that the obligee could have protected itself by contract, and that it would contravene a statute to allow such collections. 104 Wash.2d at 88. Neither of these considerations exist here.

If a judgment debtor owns real estate jointly or in common with any other person, only the debtor's interest may be levied on and sold on execution, and the sheriff's notice of sale shall describe the extent of the debtor's interest to be sold as accurately as possible.

Because only a debtor's interest in attached property can be sold, a writ of attachment is not defective if it fails to carve out the property interests of a joint or common owner of attached property.

Even if the writ could be construed to reach beyond a co-owner's interest, RCW 6.25.280 provides:

This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the complaint, affidavit, bond, writ or other proceeding, and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings.

Under this statute, MSC must be allowed time to cure any defect in the writs. Conversely, the writs cannot be quashed or vacated.

Because the writs do not impair property interests of third parties, those parties had no due process rights. Even if the writs impaired property rights of persons who were not before the court, there was no due process violation.

A statute that authorizes seizure of property without prior notice and hearing, but which provides a prompt post-deprivation hearing, does not violate due process *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986).

Due process is a flexible concept, and its procedural protections will vary depending on the particular deprivation involved. *See Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). “In general, due process requires that a hearing before an impartial decisionmaker be provided at a meaningful time, and in a meaningful manner.” *Coleman*, 40 F.3d at 260. In cases with similar facts, courts have uniformly held that a prompt post-deprivation hearing satisfies due process. *See id. at 260 & n. 2* (collecting cases).

*Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 537 (8th Cir. 1999).

In Washington, third parties are entitled to challenge the validity of an attachment after the fact. RCW 6.19.020 provides:

An adverse claimant may assert a claim under the procedures provided in this chapter whether the levy was made under a writ of execution or of attachment and whether the writ was issued by a superior court or a district court of this state, but this chapter does not supersede common law or other remedies available to an adverse claimant before or after levy or sale.

RCW 6.19.010(1) defines an “adverse claimant” as “a person, other than the judgment debtor or defendant, who claims title or right to possession

of property levied on.” A person other than the debtor defendant can also challenge an attachment under the authority of *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 P. 338 (1896). Because of these post-attachment procedural protections, strangers to a lawsuit are not entitled to notice and hearing before a writ of attachment issues.

Mr. Chill contends otherwise based on *Allyn v. Asher*, 132 Wn.App. 371, 131 P.3d 339 (2006). That case involved a question of appealability. The question arose out of a dispute concerning the constitutionality of an attachment. However, the opinion that addressed that issue was unpublished, and, thus, is not precedential. RAP 10.4(h). Also, the *Allyn* decision explains that the unpublished opinion addressed the constitutionality of an “ex parte attachment.” *Id.*, at 377. Because this dispute involves a writ of attachment issued after a hearing, *Allyn* is inapposite.

Finally, even if Ms. Chill had some due process right, Mr. Chill cannot assert that right on her behalf. Absent exceptional circumstances, constitutional rights must be asserted by the person to whom they belong. *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). To establish third-party standing to assert Ms. Chill’s right, Mr.

Chill must demonstrate that Ms. Chill is unable to protect her own interests. *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). *See also Craig v. Boren*, 429 U.S. 190, 192-197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Because Mr. Chill made no such showing, he cannot assert this due process challenge.

#### IV. CONCLUSION

The Superior Court properly confirmed the arbitration award, and entered an appealable judgment on that award. That court also properly issued writs of attachment against properties owned by Mr. Chill. That being so, this Court should affirm.

#### STATEMENT PURSUANT TO RAP 18.1(A)

MSC seeks attorney fees on appeal. This is based on Section 19.16 of the Stock Purchase Agreement, which authorizes an award of attorney fees to any party who prevails in a suit arising out of the Stock Purchase Agreement. Mr. Chill concedes that his appeal implicates this provision.

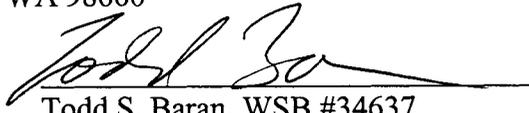
DATED this 20<sup>th</sup> day of August, 2008.

  
Todd S. Baran, WSB #34637  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of August, 2008, I served the RESPONDENT'S BRIEF upon the attorneys for all parties by depositing in the United States Post Office, Portland, Oregon, a full, true and correct copy thereof, with postage thereon prepaid, addressed to them at the addresses set forth below their names:

Ben Shafton  
Caron, Colven, Robison & Shafton, P.S.  
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Todd S. Baran, WSB #34637  
Attorney for Respondent

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