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NO. 95420-8
(Consolidated with No. 95436-4)

**SUPREME COURT
OF THE STATE OF WASHINGTON**

FEDERAL HOME LOAN BANK OF SEATTLE,

Appellant,

v.

CREDIT SUISSE SECURITIES (USA) LLC, f/k/a CREDIT SUISSE
FIRST BOSTON LLC, CREDIT SUISSE FIRST BOSTON MORTGAGE
SECURITIES CORP., and CREDIT SUISSE MANAGEMENT LLC,
f/k/a CREDIT SUISSE FIRST BOSTON MANAGEMENT LLC,

Respondents.

FEDERAL HOME LOAN BANK OF SEATTLE,
a bank created by federal law,

Appellant,

v.

BARCLAYS CAPITAL, INC., a Connecticut corporation; BCAP LLC,
a Delaware limited liability company; and BARCLAYS BANK PLC,
a public limited company registered in England and Wales,

Respondents.

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. THERE IS NEITHER “HALF A CENTURY OF SETTLED AND UNIFORM WASHINGTON LAW” NOR “50 YEARS OF CLEAR AND CONSISTENT PRECEDENT” THAT THE WSSA REQUIRES PROOF OF RELIANCE, JUST ERRANT DECISIONS OF DIVISION ONE STARTING IN 2004.....	1
A. This Court Decided Nothing About Reliance In Either <i>Hines</i> Or <i>Go2Net</i>	1
B. Division One In 2004 Was The First Court To Read A Reliance Requirement Into The WSSA.	4
C. The Legislature Has Not Acquiesced In A Reliance Requirement.	6
II. RESPONDENTS CANNOT RECONCILE THE DECISIONS BELOW WITH THE DECISION OF THIS COURT IN <i>KITTILSON</i> v. <i>FORD</i>	7
III. CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases	Page(s)
<i>1000 Friends of Wash. v. McFarland</i> , 159 Wn.2d 165 (2006)	6
<i>Basic, Inc. v. Levinson</i> 485 U.S. 224 (1985)	8
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341 (2009)	6
<i>Dura Pharmaceuticals v. Broudo</i> , 544 U.S. 336 (2005)	8
<i>Ernst & Ernst v. Hochfelder</i> , 485 U.S. 185 (1976)	7, 8, 9, 10
<i>Fast v. Kennewick Pub. Hosp. Dist.</i> , 187 Wn.2d 27, 384 P.3d 232 (2016)	4, 6
<i>Go2Net, Inc. v. Freeyellow.com, Inc.</i> , 158 Wn.2d 247, 143 P.3d 590 (2006)	1, 2, 3
<i>Guarino v. Interactive Objects, Inc.</i> , 122 Wn. App. 95, 86 P.3d 1175 (2004).....	4
<i>Halliburton Co. v. Erica P. John Fund, Inc.</i> , 134 S. Ct. 2398 (2014)	9
<i>Hines v. Data Line Sys., Inc.</i> , 114 Wn.2d 127, 787 P.2d 8 (1990)	1, 2, 3, 5
<i>Kittilson v. Ford</i> , 93 Wn.2d 223 P.2d 264 (1980)	<i>passim</i>
<i>Kunkle v. W. Wireless Corp.</i> , 133 Wn. App. 1023 (2006), <i>rev. denied</i> , 161 Wn.2d 1010, 166 P.3d 1217 (2007)	4
<i>Ludwig v. Mutual Real Estate Invs.</i> , 18 Wn. App. 33, 567 P.2d 658 (1977)	6
<i>Shermer v. Baker</i> , 2 Wn. App. 845, 472 P.2d 589 (1970)	4, 5

<i>Stewart v. Estate of Steiner</i> , 122 Wn. App. 258, 93 P.3d 919 (2004), <i>rev. denied</i> , 153 Wn.2d 1022, 108 P.3d 1229 (2005)	3, 4
---	------

Statutes

RCW 21.20	4
RCW 21.20.010	5, 9, 11
RCW 21.20.140	9
RCW 21.20.230	9
RCW 21.20.430	9

I. THERE IS NEITHER “HALF A CENTURY OF SETTLED AND UNIFORM WASHINGTON LAW” NOR “50 YEARS OF CLEAR AND CONSISTENT PRECEDENT” THAT THE WSSA REQUIRES PROOF OF RELIANCE, JUST ERRANT DECISIONS OF DIVISION ONE STARTING IN 2004.

A. This Court Decided Nothing About Reliance In Either *Hines* Or *Go2Net*.

This Court has never directly considered whether the WSSA requires proof of reliance. To characterize this as a settled question, Credit Suisse and Barclays pluck one sentence from this Court’s 1990 decision in *Hines*¹ and argue respectively that “[t]he level of causation required for a WSSA claim—reliance, or reliance and loss causation was squarely before this Court” (CS Answer 7) and “*Hines* presented this Court with the question of what elements must be proven to prevail on a WSSA claim” (Barclays Answer 4-5).

This linchpin of Respondents’ position distorts the record in *Hines*. As Seattle Bank showed in its petition (and as Respondents simply ignore), the investor-appellants in *Hines* assumed that they had to prove reliance, or transaction causation. They told this Court so in both their opening and reply briefs, which are quoted on page 10 of Seattle Bank’s petition. What they disputed, and thus all this Court was called upon to

¹ “The investors need only show that the misrepresentations were material and that they relied on the misrepresentations in connection with the sale of the securities.” *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 134, 787 P.2d 8, 12 (1990).

decide, was whether they also had to prove loss causation. The Court decided that they did not.

To create the appearance of a disagreement about a reliance requirement between the parties in *Hines* (and thus to argue that reliance was before this Court, so the Court’s sentence quoted in note 1 was not just dictum), Barclays argues:

The parties in that case [*Hines*] disagreed about whether plaintiffs needed to *only* show transaction causation (*i.e.*, that plaintiff relied on the alleged misrepresentations in entering into the transaction)—or had to prove both transaction causation/reliance and loss causation (*i.e.*, that the alleged misrepresentations were the proximate cause of plaintiff’s alleged losses).

Barclays Answer at 5 (emphasis added). Barclays’s word *only* defeats its argument. If Barclays could have written that “[t]he parties . . . disagreed about whether the plaintiffs need to show transaction causation [reliance],” then the question whether there is a reliance requirement would indeed have been before this Court. By inserting the word *only*, as it had to, Barclays admits that the parties disagreed only about loss causation.

Similarly, Respondents attempt to ground a reliance requirement in this Court’s 2006 decision in *Go2Net*,² arguing: “In *Go2Net*, this Court again articulated that reliance *is* an element” (Credit Suisse Answer 14-15 (emphasis in original)) and “this Court held that the jury’s finding—which

² *Go2Net, Inc. v. Freeyellow.com, Inc.*, 158 Wn.2d 247, 143 P.3d 590 (2006).

included plaintiff’s reliance on a material misrepresentation or omission—established a violation of the WSSA” (Barclays Answer 4). Here, Respondents rely not on any aspect of the Court’s holding, but on language in which the Court was simply recounting—in a decision on whether the WSSA permits the equitable defenses of waiver and estoppel—the questions that the trial court submitted to the jury.³

Indeed, the passages cited by Respondents simply summarize the jury’s findings and identify the questions presented to the Court (reliance not among them). *See Go2Net*, 158 Wn.2d at 250-51 (appellant “does not challenge the jury’s finding[.]” of reliance). Describing unappealed jury findings as background to the questions the Court is considering is a far cry from holding that there is a reliance requirement under the WSSA.⁴

³ After discussing *Hines*, Credit Suisse writes:

Sixteen years later this Court again recognized the WSSA’s reliance requirement, stating, “that [plaintiff], in entering the agreement, *relied on [defendant’s] material misrepresentation* or omission regarding the ownership of his company . . . established [defendant’s] violation of [the WSSA]. *Go2Net, Inc. v. Freeyellow.com, Inc.*, 158 Wn.2d 247, 250, 143 P.3d 590 (2006) (emphasis added). FHLBS points to no decision to the contrary.

Answer 7 (emphases Credit Suisse’s); *see also* Barclays Answer 4 (citing *Go2Net* decision at page 251).

⁴ Credit Suisse ignores this Court’s own instruction when it argues that the Court acquiesced in a reliance requirement because it denied review of the second decision in which Division One imposed a reliance requirement (*Stewart v. Estate of Steiner*, 122 Wn. App. 258, 93 P.3d 919 (2004), *review denied*, 153 Wn.2d 1022, 108 P.3d 1229 (2005) (Table)), and of one of *Stewart’s* unpublished

B. Division One In 2004 Was The First Court To Read A Reliance Requirement Into The WSSA.

Division One first read a reliance requirement into the WSSA in 2004.⁵ Respondents also claim to find a reliance requirement in the 1970 decision of Division Two in *Shermer v. Baker*⁶ (Credit Suisse Answer 8; Barclays Answer 10, 17). From that, Respondents argue that a reliance requirement rests on “half a century of settled and uniform Washington law” (Credit Suisse Answer 6); and “almost 50 years of clear and consistent precedent” (Barclays Answer 11-12). But the question of reliance was not before Division Two in *Shermer*. That court was asked to consider three questions about the WSSA, none of which had anything to do with a requirement to prove reliance. As Division Two stated the questions before it:

1. Does the Securities Act of Washington (R.C.W. 21.20) create an implied civil cause of action available to a seller of stock certificates against the purchaser thereof? [The court answered this question in the affirmative.]

progeny (*Kunkle v. W. Wireless Corp.*, 133 Wn. App. 1023 (2006), *review denied*, 161 Wn.2d 1010, 166 P.3d 1217 (2007) (Table)). Answer 9-10, 18. This Court has been clear that “[o]ur denial of review has never been taken as an expression of the court’s implicit acceptance of an appellate court’s decision.” *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232, 239 (2016) (internal citation omitted).

⁵ *Stewart v. Estate of Steiner*, 122 Wn. App. 258; *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 86 P.3d 1175 (2004).

⁶ 2 Wn. App. 845, 858, 472 P.2d 589 (1970).

...

3. Did defendant fail to disclose to plaintiff a “material fact”? Was the jury properly instructed as what a material fact is? [The court answered these questions in the affirmative.]

4. Is “scienter” one of the necessary elements to plaintiff’s cause of action?⁷

The court answered this last question about proof of scienter in the negative. It stated that in “an action brought under RCW 21.20.010, a plaintiff need neither plead nor prove that defendant intended to deceive him by the misrepresentation or omission.”⁸ This Court reached the same conclusion in *Kittilson v. Ford*⁹ in 1980.

Having answered the question about scienter that was actually before it, Division Two then went on to state that “[i]t is sufficient that the plaintiff relied on the misrepresentation or omission of a material fact.”¹⁰ Like the statement in *Hines*, this observation was dictum because no issue of reliance was before Division Two. In the 48 years between *Shermer* and the decisions of Division One in these cases, *Shermer* was cited just

⁷ *Id.* at 847. The other two questions were: “2. Did a fiduciary relationship exist between [defendant] and [plaintiff]? ... 5. Did the trial court improperly admit exhibit 19, an anonymous letter to the editor of the Kitsap County Herald, for consideration by the jury?” *Id.*

⁸ *Id.* at 857–58.

⁹ 93 Wn.2d 223, 608 P.2d 264 (1980).

¹⁰ 2 Wn. App. 845 at 858.

once in a published opinion for a requirement to prove reliance, in the decision of Division Two that this Court overruled in *Kittilson*.¹¹

C. The Legislature Has Not Acquiesced In A Reliance Requirement.

Respondents argue that, because the Legislature has not amended the WSSA to eliminate a reliance requirement, the Legislature has acquiesced in the supposedly 50-year-old reliance requirement. Credit Suisse Answer 12-13 (the Legislature “knows how to amend this statute” and has not); Barclays Answer 10-11, 14, 16. But both decisions of this Court that Respondents rely on concerned the inaction of the Legislature in response to square holdings by this Court.¹² Even if the Legislature can be assumed to keep abreast of the actual holdings of this Court and to acquiesce in them by inaction, the same cannot be assumed of dicta instead of holdings of this Court, nor of decisions by the Courts of Appeal (which are surely too numerous for the Legislature to monitor). It is for reasons like these that “[e]vidence of legislative acquiescence is not conclusive, but is merely one factor to consider.”¹³ Moreover, as argued immediately below, when the Legislature did amend the WSSA in 1977, it

¹¹ *Ludwig v. Mutual Real Estate Invs.*, 18 Wn. App. 33, 40, 567 P.2d 658, 661-62 (1977), overruled by *Kittilson v. Ford*, 93 Wn.2d 223, 608 P.2d 264 (1980).

¹² See *City of Federal Way v. Koenig*, 167 Wn.2d 341, 345, 348 (2009); *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 175–176, 181–182 (2006).

¹³ *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232, 239 (2016) (internal citation omitted).

eliminated the former requirement to prove “fraud or misrepresentation” and thus eliminated the need to prove the elements of fraud, including reliance.

II. RESPONDENTS CANNOT RECONCILE THE DECISIONS BELOW WITH THE DECISION OF THIS COURT IN *KITTILSON v. FORD*.

The decisions below cannot be reconciled with *Kittilson v. Ford*,¹⁴ in which this Court decided that the United States Supreme Court’s holding in *Ernst & Ernst v. Hochfelder*,¹⁵ that scienter is an element of an action under SEC Rule 10b-5, does not apply to actions under the WSSA. Ignoring the reasoning of *Ernst & Ernst*, Credit Suisse argues that *Kittilson* applies only to the element of scienter and “do[es] not have anything to do with whether the WSSA requires reliance.” Credit Suisse Answer 14-16. Likewise, Barclays seems not to appreciate that the reasoning of *Ernst & Ernst* applies not only to scienter, but also to all other elements of common law fraud, including reliance. Thus, by declining to apply the holding of *Ernst & Ernst* to the WSSA, this Court in *Kittilson* was rejecting the insertion into the WSSA of all the elements of common law fraud, including reliance.

¹⁴ 93 Wn.2d 223, 608 P.2d 264 (1980).

¹⁵ 485 U.S. 185 (1976).

In *Ernst & Ernst*, the Supreme Court noted that Rule 10b-5 was adopted by authority of section 10(b) of the Securities Exchange Act of 1934, which makes it unlawful “to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of [SEC] Rules.”¹⁶ By using the terms “manipulative” and “deceptive,” the Supreme Court held, section 10(b) proscribes only “knowing or intentional misconduct,”¹⁷ and Rule 10b-5 cannot be broader than the statute under which it was promulgated.¹⁸

Building on its interpretation of section 10(b) in *Ernst & Ernst*, the Supreme Court has held that virtually all the requirements of an action for common law fraud apply to actions under Rule 10b-5. In *Basic, Inc. v. Levinson*, the Supreme Court extended *Ernst & Ernst* to require proof of reliance in an action under Rule 10b-5.¹⁹ In *Dura Pharmaceuticals v. Broudo*,²⁰ the Supreme Court cited *Ernst & Ernst* for its conclusion that an action under Rule 10b-5 “resembles, but is not identical to, common-law tort actions for deceit and misrepresentation.”²¹ The elements of an action

¹⁶ *Id.* at 195.

¹⁷ *Id.* at 197.

¹⁸ *Id.* at 213-14.

¹⁹ 485 U.S. 224 (1985).

²⁰ 544 U.S. 336 (2005).

²¹ *Id.* at 340.

under Rule 10b-5 now overlap almost entirely with the elements of a common-law action for fraud.²²

After *Ernst & Ernst*, the Legislature amended the WSSA to expand its private right of action from cases of “fraud or misrepresentation” to all violations of RCW 21.20.010 (which is identical to Rule 10b-5). In 1977, the Legislature amended RCW 21.20.430(1) as follows:

Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010 or 21.20.140 through ~~21.10.220~~ and 21.20.230, ~~(or offers or sells a security by means of fraud or misrepresentation)~~ is liable to the person buying the security from him . . .

Laws of 1977, Ex. Sess. Ch. 172, § 4. Thus, even if the statutory term “fraud or misrepresentation” in the WSSA was the counterpart of “manipulative or deceptive” in section 10(b) of the 1934 Act, it was eliminated in 1977.

In *Kittilson*, this Court held that *Ernst & Ernst* does not apply to the WSSA for the simple reason that, after the Legislature removed the

²² As the Supreme Court summarized the elements of an action under Rule 10b-5 most recently:

To recover damages for violations of section 10(b) and Rule 10b-5, a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014).

requirement to prove “fraud or misrepresentation,” the WSSA has no counterpart to section 10(b):

We believe the holding in *Ernst & Ernst v. Hochfelder*, supra, inapplicable to our Securities Act. First, the “manipulative or deceptive” language of section 10(b) of the 1934 act is not included in the Washington act. Secondly, in contrast to the federal scheme, the language of Rule 10b-5 is not derivative but is the statute in Washington.²³

Just as *Ernst & Ernst* was not limited to scienter as the one element of common law fraud that *does* apply to an action under Rule 10b-5, so *Kittilson* is not limited to scienter as the one element of common law fraud that *does not* apply to an action under the WSSA. When this Court wrote that “[w]e believe the holding in *Ernst & Ernst v. Hochfelder*, supra, inapplicable to our Securities Act,” it was speaking not only of scienter, but of all elements of common law fraud implied by the terms “manipulative or deceptive,” which appear in the 1934 Act but, since 1977, have had no counterpart in the WSSA.

The amendment of the WSSA in 1977 and the decision in *Kittilson* also dispose of Respondents’ oft-repeated argument that the Legislature patterned the liability provisions of the WSSA on Rule 10b-5, which requires proof of reliance, and only the remedies provisions on section (12)(2) of the Securities Act of 1933, which does not. Credit Suisse

²³ 93 Wn.2d at 226.

Answer 10-12, 15; Barclays Answer 12. Nothing in Rule 10b-5 (or RCW 21.20.010) requires proof of reliance; the word “rely” and its derivatives do not even appear there. It is section 10(b) of the 1934 Act that requires proof of reliance, and even Respondents do not argue that, at least after the 1977 amendment, the Legislature patterned the WSSA on section 10(b).

III. CONCLUSION

For the reasons argued here and in its Petition, Seattle Bank respectfully urges the Court to join its nine sister state supreme courts that have rejected a reliance requirement, to reverse the judgments of the Court of Appeals, and thereby to return Washington to the mainstream of securities-law jurisprudence.²⁴

Respectfully submitted this June 4, 2018.

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²⁴ On May 21, 2018, the Court of Appeals for Division I affirmed the trial court in a related case, *Federal Home Loan Bank of Seattle v. RBS Securities, Inc.*, No. 76326-1-I. Seattle Bank will petition the Court for review of that decision as well.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a copy of the foregoing document to be served via the Washington State Appellate Courts' Portal on the following:

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