

**Court of Appeals No. 66518-9-1**

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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**MICHAEL D. KENNEDY and RUSH PROCESS SERVICES,  
INC.**

Appellants,

v.

**WINSTON BONTRAGER,**

Respondent.

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On Appeal from the King County Superior Court,  
The Honorable Richard Edie

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**APPELLANTS' REPLY BRIEF**

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## I. SUMMARY OF THE ARGUMENT

There is a genuine issue of material fact as to whether Winston Bontrager (“Bontrager”) filed his lawsuit for false service of process within the three-year limitations period. It was error for the trial court to: (1) Grant summary judgment in favor of Bontrager despite this genuine issue of material fact; (2) Deny appellants’ request to reconsider the summary judgment ruling; and (3) Deny appellants’ request for additional time to conduct discovery related to their statute of limitations defense.

Bontrager’s claim is subject to the three-year limitations period for fraud claims. That limitations period began to run when Bontrager knew, or should have known, of the facts constituting his claim. It is well-established in Washington that *actual* knowledge of fraud is not necessary to trigger the limitations period. *Hudson v. Condon*, 101 Wn.App. 866, 6 P.3d 615 (2000). In fact, the courts “will infer actual knowledge of fraud if the aggrieved party, through due diligence, could have discovered it.” *Hudson*, 101 Wn.App. at 875.

No later than September 20, 1996, Bontrager had *actual* knowledge that: (1) Diane Mackey had sued him for securities law violations; (2) the time for him to answer or appear would soon expire; and (3) Diane Mackey would seek a default judgment if the case was not resolved. We know this because on September 20, 1996, shortly after Bontrager was moved from prison to a half-way house and just nine days before his *Answer* was due, Bontrager, on his own initiative, sought out and telephoned Diane Mackey's attorney to discuss his concern about these very issues.<sup>1</sup> CP 225.

Bontrager's *actual* knowledge of the lawsuit, the pending deadline to answer and the risk of default judgment were sufficient to put him on notice of the facts constituting his claim for false service of process. *Hudson, id.* For the purposes of this appeal, plaintiff submits that the above information unquestionably creates a

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<sup>1</sup> The due date for Bontrager's *Answer* was based upon the date of his personal service. RCW 4.28.180. It is curious that Bontrager knew when his *Answer* was due, and behaved as if that deadline was valid, if he had not been served. In fact, during the September 20, 1996 telephone call, Bontrager made no claim that he had not been personally served with the summons and complaint. CP 225.

genuine issue of material fact as to when Bontrager knew, or should have known, the facts constituting his claim.

## II. ARGUMENT

### A. First Assignment of Error – Error to Grant Summary Judgment Despite Genuine Issue of Material Fact

Summary judgment was appropriate *only* if there was no genuine issue of material fact and Bontrager was entitled to judgment as a matter of law. CR 56(c). In this case, Bontrager had the burden to establish that he “did not discover the facts constituting the fraud and that [he] could not reasonably have discovered them within the statute of limitations period.” *Young v. Savidge*, 155 Wash. App. 806, 824, 230 P.3d 222 (2010).

A fact-specific inquiry is required to determine if and when plaintiff discovered, or should have discovered facts constituting the fraud:

“Whether an aggrieved party discovered or could have discovered such facts is a *question of fact*. The time at which [a plaintiff] ‘discovered’ the facts constituting the fraud, thus triggering the running of the statute of limitations, is a *material fact*.”

*Young*, 155 Wash. App. at 824 (emphasis added) (internal citations and quotations omitted). Such factual questions cry out against summary judgment.

As this court previously held, “[n]otice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which such inquiry might lead.” *Interlake Porsche & Audi, Inc. v. Buchholz*, 45 Wn.App. 502, 518, 728 P.2d 597 (1986). Bontrager admits to having a strong understanding of the litigation process:

“I just finished paying over \$1 million to at least five different defense lawyers. Any one of them would have happily filed a notice of appearance on my behalf in the [Mackey] case. My entire business career had been in the King County area and I had dealt with many, many lawyers over my years as a real estate developer. As a real estate developer who is involved in litigation as part of the process, *I am well aware* of the need to have a lawyer file a notice of appearance to protect my interest to avoid a default judgment.”

CP 89 (emphasis added).

Given his experience and awareness of the litigation process, Bontrager’s *actual* knowledge that he was facing a potential default judgment was certainly sufficient to “excite attention and put [him]

on guard or to call for an inquiry” into the *Mackey* lawsuit. *Interlake Porsche*, 45 Wn.App. at 518. Any inquiry into the *Mackey* lawsuit would have led to Kennedy’s affidavit of service that Bontrager now claims is false. The limitations period on his claim for false affidavit of service began to run no later than September 20, 1996, when Bontrager had *actual* notice of the lawsuit filed against him and the risk of default judgment.

Although Bontrager does not directly refute the evidence of his September 20, 1996 telephone conversation with Diane Mackey’s attorney, he has stated that he did not learn of the *Mackey lawsuit* until March 2010. CP 287. At most, that creates a genuine issue of material fact as to when Bontrager had notice of information sufficient to commence the three-year limitations period.

Bontrager’s response brief focuses primarily on the affidavit of service filed by Kennedy in the Mackey proceedings. In fact, Bontrager contends that “the only material fact in question” is whether Kennedy filed a false affidavit of service. *Brief of Respondent*, page 8. However, the central question before this Court

is not whether Kennedy filed a false affidavit of service, but whether Bontrager filed his claim against Kennedy within the time allowed. Even if Kennedy filed a false affidavit or service, which appellants do not concede, Bontrager must establish that he “did not discover the facts constituting the fraud and that [he] could not reasonably have discovered them within the statute of limitations period.”

*Young*, 155 Wash. App. at 824.

Bontrager did not establish those elements. In fact, Bontrager made no attempt to establish those elements, claiming instead that he was under no obligation to investigate the lawsuit filed against him because he was not served. CP 303-304. The above referenced precedent states otherwise; almost 14 years before he filed his lawsuit against appellants, Bontrager knew that Mackey had sued him, knew that his *Answer* was due and knew that Mackey would seek default if the case did not resolve. His willful ignorance as to the outcome of the Mackey litigation is no excuse. Bontrager should have investigated the litigation further and he should be charged

with any knowledge that would have resulted from a reasonable investigation, including knowledge about the affidavit of service.

There is a genuine issue of material fact as to when Bontrager knew, or should have known, of the facts constituting his claim for false service of process. It was error to grant Bontrager's summary judgment motion.

**B. Second Assignment of Error – Error to Deny Appellants' Request to Reconsider Motion for Summary Judgment**

The evidence discussed above illustrates that a genuine issue of material fact exists regarding the timeliness of Bontrager's claim. In addition, Bontrager was also on constructive notice of the *Mackey* lawsuit because his wife at the time, who was also a defendant, was personally served with the summons and complaint. CP 347-352. Given the unresolved factual issues about when Bontrager knew or should have known and, thus, when the limitations period began to run, the trial court erred in denying appellant's motion to reconsider the summary judgment.

**C. Third Assignment of Error – Error to Deny Appellants’ Request for Continuance to Allow for Discovery**

Bontrager filed his lawsuit on August 16, 2010. CP 1.

Appellants answered on November 8, 2010. CP 29. Bontrager returned his responses to interrogatories on November 10, 2010 and filed his motion for summary judgment on November 12, 2010. CP 202, CP 36. The trial court set the hearing for December 10, 2010. CP 34.

Given the rapid docketing of this case, from answer to summary judgment hearing in 32 days, appellants moved for a continuance to allow more time for discovery, including discovery into facts relevant to the statute of limitations defense. CP 181-188. Bontrager argued that a statute of limitations was unavailable because Kennedy could not re-litigate “the fact that he filed a false affidavit of service [and that] Kennedy’s liability previously has been established, and the only unaddressed issue is damages.” CP 205. Bontrager simply ignores his obligation to establish that he “did not discover the facts constituting fraud and that [he] could not

have reasonably discovered them within the statute of limitations period.” *Young*, at 824. The statute of limitations defense is certainly available to the appellants whether or not a trial court judge previously found, in a separate matter, that Kennedy did not serve Bontrager. Even if Bontrager could prove that Kennedy filed a false affidavit, Bontrager still had to bring his claim within the limitations period.

As stated above, Bontrager has claimed that he did not learn of the *Mackey lawsuit* until March 2010. Due to the quick calendaring in this case, appellants were unable to depose Bontrager and question him more deeply about his September 20, 1996 conversation with Diane Mackey’s attorney and why he did not file an appearance or respond further to the proposed settlement. Two obvious questions to Bontrager could be: (1) “How did you learn that your time to answer the *Mackey lawsuit* was about to expire?”; and (2) “What steps did you take to avoid having a default judgment entered against you?” There can be no real dispute that relevant

information could have been obtained from such Bontrager's deposition.

CR 6(b) states quite clearly that when "an act is required ... to be done at or within a specified time, the court for cause may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if the request is made before the expiration of the period originally prescribed." Appellants' response to the motion for summary judgment was due on November 29, 2010. Appellants timely filed a request for continuance on November 29, 2011. CP 179. The request was served on Bontrager's counsel on November 24, 2010. CP 185.

It should be noted that in objecting to the requested continuance, Bontrager focused on whether or not Kennedy had filed a false affidavit of service, stating in conclusion that the "fact that Kennedy filed a false affidavit has been definitively decided. No amount of discovery on any topic will change that fact." CP 212. This comment illustrates that Bontrager is focused on the wrong question and the trial court may have been focused on the wrong

question as well. Whether or not Kennedy filed a false affidavit has absolutely no bearing on whether Bontrager filed his claim on time. The germane question and what the trial court should have focused on, is when Bontrager had notice of information sufficient to commence the limitations period. Without explanation, the trial court denied appellants' reasonable and timely request for a continuance to conduct discovery into that question. It was error to deny appellants' request for a continuance.

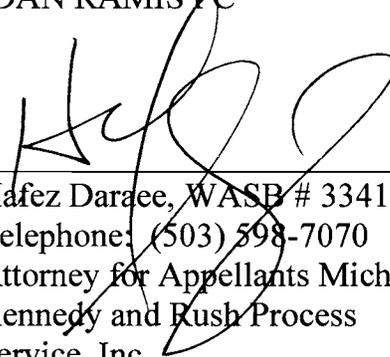
### **III. CONCLUSION**

Respectfully, this court should find that there were genuine issues of material facts in dispute, reverse the lower court's *Order Granting Winston Bontrager's Motion for Summary Judgment and Judgment* and remand for further proceedings. Alternatively, appellants respectfully request that this court reverse the lower court's *Order Granting Winston Bontrager's Motion for Summary Judgment and Judgment*, with further instruction to allow appellants

additional time to complete discovery and supplement the summary judgment record at which time the trial court could then reconsider Mr. Bontrager's motion.

Dated this 1st day of July, 2011.

JORDAN RAMIS PC

By: 

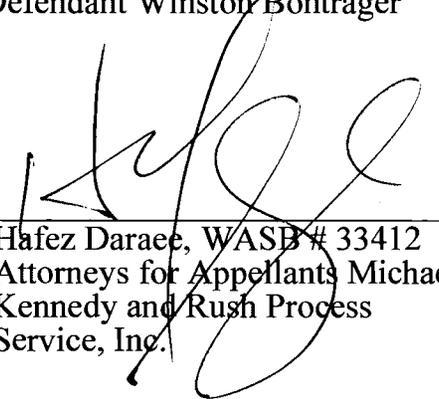
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date shown below I served a true and correct copy of **APPELLANTS' REPLY BRIEF** by Federal Express, on:

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