STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

SCOTT J. BRAUER, ADAM KILGAS, DUANE A. MCVANE, MATT J. VANDEHEY, and PAUL WEYERS,
Plaintiffs–Appellants,

Appeal No. 2018AP000761
v. Circuit Court Case No. 2014CV001664

VERIPURE, LLC, BADGER SHEET METAL WORKS OF GREEN BAY, INC. AND GREGORY A. DECASTER,
Defendants,
GREGORY A. DECASTER AND JUDITH A. DECASTER REVOCABLE TRUST, GADJAD PROPERTIES, LLC, RICHARD J. CHERNICK, BADGER CAPITAL INVESTMENTS, LLC, and DAVID J. CONARD,
Defendants–Respondents.

ON APPEAL FROM THE MARCH 2, 2018 ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY
THE HONORABLE THOMAS J. WALSH, PRESIDING

BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF THE ISSUES

I. Did the circuit court misapply the summary judgment standard or otherwise err in granting the motion by determining that IRS Form 5498, without more, was enough to trigger the statute of limitations on Plaintiffs-Appellants' claim under Wis. Stat. § 551.501.

The circuit court answered: No.

II. Must the denial of Plaintiffs' motion to permit the pleadings to be amended to conform to the evidence be reversed if the circuit court's decision as to teh claim under Wis. Stat. § 551.501 is reversed and the presumption in foavor of the amendment is restored.

The circuit court did not answer this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented by this appeal can be appropriately addressed through the written briefs. Plaintiffs-Appellants, therefore, do not request oral argument at this time.

Plaintiffs-Appellants do not believe the opinion in this matter need be published as this appeal seeks the application of well-established Wisconsin law and likely will not involve novel legal rules or further clarify existing law.

STATEMENT OF THE CASE AND FACTS

This matter is on appeal from a Brown County Circuit Court Final Order pertaining to motions for summary judgment and reconsideration which dismissed all claims against Defendants-Respondents David J. Conard, Gregory A. DeCaster and Judith A. DeCaster Revocable Trust, GADJAG Properties, LLC, Richard J. Chernick, and Badger Capital Investments, LLC (collectively, "Defendants"). (R. 175, pp. 1-2; App. pp. 388-389).[1] Following the grant, in part, of Plaintiffs-Appellants Scott J. Brauer, Adam Kilgas, Duane A. McVane, Matt J. Vandehey, and Paul Weyers' ("Plaintiffs") motion for reconsideration, the circuit court upheld its previous ruling as to the Defendants. (*Id.*). In granting Defendants' motions for summary judgment, the circuit court determined that Plaintiffs admitted that they were on inquiry notice of potential fraud claims by May 31, 2013 through an IRS Form 5498, and accordingly, missed the statute of limitations for their securities fraud claim as to the Defendants. (R. 119, pp. 6-7). Plaintiffs timely appealed this final order and the decision and order denying

[1] Claims remain against Defendants Gregory A. DeCaster, Veripure, LLC, and Badger Sheet Metal Works of Green Bay, Inc., which are not currently parties to this appeal.

Plaintiffs' motion to permit the pleadings to be amended to conform to the evidence. (R. 172, pp. 1-10; R. 175, pp. 1-2).

Plaintiffs are all *former* employees of Defendant Badger Sheet Metal Works of Green Bay, Inc. ("BSMW").[2] Plaintiffs invested the following amounts, and on the following dates, in Veripure, LLC ("Veripure"):

Party	Date	Amount	Number of Membership Units
Duane McVane	July 20, 2010	$105,733.10	1.057
Scott Brauer	September 23, 2010	$50,000.00	0.500
Matt Vandehey	September 23, 2010	$37,092.37	0.371
Paul Weyers	September 23, 2010	$50,000.00	0.500
Adam Kilgas	April 12, 2011	$40,000.00	0.400
		$282,825.47	

(*Id*.). At the time of each of their investments in Veripure, Plaintiffs were non-accredited investors.[3] To invest, Plaintiffs transferred their retirement savings via 401(k) rollover account balances from their financial advisor to Baylake Bank, which was Veripure's, BSMW's, defendant Badger Capital Investment, LLC ("Badger Capital") and defendant Richard Chernick's

[2] R. 36, p. 1; App. p. 110; R. 42, p. 1; App. p. 98; R. 43, p. 1; App. p. 101; R. 44, p. 1; App. p. 104; R. 45, p. 1; App. p. 107.
[3] R. 36, p. 2; App. p. 111; R. 42, p. 2; App. p. 99; R. 43, p. 2; App. p. 102; R. 44, p. 2; App. p. 105; R. 45, p. 2; App. p. 108.

("Chernick") bank.[4] Unbeknownst to Plaintiffs at the time, defendant David J. Conard ("Conard") signed the contract for Baylake Bank to act as the custodian of plaintiffs' 401(k) rollover accounts.[5] After investing in Veripure, BSMW terminated the employment of every plaintiff other than Adam Kilgas ("Kilgas") who voluntarily left BSMW because he believed his employment was about to be terminated.[6]

All of the Defendants, including those that are not currently parties to this appeal, have a long and entangled history. Veripure was created in 2004 and its initial owners included defendants Gregory A. DeCaster and Judith A. DeCaster Revocable Trust (the "Trust"), BSMW, Conard, and Chernick.[7]

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[4] R. 36, p. 2; App. p. 111; R. 42, p. 2; App. p. 99; R. 43, p. 2; App. p. 102; R. 44, p. 2; App. p. 105; R. 45, p. 2; App. p. 108.

[5] *Id*.

[6] *Id*.

[7] Though perhaps not material to the specific legal issues surrounding this appeal, namely, whether IRS Form 5498 triggered the statute of limitations, the documents filed with the circuit court that support and demonstrate the factual background to this case were mistakenly omitted from the circuit court's compilation of the record. As the Court may note, the Affidavit of Stephen M. Ferris ("Ferris Aff.") appears in the record as filed on January 15, 2016, but none of the attached exhibits have been included in the record transmitted to the Court of Appeals. Plaintiffs intend to correct/supplement the record by motion pursuant to Wis. Stat. § 809.15 should the parties be unable to stipulate to such correction. Any citations to the Ferris Aff. refer to R. 37 pp. 1-3 and reference the specific page that contains the paragraph which describes the contents of the attached exhibits, though those exhibits are not currently contained in the record transmitted to this Court. The

The Trust owned, at times relevant hereto, 100% of the shares of BSMW.[8] BSMW is a metal fabrication company founded by Defendant Gregory A. DeCaster's ("DeCaster") grandfather in 1923.[9] DeCaster is one of two trustees of the Trust and a beneficiary.[10] DeCaster is also the president of BSMW[11] and vice president of Veripure.[12] Conard was, at times relevant hereto, the chief financial officer of BSMW and Veripure.[13] Chernick was, at times relevant hereto, a board member of Veripure and managing member of Badger Capital.[14] Badger Capital was formed in October 2009 to assume loans to BSMW from Johnson Bank.[15] GADJAD Properties, LLC ("GADJAD") is a real estate holding company owned by the Trust and DeCaster is its managing member.[16] GADJAD owns and leases real estate

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citation to this statement in reference to the affidavit that is found on the record, and the paragraph to which it relates, is as follows: R. 37, p. 1 (Ferris Aff., Ex. A (DEF001496–97)); R. 23, p. Defendants' Answer, ¶ 6).

[8] R. 37, p. 2 (Ferris Aff., Ex. F, DeCaster Depo. 18:18-23).

[9] R. 37, p. 2 (Ferris Aff., Ex. F, DeCaster Depo., 16:22 – 17:4).

[10] R. 23, pp. 1-21 (Defendants Veripure, BSMW, DeCaster, Trust, GADJAD, and Conard Answer to Amended Complaint ("Defendants' Answer"), ¶ 9.)

[11] R. 37, p. 2 (Ferris Aff., Ex. F, DeCaster Depo. 21:5-7).

[12] R. 37, p. 1 (Ferris Aff., Ex. A, DEF009817-19).

[13] R. 37, p. 1-2 (Ferris Aff., Exs. A and F, DeCaster Depo. 26:14-24; DEF003492).

[14] R. 37, p. 1-2 (DEF009817-19.; Ferris Aff., Ex. G, Chernick Depo. 31:22-25).

[15] R. 37, p. 2 (Ferris Aff., Ex. D (BYLK 1512-1515)).

[16] *Id*. at DeCaster Depo. 41:15-14, 45:2-3, 44:18-19.

to BSMW and Veripure, among other tenants.[17]

As described in more detail below, the defendants devised a scheme to sell membership units of Veripure, a company which had never been profitable, at extremely inflated prices to BSMW employees in order to repay loans of other entities by misrepresenting and omitting material facts. Beginning in at least October 2009, DeCaster, Conard, Chernick, Veripure, and Badger Capital began devising a scheme to sell membership units in Veripure for $100,000.00 per unit.[18] As of October 31, 2007, Veripure was valued at $152,627, or $1,526 per membership unit.[19] This is easily measured because in 2009, DeCaster purchased Veripure membership units for $1,526 per unit.[20] In 2009, Chernick also purchased Veripure membership units for $1,526 per unit.[21] Shortly before November 6, 2009, Chernick formed Badger Capital to assume loans BSMW owed to Johnson Bank.[22] In late 2009, BSMW was in or near default on a multi-million dollar loan payable to Johnson Bank.[23] Given their involvement and positions with

[17] *Id*. at DeCaster Depo. 45:4-15.
[18] R. 37, p. 1 (DEF007306-07; DEF007305).
[19] *Id*. (DEF001691).
[20] *Id*. (DEF003472-73).
[21] *Id*. (DEF003472-73).
[22] R. 37, p. 2 (BYLK 1512-1515).
[23] *Id*. (BYLK 1512-1515).

the various entities, DeCaster, Conard, Chernick, Veripure and Badger Capital knew that BSMW was in or near default on a multi-million dollar loan with Johnson Bank. On December 4, 2009, Badger Capital paid Johnson Bank $2,600,000.00 to assume Johnson Bank's $3,304,557.00 loan to BSMW.[24] Baylake Bank loaned Badger Capital $2,200,000.00 as part of the amount paid to Johnson Bank.[25]

Badger Capital and Chernick intended to repay this Baylake Bank loan, at least in significant part, through the issuance of additional Veripure membership units. The proceeds derived therefrom would be used by Veripure to make a payment on a note due to BSMW, which would in turn be used by BSMW to pay down its loan to Badger Capital.[26] So desperate to get Plaintiffs' money, when the sale of membership units of Veripure appeared to stall, Chernick noted:

> Jesus Dave this is bs…We need to get this today we are broke what doesn't he understand., Mike P. has signed off 2 times and sent to Bill. Something is not right. I will have Adrian get this moving, we cannot make payroll without the $50k.[27]

DeCaster, Conard, Chernick, Badger Capital, BSMW, and Veripure devised

[24] R. 37, p. 1 (DEF007995-98).
[25] R. 37, p. 2 (Ferris Aff., Ex. B. (BC000059-60)).
[26] R. 37, p. 2 (BYLK 1512-15).
[27] R. 37, p. 1 (DEF008379-8380).

a plan to use BSMW employees' 401(k) funds, in exchange for membership units of Veripure at extremely inflated prices, to pay off the Baylake Bank loan to Badger Capital and finance BSMW. DeCaster, Conard, Chernick, Badger Capital, BSMW, and Veripure knew that selling membership units in Veripure to BSMW employees using their 401(k) funds was illicit as BSMW's own independent 401(k) plan trustee threatened to resign if Veripure membership units were sold to BSMW employees.[28] DeCaster, Conard, Chernick, Badger Capital, BSMW, and Veripure then devised a plan to have BSMW employees rollover their retirement savings from 401(k) balances from previous employers through Baylake Bank to a self-directed IRA in order to purchase Veripure membership units.[29]

By at least April 2010, BSMW had a significant cash shortage and was unable to pay its short-term liabilities.[30] In order to cover this cash shortage, Chernick requested a $250,000.00 short-term loan from Baylake Bank.[31] Chernick intended, and DeCaster, Conard, Badger Capital, BSMW and Veripure understood and agreed, that the loan would be repaid using

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[28] R. 37, p. 1 (DEF008173).
[29] *Id*. (DEF006993; DEF007305; DEF007306-07; DEF008181-82; DEF008691)
[30] *Id*. (DEF008171-72).
[31] R. 37, p. 2 (BYLK1505, BYLK3819-20).

rolled over 401(k) funds from BSMW employees, namely Plaintiffs, through the purchase of membership units in Veripure. On April 15, 2010, Conard contacted Baylake Bank to discuss setting up self-directed IRAs at Baylake Bank for BSMW employees to move funds from investment accounts outside of BSMW's 401(k) program to invest in Veripure.[32] Baylake Bank loaned Chernick $200,000.00 to cover BSMW's cash shortage and the loan was payable in full within 30 days.[33] Baylake Bank also agreed to serve as custodian for the 401(k) rollover balances from BSMW employees to invest in Veripure.[34] Baylake Bank agreed to extend the maturity of its $200,000.00 loan to Chernick based upon assurances from Chernick and Conard, with the knowledge and complicity of DeCaster, the 401(k) rollover funds from BSMW employees would be used to pay off the loan.[35] On May 7, 2010, Conard requested and received from Baylake Bank a Form W-9 and Traditional IRA Self-Directed packet for use by BSMW employees to invest in Veripure so those funds could be used to pay off Chernick's loan and other debts.[36] In June 2010, Baylake Bank again agreed to extend the maturity of

[32] R. 37, p. 1 (DEF010774).
[33] R. 37, pp. 1-2 (DEF010794; BYKL1505).
[34] R. 37, p. 1 (DEF001187).
[35] *Id*. (DEF008178; DEF008181-82).
[36] *Id*. (DEF001627).

its $200,000.00 loan to Chernick based upon a payment on the loan with funds paid by McVane for his purchase of membership units in Veripure.[37]

McVane, a non-accredited investor, purchased 1.057 Veripure membership units for $105,733.10 on or about July 20, 2010.[38] Of the $105,733.10 paid by McVane for his purchase of 1.057 membership units in Veripure, $101,516.66 went to pay off a portion of Chernick's loan with Baylake Bank.[39] In August 2010, Baylake Bank loaned Badger Capital another $255,000.00 to fund BSMW.[40] Part or all of this loan was to be repaid using funds used to purchase Veripure membership units.[41] Brauer, a non-accredited investor, purchased 0.5 Veripure membership units for $50,000.00 on or about September 23, 2010.[42] Vandehey, a non-accredited investor, purchased 0.371 Veripure membership units for $37,092.37 on or about September 23, 2010.[43] Weyers, a non-accredited investor, purchased

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[37] *Id*. (DEF008400-02).
[38] R. 44, pp. 1-3 (Affidavit of Duane A. McVane dated January 13, 2016, ¶¶ 2-3).
[39] R. 37, p. 2 (BYLK632-634).
[40] *Id*. (BC000061-62).
[41] *Id*. (BYLK3653-3661).
[42] R. 42, pp. 1-3 (Affidavit of Scott J. Brauer dated January 12, 2016, ¶¶ 2-3).
[43] R. 45, pp. 1-4 (Affidavit of Matt J. Vandehey dated January 14, 2016, ¶¶ 2-3).

0.5 Veripure membership units for $50,000.00 on or about September 23, 2010.[44] Brauer, Vandehey, and Weyers collectively paid $137,092.37 for 1.371 Veripure membership units. This money was used to pay a portion of the Badger Capital loan.[45] In April 2011, Kilgas purchased 0.4 Veripure membership units for $40,000.00.[46] DeCaster, Conard, and Chernick represented that each membership unit had a value of $100,000.00 and made this representation knowing it was false, as in 2009, DeCaster and Chernick purchased Veripure membership units for $1,526 per unit.[47] In 2009, 2010, and 2011, Veripure suffered a net losses of $274,255, $384,328 and $248,464, respectively.[48] In 2011, Veripure redeemed another owner's membership units for $1,526 per membership unit.[49]

DeCaster represented to Plaintiffs that the funds from the purchase of Veripure membership units would be used for product development.[50]

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[44] R. 36, pp. 1-3 (Affidavit of Paul Weyers dated January 12, 2016, ¶¶ 2-3).
[45] R. 37, p. 1 (DEF008168).
[46] R. 43, pp. 1-3 (Affidavit of Adam Kilgas dated January 14, 2016, ¶¶ 2-3).
[47] R. 37, p. 1 (DEF003472-3473).
[48] *Id*. (DEF003443-45; DEF003710; DEF005252).
[49] R. 37, p. 2 (Ferris Aff., ¶ 3).
[50] R. 36, 42-45 (Affidavit of Scott J. Brauer dated March 22, 2016, ¶ 4; Affidavit of Paul Weyers dated March 22, 2016, ¶ 7; Affidavit of Matt J. Vandehey dated March 23, 2016, ¶ 4; Affidavit of Duane A. McVane dated March 29, 2016, ¶ 4; Affidavit of Adam Kilgas dated March 24, 2016, ¶ 7).

DeCaster made this representation knowing it was false because the money from the purchase of Veripure membership units was always intended to be used to pay off unrelated debts. (*See*, *supra*). DeCaster failed to disclose to Plaintiffs that their investment would be used to pay the debts of other entities.[51] DeCaster represented to Plaintiffs that if they purchased membership units in Veripure, they would make ten times their money.[52] DeCaster made this representation knowing it was false because he knew that Veripure had routinely lost money and that the money invested was going to be used to pay off unrelated debts.

The Veripure membership units are and have been worthless.[53] Each of the Plaintiffs lost their retirement savings in order to purchase units of a worthless entity all the while the Defendants knew that the money would be used to satisfy the debts of other individuals and entities.

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[51] *Id*. (Plaintiffs' January 2016 Affs., ¶ 5).
[52] R. 79-83 (Affidavit of Scott J. Brauer dated March 22, 2016, ¶ 3; Affidavit of Paul Weyers dated March 22, 2016, ¶ 6; Affidavit of Matt J. Vandehey dated March 23, 2016, ¶ 3; Affidavit of Duane A. McVane dated March 29, 2016, ¶ 3; Affidavit of Adam Kilgas dated March 24, 2016, ¶ 5).
[53] R. 37, p. 2 (Ferris Aff., Ex. C. (RC00041-42)).

Plaintiffs initiated this action by filing their complaint on November 21, 2014. (R. 1, pp. 1-9; App. pp. 10-18). Plaintiffs asserted the following claims: (1) violation of Wis. Stat. § 551.501 (against Veripure and DeCaster); (2) violation of Wis. Stat. § 946.83 (against Veripure, DeCaster, and BSMW); (3) intentional misrepresentation (against Veripure and DeCaster); and (4) conversion (against BSMW). (*Id*.). After the parties had engaged in initial discovery, Plaintiffs filed an amended complaint on August 20, 2015 which joined as defendants the Trust, GADJAD, Chernick, Badger Capital, and Conard. (R. 14, pp. 1-18; App. pp. 22-39). The amended complaint also added claims for (1) negligent misrepresentation; (2) false advertising; and (3) unjust enrichment. (*Id*.).

On January 15, 2016, Plaintiffs filed a motion for partial summary judgment on their causes of action for (1) violation of Wis. Stat. § 551.501; and (2) violation of Wis. Stat. § 946.83. (R. 39, pp. 1-2; App. pp. 40-41). In support of their motion, Plaintiffs argued, among other things, that the defendants violated Wisconsin securities law by failing to disclose information that must be disclosed under related federal law. (R. 40, pp. 1-16; App. pp. 42-57).

On January 18, 2016, all defendants filed a joint motion for partial summary judgment seeking the dismissal of Plaintiffs' claims for (1) violation of Wis. Stat. § 551.501; (2) violation of Wis. Stat. § 946.83; (3) false advertising; and (4) conversion. (R. 48, pp. 1-3; App. pp. 113-115). With respect to the claim for violation of Wis. Stat. § 551.501, all defendants argued that Plaintiffs' claim was barred by the two-year statute of limitations and that the Plaintiffs should have known or were in possession of enough facts to investigate whether a fraud claim existed with their receipt of certain K-1s for Veripure. (R. 46, pp. 1-16; App. 116-131).

On March 22, 2016, Chernick and Badger Capital separately moved for summary judgment. (R. 61, pp. 1-2; App. pp. 132-133). Chernick and Badger Capital moved to dismiss Plaintiffs claims for intentional misrepresentation and negligent misrepresentation. (R. 62, pp. 1-11; App. pp. 134-144). On April 14, 2016, all defendants filed a second joint motion for summary judgment. (R. 67, pp. 1-3; App. pp. 145-147). This motion sought the dismissal of Plaintiffs intentional misrepresentation, negligent misrepresentation, and unjust enrichment claims. (R. 70, pp. 1-19; App. pp. 148-166).

In response to all defendants' joint motion for partial summary judgment as it related to Plaintiffs' securities fraud claim under Wis. Stat. § 551.501, Plaintiffs argued among other things that (1) the five-year statute of limitations applied and (2) the earliest they *could* have been on notice to investigate a claim was in 2013. (R. 76, pp. 1-13; App. pp. 188-200). More specifically, Plaintiffs stated:

> Accordingly, the earliest date Plaintiffs' [sic] *could* have suspected a problem was in after [sic] 2013 when they received IRS Form 5498 showing an 80% drop in the fair market value of their investment. Since the Plaintiffs filed their complaint on November 21, 2014, Plaintiffs' [sic] filed their complaint well before the expiration of the two year discovery period.

(R. 76, p. 6; App. p. 193) (emphasis added).[54]

On December 5, 2016, the circuit court held a hearing on the various motions for summary judgment. (R. 109, pp. 1-3; R. 182, pp. 1-95). On April 4, 2017, the circuit court entered its Decision and Order on the various motions for summary judgment. (R. 119, pp. 1-19; App. pp. 313-331). Among other things, the circuit court granted all defendants' joint motion for partial summary judgment with respect to Plaintiffs' securities fraud claim

[54] IRS Forms 5498 for Plaintiffs can be found at R. 75, pp. 3-16; App. pp. 203-216.

under Wis. Stat. § 551.501. (*Id.*). With respect to Defendants, the circuit court noted:

> Plaintiffs' statement about the IRS Form 5498 is particularly relevant to some of the Defendants, as Plaintiffs have admitted that they should have known by May 31, 2013, the latest date on which they could have received the Form (*id.*), and Plaintiffs did not file their Amended Complaint, in which they added Defendants Chernick, Conard, Badger Capital, GADJAD Properties, and the Trust, until August 20, 2015. August 20, 2015 is more than two years after the latest date at which Plaintiffs admit they could have discovered the alleged fraud, which was in May 2013. Plaintiffs have suggested that the statute of limitations should have been tolled by the filing of the original complaint, but have provided no support for such a proposition. Accordingly, summary judgment is appropriate in favor of those five Defendants.

(R. 119, p. 7; App. p. 319). With respect to the remaining defendants as it pertains to the securities fraud claim, the circuit court found:

> Defendants here claim that Plaintiffs should have been put on notice in early 2011, when all of the Plaintiffs expect Kilgas, who did not invest until 2011, received a Schedule K-1 with respect to their ownership in Veripure in 2010, which reflected that the value of each of their respective shares had decreased after their investment…The Schedule K-1 for 2011, sent to all Plaintiffs in early 2012, also indicated a value decrease. Defendants contend this is when Plaintiffs should have begun investigating for potential fraud. Plaintiffs contend that those Schedule K-1 forms indicate minimal losses for each Plaintiff, and that they expected minimal losses initially because they expected their funds to be spent on product development…Plaintiffs distinguish this situation from the 90% depreciation at issue in *Tregenza*.

> The Court agrees with Defendants. Plaintiffs do not dispute that they received the Schedule K-1 documents in 2011 and 2012, and that those forms showed losses and depreciation. It is true that the depreciation reflected in those forms is not as severe as the 90% drop in *Tregenza*, but the Court is not persuaded that the amount of the decreased value is relevant to the question of inquiry notice…

(R. 119, p. 8-9; App. p. 320-321) (citations omitted). The circuit court also dismissed Plaintiffs' RICO claim under Wis. Stat. § 946.83 and conspiracy allegations with respect to the tort claims for failure to sufficiently plead such claims. (R. 119, 9-12; App. pp. 321-324).

On April 24, 2017, Plaintiffs filed a motion for reconsideration and to permit the pleadings to be amended to conform to the evidence. (R. 123, pp. 1-2; App. p. 332-333). Among other things, Plaintiffs argued that the Schedule K-1s relied upon by the circuit court when determining when inquiry notice was triggered could not support such a finding, and because the record was replete with evidence properly supporting their RICO and civil conspiracy claims, the circuit court should allow the pleadings to be amended to conform to the evidence. (R. 125, pp. 1-13; App. pp. 334-346). The circuit court granted, in part, the motion for reconsideration as it pertained to the securities fraud claims against Veripure, DeCaster, and BSMW, but otherwise denied the motion. (R. 172, pp. 1-10). A Final Order

was entered on March 2, 2018 dismissing all claims against Defendants. (R. 175, pp. 1-2; App. pp. 388-389). A timely notice of appeal was filed on April 12, 2018. (R. 176, pp. 1-3).

ARGUMENT

I. Standard of Review.

The Court of Appeals reviews the grant or denial of summary judgment *de novo*, and applies the same summary judgment standard as the trial court. *Mach v. Allison*, 2003 WI App 11, ¶ 14, 259 Wis. 2d 686, 656 N.W.2d 766. Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). Reasonable inferences must be drawn in the light most favorable to the non-moving party. *Pum v. Wisconsin Physicians Service Ins. Corp.*, 2007 WI App 10, ¶ 6, 298 Wis.2d 497, 727 N.W.2d 346 (citing *Grams v. Boss*, 97 Wis.2d 332, 339, 294 N.W.2d 473 (1980)). As the Wisconsin Supreme Court stated:

> Summary judgment is a drastic remedy. The statute rests discretionary power in the trial court. Summary judgment should not be granted if the trial court has doubt whether all material facts are presented; where facts are in dispute; where reasonable inferences can be drawn from undisputed facts that could lead to opposite or alternative results.

American Orthodontics Corp. v. G & H Ins. Agency, Inc., 77 Wis. 337, 341, 253 N.W.2d 82, 84 (1977) (citations omitted).

When addressing motions for leave to amend the pleadings, appellate courts apply an abuse of discretion standard of review. "An appellate court 'will not reverse the trial court's determination on a motion to amend unless there has been a manifest abuse of discretion.'" *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶ 22, 310 Wis. 2d 230, 750 N.W.2d 492 (citing *Leciejewski v. Sedlak*, 116 Wis. 2d 629, 643, 342 N.W.2d 734, 741 (1984)).

II. The circuit court erred in determining that IRS Form 5498 triggered the statute of limitations on Plaintiffs' securities fraud claim as against Defendants.

In its decision to grant the joint motion for summary judgment as to Defendants with respect to Plaintiffs' claim for securities fraud under Wis. Stat. § 551.501, the circuit court determined that the statute of limitations had run "as Plaintiffs have admitted that they should have known by May 31, 2013, the latest date on which they could have received the [IRS] Form [5498]" which was more than two (2) years before filing the amended complaint. (R. 119, p. 7; App. p. 319). The circuit court erred in rendering this decision as it fails to draw reasonable inferences in a light most favorable to Plaintiffs and assumes, contrary to established law, that evidence of a drop in value, in and of itself, constitutes notice such that the statute of limitations is triggered. To demonstrate this error, a discussion of both the discovery

rule as it pertains to triggering the statute of limitations and well-known summary judgment standard are necessary. First, however, an explanation of the circuit court's decision is prudent.

The circuit court determined that a two-year statute of limitations applied to Plaintiffs' claims, noting that under Wis. Stat. § 551.509(10)(b), "an action under section 551.501 must be 'instituted within the earlier of 2 years after discovery of the facts constituting the violation or 5 years after the violation.'" (R. 119, p. 6; App. p. 318). The circuit court next construed a statement made in Plaintiffs' opposition brief to be an admission that they should have discovered facts constituting the Wis. Stat. § 551.501 violation by May 31, 2013 through the IRS Form 5498. (*Id*. at p. 7; 319). The Plaintiffs, however, made no such admission. Rather, their opposition brief stated, "[T]he earliest date Plaintiffs' [sic] *could* have suspected a problem was in after [sic] 2013 when they received IRS Form 5498 showing an 80% drop in the fair market value of their investment." (R. 76, p. 6; App. p. 193) (emphasis added). This was not an admission, nor may it serve as such on a motion for summary judgment. It was simply an observation and the circuit court must draw reasonable inference related thereto in favor of Plaintiffs.

More importantly, there are a litany of reasons why share value may decrease that are entirely unrelated to securities fraud.

Wisconsin Statutes Section 551.509(10)(b) states that "a person may not obtain relief...unless the action is instituted within the earlier of 2 years after discovery of the facts constituting the violation or 5 years after the violation." Wis. Stat. § 551.509(10)(b). When interpreting Wisconsin's version of the federal Securities Act, Wisconsin courts may look to federal case law, "since the federal courts are experienced in securities litigation, [appellate courts] view their decisions as persuasive authority." *Gygi v. Gust*, 117 Wis. 2d 464, 467, 344 N.W.2d 214, 216 (Ct. App. 1984) (citing *Wisconsin's Environmental Decade, Inc. v. PSC*, 79 Wis. 2d 161, 174, 225 N.W.2d 917, 925 (1977)).

Under federal case law, a decline in a company's value is not, in and of itself, enough to trigger the statute of limitations. "A steep decline in the price of a stock cannot without more be considered evidence of fraud sufficient to start a statute of limitations running. ("Most losses occur without fraud of any kind."[)]." *LaSalle v. Medco Research, Inc.*, 54 F.3d 443, 446 (7th Cir. 1995) (citing *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1128 (7th Cir. 1993)) (finding that over fifty-percent decline in share

price and FDA recall would not cause a reasonable investor to suspect fraud). Accordingly, the IRS Form 5498 cannot by itself trigger the statute of limitations running on Plaintiffs' securities fraud claim. Though this Court can and should reverse the circuit court's decision based upon a misapplication of the discovery rule and trigger of the statute of limitations, the summary judgment standard further demonstrates that the circuit court erred in granting Defendants' motion based solely upon IRS Form 5498.

In granting Defendants' motion for summary judgment as to Plaintiffs' securities fraud claim, the circuit court relied entirely on the IRS Form 5498 and the note in Plaintiffs' brief that the earliest they *could* have discovered a problem was in 2013. This decision, however, runs afoul of the summary judgment standard. "'A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy.'" *Oddsen v. Henry*, 2016 WI App 30, ¶ 25, 368 Wis. 2d 318, 878 N.W.2d 720 (citing *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980)). With such a stringent requirement, "[T]he [summary judgment] papers are 'carefully scrutinized,' and the nonmoving party is entitled to the benefit of all favorable facts and reasonable inferences drawn in his or her favor." *Id*. at ¶ 26 (citing *Grams*, 97 Wis. 2d at 339, 294

N.W.2d 473). "Should the material presented on the motion be subject to conflicting interpretations or if reasonable people might differ as to its significance, then summary judgment *must* be denied." *Id*. (citing *Grams*, 97 Wis. 2d at 339, 294 N.W.2d 473).

Not only is evidence of a decline in value not sufficient evidence to trigger the statute of limitations under Wis. Stat. § 551.501, there is no additional evidence from which the circuit court could determine that Plaintiffs discovered or should have discovered a violation of Wis. Stat. § 551.501. Defendants, therefore, did not demonstrate a *prima facie* entitlement to summary judgment and the circuit court should have denied the motion. While applying the discovery rule for purposes of the statute of limitations to a tort claim under Wisconsin law, a recent federal court decision describes similar circumstances that should have required the circuit court here to deny the motion for summary judgment. In *American Trust & Savings Bank*, the court stated:

> Wisconsin applies the "discovery rule" to tort actions, including claims subject to § 893.57…Under this rule, "a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the act of injury but also that the injury was probably caused by the defendant's conduct or product."…

> In its opposition brief, plaintiff contends that because defendant Bremser was engaged in a complicated fraudulent accounting scheme, the cause of the Creamery's injury was not readily apparent in 2005 or even 2007. Thus, plaintiff argues, the statute of limitations has not run on the fiduciary breach claim.
>
> In their reply brief, defendants contend that because the Creamery discovery discrepancies in its financial statements in March 2005, the Creamery would have discovered the cause of its injuries in 2005, had it exercised reasonable diligence. Also, defendants contend that plaintiff filed suit against defendants in state court on April 6, 2007, asserting identical claims…The state suit was filed more than two years before this suit. Thus, defendants argue, plaintiff cannot invoke the discovery rule.
>
> Without further factual development of the record, I cannot determine whether the Creamery exercised reasonable diligence in discovering the cause of its injury. Plaintiff contends that defendants' fraud was not obvious, and even defendants argue that several people and economic circumstances caused the Creamery's downfall. Because facts are disputed, whether plaintiff exercised reasonable diligence is a question of fact for the factfinder…

American Trust & Savings Bank v. Philadelphia Indem. Ins. Co., 678 F.Supp.2d 820, 826 (W.D. Wis. 2010) (citations omitted). Like *American Trust and Savings Bank*, before the court would even need to render inferences in Plaintiffs' favor, there was not enough evidence to demonstrate that the statute of limitations for Plaintiffs' securities fraud claim began to run in 2013. Accordingly, the circuit court erred in both the application of

the discovery rule and the summary judgment standard with respect to Plaintiffs' securities fraud claim. The circuit court's decision in this regard must be reversed and the matter remanded to circuit court for trial.

III. With the reversal of the circuit court's decision as to Plaintiffs' securities fraud claim, so to should the Court reverse the circuit court's order denying Plaintiffs' motion to permit the pleadings to be amended to conform to the evidence.

In connection with their motion for reconsideration, the Plaintiffs also moved the circuit court to permit the pleadings to be amended to conform to the evidence. (R. 123, pp. 1-2; App. pp. 332-333). In its Decision and Order, the circuit court dismissed Plaintiffs' claims for violation of Wis. Stat. § 946.83 and civil conspiracy for failing to sufficiently plead those claims. (R. 119, pp. 9-12; App. pp. 321-324). Plaintiffs argued that given the liberal standard applied to motions to amend, and given that the facts supporting the dismissed claims had been previously disclosed by Plaintiffs and submitted to the circuit court in at least their supplemental statement of facts, the circuit court should allow the pleadings to be amended. (R. 125, pp. 9-12; App. pp. 342-345). The circuit court denied the motion. (R. 172, pp. 1-10).

In its decision, the circuit court noted that there is not a presumption in favor of amendment after a motion for summary judgment is granted. (R. 172, p. 8). The circuit court then commented that there had otherwise been

no valid reason set forth for granting the amendment. (*Id*. at pp. 8-9). However, should this Court reverse the circuit court's decision as to the application of the statute of limitations to Plaintiffs' securities fraud claims, the presumption in favor of amendment would be reinstated as Defendants would be back in the case. Accordingly, this Court can and should (1) reverse the circuit court's decision in this regard and instruct the circuit court that the motion to amend shall be granted or (2) remand the matter for further proceedings such that the circuit court will determine anew whether the motion to amend should be granted without the lack of presumption in favor of amendment.

An appellate court can reverse a circuit court's decision denying a motion for leave to amend after summary judgment has been granted when that appellate court reverses the underlying summary judgment decision. *Aon Risk Services, Inc. v. Liebenstein*, 2006 WI App 4, 289 Wis. 2d 127, 710 N.W.2d 175, *abrogated on other grounds*, *Burbank Grease Services, LLC v. Sokolowski*, 294 Wis. 2d 274, 717 N.W.2d 781 (2006). In its discussion of the relevant case law and decision, the *Liebenstein* court stated:

A trial court's decision granting or denying leave to file an amended complaint is vested in that court's reasoned discretion. *Mach*, 2003 WI App 11, ¶ 20, 259 Wis.2d at 703-704, 656 N.W.2d at 774. Although the Rule's command that "leave shall be freely given at any stage of the action when justice so requires" applies before judgment is entered against the party seeking to amend its complaint, it does not apply after entry of the judgment because of the countervailing interests of the need for finality. *Id*., 2003 WI App 11, ¶¶ 23-27, 259 Wis.2d at 704-709, 656 N.W.2d at 774-777 ("[A]fter a motion for summary judgment has been granted, there is no presumption in favor of allowing the amendment.

> The party seeking leave to amend must present a reason for granting the motion that is sufficient, when considered by the trial court in the sound exercise of its discretion, to overcome the value of the finality of judgment. The reasons why the party has not acted sooner, the length of time since the filing of the original complaint, the number and nature of prior amendments, and the nature of the proposed amendment are all relevant considerations, as is the effect on the defendant. However, the absence of specific prejudice to the defendant is not a sufficient reason, in itself, for allowing amendment, because that does not give appropriate weight to the value of the finality of judgment.

Id., 2003 WI App 11, ¶ 27, 259 Wis.2d at 709, 656 N.W.2d at 777. Thus, if we were affirming the trial court's dismissal of Aon's claims against Palmer & Cay, the trial court's denial of leave to amend would be well within its discretion. Here, however, unlike the situation in *Mach*, we are *reversing* the trial court's grant of summary judgment, so the "finality" consideration falls. Thus, the "leave shall be freely given" command comes back into play. Ordinarily, we would remand to the trial court for a renewed analysis of whether leave to amend should be given, *see id.*, 2003 WI App 11, ¶ 29, 259

> Wis.2d at 711, 656 N.W.2d at 778, but there are no material countervailing considerations: Aon's claims against Palmer & Cay will be tried and the proposed amendment is within the scope of the original pleading. Accordingly, remand is not necessary because there is nothing in the Record, other than Palmer & Cay's annoyance, that militates against the "freely given" leave to which Aon is entitled under the Rule. *See Estate of Christopherson*, 2002 WI App 180, ¶ 38, 256 Wis.2d 969, 994, 650 N.W.2d 52, 65 (no need to remand where contrary ruling by trial court would be an erroneous exercise of discretion); *cf. McCleary v. State*, 49 Wis.2d 263, 291, 182 N.W.2d 512, 526 (1971) (supreme court exercised sentencing discretion in lieu of remand).

Aon Risk Services, Inc. v. Liebenstein, 2006 WI App 4, ¶ 39, 289 Wis. 2d 127, 710 N.W.2d 175, *abrogated on other grounds*, *Burbank Grease Services, LLC v. Sokolowski*, 294 Wis. 2d 274, 717 N.W.2d 781 (2006). The same reasoning applies here. As the liberality applied to motions to amend outweighs any annoyance the Defendants may claim, the denial of Plaintiffs' motion to amend should be reversed and the motion granted by this Court.

CONCLUSION

For the reasons discussed herein, Plaintiffs respectfully request that the Court of Appeals reverse the Decision and Order filed on April 4, 2017 to the extent it grants Defendants' Joint Motion for Summary Judgment as to Plaintiffs' securities fraud claims and reverse the Decision and Order filed on January 26, 2018 to the extent it denies Plaintiffs' Motion to Permit the

Pleadings to be Amended to Conform to the Evidence with instructions that the circuit court consider the pleadings so amended (or alternatively, to remand the issue to the circuit court to determine whether amendment is proper without the lack of presumption in favor of amendment).

Respectfully submitted this 3rd day of July, 2018.

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CERTIFICATION IN COMPLIANCE WITH WIS. STAT. § 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6,322 words.

Respectfully submitted this 3rd day of July, 2018.

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CERTIFICATION REGARDING ELECTRONIC BRIEF PURSUANT TO WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Wis. Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Respectfully submitted this 3rd day of July, 2018.

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CERTIFICATION OF DELIVERY

I certify that this brief was deposited in the mail via Federal Express for delivery to the Clerk of the Court of Appeals via overnight delivery on July 3, 2018. I further certify that the brief was correctly addressed.

Respectfully submitted this 3rd day of July, 2018.

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