WISCONSIN COURT OF APPEALS
DISTRICT III

SCOTT J. BRAUER, ADAM KILGAS, DUANE A. MCVANE, MATT J. VANDEHEY AND PAUL WEYERS,

Plaintiffs-Appellants,

Appeal No. 2018AP0000761

v.

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.

Appeal from Circuit Court of Brown County,
The Honorable Thomas J. Walsh, Presiding
Circuit Court Case No. 14-CV-1664

JOINT BRIEF OF DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUES

Issue No. 1: Are Appellants' claims brought pursuant to Wis. Stat. § 551.501 barred by the applicable statute of limitations?

Answered by the Trial Court: Yes.

Issue No. 2: If the Court of Appeals reverses the trial court's dismissal, on statute of limitations grounds, of Appellants' claims brought pursuant to Wis. Stat. § 551.501, must the Court of Appeals reverse the trial court's denial of Appellants' Motion to Permit Pleadings to be Amended to Conform to the Evidence and direct the trial court to re-evaluate that motion pursuant to a different, more-lenient standard of review?

Answered by the Trial Court: Not answered by the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary. The briefs adequately discuss binding precedent. The decision should not be published because it will apply settled law to an undisputed set of facts.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case involves a dispute between two groups of parties over one groups' investment into a start-up company, Veripure, LLC. Appellants are a group of former employees of Badger Sheet Metal Works of Green Bay, Inc., led by Duane A. McVane ("McVane"). Each Appellant decided to join with other investors, including BSMW, David J. Conard, Richard J. Chernick, the Gregory A. DeCaster and Judith A. DeCaster Revocable Trust, and many others, and purchase membership units in Veripure. Each Appellant funded their purchase with retirement savings accumulated while at previous employers, depositing such funds into self-directed individual retirement accounts and making the purchases.

Unfortunately for all investors, Veripure never developed into the thriving business all had hoped for, and each investor's membership interest lost its value. Years later, Appellants reacted by suing eight defendants, including Veripure, BSMW, Conard, Chernick, the Trust, GADJAD Properties, LLC, Badger Capital Investments, LLC, and Gregory A. DeCaster. Their lawsuit included seven kitchen-sink causes of action against Respondents, into

several of which they included vague "conspiracy" allegations.

After over two years of litigation, the Brown County Circuit Court granted summary judgment in favor of the defendants, leaving only intentional misrepresentation claims against Gregory A. DeCaster. On reconsideration, the trial court reinstated the securities fraud claims against DeCaster, Veripure and BSMW, but all other claims remained dismissed. The trial court also refused to allow Appellants to amend their RICO and conspiracy claims, which had been dismissed due to Appellants' failure to adequately state such claims in their pleadings.

Appellants now appeal, but do not appeal the trial court's entire decision. Rather, they appeal entry of summary judgment as to their securities fraud claims against Respondents, arguing that the trial court's decision was improper. Appellants then claim that because the trial court's decision on their securities fraud claims was improper, its refusal to allow Appellants to amend their RICO and conspiracy claims, too, was improper and that Appellants' motion regarding same should be reevaluated in a more generous light.

As explained herein, Appellants' arguments in each regard should be rejected.

II. STATEMENT OF FACTS

A. The Beginning.

Originally known as Longmark Industries, LLC, Respondent Veripure, LLC ("Veripure"), was created in 2004. (R.104:13-40.) Respondents David J. Conard ("Conard"), Richard J. Chernick ("Chernick") and the Gregory A. DeCaster and Judith A. DeCaster Revocable Trust (the "Trust") were initial investors in Veripure. (R.104:28.) Badger Sheet Metal Works of Green Bay, Inc. ("BSMW"), also was an initial Veripure investor. (R.104:28.) The Trust owns 100% of BSMW, and Gregory A. DeCaster is a beneficiary of the Trust. (R.106:1-2.) DeCaster also is the Chief Executive Officer of BSMW. (R.104:110.) Respondent GADJAD Properties, LLC ("GADJAD"), is a real estate holding company owned by the Trust that leases real estate to BSMW and Veripure. (R.106:4.)

B. Appellants Join BSMW.

Prior to December 11, 2007, Appellant Duane McVane ("McVane") was employed by Bassett, Inc. d/b/a Bassett Mechanical ("Bassett"). (R.99:6.) On that date, McVane forwarded his résumé to Conard, BSMW's Chief Financial Officer, stating, "I look forward to meeting with your

company to discuss the opportunities." (R.99:6.) On or around January 2, 2008, BSMW hired McVane to serve as BSMW's Plant Manager. (R.99:6.)

Upon his hire, McVane became intricately involved in high-level BSMW management. For example, on March 5, 2008, McVane e-mailed Conard an agenda and minutes from a BSMW Team Meeting that McVane called and facilitated, which indicate that McVane presented his ideas on the following topics: increase tool allowance; increase vacation time; publish employee handbook; receive gain sharing information more timely; update safety program; and improve sick day policy. (R.99:8.) As another example, on April 10, 2008, McVane organized a meeting at BSMW entitled "Management Issues Meeting," to which he invited DeCaster and Conard. (R.99:8.)

On July 21, 2008, BSMW hired Weyers, Appellant Adam Kilgas ("Kilgas") and Appellant Matthew Vandehey ("Vandehey"). (R.99:8.) Weyers, Kilgas and Vandehey, like McVane, all were employed by Bassett immediately prior to their hirings by BSMW. (R.99:8.)

On July 21, 2008, DeCaster e-mailed McVane, Weyers and Conard, stating: "I have a meeting set up for 3pm Tuesday in conference room to discuss future direction of BSMW and company leadership." (R.99:8.) Two days later, on July

23, 2008, McVane e-mailed Weyers, DeCaster and Conard, stating: "Attached is the agenda and notes from the meeting that was held yesterday." (R.99:8.) The agenda and notes attached to McVane's July 23, 2008, e-mail note that he, Weyers, Kilgas and Vandehey were included in the "Badger leadership team" that "will direct the future of the company" and that Kilgas and Vandehey, amongst others, would "be the top leadership on the floor." (R.99:9.)

On or around October 24, 2008, Weyers organized a lunch meeting between him, McVane and Appellant Scott Brauer ("Brauer"). (R.99:9.) On or around January 9, 2009, McVane organized another meeting with Brauer. (R.99:9.) On or around January 15, 2009, McVane organized yet another meeting entitled "Scott Brauer – Interview" and invited DeCaster. (R.99:10.)

C. McVane Becomes Involved with Veripure.

In early 2009, McVane first became involved with Veripure. On or around February 20, 2009, McVane organized a meeting with Oneida Seven Generations Corporation, and in the body of the electronic meeting note, stated, "Veripure – Needs market analysis and budgets. Testing analysis." (R.99:10.) A week later, on or around February 26, 2009, McVane organized a meeting entitled "Matt MaCarty & Buddy Levy", invited Chad Kopke ("Kopke"), a BSMW employee

devoted to Veripure, to the meeting, and in the body of the electronic meeting note, stated, "Chad, I need you over here to present Veripure to the Seminole representatives. Do you have any DVD's or promotional stuff?" (R.99:10.)

In mid-March 2009, McVane organized a meeting entitled "Mike Stone- re; Veripure" and invited Kopke. (R.99:10.) Later that month, he organized a meeting entitled "Veripure Mtg,". (R.99:10.) The attendees of this meeting included McVane, DeCaster and Chernick. (R.99:10.) In the body of the electronic meeting note regarding this meeting, McVane stated:

> We need to get some action.
>
> We need financial costs to date – Dave
> We need the revised cost to manufacture – Dave & Chad
> We need a sell price to HATCO or similar – Decided $825.
> Need to verify electronics and durability – Chad
> We need 50 units ready to sell by May 1, 2009 – Chad
> Rick will contact Daryl Burnett about selling, he will negotiate a salary to get this going. Partners will will need to a small investment to see if this is going to work. If we want Oneida to buy in, we need to have some success to get a good price.
> We need to focus on the current product. No design improvements, other than durability.
> Rick will contact Bellin, Direct Supply, Hatco.

(R.99:10-11, 33.)

On or around March 27, 2009, McVane organized a meeting entitled "Veripure Shareholders." (R.99:11.) On

April 13, 2009, after McVane had been promoted to BSMW's Vice President of Operations, he e-mailed Kilgas a document entitled "Veripure Environmental Benefits." (R.99:11.)

D. 2009 – BSMW Experiences Financial Troubles.

By July 9, 2009, McVane knew that BSMW's financial situation was dire, as, on that date, he sent the following e-mail to State Senator Robert Cowles, stating, "We need some help and we need it now!!!!" (R.99:12, 34.) The next day, July 10, 2009, McVane attended a meeting at Johnson Bank with DeCaster during which Johnson Bank indicated that it was calling its loans to BSMW. (R.99:12.)

On August 3, 2009, McVane e-mailed Conard a document called "Announcement to Badger Team Members and Customers," in which McVane stated, in part: "Badger has spent the last 6 months working with other banks and investors. We are in the process of finalizing the transaction. The agreed upon deadline for this to be complete is September 2009. According to the plans, all of Badger's outstanding bills will be paid in September." (R.99:12-13.)

McVane's involvement continued. On September 8, 2009, Conard forwarded McVane an e-mail and attached documents received from BSMW's attorney regarding a potential sale of BSMW to the Oneida Nation. (R.99:13.) The following day,

Conard forwarded McVane another e-mail and attached documents received from BSMW's attorney regarding a potential sale of BSMW to the Oneida Nation. (R.99:13.)

E. Badger Capital Steps In.

In 2009, DeCaster informed Chernick that BSMW was experiencing significant financial difficulties that, if not resolved, would cause BSMW to cease doing business and, consequently, to lay off its entire work force. (R.108:1; R.105:1.) To avoid such a loss, Chernick approached several acquaintances to determine whether they would be interested in helping save BSMW. (R. 108:1.) After making such inquiries, an initial idea was developed that would involve various individuals, groups and entities contributing $1,650,000.00 to a limited liability company, which would then provide that amount to BSMW in exchange for a 51% ownership interest. (R.99:14-15, 35-40.) Of that amount, $500,000.00 was to come from a group of BSMW employees, as evidenced by McVane's signature dated October 16, 2009, on a Memorandum of Understanding memorializing same. (R.99:14-15, 35-40.)

After that initial idea did not materialize, Chernick, three individuals and one limited liability company agreed to form Respondent Badger Capital Investments, LLC ("Badger Capital"). (R.108:2.) These individuals included the

owners or former owners of several prominent Green Bay-based businesses, including Camera Corner, Inc., Pomp's Tire Service, Inc., Unique Health Care Products, Inc., and Klemm Tank Lines, Inc. (R.108:2.) Each of these members contributed personal funds to Badger Capital, and the collective membership allowed Badger Capital to obtain loans from Baylake Bank. (R.108:2.)

F. Appellants' Investment in Veripure.

In 2009, Veripure hired an individual named Darrell Burnett to serve as its President, who regularly reported to the Veripure membership that he was developing marketing materials, obtaining endorsements, establishing connections and nearing distribution agreements with several potential vendors, including, without limitation, Spraying Systems Co., a worldwide manufacturer and distributor of spray nozzles and related products and technologies, and Midbrook Medical Products, a health care device and equipment company. (See R.104:47-68.) In fact, Burnett informed Kilgas that he was meeting with Midbrook with regard to Veripure and that he was interested in introducing Kilgas to Midbrook representatives. (R.104:65.)

McVane was intricately involved with his and the other Appellants' investments in Veripure. On or around September 10, 2009, McVane organized a meeting entitled

"Investors." (R.99:14.) On September 17, 2009, DeCaster forwarded McVane an e-mail received from Darrel Burnett, President of Veripure, regarding meetings between Veripure and Spraying Systems. (R.99:14.)

At around that time, if not before, McVane began contemplating his Veripure investment. On September 18, 2009, McVane forwarded Conard an e-mail McVane received from Bruce Catterton of Northwestern Mutual Financial Network ("Catterton") that asked questions about stock in Badger Sheet Metal Works, stating: "I will need some help on this next week." (R.99:14.) On September 21, 2009, McVane e-mailed Catterton, stating, in part: "The current stock is privately held. … Could you tell me what my current total is and the penalties that I would need to pay? I am not sure if it is worth it at this time, but I want to be prepared?" (R.99:14.)

On November 27, 2009, Conard, via e-mail, forwarded McVane drafts of the following documents regarding Veripure: Second Restated Operating Agreement of Longmark Industries, LLC; Confidential Private Placement Letter – Longmark Industries, LLC; Subscription Letter; Binding Confidentiality and Non-Disclosure Agreement; and Investor Suitability Questionnaire. (R.99:16, 41; R.47:32-136.)

On or around November 30, 2009, McVane organized a meeting entitled "Veripure Stock Offer Presentation" and forwarded an invite to the meeting to all employees of BSMW that had a BSMW-issued e-mail account. (R.99:16, 42.) In the body of the electronic meeting note for this meeting, McVane stated, "Daryl will be here around 10:30 on Tue 12/1/09 to discuss Veripure's stock offering. All team members will be eligible to invest their 401K, rollover, or other accounts if they are interested. Details will be discussed. I will page when Daryl is ready for the meeting." (R.99:16-17, 42.)

At some point prior to December 11, 2009, McVane was promoted to President of BSMW. (R.99:17.) The next week, on or around December 18, 2009, McVane organized a meeting entitled, "Sue Van Gheem – BSMW Team investment in Longmark." (R.99:17-43.) On February 26, 2010, DeCaster forwarded McVane at least six (6) e-mails regarding the current status of Veripure and its operations, including e-mails that had been sent by Burnett and various members of Veripure. (R.99:18.)

On April 15, 2010, McVane e-mailed DeCaster a document entitled "Questions for midbrook," wherein McVane stated, in part:

Questions/Concerns with Licensing Agreement with Midbrook

1.) Who is taking care of the board, venturis, etc?

a. Does Longmark want to let go of this? This is the main thing that makes the unit work.

2.) Who owns improvements on the patent? Typically those are owned by original patent holder.

3.) Is there a minimum guaranteed amt? Typically you would want to have guarantees of some sales volume in order to allow use of your technology.

4.) Does this give unwanted competition?

5.) Could this be beneficial since Midbrook has different certs than Longmark? This may allow some cross selling.

6.) Does this allow for faster market penetration?

7.) How does this effect buyout opportunity likely to surface over the next few years?

(R.99:18-19.)

On April 15, 2010, Conard e-mailed McVane and DeCaster under the subject "Transferring funds from a tax deferred environment," wherein Conard stated, in part: "I discussed the option of transferring funds to a traditional or Roth IRA with Ryan Freitag at Baylake Bank Wealth Services. IRA whether traditional or Roth are Individual Retirement Accounts. Either type of IRA can be advisor directed or self directed. The question is whether the transfer is a taxable or non-taxable transfer." (R.99:19.)

On April 16, 2010, Conard e-mailed Sue Van Gheem of Pension, Inc., stating:

> This issue was related to an employee, Duane McVane who has a traditional IRA established from a 401k rollover from a previous employer. Duane was asking if he could move those funds into Longmark Industries as an investment into Longmark while maintaining the tax exempt status of the investment. At the same time our bank had suggested if the investment was a self directed IRA that the investment could be made with Longmark Industries. The bank suggested I speak to you as well as Baylake's wealth management division. I spoke with Ryan Reitag at Baylake yesterday and what he told me gave some insight on the definition of an IRA. In short, my understanding is the only way to get money out of an IRA tax free and penalty free before the age of 59-1/2 is to roll it into marketable security (publicly traded stock). Outside of that, if the IRA was a Roth IRA then only the principle can come out before age 59-1/2 without being taxed because the principle went in after tax. I think the result is Duane probably cannot make the investment into Longmark without a tax and penalty consequence.

(R.99:19; R.104:91.) The next week, on April 23, 2010, Conard, via e-mail, sent McVane the contact information for Ryan Freitag of Baylake Bank's wealth management division. (R.99:20.)

On May 6, 2010, Richard Hearden of Baylake Bank e-mailed Conard and asked how much would be invested in Veripure. (R.99:20.) In response, on May 6, 2010, Conard e-mailed Hearden and stated, "Duane McVane getting that information on the investment total and he is currently out of the office on business." (R.99:20.)

On May 6, 2010, Conard sent McVane a chain of four e-mails between Conard and various representatives of Schenck, S.C., pertaining to investments in Veripure via individual retirement accounts. (R.99:20, 44-46.) In a May 7, 2010, response, McVane stated: "I don't see a problem with this unless I am not understanding it right." (R.99:20, 44-46.)

On that same day, Conard sent McVane a chain of nine (9) e-mails between Conard, legal counsel, representatives of Schenck, S.C., and representatives of Baylake Bank pertaining to investments in Veripure via individual retirement accounts, and stated therein: "Greg & Duane these are the final questions I have regarding the IRA." (R.99:20.) He also sent McVane a chain of an additional e-mails between Conard, legal counsel, representatives of Schenck, S.C., and representatives of Baylake Bank pertaining to investments in Veripure via individual retirement accounts, and stated therein: "Here is the response to my questions from Jim Derzon." (R.99:21.)

In April 2010, BSMW experienced a significant cash shortage and was unable to pay its short-term liabilities. (R.106:11.) In order to cover that shortage, Chernick requested a $250,000.00 short-term loan from Baylake Bank. (R.106:11.) Baylake eventually loaned Chernick

$200,000.00, which was payable in 30 days. (R.106:12.) In BSMW management meetings, which included McVane and Brauer, it was discussed that Veripure would use funds received from Appellants' purchase of Veripure membership units to pay down a portion of Veripure's debt to BSMW, which then would be able to pay back Chernick. (R.106:13; R.105:2.)

On May 25, 2010, Larry Brunette of Baylake Bank e-mailed Richard Hearden of Baylake Bank and stated, in part: "We opened an account for Duane McVane which has not been funded and will not be funded until his assets are liquidated. I will call Duane yet this morning to gain clarity around why his broker didn't sell out his holdings. He is planning on investing $100k[.]" (R.99:21; R.104:194.) On May 25, 2010, Chernick forwarded that e-mail to Conard. (R.99:21; R.104:194.)

On or around May 25, 2010, McVane organized a meeting entitled "Veripure Stock Mtg" and sent a meeting invite for same to Kilgas, Brauer and Weyers; in the body of the electronic meeting note, McVane stated: "Scott, please ask Matt to attend also. Duane." (R.99:21, 47.) On May 26, 2010, McVane, Conard and DeCaster met with 5 potential investors in Veripure and explained at that meeting that Veripure had primarily been a "cost center." (R.99:21; R.104:197-198.)

On June 7, 2010, Conard forwarded McVane, Weyers, Brauer and Kilgas a chain of e-mails between Conard, representatives of Schenck, S.C., and representatives of Baylake Bank pertaining to investments in Veripure. (R.99:21.) On June 7, 2010, Weyers forwarded those e-mails to Kurt K. Heling, CPA, of Alberts & Heling CPA's LLC ("Heling"). (R.99:22.)

With regard to Heling, he began providing accounting and investment-related advice to Kilgas, Vandehey and Weyers in the mid-200s, when they approached him with a problem with their union pension funds earned while employed by Basset. (R.106:21; R.104:221-229.) Weyers initially brought the idea of purchasing Veripure membership units to Heling, who then met with Weyers and Conard to discuss same. (R.106:21; R.104:221-229.) During that meeting, Heling noted that Conard had been working with Schenck, S.C., regarding the Veripure investment offering. (R.106:21; R.104:221-229.) Heling's files include copies of the attachments to the Veripure amended private placement letter. (R.106:21; R.104:221-229, 230-370.) In addition to assisting Brauer, Kilgas, Vandehey and Weyers with their purchases of Veripure membership units, Heling also assisted these individuals with other

investment and financial-related services. (R.106:21; R.104:221-229.)

On June 9, 2010, Keith Appleton of Baylake Bank e-mailed Chernick, stating, in part, "I spoke with our Trust area. The holdup has been Dwayne's financial advisor. We have submitted at least three times to get it liquidated and transferred. It appears it is happening shortly." (R.99:22.) Later that day, Conard forwarded McVane this e-mail. (R.99:22.)

On June 15, 2010, McVane e-mailed Chernick, stating:

> I have been in contact with my financial advisor and Dawn Peterson at Baylake Bank. The only info they are able to get is that the transfer is in process at Pershing (where my investments are held). Dawn has told me that she is calling them daily and will let me know when the assets start showing up.
>
> I will keep you posted as I learn more.

(R.99:22; R.104:199.) On June 18, 2010, he e-mailed Catterton, stating:

> I sent you the only request that I had by email. The other requests were by phone. What is going on? I talked with Aaron this morning and he stated that the funds would be liquidated today. The money would be available within 1 week. Is that still ok?

(R.99:22-23.) Regarding same, on June 21, 2010, Conard e-mailed Chernick, stating: "I spoke with Duane this morning and he stated in his account has been liquidated as of last

Friday and the funds should be transferred by Friday this week." (R.99:23.)

On June 22, 2010, McVane e-mailed DeCaster a spreadsheet entitled "Team Investment," which included the following chart:

	Low	High
Paul Weyers	$50,000	$75,000
Adam Kilgas	$50,000	$100,000
Gary Fiala	$50,000	$50,000
Matt Vandehey	$25,000	$50,000
Scott Brauer	$50,000	$50,000
Duane McVane	$105,000	$105,000
Total	$330,000	$430,000

(R.99:23, 48-49.)

On June 23, 2010, McVane e-mailed Chernick, copying DeCaster and Conard, and stated: "I received a call from my investor. The check for $104K+ went out from California today. It may take 3-5 days to get to Baylake Bank." (R.99:24; R.104:200.) Nearly a month later, on July 20, 2010, McVane invested $105,733.11 in Veripure, in exchange for which he received 1.0573311 Veripure membership units. (R.14:8.)

On August 18, 2010, Conard copied McVane on an e-mail to Park Drescher of Baylake Bank's Asset Management and Trust Division, stating, in part: "Has the agreement for Duane McVane been signed by Baylake Bank." (R.99:24.) Also on that date, Conard forwarded McVane an e-mail from

Park Drescher along with an attached letter and a document entitled "McVane Agreement 7 2010." (R.99:24-25.) Later that day, Conard copied McVane on an e-mail to Park Drescher and counsel, stating: "Thanks Park for your quick response: You show below the correct mailing address of P.O. Box 5875, DePere, WI 54115. Mail does not deliver to the street address. I apologize if I was not clear on the address. I agree with you Park that the attorneys should address the spelling of the name issue." (R.99:25.)

On September 3, 2010, McVane e-mailed DeCaster a document entitled "Veripure Assessment," which stated, in part:

> Veripure Assessment 9/3/10
>
> Situation
>
> 1) There is a serious communication breakdown between the Board and the President. Namely Greg DeCaster and Rick Chernick from the Board and Darrel Burnett as the President.
> 2) The company is near breakthrough on manufacturing design changes and is poised for explosive growth.
> 3) Key players absolutely must be on the same page fighting as the same team. That has not been happening for at least the last 6 months.
>
> Game Plan:
>
> 1) Greg and Rick to review the current job description, pay package, and operating agreement.
> a. The original contract was for 12 months and that time has expired. You need to decide if the conditions are the same.

> b. The operating agreement states that the President is also the CEO and has the authority to make all decisions for the company, unless directed otherwise by the Board. These directions need to be in writing.
>
> …
>
> 4) Duane McVane to sit in as a facilitator and note taker. (This is just a recommendation, but I can provide good insight as a peer to Darrel. I also have a vested interest in making sure this is solved. I not only own stock, but the success of Veripure greatly affects the success of Badger. We currently have 3 very strong people at a roadblock and that has to change quickly for the interest of all involved.
>
> …
>
> Week of 9/27/10 – Meeting with Greg, Rick, Darrel, and Duane. Agree to final contract and operating agreement. Shake hands, kiss, hug, or whatever you choose and let's make some money!

(R.99:25-26; R.104:88-89.)

On September 16, 2010, McVane sent Jim Appleton, an indirect member of Badger Capital, an e-mail entitled "veripure stock," stating: "If you are still interested in the Veripure stock, please give me a call." (R.99:26, 50.)

On September 23, 2010, Brauer, Weyers and Vandehey purchased their Veripure membership units, at a cost of $50,000.00, $50,000.00, and $37,500.00, respectively. (R.14:8-9.)

Kilgas made his $40,000.00 investment in Veripure on March 23, 2011. (R.14:9.) He had been in communication

with McVane and financial advisors since at least July 2010, when he first addressed the matter with Brandy Debroux ("Debroux") of Ameriprise Financial Services, Inc. (R.47:137.) He met with Debroux again in December 2010. (R.47:139.) On December 9, 2010, he told Debroux:

> I'm going through with the transfer into Veripure. I know it's risky, but there's been a turn of events in the unit that looks promising. Gary was let go recently and will not be doing the Veripure option (just so you know). Let me know when we can meet today or tomorrow. I'll see if I can dig up the old paperwork from the first time we initiated this. Thanks for the help.

(R.47:139.) On that same date, at Debroux's request, Kilgas requested "the future financial forecast for" Veripure as well as its "updated income statement" to "review again." (R.47:159.) DeCaster sent Kilgas the same documents McVane received in November 2009, including, without limitation, the Veripure draft private placement memorandum. (R:47:165-269.) He forwarded those documents to Debroux on January 17, 2011, who indicated that she'd "still like to see the balance sheet from 2010." (R:47:270-273.)

On February 25, 2011, Kilgas followed up with Debroux, stating:

> I just started selling these units myself and saw that the other investors are the owners of some very large businesses; KI, Halron Oil, Camera

> Corner, Ect.(sic) I'm being told that this is taking off and that they will be selling part of Veripure very shortly. I need to invest, and would like to start asap. Can we meet? I realize there is risk involved, but this is also a very diplomatic move for me in the company.

(R.47:270.)

III. PROCEDURAL HISTORY.

A. The Lawsuit.

Appellants filed suit on November 21, 2014, against Veripure, BSMW and DeCaster, alleging four causes of action: (1) securities fraud in violation of Wis. Stat. § 551.501 (against Veripure and DeCaster); (2) violation of the Wisconsin RICO Law, Wis. Stat. § 946.83 (against Veripure, BSMW and DeCaster); (3) intentional misrepresentation (against Veripure and DeCaster); and (4) conversion (against BSMW). (R.1:4-8, A.App. 13-17.)

On August 20, 2015, Appellants filed an Amended Complaint against Veripure, BSMW and DeCaster as well as Conard, Chernick, the Trust, GADJAD and Badger Capital. Therein, they alleged seven causes of action:

(1) securities fraud in violation of Wis. Stat. § 551.501(against all Respondents) (the "Securities Fraud Claims");

(2) violation of the Wisconsin RICO Law, Wis. Stat. § 946.83 (against all Respondents) (the "RICO Claims");

(3) intentional misrepresentation (against all Respondents) (the "Intentional Misrepresentation Claims");

(4) negligent misrepresentation (against all Respondents) (the "Negligent Misrepresentation Claims");

(5) false advertising (against all Respondents) (the "False Advertising Claims");

(6) conversion (against BSMW, GADJAD, Chernick and Badger Capital) (the "Conversion Claims"); and

(7) unjust enrichment (against BSMW, the Trust, Chernick and Conard) (the "Unjust Enrichment Claims").

(R.14:9-17.) In addition, within the paragraphs asserting the Securities Fraud, RICO, Intentional Misrepresentation, Negligent Misrepresentation and False Advertising Claims, Appellants attempted to plead a civil conspiracy (collectively, the "Conspiracy Claims"), by solely, and identically, stating with regard to each:

> In the course of raising funds for Veripure, the defendants combined, associated, agreed, mutually undertook, concerted and conspired with one another for the purpose of willfully and maliciously injuring the plaintiffs, defrauding and cheating them out of their money, entitling the plaintiffs to damages in an amount to be determined at trial.

(R.14:11, 12, 14, 15-16, 16.)

B. The Trial Court Dismisses Respondents Via Summary Judgment.

By its Decision and Order dated April 4, 2017, the trial court granted Respondents' motions for summary

judgment and dismissed all of Appellants' causes of action that remained against them.[1] (R.119.) With regard to the Securities Fraud Claims, the trial court dismissed same as barred by the applicable statute of limitation, finding that Appellants' claims accrued by no later than May 31, 2013, more than two years before they first asserted the Securities Fraud Claims against Respondents. (R.119:5-7.) The trial court dismissed the RICO Claims because Appellants "[had] not met the pleading requirements for alleging a pattern of racketeering activity[,]" strongly stating that "[o]verall, the Amended Complaint is woefully lacking in the specifics required to successfully state a claim under Wisconsin Statutes section 946.83." (R.119:9-10.) Finally, the trial court dismissed Appellants' Conspiracy Claims, finding them also inadequately pled. (R.119:12.)

C. The Trial Court Denies Appellants' Motion for Reconsideration and to Permit Pleadings to be Amended to Conform to the Evidence.

On January 26, 2018, the trial court denied Appellants' Motion for Reconsideration and to Permit the Pleadings to be Amended to Conform to the Evidence (the "Motion to Amend"), as said motion pertained to

[1] Appellants had previously voluntarily withdrawn/dismissed their Negligent Misrepresentation and False Advertising Claims. (R.110:1-2.)

Respondents. (R.172.) In support of that motion, Appellants first argued that the Court's dismissal of the Securities Fraud Claims on statute of limitations grounds was a "manifest error of fact" because Schedules K-1 cannot create the "inquiry notice" that triggers the statute of limitations. (R.127:5-6.) They next argued that the issue of whether the IRS Forms 5498, which demonstrated an 80% drop in the value of Appellants' investments in Veripure, was enough to trigger "inquiry notice" was one to be decided by the jury, not the trial court, and, as such, the trial court committed a "manifest error of law." (R.127:8-9.) Finally, Appellants argued that they should be allowed to amend their pleadings as to the RICO and Conspiracy Claims because "these issues and the facts in support thereof have been aptly demonstrated in the record" and because of "Wisconsin's policy of favoring amendments of pleadings," rather than of dismissing claims. (R.127:9, 12.)

With regard to Respondents, the trial court denied all of these arguments. The trial court first decided that Appellants, in opposing Respondents' summary judgment motions, "chose to argue that the Schedule K-1 Forms [and the IRS Forms 4598] did not demonstrate enough of a decrease in Veripure's value to justify the triggering of

the statute of limitations[,]" as opposed to arguing that these forms, in and of themselves, could not be used to trigger the statute of limitations, and that "[Appellants'] disappointment with their failure to prevail on that argument is not sufficient to demonstrate a manifest error of fact." (R.172:4-5.) It then decided that it made no manifest errors of law by dismissing the Securities Fraud Claims against Respondents, stating that "owing to [Appellants'] concession that they could have discovered the alleged violation as of May 31, 2013, summary judgment on this claim remain[ed] appropriate with respect to" Respondents. (R.172:7.)

Finally, the trial court denied Appellants' request to amend their pleadings as to the RICO and Conspiracy Claims. After pointing out that the Motion to Amend could not be a motion to amend to conform to the evidence presented at trial, as there had been no trial in this case, the trial court made clear that Appellants were not entitled to a presumption in favor of amendment, as their Motion to Amend was not filed until after summary judgment had been granted against them. (R.127:7-8.) It then formally denied the motion, stating that Appellants had implicitly admitted they had everything they needed to amend their pleadings prior to entry of summary judgment but failed to do so,

with no explanation provided as to why they made such a failure. (R.127:8-9.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED THE SECURITIES FRAUD CLAIMS AS TIME BARRED.

As explained above, via the Securities Fraud Claims, Appellants claim each Respondent violated the Wisconsin securities fraud statute, Wis. Stat. § 551.501(2), in conjunction with Appellants' purchases of Veripure membership units. (R. 14:9-11.) The trial court properly held these claims barred by the applicable statute of limitations.

A. Standard of Review – *De Novo.*

As the trial court dismissed Appellants' Wis. Stat. § 551.501(2) claims at summary judgment, this dismissal is reviewed *de novo* to determine "whether the circuit court properly granted" summary judgment. Kaitlin Woods Condo. Ass'n, Inc. v. North Shore Bank, FSB, 2013 WI App 146, ¶9, 352 Wis. 2d 1, 841 N.W.2d 562. "Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. Id. "'Whether facts fulfill a particular legal standard is a question of law to which [the Court of Appeals] give[s] *de*

novo review.'" Id., quoting Bantz v. Montgomery Estates, Inc., 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991).

Importantly, "[b]ecause the standard of review of an order granting summary judgment is *de novo*, [the Court of Appeals] may affirm on any appropriate ground." Id., citing Hansen v. Texas Roadhouse, Inc., 2013 WI App 2, ¶¶32-33, 345 Wis. 2d 669, 827 N.W.2d 99.

B. Wis. Stat. § 551.509(10), Which Incorporates Inquiry Notice, Is The Applicable Statute of Limitations.

The statute of limitations applicable to the Securities Fraud Claims is Wis. Stat. § 551.509(10). This statute states:

> **(10)** STATUTE OF LIMITATIONS. A person may not obtain relief:
>
> **(a)** Under sub. (2) for violation of s. 551.301, or under sub. (4) or (5), unless the action is instituted within one year after the violation occurred.
>
> **(b)** Under sub. (2), other than for violation of s. 551.301, or under sub. (3) or (6), 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.

Appellants do not allege Respondents violated Wis. Stat. § 551.301 (which governs the registry of securities and related issues). Wis. Stat. § 551.509(10)(b), therefore, governs the Securities Fraud Claims.

The second prong of subsection (10)(b) – "or 5 years after the violation" – is a straightforward statute of repose. Such a limitation period begins, at the very latest, on the date that the subject security is purchased. See McCool v. Strata Oil Co., 972 F.2d 1452, 1461 (7th Cir. 1992) ("[i]n securities fraud cases, the federal rule is that the plaintiff's cause of action accrues 'on the date the sale of the instrument is completed'" (citations omitted)).

The first prong of subsection (10)(b), which is a true statute of limitations, provides that claims must be brought "within … 2 years after discovery of the facts constituting the violation[.]" This discovery rule is referred to as "inquiry notice." The Court of Appeals explained this standard in Gygi v. Guest, 117 Wis. 2d 464, 344 N.W.2d 214 (Ct. App. 1984). In analyzing the predecessor statute to Wis. Stat. § 551.509(10), which contained, for all practical purposes, the same language[2] as subsection (10)(b), the Court of Appeals stated:

> While we found no prior Wisconsin cases interpreting sec. 551.59(5), several federal cases have done so. Since the Wisconsin statute is similar to the federal statute of limitations found in the Securities Act of 1933, *see* 15

[2] In Gygi, the Court of Appeals analyzed Wis. Stat. § 551.59(5), which stated: "[n]o action shall be maintained under this section unless commenced before … the expiration of one year after the discovery of the facts constituting the violation …." 117 Wis. 2d at 465-66.

> U.S.C. § 77m (West 1981), and since the federal courts are experienced in securities litigation, we view their decisions in this area as persuasive authority.
>
> The federal courts have held that the one-year limitation of sec. 551.59(5) starts to run when the defrauded party possesses sufficient knowledge to make a reasonable person aware of the need for diligent investigation. Full knowledge of the scheme or its illegality is not required. We adopt this interpretation of the statute.

117 Wis. 2d at 467-68(citations omitted).

Several federal decisions issued after Gygi further explain the inquiry notice standard applicable to Wis. Stat. § 551.509(10)(b). In Lasalle v. Medco Research, Inc., 54 F.3d 443 (7th Cir. 1995), a case upon which Appellants heavily rely, the district court granted the defendants' motion to dismiss on statute of limitation grounds, holding that, based solely on the allegations in the plaintiffs' complaint, the plaintiffs were on inquiry notice of the defendants' alleged securities fraud via a drop in the subject securities' price and an FDA recall of a new drug being manufactured by the defendants. Id. at 444-45. The Seventh Circuit Court of Appeals reversed, stating, in part, that "[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." Id. at 446.

In making this decision, however, the Seventh Circuit, expressly noted that its decision was based solely on the allegations of the complaint and that "[a] fuller factual inquiry might of course cast the 'critical facts' in a more ominous light." Id. at 447. It also distinguished its decision from other decisions where a steep security price decline was accompanied by other facts, such as "glowing prospects for appreciation," stating that "[i]t is the stark contrast between representation and (known) reality, as in Tregenza, Cooke, and other cases in which a securities suit was held untimely at an early stage in the proceedings … that is missing in this case." Id. at 446, 447.

Such cases include Tregenza v. Great American Communications Co., 12 F.3d 717 (7th Cir. 1993). In that case, the plaintiffs claimed they were told, prior to purchasing securities, that the securities were "greatly undervalued[,]" that the securities' upside dwarfed any potential downside, and that "prominent investors held large blocks" of the securities. Id. at 719-20. After the plaintiffs purchased the securities, the price plummeted and never came back up. Id. at 720.

The district court dismissed the plaintiffs' claims at summary judgment, finding them time barred, and the Seventh

Circuit affirmed. In applying the same inquiry notice standard adopted by the Wisconsin Court of Appeals in Gygi, supra, the Seventh Circuit stated:

> However all this may be, the plaintiffs were put on inquiry notice much earlier, and indeed not later than October 1990, almost two years before they sued. By that time a stock which they had been told a year earlier was greatly undervalued and would soon be worth twice as much and at worst would not fall by more than 10 percent had lost almost 90 percent of its value. This did not *prove* fraud. Lehman might have believed reasonably and in good faith, though erroneously, that the stock was undervalued, and probably no reasonable investor would have taken Lehman's representations as an actual *warranty* that the stock would not decline in value by more than 10 percent and would soon double in value. No reasonable investor would think that a stock's value can move in only one direction. But such an investor would have become suspicious and investigated when Lehman's emphatic and precise prediction was so swiftly and dramatically falsified.

Id. at 720 (emphasis in original).

The Seventh Circuit decided similarly in Whirlpool Financial Corp. v. GN Holdings, Inc., 67 F.3d 605, 610 (7th Cir. 1995), wherein the court stated that "the dramatic discrepancies between the very precise projections made by the defendants and the actual results, which Whirlpool learned through financial statements, were sufficient to give notice to Whirlpool and spur them to investigate – inquiry notice which started the limitations clock." Put differently, when the plaintiff received financial

statements that were notably different than the projections it had been provided by the defendant, inquiry notice had been triggered. See id.

C. Regardless of the Application of the Inquiry Notice Standard, McVane's Securities Fraud Claim is Time Barred.

As confirmed by the Amended Complaint, McVane purchased his Veripure membership interest on July 20, 2010. (R.14:8; A.App. 29.) Per McCool, supra, as well as common sense, which dictates that alleged fraud to induce the purchase of a security clearly must occur before or at the purchase of said security, the securities fraud McVane alleges had to have occurred before or on that date.

Pursuant to the five-year statute of repose set forth in Wis. Stat. § 551.509(10)(b), McVane then had until July 20, 2015, at the very latest, to file his Securities Fraud Claim against Respondents. He failed to do so – he filed his claim on August 20, 2015. (See R.14.) McVane's Securities Fraud Claim, therefore, is time barred pursuant to Wis. Stat. § 551.509(10)(b), regardless of inquiry notice.

D. The Trial Court Appropriately Dismissed Appellants' Securities Fraud Claim Under the Inquiry Notice Standard.

In granting Respondents' summary judgment motion on the Securities Fraud Claims, the trial court found that the

undisputed facts of this case, coupled with Appellants' own admissions, made clear that Appellants were on inquiry notice, thus starting the statute of limitations, by no later than May 31, 2013:

> Plaintiffs' argument with respect to using the five-year statute instead of the two-year statute of limitations appears to be that Defendants have not adequately demonstrated when the two-year clock would have started, so the five-year statute should apply. This argument is refuted by Plaintiffs' own submission, in which they provide a lengthy analysis of whether certain indicators would have triggered a reasonable investor to suspect fraud, as discussed *infra*. For example, Plaintiffs state that "the earliest date Plaintiffs could have suspected a problem was in after [*sic*] 2013" when they received IRS Form 5498 from Veripure indicating an 80% drop in the fair market value of their investment. (Pls.' Br. Opp. Defs.' Joint Mot. Partial Summ. J. 6.) Accordingly, Plaintiffs' argument that the five-year statute of limitations should apply is not convincing.
>
> 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.119:6-7.)

On appeal, Appellants claim the trial court erred in issuing this decision, for two reasons: (1) it improperly failed to draw reasonable inferences in their favor; and (2) it wrongly assumed "that evidence of a drop in value, in and of itself, constitutes notice such that the statute of limitations is triggered." (Appellants' Br., p. 21.) On both fronts, Appellants are wrong.

First, to support its summary judgment decision, the trial court made no inferences. Rather, it simply took Appellants' own words as true. To recap, in support of their summary judgment motion, Respondents asserted that inquiry notice was triggered when each Appellant received Schedules K-1 from Veripure indicating a decrease in the value of their respective membership units and an allocation of ordinary business loss to each. (R.46:3-4; R.47:5-31.)

In opposing Respondents' motion, Appellants decided to bring 2013 into the picture. They provided the trial court with 2013 IRS Forms 5498 they received from Veripure indicating that, for 2012, the value of their respective Veripure investments dropped by over 80%. (R.76:5-6; R.75:1-16.) In conjunction with providing these materials, Appellants admitted:

> IRS regulations state that Form 5498 must be sent to contributors no later than May 31st of the next year … **Accordingly, the earliest date Plaintiffs' 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.76:6 (emphasis added).)

These words of Appellants perfectly embody the inquiry notice standard set by Gygi – the statute "starts to run when the defrauded party possesses sufficient knowledge to make a reasonable person aware of the need for diligent investigation." 117 Wis. 2d at 467. As such, the trial court accepted these words as true and dismissed Appellants' Securities Fraud Claims against Respondents. (R.119:6-7.)

Clearly realizing the error of their ways, Appellants claim on appeal that their own statement "was not an admission" but, rather, "was simply an observation." (Appellants' Br., p. 22.) As such, per Appellants, the trial court improperly construed their own statement against them. (Id.) This, obviously, is not the case, particularly in light of the fact that Appellants made this statement when arguing that inquiry notice had not been triggered in 2011 or 2012. (R.76:5-6; R.75:1-16.) The trial court was well within its authority to accept Appellants' own words as true, and Appellants provide no

precedent dictating that a trial court is obligated to construe words against the very parties making them.

Second, and regardless of their initial argument, Appellants argue that "evidence of a decline in value [is] not sufficient evidence to trigger the statute of limitations under Wis. Stat. § 551.501[.]" (Appellants' Br., p. 25.) In support of this argument, Appellants solely cite Lasalle, supra, and assert it establishes that drops in investment value, like the ones they experienced regarding Veripure, cannot trigger a securities fraud statute of limitations. (Appellants' Br., pp. 23-24.)

In making this argument, though, Appellants conveniently ignore the entirety of Lasalle, specifically the following emphasized language: "[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." 54 F.3d at 446 (emphasis added). The "more" required by Lasalle obviously is present here, based, again, on Appellants' own words.

In alleging their Securities Fraud Claims, Appellants alleged, "DeCaster made the following material representations to induce the Plaintiffs to invest their 401(k) rollover account balances in Veripure: (i) Plaintiffs would make ten times their money, and (ii)

Plaintiffs' 401(k) rollover account balances would go to Defendant Veripure's product development and sales." (R.14:31.) Appellants doubled down on these statements in opposing Respondents' summary judgment motion on the Securities Fraud Claims, as each testified via affidavit as to these alleged statements by DeCaster. (R.79:2; R.80:2; R.81:2; R.83:2; R.84:2.) Yet, Appellants barely reference these stark allegations on appeal, stating once in their "Statement of the Case and Facts" section that "DeCaster represented to [Appellants] that if they purchased membership units in Veripure, they would make ten times their money." (Appellants' Br., p. 13.)

These allegations are important, as they distinguish this case from Lasalle and firmly place it under the umbrella of Tregenza, supra. As explained above, in that case, the Seventh Circuit found that inquiry notice had been triggered when a severe drop in an investment's value contradicted earlier positive statements by the seller, including statements that the subject securities were "greatly undervalued and would soon be worth twice as much and at worst would not fall by more than 10 percent[.]" 12 F.3d at 720. In such circumstances, the Seventh Circuit made clear that "an investor would have become suspicious

and investigated when [the seller's] emphatic and precise prediction was so swiftly and dramatically falsified." Id.

That is ***exactly*** what we have here. Appellants claim that they invested in Veripure because they were told that, if they invested, they would make ten times their money. Ten times their money! An 80% drop in the value of their investment obviously is a far different result than what they claim they were promised. Once they received notice of this decrease, inquiry notice had been triggered, and Appellants needed to investigate. Much like the "ostrich" investors in Tregenza, though, Appellants failed to do so. Due to that failure, their Securities Fraud claims are barred.

Before closing out on this subject, Respondents must address Appellants' final argument as to the dismissal of their Securities Fraud Claims, i.e., that summary judgment was unavailable to Respondents because there was insufficient evidence to satisfy the general tort-action discovery rule set forth in American Trust & Savings Bank v. Philadelphia Indemnity Insurance Co., 678 F.Supp.2d 820 (W.D. Wis. 2010). This argument is a non-starter, as any such general discovery rule is inapplicable to securities fraud claims brought pursuant to Wis. Stat. § 551.501. Rather, Gygi, supra, sets forth the "inquiry notice"

discovery standard applicable to such claims, including the Securities Fraud Claims at issue in this case.

In sum, on top of McVane's Securities Fraud Claim being barred under Wis. Stat. § 551.509(10)(b)'s five-year statute of repose, each Appellant's Securities Fraud Claim is time-barred, as inquiry notice was triggered by no later than May 31, 2013, more than two years before they asserted these claims against Respondents. The trial court properly decided as much at summary judgment, and its dismissal of the Securities Fraud Claims should be affirmed.

II. THE TRIAL COURT'S PROPER DENIAL OF APPELLANTS' MOTION TO AMEND SHOULD BE AFFIRMED.

Appellants assert that, if the Court overturns the dismissal of their Securities Fraud Claims, the standard applicable to their Motion to Amend, which deals with entirely different claims, changes and, as such, the trial court's denial of that motion should be reversed. (See Appellants Br., pp. 27-30.) This assertion is unfounded. First, the trial court properly exercised its discretion in denying the Motion to Amend. Second, the Court should disregard Appellants' argument on appeal, as they never made such an argument to the trial court. Third, even if the Court chooses to consider Appellants' argument, their position is based on a faulty interpretation of case law

that, due to distinct factual discrepancies, is irrelevant to the current matter.

A. The Trial Court Properly Exercised Its Discretion In Denying Appellants' Motion to Amend.

While Appellants labeled their Motion to Amend as a motion to conform to the evidence under Wis. Stat. § 802.09(2), the trial court properly found that statute plainly irrelevant – there had been no trial in this matter – and, instead, analyzed Appellants' request under Wis. Stat. § 802.09(1), the pretrial pleading amendment statute. (R.172:7-9.)

Decisions regarding Wis. Stat. § 802.09(1) motions to amend "lie[] within the trial court's discretion." Mach v. Allison, 2003 WI App 11, ¶20, 259 Wis. 2d 686, 656 N.W.2d 766. Such an exercise of discretion is to be affirmed on appeal "if the court applied the correct legal standard to the facts of record in a reasonable manner." Id. Only if this discretion is manifestly abused should the trial court's decision be overturned. Raasch v. City of Milwaukee, 2008 WI App 54, ¶22, 310 Wis. 2d 230, 750 N.W.2d 492. "A party who alleges an abuse of discretion has the burden of showing an abuse of discretion, and [the Court of Appeals] will not reverse unless abuse is *clearly* shown."

Gooch v. Gooch, 107 Wis. 2d 704, 711, 321 N.W.2d 354 (Ct. App. 1982) (emphasis added).

Conspicuously absent from Appellants' brief is any claim that the trial court abused its discretion in denying the Motion to Amend. (See Appellants' Br.) Had Appellants made such a claim, it would have had no defensible grounds.

In making its decision, the trial court relied on the clear, directly-on-point guidance provided by Mach, supra. The facts of our case are identical to those present in Mach – shortly after losing at summary judgment, the losing party moved to amend the pleading that had just been summarily dismissed. 2003 WI App 11, ¶¶4-6. In overturning the trial court's allowance of the requested post-summary judgment pleading amendment, the Court of Appeals made very clear:

> [W]hen a motion to amend a complaint is filed after a motion for summary judgment has been granted, there is no presumption in favor of allowing the amendment. Rather, 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. at ¶27.

The trial court's denial of Appellants' Motion to Amend directly addresses each of the considerations the Court of Appeals, via Mach, made mandatory:

> Plaintiffs have offered no reason in support of their motion that is sufficient to overcome the value of the finality of judgment. ***Indeed, Plaintiffs have offered no explanation for why they waited until this stage of the proceedings to seek leave to amend their pleadings or why justice would require the Court to permit such amendment.*** Plaintiffs' only support for their motion is that there exists a "litany of evidence" supporting their racketeering and civil conspiracy claims, which evidence was presented in Plaintiffs' briefs related to the summary judgment motions. This assertion actually undermines Plaintiffs' argument that they should be permitted to amend their pleadings. Plaintiffs implicitly admit they were aware of the information they now seek to include in the complaint prior to the entry of the April Order [granting Respondents' summary judgment motion], yet offer no explanation as to why they did not attempt to amend sooner. It is also notable that more than three years have passed since the filing of the initial Complaint. Additionally, asserting that Defendants will not be specifically prejudiced is not a sufficient reason for allowing the amendment. Taking into account the relevant considerations referenced by the Mach court, especially the absence of a reason from Plaintiffs that is sufficient to overcome the weight given to the value of the finality of judgments, the Court cannot grant Plaintiffs' motion to permit the pleadings to be amended.

(R.172:8-9 (emphasis added).)

The trial court's Mach analysis of Appellants' position was spot on, and Appellants provided it no reason to decide otherwise. Nowhere did Appellants even mention Mach, much less acknowledge its governance over the Motion to Amend and explain why they were above the hurdles defined therein. (R.125:9-12; R.148:5-6.) This is despite Respondents bringing Mach to their attention and explaining its controlling nature. (R.127:7-10.)

In making their Motion to Amend, Appellants provided nothing that would have allowed the trial court to grant that motion in light of Mach. Now, they provide nothing demonstrating, or even suggesting, that the trial court abused its discretion when it denied the motion. That is because the trial court did no such thing. Denying the Motion to Amend was a proper exercise of its discretion. Its decision should be affirmed.

B. The Court Should Refuse to Consider Appellants' Argument In Support of Reversing The Trial Court's Denial of The Motion To Amend.

Instead of addressing the substance of the trial court's denial of the Motion to Amend, Appellants request the Court for an end-run around that denial, arguing that, if summary judgment on their Securities Fraud Claims is reversed, they are entitled to amend their complaint as to two entirely separate causes of action. (See Appellants'

Br., pp. 27-30.) The Court should reject this argument, for two reasons. First, as Appellants never advanced this argument before the trial court, it has been forfeited, and the Court should disregard it out of hand. Second, even if the Court considers this argument, it misconstrues case law and ignores the facts of this case, leaving the argument unfounded.

1. Appellants never made this argument before the trial court; therefore, it has been forfeited.

"It is well-established law in Wisconsin that those issues not presented to the trial court will not be considered for the first time at the appellate level." Shadley v. Lloyds of London, 2009 WI App 165, ¶ 25, 322 Wis. 2d 189, 776 N.W.2d 838, citing State v. Gove, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989). "By following [this] rule, [the appeals] court 'gives deference to the factual expertise of the trier of fact, encourages litigation of all issues at one time, [and] simplifies the appellate task." Id., quoting State v. Caban, 210 Wis. 2d 597, 604-05, 563 N.W.2d 501 (1997). "The reason [the Court of Appeals] exclude[s] issues not raised before the trial court is because 'the trial court has had no opportunity to pass upon them.'" Id., quoting Hopper v. City of Madison, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977).

"The party alleging error has the burden of establishing [to the Court of Appeals], by reference to the record, that the error was raised before the trial court." Shadley, 2009 WI App 165, ¶26, quoting Young v. Young, 124 Wis. 2d 306, 316, 369 N.W.2d 178 (Ct. App. 1985). This principle applies equally to legal issues as it does factual. See Hopper, 79 Wis. 2d at 137. For example, in Young, the Court of Appeals confirmed that because the appellant did not mention waiver or laches in her pleadings before the trial court, the Court of Appeals would not consider those legal issues when raised at appeal. 124 Wis. 2d at 316.

Appellants never argued to the trial court that if it granted their motion for reconsideration as to the dismissal of the Securities Fraud Claims, then a liberal pleading amendment standard applied to their separate Conspiracy Claims and RICO Claims. (See R.125; R.148.) As such, per Shadley and the other cases cited above, this argument was not preserved for appeal, is therefore not properly before the Court, and should be summarily rejected.

2. Alternatively, the Court should reject Appellants' argument on substantive grounds.

If the Court chooses to address Appellants' argument, it will see that such argument has no grounds. To recap, Appellants assert that if the Court reverses the trial court's summary judgment decision as to the Securities Fraud Claims, they are entitled to a lowered pleading amendment standard regarding their request to amend their Conspiracy Claims and RICO Claims. (Appellants' Br., pp. 27-30.) They specifically assert that "should this Court reverse the circuit court's decision as to the application of the statute of limitations to [Appellants'] securities fraud claims, the presumption in favor of [pleading] amendment would be reinstated as [Respondents] would be back in the case." (Appellants' Br., p. 28.) Appellants argue Aon Risk Services, Inc. v. Liebenstein, 2006 WI App 4, 289 Wis. 2d 127, 710 N.W.2d 175[3], mandates such a holding by this Court. (Appellants' Br., pp. 28-30.)

Appellants stretch Aon far too thin. In that case, the plaintiffs filed a seven-count amended complaint against the defendants. Aon Risk Servs., 2006 WI App 4, ¶5. The trial court dismissed each of these claims at summary judgment. Id. at ¶1. After summary judgment had been orally granted, the plaintiffs moved for leave to file

[3] Abrogated on other grounds, Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, 294 Wis. 2d 274, 717 N.W.2d 781.

a second amended complaint, telling the court that 'it wanted to fix what it conceded may have been an error in drafting[,]" i.e., a failure to assert one of the dismissed claims against one of the specific defendants. Id. at ¶38. Relying on Mach, supra, the trial court denied that motion. Id. at ¶37.

On appeal, the Court of Appeals reversed the trial court's summary judgment decision, reviving all of the plaintiffs' claims. Id. at ¶39. As that reversal brought back those claims that the plaintiffs had tried to amend via the second amended complaint, the Court of Appeals found Mach no longer applicable and that, rather, the liberal standard for amending pleadings controlled, and ordered the trial court to accept the second amended complaint for filing. Id.

This aspect of Aon is inapplicable to the current matter. Aon arguably would apply if Appellants were seeking permission to amend their pleadings pertaining to the Securities Fraud Claims. They do nothing of the sort, however. Rather, they claim to tie together such a requested reversal with amending their different and distinct Conspiracy and RICO Claims. Aon does not provide the rope Appellants want, however. Nowhere did the Aon court indicate that reversal of summary judgment on one

claim dictates that a party must be allowed to amend their pleadings as to other dismissed claims.

The facts of this case are distinctly different. For Aon to apply in this case, the Court, first, would have had to reverse the trial court's summary judgment decision as to the Conspiracy Claims and the RICO Claims. No such thing can occur here, as Appellants have not appealed the trial court's decision in that regard. Rather, they wish to rescue the Conspiracy Claims and the RICO Claims through a requested reversal of their entirely separate Securities Fraud Claims. Aon provides no such life line. Reversal of summary judgment as to one claim does not deem Mach inapplicable or otherwise provide free reign to amend pleadings as to claims dismissed for entirely different reasons.

It is clear, therefore, that any reversal as to the Securities Fraud claims by this Court does not, and cannot, give Appellants a chance to revive their dismissed RICO and Conspiracy Claims via a pleading amendment. Appellants missed whatever opportunity they had to do so. The trial court's dismissal of those claims should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the trial court.

Dated this 22nd day of August, 2018.

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CERTIFICATION OF LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with monospaced font. The length of this brief is 49 pages.

Dated this 22 day of August, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of the Brief of Defendants-Respondents, which complies with the requirements of § 809.19(12). 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 filed with the court and served on all opposing parties on this date.

Dated this 22 day of August, 2018.

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