

NO. 35291-5-II, consolidated with No. 36361-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ROBERT R. MITCHELL, LISA TALLMAN, MITCHELL FAMILY
LIVING TRUST, GARY GREINDAHL, JOANN GREINDAHL,
OLYMPIC CASCADE TIMBER, INC., a Washington Joint
Venture Partnership, ROBERT R. MITCHELL, INC., a
Washington Corporation; TIMOTHY JACOBSON, HILARY
GRENVILLE,
Appellants,

v.

MICHAEL A. PRICE and JANE DOE PRICE, husband and wife;
THOMAS W. PRICE and JANE DOE PRICE, husband and wife;
JAMES REID and SONJA REID, husband and wife; KEVIN M.
BYRNE and MARY BYRNE, husband and wife; THOMAS H.
OLDFIELD and JANE DOE OLDFIELD, husband and wife; NW,
LLC a Washington Limited Liability Company,
Respondents.

**BRIEF OF APPELLANTS
(FINDINGS APPEAL)**

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INTRODUCTION

The defendants presented to the trial court grossly inadequate findings of fact and conclusions of law for the trial court despite the fact that the defendants knew exactly what the plaintiffs had argued in their opening Brief of Appellants. The conclusion that the assignment was invalid is based on law that has been outdated for almost 30 years. The conclusion on the statute of limitations is premised on the insupportable theory that the statute of limitations changed when a lawyer incorrectly advised the plaintiffs to file their lawsuit before March 2004. The only conclusion regarding the statute of limitations is that it was frivolous not to file before March 2004, even though the dispute revolves around whether the plaintiffs should have filed in June instead of July 2004.

The defendants failed to present any proposed findings of fact for almost a year; then, once the plaintiffs pointed out the need for findings, the defendants presented findings that do not even address the central issues argued in the plaintiffs opening Brief of Appellants. These findings have simply wasted everyone's time. This was not a spite, nuisance, or harassment suit. The court

should reverse the erroneous frivolous judgments against the plaintiffs.

TABLE OF FINDINGS/CONCLUSIONS

Each of the three groups of defendants -- Oldfield, Byrne/Reid, and the Price Brothers -- presented their own findings of fact. Although the three sets of findings are largely identical, there are minor variations and the numbering of the findings in each of the three sets is inconsistent. All three sets of findings were designated and included in the Clerk's Papers for the underlying summary judgment appeals and are found at the following pages: CP 2561, Price Findings and Conclusions; CP 2585, Price Judgment; CP 2595 Byrne/Reid Findings and Conclusions; CP 2602, Byrne/Reid Judgment; CP 2607, Oldfield Findings and Conclusions; CP 2615 Oldfield Judgment. Copies of all three sets of Findings and Conclusions are appended to this brief.

For ease of reference, appellants will refer to the findings by abbreviations as set forth in the following tables;

Findings Of Fact

Oldfield (OFF) CP 2607	Byrne/Reid (BRFF) CP 2595	Price (PFF) CP 2561	Combined (CFF)
1	1	1	1
2	—	2	2/_
3	2	3	3/2
4	3	4	4/3
5	4	5	5/4
6	5	6	6/5
7	6	7	7/6
8	7	8	8/7
9	8	9	9/8
10	9	10	10/9
10 (2 nd)	—	—	10(2)
—	10	11	10/11
11	11	12	11/12
—	12	13	12/13

Conclusions Of Law

Oldfield (OCL)	Byrne/Reid (BRCL)	Price (PCL)	Combined (CCL)
1	1	1	1
2	2	2	2
3	3	3	3
4	—	—	4/_
5	4	4	5/4
6	5	5	6/5

ASSIGNMENTS OF ERROR

1. The trial court erred by applying an incorrect standard of review when it entered its findings of fact and conclusion of law in support of its frivolousness judgments in favor of each of the defendants, especially considering that the underlying case did not go to trial. See CP 2561-66, 2595-600, 2607-13.

2-6. The trial court erred in entering the following Price Findings of Fact: 2(e), (f), 3, 4, 5. CP 2563-64. (Copies of all three sets of Findings of Fact and Conclusions of Law are appended to this brief and the text of those findings is incorporated as if set forth herein.)

7-9. The trial court erred in entering the following Byrne/Reid Findings of Fact: 2, 3, 4. CP 2597.

10-13. The trial court erred in entering the following Oldfield Findings of Fact: 2, 3, 4, 5. CP 2609-10.

14-16. The trial court erred in entering the following Price Conclusions of Law, 3, 4, 5. CP 2566.

17-19. The trial court erred in entering the following Byrne/Reid Conclusions of Law: 3, 4, 5. CP 2600.

20-23. The trial court erred in entering the following Oldfield Conclusions of Law: 3, 4, 5, 6. CP 2612-13.

24. The trial court erred in entering judgment in favor of Price. CP 2585.

25. The trial court erred in entering the judgment in favor of Byrne and Reid. CP 2602.

26. The trial court erred in entering judgment in favor of Oldfield. CP 2615.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a case has been dismissed on summary judgment, must the findings of frivolousness be based on the summary judgment standard, accepting as true all evidence and inferences supporting the non-moving party?

2. Can an action be found frivolous without a finding that it was brought for spite, nuisance, or harassment?

3. Does undisputed evidence support CFF 4/3 imputing any knowledge gained by plaintiff Grendahl at a March 2001 meeting to all other plaintiffs?

4. Does undisputed evidence support CFF 4/3 that in March 2001 "Plaintiffs and their representatives" discussed with

defendants Byrne and Oldfield “the same issues that were the subject of this litigation”?

5. Does the plain language of the Woodell letter contradict CFF 5/4 that the letter was written “on behalf of Plaintiffs” and that the letter “set[] forth substantially all of Plaintiffs’ claims”?

6. Can OFF 2 support a finding of frivolousness where plaintiffs presented evidence that Oldfield is guilty of misrepresentation by omission?

7. Does any evidence support PFF 2 that the plaintiffs knew when they filed this action that the Prices were not involved with the day to day operations of NW LLC or that the plaintiffs knew the Prices had no knowledge of the 1999 Graham Square assignments of deeds of trust?

8. Is it frivolous to file a lawsuit later than the statute of limitations date incorrectly suggested by a lawyer who does not know the facts?

9. Was the action frivolous “as a whole” as claimed in CCL 3?

STATEMENT OF FACTS

This brief adopts the statement of facts, statement of procedure, and reply to counterstatement of facts described in the briefs for the appeal of the summary judgment dismissal. Summary Judgment Brief of Appellant (“SJBA”) 4-21; Summary Judgment Reply Brief of Appellant (“SJ Reply”) 1-8. This appeal has been consolidated with the summary judgment appeal under Cause No. 35291-5-II.

STATEMENT OF PROCEDURE

After plaintiffs argued in their opening brief on the summary judgment appeal that the judgment awarding attorney’s fees was insufficient, SJBA 45-46, the defendants moved to enter findings of fact and conclusions of law (“findings”) on the year-old trial court order. CP 2308, 2323, 2339. Findings of fact and conclusions of law are necessary to support a judgment under RCW 4.84.185. SJBA 44-45; RCW 4.84.185. The plaintiffs objected to the proposed findings, CP 2341, but the trial court entered findings as proposed by the defendants, CP 2561, 2595, 2607, and judgments in defendants’ favor for attorney’s fees. CP 2585, 2602, 2615. Plaintiffs now appeal those findings and ensuing judgments for attorney’s fees.

ARGUMENT

- A. Where a case has been dismissed on summary judgment, the findings of frivolousness must be based on the summary judgment standard, accepting as true all evidence and inferences supporting the non-moving party.**

Despite the fact that there has been no trial and that the plaintiffs have not been able either to present evidence or to cross-examine defendants' witnesses, the trial court resolved all disputed facts in favor of the defendants. The court did not follow its own standard of review in making its findings of fact and conclusions of law in support of an order for attorney's fees and costs under RCW 4.84.185. The findings quote the standard for a frivolous action as an action that "cannot be supported by any rational argument on the law or facts." CP 2612, CCL 2 (quoting *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004)).

It necessarily follows from the standard for a frivolous action that the nonmoving party is entitled to make any argument that can be rationally supported. See *Jeckle*, 120 Wn. App. at 387. Contrary to this clear standard, the trial court found facts that contradict sworn declarations of the plaintiffs. This court should uphold only those findings that cannot be supported by any rational argument based on the facts presented by the plaintiffs.

Where the case has been resolved on summary judgment, the court must continue to give to the non-moving party the benefit of all evidence and all inferences arising from the evidence. Since there has been no trial, the trial court cannot decide to accept one party's version of the facts and reject the other party's factual assertions. Indeed, RCW 4.84.185 requires the trial court to consider all evidence before making findings of frivolousness: "The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause."

Here, the trial judge had before her sworn affidavits from the plaintiffs setting forth facts from which they believed they had reasonable cause to advance their claims. There had never been any evaluation of the credibility of the plaintiffs' evidence because there had never been any trial. It was error to reject the plaintiffs' evidence and accept the defendants' evidence.

B. An action cannot be found frivolous without a finding that it was brought for spite, nuisance, or harassment.

As the plaintiffs opening brief in the summary judgment appeal noted, frivolous judgments "apply to actions which, as a whole, were spite, nuisance or harassment suits." SJBA 46

(quoting **Biggs v. Vail**, 119 Wn.2d 129, 135, 830 P.2d 350 (1992)).

The findings are insufficient in that there is no finding that this suit was brought in spite, nuisance, or harassment of the defendants. To the contrary, the suit was brought to recover millions of dollars lost to the defendants' fraudulent actions.

C. CFF 3/2 is conclusion of law, not a finding of fact, and it is erroneous both because it is based on incorrect facts and because it is based on the Bankruptcy Act of 1898, which was superseded 30 years ago by the Bankruptcy Code of 1978.

CFF 3/2 is really a conclusion of law holding that the assignment of claims by NW Commercial to the plaintiffs was invalid. CP 2609-10, CFF 3/2. This “[i]nvalid [a]ssignment” conclusion is purportedly supported by the findings of facts therein. *Id.* CFF 3/2 errs as to its factual findings and its conclusion.

The trial court erred by finding that “N.W. Commercial Loan Fund had not listed any claims” and that it “had not given notice” to the Bankruptcy Court. CP 2609-10, CFF 3/2. NW Commercial listed potential claims against former members of NW Commercial. CP 288. Although it would have been more precise to list claims as against “former managers” than against “former members,” the listing put the court on notice that claims of this nature may arise.

SJ Reply 24. CFF 3/2 errs by omitting this listing and by missing the notice given to the bankruptcy Court.

The trial court erred further because its conclusion of an invalid assignment relied heavily on ***Stein v. United Artists Corp.***, 691 F.2d 885 (9th Cir. 1982). CP 2434-35. As was argued in plaintiffs' reply brief in the appeal of the summary judgment, ***Stein*** was based on the Bankruptcy Act of 1898, not the Bankruptcy Code adopted in 1978. SJ Reply 11. As a result, ***Stein*** is irrelevant in this case.

In re JZ, LLC, ___ B.R. ___, 2007 Bankr. LEXIS 2293, 10-11 (B.A.P. 9th Cir. 2007), makes clear that ***Stein*** is outdated and that NW Commercial had standing to sue after the confirmation of its plan. NW Commercial had the power to assign its claims to the plaintiffs subject to continuing claims of its creditors from bankruptcy. *Id.*; 11 U.S.C. § 1141. Under the Bankruptcy Code, NW Commercial needed neither to give notice nor to receive permission from the Bankruptcy Court for the property to revest in NW Commercial. SJ Reply 14-15. NW Commercial had the power to make a valid assignment subject to future claims by NW Commercial's creditors. Therefore, even if the findings of facts

were true, the conclusion that the assignment was invalid is erroneous.

Because CFF 3/2 erroneously finds the assignment of claims invalid, CCL 5/4 is also erroneous in concluding that the action was frivolous because the assignments were invalid. CP 2613. OCL 4 (CP 2613) is also erroneous in finding it frivolous to pursue malpractice and contract claims against Oldfield—the claims were validly assigned from NW Commercial to the plaintiffs.

D. CFF 4/3 is contrary to the evidence and unsupported by undisputed evidence.

1. No evidence supports CFF 4/3 that “Plaintiffs and their representatives” met with defendants Byrne and Oldfield in March 2001.

CFF 4/3 asserts that “Plaintiffs also knew that in March of 2001, more than three years before filing suit, Plaintiffs and their representatives had met with Defendants Byrne and Defendant Oldfield to discuss the same issues that were the subject of this litigation.” CP 2610 CFF 4/3. It is simply not true that all plaintiffs met with Byrne in March 2001—only Gary Grendahl did. CP 1144, 1616. Even the defendants do not dispute this fact. Defendants Byrne and Reid state that “[t]he record is that in mid-March 2001, Grendahl and Will Stevens met with Byrne.” CP 2559.

The finding presented by the defendants and accepted by the court is factually incorrect under Byrne and Reid's own account. Moreover, defendants cite no other evidence to prove the plaintiffs' knowledge of claims in March 2001 or to impute any knowledge, if any, that Grendahl gained through his meeting to the other plaintiffs. Nothing in the findings contradicts Grenville's, Mitchell's, Tallman's, and Jacobsen's evidence that they did not learn the factual basis for the instant claims until at least August 2001. CP 1363, 1370, 1536-38, 1699-700.

The trial court made its statute of limitations conclusion of law based on plaintiffs' knowledge gained in March 2001 and on the Yanick memo.¹ CP 2610 CFF 4/3 & 6/5, 2613 CCL 6/5. It is telling that even the defendants did not argue on appeal that the plaintiffs learned the facts supporting their claims in March 2001. S.J. Byrne & Reid Response Brief ("SJBRRB") 34 (arguing that Mitchell learned in June 2001). Nonetheless, aside from the letter and memo, the findings erroneously make conclusions based only on knowledge gained by March 2001. It is undisputed that the

¹ The Woodell letter appeared in the findings, but was not referenced in the conclusions of law. CP 2610 CFF 5/4, 2613 CCL 6/5.

evidence cannot support CFF 4/3 for any plaintiff other than Grendahl and, as we now show, does not even support CFF 4/3 as to Grendahl.

2. The undisputed evidence fails to support the finding that Grendahl discussed the same issues that were the subject of this litigation in his March 2001 meeting with Byrne and Oldfield.

Even Grendahl did not “discuss the same issues that were subject of this litigation” in his March 2001 meeting with Byrne and Oldfield as stated in CFF 4/3. CP 2610 CFF 4/3. To the contrary, Grendahl was told that loans were in first position and were not in default. CP 1616. Grendahl expressly denied Byrne’s assertion that Byrne would investigate the loans:

Nor did [Byrne] ever promise to “investigate” anything as it was my understanding, based upon his representations, that there was nothing to investigate. To the contrary, he repeatedly assured me that everything was fine and that I had nothing to worry about.

CP 1617. Grendahl met with Byrne and Oldfield in March 2001 because he was worried that the financial problems of T&W Leasing² would affect NW, LLC or NW Commercial and because he wished to determine the status of his investment disbursement

² T&W Leasing was a separate company owned by defendants Price. CP 1616.

request. CP 1616-17. In this meeting, Byrne actively concealed the facts of the underlying fraud in response to pointed questions about the status of Grendahl's investment in NW Commercial. *Id.*

Byrne does not argue that he disclosed to Grendahl the facts of his fraud and violation of the private placement memorandum in March. Byrne states only, "In mid-March 2001, I met with Grendahl and Will Stevens, who was an advisor of Grendahl's. Grendahl stated he was worried about the investments in NWCLF [NW Commercial]. I agreed to provide information that I could locate relating to the investments of NWCLF." CP 1144. Aside from the fact that Grendahl denies its veracity, CP 1617, Byrne's statement does not support the trial court's finding that plaintiffs discussed "the same issues that were subject of this litigation." CP 2610 CFF 4/3. This statement is not enough to start the statute of limitations. SJBA 38.

The finding that "Plaintiffs" discussed "the same issues" is simply unfounded. CP 2610 CFF 4/3. Because CFF 4/3 is erroneous, the attorney's fees award on the statute of limitations is not supported by evidence surrounding the March 2001 meeting.

E. The plain language of the Woodell letter contradicts CFF 5/4 that the letter was written “on behalf of Plaintiffs” and that the letter “set[] forth substantially all of Plaintiffs’ claims.”

CFF 5/4 recites, “On July 9, 2001, more than three years before filing suit, attorney Michael H. Woodall [sic], on behalf of Plaintiffs, sent a letter to Defendants setting forth substantially all of Plaintiffs’ claims demanding that insurers be put on notice of claims and damages to Plaintiffs.” CP 2610. This finding is contradicted by the Woodell letter itself. The finding is probably harmless, as it did not actually support any conclusion of law, CP 2612-13, but it demonstrates how cynical the defendants’ findings actually are. It also shows that what are frivolous here are not plaintiffs’ claims, but defendants’ claims of frivolousness.

CFF 5/4 says that Woodell sent the letter “on behalf of Plaintiffs.” CP 2610. To the contrary, Woodell states clearly in the very first sentence, “I represent Gary and JoAnn Grendahl, who are limited members of NW Commercial Loan Fund, LLC.” CP 2380. Clearly, Woodell did not represent all “plaintiffs” as the finding says. He wrote on behalf of the Grendahls only.

This letter states that, “[t]he Grendahls have reasonable grounds for believing the following improper acts and errors or

omissions have occurred, and are occurring” CP 2381. It also notes that the Grendahls “do not have yet all of the pertinent facts” *Id.*

Grendahl explains in his declaration that he did not know the facts at this time. CP 2372-73. Thus, it is inaccurate to say that the letter sets forth “substantially all of Plaintiff’s claims.” Grendahl explains in his declaration that shortly after this letter he was again assured by Byrne that NW Commercial was doing okay and that he would be repaid as its assets were liquidated. CP 2373-74. The Woodell letter was a declaration of reasonable suspicion and the beginning of a diligent search into the underlying facts behind the claims. SJ Reply 38-40.

F. OFF 2 cannot support the conclusion of frivolousness because plaintiffs presented evidence that Oldfield is guilty of misrepresentation by omission.

The convoluted wording of OFF 2 says that when the plaintiffs filed this action, they were unaware of any misrepresentations by Oldfield. CP 2609. If that is correct, then it was error to dismiss misrepresentation claims against Oldfield because the statute of limitations would not have begun to run under the discovery rule.

But if the purpose of OFF 2 is to establish that Oldfield made no misrepresentations and that therefore the claim was frivolous, the finding is error. An omission may be a misrepresentation of the nonexistence of an important fact. ***Colonial Imports, Inc. v. Carlton N.W., Inc.***, 121 Wn.2d 726, 731-34, 853 P.2d 913 (1993); ***Restatement (Second) Of Torts*** §§ 551, 552 (1977). Oldfield admitted that he learned of violations of the Private Placement Memorandum for NW Commercial as early as June, 2001, but he did not tell the plaintiffs. CP 1565-67. At this same time, Byrne was reassuring Grendahl and Mitchell that their investments were safe. SJBA 13-18. The plaintiffs' theory was that Oldfield owed them a duty to disclose these facts at a time when they could have acted to prevent further losses. CP 1595-1609.

It was disputed when plaintiffs learned the truth about the investments and whether Oldfield had breached any duty to the plaintiffs. Probably as a result, the trial court did not rule on the misrepresentation/omission theory in granting summary judgment. RP 68-69. OFF 2 cannot support a conclusion of frivolousness.

- G. The evidence fails to support PFF 2 that the plaintiffs knew when they filed this action that the Prices were not involved with the day to day operations of NW LLC or that the plaintiffs knew the Prices had no knowledge of the 1999 Graham Square assignments of deeds of trust.**

Price's PFF 2 incorporates the strange assertions that at the time the plaintiffs filed this action, plaintiffs knew that Prices were not involved in the day-to-day operations or managerial aspects of NW, LLC, and that plaintiffs knew that Prices had no knowledge of the 1999 Graham Square assignments of deeds of trust. CP 2562-63. The allegations of the complaint and amended complaint, on information and belief, are directly contrary. CP 7, 92-93. Although the Prices eventually denied such knowledge, CP 1263, that does not prove that plaintiffs knew the Prices had no such knowledge, or that this action was frivolous. Further, the trial court did not base summary judgment on this ground. RP 90-91.

- H. It is not frivolous to file a lawsuit later than the statute of limitations date incorrectly suggested by a lawyer who does not know the facts.**

- 1. The Yanick memo did not change the statute of limitations.**

CCL 6/5 seems to change the standard for the statute of limitations. CP 2613, CCL 6/5. It states, "Because Plaintiffs knew in December of 2003 that they were fast approaching a statute of limitations on most of their claims and because Plaintiffs were

clearly advised to file a claim no later than February of 2004, choosing to file such claims after that date was frivolous.” *Id.* This conclusion suggests that the advice contained in the Yanick memo somehow changed Grendahl and Rob Mitchell’s³ legal standing such that it was necessary to follow Yanick’s legal advice and file in February 2001 even if the advice was based on assumptions that were factually wrong.⁴ This is absurd.

The statute of limitations accrues when the plaintiffs knew, or should have known through due diligence, the underlying facts surrounding their claims sufficiently enough to take those claims to trial. SJBA 38 (citing *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163, *rev. denied*, 132 Wn.2d 1008 (1997)). There is no support for the proposition that an incorrect legal opinion changes the statute of limitations if it advises a different date from three years after the accrual date under *Crisman*. The plaintiffs and

³ The Yanick memo was addressed only to Grendahl, Mitchell, and Will Stevens. CP 1231. There is no basis for attributing the information in the memo to other plaintiffs.

⁴ As argued in the appeal of the summary judgment, the Yanick memo is blatant hearsay that is internally inconsistent and explicitly unclear about the timing of events. SJBA 16-18. At best, it creates disputed facts that should be resolved in favor of the nonmoving party on the issue of frivolousness when there was no trial.

defendants dispute the accrual dates for each plaintiff; however, the disputed dates are between June and August 2001. See SJBRRB 34, SJBA 34. Even the defendants do not argue that the claims accrued by March 2001. SJBRRB 34. Even so, the only conclusion of law on the statute of limitations holds that filing the claims later than February 2004 was frivolous.

If the plaintiffs had filed in April 2004, they would have indisputably been well within the statute of limitations while filing later than February 2004. This would not have been frivolous. CCL 6/5 was legally erroneous and must be reversed.

2. There is no factual or legal argument that the statute of limitations had run with respect to Oldfield.

In his reply to plaintiffs' objection to the findings of fact in the trial court, Oldfield states "Plaintiffs assertion that they "did not know" that they had a potential claim against Oldfield is blatantly false. There are two problems with this argument. First, despite claiming that it is "blatantly false," Oldfield cites nothing in the record to prove his claim.

Second, even though Oldfield was already in possession of the plaintiffs' opening brief on the summary judgment appeal, he could not muster an argument disputing that the statute of

limitations does not start running until the plaintiffs knew or should have known about their claims. SJBA 38 (quoting *Crisman v. Crisman*, 85 Wn. App. at 20). *Crisman* is established law—there is no argument that the statute of limitations had not run if NW Commercial did not know and should not have known about their claims against Oldfield. Oldfield has not supported factually or legally that the statute of limitations has run with respect to him.

I. The action was not frivolous as a whole.

CCL 3 concludes that the case was frivolous as a whole. CP 2612, CCL 3. RCW 4.84.185 applies to “actions which, *as a whole*, were spite, nuisance or harassment suits.” *Biggs v. Vail*, 119 Wn.2d at 135; SJBA 46. However, in conjunction with these attorney’s fees awards, there has been no finding of spite, nuisance, or harassment.

On the contrary, the assignment was not invalid and the statute of limitations had not run by March 2004, as the findings suggested. Because the assignment was valid under *In re JZ*, *supra*, the contract claims that were assigned from NW Commercial to the plaintiffs, with corresponding six-year statutes of limitations, should not have been dismissed. The defendants blatantly and fraudulently violated the private placement memorandum, leaving

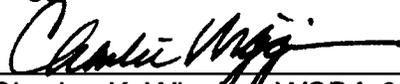
the assigned claims anything but frivolous. Because the defendants' assignment argument was based on the decidedly outdated Bankruptcy Act of 1898 and the claims transferred were meritorious, the action was not frivolous as a whole, and the trial court's conclusion was clearly erroneous. See CP 2612, CCL 3; *supra* B.

CONCLUSION

The findings of fact and conclusions of law are factually erroneous and legally insufficient. This court should reverse the frivolousness judgments.

RESPECTFULLY SUBMITTED this 4 day of September
2007.

Wiggins & Masters, P.L.L.C.



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CERTIFICATE OF SERVICE BY MAIL

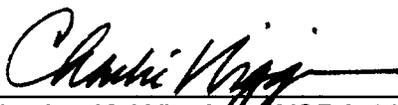
I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANTS (FINDINGS APPEAL)** postage prepaid, via U.S. mail on the 4 day of September 2007, to the following counsel of record at the following addresses:

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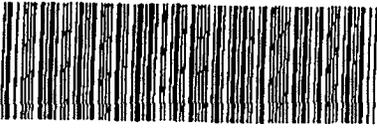
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Honorable Katherine M. Stolz

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT R. MITCHELL, et al.,
Plaintiffs,

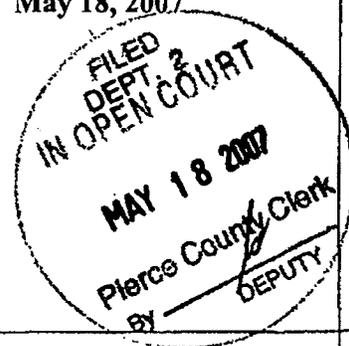
v.
MICHAEL A. PRICE, et al.,
Defendants.

KEVIN AND MARY BYRNE,
Third Party Plaintiffs,
v.
WILL STEVENS, et al.,
Third Party Defendants.

No. 04-2-10247-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENDANTS BYRNE AND REID'S
MOTION FOR ATTORNEY FEES AND
COSTS

Hearing Date: May 18, 2007



THIS MATTER having come on regularly before the court on a motion by Defendants
Byrne and Reid for an Order Awarding Attorney Fees and Costs based upon RCW 4.84.185,
and the court having considered the following:

- 1. Defendant Oldfield's Joinder in Motion of Defendants Byrne and Reid's
Motion for Attorney Fees and Costs;

FINDINGS OF FACT AND CONCLUSIONS OF
LAW RE: DEFENDANTS BYRNE AND REID'S
MOTION FOR ATTORNEY FEES AND COSTS
Page 1

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2. Defendant Byrne and Reid's Motion for Attorney Fees and Costs;
3. Declaration of Douglas V. Alling in Support of Motion for Attorney Fees;
4. Defendants Prices' Memo in Support of Motion for Attorney Fees and Costs;
5. Affidavit of Steven W. Davies in Support of Motion for Attorney's Fees and costs;
6. Declaration of Tom Price in Support of Motion for Attorney's Fees and Costs;
7. Declaration of Steven Davies re: Attorney's Fees and Costs;
8. Declaration of J. Richard Creatura in Support of Defendant Oldfield's Joinder in Motion of Defendants Byrne and Reid's Motion for Attorney Fees and Costs;
9. Plaintiffs' Response to Defendant Oldfield's Motion for Attorney's Fees;
10. Plaintiffs' Response to Defendants Price's Motion for Attorney's Fees;
11. Plaintiffs' Response to Defendants Byrne and Reid's Motion for Attorney Fees;

and the court having considered the Complaint, First Amended Complaint, Second Amended Complaint, and all pleadings in support of and in opposition to the summary judgment motions that were previously granted by the court, having heard oral argument and being otherwise fully advised in the premises, the court makes the following:

FINDINGS OF FACT

1. On July 30, 2004, Plaintiffs filed a Complaint for Breach of Contract, Negligence, Misrepresentation, Fraud, Breach of Fiduciary Duty, Negligence, Professional Malpractice and Violation of the Consumer Protection Act. The claims against Defendants Byrne and Reid in this Complaint included claims of breach of contract, misrepresentation, Consumer Protection Act violations, fraud, fraud in the inducement, breach of fiduciary duty and negligence.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW RE: DEFENDANTS BYRNE AND REID'S
MOTION FOR ATTORNEY FEES AND COSTS

Page 2

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Appendix A

1 2. Invalid Assignment. At the time of filing the lawsuit, Plaintiffs were investors
 2 in NW Commercial Loan Fund, LLC, which was in bankruptcy. Although one of the
 3 Plaintiffs had purportedly assigned NW Commercial Loan Fund's claim to the Plaintiffs, the
 4 assignment of the claim was made after NW Commercial Loan Fund had filed bankruptcy.
 5 NW Commercial Loan Fund had not listed any claims against Defendants Byrne and Reid in
 6 its bankruptcy filings. NW Commercial Loan Fund had not given notice nor received
 7 permission from the bankruptcy court to assign any NW Commercial Loan Fund claims
 8 against Defendants Byrne and Reid to outsiders. The assignment was made to limited
 9 members at the time NW Commercial Loan Fund was insolvent. The assignment to members
 10 constituted a distribution of some of the assets of the company.

11 3. Statute of Limitations. At the time of filing the lawsuit in July of 2004,
 12 Plaintiffs knew that most of their claims (misrepresentation, fraud, fraud in the inducement,
 13 breach of fiduciary duty and negligence) had statute of limitations of three (3) years or less
 14 from the time of discovery. Plaintiffs also knew that in March of 2001, more than three (3)
 15 years before filing suit, Plaintiffs and their representatives had met with Defendants Byrne
 16 and Oldfield to discuss the same issues that were the subject of this litigation.

17 4. Furthermore, on July 9, 2001, more than three (3) years before filing suit,
 18 attorney Michael H. Woodall, on behalf of Plaintiffs, sent a letter to Defendants setting forth
 19 substantially all of Plaintiffs' claims demanding that insurers be put on notice of claims and
 20 damages to Plaintiffs.

21 5. On December 20, 2003, attorney Miles A. Yanick, delivered a memorandum to
 22 Plaintiffs reciting a chronology of facts regarding the litigation and advising Plaintiffs that "to
 23 be safe, any action should be filed no later than February 2004."

1 6. Despite the warnings, Plaintiffs did not file suit until July 30, 2004.

2 7. First Motion for Partial Summary Judgment. On October 31, 2005, this court
3 granted partial summary judgment in favor of all Defendants and dismissed all claims
4 “assigned by NW Commercial Loan fund to the Plaintiffs.”

5 8. Second Motion for Summary Judgment. On May 19, 2006, after additional
6 discovery, this court granted summary judgment in favor of all Defendants and dismissed all
7 of Plaintiffs’ remaining claims with prejudice. During the interim, Defendants Byrne and
8 Reid had conducted discovery and verified that none of the Plaintiffs were aware of any facts
9 in support of their claims against Defendants Byrne and Reid.

10 9. Defendants Byrne and Reid incurred attorney fees and costs in the amount of
11 \$71,614.00. The amounts charged and costs incurred by Defendants Byrne and Reid’s
12 counsel were reasonably necessary in order to defend against Plaintiffs’ claims.

13 10. The Plaintiffs did not object to the reasonableness of Defendants Byrne and
14 Reid’s attorney fees and costs incurred.

15 11. In evaluating the “lodestar” elements of Defendants Byrne and Reid’s claim
16 for attorney fees the court makes the following findings:

17 a. The records presented by Defendants Byrne and Reid’s counsel reflect
18 the reasonable time and labor required to defend against these claims;

19 b. The amounts charged by Defendants Byrne and Reid’s counsel were
20 commensurate with the novelty and difficulty of the questions involved;

21 c. Defendants Byrne and Reid’s counsel had the requisite skill to perform
22 the legal services properly;

- 1 d. Although there was no evidence regarding the preclusion of other
2 employment, the court recognizes that representing Defendants Byrne and Reid
3 prevented counsel from performing other services for other clients;
- 4 e. The amounts charged by Defendants Byrne and Reid's counsel were
5 customary and consistent with fees charged in the community for similar work;
- 6 f. The case was charged on hourly basis at a reasonable hourly rate;
- 7 g. There were no time limitations imposed by the client;
- 8 h. The amount of fees and costs incurred were commensurate with the
9 results obtained;
- 10 i. Defendants Byrne and Reid's counsel had the requisite experience,
11 reputation and ability to represent Defendants Byrne and Reid;
- 12 j. The subject case was not undesirable; and
- 13 k. The award was consistent with awards in similar cases.
- 14 12. On June 23, 2006, the court ordered:

15 ORDERED, ADJUDGED AND DECREED that Defendants' BYRNE and
16 REID'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND
17 COSTS is hereby granted. Said Defendants are granted a judgment against the
18 Plaintiffs and each of them, jointly and severally, in the sum of \$71,614.00 for
19 attorneys fees and costs.

18 CONCLUSIONS OF LAW

- 19 1. A prevailing party is entitled to recover reasonable attorney fees and expenses
20 for defending against a frivolous action under RCW 4.84.185.
- 21 2. A frivolous action is one that "cannot be supported by any rational argument
22 on the law or facts."
- 23

1 3. The court has viewed the Plaintiffs' action against Defendants Byrne and Reid
2 in its entirety and is awarding attorney fees and costs to Defendants Byrne and Reid because
3 the action as a whole was frivolous.

4 4. Choosing to pursue claims based on an invalid assignment by NW Commercial
5 Loan Fund, which was in bankruptcy at the time, was frivolous.

6 5. Because Plaintiffs knew in December of 2003 that they were fast approaching
7 a statute of limitations on most of their claims, and because Plaintiffs were clearly advised to
8 file a claim no later than February of 2004, choosing to file such claims after that date was
9 frivolous.

10 Based on the foregoing Findings of Fact and Conclusions of Law the court hereby
11 orders that Plaintiffs pay Defendants Byrne and Reid \$71,614.00 and a judgment summary
12 shall be entered in that amount.

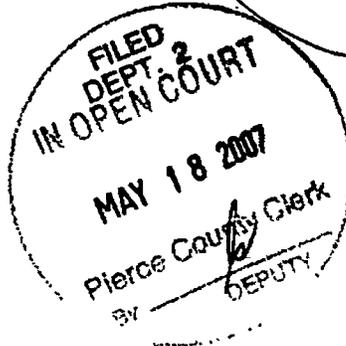
13 DONE IN OPEN COURT this 18th day of May, 2007.

14
15 *Katherine H. Stolz*
HONORABLE KATHERINE STOLZ

16 Presented by:

17 SMITH ALLING LANE, P.S.

18
19 By *[Signature]*
DOUGLAS V. ALLING, WSBA #1896
20 Attorneys for Defendants Byrne and Reid



1 Approved as to form;
2 Notice of presentment waived:

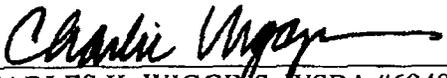
3 COMFORT, DAVIES & SMITH, P.S.

4 By 
5 STEVEN W. DAVIES, WSBA #11566
6 Attorneys for Defendants Price

7 GORDON, THOMAS, HONEYWELL,
8 MALANCA, PETERSON & DAHEIM, LLP

9 By  24251
10 J. RICHARD CREATURA, WSBA #09185
11 Attorneys for Defendants Oldfield

12 WIGGINS & MASTERS

13 By 
14 CHARLES K. WIGGINS, WSBA #6948
15 Attorneys for Plaintiffs

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23
FINDINGS OF FACT AND CONCLUSIONS OF
LAW RE: DEFENDANTS BYRNE AND REID'S
MOTION FOR ATTORNEY FEES AND COSTS

Page 7

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04-2-10247-8 27530434 FNFL 05-21-07

ORIGINAL
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ROBERT R. MITCHELL, LISA TALLMAN, MITCHELL FAMILY LIVING TRUST, GARY GREENDAHL, JOANN GREENDAHL, OLYMPIC CASCADE TIMBER, INC., a Washington Corporation, GM JOINT VENTURE, a Washington Joint Venture Partnership, ROBERT R. MITCHELL, INC., a Washington corporation,

Plaintiff,

vs.

MICHAEL A. PRICE and JANE DOE PRICE, husband and wife; THOMAS W. PRICE and JANE DOE PRICE, husband and wife; JAMES REID and SONJA REID, husband and wife; KEVIN M. BYRNE and MARY BYRNE, husband and wife; ROBERT COLEMAN and JANE DOE COLEMAN; THOMAS H. OLDFIELD and JANE DOE OLDFIELD, husband and wife; NW, LLC, a Washington Limited Liability Company,

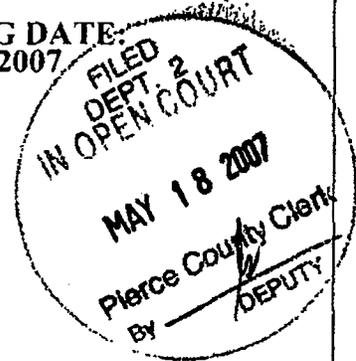
Defendants.

NO. 04 2 10247 8

FINDINGS OF FACTS AND CONCLUSIONS OF LAW RE: DEFENDANTS PRICES' MOTION FOR ATTORNEY'S FEES AND COSTS

ASSIGNED TO THE HONORABLE KATHERINE M. STOLZ

HEARING DATE: MAY 18, 2007



THIS MATTER having come before the court on a motion by defendants Price for an Order Awarding attorney's Fees and Costs based on RCW 4.84.185 and the court having considered the following:

1. Defendant Oldfield's Joinder in Motion of Defendants Byrne and Reid's Motion for Attorney's Fees and Costs;
2. Defendant Byrne and Reid's Motion for Attorney's Fees and Costs;

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1 [swd\04516\findings of fact]

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- 1 3. Declaration of Alling in Support of Motion for Attorney's Fees;
- 2 4. Defendant Price's Memo in Support of Motion for Attorney's Fees and Costs;
- 3 5. Affidavit of Steven W. Davies in Support of Motion for Attorney's Fees and
- 4 Costs;
- 5 6. Declaration of Tom Price in Support of Motion for Attorney's Fees and Costs;
- 6 7. Declaration of Steven Davies re: Attorney's Fees and Costs;
- 7 8. Declaration of J. Richard Creatura in Support of Defendant Oldfield's Joinder
- 8 in Motion of Defendants Bryne and Reid's Motion for Attorney's Fees and
- 9 Costs;
- 9 9. Plaintiff's Response to Defendant Oldfield's Motion for Attorney's Fees;
- 10 10. Plaintiff's Response to Defendant Price's Motion for Attorney's Fees;
- 11 11. Plaintiff's Response to Defendants Bryne's and Reid's Motion for Attorney's
- 12 Fees;

13 and the court having considered the Complaint, First Amended Complaint, and all pleadings
 14 in support of and in opposition to the summary judgment motions that were previously
 15 granted by the court, having heard oral argument and being fully advised in the premises,
 16 the court makes the following:

17 FINDINGS OF FACT

18 1. On July 30, 2004, plaintiffs filed a Complaint for Breach of Contract,
 19 Negligence, Misrepresentation, Fraud, Breach of Fiduciary Duty, Negligence, Professional
 20 Malpractice and Violation of the Consumer Protection Act. The claims against defendants
 21 Price in this complaint included claims of breach of contract, misrepresentation, Consumer
 22 Protection Act violations, fraud, fraud in the inducement, breach of fiduciary duty, and
 23 negligence.

24 2. Breach of Contract/Misrepresentation Claims. At the time of filing the
 25 Complaint and First Amended Complaint, the plaintiffs knew the following facts:

- 26 a. The defendants Price were members only of NW, LLC;

- 1 b. The defendants Price were not managers of any entity and were not
2 members of the NW Commercial Loan Fund;
- 3 c. The defendants Price were not involved with day-to-day operations or
4 managerial aspects of NW, LLC;
- 5 d. The defendants Price had no knowledge of the 1999 Graham Square
6 assignments of deeds of trust;
- 7 e. None of the plaintiffs were aware of any misrepresentation by
8 defendants Price or any facts in support of their claims of breach of
9 contract, misrepresentation, Consumer Protection Act violations, fraud,
10 fraud in the inducement, breach of fiduciary duty, and negligence;
- 11 f. A managing agent for NW Commercial Loan Fund did a full review of
12 all of the records after the dispute arose with NW Commercial Loan
13 Fund and before the lawsuit was filed and had not uncovered any
14 misrepresentation by defendants Price or any facts in support of their
15 claims of breach of contract, misrepresentation, Consumer Protection
16 Act violations, fraud, fraud in the inducement, breach of fiduciary duty,
17 and negligence.

18 3. Invalid Assignment. Additionally, at the time of filing the lawsuit,
19 plaintiffs were investors in NW Commercial Loan Fund, LLC, which was in bankruptcy.
20 Although one of the plaintiffs had purportedly assigned NW Commercial Loan Funds' claim
21 to the plaintiffs, the assignment of the claim was made after NW Commercial Loan Fund
22 had filed bankruptcy. NW Commercial Loan Fund had not listed any claims against
23 defendants Price in its bankruptcy filings. NW Commercial Loan Fund had not given notice
24 nor received permission from the bankruptcy court to assign any NW Commercial Loan
25 Fund claims against defendants Price to insiders.

26 4. Statute of Limitations. At the time of filing the lawsuit in July of 2004,
plaintiffs knew that most of their claims (misrepresentation, Consumer Protection Act
violations, fraud, fraud in the inducement, breach of fiduciary duty, and negligence) had
statute of limitations of three years or less from the time of discovery. Plaintiffs also knew
that in March of 2001, more than three years before filing suit, plaintiffs and their
representatives had met with defendant Byrne and defendant Oldfield to discuss the same

1 issues that were the subject of this litigation.

2 5. Furthermore, on July 9, 2001, more than three years before filing suit, attorney
3 Michael H. Woodall, on behalf of plaintiffs, sent a letter to defendants setting forth
4 substantially all of plaintiffs' claims demanding that insurers be put on notice of claims and
5 damages to plaintiffs.

6 6. On December 20, 2003, attorney Miles A. Yanick, delivered a memorandum
7 to plaintiffs reciting a chronology of facts regarding the litigation and advising plaintiffs "to
8 be safe, any action should be filed no later than February 2004".

9 7. Despite the warnings, plaintiffs did not file suit until July 30, 2004.

10 8. First Motion for Partial Summary Judgment. On October 31, 2005, this court
11 granted partial summary judgment in favor of all defendants and dismissed all claims
12 "assigned by NW Commercial Loan Fund to the Plaintiffs. (**Exhibit "A"**).

13 9. Second Motion for Summary Judgment. On May 19, 2006, after additional
14 discovery, this court granted summary judgment in favor of all defendants and dismissed all
15 of plaintiffs' remaining claims with prejudice. (**Exhibit "B"**). During the interim,
16 defendants Price had conducted discovery and verified that none of the plaintiffs were aware
17 of any facts in support of their claims against defendants price.

18 10. Amount of Attorney's Fees and Costs. Defendants Price incurred attorneys
19 fees and costs in the amount of \$37,912.52 for Tom W. Price and "Jane Doe" Price and in
20 the amount of \$30,472.71 for Michael A. Price. The amounts charged and costs incurred
21 by defendants Prices' counsel were reasonably necessary in order to defend against
22 plaintiffs' claims.

23 11. The plaintiffs did not object to the reasonableness of defendants Prices'
24 attorney's fees and costs incurred.

25 12. In evaluating the "lodestar" elements of defendants Prices' claim for attorney's
26 fees, the court makes the following findings:

- 1 a. The records presented by defendants Prices' counsel reflect the
2 reasonable time and labor required to defend against these claims;
3 b. The amounts charged by Defendants Prices' counsel were
4 commensurate with the novelty and difficulty of the questions
5 involved;
6 c. Defendants Prices' counsel had the requisite skill to perform the legal
7 services properly;
8 d. Although there was no evidence regarding the preclusion of other
9 employment, the court recognizes that representing defendants Price
10 prevented Prices' counsel from performing other services for other
11 clients;
12 e. The amounts charged by defendants Prices' counsel were customary
13 and consistent with fees charged in the community for similar work;
14 f. The case was charged on the hourly basis at a reasonable hourly rate;
15 g. There were no time limitations imposed by the client;
16 h. The amount of fees and costs incurred were commensurate with the
17 results obtained;
18 i. Defendants Prices' counsel had the requisite experience, reputation and
19 ability to represent defendants Price;
20 j. The subject case was not undesirable; and
21 k. The award was consistent with awards in similar cases.

22 13. On June 23, 2006, the court ordered:

23 ORDERED, ADJUDGED and DECREED that the defendants'
24 Price motion for an award of reasonable expenses, including
attorney's fees and costs, is granted.

25 It is further ORDERED, ADJUDGED and DECREED that the
26 defendants Tom W. Price and "Jane Doe" Price are awarded
reasonable attorney's fees in the amount of \$35,066.00, costs in

the amount of \$2,836.81, for a total award of \$37,912.52; the defendant Michael A. Price is awarded reasonable attorney's fees in the amount of \$30,463.00, costs in the amount of \$9.71, for a total award of \$30,472.71. Said defendants are entitled to judgment in the aforementioned sums with interest at the rate of twelve percent (12%) per annum from today's date until paid in full.

(Exhibit "C").

CONCLUSIONS OF LAW

1. A prevailing party is entitled to recover reasonable attorney's fees and expenses for defending against a frivolous action under RCW 4.84.185.

2. A frivolous action is one that "cannot be supported by any rational argument on the law or facts".

3. The court has viewed the plaintiffs' action against defendants Price in its entirety and is awarding attorney's fees and costs to defendants Price because the action, as a whole, was frivolous.

4. Choosing to pursue claims based on an invalid assignment by NW Commercial, which was in bankruptcy at the time, was frivolous.

5. Because plaintiffs knew in December of 2003 that they were fast approaching a statute of limitations on most of their claims and because plaintiffs were clearly advised to file a claim no later than February of 2004, choosing to file such claims after that date was frivolous.

Based on the foregoing Findings of Fact and Conclusions of Law, the court hereby orders that plaintiffs pay \$37,912.52 for Tom W. Price and "Jane Doe" Price and pay \$30,472.71 for Michael A. Price, plus interest at 12% per annum from June 23, 2006, and judgment shall be entered in that amount.

DONE IN OPEN COURT this 18th day of May, 2007

THE HONORABLE KATHERINE STOLZ

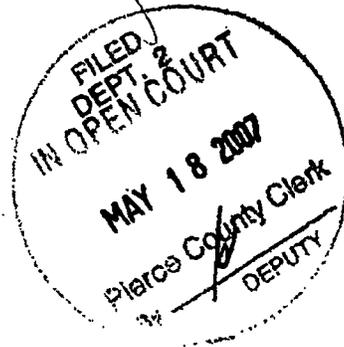
Presented By:

COMFORT, DAVIES & SMITH, P.S.

By:
STEVEN W. DAVIES, WSBA# 11566
Of Attorneys for Defendants Price

Approved as to Form; Notice of Presentment
Waived

SMITH ALLING LANE



By:
Douglas V. Alling, WSBA# 1896
Of Attorneys for Defendants Byrne and Reid

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By:
Stephanie Bloomfield 24251
J. Richard Creatura, WSBA# 09185
Of Attorneys for Defendants Oldfield

WIGGINS & MASTERS

By:
CHARLES K. WIGGINS, WSBA# 6948
Of Attorneys for Plaintiffs

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 7
{swd\04516\findings of fact}

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APPENDIX B

EXHIBIT "A"

FILED OCT 21 P. 1:21

SUPERIOR COURT
PIERCE COUNTY

Honorable Katherine M. Stolz

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT-R. MITCHELL; LISA TALLMAN;
MITCHELL FAMILY LIVING TRUST; GARY
GREINDAHL; JOANN GREINDAHL;
OLYMPIC CASCADE TIMBER, INC., a
Washington corporation; GM Joint Venture, a
Washington joint venture partnership; and
ROBERT M. MITCHELL, INC., a Washington
corporation,

Plaintiffs,

v.

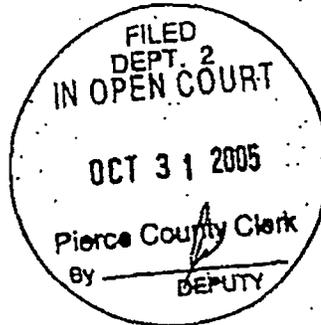
MICHAEL A. PRICE and "JANE DOE" PRICE,
husband and wife; THOMAS W. PRICE and
"JANE DOE" PRICE, husband and wife;
JAMES REID and SONJA REID, husband and
wife; KEVIN BYRNE and MARY BYRNE,
husband and wife; ROBERT COLEMAN and
"JANE DOE" COLEMAN, husband and wife;
THOMAS H. OLDFIELD and "JANE DOE"
OLDFIELD, husband and wife; and NW, LLC, a
Washington limited liability company,

Defendants.

No. 04-2-10247-8

ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT

HEARING DATE: August 26, 2005



ORIGINAL

ORDER GRANTING MOTION FOR PARTIAL
SUMMARY JUDGMENT - Page 1

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Attorneys at Law

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1 THIS MATTER having come before the Court upon Defendants KEVIN BYRNE,
 2 MARY BYRNE, JAMES REID and SONYA REID's Motion for Partial Summary Judgment,
 3 the Court having considered the following:

4 1. Defendants Byrne and Reid's Memorandum in Support of Motion for Partial
 5 Summary Judgment;

6 2. Declaration of Kevin Byrne in Support of Motion for Partial Summary
 7 Judgment;

8 3. Plaintiffs' Joint Response to Defendants' Motions for Partial Summary
 9 Judgment;

10 4. Declaration of Gary Grendahl in Response to Motions for Partial Summary
 11 Judgment;

12 5. Declaration of William Stevens in Response to Motions for Partial Summary
 13 Judgment;

14 6. Declaration of Robert Mitchell in Response to Motions for Partial Summary
 15 Judgment;

16 7. Defendants Byrne and Reid's Reply in Support of Motion for Summary
 17 Judgment;

18 8. Thomas and "Jane Doe" Oldfield's Motion for Partial Summary Judgment;

19 9. Declaration of J. Bradley Buckhalter in Support of Motion for Partial
 20 Summary Judgment with attached exhibits;

21 10. Defendants Oldfield's Reply Memorandum Re: Motion for Partial Summary
 22 Judgment;

23

ORDER GRANTING MOTION FOR PARTIAL
 SUMMARY JUDGMENT - Page 2

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 Alling
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APPENDIX B

1 11. Declaration of Thomas Oldfield in Support of Motion for Partial Summary
2 Judgment; and

3 12. Declaration of J. Richard Creatura in Support of Motion for Partial Summary
4 Judgment;

6 together with the records and pleadings on file herein, and having heard argument of counsel
6 and being otherwise fully advised in the premises, NOW, THEREFORE, it is hereby

7 ORDERED that the motion of Kevin Byrne, Mary Byrne, James Reid and Sonya Reid
8 is granted.

9 IT IS FURTHER ORDERED that all claims against all Defendants assigned by NW
10 Commercial Loan Fund to the Plaintiffs are hereby dismissed.

11 DONE IN OPEN COURT this ^{31st} ^{October} day of September, 2005.

JUDGE KATHERINE M. STOLZ

14 Presented by:

15 SMITH ALLING LANE, P.S.

16 By
17 DOUGLAS V. ALLING, WSBA #81896
Attorneys for Defendants Byrne and Reid

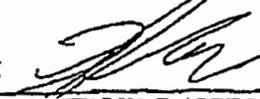
18 Approved as to form;

19 GORDON, THOMAS, HONEYWELL,
20 MALANCA, PETERSON & DAHEIM, LLP

21 By
22 J. RICHARD CREATURA, WSBA #09185
23 J. BRADLEY BUCKHALTER, WSBA #29295
Attorneys for Defendants Oldfield

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COMFORT DAVIES & SMITH

By 

STEVEN W. DAVIES, WSBA #11566
Attorneys for Defendants Price

LARSON HART & SHEPHERD

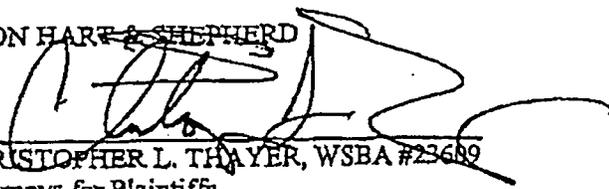
By
CHRISTOPHER L. THAYER, WSBA #23609
Attorneys for Plaintiffs..

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COMFORT DAVIES & SMITH

By
STEVEN W. DAVIES, WSBA #11566
Attorneys for Defendants Price

~~LARSON HART & SHEPHERD~~

By 
CHRISTOPHER L. THAYER, WSBA #23609
Attorneys for Plaintiffs

ORDER GRANTING MOTION FOR PARTIAL
SUMMARY JUDGMENT - Page 4

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Appendix B

EXHIBIT "B"

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Honorable Katherine M. Stolz

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

ROBERT R. MITCHELL, et al.,

Plaintiffs,

v.

MICHAEL A. PRICE, et al.,

Defendants.

KEVIN AND MARY BYRNE,

Third Party Plaintiffs,

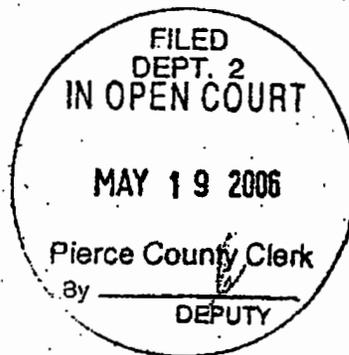
v.

WILL STEVENS, et al.,

Third Party Defendants.

No. 04-2-10247-8

ORDER ON SUMMARY JUDGMENT



THIS MATTER having come before the court upon Defendants Byrne and Reid's Motion for Summary Judgment for Dismissal of Plaintiffs' Claims, the court having before it the records and files herein, having heard argument of counsel, and having considered the following:

1

2

1. Defendant Oldfield's Motion for Summary Judgment;

3

2. Declaration of J. Richard Creatura in Support of Motion for Summary

4

Judgment;

5

3. Declaration of Thomas H. Oldfield in Support of Motion for Summary

6

Judgment;

7

4. Defendants Byrne and Reid's Motion for Summary Judgment for Dismissal of

8

Plaintiffs' Claims;

9

5. Declaration of Kevin Byrne in Support of Motion for Summary Judgment;

10

6. Declaration of Douglas V. Alling in Support of Motion for Summary

11

Judgment;

12

7. Defendants Price's Joinder in Defendants Byrne and Reid's Motion for

13

Summary Judgment for Dismissal of Plaintiffs' Claims;

14

8. Joint Declaration of Price in Support of Joinder in Defendants Byrne and

15

Reid's Motion for Summary Judgment;

16

9. Affidavit of Steven W. Davies Re Joinder in Byrne and Reid's Motion for

17

Summary Judgment;

18

10. Plaintiffs' Joint Response in Opposition to Defendant Oldfield's Motion for

19

Partial Summary Judgment;

20

11. Plaintiffs' Joint Response to Defendants Price's Joinder to Motion for

21

Summary Judgment;

22

12. Plaintiffs' Joint Response to Defendants' Byrne and Reid's Motion for

23

Summary Judgment;

ORDER ON SUMMARY JUDGMENT – Page 2

*Smith
Alling
Lane*A Professional Services Corporation
Attorneys at Law1102 Broadway Plaza, #403
Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
Facsimile: (253) 627-0123

APPENDIX B

1 13. Declaration of Robert Coleman in Response to Motion for Summary
2 Judgment;

3 14. Declaration of Christopher Thayer in Support of Plaintiffs' Opposition to
4 Defendants' Motion for Summary Judgment;

5 15. Declaration of Christopher Thayer in Support of Plaintiffs' Opposition to
6 Defendant Oldfield's Motion for Summary Judgment;

7 16. Declaration of William Stevens;

8 17. Declaration of Lisa Tallman;

9 ~~18. Declaration of Robert Mitchell;~~

10 19. Declaration of Gary Grendahl;

11 20. Declaration of Tim Jacobson;

12 21. Defendants Byrne and Reid's Reply in Support of Motion for Summary
13 Judgment for Dismissal of Plaintiffs' Claims;

14 22. Oldfield's Reply Re: Oldfield's Motion for Summary Judgment;

15 23. Declaration of J. Richard Creatura;

16 24. Defendants' Price Reply in Support of Summary Judgment; and

17 25. Affidavit of Steven W. Davies in Reply in Support of Summary Judgment.

18 NOW, THEREFORE, it is hereby

19 ORDERED, ADJUDGED AND DECREED that Defendants Byrne and Reid's, ~~and Price's~~
20 Motion for Summary Judgment is granted.

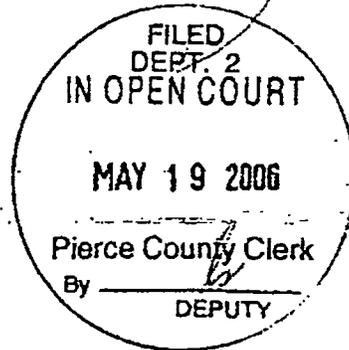
1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims by all
2 *All Defendants*
3 Plaintiffs against Defendants ~~Byrne and Reid~~ are dismissed with prejudice.

4 DONE IN OPEN COURT this 19th day of May, 2006.

5 *[Signature]*
6 JUDGE KATHERINE M. STOLZ

7 Presented by:

8 SMITH ALLING LANE, P.S.



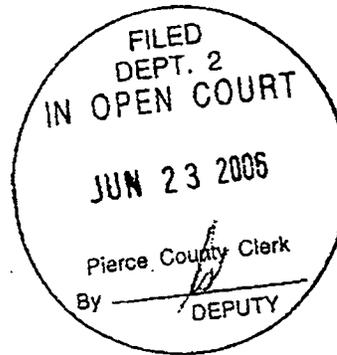
9 By *[Signature]*
10 DOUGLAS V. ALLING, WSBA #1896
11 Attorneys for Defendants Byrne and Reid

12 *[Signature]*
13 BY STEVEN W. DAVIES #11546
14 ATTORNEY FOR PLAINTIFF

15 *[Signature]*
16 #23609
17 Attys for plaintiff
18
19
20
21
22
23

EXHIBIT "C"

ORIGINAL-1
2
4
6



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

7
8 ROBERT R. MITCHELL, LISA
9 TALLMAN, MITCHELL FAMILY
10 LIVING TRUST, GARY GREINDAHL,
11 JOANN GREINDAHL, OLYMPIC
12 CASCADE TIMBER, INC., a Washington
13 Corporation, GM JOINT VENTURE, a
14 Washington Joint Venture Partnership,
15 ROBERT R. MITCHELL, INC., a
16 Washington corporation,

Plaintiff,

vs.

17 MICHAEL A. PRICE and JANE DOE
18 PRICE, husband and wife; THOMAS W.
19 PRICE and JANE DOE PRICE, husband
20 and wife; JAMES REID and SONJA
21 REID, husband and wife; KEVIN M.
22 BYRNE and MARY BYRNE, husband
23 and wife; ROBERT COLEMAN and
24 JANE DOE COLEMAN; THOMAS H.
25 OLDFIELD and JANE DOE OLDFIELD,
26 husband and wife; NW, LLC, a
Washington Limited Liability Company,

Defendants.

NO. 04 2 10247 8

**ORDER AWARDING
DEFENDANTS PRICE
REASONABLE EXPENSES,
INCLUDING ATTORNEY'S
FEES AND COSTS**

This matter having come before the court upon the defendants' Price motion pursuant to RCW 4.84.185 for an award of reasonable expenses, including attorney's fees and costs, the court having before it the records and files herein, having heard argument of counsel, and having considered the following:

- 1. Defendant Oldfield's Motion for Summary Judgment;

ORDER AWARDING DEFENDANTS PRICE
REASONABLE EXPENSES, INCLUDING
ATTORNEY'S FEES AND COSTS - 1

[swd\04516\order.atty's fees]

COMFORT, DAVIES & SMITH, P.S.

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Tacoma, Washington 98466-6225
(253) 565-3400 • Fax (253) 564-5356
E-mail - Attorneys@cdsps.com

APPENDIX B

- 1 2. Declaration of J. Richard Creatura in Support of Motion for Summary Judgment;
- 2
- 3 3. Declaration of Thomas H. Oldfield in Support of Motion for Summary Judgment;
- 4
- 5 4. Defendants Byrne and Reid's Motion for Summary Judgment for Dismissal of Plaintiffs' Claims;
- 6
- 7 5. Declaration of Kevin Byrne in Support of Motion for Summary Judgment;
- 8
- 9 6. Declaration of Douglas V. Alling in Support of Motion for Summary Judgment;
- 10
- 11 7. Defendants Price's Joinder in Defendants Byrne and Reid's Motion for Summary Judgment for Dismissal of Plaintiffs' Claims;
- 12
- 13 8. Joint Declaration of Price in Support of Joinder in Defendants Byrne and Reid's Motion for Summary Judgment;
- 14
- 15 9. Affidavit of Steven W. Davies Re Joinder in Byrne and Reid's Motion for Summary Judgment;
- 16
- 17 10. Plaintiffs' Joint Response in Opposition to Defendant Oldfield's Motion for Partial Summary Judgment;
- 18
- 19 11. Plaintiffs' Joint Response to Defendants Price's Joinder to Motion for Summary Judgment;
- 20
- 21 12. Plaintiffs' Joint Response to Defendants' Byrne and Reid's Motion for Summary Judgment;
- 22
- 23 13. Declaration of Robert Coleman in Response to Motion for Summary Judgment;
- 24
- 25 14. Declaration of Christopher Thayer in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment;
- 26
15. Declaration of William Stevens;
16. Declaration of Lisa Tallman;
17. Declaration of Robert Mitchell;
18. Declaration of Gary Grendahl;
19. Declaration of Tim Jacobson;
20. Defendants Byrne and Reid's Reply in Support of Motion for Summary Judgment for Dismissal of Plaintiffs' Claims;

ORDER AWARDING DEFENDANTS PRICE
REASONABLE EXPENSES, INCLUDING
ATTORNEY'S FEES AND COSTS - 2

[swd\04516\order.atty's fees]

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APPENDIX B

- 1 21. Oldfield's Reply Re: Oldfield's Motion for Summary Judgment;
 2 22. Declaration of J. Richard Creatura;
 3 23. Defendants' Price Reply in Support of Summary Judgment;
 4 24. Affidavit of Steven W. Davies in Reply in Support of Summary Judgment;
 5 25. Defendants' Price Motion for an Award of Reasonable Expenses, Including
 6 Attorney's Fees and Costs;
 7 26. Declaration of Tom Price in Support of Defendants' Price Motion for an
 8 Award of Reasonable Expenses, Including Attorney's Fees and Costs;
 9 27. Declaration of Steven W. Davies Regarding Attorney's Fees and Costs;
 10 28. Affidavit of Steven W. Davies; and
 11 29. Defendants' Price Memorandum in Support of Defendants' Price Motion for
 12 an Award of Reasonable Expenses, Including Attorney's Fees and Costs.
 13 30. *Plaintiff's Response to Defendant*
 14 31. *Oldfield's Motion for Award of Attorney's*
 15 32. *Fees and Costs.*
 16 33.
 17 34.
 18 35.
 19
 20

21 Now, therefore, it is hereby

22 ORDERED, ADJUDGED and DECREED that the defendants' Price motion for an
 23 award of reasonable expenses, including attorney's fees and costs; is granted.

24 It is further ORDERED, ADJUDGED and DECREED that the defendants Tom W.
 25 Price and "Jane Doe" Price are awarded reasonable attorney's fees in the amount of
 26

ORDER AWARDING DEFENDANTS PRICE
 REASONABLE EXPENSES, INCLUDING
 ATTORNEY'S FEES AND COSTS - 3

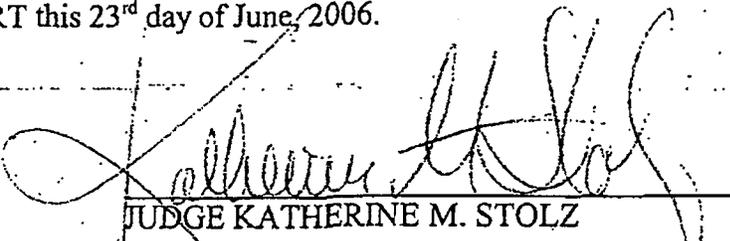
[swd\04516\order.atty's fees]

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APPENDIX B

1 \$35,066.00, costs in the amount of \$2,836.81, for a total award of \$37,912.52; the defendant
2 Michael A. Price is awarded reasonable attorney's fees in the amount of \$30,463.00, costs
3 in the amount of \$9.71, for a total award of \$30,472.71. Said defendants are entitled to
4 judgment in the aforementioned sums with interest at the rate of twelve percent (12%) per
5 annum from today's date until paid in full.

6
7
8
9 DONE IN OPEN COURT this 23rd day of June, 2006.

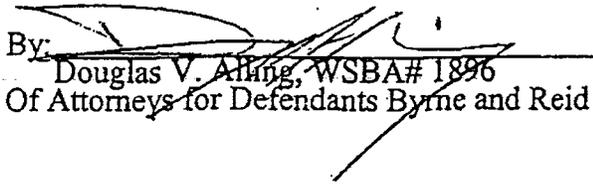
10
11 
12 JUDGE KATHERINE M. STOLZ

13 Presented By:
14 COMFORT, DAVIES & SMITH, P.S.

15
16 By: 
17 STEVEN W. DAVIES, WSBA# 11566
Of Attorneys for Defendants Price

18 Approved as to Form; Notice of Presentment
19 Waived

20 SMITH ALLING LANE

21
22 By: 
23 Douglas V. Alling, WSBA# 1896
Of Attorneys for Defendants Byrne and Reid

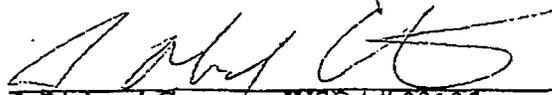
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FILED
DEPT. 2
IN OPEN COURT
JUN 23 2006
Pierce County Clerk
By: 
DEPUTY

ORDER AWARDING DEFENDANTS PRICE
REASONABLE EXPENSES, INCLUDING
ATTORNEY'S FEES AND COSTS - 4
[swd\04516\order.atty's fees]

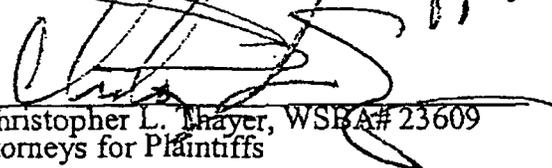
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APPENDIX B

1 GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

2
3 By: 
4 J. Richard Creatura, WSBA# 09185
Of Attorneys for Defendants Oldfield

5 LARSON HART & SHEPHARD *approved as to form*

6
7 By: 
8 Christopher L. Thayer, WSBA# 23609
Of Attorneys for Plaintiffs

9
10
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04-2-10247-B 27530442 FNCL 05-21-07



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ROBERT R. MITCHELL, et al

Plaintiff,

v.

MICHAEL A. PRICE, et al

Defendants.

NO. 04 2 10247 8

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW RE:
DEFENDANT OLDFIELD'S MOTION
FOR ATTORNEY'S FEES AND COSTS

KEVIN AND MARY BYRNE,

Third Party Plaintiffs,

v.

WILL STEVENS, et al.,

Third Party Defendants.

ASSIGNED TO THE HONORABLE
KATHERINE M. STOLZ

THIS MATTER having come before the Court on a motion by Defendants Oldfield for an Order Awarding Attorney's Fees and Costs based on RCW 4.84.185 and the Court having considered the following:

1. Defendant Oldfield's Joinder in Motion of Defendants Byrne and Reid's Motion for Attorney's Fees and Costs;
2. Defendant Byrne and Reid's Motion for Attorney's Fees and Costs;

OLDFIELD FOF/CONCLUSIONS OF LAW - 1 of 8
(04-2-10247-8)
[1380827 v5.doc]

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ORIGINAL

Appendix C

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- 3. Declaration of Alling in Support of Motion for Attorney's Fees;
- 4. Defendant Price's Memo in Support of Motion for Attorney's Fees and Costs;
- 5. Affidavit of Steven W. Davies in Support of Motion for Attorney's Fees and Costs;
- 6. Declaration of Tom Price in Support of Motion for Attorney's Fees and Costs;
- 7. Declaration of Steve Davies re: Attorney's Fees and Costs;
- 8. Declaration of J. Richard Creatura in Support of Defendant Oldfield's Joinder in Motion of Defendants Bryne and Reid's Motion for Attorney's Fees and Costs;
- 9. Plaintiff's Response to Defendant Oldfield's Motion for Attorney's Fees;
- 10. Plaintiff's Response to Defendant Price's Motion for Attorney's Fees;
- 11. Plaintiff's Response to Defendants Byrne's and Reid's Motion for Attorney's Fees;
- 12. *Reply memoranda of Defendants Oldfield et al*

YML

And the Court having considered the Complaint, First Amended Complaint, and all pleadings in support of and in opposition to the summary judgment motions that were previously granted by the Court, having heard oral argument and being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

1. On July 30, 2004, Plaintiffs filed a Complaint for Breach of Contract, Negligence, Misrepresentation, Fraud, Breach of Fiduciary Duty, Negligence, Professional Malpractice and Violation of the Consumer Protection Act. The claims against Defendant Oldfield in this Complaint included claims of breach of contract, misrepresentation, violation

1 of the Consumer Protection Act, negligence, professional malpractice. The First Amended
 2 Complaint also included an additional claim against Defendant Oldfield for breach of
 3 fiduciary duty.

4 2. Breach of Contract/Misrepresentation Claims. At the time of filing the
 5 Complaint and the First Amended Complaint, the Plaintiffs knew the following facts:

- 6 a. None of the Plaintiffs had ever had an attorney-client relationship with
 7 Defendant Oldfield.
 8
 9 b. None of the Plaintiffs had ever had any contractual relationship with
 10 Defendant Oldfield.
 11
 12 c. None of the Plaintiffs were aware of any misrepresentation by
 13 Defendant Oldfield.
 14
 15 d. A managing agent for N.W. Commercial Loan Fund did a full review
 16 of all of the records after the dispute arose with N.W. Commercial
 17 Loan Fund and before the lawsuit was filed and had not uncovered any
 18 misrepresentation by Defendant Oldfield.

19 3. Invalid Assignment. Additionally, at the time of filing the lawsuit, Plaintiffs
 20 were investors in N.W. Commercial Loan Fund, LLC, which was in bankruptcy. Although
 21 one of the Plaintiffs had purportedly assigned N.W. Commercial Loan Funds' claim to the
 22 Plaintiffs, the assignment of the claim was made after N.W. Commercial Loan Fund had filed
 23 bankruptcy. N.W. Commercial Loan Fund had not listed any claims against Defendant
 24 Oldfield in its bankruptcy filings. N.W. Commercial Loan Fund had not given notice nor
 25

1 received permission from the Bankruptcy Court to assign any N.W. Commercial Loan Fund
2 claims against Defendant Oldfield to insiders.

3 4. Statute of Limitations. At the time of filing the lawsuit in July of 2004,
4 Plaintiffs knew that most of their claims (negligence, malpractice, misrepresentation, fraud,
5 Consumer Protection Act) had statute of limitations of three years or less from the time of
6 discovery. Plaintiffs also knew that in March of 2001, more than three years before filing
7 suit, Plaintiffs and their representatives had met with Defendant Byrne and Defendant
8 Oldfield to discuss the same issues that were the subject of this litigation.

10 5. Furthermore, on July 9, 2001, more than three years before filing suit, attorney
11 Michael H. Woodall, on behalf of Plaintiffs, sent a letter to Defendants setting forth
12 substantially all of Plaintiffs' claims demanding that insurers be put on notice of claims and
13 damages to Plaintiffs.

15 6. On December 10, 2003, attorney Miles A. Yanick, delivered a memorandum to
16 Plaintiffs reciting a chronology of facts regarding the litigation and advising Plaintiffs "to be
17 safe, any action should be filed no later than February 2004."

18 7. Despite the warnings, Plaintiffs did not file suit until July 30, 2004.

19 8. First Motion for Partial Summary Judgment. On September 13, 2005, this
20 Court granted partial summary judgment in favor of Defendant Oldfield dismissing Plaintiffs'
21 claims against Defendant Oldfield: (1) that were invalidly assigned; (2) that alleged Consumer
22 Protection Act violations; and (3) the legal malpractice claim which was not assignable.

24 9. Second Motion for Summary Judgment. On May 19, 2006, after additional
25 discovery, this Court granted summary judgment in favor of Defendant Oldfield, dismissing

1 the remaining claim of misrepresentation. During the interim, Defendant Oldfield had
 2 conducted discovery and verified that none of the Plaintiffs were aware of any claimed
 3 misrepresentations of fact by Defendant Oldfield.

4 10. Amount of Attorney's Fees and Costs. Defendant Oldfield incurred attorneys
 5 fees and costs in the amount of \$110,271.17 (\$3,375 of this amount was projected). The
 6 amounts charged and costs incurred by Defendant's counsel were reasonably necessary in
 7 order to defend against Plaintiffs' claims.
 8

9 10. The above costs and fees were incurred unnecessarily and as a direct and
 10 proximate result of Plaintiffs' frivolous claims, which were advanced without reasonable
 11 cause.
 12

13 11. In evaluating the "lodestar" elements of Defendant Oldfield's claim for
 14 attorney's fees, the Court makes the following findings:

- 15 a. The records presented by Defendant Oldfield's counsel reflect the
 16 reasonable time and labor required to defend against these claims;
- 17 b. The amounts charged by Defendant Oldfield's counsel were
 18 commensurate with the novelty and difficulty of the questions
 19 involved;
- 20 c. Defendant Oldfield's counsel had the requisite skill to perform the legal
 21 services properly;
- 22 d. Although there was no evidence regarding the preclusion of other
 23 employment, the Court recognizes that representing Defendant Oldfield
 24

1 prevented Oldfield's counsel from performing other services for other
2 clients;

- 3 e. The amounts charged by Defendant Oldfield's counsel were customary
4 and consistent with fees charged in the community for similar work;
5 f. The case was charged on the hourly basis at a reasonable hourly rate;
6 g. There were no time limitations imposed by the client;
7 h. The amount of fees and costs incurred were commensurate with the
8 results obtained;
9 i. Defendant Oldfield's counsel had the requisite experience, reputation
10 and ability to represent Defendant Oldfield;
11 j. The subject case was not undesirable; and
12 k. The award was consistent with awards in similar cases.
13
14

15 CONCLUSIONS OF LAW

16 1. A prevailing party is entitled to recover reasonable attorney's fees and
17 expenses for defending against a frivolous action under RCW 4.84.185.

18 2. A frivolous action is one that "cannot be supported by any rational argument
19 on the law or facts."

20 3. The Court has viewed the Plaintiffs' action against Defendant Oldfield in its
21 entirety and is awarding attorney's fees and costs to Defendant Oldfield because the action, as
22 a whole, was frivolous.
23
24
25
26

1 4. Choosing to file malpractice claims and breach of contract claims against
2 Defendant Oldfield when Plaintiffs knew that they neither had an attorney-client relationship
3 nor a contractual relationship with Oldfield was frivolous.

4 5. Choosing to pursue claims based on an invalid assignment by N.W.
5 Commercial, which was in bankruptcy at the time, was frivolous.
6

7 6. Because Plaintiffs knew in December of 2003 that they were fast approaching
8 a statute of limitations on most of their claims and because Plaintiffs were clearly advised to
9 file a claim no later than February of 2004, choosing to file such claims after that date was
10 frivolous.

11 Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby
12 orders that Plaintiffs pay Defendant Oldfield attorney's fees and costs in the amount of
13 \$110,271.17 and judgment shall be entered in that amount.
14

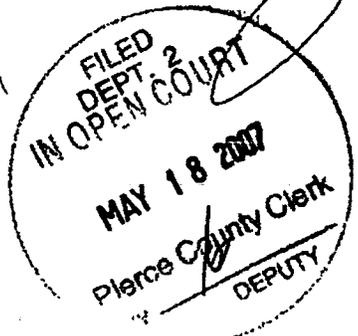
15 DONE IN OPEN COURT this 18th day of May, 2007.

16
17 *Katherine M. Stolz*
18 THE HONORABLE KATHERINE STOLZ
19 KATHERINE M. STOLZ

20 Presented by:

21 GORDON, THOMAS, HONEYWELL,
22 MALANCA, PETERSON & DAHEIM LLP
23 Attorneys for Defendants Oldfield

24 By *Stephanie Bloomfield* 74251
25 for: J. Richard Creatura, WSBA No. 09185



26 OLDFIELD FOF/CONCLUSIONS OF LAW - 7 of 8
(04-2-10247-8)
[1380827 v5.doc]

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1 Approved as to form by:

2 WIGGINS & MASTERS
3 Attorneys for Plaintiff

4 By 
5 Charles K. Wiggins, WSBA No. 6948

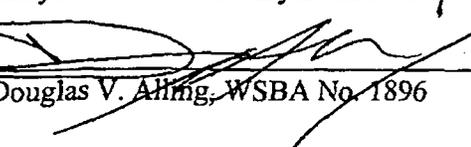
6 Approved as to form by:

7 COMFORT, DAVIES & SMITH
8 Attorneys for Defendants Price

9 By 
Steven W. Davies, WSBA No. 11566

10 Approved as to form by:

11 SMITH ALLING LANE
12 Attorneys for Defendants Byrne and Reid

13 By 
14 Douglas V. Alling, WSBA No. 1896