

NO.: 35291-5-II

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

See

ROBERT R. MITCHELL, et al,
Appellants

v.

MICHAEL A. PRICE, et al,
Respondents.

BRIEF OF RESPONDENTS PRICE
(FINDING APPEAL)

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TABLE OF CONTENTS

INTRODUCTION 1

FACTS 1

ARGUMENT AND ANALYSIS 3

A. Standards of Review 4

 1. Findings of Fact Are Reviewed for Substantial Evidence . 4

B. It Is Not Necessary to Have a Finding That an Action Was Brought for Spite, Nuisance or Harassment in Order to Find an Action Frivolous. 6

C. Price’ Finding of Fact 3 Is a Finding of Fact and Is Not Erroneous. 8

D. Combined Finding of Fact 4/3 Is Supported by Undisputed Evidence. 11

 1. Plaintiffs and their Representatives Met with Defendant Byrne and Oldfield in March of 2001. 11

 2. In Grendahl’s Meeting with Byrne and Oldfield in March of 2001, the Parties Discussed the Same Issues That Are the Subject of this Litigation. 12

E. The Woodell Letter Was Written on Behalf of the Plaintiffs and Sets Forth Plaintiffs Claims. 13

F. Oldfield Finding of Fact 2 Is Not Erroneous. 13

G. Price Finding of Fact 2 Is Not Erroneous and Is Clearly Supported by the Record. 13

| | | |
|----|--|----|
| H. | The Yanick Memo Was Derived from Facts Provided by the Plaintiffs and Known to Them at the Time Provided by the Plaintiffs. | 18 |
| 1. | The Yanick Memo Clarified the Statute of Limitations. . | 18 |
| 2. | There Was No Error on the Part of the Trial Court as to whether the statute of limitations had run in regard to Mr. Oldfield. | 19 |
| I. | Plaintiffs' Claims Were Frivolous as a Whole. | 19 |
| | ATTORNEYS FEES | 22 |
| | CONCLUSION | 23 |
| | APPENDIX | |

TABLE OF AUTHORITIES

FEDERAL CASES

Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001) 9, 10

Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555 (9th Cir. 1992) 9-11

In re JZ, LLC, 371 B.R. 412 ____ (B.A.P. 9th Cir. 2007) 9

Stein v. United Artists Corp., 691 F.2d 885, 893 (9th Cir. 1982) . . . 9, 10

WASHINGTON STATE SUPREME COURT CASES

Biggs v. Vail, 119 Wn.2d 129, 136, 830 P.2d 350 (1992) 4, 20

City of Tacoma v. State, 117 Wn.2d 348, 361, 816 P.2d 7 (1991) 5

Croton Chem. Corp. v. Birkenwald, Inc., 50 Wn.2d 684, 314 P.2d 622 (1957) 5

Dept of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) 6, 7

Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 814, 818 P.2d 1362 (1991) 12

Gevaart v. Metco Constr. Inc., 111 Wn.2d 499, 760 P.2d 348(1988) 12

Green v. A.P.C., 136 Wn.2d 87, 96, 960 P.2d 912 (1998) 19

LeCocq Motors v. Whatcom Cy., 4 Wn.2d 601, 104 P.2d 475 (1940) . . 8

Mason v. Mortgage America, Inc., 114 Wn.2d 842, 853, 792 P.2d 142 (1990) 6

State v. Jacobs, 154 Wn.2d 596, 600, ¶¶ 7, 115 P.3d 281 (2005) 6

| | |
|--|------|
| Sunnyside Valley Irrig. Dist. v. Dickie , 149 Wn.2d 873, 879, 73 P.3d 369 (2003) | 4, 5 |
| U.S. Oil & Refining Co. v. State Dep't of Ecology , 96 Wn.2d 85, 93, 633 P.2d 1329 (1981) | 12 |
| Wenatchee Sportsmen Ass'n v. Chelan County , 141 Wn.2d 169, 176, 4 P.3d 123 (2000) | 4, 5 |
| West Coast Airlines, Inc., v. Miners Aircraft & Engine Service, Inc. 66 Wn.2d 513 (1965) | 8 |
| Wilson Court Ltd. P'ship v. Tony Maroni's, Inc. , 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998) | 22 |
| Wygat v. Kilwein , 41 Wn.2d 281, 248 P.2d 893 (1952) | 9 |

WASHINGTON STATE COURT OF APPEALS CASES

| | |
|--|------|
| Beard v. King County , 76 Wn. App. 863, 868, 889 P.2d 501 (1995) .. | 19 |
| Bill of Rights Legal Found. v. The Evergreen State College , 44 Wn. App. 690, 696-97, 723 P. 2d 483 (1986) | 20 |
| Clarke v. Equinox Holdings, Ltd. , 56 Wn. App. 125, 132, 783 P.2d 82, <i>review denied</i> , 113 Wn.2d 1001 (1989) | 4 |
| Crisman v. Crisman , 85 Wn. App. 15, 20, 931 P.2d 163, <i>review denied</i> , 132 Wn.2d 1008 (1997) | 12 |
| Giraud v. Quincy Farm & Chem , 451 102 Wn. App. 443 (2000) | 19 |
| Hedlund v. Vitale , 110 Wn. App. 183 at 188, (2002) | 22 |
| Interlake Porsche & Audi, Inc. v. Bucholz , 45 Wn. App. 502, 516-17, 728 P.2d 597 (1986), <i>review denied</i> , 107 Wn.2d 1022(1987) | 12 |
| Jeckle v. Crotty , 120 Wn. App. 374, 387, 85 P.3d 931, <i>review denied</i> , 152 Wn.2d 1029 (2004) | 4, 7 |

| | |
|---|-------|
| Richter v. Trimberger , 50 Wn. App. 780, 786, 750 P.2d 1279 (1988) | 22 |
| | |
| Smith v. Okanogan County , 100 Wn. App. 7, 24, 994 P.2d 857 (2000) | 7, 20 |
| | |

FEDERAL STATUTES

| | |
|---------------------------|----|
| 11 U.S.C. §§ 521(1) | 10 |
|---------------------------|----|

STATE STATUTES

| | |
|---------------------|--------------------|
| RCW 25.15.010 | 20 |
| RCW 4.84.185 | 2, 4-7, 20, 22, 23 |

STATE RULES

| | |
|-------------------|--------|
| CR 54(b) | 2 |
| RAP 18.1 | 22, 23 |
| RAP 18.1(a) | 22 |
| RAP 18.1(b) | 22 |
| RAP 2.2(d) | 2 |

INTRODUCTION

COME NOW the respondents, Michael A. Price, Thomas W. Price and “Jane Doe” Price (hereinafter referred to collectively as “Price”), by and through their attorneys, Comfort, Davies & Smith, P.S. and Steven W. Davies, and submit their brief in response to the appellants (hereinafter referred to collectively as “Mitchell”) appeal. The respondents, Michael A. Price, Thomas W. Price and “Jane Doe” Price, hereby adopt and incorporate the factual assertions and legal arguments expressed in their brief on appeal of summary judgment dismissal and in addition, the entirety of their briefing in regard to appellants’ appeal of summary judgment. Further, the assertions and legal arguments made by respondents Reid, Byrne, and Oldfield are adopted by Price and incorporated as if fully set forth herein.

FACTS

Respondents Price request that the Court incorporate by reference the Statement of both Substantive and Procedural Facts as set forth in their Brief on Appeal of Summary Judgment Dismissal.

On May 19, 2006, after additional discovery, the trial court granted summary judgment in favor of all defendants, including the Prices, and dismissed all of Appellants’ remaining claims with prejudice. CP 1884-1887;

On June 14, 2006 Motions were brought before the trial court by Respondents Price, Respondents Reid and Byrne and joined by Respondent Oldfield, seeking an award of attorneys fees and costs pursuant to RCW 4.84.185. On June 23, 2006, the trial court granted these motions. CP 2205-2206, CP 2207-2209, CP2210-2214.

On Friday, May 18, 2007, Findings of Fact and Conclusions of Law and Judgment were entered at the trial court level memorializing the prior orders of the court and a judgment for attorneys fees. Again, there was nothing submitted by the plaintiffs supporting Mitchells' argument that the Prices had committed any wrongdoing or that there was any basis for personal liability.

On August 17, 2006, the Court entered findings and order for entry of final judgment on less than all claims by stipulation of the parties. This Order included that there was an award of attorneys fees under RCW 4.84.185. The court certified the judgments as final and appealable pursuant to CR 54(b) and RAP 2.2(d).

Then, on May 18, 2007, the trial court entered Findings of Fact and Conclusions of Law in support of the award of attorney's fees under RCW 4.84.185. CP 2561-2584, CP 259-2601, CP 2607-2614, CP 2641-2647.

Appellants are now challenging the 2007 findings in this present appeal.

ARGUMENT AND ANALYSIS

This matter is not appropriately before this Court. The filing of this brief is an inappropriate attempt by the Appellants, without requesting relief, to argue the same facts yet again. Defendants Prices' Findings of Fact and Conclusions of Law entered May 18 of 2007 were based upon facts known to the Appellants when they filed their Notice of Appeal. This is obvious based upon the fact that in this brief filed with the Court of Appeals and signed on September 4, 2007, the Appellants adopt the Statement of Facts from their original appeal brief which was filed several months earlier in March of 2007.

The appellants did not seek review of this portion of the trial court's decision nor did they seek an extension of time to amend their opening brief. The Appellants filed this brief some six months after filing their Notice of Appeal and several months after the original briefing schedule was complete. Therefore, this portion of appellants appeal is not timely, resulting in prejudice to the Respondents Price. This matter should be stricken and should not be considered by the Court of Appeals.

A. Standards of Review

1. Findings of Fact are reviewed for Substantial Evidence.

The decision to award attorney fees as a sanction for a frivolous action is left to the discretion of the trial court, and the court's decision will not be disturbed absent a showing of abuse of discretion. **Clarke v. Equinox Holdings, Ltd.**, 56 Wn. App. 125, 132, 783 P.2d 82, *review denied*, 113 Wn.2d 1001 (1989). Under RCW 4.84.185, a court cannot pick and choose among those aspects of an action that are frivolous and those that are not. **Biggs v. Vail**, 119 Wn.2d 129, 136, 830 P.2d 350 (1992). However, under RCW 4.84.185 any award is to be accompanied by written findings, without regard to whether the outcome stems from a summary judgment or a trier of fact.

As stated above, the decision to award attorney fees for a frivolous claim is a matter within the discretion of the trial court. **Jeckle v. Crotty**, 120 Wn. App. 374, 387, 85 P.3d 931, *review denied*, 152 Wn.2d 1029 (2004). **Clark v Equinox Holdings, Ltd**, *supra*. This court reviews findings of fact for substantial evidence, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. **Sunnyside Valley Irrig. Dist. v. Dickie**, 149 Wn.2d 873, 879, 73 P.3d 369 (2003) (citing **Wenatchee Sportsmen Ass'n v. Chelan County**, 141 Wn.2d 169,

176, 4 P.3d 123 (2000)). If the standard is satisfied, a reviewing court will not substitute its judgment for the trial court's even though it might have resolved a factual dispute differently. **Sunnyside Valley**, 149 Wn.2d at 879-80 (citing **Croton Chem. Corp. v. Birkenwald, Inc.**, 50 Wn.2d 684, 314 P.2d 622 (1957)).

Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. **City of Tacoma v. State**, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. **Wenatchee Sportsmen Ass'n v. Chelan County**, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

In this case the trial court had the opportunity to review extensive briefing and argument by the parties in regard to the evidence in this case. The findings raised as issues by Appellants do not go to the summary dismissal of their claims, but go to whether or not the claims were frivolous. Appellants do not identify any evidence which was either excluded or that the trial court refused to consider in regard to the defendant's motions for attorneys fees and costs pursuant to RCW 4.84.185. Based upon all of the

information provided to the trial court, substantial evidence existed to enable the trial court to conclude that Appellants not only had no information regarding any alleged wrongdoing on the part of the Prices but also filed their actions after the statute of limitations had run. The Prices' are 'entitled to the benefit of all evidence and reasonable inference therefrom in support of the findings of fact entered by the trial court.' **Mason v. Mortgage America, Inc.**, 114 Wn.2d 842, 853, 792 P.2d 142 (1990).

B. It is not Necessary to have a Finding that an Action was brought for Spite, Nuisance or Harassment in order to Find an Action Frivolous.

The plain language of RCW 4.84.185 provides as follows:

In any civil action, the court . . . may, upon written findings . . . that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action.

A court's objective in construing a statute is to determine the legislature's intent. **State v. Jacobs**, 154 Wn.2d 596, 600, ¶¶ 7, 115 P.3d 281 (2005). [I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. **Id.** (quoting **Dept of Ecology v. Campbell & Gwinn, L.L.C.**, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). A statutory provisions plain meaning is to be discerned from the

ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. **Id.** A provision that remains susceptible to more than one reasonable interpretation after such an inquiry is ambiguous and a court may then appropriately employ tools of statutory construction, including legislative history, to discern its meaning. **Dept of Ecology v. Campbell & Gwinn, L.L.C.**, 146 Wn.2d 1, at 12. 43 P.3d 4 (2002). The statute here accordingly is unambiguous.

Appellants attempt to argue that an action cannot be found frivolous without a finding that it was brought for spite, nuisance or harassment. This is just simply incorrect. A frivolous claim cannot be supported by any rational argument under the law or the facts. **Smith v. Okanogan County**, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). An action is frivolous for purposes of RCW 4.84.185 if it cannot be supported by any rational argument on the law or facts. **Jeckle v. Crotty**, 120 Wn. App. 374, 387, 85 P.3d 931 (2004). It is not necessary to have a finding that an action was brought for spite, nuisance, or harassment; however, frivolous judgments do apply to actions brought for those purposes. The trial court's ruling in this matter should not be disturbed.

C. Appellants Incorrectly Contend that Prices' Finding of Fact 3 is Erroneous.

Appellants claim that the trial court erred in regard to Price's findings regarding the invalid assignment. At the time of filing the lawsuit, plaintiffs were investors in NW Commercial Loan Fund, LLC, which was in bankruptcy. CP5; CP 368; CP 663; CP 683-718. Although one of the plaintiffs had purportedly assigned NW Commercial Loan Funds' claim to the plaintiffs, the assignment of the claim was made after NW Commercial Loan Fund had filed bankruptcy. CP 656-658; CP370. NW Commercial Loan Fund had not listed any claims against defendants Price in its bankruptcy filings. CP 683-718. NW Commercial Loan Fund had not given notice nor received permission from the bankruptcy court to assign any NW Commercial Loan Fund claims against defendants Price to insiders. CP 683-718.

Appellants do not contest the finding that "NW Commercial Loan Fund had not listed any claims against defendants Price in its bankruptcy filings." An assignment of error as to a conclusion of law does not bring up for review the facts found upon which the conclusion is based. **West Coast Airlines, Inc., v. Miners Aircraft & Engine Service, Inc** .66 Wn.2d 513 (1965), citing **LeCocq Motors v. Whatcom Cy.**, 4 Wn.2d 601, 104 P.2d 475

(1940). An assignment of error is without merit where it is based upon conclusions supported by findings which are not challenged and which have become established facts in the case. **Wygat v. Kilwein**, 41 Wn.2d 281, 248 P.2d 893 (1952).

Appellants argue that the trial court erred by relying on **Stein v. United Artists Corp.**, 691 F.2d 885, 893 (9th Cir. 1982) in its conclusion of the invalid assignment. Appellants then rely upon **In re JZ, LLC**, 371 B.R. 412 ____ (B.A.P. 9th Cir. 2007) in regard to the issue of standing. The case here is dissimilar to **JZ**, in that the 9th circuit found that it was difficult to identify a party that suffered harm as a result of the debtor's omission as all parties were paid in full. Additionally, the party making the argument, (Diamond Z) also failed to disclose the license to the bankruptcy court and was not considered to have "clean hands" necessary to make such an argument. Each situation should be evaluated on its own facts. The **JZ** case does cite several cases of reference in regard to the vesting rule and assets.

The vesting rule of Section 1141(b) does not give unlimited control over unscheduled assets to a debtor. The Ninth Circuit BAP held that Ninth Circuit Court of Appeal decisions **Cusano v. Klein**, 264 F.3d 936 (9th Cir. 2001) and **Hay v. First Interstate Bank of Kalispell, N.A.**, 978 F.2d 555

(9th Cir. 1992) both impose equitable constraints on the Debtor's entitlement to unscheduled property. Both cases support the Respondents' position that undisclosed assets do not vest in the debtor pursuant to Section 1141(b). The Bankruptcy Code placed an affirmative duty in the **Cusano** case on Mr. Cusano to schedule his assets and liabilities. 11 U.S.C. §§ 521(1). If Mr. Cusano failed to properly schedule an asset, including a cause of action, that asset continued to belong to the bankruptcy estate and did not revert to Mr. Cusano. See **Stein v. United Artists Corp.**, 691 F.2d 885, 893 (9th Cir. 1982) (holding that only property "administered or listed in the bankruptcy proceedings" reverts to the bankrupt). The trial court did not improperly rely upon the **Stein** case. In the present case, the causes of actions were not disclosed as assets and should not have vested in the debtor. The trial court properly ruled on this argument.

In both the **Cusano** and **Hay** cases, judicial estoppel was imposed on a debtor in the same Chapter 11 unscheduled property situation (i.e., the debtor was not permitted to file an action for its own advantage as to property that was not disclosed to creditors in bankruptcy). The Ninth Circuit BAP reasoned that property of the estate vested in the debtor by virtue of Section 1141(b) may, in appropriate circumstances, be subjected to equitable

constraints with respect to such property. Each situation must be evaluated on its own facts with remedies fashioned based on the certain situation. Accordingly, the **Hay** case, as pointed out in Respondent Byrne and Reid's brief, is almost identical to the situation here and we ask that the court take into consideration its ruling and reasoning.

D. Combined Finding of Fact 4/3 is supported by Undisputed Evidence.

1. Plaintiffs and their Representatives Met with Defendant Byrne and Oldfield in March of 2001.

Will Stevens, Gary Grendahl and his attorney Mike Woodell met with Tom Oldfield and Kevin Byrne in March of 2001. This meeting was confirmed by both Respondent Byrne and the Yanick memo.

Respondents now attempt to argue that Grendahl was the only Appellant that was directly involved in the meeting and therefore the only Appellant with knowledge of a claim in March of 2001. If Mr. Grendahl had knowledge or concerns about the fund and how his money was being handled or invested, it follows that the other Appellants either knew of should have known or been concerned about the fund or how their money was being invested.

2. In Grendahl’s meeting with Byrne and Oldfield in March of 2001, the Parties discussed the Same Issues that are the subject of this Litigation.

The “fund” in this case is the issue in this litigation. Appellants were concerned about its management and requested a meeting to discuss the fund. 'The discovery rule does not require knowledge of the existence of a legal cause of action itself, but merely knowledge of the facts necessary to establish the elements of the claim.' **Douchette v. Bethel Sch. Dist. No. 403**, 117 Wn.2d 805, 814, 818 P.2d 1362 (1991) (citing **Gevaart v. Metco Constr. Inc.**, 111 Wn.2d 499, 760 P.2d 348(1988)). In determining whether to apply this rule, the court must balance the problem arising from stale claims against the unfairness of precluding justified causes of action. **Id.** (quoting **U.S. Oil & Refining Co. v. State Dep't of Ecology**, 96 Wn.2d 85, 93, 633 P.2d 1329 (1981)). See **Crisman v. Crisman**, 85 Wn. App. 15, 20, 931 P.2d 163, review denied, 132 Wn.2d 1008 (1997) (citing **Interlake Porsche & Audi, Inc. v. Bucholz**, 45 Wn. App. 502, 516-17, 728 P.2d 597 (1986), review denied, 107 Wn.2d 1022(1987)) (discovery rule is traditionally applied where defendant fraudulently conceals a material fact from plaintiff, which deprives the plaintiff of the knowledge of a cause of action).

The appellants in this action were clearly concerned about “the fund.”

They had knowledge of the facts subject to this litigation and were clearly knowledgeable about the existence of the facts subject to this litigation. As stated above, the Discovery Rule only requires the knowledge of the existence of facts necessary to establish the elements of a claim.

E. The Woodell Letter was Written on behalf of the Plaintiffs and sets forth Plaintiffs Claims.

Respondents Price adopt the arguments of Byrne and Reid in response to this error claimed by Appellants.

F. Oldfield Finding of Fact 2 is not erroneous.

The court clearly stated on page 106 of their oral ruling that Mr. Oldfield had no obligations or duties with the plaintiffs. Without a duty to disclose or an obligation it is immaterial as to whether any omissions occurred or not. Respondents Price adopt the arguments of Oldfield in response to this error claimed by Appellants.

G. Price Finding of Fact 2 is not erroneous and is clearly supported by the record.

Appellants claim that Price's Finding of Fact 2 incorporates "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. Truth is stranger than fiction in some cases and so it is in this instance. Pursuant to multiple depositions taken by the parties and declarations filed by the plaintiffs which mention nothing in regard to any wrongdoing of the Prices - this finding is not strange at all. In fact, the trial court based whether the action was frivolous against the Prices' on that ground.

As argued in Respondent Prices' Appeal Response, the Prices were members only of NW, LLC. They were not managers of any entity, were not members of the NW Commercial Loan Fund, and were not involved with day-to-day operations or managerial aspects of NW, LLC. Further, the Prices had no knowledge of the 1999 Graham Square assignments of deeds of trust. This Finding is supported by evidence in the record in the form of the declarations of the parties. (Appendix A)

Despite repeated requests by the Prices, the Plaintiffs never produced any evidence whatsoever confirming or even suggesting wrongdoing or personal liability by either of the Prices. None of the plaintiffs were aware of any misrepresentation by the Prices or any facts in support of their claims of breach of contract, misrepresentation, Consumer Protection Act violations, fraud, fraud in the inducement, breach of fiduciary duty, and negligence.

Again this Finding is supported by the utter lack of evidence against the Defendants Price in the form of depositions and declarations of the parties.

The Declaration of Robert Coleman filed on May 8, 2006 is very interesting as it provides probably the most information in regard to the Price's and their involvement as members of NW, LLC.(Appendix B) Mr. Coleman states no wrongdoing on the part of either Mike or Tom Price. The most telling part in regard to the lack of wrongdoing by the Prices is evident in Exhibit D incorporated into Mr. Coleman's declaration. These were notes by Mr. Coleman from December of 2000 which specifically discuss the exclusion and removal of NW, LLC members Mike and Tom Price from the board because of financial issues.

Mr. Gary Grendahl's deposition likewise states no facts in regard to either Mike or Tom Price let alone any mention of wrongdoing on their part (Appendix C). Mr. Grendahl had known Mike Price according to his deposition for about twenty five years. Mr. Grendahl's declaration in response to Defendants' motions for summary judgments filed with the trial court on May 8, 2006 likewise mentions nothing in regard to any wrongdoing by either Mike or Tom Price. The only mention of either of the Prices was in regard to a question asked to Mr. Coleman and Mr. Byrne as to whether

financial problems of a company owned by Mike and Tom Price was affecting NW, LLC or NWCLF. The other mention of the Prices was in regard to the members of NW, LLC. (Pgs 10 & pg 12.)

Ms. Grendahl states in her deposition that she did not know Tom Price, but had met Mike Price on two social occasions previous to her investment. Ms. Grendahl really wasn't involved in the purchase of this investment and basically relied upon her husband, Gary Grendahl to make the decisions regarding the investments. Ms. Grendahl had no facts that she could rely upon to support a cause of action against either Mike or Tom Price.

Declaration of Robert Mitchell mentions the Prices on page 2, page 12, 13 and the last page of his declaration but only to the extent that the Price's were members of NW, LLC. (Appendix D) There again is no allegation or mention of wrongdoing or involvement on the part of either Mike or Tom Price.

The declaration of Tim Jacobson mentions nothing in regard to either Mike or Tom Price let alone any allegation of wrongdoing on their part.(Appendix E)

Lisa Tallman's deposition she stated that she did not know either Mike or Tom Price. Ms. Tallman had no conversations with either of them

either prior to or after her investment. Ms. Tallman also provided a declaration for the trial court. In her sworn declaration filed May 8, 2006, Ms. Tallman admits that she “did not attend any meetings, either in person or through a representative... ha[d] no idea what occurred or was discussed...” (Appendix F) She was absolutely uninvolved in knowing what was going on with her investment, but incredulously files suit against the Prices alleging they were involved in some sort of wrongdoing without any bases in fact. Ms. Tallman does not mention either Mike or Tom Price anywhere in her declaration.

The declaration of Will Stevens states only that Mike and Tom Price were members of NW, LLC. (Appendix G) This is on page 2 of his declaration. There is absolutely no other mention of either of the Price’s throughout the rest of his thirteen page declaration.

It was the plaintiff’s responsibility to put forth facts to support a cause of action against the defendants Price. They failed to do so. The findings that this action was frivolous as it relates to both Defendants Price is clearly supported by the complete lack of evidence in the record.

H. The Yanick Memo was derived from the Facts known at the time provided by the plaintiffs.

1. Clarified the Statute of Limitations

Appellants argue that there is no support for the proposition that an incorrect legal opinion changes the statute of limitations. That isn't the proposition. The purpose or evidentiary value of the Yanick Memo to the trial court was just another piece of the puzzle as to the facts known by the appellants. It shows exactly what the appellants knew and when they knew the facts they felt supported their allegations. Attorney Yanick received the factual information from the appellants. Even with the Yanick memo, it doesn't change Defendants Prices' position that they should not have been involved in this litigation.

For purposes of applying the discovery rule to determine the accrual date of a plaintiffs cause of action, the plaintiff is charged with knowledge of facts that a reasonable inquiry would have discovered.

"The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of actual harm. The plaintiff is charged with what a reasonable inquiry would

have discovered." **Green v. A.P.C.**, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). Stated more succinctly, the law does not require a smoking gun in order for the statute of limitations to commence. **Beard v. King County**, 76 Wn. App. 863, 868, 889 P.2d 501 (1995). A prospective plaintiff who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken. **Id. Giraud v. Quincy Farm & Chem**, 451 102 Wn. App. 443 (2000).

2. There was no error on the part of the Trial Court as to whether the statute of limitations had run in regard to Mr. Oldfield.

Respondents Price adopt the arguments of Mr. Oldfield in response to this error claimed by Appellants.

I. Plaintiffs claims as to the Prices were frivolous as a whole.

All of these actions were advanced with knowledge that they were beyond the statute of limitations, that the claims were based upon an invalid assignment, and that there was no evidence of or basis for personal liability against the Prices. The Defendants asks that the court also adopt the argument as outlined in Defendants' Price response to Paragraph G above in support of Defendants' position that plaintiffs action was frivolous as a whole pertaining to both Mike and Tom Price.

A lawsuit is frivolous under RCW 4.84.185 when it cannot be supported by any rational argument on the law or facts. **Smith v. Okanogan County**, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). **Bill of Rights Legal Found. v. The Evergreen State College**, 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986). The action must be viewed in its entirety and only if it frivolous as a whole will an award of fees be appropriate. **Biggs v. Vail**, 119 Wn.2d 129, 133-37, 830 P.2d 350 (1992).

The facts and issues related to the personal liability of the parties were extensively briefed and argued in conjunction with the defendants' motion for summary judgment. The Findings of Fact and Conclusions of Law clearly identify the lack of evidence offered by the plaintiffs relative to Price. Further, a managing agent for NW Commercial Loan Fund did a full review of all of the records after the dispute arose with NW Commercial Loan Fund and before the lawsuit was filed, and failed to uncover any misrepresentation by either of the Prices of any facts in support of the Appellants claims of breach of contract, misrepresentation, Consumer Protection Act violations, fraud, fraud in the inducement, breach of fiduciary duty, and negligence.

Based upon the evidence before the trial court, both Mike Price and Tom Price are protected from personal liability pursuant to RCW 25.15.010.

The Prices cannot be personally liable unless it can be shown that they knowingly and actively participated in wrongdoing. The Appellants did not, and cannot, prove this. The Prices have repeatedly requested dismissal from this action in that there were no facts supporting the claims of breach of contract, misrepresentation, Consumer Protection Act violations, fraud, fraud in the inducement, breach of fiduciary duty, and negligence against them.

Based upon all evidence presented, the plaintiffs failed to establish a basis for personal liability. The Prices have no knowledge of the assignments of deeds of trust, or the managerial and day-to-day operations of NW, LLC or NWCLF, LLC. The plaintiffs did not offer any rational argument based upon the law or facts in support of their action against the Prices. Accordingly, the trial court concluded that it “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”. CL3. Both Mike and Tom Price were entitled to an award of reasonable expenses, including the attorney’s fees and costs. This clearly was a correct decision by the trial court.

ATTORNEYS FEES

Under RAP 18.1(a), a party is entitled to reasonable fees and costs if an applicable law grants that right. However, to obtain costs and fees incurred on appeal, generally a party must comply with RAP 18.1 by advising the appellate court of its request. **Hedlund v. Vitale**, 110 Wn. App. 183 at 188, (2002) citing **Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.**, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). This involves devoting "a section of the brief to the request for the fees or expenses." RAP 18.1(b). See also **Wilson Court**, 134 Wn.2d at 710 n.4.

As stated above, RCW 4.84.185 authorizes fees and costs in this case since both Prices were the prevailing parties at the trial court level. The Prices should not have been involved in this litigation and the trial court agreed.

The Prices were awarded reasonable attorney's fees and costs pursuant to RCW 4.84.185; the Prices request that the award of attorney's fees at the trial court level be upheld. Since they were entitled to attorney fees below, they are also entitled to fees on appeal. RAP 18.1; **Richter v. Trimberger**, 50 Wn. App. 780, 786, 750 P.2d 1279 (1988). The Prices therefore, in that they have continued to be subject to this litigation, request

an award of attorney's fees and costs incurred on this Findings Appeal in accordance with RCW 4.84.185 and RAP 18.1.

CONCLUSION

The Prices join in and adopt the factual and legal responses of the defendants and respectfully request this Court affirm the trial court's decisions. The Prices also request attorney's fees for being required to again respond to this frivolous action.

Dated this 29th day of November, 2007.

COMFORT, DAVIES & SMITH, P.S.

By:  _____

Steven W. Davies, WSBA #11566

Jennifer M. Azure, WSBA #30494

Attorneys for Respondents Price

APPENDIX

- A. Affidavit of Steven W. Davies Re: Joinder in Defendants Byrne's and Reid's Motion for Summary Judgment Dismissal of Plaintiff's Claims.
Declaration of Tom Price in Support of Defendants' Price Motion for an Award of Reasonable Expenses, Including Attorney's Fees and Costs.
- B. Declaration of Robert Coleman in Response to Motion for Summary Judgment.
- C. Declaration of Gary Grendahl in Response to Motion for Summary Judgment.
- D. Declaration of Robert Mitchell in Response to Motion for Summary Judgment.
- E. Declaration of Tim Jacobson in Response to Motion for Summary Judgment.
- F. Declaration of Lisa Tallman in Response to Motion for Summary Judgment.
- G. Declaration of Will Stevens in Response to Motion for Summary Judgment.

“A”

NO.: 35291-5-II

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

ROBERT R. MITCHELL, et al,
Appellants

v.

MICHAEL A. PRICE, et al,
Respondents.

DECLARATION OF SERVICE

COMFORT, DAVIES & SMITH, P.S.
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Attorneys for Respondents Price

Danielle S. Mallek, certifies and states as follows:

I am a citizen of the United States of America, a resident of Pierce County, Washington, over the age of twenty-one (21) years and competent to be a witness in the above-entitled cause.

That on the 30th day of November, 2007, I forwarded a true and correct copy of the *Brief of Respondents Price* by facsimile and on the 30th day of November, 2007, I forwarded a true and correct copy of aforesaid document by either ABC Legal Messenger or first class mail in connection with the above-captioned matter to the following address :

Douglas V. Alling, Esq
Smith Alling Lane, PS
1102 Broadway Plaza, #403
Tacoma, WA 98402
Via legal messenger

Charles K. Wiggins, Esq.
Wiggins & Masters PLLC
241 Madison Ave. N
Bainbridge Island, WA 98110-1811
*Via first class mail and
facsimile to (206) 842-6356*

I declare under the penalty of perjury of the laws of the state of Washington that the foregoing statement is true and correct.

Dated at Fircrest, Washington this 30th day of November, 2007.


Danielle S. Mallek