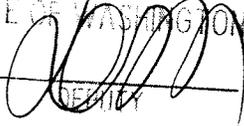


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 39289-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT R. MITCHELL, RONALD R. MITCHELL and
MARGARET MITCHELL, as Trustees of the
MITCHELL FAMILY LIVING TRUST;
GARY GREINDAHL and JOANN GREINDAHL,
husband and wife; HILARY GRENVILLE;
OLYMPIC CASCADE TIMBER, INC., a Washington corporation;
GM JOINT VENTURE, a Washington joint venture partnership;
ROBERT R. MITCHELL, INC., a Washington corporation;
TIMOTHY JACOBSON and
SYLVIA JACOBSON, husband and wife,

Petitioners,

v.

MICHAEL A. PRICE and KATHERINE M. PRICE,
husband and wife; THOMAS W. PRICE and PATRICIA PRICE,
husband and wife; JAMES REID and SONJA REID,
husband and wife; KEVIN M. BYRNE and MARY BYRNE,
husband and wife; and NW, LLC, a Washington
limited liability company,

Respondents.

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TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION	1
B. COUNTER STATEMENT OF THE ISSUES.....	2
C. COUNTER STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT	4
E. ARGUMENT IN RESPONSE.....	6
(1) <u>The Trial Court Did Not Abuse Its Discretion in Denying the Mitchells’ Motion for Leave to File Their Third Amended Complaint</u>	6
(a) <u>Standard of Review</u>	6
(b) <u>CR 15(a) Did Not Require the Trial Court to Grant the Mitchells Leave to Amend Their Complaint After Remand By This Court</u>	7
(c) <u>The Trial Court Was Bound By This Court’s Mandate</u>	12
(d) <u>The Mitchells’ WSSA Claim Is Barred By the Statute of Limitations</u>	15
(e) <u>The Mitchells’ WSSA Claim Should Not Relate Back As the Byrnes and the Reids Would Be Prejudiced</u>	21
(2) <u>As the Trial Judge Did Not Abuse Her Discretion, Remand to a Different Judge Is Not Necessary</u>	28
F. CONCLUSION.....	31

Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Associated Mortgage Investors v. G.P. Kent Constr. Co.</i> , 15 Wn. App. 223, 548 P.2d 558, <i>review denied</i> , 87 Wn.2d 1006 (1976).....	6
<i>Baker v. Winger</i> , 63 Wn. App. 819, 822 P.2d 315 (1992).....	26
<i>Balch et al. v. Smith et al.</i> , 4 Wn. 497, 30 P. 648 (1892).....	8, 12
<i>Beal v. City of Seattle</i> , 134 Wn.2d 769, 954 P.2d 237 (1998).....	8
<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).....	15
<i>Caruso v. Local Union No. 690 of Int’l Brhd. of Teamsters</i> , 100 Wn.2d 343, 670 P.2d 240 (1983).....	<i>passim</i>
<i>Dewey v. Tacoma School District No. 10</i> , 95 Wn. App. 18, 974 P.2d 847 (1999).....	9
<i>Douglass v. Stanger</i> , 101 Wn. App. 243, 2 P.3d 998 (2000).....	17, 18
<i>First Maryland Leasecorp v. Rothstein</i> , 72 Wn. App. 278, 864 P.2d 17 (1993).....	<i>passim</i>
<i>Green v. Hooper</i> , 149 Wn. App. 627, 205 P.3d 134, <i>review denied</i> , 166 Wn.2d 1034 (2009).....	12
<i>Harp v. American Sur. Co. of New York</i> , 50 Wn.2d 365, 311 P.2d 988 (1957).....	12, 14, 31
<i>Herron v. Tribune Publishing Co., Inc.</i> , 108 Wn.2d 162, 736 P.2d 249 (1987).....	7, 8, 10
<i>Hough v. Stockbridge</i> , 152 Wn. App. 328, 216 P.3d 1077 (2009).....	14
<i>HTK Management, L.L.C. v. Rokan Partners</i> , 139 Wn. App. 772, 162 P.3d 1147 (2007).....	14
<i>Hume v. Am. Disposal Co.</i> , 124 Wn.2d 656, 880 P.2d 988 (1994).....	27
<i>Interlake Porsche & Audi, Inc. v. Bucholz</i> , 45 Wn. App. 502, 728 P.2d 597 (1986), <i>review denied</i> , 107 Wn.2d 1022 (1987).....	16
<i>Kittilson v. Ford</i> , 23 Wn. App. 402, 595 P.2d 944 (1979), <i>affirmed</i> , 93 Wn.2d 223, 608 P.2d 264 (1980).....	7, 16
<i>Kittilson v. Ford</i> , 93 Wn.2d 223, 608 P.2d 264 (1980).....	22, 23
<i>Kottler v. State</i> , 136 Wn.2d 437, 963 P.2d 834 (1998).....	25

<i>McCausland v. McCausland</i> , 129 Wn. App. 390, 118 P.3d 944 (2005), <i>reversed on other grounds</i> , 159 Wn.2d 607, 152 P.3d 1013 (2007).....	29, 30
<i>Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002).....	11
<i>Mitchell v. Price</i> , 2008 WL 2505440 (2008).....	<i>passim</i>
<i>Monroe v. Winn</i> , 19 Wn.2d 462, 142 P.2d 1022 (1943).....	14
<i>Oliver v. Flow Int’l Corp.</i> , 137 Wn. App. 655, 155 P.3d 140 (2006).....	21
<i>Pietz v. Indermuehle</i> , 89 Wn. App. 503, 949 P.2d 449 (1998).....	26
<i>Robinson v. McReynolds</i> , 52 Wn. App. 635, 762 P.2d 1166 (1988).....	26
<i>Saldivar v. Momah</i> , 145 Wn. App. 365, 186 P.3d 1117 (2008), <i>review denied</i> , 165 Wn.2d 1049 (2009).....	28, 29
<i>Schwindt v. Commonwealth Ins. Co.</i> , 140 Wn.2d 348, 997 P.2d 353 (2000).....	24
<i>Sherman v. State</i> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	28
<i>Sprague v. Sumitomo Forestry Co., Ltd.</i> , 104 Wn.2d 751, 709 P.2d 1200 (1985).....	9, 10, 28
<i>State v. Kilgore</i> , 167 Wn.2d 28, 216 P.3d 393 (2009).....	13
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003).....	6, 7
<i>Turner v. Enders</i> , 15 Wn. App. 875, 552 P.2d 694 (1976).....	23

Statutes

RCW 4.16.040	24
RCW 4.16.080(4).....	16
RCW 4.22.015	25
RCW 4.22.070	25
RCW 4.22.070(1)(b).....	25
RCW 19.86	9
RCW 19.86.090	27
RCW 21.20.010	2, 17, 24
RCW 21.20.430	24, 25
RCW 21.20.430(1).....	11
RCW 21.20.430(2).....	27
RCW 21.20.430(3).....	25
RCW 21.20.430(4)(b).....	16, 20
RCW 26.19	30

Rules and Regulations

CR 158
CR 15(a).....5, 7, 8, 12
CR 15(b).....11, 12
CR 15(c).....8, 21
RAP 12.2.....13, 14

Other Authorities

DeWolf and Allen, *Tort Law and Practice*, 16 *Wash. Prac.*
§ 12.66 (2006).....26

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.
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A. INTRODUCTION

The events giving rise to this case arose eleven years ago. The original complaint was filed six years ago. The appellants (collectively “the Mitchells”) first filed a complaint against the respondents (“the Byrnes/Reids”) for breach of contract, negligence, misrepresentation, fraud, breach of fiduciary duty, professional malpractice, and violation of the Consumer Protection Act. The Mitchells filed two amended complaints, and had their motion to file a third amended complaint denied by the trial court.

After the trial court granted summary judgment in favor of the Byrnes/Reids, the Mitchells appealed. This Court reversed and remanded, holding, *inter alia*, that genuine issues of material fact existed as to when the Mitchells learned of allegedly improper loans and investments and their consequent damages. The Court reversed the trial court order denying the Mitchells’ motion to amend, allowing them to amend to assert contract and tort claims on behalf of NWLLC. But the Mitchells did not avail themselves of this Court’s permission to amend on remand. Instead, more than eight months after the mandate was issued, the Mitchells did not seek to add claims by NWLLC and instead sought to delete the common law tort claims alleged in all their prior complaints and to substitute a claim under the Washington State Securities Act (“WSSA”),

RCW 21.20.010. The trial court denied that motion on statute of limitations and prejudice grounds.

The trial court was correct in doing so. The Mitchells seek (for the fourth time) to amend their complaint more than a decade after the original transaction giving rise to their claims. The Mitchells do not have an unfettered right to amend ad infinitum. Nor should the Mitchells be allowed to amend their complaint after the entry of summary judgment and after the case was reviewed and remanded by this Court. Furthermore, WSSA has a statute of limitations entirely distinct from the statutes of limitation in the tort claims the Mitchells' now seek to drop from their complaint. That limitation period has passed. The Byrnes/Reids would be prejudiced should this Court reverse the trial Court to allow the Mitchells to replace their common law tort with a WSSA claim.

B. COUNTER STATEMENT OF THE ISSUES

The Byrnes/Reids acknowledge the Mitchells' assignments of error, but believe the issues before the Court may be better framed as follows:

1. Did the trial court properly exercise its discretion when it denied the Mitchells' motion to amend their complaint where that court had already allowed two previous amendments, summary judgment had

been entered, the case had been reviewed by this Court which gave the Mitchells leave to amend their complaint only to add NWCLF as a plaintiff, further amendment would be prejudicial, and the claim which the Mitchells' wished to add was barred by the statute of limitations?

2. Is remand to a different judge necessary where the trial judge did not err in denying the Mitchells' motion to amend their complaint, and no objectively reasonable person would question the judge's impartiality?

C. COUNTER STATEMENT OF THE CASE

This Court is already familiar with the broad contours of this case, having previously reviewed the case after the trial court's entry of summary judgment. Rather than burden the Court with further recitation of the facts of the underlying case, the Byrnes/Reids adopt the facts as laid out in this Court's opinion, *Mitchell v. Price*, 2008 WL 2505440 (2008) (referred to in this brief, as in the Mitchells' brief, as "*Mitchell I*"). In that opinion, the Court held that summary judgment was appropriately granted to the Byrnes/Reids because genuine issues of material fact remained to be resolved as to the substantive claims of the Mitchells, in particular, when the Mitchells learned the elements of their claims, suffered damage, and whether they exercised due diligence in asserting their claims. *Id.* at 2.

This Court issued its mandate in *Mitchell I* on July 29, 2008. CP 264-65. Eight and a half months later, after two previous amendments, the Mitchells did not seek to add NWLLC as a party as this Court authorized, but instead moved to file another amended complaint deleting their prior claims for breach of contract, negligence, and fraud and misrepresentation, retaining only the Consumer Protection Act (“CPA”) and fiduciary duty claims and adding WSSA claim. CP 274. The Byrnes/Reids opposed the motion because they would be prejudiced by the amendment and the statute of limitations had run on the WSSA claim. CP 298-302. The trial court, the Honorable Katherine Stolz of the Pierce County Superior Court, denied the motion to amend, citing prejudice and “significant statute of limitations problems.” CP 393-94; RP 18-20. Commissioner Eric B. Schmidt granted the Mitchells’ motion for discretionary review.

D. SUMMARY OF ARGUMENT

The original actions upon which this suit is based occurred in 1998 and 1999. The Mitchells filed their original complaint in July 2004 and amended it in November of the same year. They amended for a second time in December 2005. They filed a third motion to amend to add NWLLC as a party in May 2006, which the trial court denied. The Mitchells then sought to amend for the fourth time in March 2009, eight

and a half months after this Court issued its mandate and more than ten years after the original sales of the alleged securities in this case.

While CR 15(a) states that leave to amend should be freely given when justice requires, it does not grant a party the right to amend its complaint repeatedly and without limitation over the course of a decade. At some point, the plaintiffs must settle on their theories of the case and try them. The case cannot be ever-evolving, forcing defendants to expend time, money, and effort on theories that fall by the wayside.

CR 15(a) also does not permit an amendment to assert a futile claim. The WSSA claim the Mitchells seek to add to their complaint in lieu of the original contract and tort claims is barred by the statute of limitations. The WSSA statute of limitations is entirely distinct from the statutes of limitation for the Mitchells' other claims. While the statute of limitation on common law fraud claims does not begin to run until the plaintiff discovers the alleged fraud *and sustains actual damages* as a result of the alleged fraud, WSSA imposes a three-year statute of limitations based only on when the WSSA violation was discovered or would have been discovered in the exercise of reasonable care. Unlike the tort claims, it has no requirement of actual damage. This Court remanded because it held there were questions of material fact about both notice and damages related to the tort claims. Where the record below may have

been sufficiently ambiguous to raise doubts about notice and damages of the Mitchells tort claims, there is no such ambiguity under WSSA. The statute of limitations on the WSSA claim has run.

Allowing the Mitchells to amend their complaint once again to include a WSSA claim would prejudice the Byrnes/Reids.

E. ARGUMENT IN RESPONSE

(1) The Trial Court Did Not Abuse Its Discretion in Denying the Mitchells' Motion for Leave to File Their Amended Complaint

(a) Standard of Review

This Court will not disturb the trial court's ruling on a motion to amend absent an abuse of discretion. *Caruso v. Local Union No. 690 of Int'l Brhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983). An abuse of discretion occurs only when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558, *review denied*, 87 Wn.2d 1006 (1976). The trial court's decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). The trial court's decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view

that no reasonable person would take. *Rohrich*, 149 Wn.2d at 654. The trial court's decision here was far from an abuse of discretion.

(b) CR 15(a) Did Not Require the Trial Court to Grant the Mitchells Leave to Amend Their Complaint

The Mitchells argue that CR 15(a) grants them an essentially absolute right to amend their complaint so as to remove their contract and tort claims and add the WSSA claim.¹ Resp'ts br. at 12-14. They support their argument by citing to *Caruso* and *Herron v. Tribune Publishing Co., Inc.*, 108 Wn.2d 162, 736 P.2d 249 (1987).² Neither case supports the Mitchells' argument.

The *Caruso* court affirmed the trial court's decision to allow the plaintiff to amend his complaint five years and four months after he had filed his original complaint. *Id.* at 349-51. The *Herron* court upheld the trial court's *denial* of the plaintiffs' motion to amend their complaint approximately 10 months after they filed their first complaint and shortly after the defendants moved for summary judgment. *Id.* at 164, 168. Significantly, the motions to amend in both cases were the first motions

¹ CR 15(a) states: A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

² Curiously, a defamation and libel case respectively.

made by the plaintiffs and were made prior to trial. Those cases did not involve multiple motions to amend. Both cases indicate that the right to amend is not without limitation. It is unavailable if other parties are prejudiced. The purpose of CR 15(c) is to permit amendment, provided the defendant is not prejudiced and has notice. *Beal v. City of Seattle*, 134 Wn.2d 769, 782, 954 P.2d 237 (1998). In contrast, the present motion to amend is the fourth the Mitchells have sought since 2004. After the expense and time of discovery on the earlier complaints, this latest effort by the Mitchells represents a departure—it abandons all of their former claims in favor of new theory for recovery. The trial court could properly consider delay in determining whether yet another amendment would prejudice the Byrnes/Reids. *Id.* at 165-66. While *Caruso* and *Herron* recognized a party’s motion to amend should be freely granted under CR 15(a), neither case stands for the proposition that a party may make repeated amendments over the course of many years.

The proposition that a trial court may deny multiple amendments at its discretion long pre-dates CR 15. In *Balch et al. v. Smith et al.*, 4 Wn. 497, 30 P. 648 (1892) the trial court denied the plaintiff’s motion to amend his complaint for a third time. The Supreme Court upheld the denial. Discussing Washington courts’ tendency to grant good faith motions to amend, the court stated succinctly, “This general rule, however, has never

gone so far as to establish an absolute right on the part of the pleader to amend as often as he saw fit..." *Id.* at 504.

A trial court need not permit serial amendments. In *Sprague v. Sumitomo Forestry Co., Ltd.*, 104 Wn.2d 751, 709 P.2d 1200 (1985), the plaintiff sought to amend his complaint to add a violation of the Consumer Protection Act, RCW 19.86 ("CPA"). *Id.* at 763. The Supreme Court upheld the trial court's denial of the motion to amend, noting that the plaintiff "amended twice, then sought a third amendment, which was denied. Then permission was given to amend to include misrepresentation, but not [the CPA] violations. That was 1 year 8 months after the original complaint was filed and shortly before trial." *Id.* at 763. The Court found no abuse of discretion in denying the plaintiff's motion for an amendment so he could allege a violation of the CPA. *Id.*

Likewise, in *Dewey v. Tacoma School District No. 10*, 95 Wn. App. 18, 974 P.2d 847 (1999), this Court upheld denial of the plaintiff's motion to amend where it followed a summary judgment proceeding, a motion to dismiss, and after he had rested his case at trial. *Id.* at 27. This, despite the plaintiff's admission that the amendment was not justified by any newly discovered evidence and the claim he wished to add was based on the same facts as his original and second complaints. *Id.* at 28.

Here, the Mitchells have already amended their complaint twice, and had their third motion to amend denied. The Mitchells have now moved for a fourth time to amend, seeking to abandon the very claims for which this Court remanded for findings of fact, and to substitute in their place an entirely new statutory claim which, like the CPA claim in *Sprague*, allows the Mitchells a basis upon which to recover fees. The Mitchells went through the summary judgment process - and an appeal - but believe they have license to amend yet again. Nothing in *Caruso* or *Herron* supports the notion that a party may amend its complaint again and again. The Byrnes/Reids should not be subject to ever-shifting claims.

The Mitchells argue that the trial court repeated the same error for which it was reversed by this Court when it denied their fourth motion to amend. Resp'ts br. at 23. That argument fundamentally misconstrues what this Court's did, as well as the trial court's response to the Mitchells' motion. This Court addressed the Mitchells' former theories, holding that genuine issues of material fact remained as to when the Mitchells learned the elements of their claims, suffered damage, and whether they exercised due diligence. *Mitchell I* at 2. It specifically held that adding NWCLF as a plaintiff, as the Mitchells sought to do in their third motion to amend, would not cause substantial prejudice to the Byrnes/Reids. *Id.* Yet the

Mitchells did not avail themselves of this Court's direction on remand by adding NWCLF in their fourth motion to amend. Instead, they sought to eliminate the contract and tort claims they had presented in every complaint since 2004, and to substitute a new statutory claim instead. This Court remanded for further proceedings consistent with its opinion. It remanded, in other words, for further proceedings on the claims on which summary judgment had been granted. It did not remand for trial on an entirely new claim. Moreover, it allowed amendment for the narrow purpose of adding NWLLC as a party, a step this Court concluded would not prejudice the Byrnes/Reids.

The Mitchells give no explanation why they now seek to substitute a statutory claim for the contract and tort claims they advanced in all their prior complaints. Presumably, they are doing so to avail themselves of the attorney fees provided under RCW 21.20.430(1).³ Nor do they seek to amend the complaint to conform to the evidence under CR 15(b).⁴

³ A court may award attorney fees under WSSA, whereas attorney fees generally are not allowed in an action based upon common law fraud or misrepresentation. *Kittilson v. Ford*, 23 Wn. App. 402, 407-08, 595 P.2d 944 (1979), *affirmed*, 93 Wn.2d 223, 608 P.2d 264 (1980).

⁴ CR 15(b) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433, 40 P.3d 1206 (2002). Under CR 15(b), pleadings may be amended at the discretion of the trial court to conform to the evidence at any stage in the action, even after judgment. *Green v. Hooper*, 149 Wn. App. 627, 636, 205

The trial court “is clothed with large discretion” in determining whether to allow a pleading to be amended. *Balch*, 4 Wn. at 504. The trial court here acted entirely within its discretion when it declined to afford the Mitchells the right to once again amend a complaint. The court was entitled to finally rule that enough was enough. CR 15(a) does not require otherwise.

(c) The Trial Court Was Bound By This Court’s Mandate

This Court held that amendment of the complaint to add NWCLF as a plaintiff would not prejudice the Byrnes and Reids in an attempt to pierce the corporate veil. *Mitchell I* at 2.

It also held that genuine issues of material fact remained as to when the Mitchells learned the elements of their claims, suffered damage, and whether they exercised due diligence, and remanded for trial on the Mitchells’ contract and tort claims. *Mitchell I* at 2. This Court mandated that the trial court take further proceedings in accordance with the opinion. CP 265. The mandate is binding on the trial court and must be strictly followed. *Harp v. American Sur. Co. of New York*, 50 Wn.2d 365, 368, 311 P.2d 988 (1957). Upon remand, the trial court was obliged to proceed with trial to resolve the factual issues inherent in the Mitchells’ contract

P.3d 134, *review denied*, 166 Wn.2d 1034 (2009). The Mitchells make no reference to CR 15(b), and do not argue that their claim should be amended under its provisions.

and tort claims. The Mitchell's instead swept away all of the claims on which this Court's remand was based, and substituted an entirely different claim. The Mitchells even disregarded their opportunity afforded them by this Court's opinion to amend their complaint to add NWLLC as a party. The trial court was bound by the mandate to make further inquiry on the issues specified by this Court, not to cast the mandate aside. The case the Mitchells were to take to trial upon remand was the case this Court heard.

The trial court was not bound by the remand to allow further amendments, and properly exercised its judgment in denying the motion to amend. The Mitchells themselves cite to RAP 12.2 which provides that upon issuance of the mandate, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action. Resp'ts br. at 16; RAP 12.2. RAP 12.2 allows trial courts to entertain postjudgment motions authorized by statute or court rules, as long as the motions do not challenge issues already decided on appeal. *State v. Kilgore*, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009).

This Court addressed amending the complaint only to the extent it held that the Byrnes/Reids would not be prejudiced by adding NWCLF as a plaintiff. *Mitchell I* at 2. As noted, the Mitchells have not done so. Where the issue of amendment to add a WSSA claim was not before this

Court on appeal, RAP 12.2 provided authority for the trial court to hear argument and rule on the motion to add the WSSA claim. *HTK Management, L.L.C. v. Rokan Partners*, 139 Wn. App. 772, 780, 162 P.3d 1147, 1151 (2007). Under RAP 12.2, the trial court properly exercised its discretion and ruled on the Mitchells' motion to add the WSSA claim, as that motion was not one of the issues already decided on appeal. *See Hough v. Stockbridge*, 152 Wn. App. 328, 216 P.3d 1077 (2009) (appellate decision in prior appeal governed trial court's decision to deny motion for a more definite and certain statement of claims in pleadings); *Monroe v. Winn*, 19 Wn.2d 462, 465, 142 P.2d 1022 (1943) (trial court is limited to following mandate of the Supreme Court, but may properly hear and rule on issue that was not before the higher court).

There is a distinction between what the trial court is obligated to do on remand without the exercise of any discretion, and what acts are within its discretion. *Harp v. American Sur. Co. of N. Y.*, 50 Wn.2d 365, 368-69, 311 P.2d 988 (1957). Here, the trial court was obligated to proceed with the case as remanded by this Court, a case composed of contract and tort claims. In denying the Mitchells' motion to amend, the trial court was in fact carrying out this Court's mandate by retaining the claims considered by this Court and rejecting a substitution of those claims by a new WSSA claim. Moreover, contrary to the Mitchells' assertion in their brief at 19,

the fact that this Court reversed the trial court's earlier denial of an amendment to the Mitchells' complaint to add NWLLC as a party carries no "precedential" weight. That simple amendment is far different than the Mitchells' latest recasting of their case. *Mitchell I* did not bind it to permit an infinite number of amendments on ever-evolving theories by the Mitchells. The trial court properly exercised its discretion when it denied the Mitchells' motion to amend.

(d) The Mitchells' WSSA Claim Is Barred By the Statute of Limitations

Amendment was properly denied because the Mitchells' proposed amendment is futile as it is time-barred. *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 484-85, 209 P.3d 863 (2009).

The case this Court remanded was based on contract and tort law. The Mitchells now seek to abandon those claims and proceed with a statutory claim instead. But the statute of limitations on their WSSA claim has expired. The WSSA statute of limitations is entirely distinct from the statutes of limitation in the tort claims the Mitchells' now seek to drop from their complaint. *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 283, 287, 864 P.2d 17 (1993). WSSA does not deal with the same subject as the Mitchells' common law claims, and is a distinct cause of action with its own statute of limitations. *Kittilson*, 23 Wn. App.

at 407-08. Any remedy the Mitchells might have under WSSA is different from their potential remedies under RCW 4.16.080(4).⁵ *Id.* at 407.

In *First Maryland*, the court held that common law fraud claims require knowledge of a possible violation *and* damages, while WSSA claims merely require knowledge of a violation. “[T]he statute of limitation for a damage action based on common law fraud does not commence to run until the aggrieved party discovers, or should have discovered, the fact of fraud by due diligence and sustains some actual damage as a result therefrom.” *Id.* at 283. In damage actions based on common law fraud, a party is entitled to judicial relief only if damages have occurred as a consequence of the fraudulent acts. *Id.* at 282. Consequently, a fraud action for damages brought under RCW 4.16.080(4) before damages are incurred would be premature and subject to dismissal. *Id.*⁶

The language governing the WSSA statute of limitations, RCW 21.20.430(4)(b), differs significantly from that governing the statute of limitations in tort cases, RCW 4.16.080(4). *Id.* at 287. Under RCW

⁵ RCW 4.16.080(4) prescribes a three-year limitation period for the commencement of actions based on fraud. *First Maryland*, 72 Wn. App. at 281.

⁶ Actual knowledge of fraud or a violation of fiduciary relation will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 517, 728 P.2d 597 (1986), *review denied*, 107 Wn.2d 1022 (1987).

21.20.010, an action must be commenced within 3 years of the violation, although the 3-year period is tolled until the securities violation is discovered or should have been discovered. *Id.*

The statute of limitations on the Mitchells' common law fraud claims did not begin to run until they discovered the alleged fraud *and sustained actual damages* as a result of the alleged fraud. WSSA, on the other hand, imposes a three-year statute of limitations based only on when a violation of the act was discovered or would have been discovered in the exercise of reasonable care. Unlike the tort claims, it has no requirement of actual damage. Thus, under *First Maryland*, there is no requirement for knowledge of damage before the statute of limitations begins to run on a WSSA claim. This is very significant in this case.

Douglass v. Stanger, 101 Wn. App. 243, 2 P.3d 998 (2000) is instructive. Douglass invested in a shopping center. *Id.* at 246-47. He later discovered that the property which was to be used for the shopping center had been purchased and then re-sold in the names of the defendants only. *Id.* at 248. Douglass sued for breach of contract, breach of fiduciary duties, fraud/intentional misrepresentation, violation of Washington's securities laws, and for an accounting. *Id.* On appeal, the court held that Douglass' securities claims, which were based upon the same facts as his common law fraud action, were barred by the statute of limitations. *Id.* at

254-57. The court held Douglass was on inquiry notice more than three years before he filed his lawsuit, noting a litany of missed opportunities where Douglass might, with due diligence, have discovered the alleged fraud, including his failure to investigate upon being informed that title to the property would be transferred; his failure to investigate the fact that articles of incorporation were filed for only one year and the corporation became inactive, no corporate meetings were held, and the corporation transacted no business; and Douglass never inquired about the status of the property. *Id.* at 255-56. Essentially, Douglass failed to take action once he was put on reasonable notice that something might be amiss. Similar facts are present here.

In *Mitchell I*, this Court held certain documents presented issues of material fact regarding the Mitchell's common law tort claims (namely when the Mitchells learned the elements of their claims, whether they exercised due diligence, *and suffered damages*). Thus, the question of damages animated this Court's decision in *Mitchell I* on the viability of the Mitchells' theories. Those same documents support a finding that the WSSA limitation period had lapsed. Damages are not an issue here as to the Mitchells' WSSA claim.

This Court held that the Woodell letter and Yanick memorandum created issues of material fact regarding the claims previously dismissed

on summary judgment. It found unresolved issues of material fact regarding when the Mitchells had notice of possible violations *and of damages*. However, when the question of damages is removed from the analysis under *First Maryland*, these documents show the Mitchells had notice of possible securities violations by June or July 2001.

This Court held that the Woodell letter of July 9, 2001, showed due diligence rather than knowledge of damages. *Id.* at 3. The Woodell letter gave explicit notice of claims and stated that the plaintiffs had reasonable grounds for believing that the Byrnes/Reids had violated investment restrictions regarding the size of loans as a percentage of total assets, loan quality, and non-income producing properties; engaged in misrepresentation and concealment; made unauthorized loans against Fund assets; allowed tax liens and defaults on real estate to go uncured; and failed to comply with the Operating Agreement. Suppl. Clerk's Papers at ____.⁷ The Court noted that the plaintiffs had demanded that their accountant be given access to company records. *Mitchell I* at 3. In reviewing summary judgment on the Mitchells' fraud claim, the Court was required to consider knowledge of both a violation *and damages*. *First Maryland* at 283. An accountant's review of the records would have been designed to reveal those damages. Under *First Maryland*, the Woodell

⁷ The Woodell letter is attached to the declaration of Kevin Byrne as Appendix A for the court's convenience.

letter shows that the Mitchells had, or should have had, knowledge of a possible violation by July 9, 2001.

Similarly, the Yanick memorandum raised issues of material fact because it contained inconsistencies and discrepancies. *Mitchell I* at 3-4. Suppl. Clerk's Papers at ____.⁸ The memo, written to the Mitchells by attorney Miles Yanick, states that *by June 2001*, the Mitchells had learned - through their own investigation - that NWCLF held only eight notes, and that with one exception, the notes were all for loans to "the Graham Square LLCs." Suppl. Clerk's Papers at ____; Appendix B at 3. This internal memo clearly indicates that the Mitchells had learned of possible securities violations by June 2001. That knowledge was sufficient to trigger the statute of limitations under RCW 21.20.430(4)(b) and *First Maryland*.

The Woodell letter and the Yanick memorandum show that the Mitchells had knowledge of potential securities fraud claims by June or July 9, 2001. Under RCW 21.20.430(4)(b) and *First Maryland*, notice of a securities violation alone is sufficient to start the WSSA statute of limitations running. The Mitchells' first complaint was filed on July 30, 2004. That date was beyond the statute of limitations which began to run in June 2001 or July 9, 2001 at the latest. Yet they did not seek a WSSA

⁸ Attached to the declaration of Douglas Alling as Appendix B.

claim until after the statute of limitations had expired. Where the record below may have been sufficiently ambiguous to raise doubts about notice *and* damages of the Mitchells tort claims, there is no such ambiguity about the Mitchells' WSSA claim. The statute of limitations had expired and the trial court was not obligated to allow the Mitchells to amend their complaint to allege a non-viable claim.

(e) The Mitchells' WSSA Claim Should Not Relate Back As the Byrnes/Reids Would Be Prejudiced

Acknowledging their WSSA claim is time-barred, the Mitchells argue that their proposed amendment should relate back to their original complaint under CR 15(c). CR 15(c) provides in part that an amendment relates back when the cause asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Caruso*, 100 Wn.2d at 351. The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party. *Caruso*, 100 Wn.2d at 350. Undue delay by the party proposing the amendment constitutes a ground upon which to deny a motion to amend where such delay works undue hardship or prejudice upon the opposing party. *Oliver v. Flow Int'l Corp.*, 137 Wn. App. 655, 664, 155 P.3d 140 (2006). The Byrnes/Reids are prejudiced if

the trial court allowed the complaint to be amended. CP 298-302, 393-94; RP 18-20.

First, as the *Caruso* court noted, the risk of prejudice increases with time. *Id.* at 350. The Byrnes/Reids would indeed be prejudiced should this Court allow the Mitchells proposed amendment to relate back to their original claim because the facts forming the basis for the Mitchells' WSSA claim arose in 1999, eleven years ago. Witnesses are no longer available. The memories of available witnesses fade. Documents are not necessarily available.

Second, the Mitchells' prior contract and tort claims require the Mitchells to prove different elements than they would in a WSSA claim. Their tort claims differ from their proposed WSSA claim in more ways than the element of damages, the respective statutes of limitation, and statutory attorney fees.⁹

Scienter is not required in an action for fraud or misrepresentation under WSSA. *Kittilson*, 93 Wn.2d at 225-27. In that regard, WSSA is distinct from the common law tort of fraud where scienter is required as an element of the cause of action. *Id.* at 225. To prove the common law tort of fraud, a plaintiff must establish, inter alia, the speaker's knowledge of a

⁹ As the gravamen of the Mitchells' brief focuses on tort-related claims, the Byrnes/Reids focus their argument on those claims, rather than on the Mitchells' CPA and breach of contract claims.

statement's falsity or ignorance of its truth, and his intent that it should be acted on by the person to whom it is made. *Turner v. Enders*, 15 Wn. App. 875, 878, 552 P.2d 694 (1976). Common law fraud thus requires proof of a knowing and intentional misrepresentation. No such proof is required to prove a WSSA claim. *Kittilson*, 93 Wn.2d at 225-27. Amending the complaint at this late date would require Byrnes/Reids to conduct new discovery at added expense on this new element.

Third, since the time of the first complaint, the Byrnes/Reids have been preparing to defend against claims requiring proof of a knowing and intentional misrepresentation. To amend the complaint now would require the Byrnes/Reids to pivot and make a significant readjustment in their defense strategy at added expense in order to defend against a statutory claim which requires no scienter, and no proof of knowing and intentional misrepresentation. They would dispense with all work their counsel had done – discovery, research, etc. – to defend contractual and tort claims, and require the services of experts in securities law, and further depositions. Such a shift, after such a long delay, would be prejudicial.

Fourth, allowing the Mitchells to amend would also prejudice the Byrnes/Reids because any claim they may have had for recovery under a bond insurance policy is time-barred. NWLLC had a mortgage bankers bond insurance policy which was in effect from January 6, 2001 to

January 6, 2003. NWLLC had coverage under two separate sections of the policy. Section A covered “dishonest acts by an Employee of the Assured.” CP 317. Section D specifically provided for coverage for wrongful acts by the assured concerning the origination, processing, closing, or servicing of any real estate loan for Mortgage Backed Securities. CP 23. The Mitchells argue that the Byrnes/Reids engaged in wrongful acts in the origination of mortgage backed securities under RCW 21.20.010 and 21.20.430, coverage expressly provided for in NWLLC’s insurance policy.¹⁰

Under RCW 4.16.040, an action upon a written contract, such as an insurance policy, must be commenced within six years. *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 353, 997 P.2d 353 (2000). Had the Mitchells presented a timely WSSA claim, the Byrnes/Reids could have presented a claim to NWLLC’s insurer during the 2001-03 period.¹¹

¹⁰ RCW 21.20.010 states:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;
 - (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;
- or
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

¹¹ Coverage under a claims-made policy depends on the claim being made and reported to the insurer during the policy period. *Schwindt*, 140 Wn.2d 352. Claims were made to the insurer in August and September, 2001, within the policy period. *See*

The Byrnes/Reid would have had six years from any denial of such a claim to sue the insurer. The Mitchells, however, did not attempt to add the WSSA claim until March 17, 2009. The Byrnes/Reids because they were no longer be able to enforce their contractual rights to obtain coverage under the policy.

Fifth, the Byrnes/Reids may also no longer seek contribution from attorney Thomas Oldfield (“Oldfield”). Under RCW 21.20.430, Oldfield would be liable as a joint tort feisor. The Mitchells acknowledge that they dismissed Oldfield, yet insist the Byrnes/Reids cannot be prejudiced by an amended complaint because the Byrnes/Reids could seek contribution from Oldfield under RCW 21.20.430(3). Resp’ts br. at 19. But a released party cannot be a defendant against whom judgment is entered.¹² *Kottler v. State*, 136 Wn.2d 437, 447, 963 P.2d 834 (1998). Settling parties, released parties, and immune parties are not parties against whom judgment can be entered and will not be jointly and severally liable. *Id.* If

Appendix C (Exhibit A to Declaration of Christopher Thayer). Suppl. Clerk’s Papers at ____.

¹² RCW 4.22.070 governs limitations on contribution. If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimant’s total damages. RCW 4.22.070(1)(b). “Fault” includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. RCW 4.22.015.

a defendant in a lawsuit is seeking contribution against a party already named in the lawsuit, such action may not be brought after the other party has been dismissed. DeWolf and Allen, *Tort Law and Practice*, 16 *Wash. Prac.* § 12.66 (2006), citing *Robinson v. McReynolds*, 52 Wn. App. 635, 762 P.2d 1166 (1988).

The Byrnes/Reids would also be barred from seeking contribution from Oldfield by the statute of limitations. As discussed above, the statute of limitations in a WSSA claim is three years. Had Oldfield remained a party in the action, the Byrnes/Reids could have brought a claim for contribution against Oldfield and related that claim back to the original filing of the action. But since Oldfield was dismissed after summary judgment and before this Court remanded for further proceedings, they may no longer look to Oldfield for contribution. CP 362-64. A party making a claim for contribution must pay the liability within the statutory period. *Baker v. Winger*, 63 Wn. App. 819, 824, 822 P.2d 315 (1992). By dismissing Oldfield, the Mitchells precluded the Byrnes/Reids from relating their claims to the original filing date.

The Mitchells cite to *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998) to argue that the Byrnes/Reids can still seek contribution from Oldfield because payment has not been made. *Pietz*,

however, concerned contribution on a contract case, not a WSSA claim, and has no application here.

The Byrnes/Reids are barred from seeking contribution from Oldfield because he has been released by the Mitchells and the statute of limitations has expired. They are prejudiced if the Mitchells are now given leave to amend.

Finally, unlike the tort claims the Mitchells originally brought, WSSA provides for the award of costs and attorney fees. RCW 21.20.430(2). As suggested above, the Mitchells likely seek to amend their complaint in order to avail themselves of this statutory means of recovering their expenses. While a plaintiff is entitled to recover reasonable attorney fees and costs under CPA, the court must segregate time spent on the CPA claim from time spent on other theories and claims on the record, even if the other theories and claims are interrelated or overlap. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994); RCW 19.86.090. The fees and costs allowed under WSSA could provide the Mitchells a universal means to recover their expenses. To allow the Mitchells an eleventh hour opportunity to potentially recover all their costs and fees under the statute would be extravagantly prejudicial to the Byrnes/Reids. This matter has been in litigation since at least July 30, 2004. Six years of litigation has already exposed the Byrnes/Reids to

significant legal costs, and this appeal and further trial will only increase those costs. As it is, the Byrnes/Reids have proceeded in their defense in the presumption that they, like the Mitchells, were bearing their own legal expenses. To reverse that assumption is prejudicial. Under *Sprague, supra*, the trial court did not abuse its discretion in denying the Mitchells' motion to amend, given the delays and prior amendments it had already granted.

(2) As the Trial Judge Did Not Abuse Her Discretion, Remand to a Different Judge Is Not Necessary

The Mitchells ask this Court to remand to a different judge, arguing that an objective reasonable person would question Judge Stolz's impartiality. Resp'ts br. at 23. The test for determining whether the judge's impartiality might reasonably be questioned is an objective one. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). For all the reasons laid out above, Judge Stolz did not abuse her discretion in denying the Mitchells' motion to amend. Where the judge did not abuse her discretion, no objective reasonable person would question her impartiality. It is therefore unnecessary for the Court to remand to a different judge.

The Mitchells begin their argument by attempting to impugn Judge Stolz by pointing out that this Court recently reversed one decision in *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117, *review denied*, 165

Wn.2d 1049 (2009). Resp'ts br. at 23-24. That this Court has previously overturned a trial court judge scarcely counts as news, and the matter in which she was overturned has no bearing on the present case. Nor is it evidence of Judge Stolz's lack of impartiality that she granted summary judgment and awarded attorney fees, as the Mitchells argue. Resp'ts br. at 25. Entry of judgment and the award of fees are bread and butter for trial judges.

Compare those workaday activities to the "unusual circumstances" in the case the Mitchells point to. In *Saldivar*, this Court remanded to a different judge after Judge Stolz had, on her own motion, sought materials from the Medical Quality Assurance Commission, used that information as evidence of the plaintiffs' lack of credibility, and expressed her skepticism of the plaintiffs' and various witnesses' credibility. *Id.* Under those facts, this Court held that concerns about judicial economy and the judge's familiarity with the record did not outweigh the appearance of unfairness. *Id.* No such procedural irregularities or concerns are present here, and the Mitchells point to none other than the summary judgment and fee award which were the subject of the original appeal.

The Mitchells also cite to *McCausland v. McCausland*, 129 Wn. App. 390, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d

607, 152 P.3d 1013 (2007) stating that it is similar to the present case. Resp'ts br. at 24. That is not so.

Like this case, *McCausland* went back up on appeal after remand. In the first appeal, the Court remanded to the trial court to “reconsider and to segregate monthly child support, spousal maintenance, and any property distribution adjustments flowing therefrom.” *Id.* at 394. It also directed the trial court to set child support according to the requirements of chapter 26.19 RCW, including specifying any deviations and their justification. *Id.* Finally, it directed the trial court to reconsider its award of attorney fees to the wife at trial. *Id.* This, the trial court did not do. *Id.* at 400-01. Instead of “strictly following” the mandate, the trial court ignored this Court’s “specific holdings and directions on remand.” *Id.* at 400. This Court stated that its mandate is binding on the trial court and must be strictly followed. *McCausland*, 129 Wn. App. at 399. “[T]he remand did not open all other possible dissolution-related issues...” *Id.* at 400. This Court then remanded to a different trial judge. *Id.* at 395.

The trial court in the present case *followed* this Court’s mandate. It was confronted on remand with the Mitchells’ attempted to amend yet again to abandon their former theories and assert an entirely new one. Far from ignoring the holdings and directions of this Court on remand, the trial court was carrying out its obligations under *Harp* and CR 12.2 by

denying the motion to amend and retaining the very causes of action which this Court had already reviewed. It was the Mitchells who opened other issues, not the trial court.

In the event this Court remands for further proceedings, it should, in the interests of judicial economy, remand to Judge Stolz who is familiar with the case.

F. CONCLUSION

The trial court did not abuse its discretion in denying the Mitchells' motion to amend their complaint. It was the fourth time the Mitchells had sought to do so in the decade since the original sales of the alleged securities.

By seeking to abandon their prior claims in favor of an all together new theory, the Mitchells were fundamentally altering the nature of the case. The trial court has never had the opportunity to carry out this Court's mandate because the Mitchells ignored it and attempted to bring the new WSSA claim instead.

The Byrnes/Reids would be prejudiced by an amendment allowing a new theory eleven years after the events in this case and six years after the original complaint, a theory that is time-barred. The elements of the statutory claim differ from those of their tort claims, and, critically, entail a lower burden of proof. Allowing the Mitchells to add a WSSA claim

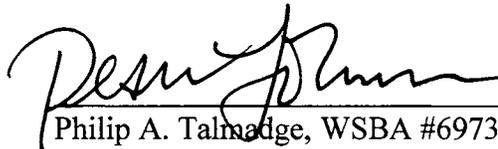
would also allow them to avail themselves of statutory attorney fees and costs, should they prevail.

As the trial judge did not abuse her discretion in denying the Mitchells' motion to amend, it is not necessary to remand to a different judge.

This Court should affirm the trial court's order denying the Mitchells' motion for leave to amend their complaint. Costs on appeal should be awarded to the Byrnes/Reids.

DATED this 12 day of February, 2010.

Respectfully submitted,



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APPENDIX

A

FILED
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ADMINISTRATION

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APR 14 2006 APR 14 2006

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

SMITH, PS LAWYERS

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.

No. 04-2-10247-8

DECLARATION OF KEVIN BYRNE
IN SUPPORT OF DEFENDANTS
BYRNE AND REID'S MOTION FOR
SUMMARY JUDGMENT

KEVIN AND MARY BYRNE,

Third Party Plaintiffs,

v.

WILL STEVENS, et al.,

Third Party Defendants.

KEVIN BYRNE declares as follows:

1. I am one of the Defendants herein. I make this declaration based upon personal knowledge.

2. On August 13, 1995, NW, LLC ("NW") was formed (a separate entity from NW Commercial Loan Fund, LLC). NW was in the business of loan securitization, a

DECLARATION OF KEVIN BYRNE IN
SUPPORT OF DEFENDANTS BYRNE AND
REID'S MOTION FOR SUMMARY JUDGMENT-

Page 1

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1 complex series of transactions, which resulted in a large number of loans being sold as a
2 group to investors. NW also loaned monies directly to borrowers, who at that time would not
3 qualify for the securitization process. All the loans involved with NW were secured by
4 commercial real estate.

5 3. On October 4, 1995, NW made its first of a series of loans to Graham Square I.
6 The loan had an equity feature and NW received back both a deed of trust and a fifty percent
7 (50%) equity interest in Graham Square. The monies loaned to Graham Square came from
8 NW and were secured by real estate owned by Graham Square and personally guaranteed by
9 Al Olson. No monies were paid to members of NW, including James Reid or myself.

10 4. On September 13, 1997, the individual members of NW, Michael Price ("Mike
11 Price"), Thomas Price ("Tom Price"), Robert Coleman ("Coleman), Reid and I purchased
12 from NW, 49.5% of Graham Square for the sum of approximately \$150,000.00. The monies
13 were paid to NW. No monies were received by individual members, including Reid and
14 myself. Thereafter, Reid and I made additional capital contributions to Graham Square in
15 excess of \$100,000.00 each. All monies paid by Reid and me to Graham Square have been
16 lost.

17 5. I also invested in NWCLF through NW's 401(k) plan. All of those funds have
18 also been lost.

19 6. NW was managed by Coleman and me. Coleman, a former bank president,
20 was operations manager in charge of managing the assets of NW. The manager for loan
21 servicing also reported to him. As asset manager, Coleman was responsible for
22 documentation of assignment of loans from NW to NWCLF. I was in charge of establishing
23

1 correspondent lenders who originated loans, relationships with investors, investment bankers
2 and rating agencies. The senior loan officer also reported to me.

3 7. On May 11, 1998, NW formed NWCLF for the purpose of holding loans
4 which did not qualify for securitization and as a vehicle for investors in NWCLF to earn
5 interest from loans assigned from NW to NWCLF. The manager of NWCLF was NW. It was
6 specifically expressed in writing that loans assigned to NWCLF would originate with NW.

7 8. In January 1999, I was not the asset manager of NW – Coleman was. Without
8 my knowledge or participation he and Steven Hansen assigned deeds of trust from NW to
9 NWCLF. I later located the documents relating to those loans, which are attached hereto.
10 (Exhibits 1, 2 and 3). These loans were secured by real property and personally guaranteed
11 by Al Olson. Mr. Olson's net worth at the time was \$3,174,670 (Exhibit 4).

12 9. On January 9, 2001, Coleman resigned as manager of NW, and as the asset
13 manager of NWCLF (Exhibit 5). Thereafter, due to adverse market conditions and debt
14 structure, NW began closing its business. At that time, NW owed in excess of
15 \$50,000,000.00 to its creditors, and US Bank and other banks, had a security interest in all the
16 assets of NW, except for the loans to Graham Square.

17 10. In February 2001, Gary Grendahl and I met to discuss the financial condition
18 of NWCLF. In that meeting Grendahl stated he had been told NWCLF was in trouble. At
19 that time, due to the lack of manpower and Coleman's resignation, I did not know what assets
20 were specifically held by NWCLF. I agreed to investigate and meet with Grendahl again in
21 mid-March.

1 11. In mid-March 2001, I met with Grendahl and Will Stevens, who was an
2 advisor of Grendahl's. Grendahl stated he was worried about the investments in NWCLF. I
3 agreed to provide information that I could locate relating to the investments of NWCLF.

4 12. In April 2001, I again met with Stevens and Grendahl and provided them with
5 a balance sheet printed on April 4, 2001 (Exhibit 6).

6 13. Shortly after May 10, 2001, I provided Grendahl and Mitchell with a detail of
7 loans outstanding for NWCLF and the current balances on those loans. These documents
8 disclose completely the loans held by NWCLF (Exhibit 7).

9 14. In May 2001, Grendahl, Mitchell and I started discussions regarding Mitchell
10 or Grendahl taking over management of NWCLF, and also discussed the potential of
11 Grendahl purchasing a portion of the property for a mini-storage warehouse. As part of these
12 discussions we finally agreed that NW would resign as the manager of NWCLF and that a
13 new entity would be created by Reid and me, which would act as the manager for NWCLF.

14 15. Prior to June 5, 2001, I met with Stevens, Grendahl and Mitchell and reviewed
15 the loans held by NWCLF. In that meeting we went through boxes which contained loan
16 documents relating to NWCLF. At that time, they indicated they had determined on their
17 own, that NWCLF held eight (8) notes, all of which, with the exception of one, were secured
18 by the Graham Square property. The loans had been purchased in January 1999. I advised
19 them that the loans were in second position; some loans were delinquent; and that the
20 members of NW were also fifty percent (50%) owners of Graham Square, with the other fifty
21 percent (50%) owned by Olson.

22 16. In our early June meeting, I provided Grendahl, Mitchell and Stevens with loan
23 memos, which described the borrower, collateral, value, guaranties, the primary source of

1 repayment, the secondary source of repayment, and comments with regard to the loans which
2 were either held by NWCLF, or which would be held by NWCLF. In addition to the memos,
3 I also provided site plans, floor plans, rent rolls, copies of assignments of deeds of trust,
4 balance sheets, profit and loss statements and photographs of the site (Exhibit 8)

5 17. On June 5, 2001, NW resigned as the manager of NWCLF (Exhibit 9). The
6 resignation was pursuant to my prior discussions and agreement with Grendahl, Mitchell and
7 Stevens, that a new entity would become the manager of NWCLF.

8 18. On June 6, 2001, Loan Holdings, LLC ("Loan Holdings") was created and
9 appointed as the manager of NWCLF. Around this time, I met with Mitchell in his office and
10 gave him additional information relating to NWCLF. In that meeting, Mitchell stated that he
11 had looked at the property and wanted to hold Olson's feet to the fire. The documents given
12 to Mitchell included the financial statement for May 31, 2001, the loans outstanding by loan
13 number and balance, and a timetable for payoff (Exhibit 10).

14 19. On July 9, 2001, I had a telephone call with Grendahl and a separate telephone
15 call with Mitchell. We agreed to meet again on July 18, 1001.

16 20. On July 9, 2001, Woodell wrote another letter to Loan Holdings (Exhibit 12).
17 In that letter, Woodell set forth all the claims that are now included in this lawsuit, and
18 demanded Stevens have access to all the documents of NWCLF.

19 21. On July 16, 2001, I sent a letter to all the members of NWCLF and provided
20 loan summaries to Grendahl and Mitchell (Exhibit 13).

21 22. On July 17, 2001, pursuant to the agreement, NW transferred all its remaining
22 interest in deeds of trust secured by Graham Square property to NWCLF (Exhibit 14). This
23 took place at the time NWCLF was being managed by Loan Holdings. After the transfer I

1 continued to discuss with Grendahl and Stevens possible arrangements for recouping value
2 out of the Graham Square property. I had several discussions with Grendahl regarding him
3 acquiring a mini-storage facility, and I also discussed with Mitchell about him managing the
4 properties. All of this occurred in June and July of 2001.

5 23. On July 18, 2001, I once again met with Grendahl and Stevens to discuss the
6 loans assigned to NWCLF and rumors of funds being used for other businesses. Grendahl
7 and Stevens agreed to return to our offices to look at documents regarding Coleman's roll in
8 assigning loans.

9 24. On November 7, 2001, Loan Holdings resigned as the manager for NWCLF,
10 and Stevens was appointed as its manager. As part of the resignation NWCLF released all
11 claims against Reid and me relating to transactions between June 6, 2001 and November 7,
12 2001 (Exhibit 14).

13 25. On January 16, 2002, NWCLF filed for bankruptcy reorganization. As part of
14 its filing, NWCLF stated: "The debtor's operations were managed primarily by Robert
15 Coleman, co-President of NW, LLC, up to the time he withdrew. Kevin Byrne agreed to
16 oversee the wind down of the debtor until current management took over." (Exhibit 15.)

17 26. All my actions in this case were taken either as a managing member of NW or
18 as managing member of Loan Holdings. I took no actions independent of my role as a
19 manager. I received no funds from NWCLF or Loan Holdings. I lost all of my investment in
20 Graham Square and all my investment in NWCLF, including the 401(k) contribution to
21 NWCLF and Capital calls by Graham Square. I did not benefit personally in any way by the
22 transactions involved in this claim.
23

LAW OFFICE OF
MICHAEL H. WOODSELL
ATTORNEY AT LAW
4540 SOUTH ADAMS ST.
TACOMA, WA 98409

TELEPHONE: (253)472-3841
FACSIMILE: (253)472-4086

CELLULAR: (253)709-1413
michaelwoodell@aol.com

July 9, 2001

Loan Holdings, LLC
7610 - 40th Street West
University Place, WA 98464

Re: Notice of Claim

Dear Sirs:

I represent Gary and JoAnn Grendahl, who are limited members of NW Commercial Loan Fund, LLC. For your information, I also intend to write a similar letter directly to NW L.C.C., LLC, NW Commercial Loan Fund, LLC, Kevin Bryne, Robert Coleman, Dr. James Reid, Michael Price, and Thomas Price.

Gary and JoAnn Grendahl hereby give notice of claim against NW L.C.C., NW Commercial Loan Fund, LLC, Mr. Kevin Byrne, Dr James Reid, Robert Coleman, Michael Price, Thomas Price, and Loan Holdings, LLC for all losses and damages the Grendahls have suffered, or will suffer, as a result of any errors and omissions; breach of fiduciary duties, or any other improper actions taken by any of them in the management of the NW Commercial Loan Fund, LLC and the protection of the limited members' membership interests and economic interests. We demand that all of the above persons or entities give immediate notice of this claim to all insurance carriers who provide cover or may provide cover for such claims.

1 **EXHIBIT** 11

NWCLF 00517

01199

The Grendahls have reasonable grounds for believing the following improper acts and errors or omissions have occurred, and are occurring, and reserve the right to add other allegations as additional facts become known:

1. Violation of investment restrictions regarding size of loans as a percentage of total assets.
2. Violation of investment restrictions regarding loan quality.
3. Violation of investment restrictions regarding non-income producing properties.
4. Misrepresentation and concealment.
5. Making unauthorized loans against Fund assets.
6. Allowing tax liens and defaults on real estate and superior loans to remain uncured, thereby jeopardizing the collateral underlying the loans.
7. Failure to comply with the Operating Agreement in several particulars, including breach of fiduciary duties, failure to act prudently in making loans and managing cash, failure to make requested withdrawals, and failure to make proper accountings.

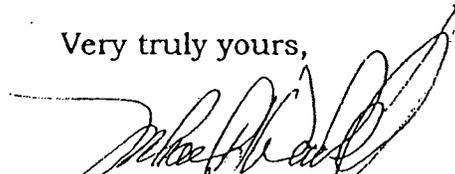
We are so concerned that we do not yet have all the pertinent facts, we must demand that our accountant, William R. Stevens, be given immediate access to NW Commercial Loan Fund records to audit the status of the loan portfolios and bank accounts. We demand to see

1. All loan applications and approval records.
2. Borrowing authority.
3. Title Policies.
4. Tax payment status.
5. Assessed values.
6. Appraisals.
7. All loan modifications and extensions.
8. Correspondence with borrowers.
9. All related party transactions.
10. Banking records.

We must have this access within five business days from the date of this letter. If we do not have such access within that time, the Grendahls will be forced to consider seeking the appointment of a receiver.

We look forward to your prompt response.

Very truly yours,



Michael H. Woodell

B

REC'D BY
SUPERIOR COURT
ADMINISTRATION

FILED
IN COUNTY CLERK'S OFFICE

APR 14 2006

A.M. APR 14 2006 P.M.

APR 14 2006

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

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.

No. 04-2-10247-8

DECLARATION OF
DOUGLAS V. ALLING IN SUPPORT
OF DEFENDANTS BYRNE AND
REID'S MOTION FOR SUMMARY
JUDGMENT

KEVIN AND MARY BYRNE,

Third Party Plaintiffs,

v.

WILL STEVENS, et al.,

Third Party Defendants.

DOUGLAS V. ALLING hereby declares as follows:

1. I am the attorney for Defendants Byrne and Reid in the above-entitled action. I make this declaration based upon personal knowledge.

DECLARATION OF DOUGLAS V. ALLING IN
SUPPORT OF DEFENDANTS BYRNE AND
REID'S MOTION FOR SUMMARY JUDGMENT

- Page 1

*Smith
Alling
Lane*

A Professional Services Corporation
Attorneys at Law

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Tacoma, Washington 98402
Tacoma: (253) 627-1091
Seattle: (425) 251-5938
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COPY

01229

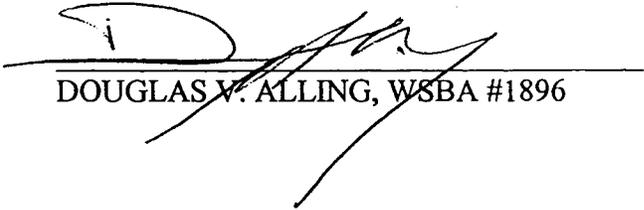
1 2. Attached hereto as Exhibit 16 is a Memorandum authored by Miles Yanick of
2 Davis Wright Tremaine to Will Stevens, Gary Grendahl and Rob Mitchell. This document
3 was produced by Will Stevens in response to a Subpoena Duces Tecum.

4 3. Attached hereto as Exhibit 17 are pages 8, 9 and 10 to the Declaration of
5 Robert Mitchell dated July 2005, which was previously filed herein.

6 4. Attached hereto is Exhibit C from William Stevens Declaration dated August
7 1, 2005, which was previously filed herein.

8 I hereby declare under penalty of perjury under the laws of the State of Washington
9 that the foregoing is true and correct.

10 EXECUTED this 14th day of April, 2006 at Tacoma, Washington.

11
12 
13 _____
14 DOUGLAS V. ALLING, WSBA #1896
15
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21
22
23



Davis Wright Tremaine LLP

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www.dwt.com

MEMORANDUM

TO: Will Stevens, Gary Grendahl, and Rob Mitchell

FROM: Miles A. Yanick

DATE: December 10, 2003

RE: Potential Claims Against Tom Oldfield or Individual Members of NW LLC

I. QUESTIONS PRESENTED

You have asked us to consider the following, based on the facts available to us at this time:

1. Do NW Commercial Loan Fund LLC ("NWCLF") or its members have a legal cause of action against Tom Oldfield arising out of his representation of NWCLF, NW LLC, as the manager of NWCLF, or Kevin Byrne, as manager of NW?
2. Are any of the individual members of NW potentially liable to NWCLF or its members for NW's wrongdoing as manager of NWCLF?

II. BRIEF ANSWERS

1. NWCLF does appear to have claims against Oldfield for malpractice, breach of his fiduciary duties to NWCLF as its lawyer, and perhaps misrepresentation, depending on the facts as they develop. It appears from the documents we have reviewed that Oldfield had an attorney-client relationship with NW, NWCLF, and perhaps Byrne all at the same time. Thus, he owed a duty to NWCLF as his client. The representation of multiple parties also created a potential conflict from the start, which he never disclosed or obtained consent to. If Oldfield knew what Byrne/NW were doing when they made the loans to the Graham Square and Inline LLCs, then he should have realized that he had an actual conflict, which he also failed to disclose. He would have been aware that one client (NW) was transacting business on behalf of a second client (NWCLF) contrary to the stated investment guidelines of the second client,



creating potential liability of the first client to the second. The more difficult task will be establishing a duty on the part of Oldfield to do more than simply withdraw once he became aware of what was happening. We will need to establish that he had a duty to do something that would have prevented the loans from being made. We also will have to establish that Oldfield in fact knew what Byrne/NW were doing at the time.

2. Individual members of NW may be liable for any knowing active participation in NW's conduct as manager of NWCLF.

III. FACTUAL BACKGROUND

A. NW Commercial Loan Fund.

NW Commercial Loan Fund ("NWCLF") was formed in May 1998. It has 21 limited members. Most of them are individuals. Limited members also include trusts, corporations, and retirement plans. It was initially funded with approximately \$3.3 million.

NW was the manager of NWCLF. The members of NW were Mike Price, Tom Price, James Reid, Kevin Byrne, and Robert Coleman. Byrne and Coleman were primarily responsible for managing the business.

B. Operating Agreement and Offering Memorandum.

The Operating Agreement describes the business of NWCLF generally as "to invest, reinvest and trade in promissory notes and other obligations secured by mortgages or deeds of trust or in real estate contracts or similar financial instruments (all such items hereafter referred to as 'Mortgages')." (Article 3.) The definition of the Manager's rights and duties was similarly broad, giving it full and complete authority and discretion to, among other things, acquire mortgages, except as otherwise provided in the Agreement. The Agreement prohibits the Manager from acting in bad faith or contrary to the interests of the company but does not limit or define the types of mortgages the Manager in which the Manager may invest.

The Offering Memorandum states NWCLF's investment policy in more detail. It states that the company "expects that at least 65% of [its] assets will be invested in commercial loans that are of A or B quality [and] may invest up to 35% of its assets in higher risk commercial loans, including 'hard money' loans." (Part III.B.) The Memorandum further states that NWCLF "will not permit more than 15% of its long-terms assets to be invested in any single Mortgage." (*Id.*) The Memorandum then lists general guidelines that the Manager "will follow . . . , subject to waiver or exception only in a limited number of instances." (*Id.*) Those general guidelines include diversification; primary investment in income-producing properties; primary investment in mortgages in first-lien position (provided that the Manager can invest in mortgages in a lower position if appropriate); and loan-to-value ratios generally of not more than 75% for "A" and "B" borrowers and 65% for "hard money" borrowers. In no event was the Manager to allow more than 10% of the company's assets to be invested in mortgages not conforming to the guidelines.

By the Subscription Agreement, members adopt and agree to be bound by the terms of the Operating Agreement and confirm that they have read carefully the Offering Memorandum.

C. Involvement of Oldfield.

Attorney Tom Oldfield assisted in drafting the Offering Memorandum for NWCLF and provided advice regarding, among other things, how to make distributions from the company taxable as interest income rather than as dividends. Mr. Oldfield also assisted in drafting the Operating Agreement for NWCLF.

Mr. Oldfield sent at least one invoice for these services to NW, to the attention of Kevin Byrne. On a post-it note on that invoice, somebody wrote the question, "Should NW Comm'l Loan Fund or NW, LLC pay?" In response, somebody else wrote "Loan Fund." Consistent with this, the placement memorandum identified Oldfield's firm as "counsel for the Company, the Member and certain of its affiliates." It also stated that his firm "has not been retained to represent the interests of Limited Members."

The address of Mr. Oldfield's firm, Sloan, Bobrick & Oldfield, Inc., P.S. is the same address as that of NW and Loan Holdings.

It is not clear how involved Oldfield was in the loans to the Graham Square LLCs. This will be an important point to establish. Without such knowledge, there is no liability for failing to disclose it. However, Oldfield did apparently prepare the deeds in lieu of foreclosure for Graham Square properties and was actively representing Byrne/NW as their improper loans came to light.

D. Discovery of Graham Square Investments.

In about March of 2001, some of the limited members of NWCLF attempted to make withdrawals from the fund and were met with delay and evasive responses from Byrne. Gary and his attorney, Mike Woodell, asked for a meeting to discuss what was happening with the fund. Byrne showed up at the meeting with Oldfield. Gary viewed Oldfield as the attorney for NWCLF at that point, and Oldfield's presence helped to allay Gary's concern.

At the meeting, Byrne said that he did not know the number of notes NWCLF held or the identities of the makers of those note but promised to provide a payoff schedule and the balance on each note. Byrne eventually provided the payoff schedule and balances and made a distribution. According to the schedule, the next distribution was due 30 days later.

When the second distribution did not arrive, Byrne said that it would take another 30 days. At that point, Gary requested another meeting with Byrne. Gary recalls Byrne saying that he wanted "his attorney" present at the meeting. That attorney was Oldfield. During that meeting, Byrne stepped outside the meeting room several times to confer with "his attorney."

The second meeting was in June 2001. By that time, the limited members had learned through their own investigation that NWCLF held only eight notes. Aside from one note for a property in Oak Harbor for approximately \$200,000, the notes were all for loans to Inline LLC, Graham Square I, LLC, and Graham Square II, LLC (collectively, "the Graham Square LLCs"). They covered contiguous parcels of property in Graham, Washington, where the makers were developing a shopping center. NWCLF had purchased the Graham Square notes in January 1999.

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The limited members got a little more information at the June meeting. They learned that NWCLF was in second position on most of the notes and that some of the notes were delinquent. They also learned that the members of the Graham Square LLCs were the members of NW, together with Al Olsen, who owned a 50% share in the LLCs.

E. Resignation of NW as Fund Manager and Decision to Liquidate NWCLF.

A May 29, 2001, letter from Byrne to limited members of NWCLF states that NW had resigned as the manager of NWCLF and that Byrne and Reid had formed a new entity, Loan Holdings LLC, to manage NWCLF. The letter refers to a previous notice to the limited members that NWCLF was being liquidated. The letter purported to enclose a financial statement for NWCLF, a list of loans it held, and a liquidation plan.

NW's resignation as manager of NWCLF was effective June 5, 2001. A letter from Loan Holdings sometime after June 6, 2001 apparently accompanied partial distributions to the limited members. It also asked the members to vote on whether audited financial statements should be prepared for NWCLF for 2000 and 2001, recommending that they not be prepared. The preferred members followed the recommendation and voted not to have audited financials prepared.

On July 9, 2001, attorney Woodell wrote to Oldfield on behalf of the Grendahls. The letter addressed Oldfield as the lawyer for NW. It notified him of the Grendahls' claims against NW and its members and NWCLF for damages they had suffered as a result of any improper actions by any of them in the management of NWCLF. The letter requested that the named people and entities give immediate notice of the claim to any insurance carriers providing coverage for such claims. The letter further demanded immediate access to NWCLF's books and threatened the appointment of a receiver.

A week later, Byrne, representing Loan Holdings, sent a letter to the NWCLF members enclosing quarterly financial statements. The letter also said that Byrne expected a second payment out of the fund within the next few weeks.

F. Loan Holdings Resigns; NWCLF Accepts Deeds in Lieu of Foreclosure.

According to a September 14, 2001 letter from Peter Kesling, another lawyer at Oldfield's law firm, to Will, Loan Holdings had been unable to carry out its repayment plan for NWCLF and was no longer capable of performing its function as manager.¹ The limited members therefore had agreed to appoint Will as interim manager of the fund. According to the letter, Will was authorized to accept deeds in lieu of foreclosure from the borrowers under the

¹ The letter refers to another letter, dated September 13, 2001, also by Kesling. It purports to be a revision of the points discussed in the September 13 letter based on Kesling's understanding of the substance of a conversation between Will and Byrne. What was the substance of this conversation?

notes held by NWCLF. It further stated that, “[b]y accepting the Deeds in Lieu it is understood that any and all personal guarantees relating to said notes will be released.”²

After Loan Holdings resigned as manager of NWCLF, the limited members apparently wanted Byrne and Reid to continue to assist the company in liquidating its holdings. A November 7, 2001, letter from Byrne states that he and Reid were willing to take that responsibility, without direct compensation, in exchange for a release of claims by NWCLF against Loan Holdings. The release document released Loan Holdings for all claims arising out of its management of NWCLF between June 6, 2001 and the date of the release (November 7, 2001). In addition, Byrne secured releases of himself and Reid from claims by the limited members of NWCLF. This release was conditioned upon each limited member receiving the balance owed to him, as stated on the June 30, 2001 statement, plus 9% interest to October 1, 2001, by April 1, 2003. These payments were never received.

Loan Holdings officially resigned as manager of NWCLF the same day – November 7, 2001. Also that day, the limited members consented to ratify amendments to the NWCLF operating agreement adopted by NW/Byrne, the resignation of Loan Holdings, and the appointment of Will as the manager.

In September and October 2001, the members of the Inline and Graham Square LLCs voted to sell all or substantially all of the LLCs’ assets. Quitclaim Deeds in lieu of foreclosure were then executed by the LLCs to Northwest Commercial Loan Fund on Friday, November 6, 2001, for the Graham Square properties. The deeds apparently were prepared by Oldfield’s firm, as the instructions were to return it to Sloan, Bobrick & Oldfield after recording.

On January 16, 2002, the limited members authorized Will to file Chapter 11 bankruptcy.

G. Questions.

A January 8, 2002, letter from Will states that it was disclosed in August 2001 that distributions to limited members were not on track and that the borrowers on the notes held by NWCLF could not repay their loans unless the collateral was sold or refinanced. It was also at that time, according to the letter, that the limited members learned that the borrowers were in default on a portion of the first-position debt and that NWCLF was in second position. We need to square these statements with the timing of events as described above. In general, the sequence of events will have to be clarified eventually. It would help to have someone review the file and make a detailed timeline.

IV. DISCUSSION

A. Claims Against NW and its Members.

Both NWCLF and its members have potential claims against NW for breach of its duties to the members, misrepresentation, breach of the operating and subscription agreements, and perhaps securities fraud and violations of the Consumer Protection Act (“CPA”).³

² Handwritten notes in the margin of the copy of this letter say “No.”

Unless otherwise provided in the limited liability company agreement, the manager or member is not liable for damages to the company or its members for any action or failure to act on behalf of the company "unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law." RCW 25.15.155. The Operating Agreement mirrors this language. It provides that the manager shall not be liable for any acts or omissions "performed in good faith pursuant to the authority granted by [the operating agreement] or in accordance with its provisions, and in a manner reasonably believed by the Manager to be within the scope of the authority granted to the Manager and in the best interest of the Company; provided that such act or omission did not constitute fraud, misconduct, bad faith or gross negligence." (Operating Agreement § 5.3.)

As the manager of NWCLF, NW violated the investment guidelines and prohibitions stated in the Offering Memorandum in numerous ways. These violations were not in the best interests of the company and may themselves have constituted breach of fiduciary duty, fraud, misrepresentation, gross negligence, and/or violations of the CPA. In addition to these tort-type claims, these violations may also support contractual claims. While the operating agreement affords some protection to all of these claims and we do not know all the details of the loan transactions at issue, it appears that establishing liability on the part of NW will be possible under a variety of theories.⁴

Your question, however, was whether the individuals could be held liable. The answer is yes, provided that the individual in question knowingly and actively participated in the unlawful conduct. See *Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745 (1971); *Consulting Overseas Mgmt., Ltd. v. Shitkel*, 105 Wn. App. 80 (2001).⁵

B. Claims Against Oldfield.

Oldfield's liability depends on two things: (1) what did Oldfield's duties to his various clients require him to do; and (2) did his failure to do so cause damage to NWCLF? Establishing both of these will not be easy. Following is a preliminary analysis of these issues, based on what we know. They will require additional legal research and factual development if we proceed.

1. Duty to withdraw.

Washington's Rules of Professional Conduct provide that "[a] lawyer shall not represent a client if the representation of that client will [or *may*] be directly adverse to another client"

³ Either NWCLF or individual members could assert these claims. Because we and Will represent NWCLF, we would bring an action on behalf of the fund. But the individual members could also bring actions of their own. In theory, their damages are no greater as individual investors than as members of the fund, but there may be practical implications if the assets available to satisfy a judgment are limited.

⁴ We have not explored exactly which claims to assert, as it is clear that many are possible and this was not one of the primary issues of concern.

⁵ For purposes of this memo, we will refer to NW, Byrne, and any other principals collectively as NW, with the understanding that we may decide to pursue claims against one or some of the individuals.

unless (1) the lawyer reasonably believes that the representation will not adversely affect the relationship with the other client and (2) each client consents in writing after consultation and full disclosure of the material facts. Rule 1.7(a) & (b). Section 131 of the RESTATEMENT OF THE LAW GOVERNING LAWYERS states the same general rule as specifically applied to the situation here:

Unless all affected clients consent to the representation under the limitations and conditions provided in section 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 131 (2000) [hereinafter, "RESTATEMENT"].

Oldfield's duties to both NWCLF and NW (and perhaps to Byrne personally) put him squarely in a conflict situation. Indeed, the potential for a conflict had been present from the outset of the relationship between Oldfield and NWCLF. Oldfield should have disclosed it long before the point at which he became aware (if in fact he did become aware) of actual misconduct on the part of NW to the detriment of NWCLF.

The case of *Eriks v. Denver*, 118 Wn.2d 451 (1992), is a good illustration of this point involving facts similar to those presented here. In *Eriks*, an attorney represented both the promoters of a tax-shelter fund and all of the investors in the fund, defending them jointly in audits before the IRS and in cases in U.S. Tax Court. *Id.* at 453-54.⁶ However, before he ever started working for the fund, the lawyer knew that the IRS was, as a matter of policy, automatically rejecting tax credits and deductions based upon similar investments. Thus, he knew that each investor would be audited and that the credits and deductions taken by that investor likely would be disallowed. He also knew that, as a result, the investor clients would potentially have civil claims against the promoter clients. The lawyer discussed the potential conflict with the promoter clients but not with the investor clients. Even when problems with the fund began to arise, the lawyer continued to represent some of the investors without advising them of their rights against the promoters. The investors eventually filed a class action against the lawyer for malpractice and breach of fiduciary duty. *Id.* at 454.

The trial court ruled on summary judgment that the lawyer had an actual conflict of interest and that his failure to disclose it to the investor clients violated the Code of Professional Responsibility and therefore was a breach of his fiduciary duty to the investor clients. On appeal, the court held that whether an attorney's conduct violates the relevant rules of professional conduct is indeed a question of law that can be decided on summary judgment and affirmed the order of summary judgment.

⁶ As here, incidentally, the lawyers shared an office space with the promoters. *Id.* at 454.

As a remedy for the breach of fiduciary duty, the trial court had ordered the attorney to return all of the fees paid by the investor clients.⁷ This, too, was affirmed. *Id.* at 462-63. The trial court did not, however, decide the malpractice and negligence claims on summary judgment, so they were not at issue in this case. *Id.* at 462.

As suggested by RPC 1.7 and stated in the *Eriks* case, a lawyer's duty of loyalty includes a duty to either avoid or disclose any actual or potential conflicts. But what should a lawyer do who finds himself with an un-waived actual conflict? The *Eriks* case suggests that the lawyer who fails to disclose a potential conflict that becomes an actual conflict must withdraw from representation, but the case does not squarely address or purport to provide the final word on the issue. *See* 118 Wn.2d at 459.

Oldfield did not disclose the potential conflict or withdraw when it became an actual conflict. But the question remains whether doing so would have prevented the losses suffered by NWCLF. Would his mere withdrawal have caused the limited members of NWCLF to investigate and discover what NW was up to? If not, his failure to do so did not cause the losses and cannot be the basis for recovering them. In any event, this is a factual issue to develop on which there will likely be room for debate. The fact that Oldfield breached a duty seems more clear (again, assuming that he knew what Byrne/NW were doing when they made the loans).

2. Duty to Speak?

More than a duty to withdraw, we would have to establish a duty on the part of Oldfield to speak—to make affirmative disclosures or warnings that ultimately would have prevented NWCLF's losses. The problem is that Oldfield also had a duty of confidentiality to NW. RPC 1.6(a).⁸

One way around this dilemma may be to argue that Oldfield had a duty to NWCLF to advise its manager, NW, that the manager was acting in a way contrary to the interests of the company. In other words, Oldfield had a duty as NWCLF's lawyer to advise NW so as to prevent it from harming NWCLF. While this duty is not spelled out in the Rules of Professional Conduct, it is consistent with a lawyer's duties of competence and loyalty. The RESTATEMENT states the rule more explicitly. It provides:

If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must

⁷ It is not clear from the case why this was the remedy.

⁸ There are exceptions to this duty. For instance, a lawyer may reveal client confidences to the extent he reasonably believes to be necessary to prevent the client from committing a crime. However, this exception has been construed narrowly, and it is doubtful whether it would apply here. This is one issue that will require more research if we decide to go forward.

proceed in what the lawyer reasonably believes to be the best interests of the organization.

RESTATEMENT § 96(2).⁹ A related rule in Washington provides that a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is . . . fraudulent.” RPC 1:2(d).

Thus, as the self-described lawyer for NWCLF, Oldfield had a duty to NWCLF to act in its best interest when he learned (again, assuming that he did) that NW was making risky investments contrary to the provisions of the Offering Memorandum. This duty arguably included advising NW against such activity and not assisting in such activity. If Oldfield believed, as he should have, that advising just Byrne personally against what he was doing would not have gotten results, then he arguably should have advised the other members of NW of what Byrne was doing. Some of those members likely would have alerted NWCLF’s limited members as to what was going on or perhaps prevented it.¹⁰

3. Negligence/Misrepresentation.

A claim for negligence or negligent or intentional misrepresentation would require proof of basically the same things as the claims for Oldfield’s breaches of his duties as a lawyer. These claims basically assert that Oldfield had a duty to speak up and failed to do so. There is no attorney-client relationship required to assert these claims. However, Oldfield’s duty not to disclose NW’s/Byrne’s confidences would be a defense.

4. Proper Plaintiff.

The plaintiff in any claim against Oldfield would have to be asserted by NWCLF, as it had the attorney-client relationship with Oldfield. He had no duty to the limited members individually. Indeed, the Offering Memorandum expressly states this.

C. Securities Fraud.

The problem with a securities fraud claim against any of the potential defendants is that it requires us to prove that the statements in the offering memorandum were false when made—i.e., that NW knew back in 1998 that it was going to take the members’ money and loan it to the Graham Square LLCs. This may be the case, but we have not seen evidence of this in the documents we have reviewed.

The claim for securities fraud against Oldfield is even more difficult. The securities laws create liability for misrepresentations by one who offers or sells a security. *See* RCW 21.20.010, –.430. A lawyer who performs routine drafting and filing services in connection with an offer is

⁹ The RESTATEMENT is not the law in Washington per se. Rather, it is a statement common of the law as it exists generally in the United States and is often relied upon by the courts for guidance, especially where, as here, there is no case law directly addressing an issue.

¹⁰ Of course, Oldfield may have had a further duty to Byrne personally not to make such disclosures to the other NW members. But ultimately he should not be able to hide behind multiple layers of conflict that he himself created to shield himself from liability.

not liable for misrepresentations made in the course of the sale; rather, his acts must be “a substantial contributive factor in the sales transaction.” *Hines v. Date Line Systems, Inc.*, 114 Wn.2d 127, 148–49 (1990) (internal quotation marks omitted). In *Hines*, the lawyers who provided routine professional services in connection with an offering were not liable for securities fraud where there was no evidence that they had “any personal contact with any of the investors or w[erē] involved in the solicitation process.” As far as we know, the same is true of Oldfield.

D. Statute of Limitations

The shortest statute of limitations we are likely to have is the three-year statute for most torts. RCW 4.16.080. The three years starts to run from the time the wrong was or reasonably should have been discovered. *Quinn v. Connelley*, 63 Wn. App. 733, 736 (1992). Based on what we know, there is no basis to conclude that the NWCLF members should have discovered NW’s activity (and therefore Oldfield’s failure to disclose it or withdraw if he was aware of it) before they actually did. It is our understanding that the discovery came—or began—perhaps as early as March 2001. To be safe, any action should be filed no later than February 2004.

C

Judge Katherine M. Stolz
Hearing Date: May 19, 2006
Hearing Time: 9:00 AM

COPY RECEIVED

MAY 18 2006

SMITH ALLING LANE
BY TIME
EG 4:14 pm

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

ROBERT R. MITCHELL, ET AL

CASE NO. 04-2-10247-8

Plaintiff,

DECLARATION OF CHRISTOPHER L.
THAYER IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS' BYRNE
AND REID'S MOTION FOR SUMMARY
JUDGMENT AND JOINDER OF PRICE
AND PRICE

v.

MARY BYRNE, ET AL

Defendants.

DECLARATION

CHRISTOPHER L. THAYER declares under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am one of the attorneys for the plaintiff in the above-captioned action, am competent to testify, and I make this declaration based upon personal

DECLARATION OF CHRISTOPHER L. THAYER IN
OPPOSITION TO BYRNE/REID'S MSJ AND JOINDER
OF PRICE & PRICE- 1



Larson Hart & Shepherd
Attorneys At Law PLLC
ONE UNION SQUARE
600 UNIVERSITY STREET · SUITE 1730
SEATTLE, WA 98101
TEL 206.340.2008 · FAX 206.340.1962
LHS@L-H-S.COM

26710
01497

1 knowledge and review of documents.

2 2. The individual defendants in this matter have not been deposed.
3 Defendant Reid's deposition is presently scheduled for 5/12/06. Defendant Byrne's
4 deposition was initially scheduled for 5/2/06, but had to be cancelled in light of
5 scheduling conflicts with defense counsel.

6 3. Attached hereto and incorporated by reference as EXHIBIT A is a letter
7 from Kevin Byrne to Bankers Insurance Services dated September 6, 2001, which
8 includes as an enclosure a letter from plaintiff, Tim Jacobson dated 8/28/01. Of
9 note, in his letter Byrne claims that he does not believe Mr. Jacobson's claims "have
10 any merit" and that "I am working with the various fund members to address any
11 concerns they might have." This is further evidence of Byrne's efforts to conceal his
12 wrongdoing and further evidence that plaintiffs did not know, even by 9/01,
13 whether they had been damaged - as Byrne was continuing to represent that they
14 could be made whole out of the sale of the notes owned by NWCLF. This document
15 was produced by Byrne's counsel in the course of discovery.
16

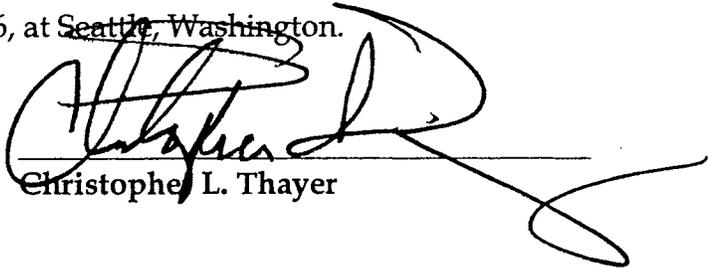
17 4. Attached hereto and incorporated by reference as EXHIBIT B is a true
18 and correct copy of a letter dated February 1, 2001 from defendant Tom Price to
19 Kevin Byrne, which was produced by Mr. Price's counsel, Steve Davies, in the
20 course of discovery in this matter. Mr. Price's letter indicates, at ¶4 an awareness of
21



1 "insider loans" made by NWCLF. This letter was also purportedly "cc'd" to the
2 "other members" of NW, LLC (which would have included defendants Reid, and
3 Mike Price).

4 5. Attached hereto and incorporated by reference herein as EXHIBIT C is
5 a true and correct copy of a letter dated March 23, 2001 from Kevin Byrne to Sound
6 Banking Company, defendant Reid and Bob Coleman. This document was
7 produced during the course of discovery by attorney Steve Davies' office. This letter
8 states "I am making arrangements for NW to resign as managing member of the
9 Fund." This letter was purportedly "cc'd" to Michael Price, Tom Price and Tom
10 Oldfield.
11

12 DATED this 8 day of May, 2006, at Seattle, Washington.

13 
14 Christopher L. Thayer





September 6, 2001

Bankers Insurance Service
Thomas J. Delaney- Vice President
10 South LaSalle Street
Suite 1900
Chicago, IL 60603

Re: Mortgage Bankers Bond Policy Number MBB-00-00211

Dear Mr. Delaney;

NW has received a letter from an investor in the NW Commercial Loan Fund. The NW Commercial Loan Fund is managed by NW L.L.C.

I do not believe this claim has any merit and I am working with the various fund members to address any concerns they might have.

Please contact me about what insurance direction you wish me to take.

Sincerely;

A handwritten signature in black ink, appearing to read 'Kevin M Byrne', is written over the typed name.

Kevin M Byrne
Managing Member

NW L.L.C.
Providing Financial Services Nationwide
www.nwllc.com

EXHIBIT A

NWCLF 00546

01500



Bankers Insurance Service
Thomas J. Delaney - U-P
10 South La Salle Street
Suite 1900
Chicago, IL 60603

NWCLF 00547

01501

August 28, 2001

NW L.C.C., LLC
7610 40th Street West
University Place, WA 98464

Re: Notice of Claim

Dear Sir:

I am writing as a limited member of NW Commercial Loan Fund, LLC, and am also writing a similar letter to Mr. Kevin Byrne, Robert Coleman, Dr. James Reid, Michael Price, and Thomas Price.

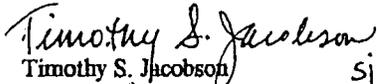
I am giving notice of claim against NW L.C.C., LLC, Mr. Kevin Byrne, Dr. James Reid, Robert Coleman, Michael Price, and Thomas Price, for all losses and damages I have suffered, or will suffer, as a result of any errors and omissions, breach of fiduciary duties, or any other improper actions taken by any of them in the management of NW Commercial Loan Fund, LLC and the protection of the limited members' membership interests and economic interests. I demand that all of the above persons or entities give immediate notice of this claim to all insurance carriers who provide cover for such claims. The likelihood is that all limited members will have similar claims. I am also writing to your insurance carrier to give notice of this claim.

I believe the following improper acts or omissions have occurred, and are occurring, and reserve the right to add other allegations as additional facts become known:

1. Violation of investment restrictions regarding size of loans as a percentage of total assets.
2. Violation of investment restrictions regarding loan quality.
3. Violation of investment restrictions regarding non-income producing properties.
4. Misrepresentation and concealment.
5. Making unauthorized loans against Fund assets.
6. Allowing tax liens and defaults on real estate and superior loans to remain uncured, thereby jeopardizing the collateral underlying the loans.
7. Failure to comply with the Operating Agreement in several particulars, including breach of fiduciary duties, failure to act prudently in making loans and managing cash, failure to make requested withdrawals, and failure to make proper accountings.
8. Self dealing.

I reserve all other rights to make additional claims against every above named person individually.

Very truly,


Timothy S. Jacobson sj
11304 116th Ave Ct NW
Gig Harbor, Wa 98329

NWCLF 00548

01502

THOMAS W. PRICE
P. O. Box 6104
Federal Way, WA 98063

February 1, 2001

Via Fax 253-460-0901 and regular mail

Mr. Kevin Byrne
Managing Member
NW, LLC
7610 - 40th Street West
University Place, WA 98464

Dear Kevin:

I understand from Dad that there is a member meeting on February 14th. Please confirm with me if this is correct. I'm glad to see we are having another meeting. Given the magnitude and seriousness of NW's position we should be meeting more frequently. I would like to review some document and have some issues I would like to discuss on the 14th as follows:

1. I would like a list of all the lenders to NW and if they are secured, unsecured, or subordinated and who is personally guaranteeing each facility. If secured I would like to know what collateral secures them. I also would like to know the credit limit, current balances, and the number and amounts of any delinquent payments and the last payment made date. On the lenders that I have a personal guarantee on I would like the contact, address and phone numbers for the lender and copies of all loan documents including my guarantee form.
2. I would like to review all insurance policies the company has had or currently has and when the premium payments are due.
3. I would like to look at any offering circular given to preferred members and any other associated contracts with preferred members. I would also like to see a current list of preferred members including amount invested. I'm concerned about any requirements the company has and what the preferred members are being told.
4. I would like a copy of any offering circular given to participants in the NW commercial loan fund and a list of participants and amount invested. I also would like to know the issues that will come up due to the inclusion of insider loans as I understand have been placed into this fund.

01503

EXHIBIT B

- 11 03/00
5. NW pulled a credit report on myself on October 13, 2000 and I do not remember authorizing this to be done. Can you let me know for what purpose this was done?
 6. I would like an update of recent legal actions filed either against the company, employees, or members that has not already been disclosed.
 7. I have been made aware of a payment posting issue whereby loan payments were credited without actually receiving the funds from the customer using a suspense account. Can you let me know your thought on this.

It would be nice to receive documents requested prior to the meeting so we can have a chance to review them and thereby be better prepared for the meeting. Also as I have requested several times before, an agenda sent out a few days before the meeting will also help me prepare for the meeting.

If you have any questions give me a call otherwise I'll see you on the 14th.

Sincerely,

Thomas W. Price

CC: Other members

Art McKean -- Aiken, St.Louis & Siljeg, P.S.

01504



NW Network Capital SM

March 23, 2001

Jim Bisceglia, CEO
Sound Banking Company
PO Box 98719
6115 Mount Tacoma Drive SW
Tacoma, WA 98498

Dr. James Reid
15419 NE 20th Suite 205
Bellevue, WA 98007

Robert J Coleman
703 Alta Vista Place
Fircrest, WA 98466

Dear Members:

I have received a fax from Mike and Tom Price requesting a "Special Meeting." This meeting is not a properly called meeting and I will not be in attendance. Under Article 8.1 of the Amended and Restated Operating Agreement of NW L.L.C. members holding 10% interest may call for a meeting. Under Article 8.4, notice of the meeting shall be delivered "not less than 10 days before a meeting" either personally or by mail. Neither service was provided.

As stated many times earlier, I am deeply concerned that all parties are not acting in the best interests of the company and that insurance coverage is not in place. Under advice of counsel, I will not participate in activities which may be interpreted later as managing member decisions. This would break down the shield that the limited liability company provides. I request that any communication be in writing provided in detail to properly address questions.

I do not plan on providing anyone with written copies of my personal counsel's advice to me. We discussed this many times before and I will not address it again.

I will continue to keep you informed on loan sales and any changes in U.S. Bank's position in writing.

If anyone has input on furniture and fixtures sales, please submit the same in writing. Auctions have been ruled out because of the limited items for sale vs. the cost. I am looking for cash buyers.

Financial condition reports will be mailed when complete. However, as discussed, it appears at this time that NW will have a large negative net worth.

I have addressed the Fountain Hills issue. I do not plan on doing so again. The same is true of the other issues in Mike and Tom Price's letter.

I have previously addressed preferred member communications. I will forward you a copy of the same when completed by Mr. Oldfield.

01505

EXHIBIT 

The Pacifica Bank line is renewed for the commercial loan fund. I am making arrangements for NW to resign as managing member of the Fund. If anyone wishes to accept this job, let me know..

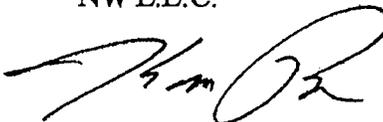
Graham Square and Inline LLC are not items for NW's input. They should be addressed at meetings scheduled by those companies.

I do not have copies of member guarantees, but have previously provided a list of guaranteed obligations. You may call the Banks for any additional information you need.

I will continue to communicate in writing on the general direction of NW. As discussed previously, each guarantor on the U.S. Bank line should be ready for a shortfall at U.S. Bank. U.S. Bank told all of the members at the meeting we had in Seattle to expect a \$2 million or greater shortfall. At this time, I think the number may be closer to \$500,000. Everyone should be ready to have a discussion with U.S. Bank as guarantors after the sold are sold to discuss the issue.

Very truly yours,

NW L.L.C.



Kevin M. Byrne
Chief Executive Officer

KMB/ssm

Enclosure

Cc: Michael Price
Thomas Price
Thomas Oldfield

DECLARATION OF SERVICE

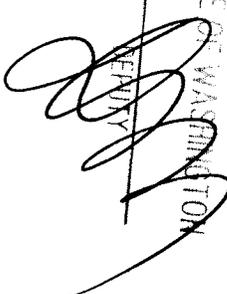
On said day below I emailed and deposited in the US Postal Service a true and accurate copy of the Brief of Respondent Byrnes and Reids in Court of Appeals Cause No. 39289-5-II to the following parties:

Douglas V. Alling
Smith Alling Lane
1102 Broadway Plaza Suite 403
Tacoma WA 98402

Jason Whalen
Eisenhower & Carlson PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402-4395

Charles K. Wiggins
Wiggins & Masters, PLLC
241 Madison Avenue North
Bainbridge Island, WA 98110

Original sent by ABC Legal Messengers filing with:
Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

FILED
COURT OF APPEALS
DIVISION II
10 FEB 12 PM 4:29
STATE OF WASHINGTON
BY 

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 12, 2010, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick