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Division II  
State of Washington  
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No. 53957-8

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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R.N., *et al.*,

Appellants,

vs.

KIWANIS INTERNATIONAL, a  
non-profit entity, *et al.*,

Respondents.

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**BRIEF OF RESPONDENTS LEWIS COUNTY  
YOUTH ENTERPRISES, D/B/A KIWANIS  
VOCATIONAL HOME FOR YOUTH; LEWIS PATTON;  
SAM MOREHEAD; EDWARD HOPKINS; LEE COUMBS;  
AND CHARLES MCCARTHY**

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**TABLE OF CONTENTS**

INTRODUCTION AND ISSUE PRESENTED..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT..... 4

    A.    PLAINTIFFS CONCEDE THEY FAILED TO COMMENCE  
          THIS ACTION WITHIN THE TIME PRESCRIBED BY THE  
          STATUTE OF REPOSE ..... 4

    B.    THE STATUTE OF REPOSE IS NOT RELATED TO THE  
          DISCOVERY OF THE INJURY OR THE ACCRUAL OF THE  
          CAUSE OF ACTION..... 5

    C.    PLAINTIFFS ALLEGE KVH’S VICARIOUS LIABILITY FOR  
          THE CONDUCT OF THE INDIVIDUALS WITHIN THE SCOPE OF  
          THEIR EMPLOYMENT..... 10

    D.    THE STATUTE OF REPOSE APPLIES TO EMPLOYEES.... 13

    E.    THE SUPERIOR COURT DID NOT MANIFESTLY ABUSE  
          ITS DISCRETION WHEN IT DENIED PLAINTIFFS LEAVE TO  
          FILE A FOURTH COMPLAINT ..... 15

CONCLUSION..... 18

**TABLE OF AUTHORITIES**

**Cases**

*Berger v. Sonneland*, 141 Wn.2d 91, 26 P.3d 257 (2001) ..... 13

*Bostock v. Clayton County, Georgia*, No. 17-1618 (June 15, 2020) ..... 12

*Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150 (2009)..... 14

*Clasen Fruit & Cold Storage, Inc. v. Frederick & Michael Const. Co., Inc.*, 162 Wn. App. 1067, 2011 WL 3198827 (July 28, 2011)..... 8

*CTS Corp. v. Waldburger*, 573 U.S. 1 (2014) ..... 5, 10

*Dania, Inc. v. Skanska USA Bldg. Inc.*, 185 Wn. App. 359, 340 P.3d 984 (2014) ..... 8

*Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892 (2011) ..... 4

*Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988)..... 7

*Gunnier v. Yakima Heart Center, Inc., P.S.*, 134 Wn.2d 854, 953 P.2d 1162 (1998)..... 7

*Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080, (2015)..... 18

*Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 705 P.2d 1195 (1985) ..... 17

*Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424, fn. 5 (2014)..... 16

*Specialty Asphalt & Construction, LLC v. Lincoln County*, 191 Wn.2d 182, 421 P.3d 925 (2018) ..... 16

<i>State Dept. of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002) .....	4
<i>State ex rel. Schillberg v. Barnett</i> , 79 Wn.2d 578, 488 P.2d 255 (1971)..	15
<i>State v. Day</i> , 96 Wn.2d 646, 638 P.2d 546 (1981) .....	14
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	15
<i>State v. Roggeankamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	15
<i>U.S. v. Ron Pair Enterprises Inc.</i> , 489 U.S. 235 (1989) .....	4
<i>v. Mason County</i> , 188 Wn. App. 1053, 2015 WL 4249367 (July 14, 2015) .....	7
<i>Wallace v. Lewis County</i> , 134 Wn. App. 1, 137 P.3d 101 (2006) .....	17
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316, (1999).....	16
<b>Statutes</b>	
RCW 23B.01.400 (15) .....	15
RCW 23B.14.340.....	1, 4, 10, 12, 14, 18
RCW 4.16.340 .....	5
<b>Other Authorities</b>	
Black’s Law Dictionary 1546 (9 <sup>th</sup> ed. 2009) .....	6
54 C.J.S., Limitations of Actions §7, p. 24 (2010) .....	6
<b>Rules</b>	
W.R.C.P. 15(a).....	17

## **INTRODUCTION AND ISSUE PRESENTED**

Plaintiffs allege they were abused at a Kiwanis group home for boys in Centralia, Washington between 1989 and 1991. This action was commenced on February 27, 2015, more than two decades after the purported abuse. The superior court granted summary judgment to Respondent Lewis County Youth Enterprises, d/b/a Kiwanis Vocational Homes for Youth ("KVH") and Respondents Lewis Patton, Sam Morehead, Edward Hopkins, Lee Coumbs and Charles McCarthy (collectively, the "Individuals") pursuant to RCW 23B.14.340, the applicable statute of repose (the "Statute of Repose"). Although Plaintiffs concede they did not commence this action within the time required by the Statute of Repose, they appeal the summary judgment orders. Thus, the issue in this appeal is simply this, notwithstanding Plaintiffs' digressive arguments:

Where a plain reading of the Statute of Repose shows conclusively that this action against KVH and the Individuals is barred because it was not brought within the statutory time period, should this Court affirm or reverse the superior court's decision that this action against KVH and the Individuals is barred because it was not brought within statutory time period?

## STATEMENT OF THE CASE

The undisputed facts relevant to the issue before this Court are these:<sup>1</sup>

1. Lewis County Youth Enterprises was a non-profit corporation that did business as KVH. CP 1708, at 1.4.
2. Lewis County Youth Enterprises d/b/a KVH was administratively dissolved as a Washington corporation on June 1, 2010. CP 1966.
3. Plaintiffs admit that Defendant and Respondent Charles McCarthy was at all relevant times the director of KVH and a board member of Lewis County Youth Enterprises. CP 1711, at 1.15.
4. Plaintiffs admit that Defendant and Respondent Lewis Patton was at all relevant times a board member of Lewis County Youth Enterprises. *Id.*, at 1.20.
5. Plaintiffs admit that Defendant and Respondent Sam Morehead was at all relevant times a board member of Lewis County Youth Enterprises. *Id.*, at 1.18.

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<sup>1</sup> In what reads like a closing argument to the jury, Plaintiffs devote seven pages of their brief detailing with plaintive specificity their allegations of purported abuse at KVH. Suffice it to say that the evidentiary strengths and weaknesses of their substantive claims are immaterial to the proper analytical framework for the determination by this Court of whether such claims are barred by the Statute of Repose.

6. Plaintiffs admit that Defendant and Respondent Edward Hopkins was at all relevant times a board member of Lewis County Youth Enterprises. *Id.*, at 1.19.
7. Plaintiffs admit that Defendant and Respondent Lee Coumbs was at all relevant times a corporate officer of KVH and a board member of Lewis County Youth Enterprises. *Id.*, at 1.17.
8. Plaintiffs allege they were abused at KVH between 1989 and 1991. CP 1708, at 1.1 - 1.3. They assert claims of negligence, Section 302B negligence, Agency, Outrage and Negligent and Intentional Infliction of Emotional Distress against all Defendants. CP 1714-1716, Counts I through VI.
9. Plaintiffs allege KVH has “vicarious liability under Washington state common law” for the purported tortious acts committed by the Individuals. CP 1715 at 3.
10. This action was commenced on February 27, 2015. Plaintiffs’ initial Complaint did not name any of the Individuals. CP 1.
11. The Complaint was subsequently amended a second time on July 23, 2018 to add the Individuals. CP 1707.

## ARGUMENT

### **A. PLAINTIFFS CONCEDE THEY FAILED TO COMMENCE THIS ACTION WITHIN THE TIME PRESCRIBED BY THE STATUTE OF REPOSE**

The role of this Court in applying statutory language is to "ascertain and carry out the Legislature's intent." *State Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4, 9 (2002). Where the "statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Ibid.* Unless a literal application of statutory language will demonstrably undermine clear legislative intent, "[t]he plain meaning of legislation should be conclusive . . . ." *U.S. v. Ron Pair Enterprises Inc.*, 489 U.S. 235 (1989). Interpreting statutes such that they produce strained results is improper. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892, 900 (2011).

The Statute of Repose at RCW 23B.14.340 provides in pertinent part:

"The dissolution of a corporation ... by administrative dissolution by the secretary of state ... shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to its dissolution or arising thereafter, unless action or other proceeding thereon is not commenced ... within three years after the effective date of any dissolution that is effective on or after June 7, 2006."

The plain meaning of the Statute of Repose, as relevant here, is that Plaintiffs' claims are time-barred unless brought within three years of the administrative dissolution of Lewis County Youth Enterprises d/b/a KVH on June 1, 2010. Because Plaintiffs admittedly did not do so, the superior court's grant of summary judgment to Lewis County Youth Enterprises d/b/a KVH and the Individuals was correct.

**B. THE STATUTE OF REPOSE IS NOT RELATED TO THE DISCOVERY OF THE INJURY OR THE ACCRUAL OF THE CAUSE OF ACTION**

Plaintiffs' primary argument, presented in repetitive iterations occupying 15 pages of their brief, is that the Statute of Repose does not bar their claims because RCW 4.16.340, the statute of limitations applicable to claims of child abuse (the "Statute of Limitations"), does not bar their claims. This argument is not only at odds with decisions of the United States Supreme Court and Washington appellate courts, but it is premised on their misapprehension of the differences between the purpose of a statute of repose and the purpose of a statute of limitations and, in turn, their failure to appreciate that either a statute of repose or a statute of limitations may bar a plaintiff's claim. The United States Supreme Court, in *CTS Corp. v. Waldburger*, 573 U.S. 1 (2014), carefully explained these truisms:

Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts. **Both types of statute can operate to bar a plaintiff's suit, and in each instance time is the controlling factor.** There is considerable common ground

in the policies underlying the two types of statute. **But the time periods are measured from different points, and the statutes seek to attain different purposes and objectives.**

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In the ordinary course, a statute of limitations creates “a time limit for suing in a civil case, based on the date when the claim accrued.” Black’s Law Dictionary 1546 (9<sup>th</sup> ed. 2009) (Black’s)(citation omitted)... Measured by this standard, a claim accrues in a personal-injury or property-damage action “when the injury occurred or was discovered.” Black’s 1546.

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A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant.... **The statute of repose limit is “not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered.”** 54 C.J.S., Limitations of Actions §7, p. 24 (2010)

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Although there is substantial overlap between the policies of the two types of statutes, each has a distinct purpose and each is targeted at a different actor. Statutes of limitations require **plaintiffs** to pursue “diligent prosecution of known claims.” Black’s 1546. Statutes of limitations “promote justice by preventing surprises through [plaintiffs’] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” (citation omitted). Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. **Statutes of repose effect a legislative judgment that a defendant should “be free from liability after the legislatively determined period of time.”** (citation omitted)...Like a discharge in bankruptcy, statutes of repose can be said to provide a fresh start or freedom from liability.

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One central distinction between statutes of limitations and statutes of repose underscores their differing purposes. Statutes of limitations, but not statutes of repose, are subject to equitable tolling, a doctrine that pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently, but some extraordinary circumstances prevents him from bringing a timely action. Statutes of repose, on the other hand generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control. (Emphasis added).

Like the United States Supreme Court, the Supreme Court of Washington has also acknowledged that a claim is time-barred if not brought within the time period of a statute of repose, regardless of whether the claim has accrued or injury has occurred. In *Gunnier v. Yakima Heart Center, Inc., P.S.*, 134 Wn.2d 854, 953 P.2d 1162 (1998), the Court held that a “statute of limitations bars an already accrued cause of action after a certain period of time, while a statute of repose terminates a right of action after a specific period of time regardless of whether it has accrued (and regardless whether injury has occurred);” *see also Anderson v. Mason County*, 188 Wn. App. 1053, 2015 WL 4249367 (July 14, 2015) (Not Reported in P.3d) citing *Gevaart v. Metco Const., Inc.*, 111 Wn.2d 499, 760 P.2d 348 (1988) (“Our Supreme Court ... has already rejected the proposition that the discovery rule overcomes the statute of repose” and “specifically held that the statute of repose limits the discovery rule and absolutely bars claims that have not accrued within six years.”).

This Court has held accordingly. In *Clasen Fruit & Cold Storage, Inc. v. Frederick & Michael Const. Co., Inc.*, 162 Wn. App. 1067, 2011 WL 3198827 (July 28, 2011) (Not Reported in P.3d), the plaintiffs contended that the pertinent discovery rule tolled any limitation period, including that imposed by the statute of repose. This Court flatly rejected that contention, holding that “the discovery rule will not affect/extend the running of the statute of repose in Washington.” *See also Dania, Inc. v. Skanska USA Bldg. Inc.*, 185 Wn. App. 359, 340 P.3d 984, 988 (2014) (The claim “must accrue within the six years following substantial completion of construction or termination of services, whichever is later. Once the claim has accrued, that is the end of the statute of repose inquiry. Whether an accrued claim is timely filed is a different question, involving the statute of limitations, not the statute of repose.”) (internal quotations omitted).

In other words, Plaintiffs’ primary submission to this Court in support of their appeal of the summary judgment orders, *i.e.*, their admitted failure to commence this action within the time mandated by the Statute of Repose does not bar their claims because they were not “discovered” until the expiration of the time limitation in the Statute of Repose, is legally meritless. As shown by the decisions from the United States Supreme Court and Washington appellate courts, including Washington’s Supreme Court, the Statute of Repose and the Statute of Limitations, having distinct purposes, do not constitute mutually exclusive requirements. Instead, they

constitute dual requirements. Because Plaintiffs concede that they did not commence their action within the time mandated by the Statute of Repose, their claims are time-barred, whether or not they were bought within the time mandated by the Statute of Limitations. *See* authorities cited above.

With all due respect, Plaintiffs' argument to the contrary is more notable for what it omits than for what it contains. They (a) do not contest that this Court should give effect to the plain meaning of the words of the Statute of Repose as the indisputable expression of legislative intent, (b) do not cite to any authority endorsing their odd notion that the Statute of Repose and Statute of Limitations constitute "either/or" rather than dual requirements, (c) do not cite, much less distinguish, the decisions cited above articulating the fundamental distinctions between a statute of repose and a statute of limitations, and (d) do not cite to any authority in support of their odd proposition that a statute designed to accomplish one purpose – a legislative judgment in a statute of repose that a **defendant** should be free from liability after a legislatively determined period of time - should be "harmonized" or "consistent" with a statute designed to accomplish a different purpose – a legislative mandate in a statute of limitations that a **plaintiff** must pursue diligent prosecution of known claims by filing such claims within a certain time after they accrue. Simply stated, "[b]oth types

of statute can operate to bar a plaintiff's suit...." *CTS Corp.*, 573 U.S. at 7. Here, the Statute of Repose does just that.

In the face of powerful authority that contravenes their argument, and devoid of any authority that supports their argument, Plaintiffs are left with nothing other than the bald submission that the Statute of Limitations supersedes the Statute of Repose because they say it does. But, as Abraham Lincoln said of calling a sheep's tail a leg, merely because they say it is so does not make it so. This Court should decline Plaintiffs' invitation to err and, instead, affirm the summary judgment orders entered by the superior court, as such orders were entered in strict accordance with powerful precedent.

**C. PLAINTIFFS ALLEGE KVH'S VICARIOUS LIABILITY FOR THE CONDUCT OF THE INDIVIDUALS WITHIN THE SCOPE OF THEIR EMPLOYMENT**

While Plaintiffs have hinged the entirety of their appeal of summary judgment in favor of KVH on their unsustainable argument that the Statute of Repose is somehow in conflict with the Statute of Limitations, Plaintiffs' brief also advances the argument that RCW 23B.14.340 does not apply to the claims against the Individuals because their conduct was "personal" and "outside" the scope of their employment as directors, officers, shareholders and employees of KVH. App. Br. 35-37. However, Plaintiffs sued KVH based on the conduct of the Individuals, alleging that it is vicariously liable for the acts or omissions committed by them. It indisputably follows that if

the dissolved corporation – KVH – is alleged to be vicariously liable for the Individuals’ alleged wrongful conduct, such conduct of the Individuals falls within the scope of their employment. Basic logic is not suspended in Plaintiffs’ favor in this Court’s consideration of their arguments.

Plaintiffs underscore the inconsistency of their instant argument that the Individuals acted outside the scope of employment by explicitly arguing throughout this action that KVH and its operators created an environment wherein KVH was liable for the conduct of each of the Individuals. Now that the superior court has granted summary judgment to KVH on the vicarious liability claim asserted against it, Plaintiffs make an abrupt about-face. They now contend that the Individuals’ performance of their duties did not involve KVH - in other words, that the dissolved corporations would not be vicariously liable for their conduct as directors, officers, shareholders and employees – because they benefitted personally, placing such conduct outside the course of employment.

This facially weak argument, if accepted by this Court, would encourage a floodgate of contentions by corporate entities undermining the principle of vicarious liability, as such corporations could always contend that the conduct of the individual was infused with a “personal” motive or involved a perceived “personal” benefit. Suffice it to say that the allegations against the Individuals are based entirely on their role and service as directors, officers, shareholders and employees of the dissolved

corporation; in other words, this case is not, by example, a situation where the Individuals' alleged wrongful conduct was assaulting a patron at a bar after work hours, burglarizing a home, or robbing a bank, truly "personal" conduct outside the scope of the workplace and, therefore, could not reasonably be alleged to be the basis of vicarious liability on the employer.

In sum, Plaintiffs cannot have their cake and eat it too. They cannot, on the one hand, argue that KVH is vicariously liable for the conduct of the Individuals because they acted within the scope of employment and, in the next breath, argue that the Statute of Repose does not apply to the Individuals because they acted outside the scope of employment. The winds of consistency do not shift so fortuitously in Plaintiffs' favor in their submissions to this Court.

Finally, the Statute of Repose unambiguously applies to "any right or claim existing, or any liability incurred." 23B.14.340 (emphasis added). In other words, the Statute of Repose does not discriminate based on a classification of a wrong as negligent or intentional act or based on the egregiousness of the alleged conduct. In the recent words of the United States Supreme Court, "only the words on the page constitute the law adopted by" the legislature. *Bostock v. Clayton County, Georgia*, No. 17-1618 (June 15, 2020). Had the legislature of this state desired to limit the application of the Statute of Repose to negligent acts, it could easily have done so. "If judges could add to, remodel, update, or detract from old

statutory terms inspired only by extra-textual sources and our own imaginations, [they] would risk amending statutes outside the legislative process reserved for the people's representatives." *Ibid.*

#### **D. THE STATUTE OF REPOSE APPLIES TO EMPLOYEES**

Plaintiffs' next argument is both inconsistent with their previous arguments and unsupported by Washington law. Plaintiffs concede that the Statute of Repose bars their claims against the Individuals because they were officers or directors of KVH, but argue that these same claims are magically resuscitated because they allege that the Individuals were also employees of KVH.

This Court should reject this weak argument for a host of separate reasons. **First**, the Statute of Repose expressly addresses all claims against the officers and directors of the dissolved corporation, and plaintiffs concede that the Individuals were either officers or directors of KVH. These plain and unambiguous words of the statute should be interpreted and applied as written. *Berger v. Sonneland*, 141 Wn.2d 91, 26 P.3d 257, 264 (2001) ("Courts should assume the Legislature means exactly what it says. Plain words do not require construction. The courts do not engage in statutory interpretation of a statute that is unambiguous").

**Second**, it is a settled principle of statutory construction that a statute should not be interpreted to lead to an unreasonable or inequitable

result. *See, e.g., State v. Day*, 96 Wn.2d 646, 638 P.2d 546 (1981). If an employee is excluded from the protections afforded by the Statute of Repose, the unreasonable and inequitable result would be this: where a shareholder, officer, director and low-level employee each commit the same wrongful act, and the corporation is alleged to be vicariously liable, and suit is brought outside the time period of the Statute of Repose, the claim against the corporation, the shareholder, the officer, and the director would be time-barred, but the lowly employee would not be afforded the same statutory protection. Plaintiffs do not cite to any authority to support the novel argument that the Washington Legislature intended such an unreasonable and inequitable result when it promulgated the Statute of Repose.

**Third**, the Court has recognized that “employees” are protected by Washington’s corporate dissolution statute. In *Cameron v. Murray*, 151 Wn. App. 646, 214 P.3d 150, 152 (2009), the court acknowledged that “Meyers Distribution and its officers, directors and employees [were dismissed] under 2006 retroactive dissolved corporation statute of repose. RCW 23B.14.340.” The *Cameron* court did not criticize the trial court for including employees in the dismissal.

**Fourth**, Washington’s Business Corporation Act, in which the Statute of Repose is situated, specifically defines an “employee” such that it “includes an officer but not a director. A director may accept duties that

make the director also an employee.” RCW 23B.01.400 (15). Thus, the Legislature specifically contemplated that an officer was necessarily an employee, and that a director may be an employee. Plaintiffs would have this Court refuse to apply the Statute of Repose to any individual who is an employee of the dissolved corporation. This reading would be inescapably at odds with the plain-language definition of “employee.” Were the Court to adopt Plaintiffs’ instant argument that their claims may proceed because some Individuals were employees, the word “officer” in the Statute of Repose would be wholly superfluous, since all officers are employees in this statutory scheme. This would be erroneous under the “well-settled principle of statutory construction that ‘each word of a statute is to be accorded meaning.’” *State v. Roggeankamp*, 153 Wn.2d 614, 106 P.3d 196, 201 (2005) (quoting *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 488 P.2d 255 (1971)); *see also: State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318, 320 (2003) (“we may not delete language from an unambiguous statute”).

**E. THE SUPERIOR COURT DID NOT MANIFESTLY ABUSE ITS DISCRETION WHEN IT DENIED PLAINTIFFS LEAVE TO FILE A FOURTH COMPLAINT**

Plaintiffs’ final charge of error is that the superior court should have permitted them to amend their Complaint a third time, over three years after initiating their action and well into the dispositive motions process, so that they could “clarify facts already known to Defendants.” App. Br. 40. In

arguing solely that Plaintiffs failed to demonstrate prejudice, they misapprehend the standard of review applicable to a superior court's ruling on a motion to amend. It is well-settled in Washington that an appellate court reviews a trial court's decision regarding a motion to amend pleadings according to a "manifest abuse of discretion" standard. *Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316, 319 (1999). "The trial court's decision **will not be disturbed on review** except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable ground, or for untenable reasons." *Specialty Asphalt & Construction, LLC v. Lincoln County*, 191 Wn.2d 182, 421 P.3d 925, 935 (2018) (internal quotations omitted). The Supreme Court of Washington has noted that it is proper to uphold a trial court's denial of a motion to amend where the amendment was proposed "well over a decade" after the alleged tortious conduct and where it "would have broadened the trial's scope and forced [defendants] to reformulate [their] defense strategies." *Schmidt v. Coogan*, 181 Wn.2d 661, 335 P.3d 424, fn. 5 (2014).

As regards prejudice to the Individuals, Plaintiffs sought to amend their Complaint in order to avoid summary judgment in Respondents' favor and require them to try the case on previously unplead theories of individual liability, apparently anticipating that the superior court would grant summary judgment. Plaintiffs sought leave to amend about two weeks prior

to the superior court's scheduled ruling on Individual Patton's summary judgment motion, despite having had all the requisite facts for years. In *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006), plaintiffs sought leave to amend their complaint more than eighteen months after initiating their action and one month before the summary judgment hearing. This Court held unequivocally that plaintiffs had "**clearly** caused undue delay" and that the trial court's denial of the motion to amend was proper on that basis. *Id.* at 114.

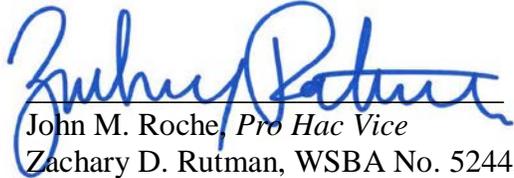
Notwithstanding Plaintiffs' out-of-context contention that Courts are to "freely" allow amendment of pleadings, Washington's Rules of Civil Procedure are explicitly clear that amendments are to be permitted freely *when justice so requires* according to the discretion of the trial court. W.R.C.P. 15(a). Notably, Plaintiffs' brief lacks any contention that justice required they be allowed to amend their Complaint yet again. They have not articulated any argument that the amendment they seek to impose over the better judgment of the presiding superior court judge would have made a difference in the outcome of the case. Assuming, *arguendo*, that the superior court erred by not permitting another amendment, still "it is not every error that is reversible error." *Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System*, 104 Wn.2d 353, 705 P.2d 1195, 1202 (1985). Said another way, "[r]eversal is a strong medicine

and will not be administered when it is plain from the record that the error was harmless.” *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080, 1088 (2015) (Gonzalez, J. concurring).

In this case, it is clear that the trial court did not manifestly abuse its discretion when it denied Plaintiffs leave to amend their complaint to “clarify” factual allegations against the Individuals. App. Br. 40. However, even had the trial court done so, Plaintiffs’ proposed amendment would be futile, and reversal improper on that basis. Plaintiffs’ claims are not time-barred due to want of clarity – the pertinent facts are undisputed. Plaintiffs’ claims were brought after the time period permitted by the Statute of Repose had expired. Despite ample opportunity and the leeway to repeatedly amend their Complaint – including to add individual parties who were not originally named years after initiating the action – Plaintiffs’ proposed third amended complaint only seeks to clarify the Individuals’ corporate duties and activities, and does not give rise to any claim that can lie against them nearly five years after the corporate entity was dissolved under the plain language of RCW 23B.14.340.

### **CONCLUSION**

For these reasons, the summary judgment orders entered by the superior court in favor of KVH and the Individuals should be affirmed.



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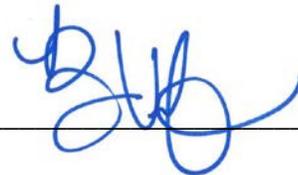
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