

73407-5

73407-5

FILED  
COURT OF APPEALS  
DIVISION II  
2015 OCT -5 PM 3:11  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

No. 73407-5-I

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

---

BUSINESS FINANCE CORP., a Washington corporation,

Respondent,

vs.

VICTORIA KNOLL, et al.

and

JERRY V. KNOLL, individually, and the MARITAL COMMUNITY OF  
JERRY V. AND JANE DOE KNOLL; and KNOLL GREENWATER  
LLC, a Washington limited liability company;

Appellants.

---

APPELLANTS' BRIEF

---

M. Owen Gabrielson, WSBA# 34214  
Kristi L. Richards, WSBA# 47945  
Farr Law Group, PLLC  
3255 Griffin Avenue  
P.O. Box 890  
Enumclaw, WA 98022  
(360) 825-6581  
Attorneys for Appellants

E  
2015 OCT -8 AM 11:09  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

**TABLE OF CONTENTS**

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR ..... 3

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 4

    A. The Greenwater deed of trust did not encumber estate property..... 4

    B. The probate court validly appointed Jerry as a co-personal representative and he was never removed; Craig could pledge estate property without Jerry and Jerry did not agree to pledge the Greenwater property..... 5

    C. Statutes of Limitations Errors ..... 5

IV. STATEMENT OF THE CASE ..... 7

    A. The History ..... 8

    B. The Greenwater Parcels: Parcels A, B, C and D..... 9

    C. The Loan Documents..... 11

        1. The Loan and Security Agreement ..... 11

        2. The Greenwater deed of trust..... 12

        3. The July 21, 2000 promissory notes ..... 13

    D. The Snohomish County deed of trust..... 13

    E. The bankruptcy ..... 14

    F. Business Finance Corporation waits until May 2010 to foreclose..... 16

V. ARGUMENT ..... 16

    A. BFC’s complaint is barred by the three-year statute of limitations ..... 16

    B. Business Finance’s complaint is barred by the six-year statute of limitations..... 23

    C. The trial court erred by finding Lorna Knoll’s Estate was a ‘Grantor’ under the Deed of Trust ..... 26

    D. Craig Knoll could not validly pledge estate property without joinder from his co-personal representative, Jerry Knoll ..... 27

VI. CONCLUSION..... 33

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Anderson</i> , 52 Wn.2d 757, 761 – 62, 328 P.2d 888 (1958) ...	31
<i>Barnes v. McLendon</i> , 128 Wn.2d 563, 910 P.2d 469, 470 (1996).....	22
<i>Berg v., Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990) .....	22
<i>Bogle &amp; Gates, PLLC v. Zapel</i> , 121 Wn. App. 444, 448, 90 P.3d 703 (2004).....	18, 23
<i>Hodgins v. State</i> , 9 Wn. App. 486, 492, 513 P.2d 304 (1973).....	27
<i>In re Estate of Olson v. Olson</i> , 194 Wash. 219, 77 P.2d 781 (1938).....	31
<i>Johnson v. Home State Bank</i> , 501 U.S. 78, 85, 111 S. Ct. 2150, 2155, 115 L. Ed. 2d 66 (1991).....	20
<i>Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Northwest, Inc.</i> , 168 Wn. App. 56, 64-65, 277 P.3d 18 (2012).....	27
<i>Sanders v. Brown</i> , 123 Wash. 611, 612, 212 P. 1070 (1923) .....	24
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003).....	26
<i>Walker v. Sieg</i> , 23 Wn.2d 552, 561, 161 P.2d 542, 546 (1945).....	26
<i>Wickwire v. Reard</i> , 37 Wn.2d 748, 226 P.2d 192 (1951) .....	24

### Statutes

11 U.S.C. § 101(5)(A).....	20
11 U.S.C. § 101(5)(B).....	20
RCW 11.28.250 .....	32
RCW 11.36.010 .....	31
RCW 11.98.016 .....	28
RCW 11.98.070 .....	28
RCW 11.98.070(18).....	28
RCW 4.16.040(1).....	23
RCW 4.16.270 .....	24

### Treatises

BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 554.....	29
---------------------------------------------------	----

## I. INTRODUCTION

When Business Finance took collateral to secure a loan to Knoll Lumber Company, it knew Knoll Lumber's president Craig Knoll was only pledging his personal interest in certain Greenwater, Washington real property and not the interest of his recently deceased mother's estate. Now, almost 20 years later it seeks to change course and not only foreclose on Craig's tenant-in-common interest, but also his mother's estate. The trial court erred by concluding the deed of trust covered more than Craig Knoll's tenant-in-common interest.

First, the estate was not a grantor. Craig and his wife Victoria only pledged *their* interest:

THIS DEED OF TRUST, made this 1st day of Sept 1999 ~~day of August~~, between **CRAIG T. KNOLL** and **VICTORIA W. KNOLL**, husband and wife, as to Parcel C and **their** undivided interest in Parcels A, B and D, GRANTORS, and FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation, TRUSTEE, ... and BUSINESS [sic] FINANCE CORPORATION, a Washington corporation, BENEFICIARY ....

(Ex 212) (Emphasis added.) Also, the deed did not contain a signature block for the other co-personal representative, Appellant Jerry Knoll, whose signature was required.

Just two days prior, Craig and Jerry validly pledged a security interest in estate owned property. Here is how the deed read:

THIS DEED OF TRUST, made this 31<sup>st</sup> day of August, 1999, between the LORNA L KNOLL ESTATE, and VICTORIA W. KNOLL, GRANTORS, and FIRST AMERICAN TITLE INSURANCE COMPANY

...

Grantors hereby bargain, warranty, sell and convey to Trustee in Trust, with power of sale the following described real property ....

(Ex 226) Also, that deed of trust (recorded in Snohomish County) had signature blocks for *both* personal representatives. Jerry Knoll did not sign the Greenwater deed. The trial court erred in concluding the parties intended not only Craig's tenant-in-common interest be pledged, but also the estate's interest.

The trial court's based its disregard for Jerry Knoll's authority as a co-personal representative on the fact that Jerry, an Alaska resident, did not file a notice of appointment of resident agent as required for his appointment under RCW 11.36.010. The trial court held that Jerry's appointment was void.

This was error for two reasons. First, Business Finance cannot collaterally attack the probate court's order, entered in 1998. Filing a single piece of paper in the probate court may well have been a condition to Jerry's appointment, but nonetheless the probate court appointed him without it. And, after Craig died, the probate court re-appointed him. (Exs 112, 219, 220) Business Finance may not appeal the probate court's order that appointed Jerry—not here.

Second, omitting to file a notice of appointment of resident agent does not void the probate court's order that appointed Jerry or deprive him of authority the probate court bestowed on him. The failure to name a

resident agent means that grounds existed for his removal. Yet no person ever sought to remove him. Had someone sought to remove him, Jerry need only have mooted it by appointing an in-state resident.

This holding sets a dangerous precedent. It will require banks, title companies—anyone who deals with personal representatives—to look behind Letters Testamentary or Letters of Administration and independently confirm facts upon which a personal representative is appointed, not only at the time of appointment but at all times subsequent, lest any and all transactions be later undone simply because it is learned *ex post facto* that a personal representative was at one more times subject to removal.

Finally, even if the trial court got it right on the deed of trust and were correct that Jerry Knoll's appointment as a personal representative were void *ab initio*, the trial court erred by failing to sustain Jerry's statute of limitations affirmative defense. Business Finance's complaint was untimely under both the three year and six year statutes of limitation.

## II. ASSIGNMENTS OF ERROR

A. The trial court erred by concluding<sup>1</sup> Lorna Knoll's estate was a 'Grantor' under the Greenwater deed of trust. (Finding No. 15, CP 699)

B. The trial court erred by concluding the Greenwater deed of trust secured real property owned by Lorna Knoll's estate, rather than just real property owned by Craig and Victoria Knoll, as husband and wife.

---

<sup>1</sup> This was a "finding of fact" but it is not a fact, but a legal conclusion based on the language in the deed and other evidence presented at trial.

C. The trial court erred in concluding Craig Knoll, as one of two co-personal representatives, had authority to bind the interest of his mother's estate without the other co-personal representative's joinder. (Conclusion Nos. 3, 4 and 7) (CP 702)

D. The trial court erred by dismissing the Knolls' statute of limitations affirmative defenses; BFC's claims were barred under both the three and six year statutes of limitations. (Conclusion No. 5) (CP 702).

E. The trial court erred in finding that *Victoria Knoll* made a voluntary payment to Business Finance towards one or both promissory notes (in order to extend the statute of limitations under RCW 4.16.270). (Finding Nos. 28, 29) (CP 700)

F. The trial court erred by finding the promissory notes "merged" into a single obligation. (Finding No. 24) (CP 700).

G. Based on the above errors, the trial court erred in decreeing that BFC may foreclose the Greenwater Properties. (Conclusion Nos. 8 and 9) (CP 703)

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

#### **A. The Greenwater deed of trust did not encumber estate property.**

By its terms, the Greenwater deed did not encumber estate property; it encumbered Craig's and Victoria's undivided interest in certain parcels and no more. The Greenwater deed uses the word, "their" in referring to Craig and Victoria Knoll "as husband and wife." (Ex 212)

Also, the Greenwater deed did not identify the estate as a grantor, neither referring to “The Estate” nor Craig and Jerry as co-personal representatives as the “Grantor”.

Craig, Jerry and Business Finance knew how to bind estate property. They pledge Snohomish County real estate using much different language. That deed of trust had signature blocks; one for each co-personal representative. (*Compare Exs 212 and 226*)

**B. The probate court validly appointed Jerry as a co-personal representative and he was never removed; Craig could pledge estate property without Jerry and Jerry did not agree to pledge the Greenwater property.**

Indeed, as Business Finance will point out, filing a notice of appointment of resident agent is a condition to being appointed. *See RCW 11.36.010(6)*. But Jerry was appointed anyway, and neither Business Finance, nor anyone else sought to remove him. Business Finance even had Jerry sign a deed of trust where it thought it was receiving estate property as collateral. (*Ex 226*) After Craig’s death, Jerry was even re-appointed. (*Exs 112, 219, 220*) Business Finance cannot collaterally attach the probate court’s order.

**C. Statutes of Limitations Errors.**

Business Finance is time-barred under the three-year statute of limitations because Business Finance relied on parol evidence. Business

Finance went beyond the writings to show the grantor was not only Craig and Victoria Knoll, husband and wife, but also the Estate of Lorna Knoll.

Also, while Business Finance alleges the amount it is owed is based on two promissory notes, (CP 2) Business Finance presented its case as if there were one combined note. When asked to which promissory note an alleged \$32,825 payment was applied, Business Finance could not say, only that the “claim” in the bankruptcy was agreed upon, but there was no evidence the notes were merged, or a new obligation was created. A claim in bankruptcy is merely an aggregation of the amount the creditor is owed; it is not an independent debt. The trial court erred in finding the notes were “combined” into a nebulous uber-debt when the only thing that happened was the overall amount was agreed; it appears the parties in the bankruptcy forgot to request rulings on apportioning which amounts were owed on which notes. (CP 700)

The complaint is also barred by the six-year statute of limitations. Business Finance alleged “the Knolls made periodic payments” that extended the statute under RCW 4.16.270 (CP 3), but there was no evidence that Victoria Knoll voluntarily made any payments. The trial court erred in finding Victoria made any payments. (CP 700 – 701) The trial court made a leap in concluding that Victoria Knoll made these payments.

Knoll Lumber, not Victoria Knoll made the payments that Business Finance relies upon to extend the statute of limitations. Its own

payment records showed that Knoll Lumber paid, not Victoria Knoll. (Ex 111) (RP 79) (Knoll Lumber was a party to the Loan and Security Agreement attached to the Greenwater deed of trust.) (Ex 212)

Having no evidence that Victoria Knoll made this payment, the statute of limitations on the promissory notes could not have been extended, and thus it expired prior to the date that Business Finance filed the complaint, which was May 24, 2010. (CP 1)

#### **IV. STATEMENT OF THE CASE**

Business Finance Corporation claims a security interest in four parcels in Greenwater, Washington. They are referred to in this case as Parcels A, B, C and D. In 1999, Craig Knoll, Jerry's brother, pledged them to Business Finance Corporation to secure two loans.

In 1999, Craig owned Parcel C, but did not own full interests in Parcels A, B and D. He had an 18% interest in Parcels A and B, and a 0% interest in Parcel D. His mother's estate owned the rest. If Business Finance had an interest in anything capable of being foreclosed, it was Craig's 18% interest in Parcels A and B and nothing more.

The trial court erred in concluding that Business Finance Corporation had a perfected security interest in Parcels A, B and D. The trial court also erred by not dismissing the Business Finance's claims as time-barred.

Finally, in order to foreclose, the debt must be liquidated, that is, the debt on the two promissory notes must be determined. Business

Finance was unable to do that. It alleged promissory notes, a bankruptcy proof of claim based on the promissory notes, adjustment of the claim amount, and effectively treated the “claim” as the debt, not the promissory notes. But Business Finance cannot foreclose, or even sue on a proof of claim. A proof of claim is merely an aggregation of what Business Finance thought it was owed by Craig Knoll. The claim in the bankruptcy is not a debt, it cannot be foreclosed upon. The claim was based on the two promissory notes, which could not be proved without extensive extrinsic evidence, which Business Finance lacked.

**A. The History.**

Jerry and Craig’s mother, Lorna Knoll, died in 1998. (CP 698)  
Her husband, Carl, predeceased her. (CP 697)

Lorna had three sons: Craig, Jerry and Charles. Charles died in 1984. (CP 697) Charles’s estate was split 50/50 between Jerry and Craig. (CP 697)

Craig and Jerry were Co-Executors of their mother, Lorna’s estate. *See Letters Testamentary.* (Ex 219)

The estate included, among other things, a family business called Knoll Lumber and Hardware Co., real property in Greenwater, real property in Whidbey Island, stocks/bonds/cash, and real property in Snohomish County. (Ex 104)

In 1999 Knoll Lumber and Hardware Company borrowed money from plaintiff Business Finance Corporation. (CP 698 – 699) To secure the

loan, Craig pledged a number of properties *he personally owned* as collateral. Craig also pledged properties *he did not own* – and this sets the stage for this case. (Ex 102, 212 through 214, 226, 229, 239) (CP 698 – 699)

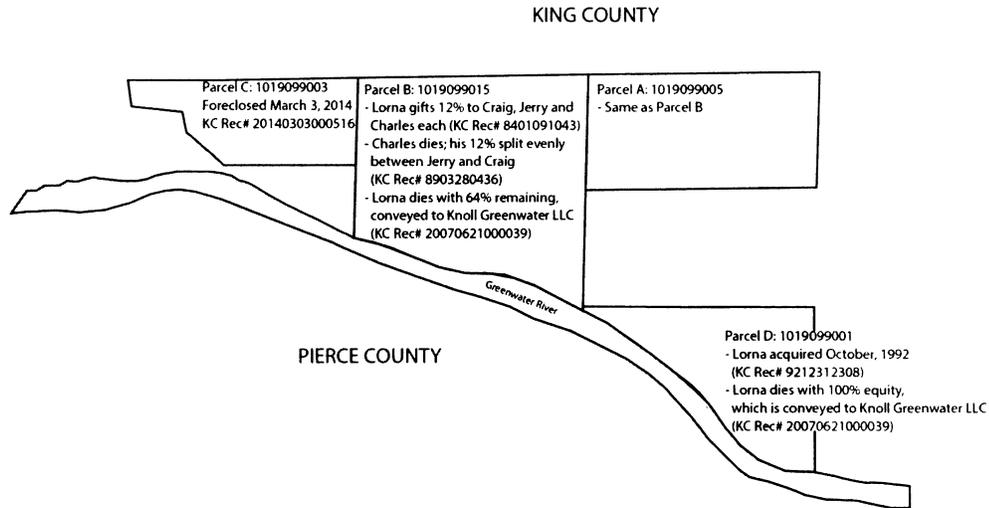
Knoll Lumber defaulted, filed bankruptcy, and Business Finance Corporation pursued Craig and Victoria Knoll personally on guaranties (which are contained in the Proof of Claim BFC filed in the bankruptcy case). (Ex 239) (CP 699) That lawsuit with Craig and Victoria settled with them executing personal notes in Business Finance Corporation's favor. *Id.* The collateral that Craig pledged for these two promissory notes – for Knoll Lumber's debt – is set out below.

**B. The Greenwater Parcels: Parcels A, B, C and D.**

Business Finance Corporation claims Craig pledged his own 18% interest in Parcels A and B, along with the Lorna Knoll Estate's 64% interest in Parcels A and B, his 100% interest in Parcel C and the estate's 100% interest in Parcel D.

The only thing is Craig Knoll only owned 18% of Parcels A and B; and he never owned Parcel D. (Ex 215 through 218) (CP 697, 698)

Parcels A, B, C and D sit along the Greenwater River, near Highway 410 between King and Pierce Counties. *See* Diagram, *infra.* (CP377).



At the time Craig pledged Parcels A and B, they were vested in Lorna’s estate (64%); Jerry (18%) and Craig (18%). These facts are undisputed. *Id.*

Parcel D was vested entirely vested in Lorna’s estate. *See* Statutory Warranty Deed.<sup>2</sup> (Ex. 218)

Parcel C was vested entirely in Craig and Victoria (Ex 217), but was recently lost to King County in a tax foreclosure. (Ex 224)

Business Finance’s complaint alleges Craig signed a “Loan and Security Agreement” in his capacity as president of Knoll Lumber and Hardware Co. (CP 2) The Loan and Security Agreement says Business Finance Corporation would advance “Term Loans” to Knoll Lumber and Hardware Co. from time to time, and that the loans would be secured with collateral of Knoll Lumber and Hardware Co. *Id.*

<sup>2</sup> This deed, Exh. 218, identifies the real property conveyed as “Parcel C.” That is just the label given to it by the Grantor in the instrument. The real property described therein is referred to in this case as Parcel D.

Believing that borrowing money to float the business was foolish, and pledging family property even more foolish, Jerry never agreed to any loan that would encumber the Greenwater parcels. (CP 426)

Craig did it anyway—without Jerry’s knowledge. It was not until later, when Craig filed bankruptcy that Jerry learned Business Finance Corporation claimed an interest in the Greenwater parcels. (CP 425)

**C. The Loan Documents.**

There are four documents that Business Finance relies on: (i) Deed of Trust dated September 1, 1999;<sup>3</sup> (ii) Loan and Security Agreement dated September 1, 1999;<sup>4</sup> (iii) Promissory Note dated July 21, 2000; and (iv) Promissory Note (second) dated July 21, 2000.<sup>5</sup> These are discussed below.

1. The Loan and Security Agreement.

The “Borrower” under the Loan and Security Agreement is Knoll Lumber and Hardware Co. (Ex 212) This Agreement is signed *only* by Craig Knoll, as president of Knoll Lumber and Hardware Co. *Id.* Craig did not sign in his personal capacity; he did not sign as a co-personal representative. *Id.* Jerry did not sign it either. *Id.*

The definition of “Collateral” under the Loan and Security is limited to property of the “*Borrower,*” which is Knoll Lumber and Hardware Co. *Id.* (emphasis added.)

Any “Term Loan made by Business Finance Corporation to

---

<sup>3</sup> See Ex 212.

<sup>4</sup> This is attached to the Greenwater deed of trust. (Ex 212)

<sup>5</sup> The promissory notes are Exs 213 and 214.



Jerry Knoll. *Id.* And Jerry did not sign. *Id.*

3. The July 21, 2000 promissory notes.

One promissory note is for \$330,780.11; the other for \$520,000.00. (Exs 213, 214) They both state that they are secured by “six Deeds of Trust dated September 1, 1999.” *Id.* Craig and Victoria Knoll personally signed both notes. Knoll Lumber and Hardware Co. did not. *Id.*

These notes came six months after the deeds of trust, out of a settlement when Business Finance Corporation sued Craig and Victoria on personal guaranties they gave on the Knoll Lumber debt. (Ex 239)

**D. The Snohomish County deed of trust.**

Business Finance Corporation knew in 1999 – actually or constructively – that Craig was one of two co-personal representatives (and thus lacked the authority to pledge a security interest in the Greenwater parcels).

On or about August 31, 1999, Business Finance Corporation received a deed of trust (Ex 226) on real property in Snohomish County; Craig and Jerry signed it *as co-personal representatives* of their mother’s estate.

THE ESTATE OF LORNA L. KNOLL

By: \_\_\_\_\_ s/

Craig T. Knoll  
Its: Personal Representative of the Estate  
of Lorna L. Knoll and Individually

By: \_\_\_\_\_ s/  
Jerry V Knoll

Its: Personal Representative of the Estate  
of Lorna L. Knoll

*Id.* This deed of trust is almost identical to the Greenwater deed of trust (they even have the same typos)<sup>6</sup> except for two glaring differences: while the Snohomish County deed has Jerry's signature; the Greenwater deed does not. And the Snohomish County deed of trust references the "LORNA L KNOLL ESTATE" as a grantor on its first page; the Greenwater deed of trust does not. (*Compare* Exs 212 and 226) The Greenwater deed of trust says only that it secures Craig and Victoria's interest. *Id.* It refers to "their" interest.

**E. The bankruptcy.**

Craig and Victoria Knoll filed a Chapter 11 bankruptcy petition on December 20, 2001. (Exs 227 and 228)

In the bankruptcy Jerry learned for the first time Business Finance was claiming a security interest in the estate's interest in the Greenwater property. (CP 425)

Jerry also learned that Craig had squandered estate property in breach of his fiduciary duties as a personal representative by taking/using/selling estate property and gifts from Lorna and diverting the proceeds to himself or to the lumber company. *Id.* Jerry sued Craig and Victoria in the bankruptcy court to recover the squandered funds and declare Craig and Victoria's debts nondischargeable. (Exs 104, 227, 238)

Business Finance Corporation was one of the first creditors to

---

<sup>6</sup> Under both deeds the beneficiary is "BUSINESS [sic] FINANCE CORPORATION."

appear in the bankruptcy, having done so through attorney Jeffrey Parker on January 11, 2002. (Ex 227)

The bankruptcy lawsuit culminated in a settlement, which also involved Business Finance Corporation. The settlement (as amended after Craig died) was thus:

- Jerry Knoll and Craig Knoll's heirs received the Greenwater parcels – Parcels A, B and D, which were since transferred to Knoll Greenwater LLC (with the Bankruptcy Court's approval);
- In exchange, Business Finance Corporation received a Snohomish County property that was not part of the bankruptcy estate. In Victoria Knoll's words, this was "necessary for the remaining [Snohomish County] parcels to have value"; this benefited Business Finance Corporation;
- Craig and Victoria Knoll would satisfy Business Finance Corporation's debt with other real property and thus the validity of Business Finance Corporation's claim against the Greenwater parcels would cease to be an issue.

(Ex 232)

Craig and Victoria Knoll received a discharge on July 11, 2003.

(Ex 231) (stating, "[c]onfirmation [of the Plan] shall operate, upon the Effective Date, as a discharge of any and all debts and claims ...."))

The Second Amended Plan provides:

If after 7 months, the debtors have not sold or do not have pending offers on their properties, the secured creditors will have the right to pursue non judicial foreclosure against the property upon which they are secured, except as otherwise set forth herein.

*Id.*

The bankruptcy administratively closed (and was opened from

time to time to sell real property that was to be marketed under the Plan).  
(Exs 237 and 238)

**F. Business Finance Corporation waits until May 2010 to foreclose.**

Business Finance Corporation filed its foreclosure complaint on May 24, 2010. (CP 1)

Jerry Knoll and Knoll Greenwater LLC accepted service of the Complaint effective August 12, 2010. (Ex 202)

Then over the course of four years the case sat – being continued from time to time. (Exs 204 through 209)

Jerry Knoll’s attorney, Ken Berger passed away and the Court allowed one final continuance, but indicated that no further continuances would be granted, and set the case for trial on December 15. (CP 200 – 207) (Ex 210)

## **V. ARGUMENT**

**A. BFC’s complaint is barred by the three-year statute of limitations.**

Had BFC relied on the promissory notes and deed of trust—and only the promissory notes and deed of trust—the six year statute of limitations would apply. But BFC introduced parol evidence to bend and twist around the Greenwater deed of trust’s language, and introduce evidence of a phantom “merger” where the two promissory notes were somehow merged into one promissory note simply by the bankruptcy

court “fixing” the total claim amount in the bankruptcy.<sup>7</sup>

The Greenwater deed of trust states Craig Knoll and Victoria Knoll pledged *their* interest in the Greenwater Parcels.<sup>8</sup> (Ex 212) While it is true the signature block identifies Craig as himself and as “personal representative,” that does not change the fact the only thing pledged was “their” interest—meaning the interest of “CRAIG T. KNOLL and VICTORIA W. KNOLL, husband and wife, as to Parcel C and their undivided interest in Parcels A, B and D.” (Ex 212) (Emphasis added.) To expand the definition of “their”, BFC sought to admit parol evidence of who owned what, when to demonstrate that “their” was intended to mean more than their, but also the estate’s and Jerry Knoll’s interest. Also, the “waiver” argument—based on the allegation that Jerry was lackadaisical—was an *allegation* in the *bankruptcy case*, but used by Business Finance to go outside the writings. *See*, Finding of Fact No. 21. (CP 699); *see also*, Response in Opp. to Motion *In Limine* at pp. 1 - 2. (stating Business Finance will present “substantial extrinsic evidence” at trial). (CP 253 – 254)

This took the contracts from the written realm, and into the oral realm, thus shortening the limitations period to three years.

When parol evidence is required to prove an essential term to a

---

<sup>7</sup> Business Finance’s president, Dane Armstrong, could not answer to what note the alleged payments was applied. After all, there were two notes, not one.

<sup>8</sup> Knolls’ first affirmative defense was that the complaint was barred based on the statute of limitations. (CP 111)

contract, the contract is partly oral, and therefore the three year statute applies. *See Bogle & Gates, PLLC v. Zapel*, 121 Wn. App. 444, 448, 90 P.3d 703 (2004); *see also* RCW 4.16.080(3) (three-year statute of limitations). The three-year statute of limitations applies here.

In *Bogle*, a law firm sued a former client for unpaid fees more than three years, but less than six years, after default in payment. The law firm's claim was time barred under the three year statute even though it had sent the client a written engagement letter confirming the terms of the engagement (and the client continued to use the law firm's services after having received the letter). The three-year statute applied because the engagement letter merely confirmed the terms of representation, but did not call for the client's written affirmation. *Id.* at 446 – 47. In dismissing the law firm's claim, the *Bogle* court stated:

Manifestly, a promise clearly obligating a contracting party is of the very essence of a contract, and when such promise is not expressed in the writing, plainly one of its most important essentials is wanting. The law firm's letter and Standard Terms of representation did not express or imply a promise by Zapel [the client], and *Bogle & Gates* failed to show any other writing in which Zapel expressed or implied a promise.

*Id.* at 451 (brackets added).

The essential elements to a contract are: parties, subject matter, promise/duty, terms/conditions of performance, price, and as the *Bogle* court specifically pointed out, "the existence of a mutual intention." *Id.* at 448. If extrinsic evidence is needed to show mutual intention, or is needed to identify the parties to a contract then the contract is no longer

completely written; it is partly oral.

Here, the contracts sued upon, by BFC's own admission, require parol evidence to establish the parties and mutual intent. BFC conceded this in its response to the Knolls' motion *in limine* to exclude extrinsic evidence:

BFC will present substantial extrinsic evidence in addition to the Deed of Trust itself, but none of it will fall within the prohibitions of the Parol Evidence Rule.

(CP 243 – 54)<sup>9</sup> As a further offer of proof, BFC filed a multipage “Addendum” to show the trial court how it intended to make an equitable case that Jerry Knoll should be bound by the deed of trust he did not sign. (CP 260 – 351)

At trial, Business Finance relied on evidence outside the promissory notes and deed of trust at almost every turn. For example, it relied on the absence of an appointment of resident agent in the Lorna Knoll probate to argue Jerry Knoll's appointment as personal representative was void *ab initio*. (RP 86 – 91) (Ex 112 – 13)

Further, Business Finance presented pleadings from the bankruptcy court in an attempt to prove that Jerry Knoll acquiesced or waived the issue. (CP 255, 426) (Exs 104 through 110)

---

<sup>9</sup> BFC also stated it would

present [at trial] evidence of the circumstances surrounding the DOT showing that the signature page was an accurate statement of the intent of the parties. ... It is well-settled in Washington that a party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are ambiguous.

(Brackets added.) (CP 256)

Business Finance also presented parol evidence to show how two promissory notes (Exs 213, 214) merged into one single “debt” without a writing saying so (this was to avoid the six-year statute of limitations on at least one of the promissory notes). While true the aggregate claim<sup>10</sup> amount may have been disputed, reduced, negotiated, fixed, etc. in the bankruptcy, if the two notes “merged” into one, such a merger was oral; there was no writing cancelling the notes in favor of a new note. Indeed, even the complaint alleges two promissory notes, and the total amount was “fixed” for purposes of comprising the proof of claim, but there is nothing about how the aggregate was ever apportioned, and nothing even alleging the notes were merged into a new obligation. (CP 2) This is important because when Business Finance’s president was asked to what note an alleged \$32,825 payment applied (which would by necessity mean at least one of the promissory notes were time-barred), Business Finance’s president could not answer:

---

<sup>10</sup> In bankruptcy court creditors who want to be repaid must file a “proof of claim” that aggregates the amount(s) they claim are owed. The proof of claim must set forth all the bases upon which the aggregate claim amount is derived. The United States Bankruptcy Code defines a “claim” as either:

A “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(A) (emphasis added); or

A right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.” 11 U.S.C. § 101(5)(B).

*See, generally, Johnson v. Home State Bank*, 501 U.S. 78, 85, 111 S. Ct. 2150, 2155, 115 L. Ed. 2d 66 (1991) (discussing the meaning of a “claim” in bankruptcy court).

Q. So the \$32,000 payment paid down which [promissory note]?

A. Good question. The Court determined that, not me.

...

THE WITNESS: The payment was applied to the court-approved balance owing in the Knoll bankruptcy.

(RP 83) The question remains, which note? And if there were only one note, where does it say they were merged into a new obligation?

Business Finance does not allege merger, only a deed of trust, two promissory notes and an aggregate amount owed. (CP 1 – 44) The only persons named on the promissory notes are Craig and Victoria Knoll, and the only thing pledged in the deed of trust was *their* interest in the described collateral:

THIS DEED OF TRUST, made this 1st day of Sept 1999 ~~day of August~~, between **CRAIG T. KNOLL** and **VICTORIA W. KNOLL**, husband and wife, as to Parcel C and their undivided interest in Parcels A, B and D, GRANTORS, and FIRST AMERICAN TITLE INSURANCE COMPANY, a corporation, TRUSTEE, ... and BUSINESS [sic] FINANCE CORPORATION, a Washington corporation, BENEFICIARY ....

(Ex 212) (caps and strikethrough in original, bold and underlines added).

The interest pledged was no more than “*their* undivided interest.” *Id.* (emphases added). Jerry Knoll, neither individually nor as a co-personal representative signed the deed of trust. The only allusion to the Estate is in the signature block – and Jerry Knoll did not sign. To bind the estate, Jerry’s signature is necessary (*see* argument, *infra*).

Business Finance Corporation may argue that this case fits within

the facts of *Barnes v. McLendon*, 128 Wn.2d 563, 910 P.2d 469 (1996), where a partner in a partnership was liable on his partner's note that was sued upon more than three, but less than six years later. *Id.* at 573. The key difference in *Barnes v. McLendon* is the borrower in that case was a partner acting for the partnership. *Id.* at 571. The parol evidence introduced in that case “merely establish[ed] the partnership relationship between the defendants, not the contract” and for that reason, the six year statute applied. *Id.* at 572. Unlike a partnership, where a partner may bind his other partners, Craig Knoll could not unilaterally bind the Estate of Lorna Knoll (this issue is argued *infra*).

Business Finance conceded in opposition to Jerry's motion *in limine* that it would present “substantial extrinsic evidence” but cryptically rode the fence, saying that it would not intend to contradict any terms, but will establish mutual intent with extrinsic evidence. *See, e.g.* Response in Opp. To Motion in Limine at pp. 1 – 2 (“BFC will present substantial extrinsic evidence in addition to the Deed of Trust itself, ....”). Business Finance Corporation went on, relying on *Berg v., Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) to argue it may allow extrinsic evidence not to contradict terms in the written agreements, but again, to establish the parties' “intent.” *See* Response at p. 6 (stating “[i]t is well-settled in Washington that a party may offer extrinsic evidence in a contract dispute to help the fact finder interpret a contract term and determine the contracting parties' intent regardless of whether the contract's terms are

ambiguous.” *Id.* (emphasis added).

The *Bogle v. Zapel* court specifically pointed out, “the existence of a mutual intention” is one of those essential terms, that if extrinsic evidence is required to prove, the contract moves from the written realm, into the oral realm. 121 Wn. App. at 448.

If the Court needs information outside the written document to determine the “intent” as Business Finance advocated, or the true identity of the parties, or that the promissory notes “merged,” then the three-year statute necessarily applies. And the complaint is time-barred under the three year statute..

**B. Business Finance’s complaint is barred by the six-year statute of limitations.**

An action on a written contract must commence within six years. RCW 4.16.040(1). The last possible time to foreclose was six years and seven months following entry of the Second Amended Plan of Reorganization on July 11, 2003:

If after 7 months, the debtors have not sold or do not have pending offers on their properties, the secured creditors will have the right to pursue non judicial foreclosure against the property upon which they are secured, except as otherwise set forth herein.

(Ex 231) Business Finance’s deadline to sue was six years later, February 11, 2010. Business Finance filed its Complaint on May 24, 2010 (Ex 201); and service was effective August 12, 2010. (Ex 202) Both of these occurred more than six years later.

Business Finance Corporation will argue a payment extended the statute of limitations. *See* Complaint, ¶15. (Ex 201) Indeed, a voluntary partial payment can extend the limitations period. *See* RCW 4.16.270. This was Business Finance's burden to prove. *See Wickwire v. Reard*, 37 Wn.2d 748, 226 P.2d 192 (1951).

The burden of proving the voluntary payment rests on the person seeking to extend the statute of limitations. *Id.* (“[t]he burden of proving that a voluntary payment was made at a time which would toll the statute rests upon the party asserting it.”) (citations omitted). A voluntary payment is necessary, but not sufficient. The payment must also come from the party against whom the payment is invoked, i.e. Craig or Victoria Knoll, the debtors. *Id.* (Ex 213, 214)

It is without doubt the law, as said by this court in *Arthur & Co. v. Burke*, 83 Wash. 690, 145 Pac. 974:

‘It is also the settled law of this state, following the trend of authority in others, that in order to toll the statute of limitations, the partial payment must have been a voluntary payment made or authorized or ratified **by the party against whom the payment is invoked** as tolling the statute.’

*Sanders v. Brown*, 123 Wash. 611, 612, 212 P. 1070 (1923) (emphasis added).

Here, Business Finance did not present evidence that either Victoria Knoll or Craig Knoll made a voluntary payment in order to extend the limitations period. While Business Finance's president, Dane Armstrong testified BFC received payments in May 2004 and January

2005, he did not say from whom the payments came, only that it was “voluntary” and the funds were from a “sale of a piece of property.” (RP 85)

Business Finance’s records showed the payment was from Knoll Lumber, not Craig or Victoria Knoll. The “General Ledger Detail Report,” second page of Exhibit 111, shows the payment as thus:

1/11/2005      Knoll Lumber      CHK: 7975      \$32,825.01.

Business Finance’s president Dane Armstrong testified the ledger was accurate:

Q.      ... you’re testifying here that [the general ledger, second page] is accurate. How do you know it’s accurate?

A.      I know it’s accurate.

Q.      Okay. Are you sure of that?

A.      I’m positive of that.

Q.      Every single number on here is accurate. Right?

A.      Yes, it is.

Q.      Every single ledger on here is accurate. Right?

A.      It’s accurate pursuant to the check deposits made into that account.

(RP 78 – 79) (Brackets added for context.)

With a \$32,825.01 check from Knoll Lumber and no evidence it came from Victoria Knoll, there was no evidence of any other payments coming from Victoria Knoll that would have extended the statute of limitations past May 24, 2010, when Business Finance filed its complaint.

(Ex 201)

Where circumstances are relied upon to toll the running of the statute of limitations, *they must show a clear and unequivocal intention on the part of the obligor to keep alive the debt.* *Berteloot v. Remillard*, 130 Wash. 587, 228 P. 690; *Abrahamson v. Paysse*, 159 Wash. 516, 293 P. 985. Detached and fragmentary statements, susceptible of different interpretations, are not sufficient to remove the bar of the statute. *Bank of Montreal v. Guse*, 51 Wash. 365, 98 P. 1127.’ (Italics ours)

*Walker v. Sieg*, 23 Wn.2d 552, 561, 161 P.2d 542, 546 (1945).

There was no evidence to support the finding that the alleged voluntary payment was made “by the party against whom the payment is invoked”—Victoria Knoll. The trial court erred by finding Victoria Knoll made this payment, and also by not dismissing the complaint as time-barred under the six-year statute of limitations.

**C. The trial court erred by finding Lorna Knoll’s Estate was a ‘Grantor’ under the Deed of Trust.**

Business Finance Corporation’s deed of trust pledges only what Craig and Victoria Knoll owned at the time of the pledge:

THIS DEED OF TRUST, made this 1st day of Sept 1999 ~~day of August~~, between CRAIG T. KNOLL and VICTORIA W. KNOLL, husband and wife, as to Parcel C and **their** undivided interest in Parcels A, B and D, ....

*See* Deed of Trust at p. 1 (emphasis added) (caps and strikethrough in original).

Courts determine parties’ intent from the language of the deed as a whole. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003) (if “the plain language is unambiguous, extrinsic evidence will not be considered.”). “In the construction of a deed, a court

must give meaning to every word if reasonably possible.” *Hodgins v. State*, 9 Wn. App. 486, 492, 513 P.2d 304 (1973) (citation omitted). Where the plain language of a deed is unambiguous, extrinsic evidence will not be considered. *Sunnyside Valley*, 149 Wn.2d at 880.

This rule is a practical consequence of the permanent nature of real property—unlike a contract for personal services or a sale of goods, the legal effect of a deed will outlast the lifetimes of both grantor and grantee, ensuring that evidence of the circumstances surrounding the transfer will become both increasingly unreliable and increasingly unobtainable with the passage of time. Accordingly, the language of the written instrument is the best evidence of the intent of the original parties to a deed.

*Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 56, 64-65, 277 P.3d 18 (2012).

Craig and Victoria Knoll *as husband and wife*, pledged *their* interest in Parcels A, B and D. It is undisputed *their* interest at that time was no more than an undivided 18% interest in Parcels A and B.

Certainly Craig Knoll and Business Finance indeed pledged estate property two days prior. In that case, the “LORNIA L. KNOLL ESTATE” was a named grantor *and* the estate’s co-personal representative, Jerry, was a signatory. (Ex 226)

**D. Craig Knoll could not validly pledge estate property without joinder from his co-personal representative, Jerry Knoll.**

RCW 11.98.016 makes co-personal representatives with nonintervention powers subject to the same state laws as co-trustees.

RCW 11.98.070 defines the powers of a trustee, or of joint

trustees, to include the power to mortgage assets of the trust estate. RCW 11.98.070(18). In 1984, the Washington legislature recodified RCW 30.99.030 into RCW 11.98.016 specifically addressing the powers of a co-trustee, and provided:

(3) An individual trustee, *with a co-trustee's consent*, may, by a signed, written instrument, delegate any power, duty, or authority as trustee to that co-trustee. This delegation is effective upon delivery of the instrument to that co-trustee and may be revoked at any time by delivery of a similar signed, written instrument to that co-trustee. However, if a power, duty, or authority is expressly conferred upon only one trustee, it shall not be delegated to a co-trustee. If that power, duty, or authority is expressly excluded from exercise by a trustee, it shall not be delegated to the excluded trustee.

(4) If one trustee gives written notice to all other co-trustees of an action that the trustee proposes be taken, then the failure of any co-trustee to deliver a written objection to the proposal to the trustee, at the trustee's then address of record and within fifteen days from the date the co-trustee actually receives the notice, constitutes formal approval by the co-trustee, unless the co-trustee had previously given written notice that was unrevoked at the time of the trustee's notice, to that trustee that this fifteen-day notice provision is inoperative.

RCW 11.98.016 (emphasis added).

Business Finance presented no evidence that Jerry conferred power on his brother Craig to bind the estate to this loan (although it attempted to adduce parol evidence regarding Jerry's involvement in the lumber company in support of a waiver argument).

Jerry's testimony was that "He [Craig] knew we both didn't want to obligate this [the Greenwater parcels] to anything." (CP 425) And Jerry did not even know the Greenwater properties had been purportedly

pledged until Craig's bankruptcy. (CP 425 – 25)

The Washington Supreme Court addressed the same type of issue presented here in *Cornett, et al. v. West*, 102 Wash. 254, 173 P. 44 (1918), holding that a co-trustee, without the other co-trustee's approval, "had no authority to borrow money in the name of the estate without the concurrence of his co-trustee." *Id.* at 261. In *Cornett*, the court required the rogue co-trustee "personally take up the loan and relieve the estate from all apparent obligation therefore." *Id.*

*Cornett* is not an outlier. The leading trusts treatise, Bogert's *Trusts and Trustees*, provides: "If two trustees have a power of sale and one makes a contract to sell the land, or executes and delivers a deed of it to a purchaser, the trust is not bound by the contract or deed." BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 554; *see id.*, n. 71 (citing cases).

In this case Jerry Knoll gave no written (or oral) consent for Craig Knoll to sign the Greenwater Deed of Trust (and Business Finance adduced no evidence he did). As in *Cornett, supra*, the co-trustee, Jerry, did not authorize the action. Even if the trial court were correct that the Greenwater deed secures more than Craig's and Victoria's tenant-in-common interest, it cannot have secured the estate's interest without Jerry. The security interest against the estate's interest is thus void.

Business Finance contends Jerry lacked authority as co-personal representative because he was an Alaska resident and did not appoint an in-state resident agent. Thus, Business Finance will contend, Craig had

full authority as the last man standing. This argument is wrong for two reasons. First, this is an impermissible collateral attack on the probate court's order appointing Jerry as a co-personal representative with nonintervention powers. (Ex 112, 219) Business Finance seeks to void the probate court order that appointed Jerry, but does so in this forum, not in the probate.

A judgment rendered by a court having jurisdiction of the parties and of the subject matter, not reversed and not vacated, is not open to contradiction or impeachment by parties or privies by a collateral attack, except for fraud of a character going to the jurisdiction of the court which prevents it from obtaining the requisite power to entertain or decide the issues in controversy. *Baskin v. Livers*, 1935, 181 Wash. 370, 374, 43 P.2d 42; *Sears v. Rusden*, 1951, 39 Wash.2d 412, 419, 235 P.2d 819; *Batey v. Batey, supra*; Freeman on Judgments (5th ed.) 661, § 331.

In *Batey v. Batey, supra*, we explored at some length the character of the fraud which justified a collateral attack on a final judgment. We there concluded that it is only where the fraud practiced by the successful party goes to the very jurisdiction of the court itself that the judgement is subject to collateral attack. We also referred to a comprehensive statement in *Dockery v. Central Arizona Light & Power Co.*, 1935, 45 Ariz. 434, 45 P.2d 656.

As said by the trial court in his very thorough memorandum decision,

‘Assuming that Albert B. Anderson did fraudulently withhold information from the Court at the time of obtaining the decree, it nevertheless is plain from the record that no fraud was practiced in obtaining jurisdiction for Thelma Anderson was personally served in the State of Washington and was not, at that time, under any legal disability. The Court did acquire jurisdiction of the subject of the action and of the person of the defendant. The fraud, if any there was, was extrinsic and thus of such a nature that it could be presented to the court only in a proceeding

to directly set aside the judgment originally rendered. It cannot be used as a basis for a collateral attack.’

*Anderson v. Anderson*, 52 Wn.2d 757, 761 – 62, 328 P.2d 888 (1958).

Indeed, RCW 11.36.010 requires the filing of a notice of resident agent for service when an executor resides outside the state of Washington. The court here appointed Jerry Knoll and did not remove him even though he did not file such a notice. (Ex 111) In fact, not only did the court not remove him, it reappointed him in February of 2007 after Craig died (with bond waived). (Exs 219, 220) But RCW 11.36.010 only speaks to a party’s qualifications to be appointed; it does not void those orders entered, perhaps hastily. Rather, RCW 11.28.250 governs removal when letters of administration have issued. In the probate court, Jerry was never removed. (Ex 112)

Although filing a notice of appointment of resident agent is required for a non-resident personal representative to initially be appointed, once Letters issue, notice and hearing are needed to remove a personal representative. Washington statute requires that where “the court has reason to believe a personal representative ... is incompetent to act, or is permanently removed from the state..., [the court] shall have power and authority, after notice and hearing to revoke such letters.” RCW 11.28.250 (emphasis added); *see also In re Estate of Olson v. Olson*, 194 Wash. 219, 77 P.2d 781 (1938) (removing personal representative for untruthfulness with court regarding her, and decedent’s, residence after notice and hearing).

Jerry was never removed. Until such time he was a validly appointed co-personal representative. His co-trustee/co-personal representative, Craig, lacked authority to pledge estate property absent Jerry's joinder. Craig's putative pledge of estate property was void because Jerry did not join in the pledge. (Ex 212)

The trial court's holding sets a dangerous precedent. If left to stand, anyone who deals with a personal representative or co-personal representative is not safe to rely on Letters of Administration. He must look behind them and conduct his own investigation by not only reviewing the probate docket, but performing background checks to assure himself that all conditions of qualification were met, and remain met. Genuine transactions would be undone simply because it is learned *ex post facto* that a ground existed for a personal representative's removal. Had anyone sought to remove Jerry in the probate of his mother's estate, using the resident agent issue as grounds, Jerry could have mooted it, simply by filing the one page piece of paper. This omission—one page of paper—is not grounds to bind an entire estate to a deed of trust that does not even say the Lorna Knoll estate's interest in the Greenwater property was pledged.

//

//

//

//

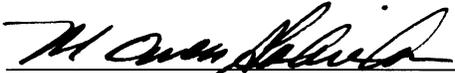
## VI. CONCLUSION

This court should reverse the trial court's judgment for any one (or more) of the following reasons:

- The Greenwater deed of trust only encompasses Craig and Victoria's tenant-in-common interest in the Greenwater property;
- The Greenwater deed of trust could not have encumbered estate property because both co-personal representatives did not join pledging the Greenwater property;
- The complaint was untimely under the three-year statute of limitations; or
- The complaint was untimely under the six year statute of limitations.

Respectfully submitted this 5th day of October, 2015.

FARR LAW GROUP, PLLC

By   
M. Owen Gabrielson, WSBA# 34214  
Email: MOG@FarrLawGroup.com  
Kristi L. Richards, WSBA# 47945  
Email: KLR@FarrLawGroup.com  
Attorneys for Appellants Jerry Knoll,  
Lucy Knoll and Knoll Greenwater LLC

**CERTIFICATE OF SERVICE**

I hereby declare, under penalty of perjury of the laws of the State of Washington, that on this day I caused to be served a true and correct copy of the foregoing Appellants' Brief by the method indicated below, and addressed to each of the following:

James C. Fowler  
Vandenberg Johnson & Gandara, LLP  
999 Third Avenue, Ste. 3000  
Seattle, WA 98104-1192  
Tel: 206-464-0404  
Fax: 206-464-0484  
Email: [jfowler@vjgseattle.com](mailto:jfowler@vjgseattle.com)  
*Attorneys for Plaintiff Business  
Finance Corporation*

- U.S. Mail, Postage Prepaid
- Hand-Delivered
- FedEx
- Facsimile Transmission
- Electronic Notification\*

\* per e-mail authority

DATED this 5<sup>th</sup> day of October, 2015, at Enumclaw, Washington.

*M. Omeyschick*

FILED  
COURT OF APPEALS  
DIVISION II  
2015 OCT -5 PM 3:11  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY