

NO. 35291-5-II

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

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

Appellants,

v.

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

Respondents.

BRIEF OF APPELLANTS

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INTRODUCTION

The plaintiffs lost several million dollars they had invested in a limited liability company, NW Commercial Loan Fund, LLC ("NW Commercial" or "NWCLF"), not to be confused with NW, LLC, another limited liability company that was the original manager for NW Commercial. NW was owned by defendants and managed by defendant Byrne. The plaintiffs brought this action after learning that defendants had caused plaintiffs' investments to be loaned to a shopping center development in Graham, Washington, in which defendants held a 50% equity interest. These investments violated the Private Placement Memorandum under which the plaintiffs had invested in NW Commercial.

The trial court never reached the merits of plaintiffs' case, instead dismissing plaintiffs' case on strained and misdirected procedural arguments. Ignoring substantial material factual disputes, the trial court dismissed the case based on a potpourri of arguments, primarily the statute of limitations. Although defendants' arguments were novel and unresolved, the trial court found the entire plaintiffs' case to be frivolous and awarded a quarter of a million dollars to defendants for attorney fees and costs. This court should reverse and remand for trial on the merits.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting partial summary judgment to defendant Oldfield dismissing claims assigned by NW Commercial to plaintiffs, and dismissing negligence and breach of fiduciary duties. CP 991.

2. The trial court erred in granting partial summary judgment dismissing as to all defendants all claims assigned by NW Commercial to plaintiffs. CP 999.

3. The trial court erred in denying plaintiffs' motion to file a third amended complaint. CP 1882.

4. The trial court erred in denying plaintiffs' motion to strike the memorandum prepared for plaintiffs by attorney Yanick. CP 1880.

5. The trial court erred in granting summary judgment dismissing all remaining claims by plaintiffs against Oldfield. CP 1888.

6. The trial court erred in granting summary judgment dismissing all remaining claims by plaintiffs against defendants Byrne, Reid and the Prices. CP 1884.

7. The trial court erred in awarding attorney fees and costs to defendants Byrne and Reid on the basis of defending a frivolous action. CP 2205.

8. The trial court erred in awarding attorney fees and costs to defendant Oldfield on the basis of defending a frivolous action. CP 2207.

9. The trial court erred in granting attorney fees and costs to defendants Price on the basis of defending a frivolous action. CP 2210.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were NW's claims against the defendants validly assigned to the plaintiffs by a validly appointed manager?

2. Was summary judgment on the statute of limitations erroneous where the facts present jury questions when Mitchell and Grendahl learned the elements of their claims and that they had suffered damage, and whether Mitchell and Grendahl exercised due diligence?

3. To the extent that the summary judgments can be read as based on any other arguments, are those arguments misdirected?

4. Were the plaintiffs' claims frivolous where they were not advanced without reasonable cause and several of defendants' theories were unresolved or issues of first impression?

STATEMENT OF FACTS

On this appeal from summary judgment, this Court engages in the same inquiry as the superior court. ***Teller v. APM Pacific Term., Ltd.***, 134 Wn. App. 696, 704, 142 P.3d 179 (2006). All facts and inferences must be granted in favor of the non-moving party, here the plaintiffs. *Id.* This brief analyzes the facts from this perspective.

A. Plaintiffs are investors in limited liability company NW Commercial, which was formed by Defendants Byrne, Reid, Price and Coleman, as members of limited liability company NW.

NW LLC is a limited liability company formed by defendants Byrne, Reid, Coleman, and the Prices. CP 4. These five defendants were the sole members of NW. CP 5, 90. Byrne and Coleman were managing members of NW. CP 2226. Defendant Oldfield, who is an attorney, formed NW and represented NW. CP 1549-50. NW was formed in 1995 for the purpose of "loan securitization," the process of putting together a package of secured loans for sale to a group of investors. CP 1141-42.

In 1995, NW made its first loan to Graham Square, a development of contiguous parcels in Graham, Washington, into a shopping and commercial center. CP 1142, 1337. NW loaned several million dollars to Graham Square, taking a second security position behind the construction lender. CP 1337. As part of the loan, NW obtained a 50% equity interest in the project. CP 1142. In 1997, defendant members of NW transferred 49.5% of Graham Square to themselves, leaving only a .5% interest in NW. *Id.*

In May 1998, NW formed a new limited liability company, NW Commercial Loan Fund, LLC (“NW Commercial” or “NWCLF”), CP 328, “for the purpose of holding loans which did not qualify for securitization and as a vehicle for investors in NWCLF to earn interest from loans assigned from NW to NWCLF.” CP 1143. NW was the manager of NW Commercial. *Id.* Defendant Oldfield represented NW in forming NW Commercial, and simultaneously represented NW Commercial. CP 1150-51.

The Private Placement Offering Memorandum sets forth NW Commercial’s investment policy, including the statement that NW Commercial “will not permit more than 15% of its long-term assets to be invested in any single Mortgage.” CP 382. Exceptions will be made to the general investment guidelines “only in a limited number

of instances.” CP 383. 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. CP 384. The operating agreement for NW Commercial prohibited the manager from acting in bad faith, fraud, or contrary to the interests of the company. CP 410-11.

Defendant Byrne told Mitchell and Grendahl about NW Commercial, “which would buy First Deeds of Trust and commercial mortgages, diversified and all in 1st position through the company he formed called NW LLC” CP 359. After several meetings with Byrne, Mitchell and Grendahl invested with NW Commercial. CP 359-60. Most of the other 19 limited members of NW Commercial were friends and family of Mitchell and Grendahl. CP 360. Members included individuals, trusts corporations, and retirement plans. *Id.* Mitchell’s understanding was that defendant Byrne was primarily responsible for managing the business, in consultation with defendant Reid. CP 361.

Defendant Coleman was the president of NW Commercial. CP 360-61. Coleman had little or no experience in lending and real estate loans. CP 1334-35. NW was structured to take advantage of Byrne’s lending expertise. CP 1335. Although NW was the

manager of NW Commercial, “[i]n reality, Kevin [Byrne] was the Asset Manager and sole decision-maker of [NW Commercial].” *Id.*

B. Defendants caused NW to sell to NW Commercial loans in the Graham Square development, owned partly by defendants themselves, in violation of the NW Commercial operating agreement.

On or about January 28, 1999, NW loaned \$2,335,852 to Graham Square II and recorded a Deed of Trust (“DOT”) in favor of NW Commercial. CP 669, 1148. This was half of NW Commercial’s loan portfolio, which was \$4.8 million (as of May 2001). CP 437. NW sold to NW Commercial yet another loan to Graham Square II in the amount of \$1,350,000. CP 669. No DOT securing this loan was ever assigned to NW Commercial. *Id.* These two loans to Graham Square II totaled almost \$3.7 million, over 75% of the entire loan portfolio.

Other Graham Square loans sold to NW Commercial include: a loan for \$255,000, DOT recorded on February 15, 1999, CP 600, 669; a loan for \$300,000, DOT recorded on October 27, 1999. CP 669, 1154. NW sold more Graham Square II loans to NW Commercial, but failed to record the assignments of DOTs until July 17, 2001. CP 669, 1557. These loans were for \$460,000, \$175,000, and \$46,205. CP 669.

The Mitchell plaintiffs eventually learned that 97% of all the loan funds of NW Commercial were invested in Graham Square I and II, and all were subordinated to more senior mortgage liens. CP 661. The loans clearly violated the offering agreement and investment guidelines that no more than 15% of the assets would be invested in a single mortgage, that investments would be diversified, primary investment would be in income producing properties, and that primary investments would be in first lien mortgages. CP 361-62.

C. When the Graham Square loans became delinquent, defendant Byrne misrepresented to plaintiffs the status of the loans and of NW Commercial.

In late fall 2000, NW became insolvent. CP 1558-60. Coleman blamed Byrne; Byrne and Oldfield blamed Coleman. CP 1143, 1339, 1559-60, 1694. In January 2001 Coleman resigned. CP 1143.

Not only was NW insolvent, the loans NW had sold to NW Commercial were seriously delinquent, although the plaintiffs did not know this. The two largest loans had a principal balance in excess of \$3.3 million as of April 1, 2001, with delinquent interest

as of April 2001 of about \$480,000. CP 1159. This suggests that no interest had been paid on these two loans since January 2000.¹

In early 2001, probably in February, plaintiff Grendahl met with defendant Byrne who assured Grendahl that the NW Commercial loans were in first position. CP 1616.

In March 2001, Grendahl and his attorney, Mike Woodell, met with defendant Byrne and defendant Oldfield. CP 723, 1616. Grendahl was reassured by Oldfield's presence as attorney for NW Commercial. CP 723. Byrne promised to provide a payoff schedule and balance on each note held by NW Commercial. *Id.* Oldfield subsequently assured Woodell that NW Commercial would be distributing redemptions of the member's interests "in the second half of this year" CP 786.

Will Stevens, an accountant, attended the meeting with Grendahl, Byrne and Oldfield. CP 1508-09. Byrne told them that all of the NW Commercial loans were secured by first position deeds of trust. CP 1509. As a result, Stevens and Grendahl had no concerns about the quality of the loans, only about liquidity to allow Grendahl to withdraw funds. *Id.*

¹ Calculated by dividing the outstanding interest by the per diem interest. CP 1159, 1166.

Oldfield knew that all of the Graham Square loans had been transferred to NW Commercial, which was contrary to the private placement memorandum, CP 1564-65, and that the Graham Square loans assigned by NW to NW Commercial were not in first position. CP 1568. Oldfield did not advise Byrne that he should disclose to the members of NW Commercial that the Graham Square funds were invested contrary to the offering memorandum. CP 1565. Oldfield also did not disclose the conflict to NW Commercial's members, even though he represented both NW and NW Commercial. CP 1568.

On May 29, 2001, Byrne, as managing member of NW, advised the limited members of NW Commercial that NW had resigned as manager and that he and defendant Reid had formed a new entity, Loan Holdings, LLC, to continue to manage NW Commercial. CP 435. Byrne sent a financial statement for NW Commercial, a list of loans owned by NW Commercial, maturity dates, and a liquidation plan. *Id.* The list of loans, which stated that only one loan was collateralized by a second deed of trust, CP 438, was false. The plaintiffs would later learn that all of the loans were junior. 1357-58, 1620. The fact that all but one of the loans were to Graham Square I or II was not disclosed anywhere in the

letter or the attachments. CP 435-40. The amount stated as the “principal balance” was in fact the principal balance plus substantial delinquent interest. *Compare* CP 438 *with* CP 1159. Not knowing any of these facts, Mitchell believed his investments were still safe. CP 1360.

In early June, 2001, defendants Byrne’s and Reid’s new LLC, Loan Holdings, sent partial distribution checks to the NW Commercial members, stating, “[t]he fund was paid on one of its loan (sic) which closed today.” CP 1458. Unbeknownst to the plaintiffs, the funds for this disbursement did not come from loan repayments, but from a \$500,000 loan from Pacifica Bank. CP 364. Grendahl interpreted the letter to mean that his investment was safe and that he would be paid in full. CP 1622. Grendahl’s feeling of safety was based on “placating promises” from Byrne and Reid. CP 1621.

Mitchell, Grendahl, Byrne and Oldfield met in June 2001. CP 723-24, 1144-45, 1357, 1566. The discussions at that meeting are disputed, as discussed more fully below. But at this point, based on letters and conversations, Mitchell and Grendahl still believed their investments were safe. CP 1360-61, 1621-22. Oldfield admitted that at this point he knew that the funds had been

invested contrary to statements in the offering memorandum, but he did not disclose this or any possible conflict of interest. CP 1566-67. Oldfield believed that he was representing Byrne as manager of Loan Holdings, and thus as manager of NW Commercial, as well as NW Commercial itself. *Id.*

On July 9, 2001, Grendahl's attorney Woodell sent a letter to Loan Holdings, LLC, on behalf of the Grendahls. CP 1199-1201. The letter advised that Grendahl had "reasonable grounds for believing" that the loan guidelines for NW Commercial had been violated. CP 1200. Concerned that "we do not yet have all the pertinent facts," Woodell demanded that accountant Stevens be given immediate access to NW Commercial records to audit the status of loan portfolios and bank accounts. *Id.*

Woodell's letter says nothing about Graham Square or the Graham Square notes because Grendahl was unaware of any of these facts at the time. CP 1622. Grendahl did not know that virtually all of NW Commercial's assets were in one development owned 50% by NW members, that the loans were junior, and that the senior loans were in default or close to default. *Id.* Grendahl did not know that the loans could not be sold to repay the

investments. *Id.* Grendahl did not know that he had suffered any damages when Woodell wrote his letter. CP 1622-23.

On July 16, Byrne sent another letter enclosing a June 2001 financial statement and stating that, “[w]e are anticipating a second payment out of the Fund within the next few weeks.” CP 1693. Like past assurances, this letter led Grendahl to believe that his investment was safe. CP 1623-24.

Grendahl again met with Byrne on or about July 18, 2001. CP 1624. Byrne reassured Grendahl that NW Commercial was “doing okay and that I should expect to get repaid in full as its assets were liquidated over time.” *Id.* Byrne followed up this meeting with a letter. CP 1694. Once again, Grendahl was reassured by the meeting and the letter. CP 1624.

D. The parties dispute when plaintiffs learned the truth about NW Commercial’s loans and defendants’ actions.

In early August 2001, Mitchell, Grendahl and Stevens met twice with Byrne. CP 1358, 1511. At the second meeting, “Byrne essentially confessed and admitted that the loans owned by NWCLF were almost entirely tied up in one commercial project in Graham and were in second position.” CP 1358. Mitchell

“remember[ed] this conversation quite clearly because it came as quite a shock to me and I was furious.” *Id.*

Prior to the August 9 meeting, Byrne repeatedly told Mitchell that the loans were secure but that loan documentation could not be provided for privacy reasons. CP 1363. Until that meeting, Mitchell did not realize that he might lose his investment in NW Commercial. *Id.* Declarations from Stevens and Grendahl are consistent. RP 1511, 1625. Mitchell summarized the impact of this disclosure in his declaration (CP 1370):

To make certain that I am absolutely clear, and to summarize, it was not until August of 2001 or later that I, or any of the limited members, became aware that the managers of NWCLF had: (a) invested substantially all of the limited members' funds into a single shopping center project; (b) that all of the loans were secured by junior deeds of trust; (c) that the first position loans were in default or soon to be in default; (d) that the loans owned by NWCLF were in default; and (e) that these loans were made to entities that were 50% owned by defendants Byrne, Reid, Price & Price (and Coleman). As of August of 2001, it was unknown whether the limited members had suffered any damages as a result of the foregoing. It was believed that the limited members' investments could likely be recovered through a sale of the Graham property. We continued to hold this belief for some time and worked hard to try to make it a reality. Nor did the limited members really understand the role that Oldfield had played (by not disclosing the problems or by not withdrawing) until some time after August of 2001.

As discussed below in the argument, the date of these revelations is critical to the defendants' statute of limitations

argument because the complaint was filed within 3 years of the August 2001 revelations, on July 30, 2004. CP 1.

The defendants submitted their own declarations contesting the plaintiffs' account of when they learned the truth about NW Commercial. Byrne claimed that in April 2001, he met with Stevens and Grendahl and provided them with a balance sheet and a list of outstanding loans for NW Commercial. CP 1144, 1158, 1159. To the contrary, Mitchell, Stevens and Grendahl all state that they received this information in August and later. CP 1355-56, 1510, 1618.

Byrne claimed that in May 2001, he provided Grendahl and Mitchell with detailed information about NW Commercial's outstanding loans and their current balances. CP 1144. Mitchell and Grendahl unequivocally deny Byrne's statements. CP 1356, 1618-19.

Byrne claimed that prior to June 5, 2001, Byrne met with Stevens, Grendahl and Mitchell and went through the boxes of loan documents, determined that all of the notes but one were secured by the Graham Square property, were in second position, were delinquent, that NW members were 50% owners of Graham Square, and that Byrne provided detailed information about the site.

CP 1144-45. Mitchell, Grendahl and Stevens unequivocally deny Byrne's allegations. CP 1357-60, 1510-11, 1619-22.

Byrne claimed that in July 2001, he provided loan summaries to Grendahl and Mitchell and discussed with Grendahl and Stevens possible arrangements for recouping value out of the Graham Square property. CP 1145-46. Mitchell and Grendahl deny receiving schedules of loans or loan summaries in July, or discussing Graham Square, because they had no idea at this time that NW Commercial owned loans that were secured by the Graham Square properties. CP 1362-63, 1623-25.

Defendants relied heavily on a memorandum written in December 2003 by attorney Miles Yanick to Mitchell, Grendahl and Stevens, analyzing potential causes of action of NW Commercial or its members against Byrne, Oldfield and the other individual members of NW. CP 1231. The Yanick memo and other documents had been flagged as privileged and non-discoverable, but were inadvertently produced. CP 1303-06, 1307-09. Mitchell moved to strike the memo, CP 1293, but the trial court denied the motion. CP 1880.

The Yanick memo is internally inconsistent, acknowledging that the facts need clarification. Page 3 recites that by June 2001,

the members of NW Commercial “had learned through their own investigation that NWCLF held only eight notes”, and that the notes were for Graham Square. CP 1233. But on page 5, the memo notes that a letter from Stevens recited that they only learned these things in August 2001 (CP 1236):

We need to square these statement 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.

The memo concludes: “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.” CP 1241.

The record does not disclose any theory on which the Yanick memo is competent evidence on summary judgment. It is not under oath, is not authenticated, and fails to recite the source of the statements. All that can be said is that it was produced by Stevens in response to a subpoena duces tecum. CP 1230.

Not only is the Yanick memo internally contradictory, Mitchell, Grendahl and Stevens all stated under oath that they did not learn the truth about the NW Commercial loans until August, and certainly not as early as June. The Yanick memo is also inconsistent with the defendants’ declarations. Byrne claimed that

he provided detailed lists of NW Commercial loans, but the lists only show six loans, not eight as stated in the Yanick memo. CP 1144-45, 1159, 1166. In addition, it is difficult to understand how Mitchell, Grendahl and Stevens could have determined by June "on their own" (CP 1144) that there were eight notes, when the assignments of three of these notes were not even filed for public record until July 17, 2001, CP 602, 605, 608, and one of the loans was never formally assigned by NW to NW commercial. CP 669.

E. The Mitchell plaintiffs lost their investments when primary lenders foreclosed on the Graham Square properties.

In September 2001, Loan Holdings ceased performing as manager of NW Commercial. CP 366-67. The members appointed Stevens as interim manager. *Id.* In October, Stevens accepted deeds to the Graham Square properties in lieu of foreclosure. CP 662. Despite plaintiffs' efforts, they lost the Graham Square properties in a foreclosure sale. CP 1366. If Mitchell and Grendahl had known earlier of the status of the loans, they could have realized almost \$1 million in equity in the property. CP 1366-70. On January 16, 2002, Stevens placed NW Commercial into a Chapter 11 bankruptcy. CP 834, 848.

STATEMENT OF PROCEDURE

Plaintiffs filed their complaint on July 30, 2004. CP 1. The eight plaintiffs were all investors in and members of NW Commercial. CP 2, 5. The named defendants were the five members of NW -- Bryne, Reid, Coleman, and the Prices -- Oldfield, and NW. CP 5. The Mitchell plaintiffs sued on their own claims as well as an assignment to them of all of NW Commercial's claims. CP 8. They alleged the following claims: breach of contract, misrepresentation, violation of Consumer Protection Act, fraud and fraud in the inducement, breach of fiduciary duty, negligence, and professional negligence of Oldfield. CP 8-14. The defendants answered, counter-claimed cross-claimed, and filed third-party claims. CP 173, 176-77, 207, 210-11, 231, 349.

Oldfield moved for partial summary judgment that assignment of NW Commercial's claims to the plaintiffs was invalid. CP 306. Byrne and Reid moved for partial summary judgment on the same ground. CP 337. Oldfield joined in Byrne's and Reid's motion. CP 355.

The trial court granted partial summary judgment dismissing all claims assigned by NW Commercial to the plaintiffs. CP 999. The Court also granted partial summary judgment dismissing

claims against Oldfield for violation of the CPA, negligence and breach of fiduciary duty. CP 991. Finally, the Court dismissed all claims against Coleman. CP 986.

Oldfield filed a second motion for summary judgment on the ground that there is no privity of contract between Oldfield and the plaintiffs, and that there is no clear and convincing evidence of misrepresentation or fraudulent inducement. CP 1129. Byrne and Reid moved for summary judgment on the ground that the claims were barred by the statute of limitations, that Byrne and Reid are protected by the limited liability status of NW, that the plaintiffs lack standing, and that Byrne and Reid were released from liability. CP 1247. The Prices joined in Byrne's and Reid's motion. CP 1266.

The plaintiffs moved to strike the Yanick memo (described above). CP 1293. They also moved to permit the filing of a third amended complaint adding as plaintiffs NW Commercial and one more investor. CP 1268. In addition, they sought to amend the complaint to conform to the evidence of corporate disregard. CP 1269. The trial court denied both motions. CP 1880, 1882.

The trial court granted summary judgment dismissing all claims against Oldfield on the ground that the statute of limitations

had expired. RP 68-69²; CP 1888. The court also granted summary judgment dismissing the claims against Byrne, Reid and the Prices based on the statute of limitations. RP 90-91; CP 1884.

All defendants then moved for an award of attorney fees and costs on the theory that the action was frivolous. CP 1892, 2015, 2045. The trial court granted the motions, awarding total fees and costs to all defendants of \$250,270.40. CP 2205-13.

On stipulation of the parties, the court entered findings and an order for entry of final judgment on less than all claims. CP 2224. The defendants' cross-claims, counterclaims, and third-party claims remain for decision. CP 2230-32. The court certified the judgments as final and appealable. CP 2235. This appeal followed. CP 2237.

ARGUMENT

A. NW Commercial's claims against the defendants were validly assigned to the plaintiffs by a validly appointed manager.

The trial court granted the defendants' first motion for summary judgment dismissing all claims assigned by NW

² The transcripts of hearings on the first summary judgment in 2005, the second summary judgment in 2006, and the argument over attorney fees have been consolidated into one consecutively numbered report of proceedings.

Commercial to plaintiffs. CP 999. NW Commercial did not have the funds to pursue claims against any of the defendants. CP 369-70. All limited members (except Byrne) were contacted about sharing the cost of this lawsuit, and plaintiffs were willing. *Id.* Rob Mitchell, acting as manager of NW Commercial, assigned its claims to plaintiffs. CP 370. NW Commercial will receive 5% of any net proceeds and the plaintiffs will receive the balance. CP 261.

1. Mitchell was validly appointed manager of NW Commercial.

Defendants argued that the assignment was invalid because Mitchell was not a manager of NW Commercial. CP 320, 343. In response, Mitchell presented evidence that he had been validly appointed. The defendants apparently abandoned this argument when they omitted it from their reply briefs. CP 956-71, 972-76. Indeed, Oldfield conceded at argument that Mitchell was the manager of NW Commercial. RP 10.

The undisputed facts show that Mitchell was validly appointed managing member. The amended operating agreement for NW Commercial provides that a managing member can be elected by a majority of the limited member units without a meeting upon written consent of those voting. CP 333, 336. Eight limited

members holding a majority of units voted to appoint Mitchell and John Williams as managers. CP 654 (see ownership percentages at CP 715). To the extent that the trial court granted summary judgment on the theory that Mitchell did not have authority to make the assignment, RP 30, the trial court erred.

2. The assignment of claims was not a “distribution” to members.

Defendants Byrne and Reid argued that the assignment was a “distribution” to some of the members and the distribution rendered NW Commercial insolvent, citing RCW 25.15.235(1). CP 341. Defendants’ theory suffers from a number of fatal flaws. First, the assignment was not a “distribution”. The assignees agreed to pay the costs of this litigation, plus five percent of any net proceeds. The assignment was a true sale of an asset, not a distribution. Moreover, it is clear that members or even managers may transact any business with an LLC that non-member could transact. RCW 25.15.035. Finally, if NW Commercial was already insolvent the distribution did not render it insolvent. If NW Commercial was solvent, the assignment did not change its solvency because it had no means of prosecuting the claims against defendant and the claims were valueless unless assigned to the defendants. Finally,

the statute on which defendants rely, RCW 25.15.235, does not render an assignment void, but merely creates potential liability on the part of members who receive assets from the LLC. To the extent that the trial court relied on this theory in dismissing the assigned claims, the court erred.

3. The assignment did not violate bankruptcy laws.

Defendants made a convoluted argument that the assignment violated the Bankruptcy Code, specifically 11 U.S.C. § 363 (c)(1), which governs a trustee operating under § 1108. CP 315-17. The argument fails for several reasons. It only applies in Chapter 11 proceedings to operation of the debtor under Section 1108 of the Code, which applies only to a trustee, and a trustee is appointed only on request of a party on interest. 11 U.S.C. § 1104. The record fails to disclose any appointment of a trustee in this Chapter 11. Second, the assignment occurred after confirmation of the plan, and confirmation vested all property of the estate in NW Commercial. 11 U.S.C. § 1141(2). As a result, even if Section 363 had ever applied, it no longer applied after confirmation. ***Penthouse Media Group v. Guccione***, 335 B.R. 66, 75 (Bankr. S.D.N.Y. 2005) (“Furthermore, § 363 does not apply to a reorganized debtor.”)

Defendants also argued that the assignment violated fiduciary obligations. CP 318-19. Defendants' argument on this point is entirely conclusory, and fails to provide any support for the idea that even a breach of fiduciary duty would avoid an otherwise valid assignment.

4. The claims against defendants Byrne, Reid and the Prices validly listed in the bankruptcy schedules.

Defendant Oldfield raised a new issue in his reply on the first summary judgment motion. Oldfield argued for the first time in his reply that NW Commercial was barred from pursuing the assigned claims because it did not disclose these claims in the bankruptcy schedules. CP 961-68. Defendants Byrne and Reid adopted Oldfield's argument by reference. CP 975. Plaintiffs objected to the new issue at the hearing, RP 7-9, but the court overruled the objection. RP 9. The court granted Oldfield's motion to dismiss the assigned claims in part on the failure to disclose the claim on the bankruptcy schedule. RP 26. The court then extended the ruling to include the other defendants, RP 29-30, and dismissed all claims assigned by NW Commercial against all defendants. CP 1001.

NW Commercial clearly disclosed the claims against the former members of NW in its bankruptcy schedules. CP 902. It

was error to dismiss the claims against the NW members on this basis.

5. Plaintiffs should not be estopped from raising the malpractice claim against Oldfield, where NW Commercial had no knowledge of the potential claim during the bankruptcy proceedings.

The trial court erred in dismissing the assigned claim for legal malpractice against Oldfield under the doctrine of judicial estoppel. There is no evidence that NW Commercial had knowledge of a potential claim against Oldfield during the bankruptcy proceedings. Moreover, the trial court should not have even addressed the issue because Oldfield raised it for the first time in his reply.

In *Hamilton v. State Farm*, 270 F.3d 778, 783, 784 (9th Cir. 2001), the Ninth Circuit held that a party may be judicially estopped from asserting a cause of action, of which he had knowledge, but failed to disclose in a prior bankruptcy proceeding:

In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. . . .

We now hold that Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings . . .³

The defendants agree that estoppel applies only if the Plaintiffs “had knowledge” of the claim they did not disclose in the bankruptcy proceeding. RP 15 (citing *Hamilton*).

The trial court should not have considered the judicial estoppel claim because Oldfield raised it for the first time in his reply. CP 965-68; RP 7; *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). The trial court refused to strike the argument on that ground (RP 7-8), incorrectly ruling that it was raised in the initial pleading. RP 9.

Oldfield’s motion never mentions judicial estoppel. CP 306-26. Contrary to the defendants’ claim (RP 8) the motion also never states that NW Commercial failed to list its potential claim against Oldfield. Compare *id.* with CP 306-26. Rather, the issues

³ This Court and the Court of Appeals Division One have recently followed the *Hamilton* rule. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98-100, 138 P.3d 1103 (2006); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 226-28, 108 P.3d 147 (2005); *Garrett v. Morgan*, 127 Wn. App. 375, 379-80, 112 P.3d 531 (2005).

presented all went to the validity of the assignment.⁴ CP 313. The court erred in considering this claim.

The trial court also erred in applying judicial estoppel where Oldfield failed to present any evidence that NW Commercial knew of the potential claim against Oldfield when it filed its bankruptcy pleadings. *Hamilton*, 270 F.3d at 783-84. Without some proof that NW Commercial knew of the claim, NW Commercial cannot be judicially estopped. 270 F.3d at 784. Moreover, Oldfield's failure to raise the issue until his reply prevented plaintiffs from presenting evidence of their lack of knowledge of the malpractice claim. Plaintiffs' lack of knowledge is suggested by Mitchell's subsequent declaration, filed for the statute of limitations issue, that plaintiffs did not understand Oldfield's role "until sometime after August of 2001." CP 1370; *see also* Stevens' letter of December, 2001, informing

⁴ Defendants subsequently conceded: "we did put [judicial estoppel] into our rebuttal brief because we found a case that exactly rebutted what the plaintiffs were claiming here." RP 14 (citing *Hamilton*). There appear to be two important admissions here: (1) the Defendants raised judicial estoppel only in their reply; and (2) they did not discover *Hamilton*, (or any other judicial estoppel case) until after both the opening motion and response were filed. In any event, judicial estoppel is not a response to any position the Plaintiffs took – the Plaintiffs certainly did not raise estoppel or anything to do with the failure to disclose the claim against Oldfield.

Oldfield of the claim against the other defendants but not of any claim against Oldfield. CP 675-76.

6. Neither precedent nor policy prohibits the assignment of a legal malpractice claim by a limited liability company to its members.

Defendant Oldfield argued that the assignment of the legal malpractice claim against him was invalid under *Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003). CP 322. The trial court dismissed the assigned legal malpractice claim on this basis. RP 26-27, 29, CP 991. This was error.

Tort claims are generally assignable under Washington law. *Kommavongsa*, 149 Wn.2d at 295-96. But the Supreme Court held in *Kommavongsa* that it violated public policy to permit “assignment of malpractice claims to an adversary in the same litigation that gave rise to the claim of malpractice . . .” *Id.* at 307. The policy reasons justifying this prohibition are: the opportunity and incentive for collusion; assignment of such claims “would lead to abrupt and shameless shift of positions”; such assignments would make lawyers hesitant to represent judgment-proof or uninsured defendants. *Id.* at 307, 310.

But the *Kommavongsa* court expressly limited its holding to the assignment of legal malpractice claims to an adversary in the same litigation giving rise to the claim:

Whether there might be an advantage, or at least an absence of undue harm in permitting the assignment of legal malpractice claims in other circumstances, where the concerns that give rise to this opinion do not exist, we do not need to decide, and do not decide today.

Id. at 311. None of the public policy concerns identified by the *Kommavongsa* court are present when a limited liability company assigns its legal malpractice claim to its members. The duties owed by Oldfield to NW Commercial were intended to benefit the members of NW Commercial. And when Oldfield breached his duties and damaged NW Commercial, he damaged the members. It was error to dismiss the assigned malpractice claim.

7. The court should have allowed the plaintiffs to amend the complaint to add NW Commercial as a plaintiff.

Plaintiffs argued in response to defendants' first summary judgment motion that if the assignment from NW Commercial was not valid, plaintiffs would move to amend the complaint to add NW

Commercial as a plaintiff.⁵ CP 820-21. The trial court dismissed the assigned claims, but when plaintiffs moved to amend their complaint to add NW Commercial, the court denied the motion. RP 41-42; CP 1882.

The court abused its discretion in denying the motion to amend. NW Commercial has a contractual claim against the members of NW, and the statute of limitations has still not run on that claim. Any potential prejudice resulting from an amendment will be eliminated upon reversal and remand for further proceedings, and the court should allow amendment on remand.⁶

⁵ Plaintiffs also sought to amend the complaint to expressly allege an argument for piercing the corporate veil, which had been argued in the first summary judgment. The court erred in denying this amendment as well. Plaintiffs argued the merits of piercing the corporate veil in both summary judgments and defendants argued piercing in the second motion. CP 818-20, 1489-91, 1792-93. The issue was thus in the case even without amendment. CR 15(b).

⁶ Although no one argued CR 17(a), the rule provides that, "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

B. Summary judgment on the statute of limitations was error where the facts present jury questions about when Mitchell and Grendahl learned the elements of their claims, when they suffered damage, and whether Mitchell and Grendahl exercised due diligence.

1. The statute of limitations defense only affects some of the claims and some of the plaintiffs.

The trial court dismissed all remaining claims on the second round of summary judgment motions based on the statute of limitations.⁷ CP 1888 (Oldfield) and 1884 (Byrne, Reid and the Prices). Thus, the statute of limitations ruling does not apply to assigned claims dismissed by the trial court on the first round of summary judgment motions. CP 991, 999. Nor does the statute of limitations argument affect the dismissal of many of the claims against Oldfield, which were dismissed in the first round of summary judgment motions. CP 991.

⁷ The trial court also said she granted summary judgment to Oldfield because he had no duty to the plaintiffs and because the damages were speculative. RP 68-69. This ignores the plaintiffs' argument that Oldfield was in a position of trust as to the plaintiffs and owed them a duty to disclose his knowledge of the defendants' violation of the investment guidelines. RESTATEMENT (SECOND) OF TORTS § 552 (1977); **Haberman v. WPPSS**, 109 Wn.2d 107, 166-168, 744 P.2d 1032 (1987); **Colonial Imps., Inc. v. Carlton Northwest, Inc.**, 121 Wn.2d 726, 731, 853 P.2d 913 (1993). The argument that damages were speculative is premised on the contested allegation that Oldfield discovered defendants' misdeeds at the same time as plaintiffs. CP 1778.

Although all remaining claims of all plaintiffs were dismissed under the statute of limitations, the facts relating to the dismissal arise almost exclusively in connection with Mitchell and Grendahl, not the other plaintiffs. For example, plaintiffs Tallman and Jacobson filed declarations stating in no uncertain terms that they were not at any of the 2001 meetings and learned of problems with NW Commercial no earlier than August, 2001. CP 1536-38, 1699-700. Nor did Hillary Grenville know of these problems. CP 1364.⁸ Nor is there any evidence when plaintiff Mitchell Family Living Trust learned the truth.⁹

The statute of limitations is an affirmative defense, and the burden is on the moving party to prove the defense. *Haslund v. City of Seattle*, 86 Wn.2d 607, 620, 547 P.2d 1221 (1976). Having presented no evidence as to this affirmative defense as to any plaintiff other than Mitchell or Grendahl, the defendants failed to carry their burden of proof and it was clearly error to dismiss the claims of these plaintiffs.

⁸ Grenville invested personally and through plaintiffs GM Joint Venture and Olympic Cascade Timber.

⁹ Ron Mitchell, not plaintiff Rob Mitchell, voted for the Mitchell Trust to appoint Rob Mitchell manager of NW Commercial. CP 654.

2. None of the plaintiffs suffered damages until NW Commercial lost its collateral and was unable to repay their investments.

The parties assumed for purposes of summary judgment that the three-year statute of limitations, RCW 4.16.080, controlled most of the remaining claims at the time of the second motion for summary judgment.^{10, 11} For several reasons, the trial court erred in granting summary judgment dismissing the claims under the statute of limitations: the plaintiffs were not damaged until they lost their investments; Mitchell and Grendahl did not discover the truth until August 2001 at the earliest; and Mitchell and Grendahl exercised due diligence to discover the truth.

This Court has explained that a cause of action does not accrue until the plaintiff suffers some form of injury or damage:

The limitation period begins to run when the plaintiff's cause of action accrues. *Malnar v. Carlson*, 128 Wn.2d 521, 529,

¹⁰ This assumption was incorrect as to the claims against defendants Byrne, Reid and the Prices for violation of the Consumer Protection Act, which has a four-year statute of limitations. RCW 19.86.120. The Mitchell plaintiffs did not raise the four-year statute on the motion for summary judgment and accordingly do not separately raise the issue here, but the four-year statute should apply to any proceedings on remand.

¹¹ The plaintiffs' claims for breaching the operating agreement and private placement memo were contract claims under the six-year statute. RP 40. The plaintiffs' attempt to pierce the corporate veil of NW, LLC, was never addressed or resolved by the trial court, which simply based the second summary judgment on the three-year statute. RP 90-91.

910 P.2d 455 (1996); RCW 4.16.005. Generally, this occurs when the plaintiff suffers some form of injury or damage. *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992).

Crisman v. Crisman, 85 Wn. App. 15, 20, 931 P.2d 163 (1997), *rev. denied*, 132 Wn.2d 1008 (1997); *see also Haslund*, 86 Wn.2d at 619. (“The mere danger of future harm, unaccompanied by present damage, will not support a negligence claim.”) This requires a practical interpretation of the statute of limitations in light of the facts of the case: “accrual of an action should not depend upon a technical breach of duty which determines whether plaintiff has a right to seek judicial relief, but upon the existence of a practical remedy.” *Id.* This is a question of fact that should be submitted to the jury. *Id.* at 620-21.

The operation of these principles in an investment case is illustrated by *First Md. Leasecorp v. Rothstein*, 72 Wn. App. 278, 864 P.2d 17 (1993). The statute of limitations only began to run on the investor when he was called upon to honor his personal guarantee of partnership debt:

Rothsteins’ liability to First Maryland was secondary, not primary. Unless the partnership defaulted and partnership assets were insufficient to satisfy the loan, Rothsteins would have no liability on their guaranty. Therefore, at the time of the alleged misrepresentations, damages based on the guaranty were speculative and Rothsteins were not entitled

to maintain an action for damages at that time. See generally 1 C. Corman [*Limitation of Actions*] § 7.4.5, at 560-61 [1991]. Once the partnership defaulted and the bank made its demand on the guarantors, damages were no longer speculative, even though their extent was not known. See *Gazija [v. Nicholas Jerns Co.]*, 86 Wn.2d 215, 543 P.2d 338 (1975)], at 219; *Steele [v. Organon, Inc.]*, 43 Wn. App. 230, 235, 716 P.2d 920, rev. denied, 106 Wn.2d 1008 (1986)], at 235. At that time, Rothsteins' cause of action accrued.

Id. at 285-86. The court held that the same principles also applied to Rothstein's claim for negligent misrepresentation. *Id.*

Applying these principles to this case, Mitchell and Grendahl were not damaged by violations of the investment guidelines for NW Commercial, but only when they lost their investments. Until October or November 2001, NW Commercial held loans and deeds of trust sufficient to repay the investors. In November 2001, Stevens on behalf of NW Commercial accepted deeds in lieu of foreclosure for the Graham Square properties. CP 368, 607, 609, 631, 662. But when the primary lender foreclosed on the lots and they were sold on at a trustee sale, NW Commercial lost its equity in these Graham Square properties. CP 1366. Even after the foreclosure, Stevens continued to work with lenders to keep Graham Square on track. CP 1366-67. When Pacifica Bank sued NW Commercial and sought to attach rental income from properties and obtain a restraining order, NW Commercial was forced to file

Chapter 11 proceedings and the plaintiffs lost their investment. CP 1515-16.

These facts show that the Mitchell plaintiffs lost their investments between November 2001 and February 2002. Prior to that point, they were not damaged and could not know whether they had been damaged. Until August 2001, Mitchell and Grendahl did not have any reason to believe that they might not recoup their investments. CP 1363, 1625. This action was filed on July 30, 2004, within the three-year statute of limitations.

Even in August 2001, Byrne was still telling Mitchell and Grendahl that the loans were secure, CP 1358-59, 1625, and telling his insurance company that claims against NW have no merit. CP 1500. Thus, even as of September, 2001, Byrne denied that plaintiffs would suffer any damage, and Oldfield's office was telling Stevens that "the applicable collateral may currently be sufficient." CP 670.

3. The parties dispute when Mitchell and Grendahl learned the truth and whether they exercised due diligence.

Not only was it error to grant summary judgment where the plaintiffs suffered their damage within the three-year statute, it was also error because the parties dispute when Mitchell and Grendahl

learned the facts giving rise to the claims in this case. The key facts are that the defendants had violated the investment guidelines, engaged in self dealing, and violated the fiduciary duties owed to NW Commercial. CP 1011-12. It is disputed whether Mitchell and Grendahl learned these facts in August 2001, *i.e.*, within three years of filing the complaint, and whether they exercised due diligence. Summary judgment was erroneous.

This Court has explained the operation and reason for the discovery rule in statute of limitations cases:

The discovery rule operates to toll the date of accrual until the plaintiff knows or, through the exercise of due diligence, should have known all the facts necessary to establish a legal claim. ***Alien***, 118 Wn.2d at 758. This rule is a court doctrine designed to balance the policies underlying statutes of limitations against the unfairness of cutting off a valid claim where the plaintiff, due to no fault of her own, could not reasonably have discovered the claim's factual elements until some time after the date of the injury.

Crisman, 85 Wn. App. at 20. The court explained that the discovery rule is typically applied in fraudulent concealment cases and where it is difficult for the plaintiff to discover the factual elements of the cause of action. *Id.* at 20-21.

This is an appropriate case for the application of the discovery rule for both reasons. Byrne falsely assured Mitchell and Grendahl their investments were safe and it was difficult for them to

learn the facts. All this is disputed. See Statement of Facts § D, *supra*. There is no way this factual dispute could be resolved without trial, and it was error to base summary judgment on the statute of limitations.

Defendants relied heavily on the Yanick memo. CP 1231. At best, the Yanick memo creates an issue of fact. At worst, the Yanick memo is inadmissible and should never have been produced or introduced into evidence.

Defendants claimed that Mitchell and Grendahl failed to exercise due diligence to discover facts that would have revealed a cause of action prior to August 2001. Under the due diligence rule, "The plaintiff is charged with what a reasonable inquiry would have discovered." ***Green v. A.P.C.***, 136 Wn.2d 87, 96, 960 P.2d 912 (1998).

"[A]nalysis of due diligence raises issues of fact." ***Allen v. State***, 118 Wn.2d 753, 760, 826 P.2d 200 (1992). Summary judgment may only be granted on due diligence in limited circumstances: "factual questions may be decided as a matter of summary judgment if reasonable minds can reach but one conclusion on them." *Id.*

The record includes ample evidence that Mitchell and Grendahl inquired with due diligence about the status and safety of NW Commercial's loan portfolio, but were falsely reassured by Byrne. Both Mitchell and Grendahl asked to withdraw funds from NW Commercial in March 2001. CP 363, 722. Byrne responded that NW Commercial would be redeeming the members' interests in the second half of 2001. CP 786. Byrne told Grendahl and Stevens that the NW Commercial loans were secured by first position deeds of trust. CP 1509. Byrne reassured Mitchell that the fund was fine and the investment secure. CP 1354-55. Mitchell was further reassured when he received a letter from Byrne, as managing member of NW, falsely representing the loan portfolio of NW Commercial. CP 1360. In June 2001, Mitchell and Grendahl were again reassured by Byrne that their investments were safe and that future distributions would be made expeditiously. CP 1359-60, 1458-59, 1621-22.

The Woodell letter is persuasive evidence of due diligence on Grendahl's part, stating that the Grendahls "have reasonable grounds for believing the following improper acts and errors or omissions have occurred, and are occurring" CP 1200. The letter continues:

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.

Id. As the text of the letter makes clear, Grendahl does not have all of the facts and he is exercising due diligence to discover the facts. Indeed, the letter is devoid of specifics and claims only that Grendahls have “reasonable grounds” for suspecting these claims. The letter says nothing about Graham Square or that the notes were all in second position because Grendahl did not know these facts when Woodell wrote the letter. CP 1622. When Grendahl met with Byrne on July 18, Byrne again reassured Grendahl that NW Commercial was doing OK and that the assets would be liquidated over time. CP 1624. Byrne followed up with a letter that he would turn over the loan files and computer entries to Grendahl, and that he hoped to work together to resolve the issues and allow everyone to be paid. CP 1694.

Mitchell’s and Grendahl’s due diligence inquiries finally bore fruit in their second meeting in August 2001, when, “Byrne essentially confessed and admitted that the loans owned by NWCLF were almost entirely tied up in one commercial project in Graham and were in second position.” CP 1358. In other words, it

was Mitchell's and Grendahl's due diligence efforts that finally forced Byrne to disclose the facts. It is ironic that Byrne, who withheld and fraudulently misrepresented the facts, would claim that Mitchell and Grendahl failed to exercise due diligence. In cases of fraud or fraudulent concealment, the statute does not begin to run until the plaintiff actually learns the truth. RCW 4.16.080(4).

Defendant Byrne desperately interjected a new argument into his reply on the second motion for summary judgment, claiming that the 1999 filing of three deeds of trust from NW to NW Commercial gave the plaintiffs constructive notice of facts prompting inquiry. CP 1787-88. But recording an instrument affecting real property provides constructive notice only to a party who had "*reason to refer to the record in which the document is recorded.*" ***Aberdeen Fed. Sav. & Loan Ass'n v. Hanson***, 58 Wn. App. 773, 777, 794 P.2d 1322 (1990) (emphasis original). In other words:

One is charged with constructive notice only if the fraud could have been discovered by examining the record and if "ordinary prudence and business judgment" required examination of the record.

Id. It would impossibly burden LLCs and partnerships investing in real estate if the members were on perpetual inquiry notice of any document recorded by the county auditor (or perhaps by any county auditor). It is absurd to suggest that due diligence required Mitchell and Grendahl to search the title records daily to make sure that the defendants were complying with the investment guidelines in the private placement memorandum. And even if Mitchell and Grendahl had discovered the three deeds of trust, the deeds do not disclose the amount or quality of the loans, and so they do not give notice whether the loans violated the investment guidelines in any way. Nor do the deeds disclose that the members of NW had an ownership interest in the properties securing the loans.

Mitchell and Grendahl exercised due diligence but their efforts were frustrated by defendants' fraudulent acts, misrepresentations, and breaches of fiduciary duty. Summary judgment of dismissal was error.

C. Plaintiffs' claims were not frivolous because they were not advanced without reasonable cause and several of defendants' theories were unresolved or issues of first impression.

A case is not frivolous just because the plaintiff loses. These plaintiffs lost millions of dollars when NW diverted the investment

portfolio of NW Commercial into Graham Square, selling off to NW Commercial loans that NW itself had made to a development owned 50% by the members of NW. Defendant Oldfield, who simultaneously represented NW and NW Commercial, did nothing to protect the interests of his client NW Commercial when he learned of this financial debacle.

The defendants' summary judgments completely diverted the court's attention from the merits of the plaintiffs' claims to a host of arcane arguments unresolved under Washington law. The defendants obtained summary judgment on the statute of limitations despite the fact that the plaintiffs presented evidence that they suffered their damages well within the three-year statute of limitations, and despite disputed facts. Even if this Court were to affirm the summary judgments, the issues were obviously debatable and defendants' theories depend on unresolved issues of law. Plaintiffs' claims were in no way frivolous.

The award of attorney fees was made pursuant to RCW 4.84.185, which provides:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the

reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

As a threshold matter, the orders granting fees are defective because they do not include any “written findings” that the action was “frivolous and advanced without reasonable cause” CP 2205, 2207, 2210. All three orders simply recite that each respective motion is granted. The transcript of the hearing reflects that the sole ground for the fees was the court’s belief that the Woodell letter of July 9, 2001 “itemized all of the causes of action which they subsequently filed on” and that the Yanick memo told them to file no later than February 2004. RP 106-07. But if the statute of limitations is indeed the basis for finding the entire action frivolous, then it did not become frivolous until the assigned claims were dismissed in October 2005, because the assigned claims included contract claims that would be governed by the six year statute of limitations. Thus, the only fees that would be recoverable were those incurred after the first summary judgment in October 2005. And yet all defendants claimed, and the trial court awarded, all attorney fees incurred for the entire action, not just those fees incurred between the first and second summary judgments. *Compare* CP 2205-06 *with* CP 1897-1935, *compare* CP 2207-08

with CP 2051-2163, compare CP 2210-13 with CP 1936-2014. Thus, the trial court's failure to include findings of fact fatally undermines the orders awarding fees.

But the award of fees was erroneous even if it had been accompanied by the required written findings. In a leading case interpreting the statute, the Supreme Court noted that the legislative history “shows an intent to have the statute apply to actions which, as a whole, were spite, nuisance or harassment suits.” **Biggs v. Vail**, 119 Wn.2d 129, 135, 830 P.2d 350 (1992). This Court has held that an action is not frivolous where it presents debatable issues: “[w]e find that the defendants have presented a meritorious defense containing debatable issues on which reasonable minds may differ.” **Crisman**, *supra*, 85 Wn. App. at 24. Division Three similarly held that a case is not frivolous, even though dismissed on summary judgment, where the case “presented an issue of first impression.” **Jeckle v. Crotty**, 120 Wn. App. 374, 387, 85 P.3d 931, *rev. denied*, 152 Wn.2d 1029 (2004). The **Jeckle** court further noted that the action must be viewed in its entirety (*id.*):

Under RCW 4.84.185, a court cannot pick and choose among those aspects of an action that are frivolous and those that are not. [citing **Biggs v. Vail**, *supra*]. The action

must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate. *Id.* at 133-37.

Viewing this case in its entirety, it presented “debatable issues upon which reasonable minds may differ.” *Crisman*, 85 Wn. App. at 24. The statute of limitations could not begin to run until plaintiff suffered some damage, *Crisman, supra*, at 20, and reasonable minds could certainly differ on the exact date on which plaintiff suffered damages. (Indeed, as discussed above, plaintiffs suffered their damages well within the three-year statute of limitations). The date on which the plaintiffs learned the truth about their investment is also disputed, in light of the conflicting declarations presented by plaintiffs and defendants. It is also debatable whether the Woodell letter reflected knowledge that the plaintiffs had a cause of action, or simply reflected the exercise of due diligence in attempting to determine the facts. CP 1199-1200. It is certainly debatable whether this letter triggered the statute of limitations, as the trial court stated. RP 106-07.

The defendants’ heavy reliance on the Yanick memo was also a debatable issue. As discussed above, the Yanick memo itself is internally inconsistent. *Compare* CP 1233 *with* CP 1236. The memo is contradicted by the sworn testimony of Mitchell,

Grendahl and Stevens, and is inconsistent with defendant Byrne's own testimony, as discussed in Section D of the Statement of Facts, *supra*. It was debatable whether the Yanick memo was discoverable, whether it should have been stricken as inadvertently produced, CP 1303-06, 1307-09, and whether defendant Byrne, as a member of NW Commercial, had any right to see the memo. Indeed, the right of a member of an LLC to see privileged communications between the LLC's attorney and the managing member appears to be either unresolved or an issue of first impression in Washington.

Finally, as discussed above, neither the Woodell letter nor the Yanick memo establishes that all of the plaintiffs had knowledge of the true facts or that they had failed to exercise due diligence. For this reason alone, it was error to find the action as a whole to be frivolous.

Nor was it frivolous for plaintiffs to pursue the claims assigned to them by NW Commercial. Defendants apparently abandoned their argument that Mitchell was not validly appointed manager of NW Commercial. The defendants' arguments that the assignment of claims was a "distribution" to members and that the assignment violated bankruptcy law are all unresolved issues for

which defendants fail to cite persuasive authority. The claim against defendants Byrne, Reid and the Prices was validly listed in the bankruptcy schedules. Oldfield's argument that the claim against him was not listed in the bankruptcy schedules was first raised on reply, depriving the plaintiffs of an opportunity to respond factually. The assignability of a legal malpractice claim under the circumstances of this case is clearly unresolved in Washington, as the Supreme Court stated in *Kommavongsa*, 149 Wn.2d at 311.

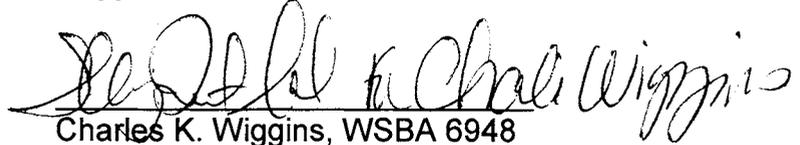
The award to defendants of a quarter of a million dollars as attorney fees under RCW 4.84.185 was clearly error and an abuse of discretion.

CONCLUSION

Plaintiffs respectfully ask the Court to reverse all orders of summary judgment, all fee awards, the order denying leave to amend the complaint, and the order denying the motion to strike the Yanick memo. Plaintiffs respectfully ask the Court to remand for trial so that the plaintiffs can finally litigate the merits of their claims against defendants for the loss of plaintiffs' investments.

RESPECTFULLY SUBMITTED this 10th day of March 2007.

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

A handwritten signature in black ink, appearing to read "Charles K. Wiggins". The signature is written in a cursive style and is positioned above the printed name.

Charles K. Wiggins, WSBA 6948

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage prepaid, via U.S. mail on the 10th day of March 2007, to the following counsel of record at the following addresses:

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11 USCS § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title [11 USCS § 552(b)], whether existing before or after the commencement of a case under this title.

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332 [11 USCS § 332], and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act [15 USCS § 18a(a)] in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section [15 USCS § 18a(a)], the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section [15 USCS § 18a(b)], the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a) [15 USCS § 18a(a)], unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section [15 USCS § 18a(e)(2)], in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section [15 USCS § 18a(g)(2)]; or

(iii) by the court after notice and a hearing.

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title [11 USCS § 721, 1108, 1203, 1204, or 1304] and unless the court orders otherwise, the trustee may enter into

transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only--

(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362 [11 USCS § 362].

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362 [11 USCS § 362]).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365 [11 USCS § 365], the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title [11 USCS §§ 1101 et seq., 1201 et seq., or 1301 et seq.] may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the

insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section--

- (1) the trustee has the burden of proof on the issue of adequate protection; and
- (2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 USCS § 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(3) if grounds exist to convert or dismiss the case under section 1112 [11 USCS § 1112], but the court determines that the appointment of a trustee or an examiner is in the best interests of creditors and the estate.

(b) (1) Except as provided in section 1163 of this title [11 USCS § 1163], on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title [11 USCS § 702].

(2) (A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

(B) Upon the filing of a report under subparagraph (A)--

(i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

(ii) the service of any trustee appointed under subsection (d) shall terminate.

(C) The court shall resolve any dispute arising out of an election described in subparagraph (A).

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if--

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods,

services, or taxes, or owing to an insider, exceed \$ 5,000,000.

(d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title [11 USCS § 324], or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

11 USCS § 1108. Authorization to operate business

Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

11 USCS § 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title [11 USCS § 502(g), 502(h), or 502(i)], whether or not--

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title [11 USCS § 501];

(ii) such claim is allowed under section 502 of this title [11 USCS § 502]; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title [11 USCS § 523].

(3) The confirmation of a plan does not discharge a debtor if--

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title [11 USCS § 727(a)] if the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.].

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter [11 USCS §§ 1101 et seq.].

(5) In a case in which the debtor is an individual--

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until

the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if--

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 [11 USCS §§ 701 et seq.] on such date; and

(ii) modification of the plan under section 1127 [11 USCS § 1127] is not practicable; and

(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that--

(i) section 522(q)(1) [11 USCS § 522(q)(1)] may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) [11 USCS § 522(q)(1)(A)] or liable for a debt of the kind described in section 522(q)(1)(B) [11 USCS § 522(q)(1)(B)].

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt--

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) [11 USCS § 523(a)] that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 [31 USCS §§ 3721 et seq.] or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor--

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

RCW 4.16.005. Commencement of actions

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

RCW 4.16.080. Actions limited to three years

The following actions shall be commenced within three years:

(1) An action for waste or trespass upon real property;

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

(4) An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

(5) An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;

(6) An action against an officer charged with misappropriation or a failure to properly account for public funds intrusted to his custody; an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation: PROVIDED, HOWEVER, The cause of action for such misappropriation, penalty or forfeiture, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statutes of limitations, or the bar thereof, even though complete, shall not be deemed to accrue or to have accrued until discovery by the aggrieved party of the act or acts from which such liability has arisen or shall arise, and such liability, whether for acts heretofore or hereafter done, and regardless of lapse of time or existing statute of limitation, or the bar thereof, even though complete, shall exist and be enforceable for three years after discovery by aggrieved party of the act or acts from which such liability has arisen or shall arise.

RCW 4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

RCW 19.86.120. Limitation of actions--Tolling

Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues: PROVIDED, That whenever any action is brought by the attorney general for a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, except actions for the recovery of a civil penalty for violation of an injunction or actions under RCW 19.86.090, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW 19.86.090 which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof.

RCW 25.15.035. Business transactions of member or manager with the limited liability company

Except as provided in a limited liability company agreement, a member or manager may lend money to, act as a surety, guarantor, or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with a limited liability company and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager.

RCW 25.15.235. Limitations on distribution

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution (a) the limited liability company would not be able to pay its debts as they became due in the usual course of business, or (b) all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability.

(2) A member who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to a limited liability company for the amount of the distribution. A member who receives a distribution in violation of subsection (1) of this section, and who did not know at the time of the distribution that the distribution violated subsection (1) of this section, shall not be liable for the amount of the distribution. Subject to subsection (3) of this section, this subsection (2) shall not affect any obligation or liability of a member under a limited liability company agreement or other applicable law for the amount of a distribution.

(3) Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said three-year period and an adjudication of liability against such member is made in the said action.