

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 JANE DOE BYRNE, husband and wife; THOMAS H. OLDFIELD
and JANE DOE OLDFIELD, husband and wife; NW LLC,
a Washington Limited Liability Company,

Respondents.

BRIEF OF RESPONDENTS OLDFIELD

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INTRODUCTION

Respondent Thomas Oldfield is an attorney who provided legal advice to NW Commercial Loan Fund, LLC ("NW Commercial") and its Manager, NW LLC. Appellants are a small sub-group of investors in NW Commercial. Oldfield never represented Appellants. Appellants admit that Oldfield never provided them with legal advice and admit that he never made any misrepresentations to them. Nevertheless, Appellants filed this lawsuit on July 30, 2004, bringing various claims against Oldfield, primarily based upon NW Commercial's alleged failure to follow the investment plan outlined in offering materials it provided to Appellants in 1998.

After NW Commercial filed for bankruptcy, without notice to or approval from the bankruptcy court, Appellants attempted to assign themselves NW Commercial's claims against Oldfield. The trial court properly held that this "assignment" was not valid and dismissed the assigned malpractice and breach of fiduciary duty claims against Oldfield. As an additional basis for dismissal of the assigned claims, the Court held that Washington law prohibits assignment of a legal malpractice claim in this context.

Further, because under well established Washington law a legal malpractice claim cannot support a CPA violation, the trial court also dismissed Appellants' CPA claims against Oldfield. Appellants had no

evidence of any misrepresentations by Oldfield, so the trial court dismissed the misrepresentation and fraud claims against Oldfield as well. Finally, because there was never any contract between Oldfield and Appellants, the contract claims against him were also dismissed. The trial court then determined that Appellants' claims against Oldfield as a whole were baseless and awarded Oldfield attorneys' fees under the frivolous claims statute.

The trial court did not err in its decisions to dismiss the claims against Oldfield, therefore the trial court's decisions should be affirmed. Because the trial court recently entered appropriate findings support its oral ruling awarding Oldfield his attorneys' fees, the trial court's award of award of attorneys' fees to Oldfield under the frivolous claims statute should also be affirmed.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly find that NW Commercial's purported assignment of legal malpractice, breach of fiduciary duty or other claims against Oldfield was invalid? **Yes.**

2. Did the trial court properly dismiss Appellants' CPA claims against Oldfield where such claims were based upon the provision of legal services to NW Commercial? **Yes.**

3. Did the trial court properly dismiss Appellants' breach of contract claims against Oldfield where no contractual relationship existed between Oldfield and Appellants? Yes.

4. Did the trial court properly dismiss Appellants' fraud and/or misrepresentation claims against Oldfield where there was absolutely no evidence of any misrepresentation by Oldfield? Yes.

5. Did the trial court properly dismiss Appellants' claims against Oldfield that were filed more than three years after Appellants knew or should have known of the existence of the claims? Yes.

6. Did the trial court properly award attorneys' fees and costs to Oldfield in accord with RCW 4.85.185? Yes.

COUNTERSTATEMENT OF FACTS

Appellants invested in NW Commercial based on an Offering Memorandum and Operating Agreement that Oldfield drafted in 1998, in his role as legal counsel for NW Commercial and its managing member, NW, LLC. CP 1011. The Offering Memorandum represented that NW Commercial planned to invest approximately 65% of its assets in "A or B quality" commercial loans and may invest up to 35% of its assets in higher risk commercial loans, including "single 'hard money' loans." CP 1010. Further, the Offering Memorandum stated that NW Commercial intended to maintain a diverse loan portfolio and would not invest more than 15% of its long-term assets in any single mortgage. CP 1010. The

Offering Memorandum makes explicitly clear that Oldfield represented the entity, NW Commercial and its manager NW LLC, not the individual limited members like Appellants. CP 1082, 1084.

NW Commercial subsequently invested a significant amount of its assets in loans for Inline, LLC, Graham Square, LLC and Graham Square II, LLC (collectively the “Graham Square entities”). Appellants contend that this violated the terms of the Offering Memorandum. CP 1013-14. They filed this lawsuit on July 30, 2004, asserting professional negligence, breach of fiduciary duty, Consumer Protection Act, breach of contract, and fraud/misrepresentation claims against Oldfield.

A. Appellants Learned About NW Commercial’s Investment Practices by March 2001.

Appellants became aware of the issues with NW Commercial’s investment in the Graham Square entities in early 2001. CP 1616. By March 2001, after acquiring this knowledge, Appellants were attempting to obtain payouts of their investments from NW Commercial. CP 723, 786, 1616. On July 9, 2001 Appellant Grendahl’s attorney specifically wrote to NW Commercial’s manager (with copies to the other Appellants) to demand that NW Commercial’s insurance carriers be put on notice of Appellants’ claims and damages. CP 1199-1201. The same claims set forth in that letter are the exact claims Appellants pursued in this lawsuit that was filed on July 30, 2004 – more than three years later. Appellants

were clearly aware of these claims no later than mid-July 2001 when they expressly itemized the claims and demanded that NW Commercial put its insurers on notice of their claims. CP 1199-1202. There is also evidence that Appellants were aware of their claims in March 2001 when they sought to withdraw their funds from NW Commercial. CP 1011. Appellants were expressly advised in December 2003 to file any lawsuit based upon these claims no later than February 2004 to meet applicable statutes of limitation. CP 1241.

B. Oldfield Never Had an Attorney-Client Relationship or Any Other Contractual Relationship with Appellants.

Appellants asserted legal malpractice claims against Oldfield, even though they acknowledge that Oldfield never provided them with legal advice or representation. Similarly, Appellants claimed that the Respondents (including Oldfield) breached a contract with them, but offered no evidence to establish that Oldfield had any contractual relationship with any of the Appellants:

Q. . . . To your knowledge, do you have any contract with Tom Oldfield or Oldfield, Sloan & Bobrick?

A. No.

Q. So the contract, I assume, that you are concerned about is the contract for NW Commercial, LLC; is that right?

A. NW Commercial, LLC, and the Fund.

CP 1112. The only contracts involved are the Operating Agreement and the Offering Memorandum, which Oldfield drafted as attorney for his clients, NW Commercial and its manager, NW, LLC. CP 1010-11.

Despite the lack of any attorney-client or contractual relationship with Oldfield, Appellants proceeded to file a lawsuit against him. However, without an attorney-client relationship or contract with Oldfield, Appellants had no standing to pursue professional negligence, breach of fiduciary duty, and breach of contract claims against him. Appellants later came up with a scheme to disguise their frivolous claims; an after-the-fact “assignment” of these claims from NW Commercial purporting to be effective one day before Appellants filed this lawsuit. CP 256-57.

C. Appellants Improperly Attempted to Assign Themselves NW Commercial’s Claims Against Oldfield without Bankruptcy Court Approval and without Proper Authority.

In January 2002 NW Commercial filed a Chapter 11 bankruptcy petition. CP 843, 848. In this initial filing, Schedule B required NW Commercial to list all “personal property” it held. CP 840-42. Schedule B includes a category for listing “other contingent and unliquidated claims of any nature”. Next to this category NW Commercial checked “NONE” to indicate it had no such claims. CP 842. In January 2003 NW Commercial’s manager (Stevens) signed a “Consolidated Plan and Disclosure Statement” that was filed with the

Bankruptcy Court. CP 269-94. This document listed all of the assets and liabilities of NW Commercial. In this disclosure NW Commercial identified only “Unliquidated Claims Against Former Members for Breach of Fiduciary Duty, amounts unknown” as assets. CP 288. NW Commercial never filed any subsequent disclosure with the Bankruptcy Court that identified or listed any potential claims against Oldfield as assets of the company despite the fact that this bankruptcy remained open when this lawsuit was filed.

On July 30, 2004, Appellants filed the initial complaint in this action. CP 1-86. At that time, NW Commercial was still a Chapter 11 “debtor in possession” under the Bankruptcy Code. As of the date when this lawsuit was filed, in its disclosures to the Bankruptcy Court NW Commercial had never identified any potential claims against Oldfield as an asset. The only assets listed were those set forth in the “Consolidated Plan and Disclosure Statement” and Schedule B. CP 288, 840-42.

The document purporting to memorialize the assignment of claims from NW Commercial to Appellants, which stated it was “effective as of July 29, 2004”, makes clear that Mitchell was not only the manager who purported to authorize the assignment but was also one of the assignees receiving the direct benefit of the assignment. CP 261-62. Although the

document reflects an “effective” date of July 29, 2004, it does not indicate when it was actually signed, and Mitchell could not recall when it was actually signed. CP 256. The document was drafted with an apparent intent to demonstrate that the assignment occurred in July 2004 – the day before this lawsuit was filed, but nothing in the document affirms the date that the assignment was executed. Indeed, Mitchell’s own testimony suggests the assignment occurred at some later date, which he could only estimate as “several months” before his December 21, 2004 deposition. CP 256.

Mitchell, as an assignee, was both a direct beneficiary of the assignment and the manager who assigned the claim away from NW Commercial. CP 255; CP 260-62. The other purported assignees are a sub-group of NW Commercial’s investors comprised of the Appellants in this action. Only this sub-group will share the recovery on these claims. CP 257. Mitchell required no cash payment for the purported assignment, leaving NW Commercial, and ultimately those investors who are not part of the Appellants’ sub-group, with the contingent right to only five percent of any recovery. CP 255; CP 257. Even though he claimed he authorized it, Mitchell could not articulate why the purported assignment was in NW Commercial’s best interest. CP 257. Although Mitchell was

represented by counsel in the negotiation of the assignment, it does not appear that NW Commercial had representation. CP 256.

NW Commercial never notified the Bankruptcy Court of the existence of these claims (which were assets of NW Commercial) and never sought Bankruptcy Court approval of the purported assignment of NW Commercial's claims against Oldfield to Appellants. CP 257. Mitchell, who became NW Commercial's manager in 2004, claimed he was appointed to his position by an "assignment" from the previous manager, Stevens. CP 254, 256. Nothing indicates that the Bankruptcy Court was notified of the change in management. CP 254. Also, there is no evidence that Mitchell attempted to disclose or receive a waiver for the conflict of interest between his role as manager of NW Commercial and assignee of the claim. Mitchell was well aware of the Bankruptcy Court's concern regarding transfer of NW Commercial's assets to "insiders" like Appellants and the Bankruptcy Court expressly refused to allow these "insiders" to purchase assets of NW Commercial. CP 371-72

D. Oldfield Made No False Representations to Appellants.

Despite substantial discovery, Appellants unearthed no evidence to show that Oldfield was aware of any contrary investment strategy when he drafted the offering documents.

Q. Now, also in paragraph 2.13 of the Amended Complaint, the Complaint states that Oldfield was or should have been aware that this investment strategy was contrary to the terms and conditions of the offering memorandum as set forth in paragraphs 2.6 and 2.7 above.

Do you have any information that Mr. Oldfield was aware of an investment strategy to invest all or substantially all of the assets in Graham Square, LLC, promissory notes at the time that the offering memorandum was prepared or circulated?

A. No.

CP 1112.

Beginning in March 2001 some of the Appellants sought to withdraw their investment funds from NW Commercial and made inquiries as to the status of NW Commercial's loan portfolio. CP 1011. By July 9, 2001, Appellants were aware of essentially all of the claims asserted in this action and a letter was sent on behalf of Appellants notifying NW Commercial's manager of their claims for damages and demanding that the insurance carriers be put on notice of their claims for damages. CP 1199-1202.

Appellants claim Oldfield engaged in negligent or intentional misrepresentations in 2001 by remaining silent. Appellants assert that they were "reassured" during meetings with NW Commercial by Oldfield's presence, and that when they later asked NW Commercial to

provide them with information, Oldfield consulted with his client who later declined to provide the requested information. CP 1113-15.

Other than declining to provide certain information, Appellants asserted no other factual basis for their fraud and misrepresentation claims against Oldfield:

Q. Other than refusing to give you information that you requested, are there any other claims that you believe [Oldfield] was negligent or intentionally misrepresented anything?

A. I don't know of any.

CP 1115.

William Stevens was the manager of NW Commercial from November 7, 2001 until sometime in 2004. CP 1123. As the manager of NW Commercial he investigated and summarized the acts of alleged self-dealing and fraud for purposes of recording an insurance claim. CP 1124-25. When Stevens wrote to the members of NW Commercial regarding potential misconduct, he did not identify any action by Oldfield that was improper. CP 1521-23. Based upon his experience as manager and his investigation of possible insurance claims between 2001 and 2004, Stevens was not able to identify a single act of misrepresentation or fraud by Oldfield.

A. . . . I'm not aware of any misrepresentations he made while I was manager of the fund.

- Q. Okay. And I guess I'm looking for whether you found any evidence of any misrepresentations by Mr. Oldfield, even if they predated the date that you became manager of NW Commercial Loan Fund?
- A. In the documents that I've looked at, I found no indication of fraud by Mr. Oldfield.

CP 1127.

ARGUMENT

Appellants brought claims against Oldfield for professional negligence, breach of fiduciary duty, violations of the Consumer Protection Act, breach of contract, and misrepresentation/fraud. Oldfield did not provide legal representation to any of the Appellants, and he had no contract with any of the Appellants. The only alleged misconduct by Oldfield was that he provided legal advice to the representative of his client, NW Commercial, who in turn declined to provide certain documents to Appellants.

Because the majority of claims Appellants asserted against Oldfield (professional negligence, breach of fiduciary duty and breach of contract) could only be asserted by Oldfield's client, NW Commercial, Appellants had to create an assignment of claims from NW Commercial to themselves to gain standing. To do this they self-designated a new "manager" for NW Commercial. The new manager, Mitchell, later signed an assignment of the claims in an attempt to give Appellants standing to

pursue claims they had previously asserted in this lawsuit. Although the claims against Oldfield were not disclosed as an asset in the Chapter 11 bankruptcy that was still pending at the time of the assignment and filing of this action, Appellants did nothing to notify the Bankruptcy Court of the existence or the transfer of this asset. The purported assignment of these claims was outside the regular course of business and completely invalid under bankruptcy law and Washington law.

Finally, the remaining claims asserted against Oldfield for alleged CPA violations and misrepresentations were also completely without foundation. Oldfield never made any affirmative misrepresentation and Appellants offered no evidence to the contrary. Professional negligence claims cannot be the basis for a CPA violation and Appellants offered no other basis for any CPA claim against Oldfield so the trial court properly dismissed the CPA claims as well.

Because there was no good faith basis for any of the claims Appellants asserted against Oldfield the trial court awarded Oldfield attorneys' fees under Washington's frivolous claims statute. The judge clearly stated her reasons for the award of fees orally on the record. RP 106-07. After noting that Appellants admitted that: (1) Oldfield never represented them; (2) Oldfield never had a contractual relationship with them; and (3) Oldfield never made any misrepresentations to them, "the suit should never have been brought against Mr. Oldfield. He had no

obligations or duties with [Appellants].” RP 106. In addition, the court noted that as of July 9, 2001, Appellants had prepared a written itemization of every claim they filed in the lawsuit, yet went forward with the claims after the statute of limitations had lapsed. RP 106-07. The Court concluded by awarding Oldfield his attorneys’ fees under the frivolous claims statute. The trial court subsequently entered written findings on May 18, 2007, to support the award of attorneys’ fees and costs under RCW 4.84.185. *See* Appendix. CP _____.

A. NW Commercial’s Purported Assignment of Its Claims Against Oldfield Was Invalid Under Bankruptcy Law.

In an effort to avoid the inescapable conclusion that the assignment of claims from NW Commercial to Appellants was invalid under bankruptcy law, Appellants dismiss the application of bankruptcy law as “convoluted” and misstate applicable Bankruptcy Code provisions. A Chapter 11 debtor in possession like NW Commercial must fulfill its fiduciary obligations in assigning any claim owned by NW Commercial to a third party. Because the purported assignment occurred outside the ordinary course of NW Commercial’s business without notice to the Bankruptcy Court and in violation of the NW Commercial’s fiduciary obligations, it was invalid.

1. Bankruptcy Law Prohibits a Debtor in Possession from Transferring or Pursuing Undisclosed Claims Without Bankruptcy Court Approval.

Oldfield's initial motion for summary judgment specifically raised the issue as to whether the purported assignment of NW Commercial's claims against Oldfield to Appellants violated the Bankruptcy Code. CP 314-19. Oldfield provided NW Commercial's schedule listing its assets as part of the evidence submitted in support of the motion for summary judgment [CP 233-305] and identified several ways that the assignment violated the Bankruptcy Code, including 11 U.S.C. § 554. CP 315, 318.

Two sections of the Bankruptcy Code potentially govern NW Commercial's conduct in this instance: Section 363 or Section 554. Regardless of whether NW Commercial assigned its claims under Section 363 or Section 554, it did so without notice or hearing. If the assignment occurred under Section 363, then it was invalid because it did not occur in the ordinary course of NW Commercial's business and because NW Commercial failed to give notice. *In re Anchorage Nautical Tours, Inc.*, 145 B.R. 637, 642 (9th Cir. B.A.P. 1992). If it occurred under Section 554, then it is invalid, because NW Commercial could abandon its legal claims against Oldfield only after giving notice of its intent to do so and obtaining the Bankruptcy Court's approval. *Id.* Either way, the

purported assignment was ineffective and NW Commercial's claims remained part of the bankruptcy estate. *Id.*

Section 554 provides in relevant part:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

* * *

(c) Unless the court orders otherwise, **any property scheduled** under section 521(1) of this title not otherwise administered at the time of the closing of a case **is abandoned to the debtor** and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, **property of the estate that is not abandoned** under this section and that is not administered in the case **remains property of the estate**.

(Emphasis added.) Since the claims against Oldfield were not listed, they were never abandoned and remained property of NW Commercial's bankruptcy estate.

It is undisputed that NW Commercial did not list claims against Oldfield in its bankruptcy schedules. CP 288, 842. Rather than addressing applicable bankruptcy law, Appellants argue that section 363(c)(1) applies only to trustees, not to debtors in possession. This is a distinction without a difference because Chapter 11 debtors in possession

are subject to the same obligations, duties and responsibilities as trustees. 11 U.S.C. § 1107; *In re Cheng*, 308 B.R. 448, 455 (9th Cir. B.A.P. 2004) (debtor in possession has same fiduciary duties as trustee). Appellants then argue that after confirmation of the plan of reorganization, all property of the estate was vested in NW Commercial. While that may be true as to all disclosed assets that were listed in the schedules, “[t]here is nothing in section 1141 or the legislative history that indicates that confirmation of a plan was to have the additional effect of barring the trustee or debtor in possession from pursuing undisclosed assets of the estate. Indeed, a review of other Code provisions indicates a contrary intent.” *In re Auto West, Inc.*, 43 B.R. 761, 763 (D. Utah 1984).

Appellants’ assertion that **unlisted** assets (like the potential claims against Oldfield) were vested in NW Commercial after its reorganization plan was confirmed is incorrect. “[A]fter confirmation of a plan, **the property dealt with by the plan** is free and clear of all claims and interests of creditors, of equity security holders, and of general partners in the debtor, except as otherwise provided in the plan or the order confirming the plan.” 11 U.S.C. § 1141(c) (emphasis added). While property not dealt with by the plan may be abandoned, as noted above, unlisted assets cannot be “abandoned” and remain part of the bankruptcy estate. *Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982).

There is such concern about collusion and self-dealing in the context of a Chapter 11 debtor in possession acting with respect to undisclosed assets that the Ninth Circuit requires Bankruptcy Court approval before any undisclosed asset is transferred or sold by a debtor in possession like NW Commercial:

The dangers resulting from the concealment of assets are greater when the debtor remains in possession than in cases in which a third party acts as trustee. An outside trustee is a separate mechanism for discovering unlisted claims or assets. If a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the fiduciary status of the debtor in possession. Whether or not the failure to list the asset in the case before us was intentional, the opportunity for concealment must be considered in formulating the proper general rule.

Stein, 691 F.2d at 892. Thus a debtor in possession, like NW Commercial, who wishes to pursue claims that were not listed as assets, must petition the bankruptcy court for permission to do so. *Stein*, 691 F.2d at 893 (“Without petitioning the bankruptcy court, Stein cannot resurrect the estate to proceed *in custodia legis*.”) NW Commercial and Appellants failed to obtain the requisite Bankruptcy Court permission to assign these claims so the assignment is not valid.

2. The Manager Purporting to Authorize the Assignment Violated His Fiduciary Duty.

The manager of a debtor in possession has the same fiduciary obligations as a trustee appointed to administer the estate of a bankrupt entity. *In re Cheng*, 308 B.R. at 455. Among those obligations are the duties to “refrain from self-dealing, avoid conflicts of interest and the appearance of impropriety, treat all parties to the case fairly, and maximize the value of the estate,” *In re Spielfogel*, 211 B.R. 133, 144 (Bankr. E.D.N.Y. 1997), and “to exercise the utmost good faith in dealing with the property of others.” *In re Shepherd Oil, Inc.*, 118 B.R. 741, 751 (Bkrcty. D. Ariz. 1990).

NW Commercial’s manager at the time of the assignment, Robert Mitchell, failed to discharge his fiduciary duties and engaged in improper self-dealing when he purported to assign NW Commercial’s claims to himself and others. Mitchell structured the assignment so that less than all of the owners would receive practically all the benefit of the assignment, leaving other investors with little hope of any recovery. He required no cash payment for the assignment, leaving NW Commercial (and all of its other members) with the right to only five percent of any recovery, greatly diminishing the value of the estate to the detriment of its creditors and other investors, including those who are not part of the sub-group of assignees. CP 255; CP 260-62. Mitchell was the manager who purported to authorize the assignment and was also one of the assignees receiving

the direct benefit of the assignment. CP 261-62. He could not explain why the assignment was in NW Commercial's best interest. CP 257. Clearly, this is exactly the type of self dealing that violates the duty imposed by bankruptcy law upon this manager to refrain from self-dealing and avoid conflicts of interest.

3. Judicial Estoppel Prohibits Assignment of Claims Not Disclosed in NW Commercial's Bankruptcy Schedules.

Although Appellants claim that the issue of judicial estoppel was first raised in Oldfield's reply brief, as discussed above, they are incorrect. It is important to note that judicial estoppel was only one of several bases Oldfield asserted to show that the assignment was invalid under applicable bankruptcy law – any one of these reasons individually was a sufficient basis to grant summary judgment. Appellants did not seek a continuance to allow time for additional briefing on the judicial estoppel issue. They did not file a motion for reconsideration on the summary judgment or otherwise make any serious attempt to refute the judicial estoppel argument. While this Court cannot consider new arguments by Appellants not made in the underlying case, it can affirm the trial court's decision for any reason, including arguments not raised below. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) (“Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the

pleadings and proof.”) “A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.” RAP 2.5(a). Moreover, a lower court’s decision to apply the doctrine of judicial estoppel is reviewed for abuse of discretion. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005). The record includes all relevant documents from NW Commercial’s bankruptcy filing confirming that claims against Oldfield were not listed as assets. CP 288; CP 842.

Judicial estoppel is routinely applied by Washington courts to prevent a party who files for bankruptcy protection and fails to list claims as assets in bankruptcy schedules, from later attempting to recover on those claims outside the purview of the bankruptcy estate.

Judicial Estoppel may apply to parties who accrue legal claims, file for bankruptcy, fail to list the claims among their assets, and then attempt to pursue the claims after the bankruptcy discharge. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001); *DeAtley v. Barnett*, 127 Wn. App. 478, 482-84, 112 P.3d 540 (2005); *Cunningham*, 126 Wn. App. at 227-33. Under the federal bankruptcy code, a bankruptcy petitioner must disclose prepetition claims, including contingent and unliquidated claims, in the bankruptcy reorganization plan or in the petitioner’s schedules or disclosure statements. 11 U.S.C. § 521(a). A litigant takes

inconsistent positions by failing to disclose a prepetition claim during bankruptcy proceedings and later attempting to pursue that claim.

Bartley-Williams v. Kendall, 134 Wn. App. 95, 98-99 (2006).

Judicial estoppel will be imposed when the debtor has **knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy**, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784 (9th Cir. 2001) (emphasis added). Clearly, any potential claim against Oldfield arose long before the bankruptcy filing and NW Commercial never disclosed the existence of any potential cause of action against Oldfield in its bankruptcy schedules. Appellants' claim that the extent of their damages was not completely known certainly did not extend beyond the January 16, 2002, filing of the bankruptcy petition and schedules or the amendment of the plan in early 2003.

It is critical to understand that in this context federal bankruptcy law, not state law, determines when Appellants' claims arose for purposes of whether it should be subject to administration in a bankruptcy proceeding. *Hassanally v. Republic Bank*, 208 B.R. 46, 50 (9th Cir. BAP 1997). Whether an interest in a claim exists for bankruptcy purposes is "to be resolved by reference to 'the text, history, and purpose' of the

Bankruptcy Code.” *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). “While state law determines the existence of a claim based on a cause of action, federal law determines when the claim arises for bankruptcy purposes.” *Hassanally*, 208 B.R. at 50. The Bankruptcy Code defines a claim to be 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).

In *Hassanally*, the Ninth Circuit expressly addressed the interplay of bankruptcy law on future claims, for example claims where the wrongful acts occurred before the bankruptcy filing, but the damages were not discovered until some later date. The Ninth Circuit was clear in holding that the claim arose at the time of the initial wrongful conduct, not at the time the damage was later incurred and thus the claim is part of the bankruptcy estate. “The fact that the consequences of the wrongful conduct materialized at a later date does not metamorphose the pre-existing wrongful conduct into future conduct”. *Hassanally*, 208 B.R. at 54.

B. NW Commercial’s Purported Assignment of Its Claims Against Oldfield Was Also Invalid Under State Law

Even if the assignment was not in violation of the Bankruptcy Code, it is invalid because it was in violation of state law. *See, e.g.*,

Integrated Solutions, Inc. v. Service Support Specialties, Inc., 193 B.R. 722, 729 (D.N.J. 1996) (bankruptcy trustee cannot assign claims that debtor could not assign under state law). Federal courts have expressly held that bankruptcy law does not permit a trustee or debtor in possession to sell or assign pre-petition or post-petition legal malpractice claims if assignment of such claims is prohibited by state law. *In re C-Power Products, Inc.*, 230 B.R. 800, 803 (N.D. Tex. 1998). Appellants attempt to assign themselves NW Commercial's claims against Oldfield is invalid under Washington law for a variety of reasons.

1. The Assignment Was Created After the Fact and Backdated by an Unauthorized Manager.

Mitchell was not authorized to assign the Debtor's claims. Mitchell testified in his deposition, he became manager based on an "assignment" from the former manager, Stevens. CP 254. Assuming this "assignment" was effective, there is absolutely no evidence to show that the Mitchell was not authorized to act as its manager and had no authority to assign NW Commercial's claims against Oldfield to a sub-group of its members in a transaction that was outside the ordinary course of business. It is important to remember that Mitchell, the new manager of NW Commercial, had the enhanced fiduciary obligations of a trustee of a debtor in possession and the duty to act on behalf of NW Commercial in dealing with its assets, rather than acting in his own self-interest.

Just as troubling, Mitchell's own testimony shows that although he signed a document purporting to assign NW Commercial's claims, he suggests he was not actually the manager at the time of the assignment. However, the assignment reflects that Mitchell signed it while acting as NW Commercial's manager. CP 261. Mitchell testified, however, that Stevens was NW Commercial's manager when the assignment actually occurred and that he did not know why he signed the document if the purported assignment occurred when Stevens was the manager. CP 256-57. Nothing in the record indicates when the assignment was actually signed. Stevens never indicated that he authorized the assignment during his tenure. Even assuming the assignment was by a manager with authority to execute it, there is no evidence that it was done at the appropriate time or in accord with the applicable provisions of Bankruptcy Law.

2. Washington Law Does Not Allow Assignment of a Legal Malpractice Claim Under these Circumstances.

Even assuming Mitchell had the authority as manager to execute an assignment of any of NW Commercial's assets, he had no ability to assign claims that are not assignable under Washington law such as legal malpractice claims. Existing case law makes clear that legal malpractice claims are not generally assignable. In Washington, a client cannot assign a legal malpractice claim to an adversary in the action in which the

malpractice allegedly occurred. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 311, 67 P.3d 1068 (2003) Washington's Supreme Court has not yet expressly addressed the question of whether legal malpractice claims are assignable in situations other than those involving former adversaries. *Id.* Existing precedent, both in Washington and in other jurisdictions, makes clear that our Supreme Court would likely hold that legal malpractice claims non-assignable as a general rule. As the court pointed out in *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 316 (Tex. App. 1994), a case cited with approval by the Washington Supreme Court in *Kommavongsa*, “[m]ost of the authorities disallowing assignment [of legal malpractice actions] reasoned that to allow assignment would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession.” That is exactly what occurred in *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. App. 1976), where the court for policy reasons fashioned a general rule against assignment of malpractice claims. Like the court in *Goodley*, Washington's Supreme Court would likely invoke public policy to prohibit assignments of all legal malpractice claims. Given that likely outcome, the Court should find the Debtor's assignment of its malpractice claim against Oldfield invalid on this basis as well.

C. Appellants Failed to Produce Any Evidence to Support a CPA Claim Against Oldfield.

Appellants allege that Oldfield violated Washington's Consumer Protection Act, RCW 19.86.120. CP 1011-15. Washington law, however, "does not allow claims against attorneys under the CPA, and specifically does not allow claims directed at an attorney's competency or strategy." *Manteufel v. Safeco Ins. Co. of America*, 117 Wn. App. 168, 174, 68 P.3d 1093 (2003). To the extent Appellants suggest there was any other "misrepresentation" or "fraud" underlying their CPA claim, they provided no evidence to suggest any improper conduct by Oldfield. Based upon the complete lack of evidence of any improper conduct by Oldfield, the trial court properly dismissed the CPA claims against Oldfield.

D. Appellants Failed to Show Any Fraudulent or False Representations by Oldfield.

Appellants failed to produce any evidence to establish that Oldfield misrepresented any fact or engaged in any fraud or other misconduct. To prove a fraud claim against Oldfield Appellants had to produce evidence to support every element of the fraud claim: (1) a representation; (2) of an existing fact; (3) its materiality; (4) its falsity; (5) the speaker's knowledge of its falsity; (6) the speaker's intent that it shall be acted upon by the person to whom it is made; (7) ignorance of its falsity on the part of the person to whom it is addressed; (8) the latter's reliance on the truth of the representation; and (9) his consequent damage. *Beckendorf v. Beckendorf*,

76 Wn.2d 457, 462, 457 P.2d 603, 606-07 (1969). Appellants further had the burden of proving each of these elements by “clear, cogent and convincing evidence.” *Id.* An unfulfilled promise cannot serve as the basis for fraud unless there is clear, cogent and convincing evidence that the promise was made with no intention of keeping it. *Id.* at 462-63, 457 P.2d at 607.

Appellants failed to produce any evidence to show that Oldfield misrepresented any fact or was aware of an alleged strategy to violate the terms of the Offering Memorandum at the time that it was presented to Appellants. In fact, the un rebutted testimony by Oldfield is as follows:

At no time during the drafting or finalization of the Offering Circular and Operating Agreement was I aware of any intention by NW, LLC or NW Commercial to invest all or a substantial portion of NW Commercial’s proceeds into the Graham Square project. I did not become aware that NW Commercial had so invested its funds until some time in 2001 — three years after the Offering Memorandum and Operating Agreement were prepared.

CP 1102.

Washington case law is clear that an attorney cannot be found liable for alleged fraud in the inducement when offering securities unless there is an affirmative representation by the attorney and the attorney occupied the status of seller, control person, director or employee. *See*

Hines v. Data Line Systems, Inc., 114 Wn.2d 127, 147-48, 787 P.2d 8 (1990). Plaintiffs fail to establish either of these two required elements.

In *Hines*, the Court held that even if an attorney is aware of facts that his client should have disclosed to an investor, the attorney is not liable to the investor for the failure to disclose such information.

Investors concede that in order to impose seller liability on counsel under *Haberman* [v. *WPPSS*, 109 Wn.2d 107 (1987)] “something more” must be shown than performance of the usual drafting and filing services provided by counsel. . . . In connection with the actual offering process, there is no evidence to indicate [the attorney] had any personal contact with any of the investors or was in any way involved in the solicitation process.

Hines, 114 Wn.2d at 149, 787 P.2d at 39.

Similarly, Oldfield drafted the documents based on information provided to him by his client but had no direct involvement with any of the investors. Oldfield’s actions cannot constitute fraud. In *Hines*, on the other hand, the attorney was aware of material facts and the attorney advised the client that these facts should not be disclosed to the investor. The court held that the client was liable for failure to disclose but nevertheless expressly held that the attorney had no affirmative duty to the investors and dismissed the attorney from the case. *Id.* Here, Oldfield was never aware of any alleged improper investment strategy and could

hardly be found liable. If such a strategy existed and if Oldfield was aware of it, he still had no duty to disclose this to Appellants and cannot be liable to them.

In any event, advice by counsel to an issuing company about the materiality about certain facts is the rendering of routine professional legal services in connection with an offer. The advice given by the [attorneys] to Data Line was not a catalyst in the sales transaction between Data Line and the investors.

Hines, at 149-50, 787 P.2d at 20.

Appellants contend that Oldfield had a duty to affirmatively disclose to them all facts regarding his client investments and operations. CP 1015-16. There is no Washington authority to support this proposition and the *Hines* case holds directly opposite, indicating that even if an attorney has knowledge regarding material facts, the attorney's duty is to advise his **client** (NW Commercial). There is no independent duty to advise the investor who the attorney does not represent. This is consistent with the confidentiality obligations imposed upon attorneys by the Rules of Professional Conduct. RPC 1.6. In fact, arguably, Oldfield would have been violating his duty to his client had he revealed the confidences of his client. *Id.*

As Oldfield explained, he initially advised his clients not to disclose where loans were placed because of legitimate privacy concerns

on behalf of the borrowers. CP 1102. Appellants provided no evidence to the contrary. Further, Appellants cannot demonstrate that the relatively negligible delay in providing this information caused any damages to them whatsoever. By the time Oldfield became involved, the investments had already been made in the Graham Square notes. Nothing of significance occurred between the time the investors made the initial inquiry until they ultimately learned about these investments. Thus, Appellants have failed to present clear, cogent and convincing evidence that: (1) Oldfield had a duty to disclose; (2) Oldfield misrepresented any existing fact; (3) Oldfield made any false representation; (4) any reasonable reliance on the alleged misrepresentation by Oldfield; (5) any damages associated with that alleged misrepresentation by Oldfield. The trial court properly dismissed the fraud and misrepresentation claims against Oldfield.

E. Appellants Had No Contract with Oldfield thus Their Breach of Contract Claim Was Properly Dismissed.

The general rule is that the obligations of an attorney are to his client and not to a third party. *Bowman v. Jane Doe II*, 104 Wn.2d 181, 186, 704 P.2d 140 (1985). Under Washington law, an action for legal malpractice can be framed as either a tort or a breach of contract claim. *Bowman*, 104 Wn.2d at 187, 704 P.2d at 143; *Peters v. Simmons*, 87 Wn.2d 400, 552 P.2d 1053 (1976). In this case, there is neither a contract for legal services between any Appellant and Oldfield nor any other

contractual relationship that could give rise to a claim for breach of contract. By Appellants' own admissions, the contract referred to in the Complaint is the contract with NW Commercial. CP 1010-11. Although Oldfield was the attorney for NW Commercial, there is no legal basis to impose liability on a party's attorney if his client later breaches the contract. Therefore, the trial court properly dismissed the breach of contract claims against Oldfield.

F. The Breach of Contract, Fraud and Misrepresentation Claims Were also Barred by the Statute of Limitations.

The fraud and misrepresentation claims in this case accrued as a matter of law when they were discovered, which was more than three years before Appellants filed this lawsuit. RCW 4.16.080. Certainly Appellants were aware of these claims no later than July 9, 2001. CP 1199-1201. In fact, because there is substantial evidence Appellants learned of these claims in March 2001, they were explicitly advised to file these claims by February 2004 to ensure they were timely. CP 1241.

Appellants claimed that Oldfield prepared the Offering Memorandum and Operating Agreement with knowledge that his client intended to breach the terms of that agreement at some future date by investing more than 10% in the Graham Square entities. CP 1015. Of course, Appellants never found any evidence to support this allegation and

the only evidence in the record is that Oldfield had no knowledge of the Graham Square issues until sometime in 2001. CP 1102.

Appellants also allege that they initially became suspicious in March of 2001 when they sought to withdraw funds from NW Commercial and were allegedly met with delays and evasive responses. CP 1011. According to plaintiff Grendahl, he discovered at that point that at in his opinion the money had gone to the “wrong use.”

In the second meeting, [Oldfield] was there, after we had discovered or felt that the money had gone to the – to the wrong use, he was there more to defend Kevin [Bryne] and they walked out of the room a couple of times when we asked them questions, they were very evasive as far as the – giving us information, and I felt that he knew what had gone on and wouldn't tell us and he never did tell us that he was conflicted.

CP 1113-14. Of course, Appellants fail to explain why Oldfield, an attorney who did not represent them, had any duty to disclose any advice or information that was confidential to non-clients. Not surprisingly, Appellants offer no legal authority to support such an obligation.

Appellants claim that they did not discover the full extent of their damages until some later date. However, the statute of limitations is not tolled while a party figures out the full extent of damages. “The general rule in Washington is that when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff

must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered.” *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). “[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose.” *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909). *Accord Enterprise Timber, Inc. v. Washington Title Ins. Co.*, 76 Wn.2d 479, 482, 457 P.2d 600 (1969); *American Sur. Co. of N.Y. v. Sundberg*, 58 Wn.2d 337, 344, 363 P.2d 99 (1961), *cert. denied*, 368 U.S. 989 (1962) (“notice sufficient to excite attention and put a person on guard, or to call for an inquiry is notice of everything to which such inquiry might lead.”) The statute of limitations is not tolled merely because further, more serious harm may flow from the wrongful conduct. *Green*, 136 Wn.2d at 97 (“the running of the statute is not postponed until the specific damages for which the plaintiff seeks recovery actually occur.”)

Certainly Appellants were all aware of the claims when they received the letter of July 9, 2000 detailing the claims and demanding that NW Commercial’s insurers be put on notice of the claims. CP 1199-1201. Appellants did not file their Complaint until July 30, 2004. This was more than three years after they discovered their claims, thus the three-year statute of limitations had already expired. Therefore, the statute of limitations as an additional independent basis for granting this motion for

summary judgment, the trial court properly dismissed the misrepresentation and fraud claims on statute of limitations basis.

G. The Trial Court Properly Awarded Attorneys' Fees to Oldfield After Finding Appellants Claims Against Him Were Frivolous.

The trial court was justified in awarding fees to Oldfield under RCW 4.84.185 based upon the trial court's determination that the claims were frivolous and asserted without reasonable cause. Washington Courts have previously affirmed fee awards under this statute where a party asserts claims without standing. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998). It is clear that the trial court is required to enter specific written findings to support its award, which did not initially occur here. However, on May 18, 2007, the trial court entered written findings and conclusions to support its award of attorneys' fees and costs under RCW 4.84.185. CP ____.¹ A true and correct copy of the trial court's findings and conclusions entered May 18, 2007 supporting the award of attorneys' fees to Oldfield is attached as an Appendix to this brief.

The trial court expressly found that the assignment of claims by NW Commercial occurred outside the regular course of business, after it filed bankruptcy and without disclosure of the assignment to the

¹ A supplemental designation of Clerk's Papers to include pleadings filed in the trial court in April and May 2007 was filed May 18, 2007 and the CP cite is not yet available.

Bankruptcy Court and without Bankruptcy Court approval to assign these claims to insiders. *See* Appendix (Finding of Fact 3). Thus, the trial court concluded that NW Commercial's attempt to assign its claims against Oldfield to Appellants was invalid and properly dismissed all of the assigned claims against him.

Because longstanding Washington law held that a CPA claim could not be asserted against a lawyer for malpractice or negligence in the practice of law, the trial court dismissed the CPA claim against Oldfield as well. The trial court further found that when they filed the Amended Complaint, Appellants knew that: (1) Appellants had no attorney-client relationship with Oldfield; Appellants had no contractual relationship with Oldfield; and Appellants were not aware of any misrepresentation by Oldfield. *See* Appendix (Finding of Fact 2). This alone was sufficient basis for the trial court to dismiss the breach of contract and misrepresentation claims against Oldfield.

However, as an additional basis for dismissal of the remaining claims, the trial court also found that Appellants and their representatives met with Byrne and Oldfield in March 2001 to discuss the same issues that were the subject of this litigation, and, on July 9, 2001, attorney Woodell sent a letter on Appellants' behalf setting forth substantially all of their claims and demanding that NW Commercial's insurers be put on notice of

their claims and damages. *See* Appendix (Findings of Fact 4 and 5). In addition, the trial court found that Appellants were advised on December 10, 2003, by attorney Yanick to file their lawsuit no later than February 2004. *See* Appendix (Findings of Fact 4 and 5).

It is clear that the findings and conclusions fully support the trial court's determination that the entirety of the claims Appellants asserted against Oldfield were frivolous. As a result, Oldfield was properly awarded his attorneys' fees and costs. The trial court did not abuse its discretion and the wholly frivolous nature of the claims against Oldfield was apparent by the conclusion of the litigation.

CONCLUSION AND REQUEST FOR FEES

Appellants had no legitimate basis for any of their claims against Oldfield. Their attempt to assign themselves claims of NW Commercial, a Chapter 11 bankruptcy debtor in possession, was completely invalid because it was done without notice to the Bankruptcy Court and without the required Bankruptcy Court approval and with complete disregard for the fiduciary duties imposed on the manager who signed the assignment. Moreover, the assignment also was invalid under Washington law because it was done by a manager who was not properly appointed and was an after the fact attempt to create standing for claims Appellants had already field without any standing to do so. Even if the assignment was assumed

to be valid, there was no evidence of any misconduct by Oldfield whatsoever.

Based upon all of the evidence submitted, the trial court found that Appellants advanced claims against Oldfield that were frivolous and justified an award of attorneys' fees under RCW 4.84.185. These claims have no greater merit now and Oldfield requests that he be awarded his attorneys' fees and costs incurred in this appeal based upon RCW 4.84.185 and RAP 18.1.

Dated this 21st day of May, 2007.

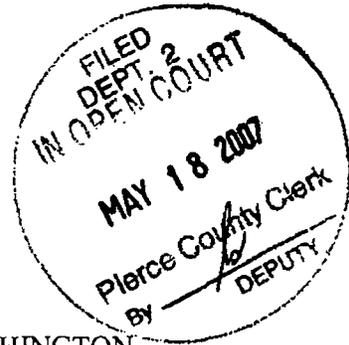
Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By Stephanie Bloomfield
J. Richard Creatura, WSBA No. 09185
Stephanie Bloomfield, WSBA No. 24251
Attorneys for Respondents Oldfield



04-2-10247-8 27530442 FNFL 05-21-07



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ROBERT R. MITCHELL, et al

Plaintiff,

v.

MICHAEL A. PRICE, et al

Defendants.

NO. 04 2 10247 8

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW RE:
DEFENDANT OLDFIELD'S MOTION
FOR ATTORNEY'S FEES AND COSTS

KEVIN AND MARY BYRNE,

Third Party Plaintiffs,

v.

WILL STEVENS, et al.,

Third Party Defendants.

ASSIGNED TO THE HONORABLE
KATHERINE M. STOLZ

THIS MATTER having come before the Court on a motion by Defendants Oldfield for an Order Awarding Attorney's Fees and Costs based on RCW 4.84.185 and the Court having considered the following:

1. Defendant Oldfield's Joinder in Motion of Defendants Byrne and Reid's Motion for Attorney's Fees and Costs;
2. Defendant Byrne and Reid's Motion for Attorney's Fees and Costs;

OLDFIELD FOF/CONCLUSIONS OF LAW - 1 of 8
(04-2-10247-8)
[1380827 v5.doc]

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ORIGINAL

3. Declaration of Alling in Support of Motion for Attorney's Fees;
4. Defendant Price's Memo in Support of Motion for Attorney's Fees and Costs;
5. Affidavit of Steven W. Davies in Support of Motion for Attorney's Fees and Costs;
6. Declaration of Tom Price in Support of Motion for Attorney's Fees and Costs;
7. Declaration of Steve Davies re: Attorney's Fees and Costs;
8. Declaration of J. Richard Creatura in Support of Defendant Oldfield's Joinder in Motion of Defendants Bryne and Reid's Motion for Attorney's Fees and Costs;
9. Plaintiff's Response to Defendant Oldfield's Motion for Attorney's Fees;
10. Plaintiff's Response to Defendant Price's Motion for Attorney's Fees;
11. Plaintiff's Response to Defendants Byrne's and Reid's Motion for Attorney's

12. Fees;

Reply memoranda of Defendants Oldfield et al

And the Court having considered the Complaint, First Amended Complaint, and all pleadings in support of and in opposition to the summary judgment motions that were previously granted by the Court, having heard oral argument and being fully advised in the premises, the Court makes the following:

FINDINGS OF FACT

1. On July 30, 2004, Plaintiffs filed a Complaint for Breach of Contract, Negligence, Misrepresentation, Fraud, Breach of Fiduciary Duty, Negligence, Professional Malpractice and Violation of the Consumer Protection Act. The claims against Defendant Oldfield in this Complaint included claims of breach of contract, misrepresentation, violation

1 of the Consumer Protection Act, negligence, professional malpractice. The First Amended
2 Complaint also included an additional claim against Defendant Oldfield for breach of
3 fiduciary duty.

4 2. Breach of Contract/Misrepresentation Claims. At the time of filing the
5 Complaint and the First Amended Complaint, the Plaintiffs knew the following facts:

- 6 a. None of the Plaintiffs had ever had an attorney-client relationship with
7 Defendant Oldfield.
8 b. None of the Plaintiffs had ever had any contractual relationship with
9 Defendant Oldfield.
10 c. None of the Plaintiffs were aware of any misrepresentation by
11 Defendant Oldfield.
12 d. A managing agent for N.W. Commercial Loan Fund did a full review
13 of all of the records after the dispute arose with N.W. Commercial
14 Loan Fund and before the lawsuit was filed and had not uncovered any
15 misrepresentation by Defendant Oldfield.
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18 3. Invalid Assignment. Additionally, at the time of filing the lawsuit, Plaintiffs
19 were investors in N.W. Commercial Loan Fund, LLC, which was in bankruptcy. Although
20 one of the Plaintiffs had purportedly assigned N.W. Commercial Loan Funds' claim to the
21 Plaintiffs, the assignment of the claim was made after N.W. Commercial Loan Fund had filed
22 bankruptcy. N.W. Commercial Loan Fund had not listed any claims against Defendant
23 Oldfield in its bankruptcy filings. N.W. Commercial Loan Fund had not given notice nor
24
25

1 received permission from the Bankruptcy Court to assign any N.W. Commercial Loan Fund
2 claims against Defendant Oldfield to insiders.

3 4. Statute of Limitations. At the time of filing the lawsuit in July of 2004,
4 Plaintiffs knew that most of their claims (negligence, malpractice, misrepresentation, fraud,
5 Consumer Protection Act) had statute of limitations of three years or less from the time of
6 discovery. Plaintiffs also knew that in March of 2001, more than three years before filing
7 suit, Plaintiffs and their representatives had met with Defendant Byrne and Defendant
8 Oldfield to discuss the same issues that were the subject of this litigation.
9

10 5. Furthermore, on July 9, 2001, more than three years before filing suit, attorney
11 Michael H. Woodall, on behalf of Plaintiffs, sent a letter to Defendants setting forth
12 substantially all of Plaintiffs' claims demanding that insurers be put on notice of claims and
13 damages to Plaintiffs.
14

15 6. On December 10, 2003, attorney Miles A. Yanick, delivered a memorandum to
16 Plaintiffs reciting a chronology of facts regarding the litigation and advising Plaintiffs "to be
17 safe, any action should be filed no later than February 2004."

18 7. Despite the warnings, Plaintiffs did not file suit until July 30, 2004.

19 8. First Motion for Partial Summary Judgment. On September 13, 2005, this
20 Court granted partial summary judgment in favor of Defendant Oldfield dismissing Plaintiffs'
21 claims against Defendant Oldfield: (1) that were invalidly assigned; (2) that alleged Consumer
22 Protection Act violations; and (3) the legal malpractice claim which was not assignable.
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24 9. Second Motion for Summary Judgment. On May 19, 2006, after additional
25 discovery, this Court granted summary judgment in favor of Defendant Oldfield, dismissing
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1 the remaining claim of misrepresentation. During the interim, Defendant Oldfield had
2 conducted discovery and verified that none of the Plaintiffs were aware of any claimed
3 misrepresentations of fact by Defendant Oldfield.

4 10. Amount of Attorney's Fees and Costs. Defendant Oldfield incurred attorneys
5 fees and costs in the amount of \$110,271.17 (\$3,375 of this amount was projected). The
6 amounts charged and costs incurred by Defendant's counsel were reasonably necessary in
7 order to defend against Plaintiffs' claims.

8 10. The above costs and fees were incurred unnecessarily and as a direct and
9 proximate result of Plaintiffs' frivolous claims, which were advanced without reasonable
10 cause.

11 11. In evaluating the "lodestar" elements of Defendant Oldfield's claim for
12 attorney's fees, the Court makes the following findings:

- 13 a. The records presented by Defendant Oldfield's counsel reflect the
14 reasonable time and labor required to defend against these claims;
- 15 b. The amounts charged by Defendant Oldfield's counsel were
16 commensurate with the novelty and difficulty of the questions
17 involved;
- 18 c. Defendant Oldfield's counsel had the requisite skill to perform the legal
19 services properly;
- 20 d. Although there was no evidence regarding the preclusion of other
21 employment, the Court recognizes that representing Defendant Oldfield
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1 prevented Oldfield's counsel from performing other services for other
2 clients;

- 3 e. The amounts charged by Defendant Oldfield's counsel were customary
4 and consistent with fees charged in the community for similar work;
5 f. The case was charged on the hourly basis at a reasonable hourly rate;
6 g. There were no time limitations imposed by the client;
7 h. The amount of fees and costs incurred were commensurate with the
8 results obtained;
9 i. Defendant Oldfield's counsel had the requisite experience, reputation
10 and ability to represent Defendant Oldfield;
11 j. The subject case was not undesirable; and
12 k. The award was consistent with awards in similar cases.

13 CONCLUSIONS OF LAW

14 1. A prevailing party is entitled to recover reasonable attorney's fees and
15 expenses for defending against a frivolous action under RCW 4.84.185.

16 2. A frivolous action is one that "cannot be supported by any rational argument
17 on the law or facts."

18 3. The Court has viewed the Plaintiffs' action against Defendant Oldfield in its
19 entirety and is awarding attorney's fees and costs to Defendant Oldfield because the action, as
20 a whole, was frivolous.
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1 4. Choosing to file malpractice claims and breach of contract claims against
2 Defendant Oldfield when Plaintiffs knew that they neither had an attorney-client relationship
3 nor a contractual relationship with Oldfield was frivolous.

4 5. Choosing to pursue claims based on an invalid assignment by N.W.
5 Commercial, which was in bankruptcy at the time, was frivolous.
6

7 6. Because Plaintiffs knew in December of 2003 that they were fast approaching
8 a statute of limitations on most of their claims and because Plaintiffs were clearly advised to
9 file a claim no later than February of 2004, choosing to file such claims after that date was
10 frivolous.

11 Based on the foregoing Findings of Fact and Conclusions of Law, the Court hereby
12 orders that Plaintiffs pay Defendant Oldfield attorney's fees and costs in the amount of
13 \$110,271.17 and judgment shall be entered in that amount.
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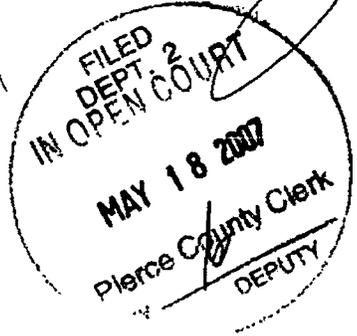
15 DONE IN OPEN COURT this 18th day of May, 2007.

16 *Katherine M. Stolz*
17
18 THE HONORABLE KATHERINE STOLZ
19 KATHERINE M. STOLZ

20 Presented by:

21 GORDON, THOMAS, HONEYWELL,
22 MALANCA, PETERSON & DAHEIM LLP
23 Attorneys for Defendants Oldfield

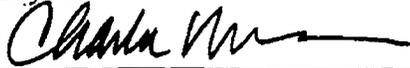
24 By *Stephanie Bloomfield* 74251
for: J. Richard Creatura, WSBA No. 09185



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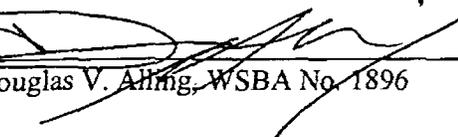
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CERTIFICATE OF SERVICE

I certify that on May 21, 2007, I caused to be delivered via messenger and/or U.S. Mail, postage paid, a copy of the foregoing Brief of Respondent Oldfield to attorneys of record at the addresses listed below:

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