



**TABLE OF CONTENTS**

**STATEMENT OF FACTS**.....1

A. Parties.....1

B. Procedural History.....2

C. Facts Relating to Claims .....4

**ARGUMENT**.....13

A. NWCLF’s attempt to assign its claims to the Appellants was null and void. ....13

    1. Mitchell was not the validly appointed manager of NWCLF. ....13

    2. The alleged assignment of claims constitutes an illegal distribution of assts of the LLC. ....14

    3. The assignment constituted a violation of bankruptcy law. ....16

    4. Claims against Byrne, Reid and the Prices were not validly listed in the bankruptcy schedule. ....22

    5. Appellants were estopped from raising the malpractice claims against Oldfield. ....23

    6. Precedents and policy prohibit the assignment of malpractice claims. ....23

    7. The court did not abuse its discretion in denying Appellants’ motion to amend its complaint to add NWCLF as a Plaintiff. ....23

B. There was no jury question regarding the application of the statute of limitations. ....27

    1. The statute of limitations claim affected all Appellants and all claims. ....27

    2. The Appellants had a cause of action when NWCLF failed to make distributions and prior to the total loss of the collateral. ....28

    3. Appellants’ own declarations, letters and memoranda demonstrate they knew of their claims no later than July 9, 2001. ....31

a.	The assignment of each of the Graham Square deeds of trust were recorded in 1999. ....	32
b.	The Woodell letter of July 9, 2001 set forth the claims that were eventually brought more than three years later. ....	33
c.	Mitchell admitted he knew in June of the facts upon which the claim is based. ....	34
d.	The Yanick memo corroborates the knowledge of the Appellants. ....	34
4.	Accrual of the alleged causes of action under the "Discovery Rule." ....	36
a.	The Discovery Rule. ....	36
C.	Appellants' claims were frivolous because they were advanced without reasonable cause. ....	38
D.	In addition to the statute of limitations there were other bases for dismissal of Appellants' claims. ....	40
1.	Appellants lack standing to bring a direct claim for injuries suffered by NWCLF. ....	40
2.	Appellants' claims fail because Byrne and Reid are protected under the limited liability status of NW. ....	44
3.	No evidence was presented supporting any claims against Reid. ....	48
4.	Appellants' claims against Byrne and Reid were cutoff by the release dated November 7, 2001. ....	48
5.	Award of fees for frivolous claims. ....	49
	<b>CONCLUSION AND REQUEST FOR FEES</b> .....	49

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>First Hartford Corp. Pension Plan and Trust v. United States</i> , 194 F.3d 1279, 1289 (Fed. Cir. 1999) .....	47
<i>Glass v. United States</i> , 258 F.3d 1349, 1354-55 (Fed. Cir. 2001) .....	47
<i>Hamilton v. State Farm Fire &amp; Cas. Co.</i> , 270 F.3d, 778 782, 784-85 (9 <sup>th</sup> Cir. 2001) .....	19, 20, 21, 22
<i>Kauffman v. Dreyfus Fund, Inc.</i> , 434 F.2d 727, 732 (3 <sup>rd</sup> Cir. 1970).....	43
<i>Leber v. Universal Music &amp; Video Distrib.</i> , 225 F.Supp. 2d 928 (U.S. Dist. Ct. 2002).....	46
<i>New Hampshire v. Maine</i> , 532 U.S. 742, 750-51, 212 S. Ct. 1808 (2001).....	20

### STATE CASES

<i>Addy v. Myers</i> , 2000 ND 165, 616 N.W.2d 359 (2000) .....	45
<i>Allen v. State</i> , 118 Wn.2d 753, 758, 826 P.2d 200 (1992).....	36
<i>Bank of America NT and SA v. David Hubert</i> , 153 Wn.2d 102, 101 P.3d 409 (2004).....	24
<i>Biggs v. Vale</i> , 119 Wn.2d 129, 137, 830 P.2d 350 (1982).....	38
<i>Bill of Rights legal Foundation v. Evergreen State College</i> , 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986).....	38
<i>Browning v. Howerton</i> , 92 Wn. app. 644, 650-51, 966 P.2d 367 (1998).....	37

<i>Clarke v. Equinox Holdings, Ltd.</i> , 56 Wn. App. 125, 132, 783 P.2d 82 (1989).....	38
<i>Colwell v. Easing</i> , 118 Wn.2d 861, 868, 825 P.2d 1005 (1992).....	30
<i>Crisman v. Crisman</i> , 85 Wn. App. 15, 22-23, 93 P.2d 163 (1997).....	37
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 108 P.3d 147 (2005).....	19, 20, 21
<i>Estates of Hibbard</i> , 118 Wn.2d, 737, 744, 826 P.2d 690 (1992).....	36
<i>First Maryland Leasecorp v. Rothstein</i> , 72 Wn. App. 278, 283, 864 P.2d 17 (1993).....	29
<i>Goodwin v. Castleton</i> , 19 Wn.2d 748, 761, 144 P.2d 725, 150 A.L.R. 859 (1944).....	42
<i>Green v. A.P.C. (American Pharmaceutical Co.)</i> , 136 Wn.2d 87, 960 P.2d 912 (1998).....	30, 37
<i>Gustafson v. Gustafson</i> , 47 Wn. App. 272, 276, 734 P.2d 949 (1987).....	42
<i>Haberman v. WPPSS.</i> , 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987) .....	26, 47
<i>Hasland v. City of Seattle</i> , 86 Wn.2d 607, 619 547 P.2d 1221 (1976).....	38
<i>Hudson v. Condon</i> , 101 Wn. App. 866, 6 P.3d 615 (2000).....	30
<i>In Re Anchorage Nautical Tours, Inc.</i> , 154 B.R. 637, 642 (9 <sup>th</sup> Cri. B.A.P. 1992).....	16, 17
<i>Interlake Porsche &amp; Audi, Inc. v. Bucholz</i> ,	

45 Wn. App. 502, 518, 728 P.2d 597 (1986), rev. den. 107 Wn.2d 1022 (1987).....	36
<i>Jeckle v. Crotty</i> , 120 Wn. App. 374, 387, 85 P.3d 931 (2004).....	38
<i>Lincoln v. Transamerica Inv. Corp.</i> , 89 Wn.2d 571 573 P.2d 1316 (1978).....	24
<i>Linklater v. Johnson</i> , 53 Wn. App. 567, 570, 768 P.2d 1020 (1989).....	17, 18
<i>Lobak Partitions, Inc. v. Atlas Const. Co., Inc.</i> , 50 Wn. app. 493, 497, 749 P.2d 716 (1988).....	46
<i>Lybecker v. United Pac. Ins. Co.</i> , 167 Wn.2d 11, 15, 406 P.2d 945 (1965).....	30
<i>Opportunity Christian Church v. Washington W. Power Co.</i> , 136 Wash. 116, 199, 238 P. 641 (1925).....	46
<i>Pac Link Communications Int'l v. Ivan Yeung, et al.</i> , 90 Cal. App. 958, 109 Cal. Rptr. 2d 436 (July 2001).....	43
<i>Pietz v. Indermuehle</i> , 89 Wn. App. 503, 511, 949 P.2d 449 (1998).....	37
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003) .....	40
<i>Reid v. Dalton</i> , 124 Wn. App. 113, 123, 100 P.3d 349 (2004).....	39
<i>Sabey v. Howard Johnson &amp; Co.</i> , 101 Wn. App. 575, 584-85, 5 P.3d 730 (2000) .....	41, 42
<i>Sherbeck v. Estate of Lymon</i> , 15 W. App. 866, 868, 552 P.2d 1706 (1976).....	29
<i>Sigman v. Stevens-Norton, Inc.</i> , 70 Wn.2d 915, 920, 425 P.2d 891 (1967) .....	30

<i>South Hollywood Hills Citizens Assn. v. King County</i> , 101 Wn.2d 68, 77-78, 677 P.2d 114 (1984).....	26
<i>State Ex Rel Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 903, 969 P.2d 64 (1998).....	39
<i>Strong v. Clark</i> , 56 Wn.2d 230, 232, 353 P.2d 183 (1960).....	32
<i>Tellinghuisen v. King County</i> , 103 Wn.2d 221, 223-24 691 P.2d 575 (1984).....	26
<i>Tex Enters., Inc. v. Brockway Standard, Inc.</i> , 110 Wn. App. 197, 39 P.3d 632 (2002).....	24
<i>U.S. Oil &amp; Refining co. v. Dept. of Ecology</i> , 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).....	30
<i>Vigil v. Spokane County</i> , 42 Wn. App. 796, 800, 714 P.2d 692 (1986).....	37
<i>Wallace v. Lewis County</i> , 134 Wn. App. 1, 137 P.3d 101 (2006).....	24
<i>Western Washington Laborers-Employers Health &amp; Sec. Trust Fund v. Harold Jordan Co., Inc.</i> , 52 Wn. App. 387, 391, 760 P.2d 382 (1988).....	32, 33
<i>Woody's Olympia Lumber, Inc. v. Roney</i> , 9 Wn. App. 626, 629, 513 P.2d 849 (1973).....	15
<i>Zaleck v. Everett Clinic</i> , 60 Wn. App. 107, 112, 802 P.2d 826 (1991).....	30
<i>Zweibach v. Gordimer</i> , 884 S.2d 244 (2004) 247.....	39

**FEDERAL STATUTES**

11 U.S. C. § 363.....16  
11 U.S.C. § 554.....16

**STATE STATUTES**

RCW 4.16.080 .....12, 29, 31, 35  
RCW 4.28.185 .....50  
RCW 4.84.185 .....38, 39  
RCW 23B.01.400(6).....15  
RCW 25.15.060 .....41, 45  
RCW 25.15.125(1).....45  
RCW 25.15.155 .....41  
RCW 25.15.235(1).....14, 15, 16  
RCW 25.15.235 .....14, 15  
RCW 25.15.370 .....43  
RCW 26.16.030 .....27

**RULE**

PCLR 4(c).....25  
RAP 18.1.....50

**MISCELLANEOUS**

3A L. Orland, Wash. Prac. cmt. § 5185 at 43-44  
(3<sup>rd</sup> ed. 186 Supp.).....26

**I. STATEMENT OF FACTS**

**A. Parties.**

Appellants are limited members of NW Commercial Loan Fund (“NWCLF”).<sup>1</sup> CP 1-86. NWCLF is a Washington limited liability company. All of the Appellants except Tim Jacobson (“Jacobson”) and Hilary Grenville (“Grenville”) claim to be assignees of claims held by NWCLF against the Respondents. CP 657-658. Robert Mitchell is a partner in GM Joint Ventures, and Robert R. Mitchell, Inc. CP 658.

Respondents Kevin Byrne (“Byrne”) and James Reid (“Reid”) are members of NW, LLC, a separate entity (“NW”). CP 1142. Until June 6, 2001, NW was the Manager of NWCLF. CP 1143, 1145. During that period of time, NWCLF’s operations were managed primarily by Robert Coleman (“Coleman”), Co-President of NW until January 9, 2001, when he resigned as Asset Manager of NWCLF. CP 1157. Coleman was a Third-Party Defendant but was dismissed by stipulation. CP 986-988.

From June 6, 2001 to November 7, 2001, NWCLF was managed by Loan Holdings, LLC. (Loan Holdings”). CP 1192, 1227. It was then managed by Will Stevens (“Stevens”). CP 1227.

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<sup>1</sup> Appellants refer to NW Commercial Loan Fund as NW Commercial; however, in all trial court documents, it was referred to as NWCLF. To be consistent with the record, these Respondents refer to NW Commercial Loan Fund as NWCLF.

**B. Procedural History.**

Appellants originally brought this action on July 30, 2004. CP 1. The claims alleged by the Appellants included breach of contract, misrepresentation, violation of Consumer Protection Act, fraud and fraud inducement, breach of fiduciary duty, negligence, and professional negligence of Oldfield. CP 1-15. Respondents answered and denied all of the allegations, counterclaimed, cross-claimed, and filed third party claims. CP 173, 176-77, 207, 210-11, 321, 349.

On November 17, 2004, Appellants filed their first Amended Complaint. CP 87-172.

A confirmation of joinder was required on July 18, 2005. CP 1720.

On August 26, 2005, the trial court granted partial summary judgment dismissing all claims assigned by NWCLF to the Appellants. CP 999-1005.

On September 21, 2005, depositions of some of the Appellants were taken, and on October 6, 2005, additional depositions were taken. CP 1720.

On October 25, 2005, interrogatories were served by the Respondents on Appellants. CP 1720.

On December 15, 2005, Appellants filed their Second Amended Complaint adding Jacobson and Grenville as to contract claims only. CP 1006-1091.<sup>2</sup>

On April 13, 2006, Respondent Oldfield filed a Motion for Summary Judgment seeking dismissal. CP 1129. On April 14, 2006, Respondents Byrne and Reid filed a Motion for Summary Judgment seeking dismissal based upon the statute of limitations, limited liability status of NW, lack of standing between the Appellants and Respondents Byrne and Reid, and the release from liability granted to Byrne and Reid CP 1247-1261. Respondents Prices joined in the Byrne and Reid motions. CP 1266.

The discovery cutoff was May 1, 2006. (Resp. Byrne's Supp. C.P. #2, Appendix B.)

On May 19, 2006, the trial court granted Summary Judgment dismissing all claims against Oldfield (CP 1888), Byrne, Reid and the Prices. CP 1884-1887.

On June 23, 2006, the trial court granted a motion awarding attorney's fees based on the theory that the actions were frivolous. CP 2205-13.

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<sup>2</sup> Appellants' Motion to Amend makes it clear that Grenville and Jacobson have breach of contract claims only. CP \_\_\_\_\_, Resp. Byrne's Supp.

On May 18, 2007, the trial court entered Findings of Fact and Conclusions of Law in support of the award of attorney fees. CP \_\_\_\_\_ (see Resp. Byrne's Supp. C.P. #3, Appendix B).

**C. Facts Relating to Claims.**

On August 13, 1995, NW was formed (a separate entity from NWCLF). CP 1141. NW was in the business of loan securitization, a complex series of transactions, which resulted in a large number of loans being sold as a group to investors. CP 1142. NW also loaned monies directly to borrowers, who at that time would not qualify for the securitization process. CP 1143. All the loans involved with NW were secured by commercial real estate. CP 1142.

On October 4, 1995, NW made its first of a series of loans to Graham Square I and Graham Square II. CP 1143. As part of the loan terms, NW also received a 50% equity interest in Graham Square. CP 1142. The monies loaned to Graham Square came from NW and were secured by real estate owned by Graham Square. CP 1142. The loan was personally guaranteed by Al Olson, who was not a member of NW or NWCLF. CP 1142. No monies were loaned or paid to members of NW, including Byrne or Reid. Mr. Olson's net worth at the time was \$3,174,670.00. CP 1155.

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Designation C.P. #1, Appendix B.

On September 13, 1997, the individual members of NW, Michael Price, Thomas Price (hereinafter the "Prices"), Coleman), Byrne and Reid, purchased from NW, 49.5% of Graham Square for the sum of approximately \$150,000.00. CP 1145. The monies were paid to NW. CP 1142. No monies were received by individual members, including Byrne and Reid. CP 1142. Thereafter, Byrne and Reid made additional capital contributions to Graham Square in excess of \$100,000.00 each. CP 1142. All monies paid by Byrne and Reid to Graham Square have been lost. CP 1142.

NW was managed by Coleman and Byrne. CP 1142. Coleman, a former bank president was operations manager in charge of managing the assets of NW. The manager for loan servicing also reported to him. CP 1142. As asset manager, Coleman was responsible for documentation of assignment of loans from NW to NWCLF. CP 1142. Byrne was in charge of establishing correspondent lenders who originated loans, relationships with investors, investment bankers and rating agencies. CP 1142. The senior loan officer also reported to Byrne. CP 1142.

On May 11, 1998, NW formed NWCLF 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. The manager of NWCLF was NW. CP 379, 407, 1143. It was

specifically expressed in writing that loans assigned to NWCLF would originate with NW. CP 1143. The prospectus stated: "The member [NW] and its affiliates will be a primary source of supply for the company in acquiring new mortgages for its portfolio." CP 389.

The prospectus also stated: "The Company will not permit more than 15% of its long-term assets to be invested in any single mortgage; except this policy shall not apply at any time while the total assets of the Company are less than \$5,000,000.00." Emphasis added. CP 382.

Appellants have repeatedly cited this provision without recognizing it only applies if the total assets were more than \$5,000,000.00. At no time was NWCLF's assets greater than \$5,000,000.00.

The prospectus also stated: "The Company will primarily invest in Mortgages in not less than a first lien position - deeds of trusts and mortgages. Provided, however, the General Manager have the discretion to invest in mortgages which are in a lower lien position if the General Manager determine such investment to be appropriate for the Company." Emphasis added. CP 383. Appellants have also cited this provision, but failed to recognize the discretion granted to the General Manager.

Starting in January of 1999, NW, through its asset and financial manager, Coleman, assigned deeds of trust secured by the Graham Square property to NWCLF. CP 1143, 1148-1154. Coleman managed the

operations of NWCLF. Assigned deeds of trust were for loans originally made between 1995 and 1998 by NW. CP 1148-1154. Neither Reid nor Byrne directed, approved or signed any of the assignments. CP 1143, 1148-1154. The assignments were recorded under the following documents:

1. January 18, 1999 Assignment of Deed of Trust from NW to NWCLF, securing a \$2,335,852.00 loan previously made on January 22, 1998, signed by Steven Hanson. CP 1148.
2. February 25, 1999 Assignment of Deed of Trust from NW to NWCLF, securing a loan of \$255,000.00, previously made on October 11, 1995, signed by Coleman. "CP 1153.
3. November 27, 1999 Assignment of Deed of Trust from NW to NWCLF, securing the sum of \$300,000.00, previously made on January 22, 1999, signed by Coleman. CP 1154.

As subsequently explained, these are the assignments that are in contention in this case.

On January 9, 2001, Coleman resigned as manager of NW, and as the asset manager of NWCLF. CP 1157. Thereafter, due to adverse market conditions and debt structure, NW began closing its business. CP 1143. At that time, NW owed more than \$8,000,000.00 to its creditors, and U.S. Bank had a security interest in all the assets of NW, except for the loans to Graham Square. CP 1143.

In February of 2001, Gary Grendahl ("Grendahl"), one of the Appellants, met with Byrne to discuss the financial condition of NWCLF.

CP 1143. In that meeting Grendahl told Byrne that he had been told NWCLF was in trouble. In February, due to the lack of manpower and Coleman's resignation, Byrne did not know what assets were specifically held by NWCLF. CP 1143. He agreed to investigate and meet with Grendahl again in mid-March. CP 1143.

In mid-March, 2001, Byrne met with Grendahl, Mitchell and Stevens ("Stevens"), who was an advisor of Grendahl's. CP 1144. At that time, Grendahl and Mitchell, along with other limited members of NWCLF were attempted to make partial withdrawals of money from NWCLF, and were met with delays and evasive responses. CP 363.

In April, 2001, Byrne again met with Stevens and Grendahl, and provided them with a balance sheet for NWCLF dated April 4, 2001. CP 1144, 1158.

Shortly after May 10, 2001, Byrne provided Grendahl and Mitchell with a detail of loans outstanding for NWCLF and the current balances on those loans. CP 1144. These documents disclose completely the loans held by NWCLF. CP 1159-1165.

In May 2001, Grendahl, Mitchell and Byrne started discussions about Mitchell or Grendahl taking over management of NWCLF. CP 1144. As part of these discussions the parties agreed that NW would resign as the manager of NWCLF and that a new entity would be created

by Reid and Byrne, which would act as the manager for NWCLF. CP 1144.

In early June 2001, Byrne met with Stevens and Grendahl. At that time, Grendahl, Stevens and Mitchell indicated they had determined on their own, that NWCLF held eight notes, all of which, with the exception of one, were secured by the Graham Square property. CP 144. Also, see Declaration of Mitchell CP 368. The loans had been purchased in January 1999.

In response to the first summary judgment motion in this action, Grendahl and Mitchell admit that in June they knew of the loans and the ownership of Graham Square. CP 365. In Mitchell's declaration he stated:

According to the schedule the next disbursement was due in June. When the next disbursement did not arrive. . . Gary Grendahl, Will Stevens and I became very suspicious of Byrne's actions. By that time the limited members had learned through their own investigation that NWCLF, LLC held only eight notes, not 18 as we had been told. Aside from one property in Oak Harbor for approximately \$200,000.00 the notes were all loans to Inline, LLC, Graham Square I, LLC and Graham Square II (collectively the Graham Square, LLC). They covered adjacent and contiguous parcels of property in Graham, Washington, where the makers were developing a shopping center. NWCLF, LLC had apparently acquired the Graham notes in January of 1999. I did not invest my money with NWCLF, LLC to finance a shopping center in Graham, Washington, which was owned by Kevin Byrne, Jim Reid

and other members of NW, LLC and end up in second position with notes in default.

Declaration of Mitchell CP 365.

On June 5, 2001, NW resigned as the manager of NWCLF. CP 1192. The resignation was pursuant to prior discussions and agreement with Grendahl, Mitchell and Stevens, that a new entity would become the manager of NWCLF. CP 1145. Pursuant to the agreement, on June 6, 2001, Loan Holdings, LLC ("Loan Holdings") was created and appointed as the manager of NWCLF. CP 1145.

On July 9, 2001, Woodell wrote another letter to Loan Holdings. CP 1199. In that letter, Woodell set forth all the claims that are now included in this lawsuit, and demanded Stevens have access to all the documents of NWCLF. CP 1199. Woodell's letter stated, among other things:

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

1. Violation of investment restrictions regarding the size of loans as a percentage of total assets.
2. Violation of investment restrictions regarding loan quality.
3. Violation of investment restrictions regarding non-income producing properties.

4. Misrepresentation and concealment.
5. Making unauthorized loans against Fund assets.
6. Allowing tax liens and defaults on real estate and superior loans to remain uncured, thereby jeopardizing the collateral underlying the loans.
7. Failure to comply with the Operating Agreement in several particulars, including breach of fiduciary duties, failure to act prudently in making loans and managing cash, failure to make requested withdrawals, and failure to make proper accountings.

CP 1199-1202.

On July 17, 2001, pursuant to the June agreement with Grendahl, Mitchell and Stevens, NW transferred to NWCLF all its remaining interest in deeds of trust secured by the Graham Square property. CP 1224-1226.

On November 7, 2001, NWCLF released Loan Holdings and its members (including Reid and Byrne), managers, employees, representatives and affiliates, from all investments made by the fund between June 6, 2001 and the date of the release. CP 1127. Stevens then became Manager of NW. CP 1146.

On January 16, 2002, NWCLF filed for bankruptcy reorganization. At that time, NWCLF was managed by Stevens. CP 834. As part of its filing, NWCLF stated: "The debtor's operations were managed primarily

by Robert Coleman, co-President of NW, LLC, up to the time he withdrew. Kevin Byrne agreed to oversee the wind down of the debtor until current management took over.” CP 1128.

On December 10, 2003, Miles Yanick (“Yanick”), an attorney paid by NWCLF, prepared a memo to Stevens, Grendahl and Mitchell. CP 1231-1246. The memo stated:

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

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

CP 1233-1234.

The final paragraph of that memo advised the Appellants to bring a lawsuit prior to February 2004, stating as follows:

The shortest statute of limitations we are likely to have is a three-year statute for most torts. RCW 4.16.080. The three years starts to run from the time the wrong was or reasonably should have been discovered. *Quinn v.*

*Connelley*, 63 Wn. App. 733, 736 (1992). Based on what we know, there is no basis to conclude that NWCLF's members should have discovered NW's activities (and therefore Oldfield's failure to disclose it or withdraw if he was aware of it) before they actually did. It is our understanding that the discovery came or – began – perhaps as early as March 2001. To be safe, any action should be filed no later February of 2004. (Emphasis added.)

CP 1241.

On July 30, 2004, this action was filed. CP 1. The claims are the same claims that were identified in Grendahl's letter of July 9, 2001 (CP 1199-1201), and claims that Yanick stated should be brought before February of 2004. CP 1241.

## II. ARGUMENT

### A. NWCLF's attempt to assign its claims to the Appellants was null and void.

#### 1. Mitchell was not the validly appointed manager of NWCLF.

The assignment of claims from NWCLF to Mitchell and others was signed by Mitchell purportedly acting manager of NWCLF. CP 656-657. The assignment does not state the date it was actually signed, but merely states its effective date. CP 657. Mitchell's prior testimony was he was appointed as the manager by assignment from Stevens. CP 254. Mitchell further testified that he signed the assignment while Stevens was the manager. CP 256-257. The assignment itself demonstrates that it was

prepared after the date Coleman was dismissed as a party on August 26, 2005. The original Complaint included claims against Coleman. CP 1-87. On August 26, 2005, by stipulation Coleman was dismissed. CP 986-988. The assignment with the effective date, July 29, 2004, did not include the claims against Coleman, which were in the original Complaint. Therefore, it was back dated after August 26, 2005.

2. **The alleged assignment of claims constitutes an illegal distribution of assets of the LLC.**

NWCLF is a separate entity which holds certain assets. Claims against third parties are an asset of the entity. The alleged assignment of those claims constitutes a distribution of the assets to some members of the LLC. The assignment of claims violated RCW 25.15.235(1), which states:

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... exceed the fair value of the assets of the limited liability company. . . . (Emphasis added.)

RCW 25.15.235(1). Here, the purported assignment of claims was executed after NWCLF had filed bankruptcy. At the time, NWCLF was insolvent. Appellants make the disingenuous argument that because NWCLF was already insolvent RCW 25.15.235(1) does not apply. This

ignores the intended purpose of RCW 25.15.235, which is to protect the creditors and members of the LLC from misappropriation of assets at the time it is insolvent. The prohibition against distributions is also stated in the NWCLF Operating Agreement. CP 414.

The term "distribution" is not specifically defined with respect to LLCs. However, the term is defined with regard to corporations. *See* RCW 23B.01.400(6).<sup>3</sup> Essentially, that section considers any transfer of property to a shareholder, or incurrence of debt for the benefit of a shareholder as a distribution. *Id.* Moreover, courts consistently characterize legal claims as property. *See, e.g., Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 629, 513 P.2d 849 (1973) (holding that unliquidated damages of a tort claim constituted "property" that could be levied against).

In an effort to circumvent statutory authority and well recognized law concerning the distribution of assets in insolvency by an LLC, Appellants argue that the purported assignment was the only way for NWCLF to recover any value and was valid for that reason. However, the

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<sup>3</sup> Distribution means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect to any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a distribution in partial or complete liquidation, or upon voluntary or involuntary dissolution; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

law is clear. An LLC simply may not make distributions to its members when the LLC is insolvent or the distribution would render it so. *See* RCW 25.15.235(1).

One of the primary reasons a distribution of assets in insolvency is illegal is to protect creditors and those parties entitled to payment prior to the members of the LLC. Here, by purportedly assigning its claims to its members, NWCLF would be giving priority to its members over creditors thereby explicitly violating RCW 25.15.235(1), statutory intent, and widely held law. A mere five percent of the net proceeds would flow back to NWCLF. CP 656. Thus, not only is the purported assignment of its claims *per se* illegal, the token five percent shows that the true intent of the assignment is not to benefit NWCLF or its creditors.

**3. The assignment constituted a violation of bankruptcy law.**

Prior to the institution of this lawsuit, NWCLF had filed for bankruptcy and was a debtor in possession. CP 833-954. It claims to have assigned claims to some of its members. CP 656. The assignment violated § 363 because it was an assignment not in the ordinary course of its business. 11 U.S.C. § 363. *In Re Anchorage Nautical Tours, Inc.*, 154 B.R. 637, 642 (9th Cir. B.A.P. 1992). Further, if the assignment occurred under §554 it is invalid because NWCLF could only abandon its legal

claims against the Respondents after giving notice of intentions to do so and obtaining the bankruptcy court's approval. *Anchorage Nautical Tours, supra*.

In Schedule B filed with the initial bankruptcy petition, NW stated "none" when it was required to list "other contingencies and unliquidated claims of any nature. CP 886. In the Consolidated Plan and Disclosure Statement that was filed with the bankruptcy court (CP 269-94), the only disclosure of unliquidated claims stated "unliquidated claims against former members for breach of fiduciary duty amount unknown. CP 288. The claims brought in this action were not claims against former members of NWCLF. At the time this Complaint was filed NWCLF was still a Chapter 11 debtor in possession and had neither disclosed the claims nor received permission to prosecute them.

After confirming a plan, to regain control of a potential claim or cause of action after confirmation, a debtor must have disclosed that claim to the bankruptcy court. *Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989).

When a bankruptcy is filed, the debtor is required to include all legal or equitable interests. . .in property as of the commencement of the case. This includes. . .all property of the debtor, even that needed for a fresh start. All rights of action in which the debtor has an interest become property of

the estate under 11 U.S.C. § 541. Rights of action may be subject to exemption under 11 U.S.C. § 522(1), but the debtor must take affirmative steps to remove except property from the estate.

*Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989)

(internal citations and quotations omitted).

Because NWCLF did not disclose its claims as an asset during the bankruptcy proceedings, then both the Bankruptcy Code and Washington law make clear that it cannot now pursue those claims. As *Linklater* explains, an undisclosed asset may not be addressed in bankruptcy or be the subject of a court order. Instead, the claims remain the property of the estate. *Id.* Because this is the case, “a discharged debtor lacks legal capacity to subsequently assert title to and pursue an unscheduled claim simply because a trustee, without knowledge of the claim, took no action with respect to it.” *Id.* In other words, NWCLF lacks standing to pursue its claims.

In this case, there is no dispute that NWCLF’s purported claims accrued before Chapter 11 bankruptcy was filed or the plan was confirmed, but the potential claim was not disclosed in any of the Schedule B statements or any of the Statements of Financial Affairs filed with the Chapter 11 petition (*In re NW Commercial Loan fund, LLC*, Cause No. 02-40511, Dot. #s 1, 7, 8, 26). CP 834-950, *see* 840 and 934.

The Bankruptcy Code and court rules impose on the debtor an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005). A debtor must list potential causes of action even when lacking knowledge about the likelihood of success. *Id.* at 230-31. In the bankruptcy context, judicial estoppel can preclude a debtor from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). "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." *Id.* at 784.

Judicial estoppel arises in equity and serves to preclude a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court. *Cunningham*, 126 Wn. App. at 228. A court may invoke judicial estoppel either to prevent a party from gaining an advantage by taking inconsistent positions or to maintain the dignity of judicial proceedings. *Hamilton*, 270 F.3d at 782.

In deciding whether to apply judicial estoppel, a court considers three factors: (1) whether the party's later position clearly conflicts with its earlier one, (2) whether the party persuaded a court to accept its early position such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court, and (3) whether the party derives an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped. *Hamilton*, 270 F.3d at 782; *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 212 S. Ct. 1808 (2001). No improper intent is required. *Cunningham*, 126 Wn.2d at 234. In *Cunningham*, the court applied judicial estoppel for a party's failure to disclose a potential claim in bankruptcy when the party merely asserted an inconsistent position that the court had accepted. *Cunningham*, 126 Wn.2d at 227-233. The party need not receive an unfair advantage as well. *Id.* at 230-31.

In *Hamilton*, the Ninth Circuit Court of Appeals affirmed the application of judicial estoppel to bar Hamilton's undisclosed pre-petition claim against his insurer even after the bankruptcy court vacated the discharge. *Hamilton*, 270 F.3d at 784. The court determined that Hamilton asserted consistent positions when he failed to list his insurance claim and then later sued the insurer on the same claims. *Id.* at 784. The court held as follows:

Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated.

*Hamilton*, 270 F.3d at 784.

NWCLF did not disclose the existence of its possible claim on any of its Schedule B statements or any of the Statements of Financial Affairs filed with the Chapter 11 petition. In fact, NWCLF repeatedly marked “none” on item 20 of the schedule B form requesting disclosure of “other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtors and rights to set off claims.” *Id.* By now asserting its claim before this court, Appellants are taking a position that is clearly inconsistent with NWCLF’s earlier position before the bankruptcy court that no claim, potential or otherwise, existed. Under *Hamilton* and others, the bankruptcy court’s confirmation of NWCLF’s Chapter 11 plan constitutes the court’s acceptance of its earlier position, and the principle of judicial estoppel now bars Appellants’ claims.

In addition, although under *Cunningham*, both acceptance of NWCLF’s earlier position and benefit to NWCLF are not required for judicial estoppel to apply in Washington, both are present here. While in bankruptcy court, NWCLF benefited from the bankruptcy stay, the

confirmation of its Chapter 11 plan, and now continues to benefit from the post confirmation control of its assets.

The *Hamilton* court unequivocally stated:

The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.*

*Hamilton*, 270 F.3d at 785 (emphasis in original) (citations omitted).

NWCLF has benefited by the bankruptcy proceeding, and its failure to disclose its claims against Respondents in that proceeding was accepted by the court. Appellants may not now assert or assign those claims before this court for their own future benefit at the expense of the interests of NWCLF's creditors and the integrity of the bankruptcy court.

**4. Claims against Byrne, Reid and the Prices were not validly listed in the bankruptcy schedule.**

The only reference to fiduciary claims in the bankruptcy schedule did not identify Byrne or Reid, but stated: "Unliquidated claims against former members for breach of fiduciary duty, amount unknown." Neither

Byrne nor were former members of NWCLF.<sup>4</sup> CP 288. Appellants argue the claims were also set forth at CP 902; however, the only claims listed at CP 902 stated: “Pacifica Bank v. Debtors Robert Coleman, Tom Price, Kevin Byrne, and James Reid collection action filed in King County Superior Court No. 02-2-0637-0 SEA January 9, 2002 action is stayed by this filing.” Appellants are simply factually wrong that the claims against Byrne and Reid were ever listed in the bankruptcy filings.

5. **Appellants were estopped from raising the malpractice claims against Oldfield.**

These Respondents adopt the arguments set forth by Oldfield in response to this claimed error.

6. **Precedents and policy prohibit the assignment of malpractice claims.**

These Respondents adopt the arguments of Oldfield in response to this claimed error.

7. **The court did not abuse its discretion in denying Appellants’ motion to amend its complaint to add NWCLF as a Plaintiff.**

On May 19, 2006, the court denied Appellants’ third motion to amend the Complaint, which attempted to add NWCLF as a Plaintiff, and attempted to bring a cause of action for piercing the corporate veil. CP

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<sup>4</sup> The IRA account for Byrne was a member of NWCLF, but no claim was ever made against the IRA account.

1882-1883. The court did not abuse its discretion in refusing to grant a motion to amend.

Dispositions of motions to amend pleadings is discretionary with the trial court and its refusal to grant such an amendment will not be overturned except for manifest abuse of that discretion. *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978); *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006) (no abuse of discretion when plaintiff filed an amended complaint shortly before a dispositive summary motion hearing) at 26. *Bank of America, NT and SA v. David W. Hubert*, 153 Wn.2d 102, 101 P.3d 409 (2004) (no abuse of discretion when motion to amend was made the date of hearing on summary judgment). *Tex Enters., Inc. v. Brockway Standard, Inc.*, 110 Wn. App. 197, 39 P.3d 632 (2002) (undue delay is the proper ground for denial of a motion for leave to amend). A trial court's decision will only be reversed when it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Tex Enters. v. Brockway Standard, Inc.*, *supra*.

Here the facts show the denial was not a manifest abuse of the court's discretion. Appellants waited until May 4, 2006, two months prior to trial to make a motion to file a third amended complaint adding NWCLF as a Plaintiff. CP 1268-1272.

The motion for the third amendment to the Complaint was filed nearly two years after the original Complaint was filed CP 1-86; 8-1/2 months after the summary judgment motion dismissing assigned claims was granted CP 991-994; after the Complaint had already been amended on two occasions CP 87-172; 989-990; nearly one year after the confirmation of joinder was required on July 18, 2005 CP 1720; and after discovery was cutoff on May 1, 2006 CP 1720; and while the final motion for summary judgment was pending.

The trial court properly applied PCLR 4(c), which requires that the court find good cause to add an additional party after the confirmation of joinder. In this case, Appellants were seeking to add an additional plaintiff two months prior to trial. Adding NWCLF not only added an additional party, but also expanded the claims that had already been dismissed.

Appellants' failure to name NWCLF at the time the action was commenced was intentional. Appellants did not want to include the claims because recovery would benefit the creditors of NWCLF and the other members. The original Appellants were seeking to keep all the claims to themselves by alleging an assignment by Mitchell to them.

Appellants have cited cases that provide for a liberal application of the right to amend, but all of those case deal with amendment to add new

claims. However, in cases where leave to amend to add additional parties has been sought, the court has held that inexcusable neglect alone is a sufficient ground for denying the motion. *Tellinghuisen v. King County*, 103 Wn.2d 221, 223, 691 P.2d 575 (1984); *South Hollywood Hills Citizens Assn. v. King County*, 101 Wn.2d 68, 677 P.2d 114 (1984). “Generally, inexcusable neglect exists when no reasons for the initial failure to name the party appears in the record. *South Hollywood Hills Citizens*, 101 Wn.2d at 78. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable. See 3A L. Orland, Wash. Prac. cmt. § 5185, at 43-44 (3<sup>rd</sup> ed. 1986 Supp.); *Tellinghuisen*, 103 Wn.2d at 224 (no excuse where identity of omitted parties was matter of public record); *South Hollywood Hills*, 101 Wn.2d at 77 (no excuse because identity of omitted parties was matter of public record).” *Haberman v. WPPSS*, 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).

Adding NWCLF would have highly prejudiced the Respondents in this action. The claims to be brought by NWCLF concerned events which go back as far as 1995 with the establishment of NW. CP 1722. The original Appellants knew of these claims since 2001. Due to the extraordinary length of time that the Appellants allowed NWCLF’s claims

to languish, even finding relevant documents and witnesses would be difficult.

B. **There was no jury question regarding the application of the statute of limitations.**

1. **The statute of limitations claim affected all Appellants and all claims.**

Appellants claim that the statute of limitations did not run on Jacobson and Grenville. Jacobson and Grenville only make breach of contract claims. CP 1106-1191. *Also see* Motion and Declaration to Permit the Filing of Second Amended Complaint. CP \_\_\_\_\_ (Resp. Byrne's Supp. C.P. #1.) However, neither Jacobson nor Grenville were assignees of the contract claims, nor do they have standing to bring them. *See* standing argument herein at D.1. The Appellants lack standing to bring direct claims for injuries suffered by NWCLF. Therefore, they are appropriately dismissed not based upon the statute of limitations, but based upon their lack of standing.

Lisa Tallman was the wife of Robert Mitchell and was listed with him as a member of NWCLF in the bankruptcy proceeding. CP 715. Both spouses in a marriage are the managers of community property. RCW 26.16.030. The Mitchell Family Trust provided no declarations or other evidence claiming it did not know of the original transactions in 1999, nor did it submit any declarations regarding who managed the trust. The

Mitchell Family Trust did not sign for or accept the assignment of claims.

CP 658.

2. **The Appellants had a cause of action when NWCLF failed to make distributions and prior to the total loss of the collateral.**

Appellants claim they suffered a loss more than three years prior to filing the action. Mitchell claims that in March of 2001, he and Grendahl attempted to obtain a disbursement from NWCLF, but were met with delays and evasive responses. CP 363. Mitchell further claims that he received some disbursement but did not receive an additional disbursement promised to him. CP 363. He claims that due to the failure to receive disbursement funds, he lost an estimated \$400,000.00 arising from an agreement to purchase the home in Arizona in March of 2001. CP 364.

Grendahl claims that in March he had requested a disbursement of funds, which was not made. CP 1616. Grendahl's attorney also wrote the July 9, 2000 letter in which he stated: "Gary and Joann Grendahl hereby give notice of claims against NW, LLC." CP 1199.

In the first Complaint and every amended complaint thereafter, Appellants claimed some of the members of NWCLF sought to withdraw funds from NWCLF and were met with delays and evasive responses from

Respondent Byrne.<sup>5</sup> CP 6, 10-11. Appellants did not claim a total loss of their investment; however, they claimed improper investing of Graham Square, failing to diversify the portfolio, investments of all its assets in Graham Square and failing to make distributions after repeated demands. CP 1-86.<sup>6</sup>

Under the expressed terms of RCW 4.16.080, a cause of action for fraud does not accrue until the aggrieved party discovers the facts constituting a fraud. *Sherbeck v. Estate of Lymon*, 15 Wn. App. 866, 868, 552 P.2d 1706 (1976); however, the court infers actual knowledge of fraud if the aggrieved party, through due diligence, could have discovered it. Accordingly, the statute of limitations for damage action based upon fraud and misrepresentation commences when the aggrieved party discovers or should have discovered the facts of the fraud and sustained some damage as a consequence. *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 283, 864 P.2d 17 (1993).

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<sup>5</sup> In Appellants' Complaint they state: "To date Plaintiffs have received only partial distribution of their investments and, despite repeated demand therefor, have not been repaid in full. Attached hereto and incorporated by reference herein as Exhibit C is a spreadsheet which, on information and belief accurately summarizes Plaintiffs' investments and the limited disbursements made by NWCLF." CP 1013, ¶ 2.14.

<sup>6</sup> These claims parallel the claims set forth in Woodell's letter of July 9, 2001. CP 1199-1201.

The plaintiff need not be aware of the full extent of the damages; knowledge of some actual, appreciable damage is sufficient to begin the running of the statute of limitations. *Green v. A.P.C.*, 136 Wn.2d 87, 97-97, 960 P.2d 912 (1998); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 112, 802 P.2d 826 (1991). The running of the statute is not postponed by the fact that the substantial damages occurred later, and is not postponed until the specific damages occur for which the plaintiff seeks recovery. *Green*, 136 Wn.2d at 96-97. *See also Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000).

As a general principle a statutory limitation period commences and causes of action accrue when a party has the right to seek relief in courts. *Colwell v. Easing*, 118 Wn.2d 861, 868, 825 P.2d 1005 (1992); *U.S. Oil & Refining Co. v. Department of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981); *Lybecker v. United Pac. Ins. Co.*, 167 Wn.2d 11, 15, 406 P.2d 945 (1965). In a damage claim based upon common law fraud, a party is entitled to judicial relief only if damages have occurred as a consequence of the fraudulent act. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967).

Applying these principals to our facts and the specific claims made in the Complaint, Appellants alleged they were damaged when distributions were not made when requests for distributions were made from NWCLF. These demands for distributions were made in March of 2001. Appellants

specifically claimed in their Complaint that “Plaintiffs have received only a partial distribution of their investment and despite repeated demands therefor, have not been repaid in full.” CP 94.

3. **Appellants own declarations, letters and memoranda demonstrate they knew of their claims no later than July 9, 2001.**

The undisputed facts of this case demonstrate that the cause of action asserted by Appellants in this matter occurred more than three years prior to the bringing of the action and, thus, is barred by the statute of limitations. RCW 4.16.080. Appellants cannot deny the following facts.

First, Appellants cannot contest that the assignments of each of the three Graham Square deeds of trust were recorded with the Pierce County Auditor as a public record in 1999, *five years* prior to the initiation of this action. CP 1148-1154.

Second, Appellants do not dispute the letter from Attorney Michael H. Woodell dated July 9, 2001, which outlines each of the claims now made by Appellants. CP 1194-1201. This letter was dated more than three years prior to this action, and clearly shows that Appellants had sufficient knowledge of their potential claims to proceed to court.

Third, Mitchell, in his own declaration declared that by June of 2001, the limited liability members had learned through their own investigation that “NWCLF, LLC held only eight notes, not 18 as we had been told. Aside from

one property in Oak Harbor for approximately \$200,000.00 the notes were all loans to Inline, LLC, Graham Square I, LLC and Graham Square II (collectively the Graham Square, LLC).” CP 365.

Finally, Appellants do not dispute any of the facts contained in the Memorandum from Attorney Miles A. Yanick dated December 10, 2003 (the “Yanick Memo”), which confirms details of Appellants’ discovering the facts as early as March of 2001. CP 1231-1241.

a. **The assignment of each of the Graham Square deeds of trust were recorded in 1999.**

Appellants’ complaints center on the assignment of three deeds of trust from NW to NWCLF that were made in 1999, *each of which was recorded in Pierce County.*

When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents. . . . When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument.

*Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960) (discovery rule applied to fraud cases). This holding was confirmed in *Western Washington Laborers-Employers Health & Sec. Trust Fund v. Harold Jordan Co., Inc.*, 52 Wn. App. 387, 760 P.2d 382 (1988). In that fraudulent conveyance case, the

filing of a UCC financing statement triggered commencement of statute of limitations.

[W]hen the facts upon which the fraud is predicated are contained in a written instrument which is placed on public record, the aggrieved party receives constructive notice of its contents. Thus, the statute of limitations begins to run from the date of the recording of the instrument.

*Western Washington Laborers-Employers*, 52 Wn. App. at 391.

Thus, the recording of the Graham Square deeds of trust in 1999 gave Appellants notice of facts sufficient to prompt them to inquire into the presence of an injury. The statute of limitations began to run in 1999, the year the documents were recorded with the Pierce County Auditor.

**b. The Woodell letter of July 9, 2001 set forth the claims that were eventually brought more than three years later.**

On July 9, 2001, Woodell wrote to the Respondents<sup>7</sup> stating: “We demand that all of the above persons or entities give immediate notice of this claim to all insurance carriers who provide coverage or may provide coverage for such claims.” CP 1199.

Woodell further stated: “Grendahl has reasonable grounds for believing:

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<sup>7</sup> Woodell made claims against NW, LLC, NW Commercial Loan Fund, LLC, Kevin Byrne, James Reid, Robert Coleman, Michael Price, Tom Price and Loan Holdings, LLC for all losses and damages.

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

CP 1199-1201.

**c. Mitchell admitted he knew in June of the facts upon which the claim based.**

In Mitchell's declaration dated July 30, 2005, he claimed that in March of 2001, NWCLF did not make distributions of funds as required. The purpose of the funds were purchase a home in Arizona in March. CP 363. Mitchell claims he was unable to complete the purchase due to the lack of distributions from NWCLF resulting in a loss of \$400,000.00. CP 363-364. Mitchell admits that in June of 2001, he, Grendahl and Stevens had discovered on their own the investments which formed the basis of their claim against the Respondents. CP 365.

d. **The Yanick memo corroborates the knowledge of the Appellants.**

In the Yanick memo of December 10, 2003, he confirms the details of Appellants' knowledge more than three years prior to the claim being filed. In that memo he stated:

- In March 2001, Byrne, Grendahl, Attorney Oldfield and Attorney Woodell met to discuss NWCLF because of concerns held by some of the limited members after the limited members' attempts to make withdrawals from NWCLF.
- By the time of a second meeting in June 2001, the limited members had learned through their own investigation that NWCLF held only eight notes, and that except for one, were all for loans to the Graham Square LLCs.
- At the June 2001 meeting, the limited members learned that NWCLF was in second position on most of the notes and that some of the notes were delinquent. They also learned that the members of the Graham Square LLCs were the members of NW, together with Al Olsen, who owned a 50% share in the LLCs.
- The shortest statute of limitations you are likely to have is a three year statute for most torts. RCW 4.16.080. The three year statute starts to run from the time the wrong was or reasonably should have been discovered. *Quinn v. Connelley*, 63 Wn. App. 733, 736 (1992). Based upon what we know, there is no basis to conclude that NWCLF's members should have discovered NW's activities (and, therefore, Oldfield's failure to disclose or withdraw if he was aware of it) before they actually did. It is our understanding that the discovery came – or began – perhaps as early as March 2001. To be safe any action should be filed no later than February of 2004.

CP 1231-241.

The Yanick Memo is not offered primarily to impose upon the court the opinions of the writer, but to inform the court of what Appellants knew and

when they knew it. Notably, Appellants do not dispute Yanick's description of Appellants' (his clients') knowledge that, as of March 2001, they had facts sufficient to seek relief from the court. This recitation of facts could only be based on what Appellants directly told Attorney Yanick.

The Yanick memo, the Woodell letter and the Declaration of Mitchell were drafted by competent counsel based on information received from the Appellants. Each document is consistent with the other and they soundly prove the Appellants knew the facts underlying the claim and their damages more than three years prior to bringing the action, and they learned this information on their own.

4. **Accrual of the alleged causes of action under the "Discovery Rule."**

a. **The Discovery Rule.**

Under the "discovery rule," a cause of action does not accrue until an injured party knows, *or in the exercise of due diligence should have discovered*, the factual bases of the cause of action. *Estates of Hibbard*, 118 Wn.2d, 737, 744, 826 P.2d 690 (1992); *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). A Plaintiff bears the burden to show that the facts constituting the tort were not discovered *or could not have been discovered* by due diligence within the 3-year period. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986), review denied, 107 Wn.2d 1022 (1987).

Nevertheless, once a plaintiff has notice of facts sufficient to prompt a person of average prudence to inquire into the presence of an injury, he or she is deemed to have notice of all facts that reasonable inquiry would disclose. *Vigil v. Spokane County*, 42 Wn. App. 796, 800, 714 P.2d 692 (1986).

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. "[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) ("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."), cert. denied, 368 U.S. 989, 82 S.Ct. 598, 7 L.Ed.2d 526 (1962).

*Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wn.2d 87, 960 P.2d 912 (1998).

Claims for breach of fiduciary duty, fraud and misrepresentation sound in tort, and the applicable statute of limitations is three years. *Browning v. Howerton*, 92 Wn. App. 644, 650-51, 966 P.2d 367 (1998); *Crisman v. Crisman*, 85 Wn. App. 15, 22-23, 93 P.2d 163. See also *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998). The general rule is that a cause of action accrues in the statute of limitations and begins

to run when the party has the right to apply to a court for relief. *Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976).

In summary, there was no question of fact regarding what was known by the Appellants three years prior to the commencement of the action.

**C. Appellants' claims were frivolous because they were advanced without reasonable cause.**

Appellants in this case were advised by competent counsel that they should bring their claim no later than February of 2004. CP 1241. On July 9, 2001, attorney Woodell gave notice of claims against the Respondents. CP 1199. In a response to summary judgment Mitchell claimed that in June of 2001 the limited members had learned through their own investigation NWCLF had made improper investments. CP 365.

An action is frivolous if it cannot be supported by any rational argument on the law or facts. *Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931 (2004); *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82 (1989); *Bill of Rights Legal Foundation v. Evergreen State College*, 44 Wn. App. 690, 696-97, 723 P.2d 483 (1986).

The purpose of RCW 4.84.185 is to “discourage frivolous lawsuits and to compensate the target of such lawsuits for fees and expenses incurred in fighting meritless cases.” *Biggs v. Vale*, 119 Wn.2d 129, 137, 830 P.2d 350 (1982).

Under our facts, Appellants brought an action which was barred by the statute of limitations. Appellants had in their possession, the memorandum from Yanick advising them “the action should be brought no later than February of 2004.” Rather than bringing the action in February, Appellants waited until July 30, 2004.

Throughout this litigation, Appellants knew that there was no legal or factual basis upon which they could prevail; however, they continued the action even though they were informed the statute of limitations had run.

An award of attorney fees for frivolous litigation under RCW 4.84.185 is proper where the action clearly is barred on several grounds, including the statute of limitations and lack of standing. *Reid v. Dalton*, 124 Wn. App. 113, 123, 100 P.3d 349 (2004). Court in other jurisdictions have also come to the same conclusions. *Zweibach v. Gordimer*, 884 S.2d 244, 247 (2004).

Our case is similar to that of *State Ex Rel Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998), wherein the court awarded attorney fees under RCW 4.84.185, on the basis that reasonable inquiry by the plaintiff and his counsel would have shown that his theory of standing was not well-grounded in fact and not warranted by existing law.

Had the Appellants followed the research previously provided by Yanick, this action would have been filed in February of 2004. Waiting until July 30, 2004, constituted an action advanced without reasonable cause.

**D. In addition to the statute of limitations there were other bases for dismissal of Appellants' claims.**

Respondents at the time of the final summary judgment made other arguments for dismissal of Appellants' claims. Generally an appellate court may affirm a grant of summary judgment on issues not decided by the trial court, provided it is supported by the record within the pleadings and the proof. *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

**1. Appellants lack standing to bring a direct claim for injuries suffered by NWCLF.**

Without having a proper assignment from NWCLF the Appellants have no standing to bring claims against the Respondents. Appellants Jacobson and Grenville were not assignees of claims, and the attempt of assignment to the other Appellants was invalid as a result of the breach of Washington State law and the Bankruptcy Code. Without a valid assignment, Appellants are bringing a claim as members of NWCLF against members of NW.

Members and managers of limited liability companies are not liable to every claimant who comes forward – only to those claimants with standing.<sup>8</sup>

The standing doctrine requires that a plaintiff must have a personal stake in the outcome of the case in order to bring suit. Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is a separate entity: the shareholder's interest is viewed as too removed to meet the standing requirements. Even a shareholder who owns all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual.

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There are two often overlapping exceptions to the general rule: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder; and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.

*Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 584-85, 5 P.3d 730

(2000) (citations omitted).<sup>9</sup>

A special duty may exist only if a duty was owed to the individual independent of his status as a shareholder, that is, “when that special duty had its origin in circumstances independent of the stockholder's status as a stockholder.” *Sabey*, 101 Wn. App. at 584.

RCW 25.15.060 adopts Washington business corporation standards for determining liability of managers and members of LLC's. “Members of limited liability companies shall be personally liable for any acts, debts,

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<sup>8</sup> Even if Byrne and Reid had engaged in some wrongful conduct that gave rise to liability under RCW 25.15.155, only the entity of which Byrne and Reid were members or managers (NW) or its members could have standing to pursue any action against Byrne and Reid. Members of NWCLF have no standing.

obligations or liabilities of a limited liability company to the extent shareholders of a Washington business corporation be liable in analogous circumstance. . . .”

The Appellants have no standing to bring a direct claim. The doctrine of standing requires that a claimant must have a personal stake in the outcome of a case in order to bring suit. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987). Ordinarily, this means that a shareholder cannot sue for wrongs done to an LLC or corporation. The LLC or corporation is a separate entity. The member or shareholder’s interest is deemed too remote to meet the standing requirement. *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 584, 5 P.3d 703 (2000), *Guftason, supra*. “The reason for this is that the cause of action accrues to the corporation itself, and the stockholders’ rights therein are merely of a derivative character and therefore can be enforced or asserted only through the corporation.” *Goodwin v. Castleton*, 19 Wn.2d 748, 761, 144 P.2d 725, 150 A.L.R. 859 (1944) (citing 13 Am. Jur. 504, Corporations, § 461; 18 C.J.S., Corporations, § 559, p. 1272).

This means that even if the stockholder has suffered indirect harm, such as a diminution in the value of his or her corporate shares due to a

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9 This second exception does not apply, because Appellants here cannot assert that they are in any position different from other members of NWCLF.

wrong done to the corporation by a third party, the stockholder still does not have an individual right of action. *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3<sup>rd</sup> Cir. 1970).

In our case, Appellants have not brought a derivative action on behalf of NWCLF. As a matter of law, even if Appellants' claims did have merit, they would belong to NWCLF and not Appellants individually.

Washington law contemplates that members of a limited liability company can bring a derivative action. RCW 25.15.370 states:

A member may bring an action in superior courts *in the right of a limited liability company* to recover a judgment in its favor if managers or members with the authority to do so have refused to bring the action, or in an effort to cause those managers or members to bring the action is not likely to succeed. (Emphasis added.)

Although no Washington court has addressed derivative suits for an LLC, the issues have been addressed in California, which has applied the requirements for corporate derivative lawsuits to LLCs. *Pac Link Communications Int'l v. Ivan Yeung, et al.*, 90 Cal. App. 958, 109 Cal. Rptr. 2d 436 (July 2001). An individual member may not maintain his own action in his own right for the destruction or diminution of the value of an LLC or its membership. *Id.* at 440.

Plaintiffs' claims stem from injuries incurred as a result of alleged poor investments made by NWCLF and the failure to make distributions. CP 1006-1091. *See* Complaint, ¶¶ 3.1-9.3. Based upon this alone, Appellants clearly understand that any losses suffered were suffered by NWCLF and, therefore, the claims against Respondents, if any, are vested in NWCLF.

2. **Appellants' claims fail because Byrne and Reid are protected under the limited liability status of NW.**

Reid was a member of NW and not a member or manager of NWCLF. Byrne was a member and manager of NW, but was not the manager of NWCLF. There has been no claim that Byrne undertook any activities other than a manager for NW or for Loan Holdings. In fact, neither Byrne nor Reid signed the documents which form the basis of Appellants' claims. CP 1143, 1148-1154. As such, both Byrne and Reid are protected the limited liability status of NW.

An LLC is a distinct legal entity, separate and apart from its members and its managers, thereby providing "limited liability."

The debts, obligations and liability of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations or liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

RCW 25.15.125(1). An LLC member is protected from personal liability just like a shareholder of a corporation is protected from personal liability. In order for a member or manager of an LLC to be held personally liable for the LLC's acts, debts, obligations, or liabilities, the claimant must first "pierce the veil" to the same extent necessary for personal liability to attach to shareholders or officers of a Washington corporation. RCW 25.15.060.<sup>10</sup> In this case, the Respondents were members or managers of NW, a separate entity from NWCLF.

Washington courts have not specifically addressed the issue of a member's limited liability; however, other jurisdictions have. Under a recent North Dakota Supreme Court decision the court in reference to its own LLC statute stated: "A limited liability company is a separate business entity and its owners or members are not exposed to personal liability for the entity's debts unless there are personal guarantees." *Addy v. Myers*, 2000 ND 165, 616 N.W.2d 359 (2000). In addition, an Illinois United States District Court case also affirms that a member of a Delaware LLC will not be held liable, as the statute makes clear. "Members of a Delaware limited liability company are not governed by partnership

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<sup>10</sup> Appellants waited until two months prior to trial to attempt to amend their complaint to bring a claim to pierce the corporate veil. The motion to

principles and are not obligated for the contractual liabilities of the limited liability company.” *Leber v. Universal Music & Video Distrib.*, 225 F. Supp. 2d 928 (U.S. Dist. Ct. 2002).

Pursuant to the Washington statute, it is clear that a member or manager will not be liable for the debts of the LLC. Thus, if Appellants have a right to recover under their claims, those claims are against NW, as manager of NWCLF, and not Respondents Byrne and Reid, individually.

Byrne and Reid were not contractually obligated to NWCLF. Absent privity of contract there is no standing to bring an action on the contract and the claims must be dismissed. *See Lobak Partitions, Inc. v. Atlas Const. Co., Inc.*, 50 Wn. App. 493, 497, 749 P.2d 716 (1988) (holding that a sub-subcontractor could not bring a breach of contract action against the prime contractor because the former did not directly contract with the latter and, therefore, lacked privity). *Opportunity Christian Church v. Washington W. Power Co.*, 136 Wash. 116, 199, 238 P. 641 (1925) (an action by shareholders of a water company to enforce a contract made by it with a power company, court dismissed suit for lack of privity between those water company shareholders and the power company.) Courts have also applied this principle in the context of

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amend the complaint was denied. CP 1882-1883. Case Schedule CP \_\_\_\_\_ (see Respondents’ Supplemental Designation of Clerk’s Papers, Appendix B.

shareholders of corporations. Specifically, parties who sue as shareholders, with no independent stake in the outcome other than through their ownership interest in the corporation, are not in privity of contract and have no basis to allege injury for breach. *See Glass v. United States*, 258 F.3d 1349, 1354-55 (Fed. Cir. 2001) (shareholders did not have standing to sue because they were not third-party beneficiaries to the contract, but at most, incidental beneficiaries); *see also First Hartford Corp. Pension Plan and Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (holding that shareholders had standing to bring a derivative suit against the Government, but no standing to bring a direct suit due to lack of privity).

Simply put, “[t]he doctrine of standing prohibits a litigant from raising another’s legal rights.” *Haberman v. WPPSS*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). Here, Appellants as individual investors in NWCLF are attempting to raise NWCLF’s legal rights under the contract between NWCLF and NW by way of direct action against Respondents Byrne and Reid. The two LLC’s, NWCLF and NW, are the *exclusive* parties to that contract and are the only parties with privity.

3. **No evidence was presented supporting any claims against Reid.**

Appellants, before the trial court and before this court have gone to great lengths to disparage Respondent Byrne. However, Appellants never set forth any facts claiming that Respondent Reid should be liable for any wrongful conduct. Appellants presented no evidence by way of declaration, written documents, or otherwise, which indicated Reid had any contact with Appellants or ever discussed any of the investments with them, or made any misrepresentations to them. Appellants claims against Reid were, therefore, properly dismissed.

**4. Appellants' claims against Byrne and Reid were cutoff by the release dated November 7, 2001.**

On November 7, 2001, NWCLF released Loan Holdings LLC, Byrne and Reid from liability for actions taken between June 6, 2001 and November 7, 2001, including assignments of deeds of trust and loans to Graham Square CP 1227. The Release of Claims specifically states that it was made "with the intention of binding itself, its members and their successors and assigns." *Id.* As such, all members of NWCLF, including Appellants here, released Respondents Byrne and Reid for any actions they took between June 6, 2001 and November 7, 2001.

Appellants have released Byrne and Reid for all of their conduct subsequent to June 5, 2001 (up to and including November 7, 2001). Appellants have not set forth any conduct by Byrne or Reid past November 7,

2001 that they consider to have been wrongful. Thus, the only conduct of which Appellants may complain must have occurred prior to June 6, 2001.

Appellants indeed complain about NW's management of NWCLF. NW ceased to manage NWCLF on June 5, 2001; thus any wrongful conduct by NW or its managers had to have occurred prior to June 5, 2001.

But Appellants brought the present action on July 30, 2004, more than three years after the effective period of the release and after the last date NW served to manage NWCLF. Thus, any claims against Byrne and Reid are precluded by the statute of limitations.

**5. Award of fees for frivolous claims.**

Appellants properly noted the failure of the court to enter Findings of Fact and Conclusions of Law to support the award of attorney fees. This procedural difficulty was satisfied on May 18, 2007 by the court entering Findings of Fact and Conclusions of Law in support of the award.

**III. CONCLUSION AND REQUEST FOR FEES**

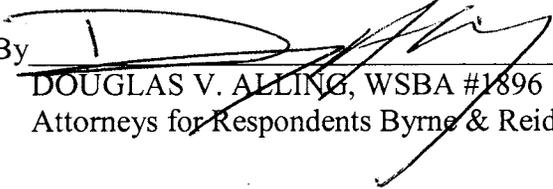
Appellants presented no question of fact relating to their attempt to assign NWCLF's claims to themselves and their knowledge of their claims more than three years prior to the filing of this litigation. The claims when they were brought were frivolous and remain frivolous. On that basis,

Respondents Byrne and Reid request an award of fees in this appeal based upon RCW 4.28.185 and RAP 18.1.

RESPECTFULLY SUBMITTED this 21st day of May, 2007.

SMITH ALLING LANE, P.S.

By

  
DOUGLAS V. ALLING, WSBA #1896  
Attorneys for Respondents Byrne & Reid

**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF RESPONDENTS BYRNE AND REID postage prepaid, via U.S. mail on 21<sup>st</sup> day of May, 2007 to the following counsel of record at the following addresses:

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## **APPENDIX A**

## 11 U.S.C. § 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, 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, 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 in the case of a transaction under this subsection, then--

(A) notwithstanding subsection (a) of such section, 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, 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), unless such waiting period is extended--

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; 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 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.

**(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).

**(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, 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 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 U.S.C. § 522. Exemptions

(a) In this section--

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

**11 U.S.C. § 554. Abandonment of property of the estate**

- (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.
- (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to 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.

## 11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

- (4)** any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--
- (A)(i)** the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and
- (ii)** but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or
- (B)(i)** the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and
- (ii)** but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;
- (5)** funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but--
- (A)** only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;
- (B)** only to the extent that such funds--
- (i)** are not pledged or promised to any entity in connection with any extension of credit; and
- (ii)** are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and
- (C)** in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;
- (6)** funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but--
- (A)** only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;
- (B)** with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(7) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and
- (C)** in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed \$5,000;
- (7)** any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986; except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b); or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

**(c)(1)** Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

**(A)** that restricts or conditions transfer of such interest by the debtor; or

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

**(2)** A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

**(d)** Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

**(e)** In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

**(f)** Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

**RCW 26.16.030. Community property defined--Management and control**

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

- (1) Neither spouse shall devise or bequeath by will more than one-half of the community property.
- (2) Neither spouse shall give community property without the express or implied consent of the other.
- (3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses.
- (4) Neither spouse shall purchase or contract to purchase community real property without the other spouse joining in the transaction of purchase or in the execution of the contract to purchase.
- (5) Neither spouse shall create a security interest other than a purchase money security interest as defined in \*RCW 62A.9-107 in, or sell, community household goods, furnishings, or appliances, or a community mobile home unless the other spouse joins in executing the security agreement or bill of sale, if any.
- (6) Neither spouse shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses participate in its management without the consent of the other: PROVIDED, That where only one spouse participates in such management the participating spouse may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse.

**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.

### **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 25.15.060. Piercing the veil**

Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances. In this regard, the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil, except that the failure to hold meetings of members or managers or the failure to observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish that the members have personal liability for any act, debt, obligation, or liability of the limited liability company if the certificate of formation and limited liability company agreement do not expressly require the holding of meetings of members or managers.

**RCW 25.15.125. Liability of members and managers to third parties**

(1) Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

### **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.

**RCW 25.15.370. Right to bring action**

A member may bring an action in the superior courts in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

**RCW 23B.01.400. Definitions**

(6) "Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect to any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a distribution in partial or complete liquidation, or upon voluntary or involuntary dissolution; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

**RCW 4.28.185. Personal service out of state--Acts submitting person to jurisdiction of courts--Saving**

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

**PCLR 4. Confirmation of Joinder and Status Conference**

**(a) Scope.** This rule shall apply to all cases governed by a Case Schedule pursuant to PCLR 1.

**(b) Additional Parties, Claims, and Defenses.** No additional parties may be joined, and no additional claims or defenses may be raised, after the date designated in the Case Schedule for confirmation of Joinder of Additional Parties, Claims and Defenses, unless the court orders otherwise for good cause and subject to such conditions as justice requires.

**(c) Confirmation of Joinder; Form.** No later than the designated deadline for joining additional parties and raising additional claims and defenses, as described in section (b) above, the plaintiff shall, after conferring with all other attorneys or parties pro se pursuant to paragraph (d) of this rule, file with the Pierce County Clerk and with the assigned department, and serve by mail upon the opposing counsel or parties pro se, a report entitled “Confirmation of Joinder of Parties, Claims, and Defenses,” which will contain the case heading and otherwise be as set forth in Appendix, Form F.

## **APPENDIX B**

A.M. MAY 21 2007 P.M.

PIERCE COUNTY WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

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

ROBERT R. MITCHELL; LISA TALLMAN;  
MITCHELL FAMILY LIVING TRUST; GARY  
GRENDAHL; JOANN GRENDAHL;  
OLYMPIC CASCADE TIMBER, INC., a  
Washington corporation; GM Joint Venture, a  
Washington joint venture partnership; and  
ROBERT M. MITCHELL, INC., a Washington  
corporation,

Plaintiffs,

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 BYRNE and MARY BYRNE,  
husband and wife; ROBERT COLEMAN and  
"JANE DOE" COLEMAN, husband and wife;  
THOMAS H. OLDFIELD and "JANE DOE"  
OLDFIELD, husband and wife; and NW, LLC, a  
Washington limited liability company,

Defendants.

No. 04-2-10247-8

DEFENDANTS BYRNE AND REID'S  
SUPPLEMENTAL DESIGNATION OF  
CLERK'S PAPERS

Div. II Appeals Case No. 35291-5-II

Defendants KEVIN BYRNE and MARY BYRNE, and JAMES REID and SONJA

REID, designate the following pleadings to be transmitted to the Court of Appeals Division II:

DEFENDANTS BYRNE AND REID'S  
SUPPLEMENTAL DESIGNATION OF CLERK'S  
PAPERS – Page 1

**COPY**

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Alling  
Lane*

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Attorneys at Law

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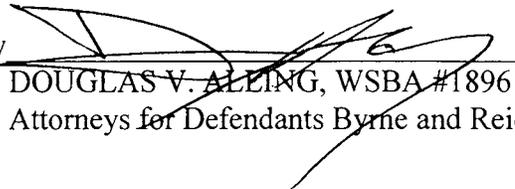
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<u>No.</u>	<u>Filing Date</u>	<u>Description/Name</u>
1.	7/28/05	Motion and Declaration for Filing Second Amended Complaint
2.	8/26/05	Order Amending Case Schedule
3.	5/18/07	Findings of Fact and Conclusions of Law Re Defendants Byrne and Reid's Motion for Attorney Fees and Costs

DATED this 21<sup>st</sup> day of May, 2007.

SMITH ALLING LANE, P.S.

By

  
DOUGLAS V. ALLING, WSBA #1896  
Attorneys for Defendants Byrne and Reid

COPY RECEIVED

MAY 21 2007

SMITH ALLING LANE  
BY TIME  
S. 10:02 AM

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

Court of Appeals No. 35291-5

DEFENDANT OLDFIELD'S  
DESIGNATION OF CLERK'S PAPERS

KEVIN AND MARY BYRNE,

Third Party Plaintiffs,

v.

WILL STEVENS, et al.,

Third Party Defendants.

ASSIGNED TO THE HONORABLE  
KATHERINE M. STOLZ

TO THE CLERK OF THE COURT:

Please prepare the following document or exhibits for transmittal to the Court of Appeals of the State of Washington:

<u>NO.</u>	<u>DOCUMENT</u>	<u>DATE FILED</u>
1.	Motion for Judgment (Def. Oldfield)	5/9/07
2.	Motion for Judgment (Def. Byrne)	5/9/07
3.	Motion for Judgment (Def. Price)	5/10/07

OLDFIELD DES. OF CLERK PAPERS - 1 of 2  
(04-2-10247 8)  
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4.	Objections/Opposition of Plaintiff	5/16/07
5.	Reply of Defendant Oldfield	5/17/07
6.	Affidavit/Declaration of Counsel	5/17/07
7.	Reply of Defendant Byrne	5/17/07
8.	Judgment (Def. Oldfield)	5/18/07
9.	Judgment (Def. Byrne)	5/18/07
10.	Judgment (Def. Price)	5/18/07
11.	Findings of Fact and Conclusions of Law (Def. Oldfield)	5/18/07
12.	Findings of Fact and Conclusions of Law (Def. Byrne)	5/18/07
13.	Findings of Fact and Conclusions of Law (Def. Price)	5/18/07

Dated this 18th day of May, 2007.

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

By Stephanie Bloomfield  
Stephanie Bloomfield, WSBA No. 24251  
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Attorneys for Defendant/Respondent Oldfield