

FILED
COURT OF APPEALS
DIVISION II

09 MAR 11 PM 3:32

STATE OF WASHINGTON
BY *YSC*
DEPUTY

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

Case No. 38190-7-II

WILLIAM CHUNG,
Appellant,

v.

JOSEPH OH & HAE Y. OH,
Respondents.

RESPONDENTS' BRIEF

Mark B. Anderson, WSBA #25895
SMITH ALLING LANE, P.S.
1102 Broadway Plaza, Suite 403
Tacoma, Washington 98402
Tel: 253-627-1091
Attorneys for Respondents

TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR1

III. STATEMENT OF THE CASE1

 A. Factual Background.1

 B. Procedural Background.....3

IV. ARGUMENT5

 A. Standards and Scope of Review.....5

 1. Standard of Review for Motions to Dismiss Under
 CR 12(b)(6).....5

 2. Standard of Review for Motions for Terms Under
 CR 11 and RCW 4.84.185.6

 3. Scope of Review for Motions to Dismiss Under
 CR 12(b)(6).....6

 B. Chung’s Complaints Were Insufficient on Their Face.7

 1. Chung’s Initial Complaint Did Not State a Valid
 Cause of Action.....8

 2. Chung’s Amended Complaint did not Cure the
 Deficiencies of the Initial Complaint.8

 C. The Trial Court Correctly Determined that Chung’s
 Claims Were Barred by the Statute of Limitation for
 Oral Contracts.9

 1. The Applicable Statute of Limitation is Three
 Years.9

 2. RCW 62A.3-118 is not Dispositive of the
 Applicable Statute of Limitation.....9

 3. The Check is Not a Contract Subject to a Six-
 Year Statute of Limitation.11

 D. The Trial Court Correctly Awarded Defendants Their
 Attorney Fees and Costs15

 1. Defendants are Entitled to CR 11 Sanctions.....15

 2. Defendants are Entitled to Attorney Fees and Costs
 Under RCW 4.84.185 for a Frivolous Action.....16

V. CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).....	8
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994)	7, 19
<i>Bill of Rights Legal Foundation v. Evergreen State College</i> , 44 Wn. App. 690, 723 P.2d 483 (1986).....	19
<i>Bogle & Gates PLLC v. Holly Mountain Resources</i> , 108 Wn. App. 557, 32 P.3d 1002 (2001).....	14
<i>Bogle & Gates PLLC v. Zapel</i> , 121 Wn. App. 444, 90 P.3d 703 (2004).....	14
<i>Clarke v. Equinox Holdings, Ltd.</i> , 56 Wn. App. 125, 783 P.2d 82 (1989).....	18
<i>Cutler v. Phillips Petroleum Co.</i> , 124 Wn.2d 749, 881 P.2d 216 (1994).....	5, 6, 9
<i>Halvorson v. Birchfield Boiler, Inc.</i> , 76 Wn.2d 759, 458 P.2d 897 (1969).....	8, 10, 16
<i>Hoffer v. State</i> , 110 Wn.2d 415, 420, 755 P.2d 781 (1988), aff'd, 113 Wn.2d 148, 776 P.2d 963 (1989).....	8
<i>Hoffer v. State</i> , 110 Wn.2d 415, 755 P.2d 781 (1988), <i>aff'd</i> , 113 Wn.2d 148, 776 P.2d 963 (1989).....	6
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	6
<i>Jeckle v. Crotty</i> , 120 Wn. App. 374, 85 P.3d 931 (2004).....	18
<i>Lawson v. State</i> , 107 Wn.2d 444, 730 P.2d 1308 (1986).....	9
<i>Madden v. Foley</i> , 83 Wn. App. 385, 922 P.2d 1364 (1996).....	7
<i>Miller v. Campbell</i> , 164 Wn.2d 529, 192 P.3d 352 (2008).....	6
<i>Nat'l Bank of Commerce of Seattle v. Preston</i> , 16 Wn. App. 678, 558 P.2d 1372 (1977).....	13, 14, 15, 16
<i>Potter v. Wash. State Patrol</i> , 161 Wn.2d 335, 166 P.3d 684 (2007).....	8
<i>Reid v. Dalton</i> , 124 Wn. App. 113, 100 P.3d 349 (2004).....	20
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	7, 19, 20
<i>State v. Batten</i> , 16 Wn. App. 313, 556 P.2d 551 (1976).....	7
<i>Tenore v. AT&T Wireless Services</i> , 136 Wn.2d 322, 962 P.2d 104 (1998).....	6
<i>Yurtis v. Phipps</i> , 143 Wn. App. 680, 181 P.3d 849 (2008)	5
<i>Zweibach v. Gordimer</i> , 884 So.2d 244 (Fla. 2004)	20

Statutes

RCW 4.16.040 12, 13, 17
RCW 4.16.080(3)..... 14, 17
RCW 4.84.185 passim
RCW 62A.3-118 i, 8, 11, 12
RCW 62A.3-305 11, 12

Other Authorities

5, C. WRIGHT & A. MILLER, Federal Practice § 1357, at 604
(1969).....6

I. INTRODUCTION

Appellant brought suit against Respondents to enforce the payment terms of an oral contract into which the parties had allegedly entered more than five years prior. On Respondents' motion, the trial court dismissed Appellant's causes of action as barred by the statute of limitation for oral contracts, and awarded Respondents their attorney fees and costs under CR 11 and for a frivolous action.

II. ASSIGNMENTS OF ERROR

A. Appellant contends that the trial court erred when it ruled that the statute of limitation for a check is three years, rather than a six or ten-year statute of limitation under RCW 62A.3-118.¹

B. Appellant contends that the trial court erred when it ruled that a check is not a written contract to which a six-year statute of limitation applies.

C. Appellant contends that the trial court abused its discretion in awarding attorney's fees and costs in favor of Respondents.

III. STATEMENT OF THE CASE

This case involves a dispute between Appellant William Chung ("Chung") and Respondents Joseph and Hae Oh, husband and wife ("Oh") over the repayment of an alleged debt.

A. Factual Background.

The following facts were adduced from Chung's Complaint² and in declaration testimony offered by Chung. On or about January 21, 2003,

¹ The trial court, however, did not make such a ruling.

Oh requested that Chung pay \$20,000 to a third party, Mr. Park, for the purpose of investing in Mr. Park's water bottling company. CP 29, CP 31. Chung contends that he did pay \$20,000 cash to Park at that time. CP 32.

On January 21, 2003, Oh issued a personal check drawn on Key Bank in the amount of \$20,000 made payable to Mr. Chung, and annotated in the memo section with the words "personal loan." CP 7-8. Oh initially told Chung to hold off on cashing the check until sufficient funds were in his account. CP 32, CP 76. Thereafter, in the spring and summer of 2004, Chung periodically demanded of Oh that he be permitted to cash the check and, each time, Oh denied the request, saying he did not have enough money in his account to cover the check. CP 32. At some point after summer of 2004, Chung went to a bank³ to "ask for funds," but was apparently told that they could not deposit a check that was over 180 days old. CP 32, CP 76. At no point did Chung ever endorse and present the check to any bank for payment. *See*, CP 33.

Other than Oh's stale check, Chung has produced no documentary evidence of any transaction or agreement between Chung and Oh, or between either of them and Park. *See generally*, CP 6-8, CP 75-77. To date, the check has not been negotiated and Oh has not paid Chung under

² For purposes of a CR 12(b)(6) motion, the allegations contained in a plaintiff's complaint are presumed to be true. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

³ In his First Amended Complaint, Chung claims he was told by the "drawing bank" that the check could not be deposited. CP 76. In his Declaration dated July 7, 2008, Chung claims he "personally went to Heritage Bank, the issuing bank, to get the funds, but the bank refused to tender." CP 32. In his appellate brief, Chung claims he "personally went to Heritage Bank, Oh's bank. . . ." Appellant's Brief at 3. In any event, it is clear that Chung never presented the check to Key Bank, the drawee bank, for payment.

the alleged 2003 oral agreement to do so. CP 33, CP 64; *see generally*, CP 6-8, CP 75-77.

B. Procedural Background.

On February 27, 2008, Chung filed suit in Pierce County Superior Court to enforce the terms of an alleged oral agreement under which Oh would pay \$20,000 to Chung. CP 6-8. In that Complaint, Chung contended as follows:

- 3.1 On or about January 21, 2003, Defendant Joseph Oh became indebted to Plaintiff in the amount of \$20,000.00.
- 3.2 Defendant Joseph Oh then issued a check for \$20,000.00 to Plaintiff for the indebtedness. Exhibit "A".
- 3.3 Plaintiff made numerous demands to pay the debt, but Defendants steadfastly refused.
- 3.4 To date, the \$20,000 check remains unpaid.

CP 6-8. Oh appeared and accepted service of the Summons and Complaint through Oh's counsel. CP 11-14. Thereafter, on July 2, 2008, Oh filed an Answer and Affirmative Defenses. CP 24-28.

Coincident with answering the Complaint, Oh brought a Motion to Dismiss pursuant to CR 12(b)(6). CP 19-23. Chung responded to the Motion to Dismiss on July 8, 2008. CP 35-42. Chung's response included a Memorandum in Opposition and the Declarations of William Chung, Byong Moon and attorney Karl Park, Chung's counsel. CP 31-32, CP 29-30, and CP 33-34 respectively. Oh replied, CP 83-89, and brought a Motion to Strike the declarations, CP 50-54, as Oh contended that they improperly introduced matters outside the pleadings. *Id.*

Subsequently, on July 16, 2008, and without leave of court, Chung filed with the Court a pleading entitled “First Amended Complaint for Failure to Pay Money Owed Based on Written Instrument.” CP 75-77. Chung concurrently filed a Motion to Amend his Complaint. CP 63-74. Chung’s stated purpose for seeking the amendment was to “clarify that the check issued by [Oh] to [Chung] was unable to be deposited and remains unpaid to date.” CP 63. Chung’s only changes to the Complaint were to the factual allegations, into which he inserted the following paragraphs following paragraph 3.2:

- 3.3 Defendant Joseph Oh then asked Plaintiff not to deposit the check until he authorizes.
- 3.4 Based on such request, the check was not deposited.
- 3.5 Plaintiff later attempted to deposit the check, but was informed by the drawing bank that, because the check was over 180 days old, it could not be deposited. As such, the check remains unpaid.

CP 76.

On July 25, 2008, the Honorable Kitty-Ann van Doorninck, Pierce County Superior Court, heard oral arguments on Chung’s Motion to Amend, Oh’s Motion to Dismiss, and Oh’s Motion to Strike. At that hearing, the Court granted Chung leave to amend his Complaint. RP(1) 10-11⁴; CP 90-91. Then, on Oh’s CR 12(b)(6) motion, the Court dismissed the action with prejudice. RP(1) 10-11; CP 92-93. The Court did not affirmatively rule on Oh’s Motion to Strike. RP(1) 11. The Court implicitly reserved the issue of attorney fees for further motion practice.

⁴ RP(1) refers to the Verbatim Report of Proceedings dated July 25, 2008. RP(2) will refer to the Verbatim Report of Proceedings dated September 5, 2008.

On July 31, 2008, Chung brought a Motion for Reconsideration of the Order of Dismissal. CP 97-102. On August 5, 2008, the trial court denied Chung's motion. CP 105.⁵

On August 15, 2008, Oh brought a Motion for Attorney Fees and Costs pursuant to CR 11 and RCW 4.84.185 for a frivolous and unfounded action, CP 133-138, and submitted a cost bill, CP 142-144. The trial court granted Oh's motion, CP 206-209, and entered judgment in favor of Oh and against Chung. CP 210-211.

Chung now appeals the decisions of the trial court.

IV. ARGUMENT

A. Standards and Scope of Review.

1. Standard of Review for Motions to Dismiss Under CR 12(b)(6).

An Appellate Court reviews an Order dismissing an action under CR 12(b)(6) *de novo*, engaging in the same inquiry as the trial court. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 881 P.2d 216 (1994). *See also, Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008) (decision to grant CR 12(b)(6) motion is question of law). Motions under CR 12(b)(6) "should be granted `sparingly and with care and `only in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Tenore*

⁵ The trial court ruled on Chung's Motion for Reconsideration prior to receiving or reviewing any further submissions from either Oh or Chung. After the trial court entered its ruling, but prior to learning that the Court had already ruled on that motion, Oh timely submitted a response brief in opposition and Chung submitted a reply brief. CP 106-113 and CP 117-131 respectively.

v. *AT&T Wireless Services*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998); *Cutler*, 124 Wn.2d at 755; *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781 (1988) , *aff'd on rehearing*, 113 Wn.2d 148 (1989) (quoting 5, C. WRIGHT & A. MILLER, Federal Practice § 1357, at 604 (1969)).

2. Standard of Review for Motions for Terms Under CR 11 and RCW 4.84.185.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion. *Miller v. Campbell*, 164 Wn.2d 529, 536, 192 P.3d 352 (2008). An abuse of discretion occurs only where the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons, *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997), or when no reasonable person would take the position adopted by the trial court. *State v. Batten*, 16 Wn. App. 313, 556 P.2d 551 (1976).

An Appellate Court reviews an award of fees for frivolous litigation for abuse of discretion. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). This court reviews the imposition of CR 11 sanctions under this same abuse of discretion standard. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Madden v. Foley*, 83 Wn. App. 385, 389, 922 P.2d 1364 (1996).

3. Scope of Review for Motions to Dismiss Under CR 12(b)(6).

RAP 2.5 provides:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

RAP 2.5(a). An appellate court is generally limited in its consideration to only that evidence and those issues properly on file and called to the attention of the trial court in its determination on such a motion. *See, e.g.,* RAP 9.12; *Potter v. Wash. State Patrol*, 161 Wn.2d 335 (footnote 2), 166 P.3d 684 (2007). However, an appellate court may also, under certain circumstances, consider statutes not raised before the trial court. *See, e.g.,* *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990) (allowing consideration of statute not addressed below but pertinent to the substantive issues raised below).

Chung has raised RCW 62A.3-118, in effect, for the first time on this appeal. If this statute is determined to indeed be pertinent in any way to the substantive issues below or to those presented here, then Oh is equitably entitled to cite to and argue other statutory and case authority in rebuttal of any position taken by Chung based on that statute.

B. Chung's Complaints Were Insufficient on Their Face.

A complaint may be dismissed by a trial court under CR 12(b)(6) if it fails to state a claim upon which relief can be granted. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988), *aff'd*, 113 Wn.2d 148, 776 P.2d 963 (1989). *See also, Halvorson v. Birchfield Boiler, Inc.*, 76 Wn.2d 759, 458 P.2d 897 (1969) (dismissal proper if there is no rule of law giving plaintiff a right of action). For purposes of a CR 12(b)(6) motion, the plaintiff's allegations are presumed to be true. *Cutler*, 124 Wn.2d at 755.

An action may be dismissed under CR 12(b)(6) if "it appears beyond doubt that the plaintiff can prove no set of facts, *consistent with the complaint*, which would entitle the plaintiff to relief." *Lawson v. State*,

107 Wn.2d 444, 448, 730 P.2d 1308 (1986) (emphasis added), quoting *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985).

1. **Chung's Initial Complaint Did Not State a Valid Cause of Action.**

In his Complaint, Chung essentially contended as follows:

- Oh owed Chung \$20,000;
- Oh paid Chung the \$20,000 on January 21, 2003 by way of a check; and [without further explanation]
- Oh still owed \$20,000 to Chung.

This did not make sense: these contentions were either an incomplete description of the facts giving rise to the claimed cause of action or self-contradicting. In either event, Chung's initial Complaint failed to competently state any cause of action for which relief could be granted. Additionally, any agreement under which Oh may have become obligated to pay Chung was apparently an oral contract at best, enforcement of which was barred by a three-year statute of limitation. It was on those bases that Oh brought the CR 12(b)(6) Motion to Dismiss.

2. **Chung's Amended Complaint did not Cure the Deficiencies of the Initial Complaint.**

With Oh's motion pending, and without leave of court, Chung then filed a First Amended Complaint, in which Chung only added factual contentions related to Chung's efforts to negotiate the check. The stated causes of action remained unchanged and no allegations were made to bring the cause of action within the three-year statute of limitation for oral contracts. Like the initial Complaint, the First Amended Complaint failed to state any viable cause of action for which relief could be granted. The

trial court correctly concluded that it was proper to dismiss the action with prejudice.

C. **The Trial Court Correctly Determined that Chung's Claims Were Barred by the Statute of Limitation for Oral Contracts.**

1. **The Applicable Statute of Limitation is Three Years.**

The true nature of this action is to enforce the payment term of an oral contract into which the parties entered in January 2003; indeed, Chung himself alleges that Oh's obligation to pay Chung arose in January 2003 when Chung is claimed to have "loaned" money to Oh. Chung does not dispute that, other than the check, there was no writing that would evidence any obligation on the part of Oh to pay Chung for a loan or otherwise. Thus, any loan agreement or other contract that would obligate Oh to pay Chung any monies was at least partly oral in nature.

The statute of limitation on oral contracts is three (3) years. RCW 4.16.080 (3). Nevertheless, Chung brought his action to enforce the payment term of that oral contract more than five (5) years after Oh was alleged to have incurred any obligation to tender payment to Chung. The trial court correctly concluded that the three-year statute of limitation barred Chung from bringing this action.

2. **RCW 62A.3-118 is not Dispositive of the Applicable Statute of Limitation.**

As a preliminary matter, it should be noted that Chung's counsel did not consider *nor was he even aware of* RCW 62A.3-118 prior to filing Chung's initial Complaint and Chung's First Amended Complaint. RP(2) 5. The issue of application of RCW 62A.3-118 did not even

subsequently come before the trial court on either Oh's Motion to Dismiss or Chung's Motion for Reconsideration. As such, the trial court was never invited to consider that statute in its dismissal of the action and denial of Chung's Motion for Reconsideration. Accordingly, the trial court cannot be said to have erred at all with respect to the applicability of RCW 62A.3-118 to the propriety of its decision to dismiss Chung's action with prejudice and to deny Chung's Motion for Reconsideration.

Nevertheless, Chung contends that RCW 62A.3-118 sets forth a definitive six-year statute of limitation for enforcement of the check. However, that statute remains subject to the remaining provisions of the Uniform Commercial Code. RCW 62A.3-305 provides as follows:

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

* * *

(2) A defense of the obligor stated in another section of this Article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; . . .

RCW 62A.3-305 (emphasis added). Thus, under RCW 62A.3-305, Chung's right to enforce the check remains subject to other defenses available to Oh, including the statute of limitation on the underlying obligation.⁶

Oh's claimed obligation to pay Chung arose from an oral agreement into which the parties allegedly entered in January 2003.

⁶ Here, Chung was the original holder of the instrument. Accordingly, the exceptions set forth in subsection (b) of RCW 62A.3-305 do not apply.

RCW 62A.3-118 does not supersede the statute of limitation for oral contracts; Chung's "true" cause of action remains subject to that statute of limitation. The trial court correctly concluded that the three-year statute of limitation barred Chung's enforcement of Oh's alleged obligation to pay under the oral contract.

3. The Check is Not a Contract Subject to a Six-Year Statute of Limitation.

Chung also contends that the \$20,000 check constituted a written contract for payment from Oh to Chung and, as such, was subject to a six-year statute of limitation under RCW 4.16.040. In support of his position, Chung cites to non-controlling authority from foreign jurisdictions, as well as to treatises and other secondary sources.

But under Washington law, Chung is incorrect. Contrary to Chung's argument, this is *not* a case of first impression: existing Washington law does exist and does apply; this Court is bound to apply Washington law. Essentially, while checks may be a component part of a transaction between parties, checks do not themselves typically form or constitute contracts; the check in this case was no exception.

In order to be subject to the six-year statute of limitation, a contract must be in writing, RCW 4.16.040(1), and the writing must contain the essential elements of the contract. Division Two of the Court of Appeals addressed the proper application of RCW 4.16.040 to checks in *Nat'l Bank of Commerce of Seattle v. Preston*, 16 Wn. App. 678, 558 P.2d 1372 (1977). In that case, the court specifically held as follows:

The 6-year statute of limitation, RCW 4.16.040(2), applies only to actions upon a contract in writing, or liability

express or implied, arising out of a written agreement. A written agreement *for purposes of that statute* must contain all the essential elements of the contract, and if resort to parol evidence is necessary to establish any material element then the contract is partly oral and the 3-year statute of limitations applies.

Preston, 26 Wn. App. at 679 (emphasis added). Thus, under Washington law, for a check to be a contract *at all* for the purposes of applying a six-year statute of limitation under RCW 4.16.040, it must still contain all essential elements of a contract. *Preston*, 16 Wn. App. at 679.

The essential elements of a contract include: (1) the subject matter, (2) the parties, (3) the promises, (4) the terms and conditions, and (5) in some but not all cases, the price and/or consideration. *Bogle & Gates PLLC v. Zapel*, 121 Wn. App. 444, 448-49, 90 P.3d 703 (2004). If the court must resort to parole evidence in order to establish *any* of the essential elements of the contract, then the contract is partly oral and a three-year statute of limitation applies. RCW 4.16.080(3); *Bogle & Gates PLLC v. Holly Mountain Resources*, 108 Wn. App. 557, 560, 32 P.3d 1002 (2001); *Nat'l Bank of Commerce of Seattle v. Preston*, 16 Wn. App. 678, 679, 558 P.2d 1372 (1977).

The *Preston* case involved an unsuccessful attempt by plaintiff/creditor to establish four negotiated checks as constituting written loan agreements subject to the six-year statute of limitation. Two of the check stubs contained the notation "loan," one check stub contained the notation "loan (house)," and the fourth check stub had no notation. The Court of Appeals held that none of the four checks at issue contained all of

the essential elements of a contract and affirmed that the action was barred by the three-year statute of limitation for oral contracts.

A borrower's promise to repay loaned funds is an essential element of a loan agreement. *Preston*, 16 Wn. App. at 680. The *Preston* court determined that none of the check stubs contained the necessary language constituting the borrower's promise to repay. In the absence of an essential promise to pay, the *Preston* court held the subject checks and check stubs to be merely *orders of payment* and not written loan agreements. Since parol evidence would be necessary to establish essential terms of the agreement, the *Preston* court held the contract relating to the checks to be partly oral and, thus, the three-year statute of limitation applied.⁷

As with the checks in *Preston*, the check at issue here does *not* contain all of those essential elements of a contract; it does not reflect any “borrower’s promise” to repay loaned funds. Instead, the check was merely a unilateral *order of payment*, but was *not* a written contract. *See e.g., Preston*, 16 Wn. App. at 681; *see also*, RCW 62A.3-104(f) (a check is a draft) and comment 4 to RCW 62A.3-104 (“A draft is an instrument that is an order.” . . . “The term ‘draft,’ defined in subsection (e), includes

⁷ The *Preston* court noted that parol evidence would also be necessary to determine whether the checks were for a loan from the plaintiff to the defendant or whether they were for repayment of a loan from the defendant to the plaintiff, or whether they concerned a transaction relating to a loan involving a third party. *Preston*, 16 Wn.2d at 680-81. And so it is here. The memo notation on Oh’s check (“personal loan”) does not make clear whether this check was intended to indicate that it was a personal loan from Oh to Chung (so that Chung could himself invest more in Mr. Park’s water company), or in repayment of a loan to Oh from Chung, or for some other purpose. Parol evidence would be necessary to sort this out.

a ‘check’ which is defined in subsection (f).”). The only possible “borrower’s promise to repay” here arose from an oral agreement into which the parties allegedly entered in January 2003.

The check here does not contain all of the essential elements of a written contract under Washington law, nor does it reflect the traditional common law elements of a contract: offer, acceptance and consideration. To see Oh’s check as anything *but* an order (*i.e.*, as a contract), one must therefore look to parol evidence to find these essential elements. To the extent that it is necessary to establish *any* of the essential elements of a contract by such parol evidence, any contract evidenced by the check is partly oral and the three-year statute of limitation applies. *See e.g., Preston* at 681.

Notably, Chung has never alleged nor identified any writing that would create an obligation of Oh to tender any payment at all to Chung. In the absence of any other writing containing the essential elements of a contract, any contractual obligation that led Oh to tender a \$20,000 check to Chung must have been oral, and subject to the three-year statute of limitation set forth in RCW 4.16.080(3).

In sum, the present case involves claimed liability arising out of an oral agreement, and not out of a written agreement as is required for application of RCW 4.16.040. The trial court correctly concluded that the check was not a contract, written or otherwise, and thus not subject to the six-year statute of limitation set forth in RCW 4.16.040.

D. The Trial Court Did Not Abuse Its Discretion When It Awarded Defendants Their Attorney Fees and Costs

1. Defendants are Entitled to CR 11 Sanctions.

CR 11 provides that, by signing the pleading, the party and/or attorney certifies:

that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11. The sanction for violation of CR 11 may include an award of reasonable attorney fees and costs.

Notably, at the hearing on Oh's Motion for Attorney Fees and Costs, Chung's counsel admitted that he was not even aware of RCW 62A.3-118 prior to bringing his Complaint and First Amended Complaint. RP(2) 5. Thus, that statute did not contribute *at all* to the formation of *any* good faith basis for commencing the action. It was not until after the Court had denied Chung's Motion for Reconsideration that Chung first raised that statute as a possible basis to avoid the statute of limitation defense. CP 117-121.

Remarkably, Chung still fails to understand that Oh's purported obligation to pay arose from an oral contract, subject to a three-year statute of limitation. Enforcement of that obligation to pay is now precluded by that statute of limitation. Such abject failure to acknowledge existing law is sufficient grounds in itself to award attorney fees and costs here.

By signing Plaintiff's Complaint and First Amended Complaint, Plaintiff and his attorney certified under CR 11 that these pleadings were "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." But Chung set forth no good faith reason whatsoever to challenge long-standing tenets of contract law or the laws already established by the legislature and the courts of this state. These laws have withstood the test of time and any challenge to them now cannot be said to have been made in good faith. When a party so boldly attempts to advance arguments that are squarely at odds with existing case law, that party is subject to sanctions under CR 11. The trial court did not abuse its discretion when it awarded attorney fees and costs pursuant to CR 11.

2. Defendants are Entitled to Attorney Fees and Costs Under RCW 4.84.185 for a Frivolous Action.

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 non-prevailing 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. . . .

RCW 4.84.185. 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 (1994).

Under our facts, Chung brought an action on an oral contract, which was clearly barred by the statute of limitation. Throughout this litigation, Chung knew that there was no legal or factual basis upon which he could prevail to enforce the payment terms of an oral contract allegedly made in 2003. But instead of bringing his action within three years of the date the alleged obligation arose, *Chung waited more than five years* before bringing his action.

Chung advanced no rational or competent argument on the law or the facts that would support the avoidance of the three-year statute of limitation. The present case is similar to that of *State Ex Rel Quick-Ruben v. Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998), wherein the court awarded attorney fees under RCW 4.84.185 on the basis that reasonable inquiry by the Chung and his counsel would have shown that his theory of standing was not well-grounded in fact and not warranted by existing law. *See, Quick-Ruben*, 136 Wn.2d at 903-05. By waiting for more than five years to enforce an oral contract, Chung’s action constituted an action advanced without reasonable cause and one that was indeed frivolous.

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 limitation and lack of standing. *Reid v.*

Dalton, 124 Wn. App. 113, 123, 100 P.3d 349 (2004).⁸ To defend against this frivolous action, Oh was required to incur attorney fees and costs and, under RCW 4.84.185, Chung should have to bear those expenses.

Accordingly, the trial court held that “the complaint was frivolous and advanced without reasonable cause” and ruled that it was going to award attorney fees. RP(2) 7; CP 206-209. The trial court awarded Oh \$5,400.00 for attorney fees and costs, CP 209, and entered Judgment to that effect, CP 210-211.⁹

Despite a three-year statute of limitation on oral contracts, a limitation of which Chung and his counsel should have been perfectly aware, Chung nevertheless brought this action and attempted to recover monies allegedly owed as payment under an oral contract. Chung’s action was indeed frivolous. The trial court did not abuse its discretion when it awarded attorney fees and costs to Oh for a frivolous action under RCW 4.84.185.

V. CONCLUSION

The check is not a contract, but merely an order for payment subject to all defenses available to Oh on the underlying obligation. This was, at best, an action to enforce the payment terms of an oral contract.

⁸ Courts in other jurisdictions have also come to the same conclusions. *See, e.g., Zweibach v. Gordimer*, 884 So.2d 244 (Fla. 2004) at 247.

⁹ In defense of Oh’s Motion for Attorney Fees and Costs, Chung did not object to the reasonableness of Oh’s attorney fees and costs except to say that those fees and costs were “not supported by any detailed log.” CP 159.

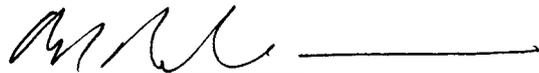
As such, the trial court correctly concluded that Chung's cause of action to collect on the check is barred by a three-year statute of limitation.

The trial court did not abuse its discretion when it awarded Oh attorney fees and costs under CR 11 and for a frivolous action under the provisions of RCW 4.84.185.

Oh therefore respectfully requests that the decision of the trial court be AFFIRMED, and that Oh be awarded all costs and reasonable attorney fees on this appeal pursuant to statute.

Respectfully submitted this 11th day of March 2009.

SMITH ALLING LANE, P.S.

A handwritten signature in black ink, appearing to read 'MBA', followed by a horizontal line.

MARK B. ANDERSON, WSBA #25895
Attorneys for Respondents

FILED
COURT OF APPEALS
DIVISION II

09 MAR 11 PM 3:32

STATE OF WASHINGTON
BY
DEPUTY

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

WILLIAM CHUNG,

Appellant,

v.

JOSEPH OH & HAE Y. OH,

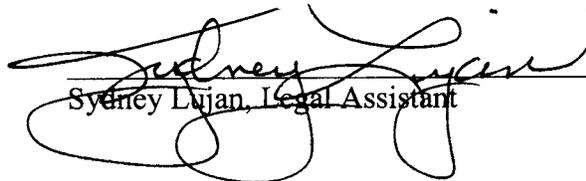
Respondent.

NO. 38190-7-11

DECLARATION OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a copy of the Respondents' Brief, postage prepaid, via U.S. mail on the 11th day of March, 2009, to the following counsel of record at the following addresses:

Karl Y. Park
Law Offices of Karl Y. Park
1010 S. 336th St., Suite 320
Federal Way, WA 98003


Sydney Lujan, Legal Assistant