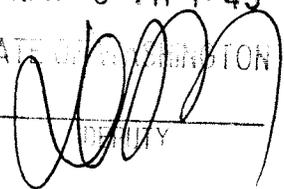


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY   
DEPUTY

NO. 39289-5-II

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

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ROBERT R. MITCHELL, LISA TALLMAN, MITCHELL FAMILY  
LIVING TRUST, GARY GREINDAHL, JOANN GREINDAHL,  
OLYMPIC CASCADE TIMBER, INC., a Washington corporation,  
GM JOINT VENTURE, a Washington joint venture partnership,  
ROBERT R. MITCHELL, INC., a Washington Corporation,  
TIMOTHY JACOBSON, HILARY GRENVILLE,

Petitioners,

v.

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

Respondents,

THOMAS H. OLDFIELD and JANE DOE OLDFIELD, husband  
and wife,

Defendants.

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**CONSOLIDATED REPLY BRIEF OF PETITIONERS TO BRIEFS  
OF RESPONDENTS BYRNES, REIDS AND PRICES**

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## REPLY TO COUNTER STATEMENT OF THE CASE

Defendants' briefs work very hard to transform this Court's opinion in *Mitchell I* into a "directive" for the Mitchell plaintiffs to amend their complaint to add NWCLF as a plaintiff. Price BR 6. The defendants have woven this theme throughout their appellate briefs:

- ◆ "[T]he Mitchells did not avail themselves of this Court's permission to amend on remand." Byrne/Reid BR 1;
- ◆ "[T]his Court . . . gave the Mitchells leave to amend their complaint only to add NWCLF as a plaintiff . . . ." *Id.* at 3.
- ◆ Yet the Mitchells did not avail themselves of this Court's direction on remand by adding NWCLF in their fourth motion to amend." *Id.* at 10-11.
- ◆ "[T]his Court reversed and remanded, thereby *allowing the Mitchells to add NWCLF as a Plaintiff in an attempt to pierce the corporate veil.*" Price BR 5 (emphasis in original);
- ◆ "Significantly, the Mitchells never followed the directive of this Court in *Mitchell I.*" *Id.* at 6.

This Court never issued a "directive" to the Mitchells to amend their complaint to add NWCLF as a plaintiff. To the contrary, the Court simply held that the trial court abused her discretion by denying the motion to amend the complaint and that the trial court erroneously granted summary judgment based on the statute of limitations. Nothing in this Court's order suggests that the Court ordered the Mitchells to amend their complaint. Accordingly,

nothing about the motion to amend to add claims under the Washington State Securities Act (WSSA”) was contrary to this Court’s decision or mandate in *Mitchell I*.

The defendants’ appellate briefs focus obsessively on the fact that the Mitchells twice previously amended their original complaint. Byrne/Reid BR 1, 2, 4, 8, 31; Price BR 3 n.3, 8, 9, 17, 19. The defendants ignore that, as clearly stated in the Mitchell’s opening brief, the prior two amendments simply dropped references to a bankrupt defendant, added two plaintiffs, and specified which claims related to which plaintiffs. BA 6. These minor changes in the identity of parties have no bearing on whether Judge Stolz abused her discretion in denying leave to amend to add a claim under the WSSA.

Defendant Price argues that there is no evidence that he had any managerial control over investment decisions. Price BR 4. Unfortunately for Price, his co-defendant Byrne filed a declaration stating that Price was a member of the Board of Directors of MW and “met regularly and approved all significant transactions of the company.” CP 381. This fact alone defeats Price’s argument on summary judgment.

Defendant Price argues that the Mitchells do not allege that Price had any involvement in preparation of the Private Placement Memorandum or any managerial control over NW, LLC. Price BR 16-17. To the contrary, the proposed amended complaint alleged that “defendants” formed NWCLF in order to remove from the books of NWLLC loans to Graham Square, that “defendants” solicited investments in NWCLF, and that “defendants” provided copies of the PPM to the Mitchells. CP 281. Defendants Price filed a declaration in opposition to the motion to amend, but neither denied having any involvement in preparation of the PPM or solicitation of investments. CP 292-94.

### **REPLY TO RESPONDENTS’ ARGUMENTS**

**A. The trial court should have granted leave to file the Mitchells’ proposed amended complaint because it was neither prejudicial to defendants nor barred by the statute of limitations.**

**1. The trial court’s reliance on the statute of limitations was contrary to this Court’s prior opinion that factual questions require trial of statute of limitations issues.**

Defendants purport to find it “curious[ ]” that the Mitchell plaintiffs have cited the leading case on amendment of pleadings, ***Caruso v. Local Union No. 690 of Int’l Bhd. of Teamsters***, 100 Wn.2d 343, 670 P.2d 240 (1983) and another applying ***Caruso’s***

reasoning, *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987). Byrne/Reid BR 7 n. 2. Despite their “curiosity,” defendants never respond to the main points of these two cases. *Caruso* holds unequivocally that delay alone does not justify denying a motion to amend. BA 12-13, 100 Wn.2d at 350. Defendants simply ignore this key holding.

Defendants similarly ignore the holding of *Herron* that leave to amend is even more freely granted when the amendment simply states an additional legal basis for recovery arising out of the same facts and occurrences alleged in the original pleading. BA 13, 108 Wn.2d at 166-67. Nor do defendants respond to the Mitchell plaintiffs’ basic point that the facts alleged in their original complaint in support of a claim of fraud in the inducement are the same facts that support a claim under the WSSA (CP 12, quoted at BA 5-6):

6.15 On information and belief, defendants Michael Price, Tom Price, James Reid, Kevin Byrne and Robert Coleman never intended to comply with the terms of the Offering Memorandum and, instead, intended at all times material hereto, to use NWCLF to invest in the Graham Square Properties.

6.16 Such conduct constituted fraud in the inducement and proximately caused plaintiffs damages in an amount to be proven at trial . . . .

This identity of facts gives the lie to defendant’s hyperbole that they are being subjected to “ever-shifting claims.” Byrne/Reid BR 10.

Defendant Price argues that the WSSA claim is not based on the facts alleged in the original complaint, erroneously stating that the complaint is limited to the use of the money invested by the Mitchells after the original 1998 offer, sale, and purchase of the Mitchells' interests in NWLLC. Price BR 14. Price has simply ignored the Mitchells' allegations of fraud in the inducement. Complaint ¶¶ 6.15, CP 12 (quoted above). The allegation that the defendants intended from the outset to breach the Offering Memorandum sets forth the facts underlying their claim for a violation of the WSSA.

Defendant Price offers the bizarre argument that **Caruso** and **Herron** are distinguished by the fact that there the motions to amend were brought before trial, while here the Mitchells seek to amend "*after entry of summary judgment and appeal and remand.*" Price BR 9 (emphasis in original). Price neglects to add that the Mitchells bring this motion before trial—because there has never been a trial—and that the summary judgment was reversed. Price relies on non-distinctions.

Unable to respond to the arguments raised by the Mitchell plaintiffs, defendants attempt to distinguish **Caruso** and **Herron** by arguing that these leading cases did not involve "multiple motions

to amend” or “serial amendments”, Byrne/Reid BR 8-9, or a “third proposed amended complaint.” Price BR 9 (emphasis omitted). Defendants fail to explain the relevance of the two prior motions to amend to drop one party and to add another; there is no relevance. Nor do these motions have anything to do with the principles discussed in *Caruso* and *Herron*. The two prior motions relate neither to delay nor prejudice. Nor do these motions undermine the fact that the Mitchell plaintiffs’ motion simply asserts a legal theory for facts pled in the original complaint. Defendants are pointing to a classic distinction without a difference.

Defendants reach back 118 years to find a quotation that there is no “absolute right on the part of the pleader to amend as often as he saw fit . . . .” Byrne/Reid BR 8-9, citing *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648 (1892). But defendants ignore that civil procedure has changed in the past century, failing to understand that *Balch* turned on the peculiarities of code pleading and the question whether the court should allow “a defective pleading to be amended.” *Id.* at 504. The problem in *Balch* was that the complaint was subject to a demurrer and had been amended twice, still without curing the deficiencies. In addition, the plaintiff had failed to provide the court with the proposed amendment, depriving the court

of the ability to determine whether the amendment would resolve the deficiencies. *Id.* at 504-05. None of these deficiencies are present here—the complaint is neither “defective” nor subject to demurrer and the Mitchells provided the court with their proposed amendment.

Defendants argue that “serial amendments” are not permitted, citing ***Sprague v. Sumitomo Forestry Co.***, 104 Wn.2d 751, 763, 709 P.2d 1200 (1985). Byrne/Reid BR 9. In that case, the Supreme Court affirmed the denial of a third amendment, not because there had been prior amendments, but because the amendment was sought “shortly before trial.” Here, however, trial was one year away. CP 284.

Ultimately, incapable of responding to the Mitchells’ actual arguments, defendants claim that the Mitchells are arguing for “an essentially absolute right to amend their complaint . . . .” Byrne/Reid BR 7. It is telling that defendants feel obliged to erect such a flimsy straw man instead of meeting the Mitchells’ actual arguments directly. The Mitchells argued that Judge Stolz ruled on several specific untenable grounds and for untenable reasons. BA 11 *et seq.* The Mitchells never argued for an “absolute right to amend.”

The defendants speculate that the Mitchells “[p]resumably” seek to amend the complaint to add the claim under the WSSA “to avail themselves of the attorney fees provided under RCW 21.20.430(1).” Byrne/Reid BR 11. Defendants’ speculation is disingenuous because the answer to this question is found in the Yanick memo found attached to the defendants’ brief. *Id.* at Appendix B, CP 494 et seq. The Yanick memo, which was prepared prior to the filing of this lawsuit, notes that it will be necessary to obtain additional evidence before asserting a securities claim. Yanick memo page 9, CP 503.

**2. This Court’s mandate in the prior appeal did not preclude the Mitchells’ motion to amend.**

Defendants argue that this Court’s mandate prevented Judge Stolz from granting the Mitchell’s motion to amend. Byrne/Reid BR 12-15. The defendants never explain why this is so and never quote from the mandate or from the Rules of Appellate Procedure to support their argument. The operative language of this Court’s prior opinion is straightforward:

- ◆ “We reverse the summary judgment dismissal because genuine issues of material fact still exist and we reverse the trial court’s award of attorney fees.” CP 267;
- ◆ “[W]e hold that the trial court abused its discretion because where there is no prejudice by the addition [of a party], there

is no tangible ground to support the trial court's decision." CP 269;

- ◆ "Because we reverse the summary judgment, we do not address the Mitchells' substantial evidence challenges. Further, we reverse the trial court's award of attorney fees, as this case was not frivolous." CP 272.

The defendants never explain how this Court's opinion prevented Judge Stolz from granting a motion to amend, and no reason appears. RAP 12.2 permits the trial court to rule on motions after the mandate "so long as those motions do not challenge issues already decided by the appellate court." Judge Stolz never decided any issues regarding the WSSA. But this Court did consider statute of limitations issues, and Judge Stolz erroneously contradicted this Court's mandate that summary judgment was precluded on statute of limitations issues.

**3. This Court's decision belies the defendants' statute of limitations argument.**

Defendants go to great lengths to argue that, "there is no requirement for knowledge of damage before the statute of limitations begins to run on a WSSA claim." Byrnes/Reid BR 17; Price BR 11-12. The defendants never raised this issue in the trial court; therefore this Court should refuse to consider it.

The defendants argue incorrectly that, "the question of damages animated this Court's decision in *Mitchell I* on the viability

of the Mitchells' theories." Brynes/Reid BR 18. The defendants do not understand this Court's prior decision. The fraud claim and the WSSA claim are both premised on the defendants' causing NWCLF to purchase loans for one particular property. This Court's opinion in Mitchell I pointed out that the Mitchells "allege that the defendants misrepresented the status of the NWCLF portfolio, breached contracts, and committed fraud, resulting in significant pecuniary loss to the Mitchells." CP 267. The operative language of this Court's decision was that the statute of limitations could not commence running at least until the Mitchells discovered the status of the NWCLF loans:

[The Yanick memorandum] is inconsistent with the fact that Mitchell, Grendahl, and Stevens all stated under oath that they did not learn about the NWCLF loans until August 2001. A genuine issue of a material fact exists as to when the Mitchells learned of the NWCLF loans and there status.

CP 272.

In other words, this Court reversed the summary judgment because a genuine dispute exists as to when the Mitchells learned of the breach, not when the Mitchells suffered damage. The defendants' arguments miss this point entirely.

The apparent reason for defendants' argument about the statute of limitations under the WSSA is to create a pretext for

repeating the same arguments rejected by this Court's prior opinion, *i.e.*, that the Woodell letter and the Yanick memo show that the Mitchells knew of possible claims at the time the letter and the memo were written. Byrne/Reid BR 19-20. This argument is directly contrary to the Court's prior opinion, holding that "the Woodell letter does not show knowledge but, rather, shows due diligence at the beginning of an inquiry." CP 270-71. And, as noted above, this Court pointed out that the Yanick memo presented genuine issues of material fact "as to when the Mitchells learned of the NWCLF loans and their status." CP 272.

Defendants' appellate counsel does not seem to have read this Court's prior decision, because he argues that the Yanick memo shows that the Mitchells knew by June 2001 that NWCLF held only eight notes, all for loans to the Graham Square LLCs. Byrnes/Reid BR 20. This Court clearly stated that the memorandum acknowledges its own inconsistencies, including discrepancies with the timeline. CP 272. The date of the Mitchell plaintiffs' discovery of violations of the private placement memorandum remains disputed.

**4. There was no tangible ground to support the trial court's general statement about prejudice.**

The Mitchells pointed out in their opening brief that Judge Stoltz failed to articulate any specific prejudice. BA 18-19. Despite their efforts, the defendants still fail to show prejudice.

First, defendants argue prejudice by virtue of the passage of time, claiming that witnesses' memories have faded and documents are "not necessarily available." Byrnes/Reid BR 22. The defendants ignore the fact that the Mitchells have always claimed fraud in the inducement, which would be proven as the same facts as the WSSA claim. CP 12, quoted supra and at BA 5-6. Indeed, the defendants fail to show that they would defend a WSSA claim any differently than their defense of a fraud in the inducement claim.

Second, defendants claim that the Mitchells' contract and tort claims had different elements than a WSSA claim. Byrnes/Reid BR 22. Obviously. But the WSSA claim generally has less elements than the Mitchells' common law claims. In any event, defendants utterly fail to explain what new element presents them with proof problems. Defendants note that scienter is an element of common law fraud and not of the WSSA. Byrne/Reid BR 22. It is somewhat mystifying why dropping an element would require

defendants to conduct “new discovery at added expense on this new element.” *Id.* at 23.

Third, defendants complain that dropping common law claims and shifting to a WSSA claim would add expense. *Id.* at 23. But defendants would have incurred the same expense even if the Mitchells had included a WSSA claim in the original complaint. There is no added expense by bringing the WSSA claim at this point.

Fourth, defendants claim that they are prejudiced because they can no longer tender a WSSA claim under the NWLLC mortgage banker’s bond insurance policy. *Byrne/Reid BR 23-24.* Defendants argue that NWLLC had coverage under Section A of the bond for “dishonest acts by an Employee of the Assured.” *Id.*, citing CP 317. But there is no indication that any of the defendants were employees of NWLLC, or that this provision would apply to them. Even if any of the defendants had been partners in NWLLC, any losses by their acts would be excluded under Section A. CP 335, exclusion 1.

Defendants argue that the bond provided coverage under Section D, for wrongful acts concerning “the origination, processing, closing, or servicing of any real estate loan for Mortgage Backed

Securities.” Byrne/Reid BR 24. Defense counsel should have read the Mitchells’ opening brief more carefully, since it points out that Section D is inapplicable because: the WSSA claims in this case do not arise out of defendants’ activities as a mortgage broker; violations of state securities acts are excluded; and the exclusion has an exception for “Mortgage Backed Securities,” which is defined as a security representing an undivided interest in a pool of mortgages or deeds of trust. BA 21-23. Defendants have not answered any of these points and fail to show that they would have had coverage under their mortgage bond.

To their credit, appellate counsel have disclosed that a claim was made to the insurer in August and September, 2001, within the policy period. Byrne/Reid BR 24 n. 11, citing letters now paginated at CP 513-15. The bond insures against any loss “sustained by the Assured at any time and discovered by the Assured during the Bond Period . . . .” (Section A covering dishonesty of an employee, CP 317), or “any Claim first made against the Assured by a third party during the Bond Period . . . . (Section D, Professional Services Liability, CP 322). The bond defines “discovery” of a claim under coverage A to include receiving notice of an actual or potential claim by a third party. CP 329.

Reading the provisions of the bond together with the claim actually given to the insurer during the bond period leads to the inevitable conclusion that a claim under the WSSA is covered by the Bond, contrary to the argument made in defendants' trial court opposition to amendment of the complaint. CP 300. Moreover, none of the defendants have stated under oath that the insurer ever denied coverage for a WSSA claim. There is no showing of prejudice.

Fifth, defendants argue that they may no longer seek contribution from attorney Thomas Oldfield as a joint tortfeasor under RCW 21.20.430. Byrne/Reid BR 25-27. Defendants argue that the 1986 Tort Reform Act modified joint and several liability to preclude their contribution claim from Oldfield. *Id.* The argument has no merit for several reasons. It is unclear, but unlikely, that the Tort Reform Act of 1986 applies to this statutory claim under the WSSA. RCW 21.20.430(3), upon which defendants would base a claim for contribution, provides in relevant part, "[t]here is contribution as in cases of contract among the several persons so liable." The Tort Reform Act did not affect contractual contribution, but contribution in cases involving "fault" arising out of torts.

Accordingly, it is unlikely that the Tort Reform Act precludes a claim for contribution against Oldfield.

But the defendants would not be prejudiced by adding the WSSA claim even if the Tort Reform Act applied. Under the Tort Reform Act, there would be no joint and several liability between defendants and Oldfield because judgment will not be entered against Oldfield within the meaning of RCW 4.22.070. Accordingly, if the act applied, defendants would not be liable for Oldfield's "fault" in any event. This point in itself helps to show why defendants' argument has no merit. The Legislature expressly provided for contribution under the WSSA and that right of contribution is not affected by the Tort Reform Act.

The defendants completely garble the holding of *Baker v. Winger*, 63 Wn. App. 819, 824, 822 P.2d 315 (1992) when they argue that *Baker* holds that, "[a] party making a claim for contribution must pay the liability within the statutory period." Byrne/Reid BR 26. *Baker* interprets a portion of the Tort Reform Act, RCW 4.22.050(3). If no action has been filed, the right to contribution arises within one year after the contribution claimant has paid the common liability during the period of the statute of limitations. Subsection 050(3)(a). If an action is pending, then the

contribution claimant must agree with the plaintiff to pay the common liability and within one year of the agreement pay the liability and commence an action for contribution. Subsection 050(3)(b). Here, if subsection 050 even applies to this case, defendants would have one year after judgment to seek contribution, or one year after agreeing to a settlement and making payment to the Mitchells.

The defendants argue that contractual contribution as described in *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998), under which the cause of action for contribution does not accrue until payment is actually made by the party seeking contribution, does not apply to this case because this is not a contract case. Byrne/Reid BR 26-27. Defendants again ignore the clear language of RCW 21.20.430(3) that, “[t]here is contribution as in cases of contract among the several persons so liable.” See BA 19-20.

Finally, the defendants argue that they should not be subjected to an award for attorney fees and costs under the WSSA for the Mitchells’ fees incurred before moving to amend. Byrne/Reid BR 27. The trial court should be quite capable of making a reasonable determination of fees and costs on remand.

Any prejudice arising from the Mitchell's amendment is entirely speculative.

**B. An objective reasonable person would question Judge Stolz's impartiality where she immediately repeated the same error for which she was reversed by this Court.**

The defendants argue that this case should be remanded to Judge Stolz because she was correct. Byrne/Reid BR 28-29; Price BR 18. For the reasons already discussed, the Court should reverse Judge Stolz.

All defendants argue that Judge Stolz did not repeat her earlier error, but followed this Court's mandate. Byrne/Reid BR 10, 30-31, Price BR 18-19. The defendants ignore the obvious: Judge Stolz originally granted summary judgment on the basis of the statute of limitations; this Court reversed and remanded; Judge Stolz denied the motion to amend on the basis of the statute of limitations. These are the circumstances under which a reasonable person would question Judge Stolz's impartiality.

Defendants argue that the case should be remanded to Judge Stolz in the interests of judicial economy. Byrne/Reid 31. Judge Stolz has had very little involvement in this case other than to erroneously grant summary judgments, erroneously award

attorney fees, and erroneously deny leave to amend. There is no economy in remanding the case to Judge Stolz.

### CONCLUSION

Defendants attempt to avoid the Mitchells' arguments instead of answering them. When they do respond, they recycle arguments rejected by this Court in Mitchell I. This Court should reverse Judge Stolz and remand this case to a new judge who can take a fresh look at the facts, law and procedure in a second remand.

RESPECTFULLY SUBMITTED this 7 day of April,  
2010.

WIGGINS & MASTERS, P.L.L.C.



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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **CONSOLIDATED REPLY BRIEF OF PETITIONERS TO BRIEFS OF RESPONDENTS BYRNES, REIDS AND PRICES** postage prepaid, via U.S. mail on the 7 day of April, 2010, to the following counsel of record at the following addresses:

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