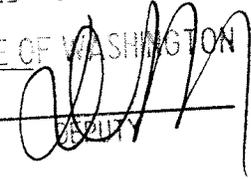


FILED
COURT OF APPEALS
DIVISION II

10 FEB -8 PM 3:50

STATE OF WASHINGTON

BY 

NO.39289-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ROBERT R. MITCHELL; RONALD R. MITCHELL and MARGARET MITCHELL, as trustees of the MITCHELL FAMILY LIVING TRUST; GARY GREND AHL and JOANN GREND AHL, husband and wife; HILARY GRENVILLE; OLYMPIC CASCADE TIMBER, INC., a Washington corporation,

Appellants,

v.

MICHAEL A. PRICE and KATHERINE M. PRICE, husband and wife; THOMAS W. PRICE and PATRICIA PRICE, husband and wife; JAMES REID and SONJA REID, husband and wife; KEVIN M. BYRNE and MARY BYRNE, husband and wife; and NW, LLC, a Washington limited liability company,

Respondents.

BRIEF OF RESPONDENTS THOMAS W. PRICE AND PATRICIA PRICE

EISENHOWER & CARLSON, PLLC
By Jason M. Whalen, WSBA # 22195
Jennifer A. Wing, WSBA # 27655
Attorneys for Respondents Price

EISENHOWER & CARLSON, PLLC
1200 Wells Fargo Plaza
1201 Pacific Avenue
Tacoma, Washington 98402
Telephone: (253) 572-4500

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENTS.....1

II. ISSUES PRESENTED FOR REVIEW1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT7

 A. Standard of Review.....7

 B. The trial court did not abuse its discretion in denying the Mitchells' Motion for Leave to File a Third Amended Complaint because the amendment is prejudicial to defendants8

 1. Under the unique circumstances of the case, the trial court acted within its discretion in denying the amendment of the Mitchells' complaint to add a claim for violation of the Washington State Securities Act.....8

 2. The trial court acted within its discretion in denying the amendment of the Mitchells' complaint as the claim for violation of the Washington State Securities Act is barred by the statute of limitations.....13

 3. The trial court acted within its discretion in denying the amendment of the Mitchells' complaint where there is no legal basis for the Washington State Securities Act claim against Price and amendment as to Price is futile15

C. If this Court finds error in the trial court's ruling and reverses and remands the case, proceedings should remain before Judge Stolz and the Mitchells should be required to file their Third Amended Complaint in the form previously proposed to the trial court.....17

V. CONCLUSION.....19

TABLE OF AUTHORITIES

Cases

Caruso v. Local Union No. 690 of Int'l Bhd. Of Teamsters,
100 Wn.2d 343, 350, 670 P.2d 240 (1983).....8, 9

Doyle v. Planned Parenthood of Seattle-King County, Inc.,
31 Wn. App. 126, 132, 639 P.2d 240 (1992).....16

First Maryland Leasecorp v. Rothstein, 72 Wn. App. 278,
864 P.2d 17 (1993)11, 12

Harris v. Grange Insurance Ass'n, 73 Wn. App. 195, 200,
868 P.2d 201 (1994)18

Herron v. Tribune Publ'g Co., 108 Wn.2d 162, 165,
736 P.2d 249 (1987)7, 8, 9, 10, 16

Hyundai Motor America v. Magana, 141 Wn. App. 495, 523,
170 P.3d 1165 (2007), *rev. on other grounds*, 167 Wn.2d 570,
220 P.3d 191 (2009)18

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).....7

Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).....7, 15

Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999)7

Statutes

RCW 4.16.080(4).....12

RCW 21.20.01014, 16

RCW 21.20.14016

RCW 21.20.180 through RCW 21.20.230.....16

RCW 21.20.43013

RCW 21.20.430(4)(b).....12,14

Court Rules

CR 15(c).....9
RAP 12.2.....18

I. IDENTITY OF RESPONDENTS

COME NOW the Respondents, Thomas W. Price and Patricia Price, and by way of Response to the Brief of Petitioners state as follows.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly denied the Mitchells' motion for leave to file a third amended complaint where the amendment of the complaint is prejudicial to defendants.

2. Whether the trial court's order denying the Mitchells' motion for leave to file a third amended complaint contravened the decision of this Court as set forth in *Mitchell v. Price*, No. 35291-5-II (6/24/08) (unpublished).

3. Whether, assuming this Court determines that the trial court abused its discretion in denying the Mitchells' motion for leave to file third amended complaint, an objective person would find that the trial court was not impartial.

III. STATEMENT OF THE CASE

On July 30, 2004, Petitioners (collectively "Mitchell(s)") filed an action against the Respondents as well as defendants Thomas Oldfield and

Robert Coleman.¹ CP 1-15. The Mitchells alleged causes of action in tort against defendants for breach of contract, negligence, misrepresentation, fraud, professional malpractice (as to Oldfield only), breach of fiduciary duty and violation of the Consumer Protection Act. CP 1-15.

Each of the eight plaintiffs was an investor and member of NW Commercial Loan Fund, LLC ("NWCLF").² *Mitchell I*, CP 267. NWCLF was formed on May 11, 1998 for the purpose of investing, reinvesting and trading in promissory notes and other obligations secured by mortgages or deeds of trust or in real estate contracts or similar financial instruments. CP 26, 306. Kevin Byrne was NWCLF's managing member. CP 45. NWCLF's Offering Memorandum was dated May 11, 1998 and subsequently amended in July 1999. CP 309, 49-50.

The named defendants – Byrne, Reid, Coleman, and the Prices - were the five members of NW, LLC ("NW"). *Mitchell I*, CP 267. The Mitchells brought the lawsuit on their own behalf and on behalf of NWCLF. *Mitchell I*, CP 267. NWCLF assigned to the Mitchells any causes of action they had against the defendants. *Id.*

¹ The Mitchells settled all claims against Oldfield, CP 362-371, and dismissed him from the lawsuit. CP 297. Robert Coleman was also dismissed from the lawsuit after he filed Chapter 7 bankruptcy and received a discharge.

² Many of the facts recited in the Respondents' Statement of the Case are taken from this Court's unpublished decision, *Mitchell v. Price* No. 35291-5-II (6/24/08) (unpublished) (hereinafter "Mitchell I").

The Mitchells allege that the defendants violated the NWCLF operating agreement when NWCLF invested resources in a property in Graham, Washington, for which it held subordinate loan positions. *Mitchell I*, CP 267. The Mitchells also allege that the defendants misrepresented the status of the NWCLF portfolio, breached contracts and engaged in fraud, which caused damage to the Mitchells. *Mitchell I*, CP 267.³

Further, the Mitchells' complaint alleges that the defendants Price, Reid and Byrne "all knowingly and actively participated in the decision to have NWCLF invest its assets in the Graham Square LLC's promissory notes, instead of a diversified portfolio of first-position mortgages as provided for by the Offering Memorandum." Brief of Petitioners, at p. 5; CP 7. These actions allegedly constitute violations of the causes of action in their complaint, (with the exception of the professional negligence claim, which related only to attorney Oldfield). *Id.*

With regard to the offer, purchase and sale of securities, on May 1, 1998, Thomas Oldfield, the attorney for NWCLF prepared and issued a Private Placement Memorandum detailing NWCLF's investment in mortgage backed securities. CP 179. Thereafter, between August 13,

³ On November 17, 2004, the Mitchells filed a first amended complaint, CP 87, and, thereafter, filed a second amended complaint on December 15, 2005. CP 174.

1998 and August 17, 1998, the Mitchells became members of NWCLF. CP 304.

There is no evidence in the record that Respondent Price was involved in the offer or sale of securities. In fact, there is not a single allegation in the Mitchells' complaint or second amended complaint that the Prices were involved in any manner with the preparation of the Private Placement Memorandum, or that the Prices had any managerial control, as a member of NW, LLC, in the investment decisions alleged to have been made by NWCLF. CP 87, 174.

On July 15, 2005, defendants Byrne and Reid filed a motion for partial summary judgment seeking dismissal of all claims that NWCLF assigned to the Mitchells, arguing that the assignment of the claims was null and void. *Mitchell I*, CP 267. The trial court, the Honorable Katherine M. Stolz, granted partial summary judgment and dismissed all claims that had been assigned to the Mitchells by NWCLF. *Id.*

In April 2006, Byrne and Reid filed another motion for summary judgment, seeking dismissal of all of Mitchells' remaining claims based upon the expiration of the statute of limitations. *Mitchell I*, CP 267. Defendants Byrne and Reid argued that the Mitchells knew or should have known of the breach of their investment agreement prior to July 30, 2001.

Id. The trial court granted summary judgment dismissing claims against Byrne, Reid and the Prices based upon the statute of limitations. *Id.*

Thereafter, the May 4, 2006, the Mitchells moved to strike a memorandum from one of the NWCLF attorneys that they inadvertently produced (the Yanick memorandum) and moved for leave to file a third amended complaint to add NWCLF as plaintiff. *Mitchell I*, CP 268. The trial court denied both motions. *Id.*

The Mitchells appealed, and on June 24, 2008, this Court reversed and remanded, thereby *allowing the Mitchells to add NWCLF as a Plaintiff in an attempt to pierce the corporate veil.* *Mitchell I*, CP 272.

This Court held, in relevant part, that (1) allowing the Mitchells to add NWCLF as plaintiff and pierce the corporate veil would not substantially prejudice the defendants and the court should have granted leave to file a third amended complaint and (2) a genuine issue of material fact existed as to when the Mitchells learned of the NWCLF loan and their status.

Mitchell I, CP 268, 272. This Court's holding did not in any manner address issues relating to the Washington State Securities Act violations because the Mitchells' initial motion for leave to amend did not address this statutory claim, and instead sought to add NWCLF as plaintiff.

Mitchell I, CP 266-272.

Significantly, the Mitchells never followed the directive of this Court in *Mitchell I*. Instead, after *Mitchell I*, the Mitchells switched courses and, on March 17, 2009, brought a motion for leave to amend their complaint a third time to add a claim for violation of the Washington State Securities Act (“WSSA”). CP 273-275. The Mitchells also represented to the trial court that it intended to "delete" the claims for breach of contract, negligence, fraud and misrepresentation claims. CP 273-275.

On April 17, 2009, after hearing the argument of the parties, the trial court denied the Mitchells' motion. CP 393-394. Before ruling, the trial court stated:

THE COURT: Well, you know, it does seem to me that *there are some significant statute of limitation problems on this case*. I mean, this lawsuit wasn't even filed until '04, and this transaction occurred in '98; and so now, we're talking 11 years ago, more or less; and obviously your clients have known since – when they filed this in '04, they had knowledge prior to that time period that there were some problems and didn't bother to amend the complaint; so I'm not going to allow the amendment on that issue at this time.

(RP 18-19) (emphasis added).

The trial court, making very clear its rationale for denying the amendment, namely prejudice to the defendants, specifically stated:

I do think there's prejudice to the other side. We're talking about 11 years here. This case was filed in '04, so I'm not going to allow you to amend.

(RP 20) (emphasis added).

Thereafter, the Mitchells sought discretionary review of the trial court's decision and Commissioner Schmidt granted discretionary review.

IV. ARGUMENT

A. Standard of Review.

The decision to grant or deny a motion to amend a pleading is within the sound discretion of the trial court. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). The appellate court, in applying a manifest abuse of discretion standard, will not disturb the trial court's decision unless it was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id.* at 505; *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In reviewing a trial court's determination denying a motion to amend, the appellate court considers the prejudice to the nonmoving party. *Wilson*, 137 Wn.2d 505. In determining prejudice, the court may consider undue delay and unfair surprise as well as the futility of the amendment. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987).

Further, it is well established that in reviewing the lower court's decision the appellate court can affirm on any basis supported by the record. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

B. The trial court did not abuse its discretion in denying the Mitchells' Motion for Leave to file a Third Amended Complaint finding prejudice to defendants.

1. Under the unique circumstances of the case, the trial court acted within its discretion in denying the amendment of the Mitchells' complaint to add a claim for violation of the Washington State Securities Act.

The trial court acted within its discretion and in accordance with established legal standards in denying the Mitchells' motion for leave to file a third amended complaint. Before ruling, the trial court made clear her reasoning for denying the amendment, specifically finding prejudice to the defendants. Judge Stolz stated, “*I do think there's prejudice to the other side. We're talking about 11 years here. This case was filed in '04, so I'm not going to allow you to amend.*” (RP 20) (emphasis added).

The Mitchells cite to *Caruso v. Local Union No. 690 of Int'l Bhd. Of Teamsters*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983) and *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987), to support their argument that the court erred in denying them leave to file a third amended complaint pursuant to CR 15(a).

However, both cases are distinguishable from this case. In *Caruso*, *supra*, the plaintiff filed a complaint alleging business interference. After the death of the plaintiff's original attorney and the hiring of a new attorney, and six years after the filing of the original complaint, the

plaintiff sought to amend the complaint to add a defamation claim. *Id.* at 347. The trial court granted the motion and, on review, the appellate court affirmed finding that the defendant was not prejudiced by the amendment where the only factor considered in determining prejudice was undue delay. The *Caruso* court held that undue delay and the mere passage of time was not reason, *in and of itself*, to deny a motion to amend under CR 15(c). *Id.* at 349. *Caruso* does not stand for the proposition that undue delay and the passage of time is not a relevant consideration in the court's determination of prejudice when coupled with other compelling circumstances supporting prejudice. *See Id.*

While the Mitchells rely upon the broad principals advanced in both *Caruso* and *Herron* regarding freely granting leave to amend, there are limits to the freedom to amend, which are present in this case. Unlike *Caruso* and *Herron*, the Mitchells' motion for leave to file an amended complaint was not their first proposed amendment presented to the trial court, but their third proposed amended complaint brought five years after filing of the original action and ten years after the events giving rise to the action. Additionally, in both *Caruso* and *Herron*, the motions for leave to amend were considered *prior to trial* (or a summary judgment), whereas in this case, the Mitchells' sought leave to file the third amended complaint *after entry of summary judgment and appeal and remand*.

Further, the Mitchells' proposed amendment adds a statutory cause of action providing for an award of attorney's fees. While the Mitchells do not explain the justification for their late addition of their WSSA claim, one can only logically conclude that the proposed addition is based upon the statute's attorney fee provision. Where it is possible that decisions in the litigation may have been different had the WSSA been pled earlier in the litigation (given the impact of a potential award of attorney's fees after years of litigating), allowing the Mitchells to add a cause of action with an attorney's fee provision is prejudicial to the defendants. *See Herron, supra*, at 168 (appellate court affirming trial court's denial of motion to amend acknowledging appropriateness of trial court's consideration of unfair surprise and prejudice where lawsuit pending for considerable period of time).

The foregoing circumstances, including the filing of a third amended complaint after a summary judgment, appeal and remand which adds a statutory cause of action containing an attorney's fee provision five years after the filing original complaint, support the trial court's finding of prejudice.

Finally, the Mitchells incorrectly assert that the trial court disregarded the mandate of this Court in *Mitchell I* in basing its determination of prejudice upon statute of limitations grounds.

Significantly, nothing in the record supports the Mitchells' argument that the trial court failed to comply with this Court's mandate in *Mitchell I*.

In *Mitchell I*, this Court reversed the trial court, holding, in relevant part, that the Mitchells could amend their complaint by adding NWCLF as a Plaintiff in the case, and by attempting to pierce the corporate veil. *Mitchell I*, at pp. 1-7.

Mitchells' motion to amend (reviewed in *Mitchell I*) did not seek to add the statutory claim of violation of the WSSA, and nowhere in *Mitchell I* did this Court remand with a mandate allowing the Mitchells to file a statutory claim. As such, the trial court neither violated this Court's mandate nor abused its discretion in denying the motion based upon a statute of limitations issue, or upon a finding of prejudice to the Defendants.

Significantly, with regard to the statute of limitations, the limitations periods and the analysis of their application are entirely different for the tort claims considered in *Mitchell I* and the statutory WSSA claim considered by the trial court.

In *First Maryland Leasecorp v. Rothstein*, 72 Wn.App. 278, 864 P.2d 17 (1993), the court reviewed the trial court's denial of defendant's motion to dismiss the plaintiff's claims for fraud, negligent misrepresentation and violation of the Washington State Securities Act

based upon the statute of limitations. *Id.* at 279-81. The *First Maryland* court addressed statute of limitations periods for common law negligent misrepresentation and fraudulent claims as well as the WSSA. The appellate court held that common law fraud and negligent misrepresentation claims accrue when the plaintiff discovers, or by reasonable diligence would have discovered, the cause of action and sustains actual damages as a result of the defendant's actions. *Id.* at 283; 286; RCW 4.16.080(4). The *First Maryland* court also held that a WSSA claim accrues when the plaintiff discovers or should have discovered violations under the chapter. Unlike the common law fraud and negligent misrepresentation tort claims, no showing of consequential damage is required to trigger the accrual of the WSSA statute of limitations period. *Id.* at 287-88; RCW 21.20.430(4)(b).

Given the foregoing, the Petitioners can advance no credible argument that the trial court abused its discretion in finding prejudice based upon statute of limitations issues relating to Mitchells' newly proposed WSSA claim because of this Court's consideration of the statute of limitations period in *Mitchell I*.

Quite simply, the unique circumstances of this case set forth above support the trial court's finding of prejudice and resulting denial of the

Mitchells' motion for leave to amend. The trial court cannot be said to have abused its discretion in denying the Mitchells' motion.

2. The Trial Court acted within its discretion in denying the amendment of the Mitchells' complaint as the claim for violation of the Washington State Securities Act is barred by the statute of limitations.

The trial court's ruling finding prejudice in the proposed amendment of the Mitchells' complaint is also supported by the fact that the statute of limitations had run on the Mitchells' proposed Washington State Securities Act ("WSSA") claim. As described above, the Mitchells argument that the trial court's ruling ignores the prior opinion of this Court regarding the statute of limitations is erroneous. Although this Court has held that the Yanick memorandum created an issue of material fact as to when the Mitchells learned of the NWCLF loans and their status, the trial court correctly determined that it does so only for the claims previously dismissed on summary judgment.

A claim under the Washington Securities Act can only be brought in connection with the sale of securities. RCW 21.20.430. Unlike the prior claims dismissed on summary judgment (and reversed on appeal), there is no factual dispute that the original sale of securities, for which the Mitchell Plaintiffs' Securities Act claim arises, occurred in 1998. CP 304

“Between August 13, 1998 and August 17, 1998, the Plaintiffs herein became members of NWCLF.”).

RCW 21.20.430(4)(b) provides:

No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140(1) or (2) (unlawful to offer or sell unregistered securities) or 21.20.180 through 21.20.230 (registration by coordination or qualification), **or more than three years after a violation of the provisions of RCW 21.20.010⁴, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care.**

RCW 21.20.430(4)(b) (emphasis added). The Mitchells’ complaints focus not so much on fraud or misrepresentations made *at the time of the sale*, but rather, on the alleged use of those funds following the original 1998 offer, sale, or purchase of the security by the Plaintiffs. CP 1-15.

Quite simply, there is there is no dispute as to when the Mitchell Plaintiffs were solicited to invest and invested with NWCLF — in 1998. CP 278-280 (*Third Amended Complaint, at Paragraphs 15, 16, and 21—describing the dates in which NWCLF*

⁴ RCW 21.20.010 provides, in part, that it is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud; (2) to make any untrue statement of a material fact or to omit to state a material fact necessary. . . ; or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

issued its Private Placement Memorandum, as Amended, and solicited the Mitchell Plaintiffs' investments); CP 305, 310 (citing Exhibit 3 Byrne Dec., for support that the Plaintiffs became members of NWCLF between August 13, 1998 and August 17, 1998). Nonetheless, the Mitchells claim that "[t]he original complaint alleged the very same facts on which the WSSA claim was based." Brief of Petitioner, at p. 17. Hoping for a CR 15(c) "relation back" to avoid a statute of limitations problem, the Mitchells assert that there are issues of fact as to when they discovered or should have discovered violations under the WSSA. The record does not support this assertion.

Where the record reflects that the statute of limitations expired as to the WSSA claim, the trial court's decision was neither manifestly unreasonable nor exercised on untenable grounds or for untenable reasons under the circumstances and should be upheld in light of its discretion.⁵

3. The trial court acted within its discretion in denying the amendment of the Mitchells' complaint where there is no legal basis for the Washington State Securities Act claim against Price and amendment as to Price is futile.

⁵ While the Mitchells argue that the defendants did not raise the issue of statute of limitations in the trial court, as set forth above, the appellate court may affirm the trial court on any basis supported by the record. Wendle, supra.

The trial court's decision denying the Mitchells' motion for leave to file third amended complaint is sustainable with regard to defendant Price because a WSSA claim against Price lacks merit and is futile.

In determining whether an amendment will prejudice a party, the trial court may consider the probable merit or the futility of the amendment in making its determination. *Herron*, 108 Wn.2d at 165; *Doyle v. Planned Parenthood of Seattle-King County, Inc.*, 31 Wn. App. 126, 132, 639 P.2d 240 (1992). In *Doyle, supra*, the appellate court upheld the trial court's denial of the plaintiff's motion to amend its complaint where its claims for strict products liability were not applicable to the defendants, namely to medical personnel furnishing services as opposed to products. *Doyle*, 137 Wn.App. at 131-32.

In this case, the new theory of liability, that is, the assertion of the WSSA against Price lacks legal support as to Price. The WSSA requires a showing of unlawful activities (including fraud and misrepresentation) in the "offer, sale or purchase" of securities. *See* RCW 21.20.010. RCW 21.20.140, RCW 21.20.180 through RCW 21.20.230.

The record demonstrates that the Mitchells and other plaintiffs do not allege that the Prices were involved in any manner with the preparation of the Private Placement Memorandum, or that Price had any managerial control, as a member of NW, LLC, in the investment decisions

alleged to have been made by NWCLF. CP 87, 174. Moreover, it was Byrne, not Price, who was NWCLF's managing member of NWCLF. CP 45.

Where the WSSA requires unlawful conduct in connection with the offer, sale or purchase of securities, Price cannot be found liable for a violation of the WSSA where he is not alleged to have participated in any manner in any offer or sale of the securities.

Consequently, the trial court did not abuse its discretion by denying the Mitchells' motion for leave to file a third amended complaint when the proposed new claim would be futile against Price and thus, prejudicial. As such, the trial court's decision denying Mitchells' motion for leave to file a third amended complaint (as to Price) was not an abuse of discretion and should be sustained.

C. If this Court reverses and remands back to the trial court, proceedings should remain before Judge Stolz in accordance with proper judicial procedure; the Mitchells should be directed to file their Third Amended Complaint in the form proposed to the trial court.

The Mitchells seek remand of this case to a different trial court judge, claiming that Judge Stolz's impartiality might reasonably be questioned by an objective observer. Brief of Petitioners, at pp. 23-25. However, judicial policy strongly favors proceedings to be held before the

same court or authority that originally ruled. *Harris v. Grange Insurance Ass'n*, 73 Wn. App. 195, 200, 868 P.2d 201 (1994). The editorial comments to Rule 12.2, note that a case should only be given to a new judge “in extraordinary cases” of prejudice. RAP 12.2.

Further, the law requires that a judge both is, and appears to be, impartial. *Hyundai Motor America v. Magana*, 141 Wn.App. 495, 523, 170 P.3d 1165 (2007), *rev. on other grounds*, 167 Wn.2d 570, 220 P.3d 191 (2009). To support a change of judge, a litigant must submit proof of actual or perceived bias to support an appearance of impartiality claim. *Id.* (citation omitted).

First, for the reasons above, the trial court's decision denying the Mitchells' motion for leave to file a third amended complaint is sustainable where the trial court applied the proper legal standard to compelling facts, finding that the defendants would be prejudiced by the amendment of the complaint. Where this is the case, there is no abuse of discretion and this Court should affirm the trial court's decision making the Mitchells' argument moot.

Assuming arguendo, that this Court reverses the trial court, determining that its finding of prejudice is unsupported by the record, an erroneous decision by the trial court does not amount to prejudice, actual or perceived. Contrary to the Mitchells' contention, an objective person

would not question the trial court's impartiality under the circumstances, specifically where the statute of limitations of the various causes of action differ, where significant time has lapsed relative to the original filing of the complaint and where the Mitchells sought to file a third amended complaint after summary judgment, appeal and remand. An erroneous determination (if this court finds such) does not translate into bias, and remand before a different judge is not sustainable.

Finally, if this Court reverses and remands, the Prices request that this Court direct the Mitchells to file their Third Amended Complaint in the form presented to the trial court, that is, by "deleting the breach of contract, negligence, fraud and misrepresentation claims" and adding "a claim under the Washington State Securities Act." CP 273-275.

V. CONCLUSION

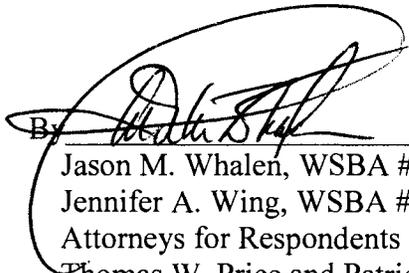
The trial court did not abuse its discretion when it determined that the defendants would be prejudiced by the filing of a third amended complaint five years after filing the original complaint and after a summary judgment motion, appeal and remand to the trial court. Further, where the statute of limitations expired on the WSSA claim and where an amendment as to Price would have been futile, the trial court did not abuse its discretion in denying the motion to amend.

///

Accordingly, Respondent Price respectfully requests this Court affirm the trial court Order Denying Plaintiff's Motion for Leave to File Third Amended Complaint.

RESPECTFULLY SUBMITTED this 8th day of February, 2010.

EISENHOWER & CARLSON, PLLC

By 
Jason M. Whalen, WSBA # 22195
Jennifer A. Wing, WSBA # 27655
Attorneys for Respondents
Thomas W. Price and Patricia Price

CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of the foregoing Brief of Respondents Thomas W. Price and Patricia Price on the 8th day of February, 2010 by facsimile, and also via legal messenger for delivery on 2/9/2010, to the following counsel of record:

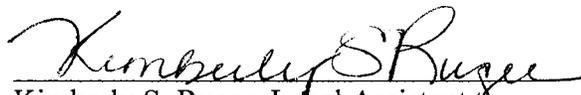
Charles K. Wiggins
Wiggins & Masters, PLLC
241 Madison Ave. North
Bainbridge Island, WA 98110
Facsimile: (206) 842-6356

Douglas V. Alling
Smith Alling Lane, PS
1101 Broadway, Suite 403
Tacoma, WA 98402
Facsimile: (253) 627-0123

Philip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
Facsimile: (206) 575-1397

James V. Handmacher
Morton McGoldrick, P.S.
820 A Street, Suite 600
P. O. Box 1533
Tacoma, WA 98401
Facsimile: (253) 272-4338

FILED
COURT OF APPEALS
DIVISION II
10 FEB - 8 PM 3:50
STATE OF WASHINGTON
BY _____
KIMBERLY S. RUGER


Kimberly S. Ruger, Legal Assistant to
Jason M. Whalen