# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| ROBERT R. MITCHELL, LISA TALLMAN, MITCHELL FAMILY LIVING TRUST, GARY GRENDAHL, JOANN GRENDAHL, OLYMPIC CASCADE TIMBER, INC., a Washington corporation, GM JOINT VENTURE, a Washington joint venture partnership, ROBERT R. MITCHELL, INC., a Washington corporation, TIMOTHY JACOBSON, and HILARY GRENVILLE,<br><br>Appellants,<br><br>v.<br><br>MICHAEL A. PRICE and JANE DOE PRICE, husband and wife; THOMAS W. PRICE and JANE DOE PRICE, husband and wife; JAMES REID and SONJA REID, husband and wife; KEVIN M. BYRNE and MARY BYRNE, husband and wife; and NW, LLC, a Washington Limited Liability Company,<br><br>Respondents,<br><br>And<br><br>THOMAS H. OLDFIELD and JANE DOE OLDFIELD, husband and wife,<br><br>Defendants. | No. 39289-5-II<br><br>UNPUBLISHED OPINION |
|---|---|

Armstrong, J. — In this discretionary appeal, Robert R. Mitchell and Margaret Mitchell, as trustees of the Mitchell Family Living Trust, Gary Grendahl and Joann Grendahl, Hilary Grenville, Olympic Cascade Timber, Inc., GM Joint Venture, Robert R. Mitchell, Inc., Timothy Jacobson, and Sylvia Jacobson (collectively "the Mitchells") challenge the trial court's refusal to allow them to amend their complaint. They argue that the claim they seek to add relates back to

the date of the original complaint with no prejudice to the defendants. In addition, they ask us to assign a new judge on remand. We agree; therefore, we reverse the trial court and remand to a different trial court judge.

FACTS

Formed in 1995, NW, LLC (NW) engaged in loan securitization, a complex series of transactions that resulted in the sale of large numbers of loans to groups of investors.[1] In 1998, NW formed NW Commercial Loan Fund, LLC (NWCLF) for the purpose of investing and trading in loans that did not qualify for securitization, providing a vehicle for investors to earn interest from loans that NW assigned to NWCLF. The Mitchells invested in NWCLF by purchasing membership units at a price of $1 per unit.

On July 30, 2004, the Mitchells sued the members of NW, Kevin Byrne, James Reid, Michael Price, Thomas Price, and Robert Coleman, as well as NW's attorney, Thomas Oldfield, who drafted the documents associated with NWCLF's formation.[2] The Mitchells claimed that the defendants violated NWCLF's operating agreement when they invested significant resources in a property and accepted security interests that were subordinate to other security interests in the property. They also claimed that the defendants misrepresented the status of NWCLF's portfolio, breached contracts, breached their fiduciary duty, committed fraud, and violated the Consumer Protection Act, chapter 19.86 RCW, all of which caused the Mitchells significant losses.

---

[1] These parties are before this court a second time and many of the relevant facts have been previously litigated. *See Mitchell v. Price*, 145 Wn. App. 1021, 2008 WL 2505440 (Wn. App. Div. II).

[2] Robert Coleman was dismissed from the lawsuit after filing for chapter 7 bankruptcy and receiving a discharge. The Mitchells alleged a claim of professional negligence against Oldfield, who was subsequently dismissed from the lawsuit.

In April 2006, Byrne and Reid moved for summary judgment, arguing that the Mitchells' claims had expired under the applicable statute of limitations. The Mitchells sought leave to file a third amended complaint to add NWCLF as a plaintiff. The trial court denied the Mitchells' motion and granted summary judgment in favor of Byrne and Reid, dismissing all of the remaining claims against the NW members.

The Mitchells appealed the summary judgment order and denial of their motion to amend. We reversed, holding that the trial court erred in dismissing the Mitchells' claim because the statute of limitations had expired. We reasoned that genuine issues of material fact existed "as to when the Mitchells learned of the NWCLF loans and their status." *Mitchell v. Price*, 145 Wn. App. 1021, 2008 WL 2505440 at *2. We remanded to the trial court for further proceedings in accordance with the opinion.

After our remand, the Mitchells again moved to amend by deleting claims for breach of contract, negligence, fraud, and misrepresentation, and adding a new claim for violations of the Washington State Securities Act (WSSA), chapter 21.20 RCW.[3] The trial court denied the motion, stating in its oral ruling:

> Well, you know, it does seem to me that there are some significant statute of limitations 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.
> . . . .
> Well, I do think there's prejudice to the other side. We're talking 11 years later. This case was filed in '04, so I am not going to allow you to amend.

[3] The proposed amended complaint also changed some parties and dismissed Oldfield. These changes are not at issue here.

Report of Proceedings (Apr. 17, 2009) at 18-20. The Mitchells sought discretionary review of the trial court's decision, which our commissioner granted.

## ANALYSIS

### I. Leave to Amend Complaint

The Mitchells argue that the trial court should have granted leave to file an amended complaint because it was neither barred by the statute of limitations nor prejudicial to the defendants. They also argue that the trial court's ruling was contrary to our prior decision in *Mitchell* I, which acknowledged issues of material fact existed as to when the Mitchells learned the elements of their claims, suffered prejudice, and whether they exercised due diligence.

Leave of the court to amend a pleading "shall be freely given when justice so requires." CR 15(a); *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). The trial court has discretion to grant or deny a motion to amend and we will not disturb the trial court's decision unless it was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

#### A. Grounds to Amend

The Mitchells claim that the trial judge abused her discretion when she denied their motion to amend because "there are some significant statute of limitations problems on this case." Br. of Appellant at 18. First, they argue that the WSSA claim relates back to the date of the original complaint. Second, they argue that the factual disputes that precluded summary judgment also preclude denial of their motion to amend the complaint.

1. Relation Back

Under CR 15(c), parties may generally amend pleadings if the amendment relates back to conduct, transactions, or occurrences in the original pleading. *Miller v. Campbell*, 164 Wn.2d 529, 537, 192 P.3d 352 (2008). The rule is based on the premise that once litigation involving particular conduct has been instituted, the parties are not entitled to statute of limitations protection against amended claims that arise out of the same conduct alleged in the original pleading. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983) (citing 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice* § 1488 (1971)). The rule is also consistent with the judicial preference for deciding cases on their merits. *Herron v. Tribune Publ'g Co., Inc.*, 108 Wn.2d 162, 167, 736 P.2d 249 (1987).

The Prices assert that the Mitchells' original complaint focuses on alleged violations occurring after the sale of the securities, not fraud or misrepresentation occurring at the time of the sale.[4] Accordingly, the Prices contend that a WSSA claim, which pertains to the offer and sale of a security, does not relate back to the date of the original complaint.

In the original complaint, the Mitchells alleged fraud in the inducement stemming from conduct relating to the offer to invest in NWCLF. Although not explicitly pertaining to the sale of securities, the common law claim implicates the same wrongful conduct on the part of the defendants as the WSSA claim does. The proposed third amended complaint alleges that the

[4] Byrne and Reid do not explicitly concede that the WSSA claim relates back to the original complaint, but they essentially argue that the issue is moot. According to Byrne and Reid, the statute of limitations for the Mitchells' WSSA claim had already expired by the time they filed the original complaint.

defendants employed a scheme to defraud the Mitchells, made untrue statements of material fact, failed to disclose material facts, and engaged in an act, practice, or course of business that operated as a fraud on the Mitchells, in connection with the offer and sale of securities to them in violation of RCW 21.20.010. The original complaint asserts that the defendants acted contrary to the terms of the Offering Memorandum, invested substantial funds based on the representations in the memorandum, and never intended to comply with the memorandum's terms. The Offering Memorandum, attached as an exhibit to the original complaint, offers potential investors membership in NWCLF through the sale of units of interest in the company. Thus, the original complaint gave the defendants notice that the Mitchells claimed to be victims of fraudulent acts or misrepresentations in the original sale of securities, specifically the offer and sale of membership units. The WSSA claim clearly arises out of NW members' conduct as originally alleged and therefore relates back to the original complaint.

2. Statute of Limitations

Byrne and Reid argue that regardless of whether the WSSA claim relates back, the statute of limitations had already expired by the time the Mitchells filed the original complaint in 2004. They contend that *Mitchell* I is inapplicable because the statute of limitations issue involved common law torts, not a WSSA claim.

In considering a proposed amendment to a complaint, trial courts can consider whether the new claim is futile or untimely. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997). Under the WSSA, an action must be commenced within three years of the violation, although the three-year period is tolled until the securities violation is discovered or

should have been discovered. RCW 21.20.430(4)(b); *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 287, 864 P.2d 17 (1993). Unlike the statute of limitations for a common law torts claim, the WSSA statute of limitations can begin to run before the plaintiff sustains actual damages as a result of the alleged fraud. *See First Maryland*, 72 Wn. App. at 282.

The offer and sale of the securities to the Mitchells took place in 1998-99. The Mitchells filed the original complaint on July 30, 2004. The issue, however, is whether we can determine from the record when the Mitchells discovered or should have discovered the alleged violation. We addressed this exact issue in *Mitchell* I. That the statute of limitations for common law torts addressed in *Mitchell* I is different from the statute of limitations for WSSA claims is immaterial. We did not make a legal determination regarding the expiration of the common law tort statute of limitations; instead, we found issues of material fact as to when the plaintiffs learned of potential violations, which would trigger the statute of limitations. *Mitchell* I, 2008 WL 2505440 at *4. Contrary to what Byrne and Reid argue, *Mitchell* I focused on "when the Mitchells learned of the NWCLF loans and their status," not when they learned the extent of their loss. *Mitchell* I, 2008 WL 2505440 at *4. By basing its denial of leave to file the third amended complaint on "significant statute of limitation problems," the trial court repeated the error we found in the prior appeal. Accordingly, we hold that the trial court's ruling was based on untenable grounds and contrary to our prior opinion.

B. <u>Prejudice</u>

Byrne and Reid argue that the amendment would prejudice them for six reasons. First, the amendment causes undue delay, prejudicing them because witnesses and documents are no longer

available and witnesses' memories fade. Second, a new claim with different elements would require new discovery. Third, the amendment would require a shift in defense strategy. Fourth, their claim for recovery under a bond insurance policy is time-barred. Fifth, they can no longer seek contribution from Oldfield. Finally, the WSSA's attorney fee provision would allow the Mitchells to recover all expenses pertaining to the litigation, not just costs associated with the WSSA claim.[5]

Leave to amend should be freely given except where it would cause prejudice to the opposing party. *Herron*, 108 Wn.2d at 165. A party is prejudiced if the amendment would cause undue delay, unfair surprise, or jury confusion. *Wilson*, 137 Wn.2d at 505-06. The timing of a motion can cause prejudice, but delay without prejudice will not bar an amendment. *Herron*, 108 Wn.2d at 166.

Here, although the WSSA claim comes late in the litigation, Byrne and Reid have failed to show prejudice with sufficient specificity. They have not shown how the amendment would adversely affect their ability to litigate the new claim, given that the WSSA claim is virtually identical to the fraud in the inducement claim in the initial complaint. Given the similarities in the claims, it is unlikely the WSSA claim will require significant new discovery. Although the parties may need new expert securities witnesses, the factual witnesses—most likely the parties—will remain the same. Issues of faded memories and unavailable witnesses are unlikely to change because of the added WSSA claim. Moreover, contrary to what Byrne and Reid argue, a WSSA claim has fewer elements than a common law fraud in the inducement claim. In the same vein,

[5] The Prices also allege that adding a cause of action with an attorney fee provision is prejudicial to them. They generally assert that adding a claim where the statute of limitations has expired prejudices them.

any shift in defense strategy is likely to be minimal. Because Byrne and Reid were on notice of the relevant facts of a securities claim, they have not shown that the proposed amendment will prejudice them by either altering the witness line-up or expanding the issues.

Nor is there any merit to their argument that recovery under a bond insurance policy is time-barred.[6] Byrne and Reid argue they are covered under two separate sections of the policy: section A, which covers dishonest acts by an employee of the Assured party, and section D, which provides coverage for wrongful acts concerning any real estate loan for mortgage-backed securities. But section A, by its clear terms, covers only employees of the Assured, explicitly excluding partners. Byrne and Reid are members of NW, not employees; thus, their acts are likely excluded under section A. They are also not entitled to coverage under section D: the policy specifically excludes claims arising out of a violation of state securities laws.[7] Byrne and Reid cannot show prejudice where they are not eligible to recover under the bond.

With respect to the fifth issue, the WSSA allows contribution among persons jointly and severally liable under the Act.[8] RCW 21.20.430(3). Under the WSSA, "[t]here is contribution as

---

[6] Banker's Insurance Service issued a mortgage banker's bond for NW for the period between 1998 and 2003. The bond covered claims for wrongful acts on the part of NW solely concerning NW's origination, processing, closing, or servicing of real estate mortgage loans for any mortgage backed securities.

[7] An exception to the exclusion states that the exclusion shall not apply if the wrongful act concerns the origination, processing, or servicing of any real estate loan for mortgage-backed securities. Here, the WSSA claim is based on the offer and sale of membership units of NWCLF, not a mortgage-backed security, which is defined as an undivided interest in a pool of real property mortgages or trust deeds.

[8] Byrne and Reid conceded at oral argument on September 2, 2010, that the Tort Reform Act of 1986, chapter 4.22 RCW, does not apply or limit their ability to seek contribution from Oldfield. Provisions in the Tort Reform Act that protect a released party against contribution claims are therefore inapposite.

in cases of contract among the several persons so liable." RCW 21.20.430(3). Where contribution is available on the basis of contract, an indemnity or contribution cause of action accrues when payment is made. *Pietz v. Indermuehle*, 89 Wn. App. 503, 511, 949 P.2d 449 (1998). Any of the defendants can still seek contribution after the trial court enters a final judgment on the Mitchells' claims. They have not shown that adding the WSSA claim has prejudiced them by limiting their ability to seek contribution from Oldfield.

Finally, Byrne and Reid offer no authority for their proposition that increased exposure to attorney fees and costs is prejudicial. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (this court will not review inadequate argument). That an added claim bears additional consequences is not the same as prejudicing the party at trial. At best, this additional exposure to costs as a result of the WSSA claim could constitute an unfair surprise, but, as noted earlier, because the claim is similar to a claim in the original complaint, the resulting prejudice is minimal. *See Herron*, 108 Wn.2d at 168 (prejudice from unfair surprise occurs, in part, because an amendment can in effect broaden the issues).[9]

II. Remand to Different Judge

The Mitchells ask us to remand this case to a different trial judge to safeguard the appearance of fairness. They reason that the trial judge's repeated error is sufficient to question her impartiality.

Litigants are entitled to a judge who appears to be and is impartial. *Magana v. Hyundai*

---

[9] In addition, Byrne and Reid claim that the plaintiffs were mandated by this court in *Mitchell* I to add NWCLF as a plaintiff. But we held only that there was no prejudice to Byrne and Reid in allowing the Mitchells to add NWCLF as a plaintiff. *Mitchell* I, 2008 WL 2505440 at *3. We did not require the Mitchells to do so.

*Motor Am.*, 141 Wn. App. 495, 523, 170 P.3d 1165 (2007), *rev'd on other grounds*, 167 Wn.2d 570 (2009). Litigants must submit proof of actual or perceived bias to support an appearance of impartiality claim. *Hyundai Motor*, 141 Wn. App. at 523. Where a trial court judge appears to have difficulty setting aside a previously expressed opinion, we will appoint a new judge to preserve the appearance of fairness.. *See In re Custody of R.*, 88 Wn. App. 746, 762, 947 P.2d 745 (1997) ("justice must satisfy the appearance of impartiality"), *superseded by statute as stated in In re Marriage of Tostado*, 137 Wn. App. 136, 151 P.3d 1060 (2007). In *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117, *reconsideration granted in part*, 2008 Wn. App. Lexis 2216 (2008), *rev. denied*, 165 Wn.2d 1049 (2009), we remanded to a different judge because the trial judge's statements—impugning certain witnesses' credibility—suggested that she would have a hard time setting aside previously expressed opinions. And in *McCausland v. McCausland*, 129 Wn. App. 390, 417, 118 P.3d 944 (2005), *reversed on other grounds*, 159 Wn.2d 607 (2007), we remanded to a different judge where the trial judge failed to strictly follow our mandate on remand.

Here, the trial judge expressed an opinion on a factual determination and failed to strictly follow our mandate. This matter was mandated for further proceedings consistent with our decision in *Mitchell* I. We held that "[a] genuine issue of material fact exists as to when the Mitchells learned of the NWCLF loans and their status." *Mitchell* I, 2008 WL 2505440 at *4. As noted above, the trial court judge's ruling was directly contrary to this holding.

The judge's ruling that there are "statute of limitations problems on this case" was not only contrary to our holding in *Mitchell* I but it also suggested she had views on whether the

Mitchells knew about the defendants' wrongdoing early enough that the statute of limitations barred their claims. Moreover, neither Byrne and Reid, nor the Prices, raised the statute of limitations argument in opposition to the latest motion to amend; the trial court judge did so on her own. In light of this history, it is to be expected that the Mitchells would perceive the judge's rulings as showing bias. This problem of perceived bias is compounded by the fact that in *Mitchell* I, the trial judge dismissed the plaintiffs' claims as barred by the statute of limitations and awarded the defendants attorney fees and costs, amounting to $250,270.40, on the theory that the action was frivolous. *Mitchell* I, 2008 WL 2505440 at *1.

The respondents argue that a remand to a different judge would not promote judicial economy. But as the Mitchells point out, the trial has yet to begin; any additional burden to a new trial judge is therefore minimal. In fact, judicial economy may best be served by remanding to a different judge so that appeals such as this one can be avoided. *See State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996). Accordingly, in the interest of the appearance of fairness, we remand this matter to a different trial court judge.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Worswick, A.C.J.

---

Alexander, J.P.T.