

66721-1

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Cause No. 66721-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION 1

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JACK GRANT,

Plaintiff-Appellant

vs.

First Horizon Home Loans, aka FIRST HORIZON CORPORATION dba  
"First Horizon Home Loans" et al,

Defendants-Respondents

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COURT OF APPEALS  
DIVISION 1

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ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT  
Cause No. 10-2-02676-9  
Hon. Steven J. Mura, Presiding

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BRIEF OF RESPONDENT STEWART TITLE COMPANY, INC.

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**1. INTRODUCTION.**

Appellant Jack Grant (“Grant”) admits in his complaint that he was aware of the facts supporting each of the claims alleged against respondent Stewart Title, Inc. (erroneously sued herein as Stewart Title, Stewart Title of Western Washington, Inc., and Stewart Title of Bellingham, Inc.) (all collectively referred to as “Stewart”) when he signed the documents in question on December 1, 2004 and no later than December 6, 2004 when the quitclaim was recorded, yet he did nothing to enforce any rights which he might have had until filing the complaint in this action on October 25, 2010, long after the limitations periods had expired. The trial court correctly dismissed Grant’s complaint upon finding that his claims are barred by the applicable statutes of limitations and Stewart requests that the trial court’s ruling be affirmed.

**2. STATEMENT OF FACTS.**

The essence of Grant’s claims against Stewart is that somehow Stewart, acting as escrow officer in a 2004 refinancing transaction, used undue influence and coercion to force Grant<sup>1</sup> to quitclaim his separate property to himself and his wife as community property as part of their refinancing the debt secured by that property, causing him untold damage.

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<sup>1</sup>

Grant is a practicing attorney in the Bellingham area. (CP at 283.)

Perhaps not coincidentally, the loan is now in default and despite sleeping on his perceived rights for years, Grant now makes these claims against Stewart for the first time in connection with his attempts to avoid foreclosure.

In November, 2004, Grant sought to refinance the existing construction debt secured by the property. (Clerk's Papers "CP" at 227., ¶ 4.3.) As shown in Exhibit A to the complaint, the initial order sheet submitted to Stewart from defendant lender First Horizon showed the buyers/borrowers to be Jack H. and Lisa A. Grant. (CP at 252.) Likewise, the closing instructions and conditions showed that title was to be held by "Jack H. and Lisa A. Grant, Husband & Wife." (CP at 265.) In fact, the closing instructions make it clear that closing was conditioned on title vesting in both Grant and his spouse and that the instructions could not be amended by oral agreement and that no deviation was permitted. (*Id.*) Yet still, Grant claims that he was somehow surprised when his wife was required to sign the loan documents prepared by First Horizon placing both of them on title to the Property. (CP at 227-228, ¶ 4.5)

Consistent with the application showing both Jack and Lisa Grant as buyers and consistent with the escrow instructions, Stewart allegedly prepared a quitclaim deed which, once signed, delivered and accepted would convert the Property from Grant's separate property to property of

his marital community. (CP at 228, ¶ 4.6) Despite his alleged objections and protests, Grant signed the quitclaim and placed it into escrow for delivery. (CP at 228-229, ¶ 4.8-4.10.) Grant says that he began to suffer damage from Stewart's allegedly wrongful acts in December, 2004 when he claims he lost his ability to manage the property as his own. (CP at 229-230, ¶ 4.13)

Despite all of Grant's current complaints with Stewart's alleged conduct in the transaction, all of Grant's efforts to resolve his claims were through First Horizon only. In fact, it was not until September 7, 2010, when First Horizon told plaintiff in exasperation that he should take up his dispute "with the closing agent", that he concluded to sue Stewart. (CP at 232, ¶ 4.24; CP at 289-290.) Grant even admits that his sole basis in pursuing Stewart was this statement, not some perceived wrong which Stewart allegedly worked upon him. (*Id.*)

Based on these facts, all of which occurred in November and December, 2004, Grant filed his complaint on October 25, 2010, alleging claims against Stewart as follows:

1. Breach of Contract/Fiduciary Duty (even though Grant does not in his pleadings identify any contract which he might have had with Stewart or how that contract might have been breached);

2. Bad Faith Breach of Duties (despite the fact that Grant does not identify any contract between himself and Stewart through which a duty of good faith and fair dealing could be implied);
3. Intentional Infliction of Emotional Distress/Outrage;
4. Interference with Contractual Relations/Prospective Economic Advantage;
5. Negligence in requiring the quit claim deed;
6. Violation of the Consumer Protection Act.

As held by the trial court and more specifically set forth below, each of these claims is barred by the applicable statute of limitations.

#### **4. LEGAL DISCUSSION.**

##### **A. Standard of Review.**

The appellate court conducts a de novo review of a dismissal pursuant to CR 12(b)(6) for failure to state a claim for which relief can be granted de novo. *Jeckle v. Crotty*, 120 Wn. App. 374, 380 (2004). In performing such a review, the appellate court engages in the same inquiry as the trial court. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 891 (2000).

“Under CR 12(b)(6), ‘a defendant may move to dismiss where a plaintiff’s pleadings do not state a claim for which relief can be granted.’” *Kinney v. Cook*, 150 Wn.App. 187, 192-193 (2009)(citations omitted.) Dismissal is appropriate only 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." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987)(citations omitted.)

As set forth below, based on the facts alleged in the complaint, each of the claims against Stewart are barred by the applicable statute of limitations. Because plaintiff can plead no set of facts which would change that result, this court should affirm the trial court's dismissing all claims against Stewart without leave to amend..

**B. All Claims Against Stewart Are Barred By The Statute Of Limitations.**<sup>2</sup>

**i. Grant's Unpled Claim For Breach Of Oral Contract Is Barred By RCW 4.16.080(3).**

Grant maintains that he can pursue a claim for breach of contract against Stewart, even though there is no contract between Grant and Stewart alleged in the pleading or included in the record which could have been breached, leaving Stewart without any notice regarding what claim was being made against it. Then, at oral argument on the motions to dismiss, Grant for the first time claimed that there was some agreement

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Stewart is not a party to the claims alleging violations of the Deed of Trust Act or Truth In Lending Act. Accordingly, those claims are left for others to analyze and discuss.

between himself and Stewart made on December 1, 2004 wherein Stewart allegedly promised not to record the quitclaim between Grant and his wife. (Verbatim Report of Proceedings (“RP”) at 7:4-5, 25:12-22.) Grant claims that agreement was breached within days when the quitclaim was recorded on December 6, 2004. (RP at 22:3-4.)

RCW 4.16.080 provides the following in the relevant part:

The following actions shall be commenced within three years:

...  
(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;

Although this claimed contract appears nowhere in the complaint, if pled it would be barred by the statute of limitations.

The very act that Grant claims breached the contract – Stewart’s recording the quitclaim deed with the county recorder’s office – was an act of which Grant had immediate constructive knowledge. *S. Tacoma Way v. State*, 146 Wn. App. 639, 652 (2008). As the Washington Supreme Court ruled in *Strong v. Clark*, 56 Wn.2d 230, 232 (1960):

When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents. (*Citations omitted.*) When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public

record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument.

While the issue here is not the same as fraud, Grant seemed to invoke the discovery rule by saying that he was not aware of the breach until 2007 or so. However, even if the discovery rule applied, it would provide Grant no help. Once the quitclaim deed was on December 6, 2004, Grant had constructive knowledge of its recording and thus constructive knowledge of the breach. Because Grant did not file any action to enforce his claimed rights within three years of that date, his breach of oral contract claim is barred by the limitations period set forth in RCW 4.16.080(3).

**ii. Any Claim For Breach Of Fiduciary Duty Is Waived And Otherwise Barred By RCW 4.16.080(4).**

In his opposition to the dismissal motions, Grant admits that no defendant owed him a fiduciary duty. Specifically, in his opposition papers, Grant states:

**Defendants Claims:** The Defendants owe the Plaintiff Fiduciary Duties.

**The Truth:** Plaintiff did not intend to suggest in the Complaint that any of the Defendants owed him fiduciary duties. . . . However, the word fiduciary was incorrectly

used in paragraph 7.6 of the Complaint and is hereby withdrawn. . .

To the extent that the Complaint could be read to include a claim against Stewart for breach of fiduciary duty, Grant has himself expressly waived that claim on the record. For this reason alone, the dismissal of this claim should be affirmed.

Further, even if Grant had not expressed this understanding of the non-fiduciary nature of the parties' relations, any claim for breach of fiduciary duty is time barred. RCW 4.16.080(4) requires that any claim for fraud be made within three years of discovery of the facts constituting the fraud. This requirement applies equally to claims for breach of fiduciary duty. *Hudson v. Condon*, 101 Wn.App. 866, 874-875 (2000). To the extent Stewart owed any fiduciary duty to Grant, any claim for breach of that duty had to have been filed within three years of Grant's discovering the facts upon which Grant bases his claims.

At the time Grant was allegedly forced by Stewart to sign the quitclaim deed, Grant was actually aware of the coercion deployed against him. From his protests and objections, and the fact that he was and is a practicing attorney, it is clear that Grant was also actually aware of the alleged loss of his property rights at that time. Grant was further constructively aware of the quitclaim being recorded immediately upon

recording on December 6, 2004. Grant had until no later than December 5, 2007 (three years from the date Grant claims the quitclaim was recorded) to enforce his rights. His failure to do so is fatal to his claim. The discovery rule does not aid Grant and any claims for fraud or breach of fiduciary duty against Stewart claim were rightly dismissed. The trial court's ruling should be affirmed.

**iii. The Emotional Distress/Outrage,  
Interference With Economic Advantage  
And Negligence Claims Are Barred By  
RCW 4.16.080(2).**

Negligent infliction of emotional distress/outrage, interference with economic advantage and negligence all are governed by the 3 year proscriptive period in RCW 4.16.080(2).<sup>3</sup> Because the facts giving rise to Grant's claims against Stewart all occurred on or before December 1, 2004 and because Grant was aware of those facts at that time, these claims had to have been raised no later than November 30, 2007. Instead, Grant waited until October 25, 2010, when his home went into foreclosure for nonpayment to allege these claims, to file his claims. Grant is time barred from asserting these claims against Stewart.

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Intentional infliction of emotional distress/outrage – *Milligan v. Thompson*, 90 Wn.App. 586, 592 (1998); interference with contract/prospective economic advantage – *Ballard v. Popp*, 142 Wn. App. 307, 309 (2007); negligence – *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599 (2005).

**C. Grant's Claim Arising Out Of The Consumer Protection Act Is Barred By The Applicable Four Year Statue Of Limitation.**

RCW 19.86.120 states:

Any action to enforce a claim for damages under RCW 19.86.090 [providing for a private right of enforcement of the Consumer Protection Act] shall be forever barred unless commenced within four years after the cause of action accrues . . .

Allowing for a four year limitation period, Grant's Consumer Protection Act ("CPA") claim was "forever barred" as of November 30, 2007. Grant's claim for relief under the CPA filed on October 25, 2010 is untimely and barred under the statute of limitations set forth in RCW 19.86.120.

**D. Grant's Request For Leave To File An Amended Complaint Was Properly Denied.**

The denial of a motion to amend is reviewed for abuse of discretion. *Deschamps v. Sheriff's Office*, 123 Wn. App. 551, 563 (2004). While leave to amend is freely given as the interest of justice might require, where the proposed amendment is futile, the court should properly deny the request. *Shelton v. Azar*, 90 Wn. App. 923, 928 (1998). As the Court recognized in *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 279 (2008):

A lawsuit is futile where there is no evidence to support or prove existing or additional allegations and causes of actions. (Citations omitted.) Futility is a reasonable ground for denying a motion to amend a complaint. (Citations omitted.)

Here, in light of the matters alleged in the complaint, there is no set of facts which Grant could possibly plead that would avoid the limitations defense. As set forth above, Grant was well aware of the facts constituting his claims and that he had allegedly sustained damage based on those facts as early as December 1, 2004 and no later than December 6, 2004. No claim set forth against Stewart, all of which are subject to a three or four year limitation period, survived beyond December 5, 2008. Far from asserting his rights in a timely fashion, the record reflects that Grant never even complained to Stewart for the alleged heavy-handed conduct of its escrow officers until after he defaulted on the note, long after the limitations period expired.

Based on the extended length of time which has passed since Grant's last alleged involvement with Stewart on December 1, 2004 and his awareness of his damage on that date and no later than December 6, 2004, the only possible claim that Grant could have alleged against Stewart which would survive the statute of limitations is breach of written agreement, which is subject to the six year limitation period in RCW

4.16.040(1). In fact, while Grant seemed to allude to such an agreement (or at least the extended limitations period) at oral argument (RP at 25:18-19), no such agreement is alleged in his proposed amended pleading and the only writings on the issue in the record are the escrow order and the escrow instructions directing that title to the property be held in the name of both Grant and his then wife (CP at 265). Grant's claims are contradicted by the record and no set of facts can be alleged can explain away Grant's failure enforce any rights he though he had against Stewart. The trial court properly denied the motion for leave to amend where no set of fact could be pled to avoid the statute of limitations.

**4. CONCLUSION.**

Each of the claims asserted against Stewart arises out of conduct allegedly committed on or before December 1, 2004. As such, each claim is barred by the applicable statute of limitations and Stewart is entitled to

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an order affirming the trial court's dismissing this action as to it with prejudice and without leave to amend.

Respectfully submitted on the 27<sup>th</sup> day of June, 2011, by:

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**CERTIFICATE OF SERVICE**

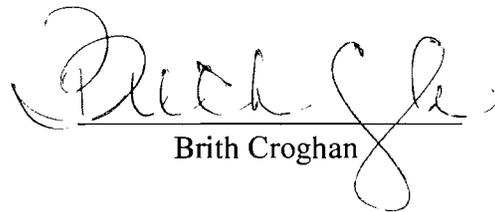
I, Brith Croghan, hereby certify that on this date I caused a true and correct copy of the document to which this Certificate is attached, and all supporting documents submitted to the court herewith, to be delivered to the parties of record by depositing the same in an envelope, addressed as follows, and sending them for delivery via U.S. Mail (Postage prepaid):

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