

**FILED**

**JUN 20 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 304132

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

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RANDALL LEESTMA;

Appellant.

vs.

WILLIAM ROBERTS AND WANDA ROBERTS

Respondents.

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APPEAL FROM THE SUPERIOR COURT OF PEND OREILLE  
COUNTY

THE HONORABLE PATRICK MONASMITH

---

RESPONDENTS' BRIEF

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**I.**

**RESPONDENTS' ANSWER TO ASSIGNMENTS OF ERROR**

A. The trial court did not err when it granted the Respondents' William and Wanda Roberts' motion for summary judgment and dismissed the Appellant Randall Leestma's case with prejudice.

**II.**

**RESPONDENTS' ANSWER TO ISSUES PERTAINING TO  
ASSIGNMENTS OF ERROR**

A. It was not error but instead substantial justice when the trial court ruled that the Appellant Randall Leestma filed his complaint after the relevant statutes of limitations on his claims had expired.

**III.**

**STATEMENT OF THE CASE**

**A. FACTUAL BACKGROUND**

The Respondents William Roberts and Wanda Roberts ("the Roberts") purchased from Linda Sue Bird real estate located in the County of Pend Oreille and the State of Washington on April 1, 1993.<sup>1</sup> In 1995, the Roberts decided to list their entire property for sale based on a Record of Survey.<sup>2</sup> A proposed short plat—SP-96-04—was filed on Jan. 19, 1996. However, the short plat was terminated on February 1, 1996 when

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<sup>1</sup> CP 121-122; CP 126-127.

the Roberts changed their mind and took their property off the market.<sup>3</sup> All application fees were refunded by the Pend Oreille County Public Works Department.<sup>4</sup>

In March 1998, the Roberts informed the Appellant Randall Leestma (“Leestma”) that they were considering selling their home and property for \$107,500.<sup>5</sup> Leestma came to the Roberts’ residence in May 1998 to see the home and property that they were selling.<sup>6</sup> He was shown the location of all four controlling General Land Office Corners of the property in correspondence with the 1995 Recorded Record of Survey.<sup>7</sup> In addition, while there, Leestma reviewed the following documents:

- Record of Survey (AUDITOR’S CERTIFICATE—Doc No. 229924, in Book 3 of Surveys at Page 230, filed for record this 21<sup>st</sup> Day of August 1995).<sup>8</sup>
- Real Estate Contract (Doc. No. 216492) and the Roberts’ Executor’s Deed (Doc. No. 218591) that was in effect at the time

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<sup>2</sup> CP 122.

<sup>3</sup> CP 122.

<sup>4</sup> CP 144-148.

<sup>5</sup> CP 122.

<sup>6</sup> CP 122.

<sup>7</sup> CP 122.

<sup>8</sup> CP 132-133.

the Roberts originally purchased the property from Linda Sue Bird.<sup>9</sup>

- Document No. 231663, Pend Oreille County Auditor's Office VOL. 122, Page 1416, where Linda Sue Bird stated and claimed the Fence Line located at the back of the Property since 1968 is the property line that is the Howe's and Pease. (The area without the title was included in the sale of property to the Roberts.)<sup>10</sup>
- Document No. 236042—Easement / Quit Claim Deed for Dean and Mardi Real, granting ingress and egress to the back of the Roberts' property.<sup>11</sup>
- Road Approach Permit for the Roberts' home and outbuildings. (Permit No. 94-6)<sup>12</sup>

In June 1998, Leestma expressed interested in the Roberts' property but not the Roberts' home.<sup>13</sup> The next month, the Roberts informed Leestma that they might consider selling part of their property under their terms and conditions.<sup>14</sup> However, no offer was made either time.<sup>15</sup>

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<sup>9</sup> CP 126-129; CP 134-136.

<sup>10</sup> CP 137-138.

<sup>11</sup> CP 139-140.

<sup>12</sup> CP 130-131.

<sup>13</sup> CP 123.

<sup>14</sup> CP 123.

<sup>15</sup> CP 123.

In October 1998, the Roberts informed Leestma that they would consider selling him the back portion of their property for \$42,345.00.<sup>16</sup> Under the agreement, the Roberts would keep and retain, and exclude approximately two acres upon which the Roberts' home, outbuildings, fences, and livestock were located.<sup>17</sup> In turn, Leestma would agree to lease said property to the Roberts for pasture, for a five year period at \$1.00 per year, and further agree to fix, install, repair any and all fences which border the property within 180 days after the purchase of said property.<sup>18</sup> Both parties agreed to the real estate sales agreement and the parties signed, and notarized it on October 16, 1998. On that date, the Roberts received a Security Deposit from Leestma in the amount of \$5,000.00 to go towards the purchase of said property.<sup>19</sup>

On December 8, 1998, William Roberts submitted an application for the short plat, SP-98-13.<sup>20</sup> From January 1999 to March 1999, John M. Shackelford surveyed the property for 1998 Short Plat. On March 8, 1999, Pend Oreille County Engineer approved Roberts Short Plat, File No. SP-98-13. On March 9, 1999, Northeast Tri-County Health District approved Roberts Short Plat, File No. SP-98-13. On March 11, 1999, the

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<sup>16</sup> CP 123.

<sup>17</sup> CP 123.

<sup>18</sup> CP 123.

<sup>19</sup> CP 123.

<sup>20</sup> CP 149-150.

Roberts received a Personal Check for \$577.00 from Leestma (which was to cover his part of expenses for meeting county requirements, perk test, etc.). On March 15, 1999, the Pend Oreille County Commissioners approved Roberts Short Plat, File No. SP-98-13. On March 16, 1999, Roberts Short Plat, File No. SP-98-13 was recorded by the County Auditor.<sup>21</sup> Thee parties signed and notarized on April 2, 1999 a real estate sale agreement receipt for their real estate sales agreement.<sup>22</sup> On May 14, 1999, the Quit Claim Deed for the real estate transaction was filed and recorded with Pend Oreille County Auditor.<sup>23</sup>

On December 16, 2005, Leestma went to the Pend Oreille County Public Works Department and requested to see a copy of all records pertaining to the Roberts' Short Plat and his property. Terry Ann Headkey of the Public Works Department personally copied and delivered to Leestma all records pertaining to the Roberts' Short Plat and their property including the original proposed short plat, SP-96-04, which was initiated on January 19, 1996 and terminated on February 1, 1996 by the Roberts.

Upon review of the 1996 proposed and terminated short Plat, File No, SP-96-04, Leestma asked Headkey said that he had never seen it before and that it did not match his. Headkey explained to Leestma that

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<sup>21</sup> CP 151-152.

<sup>22</sup> CP 58.

<sup>23</sup> CP 59.

the Roberts' 1996 proposed and terminated short plat (SP-96-04) had been withdrawn and never processed and that the Roberts were given a complete refund for their application fees. Headkey then informed Leestma that the Roberts' short plat that was recorded on March 16, 1999 (SP-98-13) was the official record and actual document used by the County.

## **B. PROCEDURAL BACKGROUND**

Leestma filed suit against the Roberts in Pend Oreille County Superior Court on April 19, 2007.<sup>24</sup> The basis of his action was that the Roberts allegedly used the 1996 short plat (SP-96-04)—which depicted a parcel consisting of 28.23 acres—to convince Leestma to purchase the property rather than the 1999 short plat (SP-98-13)—a parcel consisting of 25.50 acres—that depicted the property that was actually sold. Leestma claimed he did not know about the Roberts' alleged deception until he saw the recorded copies of the plats at the Pend Oreille County Public Works Department on December 16, 2005.

Leestma later moved for and filed amended complaints on June 17, 2009 and June 22, 2010.<sup>25</sup> The Roberts filed a Motion for Dismissal with Prejudice for Plaintiff's Failure to State a Claim and/or Summary

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<sup>24</sup> CP 1-10.

<sup>25</sup> CP 11-19.

Judgment based on Leestma's failure to file suit within the relevant statute of limitations.<sup>26</sup> A hearing on the motion was held in Pend Oreille County Superior Court on October 20, 2011 during which Leestma stated that shortly after the receipt document was executed on April 2, 1999, he "discovered there was something wrong with the short plat."<sup>27</sup> The Superior Court held that the statute of limitations began running when the Quit Claim Deed was filed on May 14, 1999 and granted the Roberts' motion for summary judgment thereby dismissing Leestma's action with prejudice.<sup>28</sup>

#### IV.

#### SUMMARY OF ARGUMENT

The trial court correctly granted summary judgment dismissing Leestma's complaint against the Roberts on the basis he had filed suit after the relevant statutes of limitations had expired on his claims. In addition, Leestma's fraudulent concealment argument is new and cannot be raised for the first time at the appellate level. Yet, even if it were properly before the court, it would not matter because of Leestma's aforementioned failure to file suit before the statutes of limitations had run.

#### V.

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<sup>26</sup> CP 118-120.

<sup>27</sup> RP 30.

<sup>28</sup> RP 32, RP 35-36, RP 37; CP 154-156.

## **ARGUMENT**

### **A. STANDARD OF REVIEW ON APPEAL**

At the appellate court level, a trial court's order granting summary judgment is reviewed de novo. *Smith v. Stockdale*, 166 Wn.App. 557, 563, 271 P.3d 917 (2012). The trial court's decisions conclusions of law are also reviewed de novo but are accorded great significance by the appellate court. *City of Seattle v. Megrey*, 93 Wn.App. 391, 393-394, 968 P.2d 900 (1998). If the trial court's findings of fact are supported by substantial evidence, it will not be disturbed on appeal. *Frank Coluccio Construction Company, Inc. v. King County*, 136 Wn.App. 751, 770, 150 P.3d 1147 (2007). The trial court's order granting summary judgment will be affirmed if there are no genuine issues of material fact thereby confirming that the party moving for summary judgment is entitled to judgment as a matter of law. *Bennett v. Computer Task Group, Inc.*, 112 Wn.App. 102, 106, 47 P.3d 594 (2002).

### **B. FRAUD, NOTICE, AND STATUTES OF LIMITATION**

The Roberts did nothing fraudulent during the negotiations and sale of their property to Leestma. Before the transaction was finalized on October 16, 1998, Leestma inspected the property, read all the important documents, and had more than enough opportunity to ask questions and object if there was anything supposedly wrong. However, even one

assumes the opposite for the sake of argument, Leestma's claims are still without merit as was determined by the trial court. In fact, in his appellant brief, Leestma has not factually or legally disputed the basis of the trial court's decision dismissing his case which is that Leestma waited too long to file suit.

**1. Relevant Law and Its Application to This Case**

In fraud cases, the relevant statute of limitations is three years from discovery by the aggrieved party of the facts constituting the fraud. RCW 4.16.080(4). Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it. *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183 (1960). When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents. *Id.* When the facts upon which the fraud is predicated are contained in a written instrument which is placed in 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. *Id.*

Leestma had seven causes of action against the Roberts: fraudulent misrepresentation, material misrepresentation, constructive fraud by non-disclosure, breach of the general contractual obligations of good faith and fair dealing, negligent misrepresentation, breach of contract, and constructive trust. Of these, the actions for fraudulent misrepresentation,

material misrepresentation, constructive fraud by non-disclosure, negligent misrepresentation, and constructive trust had to be commenced within three years of discovery by the aggrieved party. *See* RCW 4.16.080(4). The statute of limitations for commencing the actions for breach of the general contractual obligations of good faith and fair dealing and breach of contract was six years. *See* RCW 4.16.040(1). The trial court in this case held that the date the statutes of limitations for Leestma's actions began to run was on May 14, 1999.<sup>29</sup> That was the day the Quit Claim Deed was recorded with the Pend Oreille County Auditor thereby notifying the world of its contents.<sup>30</sup> The facts upon which the alleged act of fraud were predicated were contained in a written instrument and placed in the public record thereby effecting constructive notice of its contents to everyone (Leestma included) and beginning the running of the statutes of limitations. The last date the actions for fraudulent misrepresentation, material misrepresentation, constructive fraud by non-disclosure, negligent misrepresentation, and constructive trust had to be commenced was May 14, 2002. For the actions of breach of the general contractual obligations of good faith and fair dealing and breach of contract, Leestma had until May 14, 2005 to file suit. However, Leestma did not file suit until April

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<sup>29</sup> RP 35 and 37.

<sup>30</sup> CP 59.

19, 2007—well after *both* the relevant three-year and six-year statutes of limitations for his causes of action expired. On that basis, the trial court’s summary judgment dismissal under CR 56 of Leestma’s suit with prejudice was correct.

**2. Leestma’s Fraudulent Concealment Argument**

Leestma cites *Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163 (1997) in the “Statement of Facts” section of his appellate brief and mentions that the Roberts “breached an affirmative duty to disclose the division of land.” This apparently constitutes an act of fraudulent concealment that tolls the statute of limitations. However, this is the first time Leestma has raised such an argument. Arguments or theories not presented to trial court will generally not be considered on appeal. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 840 P.2d 860 (1992). RAP 2.5(a) also states that an “appellate court may refuse to review any claim of error which was not raised in trial court” but allows for exceptions which include (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. However, Leestma’s fraudulent concealment argument does not fall within these exceptions.

Even if Leestma’s fraudulent concealment argument was not new, it should still be rejected. This is because Leestma has been inconsistent

regarding with his claims on when the alleged breach occurred or when he became aware of it. His first complaint gives no specific date.<sup>31</sup> His first amended complaint in paragraph 3.22 states, “On December 16 2005, plaintiff discovered information sufficient to understand that defendant’s intentional actions induced him to enter a ‘switch and bait’ real property transaction.” This allegation remains unchanged in Leestma’s second amended complaint.<sup>32</sup> However, in the Plaintiff’s Statements of Fact, Leestma indicates that in September 2002 he discovered “there is an easement on the face of the 1998 Roberts Short Plat” and “a breach of contract contradicting the Escrow Closing Instructions.”<sup>33</sup> Also, Leestma attached a declaration from George E. Stuivenga dated April 16, 2005 attesting to the fact that on some unspecified date, Leestma indicated he thought the Roberts cheated him out of \$5,000 and three acres and that apparently later, during the fall of 2002, the Roberts moved the fence between their property and Leestma’s and used the easement as a driveway.<sup>34</sup> Leestma put forth yet another date of discovery during the summary judgment hearing when he admitted that he thought he had been “scammed” after he received a copy of the recorded short plat and right

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<sup>31</sup> CP 1-5.

<sup>32</sup> CP 11-19.

<sup>33</sup> CP 178

<sup>34</sup> CP 180-181.

after he and Roberts executed the short plat *in spring 1999*.<sup>35</sup> Finally, in his appellate brief, Leestma seemingly settles on sometime in October 2002 which is when he “discovered an easement encumbering the conveyance” and began “investigating persistently until he discovered the bait and switch.”<sup>36</sup>

The varying dates on which Leestma says he realized there may have been something wrong with his real estate transaction with Roberts ultimately do not matter that much in this case. This is because no legal action was taken soon after any of them. What *does* matter is the date he actually did file suit: April 19, 2007. This is because by that time, the statute of limitations on all his claims had expired. The date the statutes of limitations began running was May 14, 1999 when the Quit Claim Deed was filed and recorded.<sup>37</sup> That fact and law supporting it has not been refuted or challenged.

### **C. REQUEST FOR ATTORNEY FEES, EXPENSES, AND SANCTIONS**

Leestma’s appeal is frivolous. Thus, the Roberts are requesting reasonable attorney fees and legal expenses related to this appeal pursuant to RAP 18.1 and sanctions pursuant to RAP 18.9(a), which states:

The appellate court on its own initiative or on motion of a

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<sup>35</sup> RP 27, RP 30.

<sup>36</sup> Brief of Appellant [sic], page 8.

<sup>37</sup> RP 35 and 37; CP 59.

party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *Green River Community College, Dist. No. 10 v. Higher Educ. Personnel Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986). When determining whether an appeal is frivolous, justifying the imposition of terms and compensatory damages, the court will consider: (1) that a civil appellant has a right to appeal under RAP 2.2, (2) that all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant, (3) that the record should be considered as a whole, (4) that an appeal that is affirmed simply because the arguments are rejected is not frivolous, and (5) that an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Public Employees Mut. Ins. Co. v. Rash*, 48 Wn.App. 701, 740 P.2d 370 (1987).

In this case, Leestma has never contested or even addressed the factual and legal basis of the trial court's dismissal on grounds he waited

too long to file suit. His appeal has no debatable issues upon which reasonable minds might differ and is so totally devoid of merit that there is no reasonable possibility of reversal. It seems to exist for the purposes to generating harassment, delay, and needless legal costs. For the Roberts, Leestma's appeal constitutes an unwarranted waste of time and expense. Because of this, the imposition of sanctions is appropriate here.

Furthermore, the Roberts request imposition of sanctions on Leestma under RAP 10.7 for his failure to submit an appellate brief complying with the standards of RAP 10.3(a). Even though Leestma was given the opportunity to go back and revise his brief, it still lacks the coherence necessary to enable the reader to discern exactly what the legal basis of his appeal is. In particular, Leestma seems to be confused about what he is supposed to do in the "Statement of the Case" and the "Argument" sections. The "Argument" section, for example, consists of nothing but assertions and lacks any citations to legal authority.<sup>38</sup> See RAP 10.3(a)(5). Contentions unsupported by legal argument need not be considered on appeal. See *Island County v. Mackie*, 36 Wn.App. 385, 675 P.2d 607 (1984). There is also the fact the revised brief by Leestma was neither typed nor printed in "12 point or larger type" according to the

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<sup>38</sup> Brief of Appellant [sic], pgs. 9-11.

format requirements of RAP 10.4(a). In short, Leestma's appellate brief was not proper according to requirements set forth in the RAP.

## VI

### CONCLUSION

For the reasons stated in this brief, the Respondents William and Wanda Roberts ask this court to affirm the trial court's summary judgment in their favor. The Roberts further request the Appellant Randall Leestma be made to pay their attorney fees, legal costs, and that sanctions be imposed on him.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of June 2012.

LLOYD A. HERMAN & ASSOCIATES, P.S.



LLOYD A. HERMAN

WSBA # 3245

Attorney for the Respondents

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of June 2012, I sent

by:

\_\_\_\_\_ Electronic mail;

\_\_\_\_\_ facsimile;

✓ \_\_\_\_\_ U.S. Mail; and/or

\_\_\_\_\_ personal delivery;

true and correct copies of the foregoing to the following:

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