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

No. 31740 -4

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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SHARON SHEPARD,

Appellant,

v.

DAVID HOLMES and LORAINÉ HOLMES,  
ERA SUN RIVER REALTY, and  
CHICAGO TITLE INSURANCE COMPANY

Respondents

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APPELLANT SHARON SHEPARD'S BRIEF

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BENJAMIN DOW, WSBA #39126

**DOW LAW FIRM**

1060 Jadwin Ave, Ste 125

Richland, WA 99352

Attorney for Sharon Shepard

**TABLE OF CONTENTS**

A. Table of Authorities.....2

B. Court Rules.....3

C. Preliminary Statement.....4

D. Statement of Case.....5-11

E. Legal Argument.....11-23

## TABLE OF AUTHORITIES

### CASES

<i>Lewis v. Bell</i> .....	11, 12
<i>Molloy v. City of Bellevue</i> .....	11
<i>Caruso v. Local Union No. 690 Int'l Bhd. Of Teamsters</i> .....	14, 16
<i>Appliance Buyers Credit Corp. v. Upton</i> .....	14
<i>Pernie Walla v. Johnson</i> .....	14, 16
<i>Tagliani v. Colwell</i> .....	15, 16
<i>Forman v. Davis</i> .....	15
<i>Strong v. Clark</i> .....	18
<i>First Maryland Leasecorp v. Rothstein</i> .....	18
<i>Green v. A.P.C</i> .....	18
<i>McRae v. Bolstad</i> .....	19
<i>Alexander Myers &amp; Co., Inc. v. Hopke</i> .....	19
<i>Bennet v. Computer Task Group, Inc</i> .....	21

**COURT RULES**

CR 12(b)(6).....6  
CR 15(b).....10  
CR 8.....11, 13  
CR 8(a).....11  
CR 15(a).....15  
RCW 4.16.080(4).....17, 18  
RCW 64.06.020.....19  
RCW 4.16.040(1).....21  
RCW 4.16.080.....21

## **I. PRELIMINARY STATEMENT**

Plaintiff Sharon Shepard (“Ms. Shepard”) brought the underlying suit against three defendants based on causes of action arising out of a real estate transaction executed in 2007. Ms. Shepard was the purchaser of the parcel in question, and the defendants include the real estate sellers (“the Holmes”), the seller’s listing agent (“ERA”), and the title insurance company (“Chicago Title”). As represented by the defendants both orally and in writing, the parcel consisted of four separate lots that could be sold individually.

The basis for the present suit arose in 2011 when Ms. Shepard learned that the parcel could not be sold as 4 individual lots, and did not conform to the real estate listing, real estate contract, or title insurance policy. Unknown to Ms. Shepard, the property was subject to a deed of consolidation filed in 1998; a deed which prevented her from selling the lots individually thereafter because of changes in the zoning requirements.

According to the trial court, Ms. Shepard’s claims were barred by the relevant statutes of limitations because she should have known of the defective title despite the false representations of the Holmes, ERA, and Chicago Title.

## II. STATEMENT OF CASE

### A. Background Facts

In 2007, Ms. Shepard and her then husband where in the real estate market looking for an investment property. *CP at 26*. This led Ms. Shepard and her husband to the Holmes, who were selling a parcel of unimproved property that was represented as one lot consisting of four individual lots. *Id.*

The Holmes orally represented that the four lots could be resold individually. *Id.* The same representation was made by agents of ERA and Chicago Title. *CP at 2, 26, 27*. All three defendants represented that the legal description of the property consisted of: lots 1, 2, 3, and 4, as delineated on short plat No. 865, recorded under Auditor's Recording No. 804872, records of Benton County, Washington. *Id.*

This representation was further consistent with the written MLS listing of ERA which included a plat map consisting of four lots (*CP at 27*), and a title insurance policy from Chicago Title. *CP at 171-182*. The title insurance policy that contained not only the legal description above (*CP at 176*), but a short plat map indicating that the parcel consisted of four lots. *CP at 180*. Under Schedule A of the policy, the parcel was referred to as: "Lots 1, 2, 3 and 4, as delineated on Short Plat No. 865,

recorded under Auditor's Recording No. 804872, records of Benton County, Washington." *CP at 176.*

Ms. Shepard ultimately entered into a written purchase and sale agreement that included the same legal description above, indicating that the parcel consisted of four separate lots. *CP at 107.* The purchase and sale agreement was executed on July 15, 2007, and signed by both the Holmes and ERA. *Id.*

In the summer of 2011, Ms. Shepard learned that the parcel was actually subject to a previous deed of consolidation. *CP at 27.* Ms. Shepard learned of the deed of consolidation from the Benton County Planning Department after inquiring into whether she could use one well as a community well for several of the lots. *Id.* In response, Ms. Shepard was informed that the property was not actually short platted, because of a deed of consolidation filed by the Holmes in 1998. *Id.* This deed changed the character of the parcel from four lots to one tract. *Id.*

**B. Ms. Shepard files an action against the Holmes, ERA, and Chicago Title**

In response to learning of the deed of consolidation, Ms. Shepard filed an action in Benton County Superior Court. *CP at 1.* The Complaint listed the Holmes, Sun River, and Chicago Title as defendants. *Id.* Under the heading "Contract Formation," Ms. Shepard alleged that defendants

Holmes, Sun River, and Chicago Title represented that the parcel consisted of four lots, and received consideration from the transaction. *CP at 2*. Under the heading “Default/Breach,” the Complaint alleged that defendants Holmes, Sun River, and Chicago Title “breached their agreements with the Plaintiff and have caused considerable monetary damages...” *Id. at 3*. The Complaint included additional causes of action under the headings of “Bad Faith Failure to Pay a Covered Title Insurance Claim” (*CP at 3*), “Breach of Contract” (*CP at 4*), “Misrepresentation and Consumer Protection Act Violation” (*CP at 4*), and “Failure to Pay a Covered Title Insurance Claim in Bad Faith and [...] Disclose Recorded Defects of Title and Misrepresentation” *CP at 5*.

**C. ERA files a motion to dismiss under CR 12(b)(6), which was converted to summary judgment**

Defendant ERA responded by filing a CR 12(b)(6) motion to dismiss the claims for negligent misrepresentation and violation of the Consumer Protection Act. *CP at 10-12*. The basis for the motion was that both claims were barred by the applicable statute of limitations. *Id.* A hearing on the motion was held on March 10, 2013, where the trial court converted the motion to one for summary judgment. *RP 3/10/13 at 10*. At the conclusion of the hearing, the trial court set a date for the trial court’s oral ruling and without further oral argument. *RP, 3/29/13, at 25*.

After the hearing on ERA's motion to dismiss, and prior to the hearing on the court's final ruling, Ms. Shepard obtained by way of subpoena a copy of the original purchase and sale agreement. *CP at 105-06*. Ms. Shepard did not have a copy of the document previously because it remained in her husband's possession following their divorce, and the real estate broker would not release a copy absent a subpoena. *Id.* The purchase and sale agreement listed ERA as a contracting party, and included the erroneous legal description at issue. *Id.*

Prior to the hearing set for the trial court's ruling, Ms. Shepard argued for a continuance of the hearing, and time to address the legal efficacy of the recently discovered purchase and sale agreement. *RP, 3/21/13, at 8, 9*. The basis for the request was that the existence of a written contract signed by ERA was significant to whether a six year statute of limitations applied. *Id.* The trial court denied the request.

On March 29, 2013, a hearing was held where the trial court issued its oral ruling. The trial court granted summary judgment after concluding that the statute of limitations began to run in 2007 when Ms. Shepard purchased the property, and not in 2011 when she learned that the property did not actually consist of four lots. *RP 3/29/2013, at 28-29*. The trial court concluded by stating for the first time that it did not view the

complaint as including a claim for breach of contract against ERA. *Id.* at 29.

In response, Ms. Shepard's counsel made the following argument under the notice pleading rule, and request for leave to amend:

Mr. Ben Dow: Your Honor, just for purposes of preserving the record, the complaint does allege a breach of contract. That is in the complaint. And I think under the notice preceding [sic] all that was sufficient. And if the court maintains that it was not, we would ask for permission to file a motion for leave to amend the complaint if we need to specifically outlay, in further detail, a breach of contract claim. *RP*, 3-29-13, at 30.

The trial court denied the motion, stating: "I have read through the complaint and I don't see that there was any assertion of any claim against ERA regarding breach of contract, so the court's going to deny the motion." *Id.*

After the trial court's ruling denying the oral motion for leave to amend, but before the entry of an order on summary judgment, Ms. Shepard filed a written motion seeking leave to amend and include a breach of contract claim based upon the discovered purchase and sale agreement. *CP* at 311-317.

A hearing on the entry of an order granting summary judgment and on the motion for leave to amend was held on May 17, 2013. The trial court first addressed ERA's proposed order on summary judgment. Here, ERA argued that it was entitled to attorney's fees based on the provisions of the purchase and sale agreement. *RP, 5-17-13, at 32-33, 34-35.* Ms. Shepard argued that ERA could not seek attorney's fees under the agreement, while at the same time argue that Ms. Shepard did not raise a claim for breach of contract. *Id. at 33.* Relying on the purchase and sale agreement, the trial court granted ERA attorney fees:

It does appear there from the contract, the agreement that a broker would be entitled to their attorney fees from litigation arising out of the transaction...I think that the contract is clear and that there is coverage for attorney fees for the broker and no argument that they're not reasonable, the court will grant the order. *RP, 5-17-13, at 36.*

After granting ERA attorney fees based on the purchase and sale agreement, the trial court denied Ms. Shepard's motion for leave to amend based on a claim for breach of the contract under the agreement:

[T]he court made its ruling on this matter um, some weeks ago...At that time there was an oral motion made to amend the complaint. I did not think that was timely. And in regard to the

current motion, I don't believe it's timely either. The portion of the rule that allows for amendment after a judgment is 15(b) I believe. So when an issue not raised by the pleadings are tried by the express or implied consent of the parties it shall be treated in all respects as if they had been raised in the pleadings. This amendment of the pleadings as may be necessary to cause to conform to the evidence and to raise these issues being made upon motion of any party at any time even after judgment. In this case there was not trying of issues by express or implied agreement of the parties. It was raised and objected to after the court had made its ruling regarding the other issues in this matter. The court does not believe that at this point the court has the authority to amend the complaint as the matter against Sun River ERA has been dismissed. And as I say, I don't believe CR 15(b) can be applied to this situation because there was not implied or express consent of the parties to try the issue of breach of contract so the court will deny the motion to dismiss, to amend excuse. *RP, 5-17-13, at 48-49.*

## **II. LEGAL ARGUMENT**

### **A. Ms. Shepard properly raised a claim for breach of contract pursuant to the notice pleading rule**

The trial court erroneously concluded that Ms. Shepard's complaint did not raise a claim for breach of contract against ERA. Ms. Shepard's complaint was sufficient to raise this claim pursuant to the notice pleading rule under CR 8, when it alleged that Ms. Shepard entered into a written purchase and sale agreement, that ERA acted as an agent of the Holmes, that Ms. Shepard relied on the documents executed upon closing, and that ERA breached its agreement with Ms. Shepard. This is particularly true where ERA sought attorney fees against Ms. Holmes based on the purchase and sale agreement.

Under the liberal rules of procedure, pleadings are intended to give notice to the court and the opponent of the general nature of the claim asserted. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). Although inexperienced pleading is permitted, insufficient pleading is not. *Lewis*, 45 Wn. App. at 197. "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Lewis*, 45 Wn. App. at 197 (citation omitted); *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (complaint must apprise defendant of the nature of plaintiff's claims

and legal grounds upon which claim rests). A complaint for relief should contain: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." CR 8(a).

In the present case, Ms. Shepard's complaint alleged under the heading of "Contract Formation" that the Holmes executed a written purchase and sale agreement, and that ERA "act[ed] as the seller's agent." *CP at 2*. Under the heading "Completion of Contract," Ms. Shepard alleged that "[n]one of the paperwork provided at closing disclosed that the property had been previously reconsolidated by a Deed of Consolidation[.]" *Id.* Under the heading "Default/Breach," Ms. Shepard claimed that the fact of the consolidation "had never been disclosed to [the Shepards] by any of the Defendants[...]" and that "Defendants Holmes, ERA Sun and Chicago Title have all breached their agreements with Plaintiff[.]" *CP at 3*. Under the heading "Requested Relief," the complaint stated that "Plaintiff seeks judgment against Defendants after the court determines the amount of monetary damages suffered due to the breach by Defendants[.]" *CP at 4*. And, under the heading of "Causes of Action," the complaint states that: "All facts, allegations and requests for relief cited above are hereby realleged as though fully set forth." *Id.*

While Ms. Shepard's complaint may be criticized as inexpert, it cannot be said that ERA lacked notice of the general nature of the claims asserted. *See Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). The complaint repeatedly referenced ERA in the context of the formation of a contract under the purchase and sale agreement, the failure of the defendants to complete the contract, the ultimate breach of the contract, and a request for relief based on ERA's breach. Finally, the fact that ERA sought attorney fees on the basis that Ms. Shepard's claims should be dispositive alone.

Given the above, Ms. Shepard's complaint satisfied the notice pleading requirements of CR 8 regarding the claim that ERA breached a written contract. The trial court's finding that Ms. Shepard did not bring a claim for breach of contract should therefore be reversed.

**B. The trial court erred by denying Ms. Shepard's motions for leave to amend**

The trial court should be reversed based on its failure to grant Ms. Shepard's two motions for leave to amend the pleadings based on claim for breach of contract. At a hearing on ERA's motion for summary judgment, Ms. Shepard learned for the first time that the trial court did not read the complaint to include an action for breach of contract. Ms. Shepard made an oral motion for leave to amend the complaint, and

subsequently a written motion for leave to amend prior to the formal entry of the order granting summary judgment. The trial court denied both motions on the basis that they were untimely:

At [the] time [of Sun River's motion to dismiss], there was an oral motion made to amend the complaint. I did not think that was timely. And in regard to the current [written] motion, I don't believe it's timely either. *RP, May 17, 2013, at 48.*

However, a finding of undue delay alone is not a sufficient basis for denying a motion for leave to amend. Rather, the trial court was required to make an additional finding of prejudice to ERA before denying the motions.

In *Caruso v. Local Union No. 690 Int'l Bhd. Of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983), the Supreme Court of Washington upheld a trial court's ruling granting leave to amend more than 5 years 4 months after the original complaint. "We have held that undue delay on the part of the movant in proposing the amendment constitutes grounds to deny a motion to amend only 'where such delay works undue hardship or prejudice upon the opposing party.'" *Id. at 349*, quoting *Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 800, 399 P.2d 587 (1965). The court further explained that delay alone is not a basis for denying leave to amend: "This holding is in accord with the holding of many courts that

delay, excusable or not, in and of itself is not sufficient reason to deny the motion.” *Id.* (citations omitted).

In *Pernie Walla v. Johnson*, 50 Wn.App. 879, 751 P.2d 334 (1988), the Court of Appeals reversed a trial court’s denial of leave to amend brought three months before trial. Here, the Court stated that the denial of leave to amend based solely on undue delay is an abuse of discretion. *Id. at 884.* The fact that the motion was brought three months prior to trial still allowed “sufficient time to conduct adequate discovery and prepare a case for trial, absent special circumstances.” *Id.* While the non-moving party’s affidavit stated that “it would be impracticable or impossible to prepare for trial,” the Court concluded that “[s]uch conclusory assertions do not rise to the level of showing actual prejudice.” *Id.*

In *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207 (1973), the Court of Appeals reversed a trial court’s denial of leave to amend after the movant sought to add two additional causes of action after summary judgment had been argued, but before formal entry of the order granting summary judgment. In reversing the trial court’s denial of leave to amend, the Court quoted the United States Supreme Court in *Forman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S.Ct. 227 (1962):

Rule 15(a) declares that leave to amend “shall be freely given when justice so requires”; this mandate is to be heeded...If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant,...the leave sought should, as the rules require, be “freely given.” *Tagliani v. Colwell*, *supra* at 233.

In the present case, Ms. Shepard’s oral and written motions to amend were brought within four months of the complaint. This is a far cry from the 5 years 4 months allowed under *Caruso v. Local Union No. 690 Int’l Bhd. Of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983). Ms. Shepard’s motions were also brought prior to the deadline of three months before trial allowed under *Pernie Walla v. Johnson*, 50 Wn.App. 879, 751 P.2d 334 (1988). And, the present facts are nearly identical to *Tagliani v. Colwell*, 10 Wn.App. 227, 517 P.2d 207 (1973), where Ms. Shepard’s motions were brought prior to formal entry of the order granting summary judgment. Finally, the trial court also failed to make any finding that ERA would have been prejudiced by granting the motions, or left unprepared for trial.

In light of the above, the trial court committed reversible error by denying Ms. Shepard's motions for leave to amend the complaint.

**C. The trial court erred by granting summary judgment based upon the statute of limitations**

The trial court erroneously granted summary judgment in favor of both ERA and Chicago Title based on the decision of *Strong v. Clark*, 56 Wn.2d 230, 352 P.2d 183 (1960). *RP*, 3/29/13, at 28, and 5/24/13 at 32-33. Under *Strong*, "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." *Strong*, 56 Wn.2d 230, 232. However, *Strong* is inapposite to the present case for several reasons.

First, applying the rule in *Strong* to the present case would improperly transform the limitation period under RCW 4.16.080(4) into a statute of repose, not a statute of limitations. Here, the statute of limitations began to run in 1998 when the deed of consolidation was recorded. Because Ms. Shepard did not purchase the property until 2007, the limitation period would have already expired.

The application of RCW 4.16.080(4) in a manner which creates a statute of repose was rejected in *First Maryland Leasecorp v. Rothstein*, 72 Wn.App. 278, 864 P.2d 17 (1993):

If the limitation period for fraud commences upon discovery of the fraudulent acts, regardless of when damages were incurred, RCW 4.16.080(4) would be a statute of repose, not a statute of limitations. A statute of limitation limits the time in which an aggrieved party may bring suit after a cause of action accrues. A statute of repose potentially bars a suit before the cause of action even arises.

In interpreting statutes, the court is to ascertain and give effect to the intent and purpose of the Legislature as expressed in the act as a whole. Statutes should not be interpreted in a manner which yields insupportable, unlikely or strained consequences... There is no indication the Legislature intended to protect those accused of fraud by imposing a relatively short 3-year statute of repose based solely on discovery of fraudulent acts. *First Maryland Leasecorp v. Rothstein*, 282-83 (internal citations omitted).

Applying these principals to the present case, the statute of limitations should not have been deemed to commence upon the recording of the deed of consolidation. Rather, the limitation period began when

Ms. Shepard learned that the parcel was subject to a single lot, and could not be re-zoned back to 4 lots thereafter.

Second, the trial court improperly applied the *Strong* decision because the constructive notice doctrine does not overcome Ms. Shepard's right to rely on the actual representations of parties. Where a seller or their agent make affirmative representations regarding real property that conflict with the actual title, the buyer should not be charged with constructive notice to the contrary. In every real estate transaction, the seller and his agents have a duty to disclose to the buyer all material facts not reasonably ascertainable. *McRae v. Bolstad*, 32 Wn.App. 173, 176-77, 646 P.2d 771 (1982). Breach of this duty is fraud. *Id.* At 177. Further, a real estate seller has a statutory duty to disclose the material facts about the property. *RCW 64.06.020*. For example, if the buyer cannot reasonably ascertain the property boundaries without a survey, the buyer may rely on the seller's representations about the boundaries. *Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 455, 565 P.2d 80 (1977).

Here, the Holmes, ERA, and Chicago Title all made affirmative representations that the parcel in question consisted of four lots. This untruth could not be uncovered by visual inspection, similar to boundaries without a survey. However, Ms. Shepard was presented with a certified plat map that appeared to confirm that the plot consisted of four lots.

Based on the above authorities, she was entitled to rely on these representations, and should not be charged with constructive knowledge to the contrary. The statute of limitations should not have commenced, then, until Ms. Shepard actually learned of the deed of consolidation and that the property could not be re-zoned to four lots.

Finally, the holding in *Strong* is premised upon constructive notice: “Actual knowledge of the fraud will be inferred if the aggrieved party, by the exercise of due diligence, could have discovered it.” *Strong*, 56 Wn.2d 230, 232. Implicit in the doctrine of constructive notice is that actual knowledge will only be imputed if the party did not exercise due diligence in discovering the salient facts. Yet here, Ms. Shepard made specific inquiries to the Holmes, ERA, and Chicago Title regarding whether the property consisted of four lots. All three parties responded affirmatively, and responded with the same plat map showing four lots. Her reliance on this plat map was particularly appropriate, when Chicago Title as her agent produced an identical document. The question left unanswered by the trial court, then, is what steps Ms. Shepard should have taken when three separate individuals with either personal knowledge as the owners, or professional knowledge as a realty and title company, all proffered the same plat map of four lots. Ms. Shepard made a diligent inquiry, and the

statute of limitations should not have commenced until she had actual knowledge of the prior deed of consolidation.

**D. The trial court erred by awarding ERA attorney fees based on the purchase and sale agreement**

The trial court erred by awarding ERA attorney fees on the purchase and sale agreement after concluding that Ms. Shepard did not sufficiently plead a claim on the contract. The trial court ruled that Ms. Shepard's complaint was limited to claims for negligent misrepresentation and violations of the CPA, and refused to recognize a claim on the contract for breach or otherwise. However, the trial court erred by ruling that Ms. Shepard did not bring a claim on the contract, yet thereafter awarded attorney's fees based on the agreement.

First, if the trial court viewed Ms. Shepard's claims for negligent misrepresentation and violations of the CPA as arising out of the purchase and sale agreement, then a six year statute of limitations should have applied. See RCW 4.16.040(1). However, the trial court applied the three year limitation period for torts. See RCW 4.16.080.

Assuming arguendo that the trial court properly applied a three-year limitation period, it would be because Ms. Shepard's claims were not upon "a liability express or implied arising out of a written agreement," but because ERA's duty arose "from sources external to the agreement."

*Bennet v. Computer Task Group, Inc.*, 112 Wn.App. 102, 109, 47 P.3d 594

(2002). Taking this as true, the trial court erred by awarding ERA attorney fees for claims that arose outside of the purchase and sale agreement.

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Benjamin Dow, WSBA #39126  
Attorney for Sharon Shepard