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DEC 26 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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317404

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

SHARON SHEPARD

Appellant,

v.

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

Respondents

RESPONDENT ERA SUN RIVER REALTY'S BRIEF

ERA Sun River Realty
Shea C. Meehan, WSBA #34087
Bret Uhrich, WSBA #45595

1333 Columbian Park Trail, Ste 220
Richland, WA 99352
(509) 735-4444 – Telephone
509 735-7140 – Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES	Page 2
INTRODUCTION	Page 4
STATEMENT OF THE CASE	Page 6
STATEMENT OF THE ISSUES	Page 11
ARGUMENT	Page 12

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Aberdeen Federal Savings and Loan Association v Hanson</i> , 58 Wn. App. 773, 794 P.2d 1322 (1990).	15
<i>Absher Const. Co. v. Kent Sch. Dist. No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1995).	35-36
<i>American Pipe & Construction Co. v. Harbor Construction Co.</i> , 51 Wn.2d 258, 266, 317 P.2d 521 (1957.)	32
<i>Allen v. Graaf</i> , 179 Wash. 431, 38 P.2d 236 (1934).	14
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).	36
<i>Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots, W. Coast & Pac. Region Inland Div., Branch 6</i> , 92 Wn.2d 762, 600 P.2d 1282 (1979).	31
<i>Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.</i> , 166 Wn.2d 475, 209 P.3d 863 (2009).	27; 30
<i>Davidheiser v. Pierce County</i> , 92 Wn. App. 146, 960 P.2d 998 (1998).	12
<i>Davis v. Rogers</i> , 128 Wash. 231, 222 P. 499 (1924).	14
<i>Dewey v. Tacoma Sch. Dist. No. 10</i> , 95 Wn. App. 18, 974 P.2d 847 (1999).	20; 26
<i>Failes v. Lichten</i> , 109 Wn. App. 550, 37 P.3d 301 (2001).	35
<i>First Maryland Leasecorp v. Rothstein</i> , 72 Wn. App. 278, 864 P.2d 17 (1993).	13
<i>Gardner v. First Heritage Bank</i> , 175 Wn. App. 650, 303 P.3d 1065 (2013).	28
<i>Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.</i> , 71 Wn.2d 679, 430 P.2d 600 (1967).	23; 31
<i>Highland Sch. Dist. No. 203 v. Racy</i> , 149 Wn. App. 307, 202 P.3d 1024 (2009).	36
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 937 P.2d 154 (1997).	27-29
<i>Irwin v. Holbrook</i> , 32 Wash. 349, 73 P. 360 (1903).	16
<i>Key Design Inc. v. Moser</i> , 138 Wn.2d 875, 983 P.2d 653 (1999).	17-18
<i>Lewis v. Bell</i> , 45 Wn. App. 192, 724 P.2d 425 (1986).	20
<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 145 Wn.2d 178, 35 P.3d 351 (2001).	13
<i>Ramos v. Arnold</i> , 141 Wn. App. 11, 169 P.3d 482 (2007).	32

<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).	24
<i>State v. Hanson</i> , 59 Wn. App. 651, 800 P.2d 1124 (1990).	23; 31
<i>Steele v. Lundgren</i> , 96 Wn. App. 773, 982 P.2d 619 (1999).	36
<i>Strong v. Clark</i> , 56 Wn.2d 230, 352 P.2d 183 (1960).	14-16
<i>Tenco, Inc. v. Manning</i> , 59 Wn.2d 479, 368 P.2d 372, (1962).	17
<i>Walla v. Johnson</i> , 50 Wn. App. 879, 751 P.2d 334 (1988).	24
Statutes and Court Rules	Page(s)
RCW § 4.16.080	12
RCW § 4.84.330	34
RCW § 19.86.090	13
RCW § 19.86.120	12
RCW § 65.08.070	14
CR 6	25-26
CR 12	7
CR 15	25-26
RAP 18.1	37
Secondary Sources	Page(s)
Restatement (Second), Agency § 328 (1958)	31

I. INTRODUCTION

This appeal arises out of a real estate transaction. Sharon Shepard (Ms. Shepard), the appellant, was the buyer of the property. ERA Sun River Realty (“Sun River”), the respondent, was the seller’s real estate agent. Ms. Shepard bought the property in July of 2007. Ms. Shepard alleges that when she bought the property, she was told the property was legally described as “Lots 1, 2, 3, and 4 of Short Plat 865.” She also alleges that she was told that the lots could be segregated and sold individually.

In 2011, Ms. Shepard went to the Benton County Planning Department to determine the septic requirements for selling the lots individually. She was told by the planning department that her lot was subject to a Deed of Consolidation recorded in 1998. She was also told that, at the time of the sale, she could have rescinded the deed and sold the lots individually. However, as there were now intervening density requirements imposed by the County, the lots could no longer be sold individually.

In December 2012, Ms. Shepard filed suit against the seller for breach of contract, against Sun River for misrepresentation and a Consumer Protection Act violation (“CPA”); and against Chicago Title for

bad faith failure to pay a covered title insurance claim, failure to disclose defects in title and misrepresentation.

As the statute of limitations is three years for misrepresentation and four years for CPA violations, Ms. Shepard filed this lawsuit well after the statute of limitations had run. Because the Deed of Consolidation that is the basis for the “misrepresentation” was recorded in 1998, Ms. Shepard was on constructive notice that her claims had accrued and therefore the statute of limitations began running immediately.

In addition to filing past the statutes of limitation deadlines, neither of the “misrepresentations” alleged by Ms. Shepard are actually misrepresentations. The property is legally described as “Lots 1, 2, 3, and 4 of Short Plat 865.” This was and continues to be the proper legal description for the property purchased by Ms. Shepard. The claim allegedly made by Sun River that the property could be segregated and sold separately is also not a misrepresentation because it is uncontroverted that this statement was true at the time it was made. Sun River cannot be held responsible for future changes to the law.

After the trial court orally granted summary judgment to Sun River based on the statute of limitations, Ms. Shepard alleged for the first time that there was also a breach of contract claim against Sun River based on the Real Estate Purchase and Sale Agreement (“REPSA”). However, the

complaint clearly alleged only a breach of contract claim against the sellers Dan and Loraine Holmes. As Sun River was a disclosed agent of the sellers, it was not a party to the contract. The trial court properly rejected untimely motions to amend the complaint to add a breach of contract claim against Sun River. This appeal followed.

II. STATEMENT OF THE CASE

Factual Background

On July 14, 2007, David Speer entered into a REPSA to purchase property in Benton County, Washington. *CP at 107-118*. In the REPSA addendum, Mr. Speer assigned his entire interest in the contract to Ms. Shepard and her husband. *CP at 118*. The REPSA contained an agency disclosure section that identified Sun River as the seller's agent. *CP at 107*. The REPSA identified the land being purchased as "Lots 1, 2, 3 & 4 Short Plat 865 R 26/ T 9/ Sec 18." *CP at 107*. The REPSA identified the single tax parcel number associated with the tract as 118962010865005. *CP at 107*.

Ms. Shepard alleges that she was told by the seller "through their agent ERA [...] that the above property was subject to Short Plat No. 865 and had individual lots 1, 2, 3, and 4 which could be independently sold." *CP at 2*. In 2011, Ms. Shepard went to the Benton County Planning Department to determine the septic requirements for selling the lots. *CP*

at 27. Ms. Shepard was told that the property was subject to a Deed of Consolidation recorded in 1998. *CP at 27.* She was advised that she could have rescinded the deed when she bought the property, but that subsequent County density requirements made the individual sale of lots no longer possible. *CP at 27.*

On December 20, 2012, Ms. Shepard filed the present lawsuit. *CP at 1.* In the complaint, Ms. Shepard alleged a breach of contract claim against the seller. *CP at 4.* Ms. Shepard alleged misrepresentation and a CPA violation against Sun River. *CP at 4.* She also alleged bad faith, failure to disclose title defects, and misrepresentation against Chicago Title. *CP at 5.*

Summary Judgment Granted Dismissing Claims Against Sun River

On February 25, 2013, Sun River filed a motion to dismiss Shepard's claims under CR 12(b)(6) based on the statute of limitations for both the CPA and misrepresentation claims. *CP at 15; CP at 16-19.* The statute of limitations for misrepresentation is three years. RCW § 4.16.080(2). The statute of limitations for CPA claims is four years. CR § 19.86.120. Shepard opposed the motion arguing that the discovery rule applied. *CP at 20-25.* She also filed a declaration in opposition to the motion to dismiss. *CP 26-28.* As the court considered evidence outside

the pleadings, the trial court applied the summary judgment standard. CR 12(b)(6); *RP*, 3/29/13 at 30.

In response to Ms. Shepard's declaration, Sun River filed a supplemental memorandum in support of summary judgment. *CP* at 66-72. In the memorandum, Sun River argued in addition to the statute of limitations, the uncontroverted declaration of Ms. Shepard showed that no misrepresentation occurred because the declaration admitted that she could have sold the lots individually if she had done so in 2007. *CP* at 71. On March 29, 2013, the trial court determined that while the discovery rule could generally apply to Shepard's claims, the recorded consolidation deed constituted constructive notice to all persons with an interest in the property and subsequent purchasers. *RP*, 3/29/13 at 28. As a result, the trial court determined that the statute of limitations began to run in July 2007. *RP*, 3/29/13 at 28. Because both claims asserted against Sun River were not made until five-and-one-half years after the transaction, the trial court orally granted the summary judgment motion. *RP*, 3/29/13 at 29.

Motion for Leave to Amend the Complaint

After the court orally dismissed the claims against Sun River, Shepard's attorney asserted for the first time that the complaint actually included a breach of contract claim against Sun River as well. *RP*, 3/29/13 at 39. The complaint acknowledged that Sun River acted as an

agent of the seller and specifically alleged a breach of contract claim solely against the seller. *CP at 2; 4*. Nowhere in Ms. Shepard's response to the motion to dismiss did she reference a breach of contract claim against Sun River. *CP 20-25*.

After the ruling, Shepard's attorney asked permission of the court to file an amend complaint to add a breach of contract claim against Sun River. *RP, 3/29/13 at 29-30*. The oral motion did not attach the proposed amended complaint and Sun River was not given five days' notice of the motion. *See RP, 3/29/13 at 30*. The trial court denied the oral motion to amend. *RP, 3/29/13 at 30*. The court asked the Sun River's attorney to draft an order granting summary judgment and provide it to Ms. Shepard's attorney. *RP, 3/29/13 at 30*.

On April 9, 2013, Sun River's attorney sent an order to Shepard's attorney for review and signature. *CP at 334*. The order was sent to Shepard's attorney again on April 17, 2013. *CP at 332*. After assurance from Shepard's attorney "I can sign if you send it again," Sun River's attorney sent the order for a fourth time and stated he would make a special setting in front of the court for presentment if it was not signed by Shepard's attorney. *CP at 329*. Once again, Shepard's attorney did not sign the order on summary judgment which then had to be noted for presentment. *RP, 5/17/13 at 29*.

Despite being delayed almost month by Shepard's attorney's repeated assurances and ultimate failure to sign the order, Sun River's attorney was still able note the order for presentment before Shepard filed the motion for leave to amend the complaint. *RP 5/17/13 at 29; CP at 311*. At the hearing, Sun River's attorney asked that the court address the order of dismissal before the motion for leave to amend as the notice of presentment was filed first. *RP 5/17/13 at 29*. Shepard's attorney said that he had no objection to addressing the order presentment prior to hearing the motion for leave to amend. *RP 5/17/13 at 29*. The trial court signed the order granting summary judgment on the claims against Sun River before addressing the motion to amend. *RP 5/17/13 at 38*.

In addressing the motion to amend, Sun River argued that with a dispositive final order in place which dismissed it from the case, the motion to amend was untimely. *RP 5/17/13 at 44*. Sun River also argued that the amendment would be futile because Sun River was a disclosed agent and not a party to the REPSA. And Sun River argued that even it was a party to the contract, no misrepresentation was made to support a "breach" of the contract. *CP at 321-326*. The court ruled that the motion for leave to amend the complaint was untimely and denied the motion. *RP 5/17/13 at 48*.

Attorney Fees Awarded to Sun River

The REPSA provided that:

If the Buyer, Seller, *or any real estate licensee or broker* involved in this transaction is involved in *any dispute relating to the transaction*, any prevailing party shall recover reasonable attorney's fees and costs (including those for appeals) which relate to the dispute.

CP at 109 (emphasis added). The REPSA also contains a non-merger clause that ensures the terms of the agreement survive past the closing of the transaction. *CP at 109*. Based on those clauses, Sun River filed a motion for attorney fees as a third-party beneficiary of the attorney fee provision. *CP at 287-298*. The court agreed that the provision applied and that Shepard's claims qualified as a dispute related to the transaction. *RP, 5/1713 at 36*. The court awarded Sun River reasonable attorney fees. *RP, 5/1713 at 36*

III. STATEMENT OF ISSUES

1. Whether the trial court properly determined that the discovery rule did not apply because Shepard had constructive knowledge based on the recorded Deed of Consolidation.
2. Whether the uncontroverted facts alleged by Shepard established a misrepresentation by Sun River to support the misrepresentation and CPA causes of action.

3. Whether the trial court properly determined that Shepard did not plead a breach of contract claim against Sun River in the complaint.
4. Whether the trial court properly denied Shepard's motion for leave to amend the complaint as untimely and whether the amendment would have been futile.
5. Whether the trial court properly awarded Sun River attorney fees under the REPSA.

IV. ARGUMENT

A. The Trial Court Decision Should Be Affirmed Because Shepard's Claims Are Barred By The Applicable Statutes Of Limitations.

Shepard's claims are barred by the applicable statutes of limitations. The applicable statutes of limitation are clear: "Claims for negligent misrepresentation are subject to the three year statute of limitations for fraud under RCW 4.16.080(4)." *Davidheiser v. Pierce County*, 92 Wn. App. 146, 156 n.5 960 P.2d 998, 1003 (1998). For CPA claims, RCW § 19.86.120 sets the limitations period at four years. According to this statute, "[a]ny action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues" *See Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 196, 35 P.3d 351, 360 (2001).

The “misrepresentation” that Appellant claims as the basis for both her misrepresentation claim and the CPA claim occurred on or before July 27, 2007. It could not have occurred any later because she claims it induced her to buy the property referenced in this case. *See CP at 2.* She closed on the property on July 27, 2007. *CP at 2.* Thus, whatever the circumstances, the misrepresentation must have occurred before July 27, 2007. Suit was filed on December 20, 2012—in excess of five-and-one-half years after the latest possible date the misrepresentation could have occurred. *CP at 1.* Therefore, her claims are barred.

Shepard claims that the discovery rule tolled the statute of limitations until she discovered facts that put her on notice of the claims. However, while the discovery rule may generally apply to misrepresentation or CPA claims, it does not apply to extend the statute of limitations in this case. The discovery rule stands for the proposition that “the statute of limitation does not begin to run until the plaintiff discovers, or, by reasonable diligence, would have discovered, the cause of action.” *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 282, 864 P.2d 17, 19-20 (1993). In this case, as a matter of law, Shepard was on notice of the Deed of Consolidation at or before the time the alleged misrepresentation was made. Because it was a recorded document, she

cannot benefit from the discovery rule. RCW § 65.08.070 states as follows:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

“When an instrument involving real property is properly recorded, it becomes notice to all the world of its contents.” *Strong v. Clark*, 56 Wn.2d 230, 232, 352 P.2d 183, 184 (1960) (citing *Allen v. Graaf*, 179 Wash. 431, 38 P.2d 236 (1934)). “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.” *Id* (citing *Davis v. Rogers*, 128 Wash. 231, 222 P. 499 (1924)).

In *Strong*, a bankruptcy trustee initiated an action for fraudulent conveyance and the defendant argued that the cause of action was barred by the applicable three-year statute of limitations. The trustee asserted that recording an option to purchase did not give constructive notice. *Strong*, 56 Wn.2d at 232. The court disagreed, stating that “[t]he

recording gave constructive notice to all persons that the owners had given the tenants an option to purchase the property for the consideration specified therein.” *Id.* at 233. As a result, the court in *Strong* concluded that the creditors, in whose shoes the trustee stood, were deemed to have discovered the facts constituting the fraud on the date the option to purchase was recorded. *Id.* at 233.

In *Aberdeen Federal Savings and Loan Association v Hanson*, the court stated:

Strong stands for the proposition that the recording of an instrument affecting real property is constructive notice to all those who subsequently acquire an interest in the property and have reason to refer to the record in which the document is recorded.

58 Wn. App. 773, 777, 794 P.2d 1322, 1324 (1990).

Shepard’s claim that *Strong* would act as a statute of repose is incorrect. Rather, the knowledge of the necessary facts would have accrued immediately—no later than the time of closing—because the Deed of Consolidation was already recorded. One is charged with constructive notice if the misrepresentation could have been discovered by examining the record and if “ordinary prudence and business judgment” required examination of the record. *See id.* at 777 (citing *Irwin v. Holbrook*, 32 Wash. 349, 357, 73 P. 360 (1903)).

As the purchaser of the property, Shepard, in ordinary prudence and business judgment, had reason to review the recorded documents affecting the property. Furthermore, the REPSA listed only one tax parcel number for the property. *CP at 107*. This alone should have notified Shepard the purchased property was one tract of land. Because Shepard had notice of all of the facts revealing the “misrepresentation” at the time of purchase, the causes of action accrued immediately and the statute of limitation began to run. Since Shepard waited until December 20, 2012 to file suit, the statute of limitations for both misrepresentation and CPA violations had long since run. As a result, the trial court properly dismissed the causes of action against Sun River.

B. The Trial Court Should Be Affirmed Because There Was No Misrepresentation Made To Shepard.

This court should affirm the dismissal of Shepard’s claims against Sun River because there was no misrepresentation made. Shepard’s claims of “misrepresentation” rely on two facts: (1) that the legal description of the property begins “Lots 1, 2, 3, and 4 of Short Plat 856...” when the property was only a single parcel; and (2) that she was told the lots could be sold individually. Neither of these items are misrepresentations.

1. The Legal Description Is Not Inaccurate And Is Not A Misrepresentation.

The legal description contained in the purchase and sale agreement was and continues to be the true and correct legal description for the property and therefore cannot constitute a misrepresentation. The primary “misrepresentation” claimed by Shepard is that the property described by the legal description—“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”—is not four separate lots. *See CP at 26*. This is not a misrepresentation, as this was and continues to be the proper legal description for the property in question. *CP at 176*.

To satisfy the statute of frauds, a contract for the sale of real property must contain “a description of land sufficiently definite to locate it without recourse to extrinsic evidence or else reference must be made to another instrument which does contain a sufficient description.” *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 485, 368 P.2d 372, 375 (1962). Failure to include a proper legal description renders a conveyance unenforceable. *See Key Design Inc. v. Moser*, 138 Wn.2d 875, 881, 983 P.2d 653, 657 (1999).

Were the contract to legally describe the property in any other way, it would have been an invalid sale because a contract for the conveyance of real property must include the full and complete legal description of the

property. *Id.* Nowhere in the complaint or in her declaration does Shepard allege that the provided description is not the correct legal description for the property. It provided the information necessary to identify the property to be sold without reference to extrinsic evidence. The RESPA correctly contained only one tax parcel number which showed that the property being sold was a single parcel. Therefore, Shepard's claims of misrepresentation and CPA violation both fail because the legal description is not a misrepresentation.

**2. At The Time Of The Sale, A Representation That The
Parcels Could Be Segregated And Sold Separately
Was Accurate.**

The claimed "misrepresentation" that the property could be segregated and sold was not a misrepresentation because at the time of the sale this statement, if made, was true. As shown by Ms. Shepard's uncontroverted declaration, Sun River did not make a misrepresentation to Shepard. Shepard claimed that Sun River represented in 2007 that she could segregate the property she was buying and sell it as four individual parcels. *See CP at 2.* She did not allege, either in the complaint or her declaration, that Sun River represented that the circumstances allowing her to sell individual parcels would never change. *See CP at 1-5; 26-28.* Shepard also did not allege that Sun River misled her in regard to any process or procedural requirements that she might have to go through to

sell the parcel(s) as four separate lots. The undisputed facts contained in Shepard's declaration show that, if she had promptly pursued the matter, instead of waiting until 2011, she could have sold the individual parcels.

The relevant statements from the declaration state as follows:

- Shepard was advised that "when we purchased the property, in July of 2007, we could have simply had the short plat reinstated by rescinding the Deed of Consolidation."

CP at 27.

- Shepard was advised that it "had now become a moot point as density requirements had changed in our area and we could no longer sell individual parcels."

CP at 27.

Thus, even if Sun River's agent represented that the property could be sold as four separate lots in 2007, there was no misrepresentation. Therefore, the trial court properly dismissed Shepard's claims against Sun River.

C. The Trial Court Should Be Affirmed Because Shepard Did Not Allege A Breach Of Contract Claim Against Sun River In The Complaint.

The court should affirm the trial court finding that Shepard did not allege a breach of contract claim against Sun River. 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 inexpert pleading is

permitted, insufficient pleading is not. *Id.* 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. *Id.* All elements of a cause of action must be pleaded in order to give the opposing part fair notice. *See Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 25, 974 P.2d 847, 851 (1999). In her complaint, Shepard did not allege a breach of contract claim against Sun River.

It is also evident that even Ms. Shepard's counsel did not believe there was a breach of contract claim made against Sun River. Shepard's counsel did not assert that the complaint alleged a breach of contract claim against Sun River until after the court had already orally granted summary judgment. *RP*, 3/29/13 at 29. Even in Shepard's memorandum opposing the motion to dismiss, she limited her discussion to a misrepresentation claim and a CPA claim. *See CP at 20-25*. Not once in the memorandum did she assert that a breach of contract claim was made against Sun River or that Sun River was subject to a six-year statute of limitations based on a contract claim. *CP at 20-25*.

1. The Causes Of Action Section Of The Complaint Clearly Allege Only Misrepresentation And CPA Claims Against Sun River.

Shepard's complaint only alleges the causes of action for misrepresentation and CPA violations against Sun River. In her

complaint, Shepard designates an entire section of the pleading as “CAUSES OF ACTION.” *CP at 4*. The section reads as follows:

- I. CAUSE OF ACTION NUMBER ONE – BREACH OF CONTRACT
 - 1.0 All facts, allegation and requests for relief cited above are hereby realleged as though fully set forth.
 - 1.1 *Defendant Holmes* breached the contract for sale of the real property.
 - 1.2 Plaintiff requests damages, in the alternative rescission of the contract and reasonable attorney fees for bringing this action.

- II. CAUSE OF ACTION NUMBER TWO – MISREPRESENTATION and CONSUMER PROTECTION ACT VIOLATION
 - 2.0 All facts, allegations and requests for relief cited above are hereby realleged as though fully set forth.
 - 2.1 *ERA* misrepresented the real property as four separate lots in violation of the Washington Consumer Protection Act and other Washington statutes and caselaw.
 - 2.2 Plaintiff requests monetary damages and reasonable attorney fees for bringing this action.

- III. CAUSE OF ACTION NUMBER THREE – FAILURE TO 1.) PAY A COVERED TITLE INSURANCE CLAIM IN BAD FAITH AND 2.) DISCLOSE RECORDED DEFECTS OF TITLE AND MISREPRESENTATION
 - 3.0 All facts, allegations and requests for relief cited above are hereby realleged as though fully set forth.
 - 3.1 *Chicago Title* failed to disclose the recorded Deed of Consolidation and unlawfully and in bad faith refused to pay a proper claim. This constitutes a violation of the Washington Consumer Protection Act and other Washington statutes and caselaw.
 - 3.2 Plaintiff requests monetary damages and reasonable attorney fees for bringing this action.

CP at 4-5 (emphasis added). As one can see from the above quoted text, Shepard clearly alleged specific causes of action exclusively against the

separate defendants. The complaint does not allege a breach of contract claim against Sun River any more than it alleges a denial of insurance claim in bad faith against Sun River. The causes of action are alleged against separate defendants. According to this section, the breach of contract claim is only alleged against defendant Holmes. Therefore, the trial court properly found Shepard did not plead a breach of contract cause of action against Sun River.

2. The Factual Allegations Of The Complaint Did Not Put Sun River On Notice Of Breach Of Contract Claim Because The Complaint Acknowledges Sun River Was Acting As An Agent.

Shepard also failed to allege sufficient facts that would put Sun River on notice that breach of contract claim was alleged against Sun River. In the complaint, under the heading “CONTRACT FORMATION,” Shepard alleged:

Plaintiff was told by Defendant Holmes, *through their real estate agent ERA*, and were subsequently told by others including Chicago Title that the above property was subject to Short Plat No. 865 and had individual lots 1, 2, 3, and 4 which could be independently sold.

CP at 2 (emphasis added). Shepard’s statement is consistent with the REPSA which, under the section labeled “Agency Disclosure,” lists “Donna Powers, ERA Sun River Realty” as the seller’s agent. Disclosed agents are not and do not become parties to contracts. *See State v. Hanson*, 59 Wn. App. 651, 661, 800 P.2d 1124, 1131 (1990) (*citing*

Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wn.2d 679, 686, 430 P.2d 600 (1967)).

In *Hanson*, the State sought to criminally prosecute the defendant for selling pre-need cemetery plots without a proper license or exemption. *See Hanson*. 59 Wn. App. At 653. At the time, the defendant was working for Green Hills Cemetery. *Id* at 661. The court held that the defendant did not “enter into” a contract because she acted as a disclosed agent of Green Hills. *Id*. Therefore, the defendant was not a party to the contract and could not be criminally liable in her capacity as an individual for acting on behalf of the cemetery. *Id*.

Hanson is on point in this matter. Sun River acted as a disclosed agent in the real estate transaction. This is what is alleged in Shepard’s complaint and is undisputed. As a disclosed agent, Sun River is not a party to the contract. Therefore, Shepard did not allege sufficient facts to put Sun River on notice of a breach of contract claim because Shepard acknowledged that Sun River merely acted as an agent of Holmes. As a result, the court should affirm the trial court finding that no breach of contract claim was alleged against Sun River.

D. The Court Should Affirm The Trial Court's Denial Of The Motion To Amend Because The Motion Was Untimely And Would Have Been Futile.

The court should also affirm the trial court's denial of the motion to amend the complaint because the motion was brought in an untimely manner and would have been futile to grant. Motions to amend the complaint can be denied for causing prejudice or being brought with undue delay, bad faith or dilatory motive. *See Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334, 336 (1988). Denials on motions for leave to amend are reviewed for abuse of discretion. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 729, 189 P.3d 168, 177 (2008).

1. The Trial Court Properly Found That Shepard's Motion To Amend Was Untimely.

The trial court properly denied Shepard's leave to amend because the motions were both untimely and procedurally defective and allowing amendment would have been futile.

i. The Oral Motion To Amend Was Untimely And Procedurally Defective.

The oral motion to dismiss made by Shepard was untimely and procedurally defective. At the hearing on March 29, 2013, the trial court ruled that the statute of limitations barred the claims against Sun River. *RP, 3/29/13 at 29*. Having been notified that all the claims against Sun

River were to be dismissed, Shepard's counsel alleged for the first time that the complaint alleged a breach of contract claim against Sun River. *RP, 3/29/13 at 29-30.* Shepard's counsel asked "for permission to file a motion to amend the complaint." *RP, 3/29/13 at 29-30.* The court denied this request. *RP, 3/29/13 at 30.*

According to CR 15, if a party wishes to amend the complaint after the opposing party files a responsive pleading, the party may only amend the complaint by leave of the court or if stipulated by the parties. CR 15(a). A party that moves to amend the pleadings must attach a copy of the proposed pleadings to the motion. CR 15(a). The motion must also be served on the opposing parties no less than five days before the motion is to be heard. CR 6(d).

In *Dewey v. Tacoma School Dist. No. 10*, the plaintiff alleged multiple causes of action against the defendant. *See Dewey, 95 Wn. App. 18 at 22.* When the defendant moved for summary judgment, the plaintiff asserted two new causes of action. *Id.* During argument on a subsequent motion to dismiss, the plaintiff asserted for the first time that a First Amendment claim was also being asserted and that the claim had been "notice pled." *Id.* At trial, the defendant moved for a directed verdict which the court granted. *Id.* at 23. The plaintiff argued that there was still a First Amendment claim pled and made an oral motion to amend to

solidify the cause of action. *Id.* The court found that First Amendment claim had not been properly pled and denied the oral motion to amend. *Id.* The court of appeals affirmed, holding that allowing an amendment to the complaint after multiple dispositive motions had been brought would have resulted in prejudice to the defendant. *Id.* at 27. Therefore, denial of the motion for leave to amend was within the proper discretion of the trial court. *Id.*

In presenting her oral motion for leave to amend the complaint, Shepard did not comply with the requirements of CR 15 and CR 6. Sun River was not given notice of the motion and a proposed amended complaint was not provided. Essentially, the oral motion to amend was brought only as Shepard's knee-jerk response to finding out Sun River was to be dismissed. As the motion was defective under CR 15 and because granting the motion would have caused prejudice to Sun River by pulling it back into the case, the trial court properly denied the motion as untimely.

ii. The Written Motion To Amend Was Untimely Because It Was Not Filed Until After The Motion To Dismiss Sun River Was Granted.

Shepard's written motion to amend was properly denied as it was untimely. Shepard wishes to rely solely on the timing of motion for leave to amend in relation to when the initial complaint was filed. However,

this ignores the timing of the motion which was made after the court orally granted the motion to dismiss Sun River from the lawsuit. It also ignores the prejudice that would have been incurred by Sun River had the motion been granted.

In determining whether to grant a motion for leave to amend, the court may consider whether the new claim is futile or untimely. *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.*, 166 Wn.2d 475, 483-84, 209 P.3d 863, 869 (2009). A motion for leave to amend may properly be denied if the motion is brought after the court has made a final ruling in the case. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154, 176 (1997). In *Ino Ino*, the plaintiff sought to amend the complaint after the court entered a final judgment in the case. *Id.* The Washington Supreme Court affirmed that the motion was untimely. *Id.* A motion for leave to amend may also be untimely when brought in response to a dispositive motion from the opposing party. *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 675, 303 P.3d 1065, 1078 (2013).

In the present case, the court orally granted the motion to dismiss the claims against Sun River on March 29, 2013. *RP*, 3/29/13 at 29. On April 9, 2013, Sun River's attorney sent an order to Shepard's attorney for review and signature. *CP* at 334. The order was sent to Shepard's attorney again on April 17, 2013. *CP* at 332. After assurance from

Shepard's attorney "I can sign if you send it again," Sun River's attorney sent the order for a fourth time and stated he would make a special setting in front of the court for presentment if it was not signed by Shepard's attorney. *CP at 329*. Once again, Shepard's attorney did not sign the order which had to be noted for presentment. *RP 5/17/13 at 29*.

Despite being delayed almost month by Shepard's attorney's repeated assurances but ultimate failure to sign the order, Sun River's attorney was still able note the order for presentment before Shepard filed the motion for leave to amend the complaint. *RP 5/17/13 at 29; CP at 311*. At the hearing, Sun River's attorney asked that the court address the order before the motion for leave to amend. *RP 5/17/13 at 29*. Shepard's attorney said that he had no problem with addressing the order presentment prior to hearing the motion for leave to amend. *RP 5/17/13 at 29*. As the court stated:

[T]he court granted the motion dismissing the claims against ERA Sun River that exist at this time. So there are, as I understand it, no other claims currently involving ERA Sun River Realty.

RP, 5/17/13 at 31. The court then moved on to addressing the motion to amend. *RP 5/17/13 at 38*. This resulted in the court ordering dismissal of Sun River from the case prior to even addressing the motion for leave to amend. *See RP 5/17/13 at 41*. Without objection from Shepard's counsel,

Sun River was dismissed from the case before the motion to amend was heard by the court.

The present case is similar to what occurred in *Ino Ino* when the appellant sought to amend the complaint after final judgment had been entered. The only difference here is that an abnormal presentment issue arose which delayed entry of the written order. For all intents and purposes, Sun River was dismissed from the case for more than a month before the motion to amend was filed. Shepard could have filed a motion to amend before the court rendered its decision dismissing Sun River from this matter. Instead, Shepard waited until after the court rendered its oral decision to file a motion to amend the complaint. *CP at 311*. In doing so, Shepard's counsel also delayed entry of the dismissal order—even after saying that they would sign it—in order to gain a perceived tactical advantage in regard to its motion for leave to amend. *Compare CP at 329-334 with CP at 311*. Therefore, the trial court properly denied the motion for leave to amend the complaint as untimely.

2. In The Alternative, The Motion To Amend Should Have Been Denied As Futile.

In the alternative, the trial court's denial of the motion to amend should be affirmed because amendment would have been futile. As noted above, a trial court may properly deny a motion for leave to amend the

complaint when the amendment would be futile. *See Cambridge Townhomes, LLC*, 166 Wn.2d at 483-84. Shepard amending the complaint would have been futile as there was no contract between Shepard and Sun River. Additionally, any amendment would have been futile because there was no misrepresentation to form the “breach” for the cause of action.

i. Sun River Was A Disclosed Agent And Not A Party To The Contract

Sun River was not a party to the REPSA, making a breach of contract claim against Sun River futile. Washington follows the standard and well-established rule that disclosed agents are not personally liable in contracts that bind the principal and are not parties to the contract. *See Griffiths*, 71 Wn.2d at 686 (*citing* Restatement (Second), Agency § 328 (1958)); *see also Hanson*, 59 Wn. App. at 661.

Here the RESPA has a specific section devoted to “Agency Disclosure.” *CP at 107*. ERA Sun River is listed as representing the seller in the transaction as an agent. *CP at 107*. Therefore, Sun River as a disclosed agent is not a party to the contract. As an underlying contract between Shepard and Sun River is a prerequisite to a breach of contract claim, allowing Shepard to amend the complaint to add the cause of action would have been futile.

ii. The Fact That Sun River Was A Third-Party Beneficiary To The Attorney Fees Provision Does Not Make The 6 Year Statute Of Limitations Applicable.

The fact that Sun River was a third-party beneficiary of the REPSA attorney fee provision does not make the six year statute of limitations applicable. Nothing prevents contracting parties from providing benefits to third-parties in a contract. *Ramos v. Arnold*, 141 Wn. App. 11, 21, 169 P.3d 482, 487 (2007). The creation of a third-party beneficiary in a contract requires that the parties intend that the promisors assume a direct obligation to the intended beneficiary at the time they enter into the contract. *See Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots, W. Coast & Pac. Region Inland Div., Branch 6*, 92 Wn.2d 762, 767, 600 P.2d 1282, 1285 (1979) (citing *American Pipe & Construction Co. v. Harbor Construction Co.*, 51 Wn.2d 258, 266, 317 P.2d 521 (1957)).

Here, the parties to the REPSA explicitly extended a third-party benefit to “any real estate licensee or broker involved in the transaction.” *CP at 109*. However, this gratuitous extension of a third-party benefit does not make Sun River a party to the contract. As can be seen by reviewing the REPSA, the only arguable obligation on behalf of the seller’s agent was to provide any notices to the seller by phone or by

mailing the notice to seller's last known address. *CP at 107-118*. Shepard has not alleged that Sun River has failed to provide necessary notices to the seller. Therefore, the third-party attorney fees provision does not serve to extend the statute of limitations or create contractual obligations for Sun River where none exists.

If being a third-party beneficiary can transform a non-party into a party to the contract, then it would be possible for persons to involuntarily bind non-parties to contract and to terms they did not acquiesce to. The notion that a non-party can be involuntarily joined to a contract is not supported by Washington law. As a result, allowing Shepard to amend the complaint to add a breach of contract claim would have been futile.

iii. There Was No Misrepresentation And There Is No Evidence Alleged To Support A Breach Of Contract Claim Without A Misrepresentation.

Allowing Shepard to allege a breach of contract claim against Sun River would have been futile because "breach" is based on Sun River's "misrepresentation." Based on Shepard's uncontroverted allegations and declaration, there was no misrepresentation because the legal description is accurate. The alleged statement that the four lots could be segregated and sold individually is also not a misrepresentation because that statement was accurate at the time of the transaction.

a. The Legal Description Is Not Inaccurate.

See discussion *supra* contained in Section (B)(1) of this brief.

b. At The Time Of Sale Shepard Could Have Segregated The Lots And Sold Them Separately.

See discussion *supra* contained in Section (B)(2) of this brief.

E. The Trial Court Properly Awarded Attorney Fees To Sun River Because The Contract Between Shepard And Holmes Provided For Attorney Fees For Third-Parties.

1. Sun River Has A Basis For The Award Of Attorney Fees Under RCW § 4.84.330.

Sun River was properly awarded attorney fees because the lawsuit arose out of a dispute relating to the transaction and is therefore covered by the contract attorney fees provision. Attorney fees provisions contained in contracts are generally enforceable. *See* RCW § 4.84.330.

Section 16 of the REPSA agreement states as follows:

If the Buyer, Seller, *or any real estate licensee or broker* involved in this transaction is involved in *any dispute relating to the transaction*, any prevailing party shall recover reasonable attorney's fees and costs (including those for appeals) which relate to the dispute. *CP at 109* (emphasis added).

In addition to the attorney fees provision, the REPSA contains an anti-merger clause which states:

All terms of this Agreement, which are not satisfied or waived prior to closing, shall survive closing. These terms shall include, but not be limited to, representations and warranties, attorney's fees and costs, disclaimers, repairs, rents and utilities, etc. *CP at 109*.

Based on the terms of these provisions, the attorney fees extend to the misrepresentation and CPA claims alleged by Shepard as they arose out of the real estate transaction.

In *Failes v. Lichten*, the plaintiff alleged fraudulent concealment, misrepresentation, and/or mutual mistake of fact against the defendants after the buyers found considerable mold in the house after the sale. *Failes v. Lichten*, 109 Wn. App. 550, 553, 37 P.3d 301 (2001). Notably, the plaintiff did not allege a breach of contract claim under the REPSA. *Id.* When the defendant prevailed on all of the claims, the defendant sought attorney fees under the REPSA provision. *Id.* at 554. The court determined that the tort claims related to the transaction and were therefore subject to the attorney fees provision. *Id.*

Failes is directly on point. In fact, based on the quotations contained in the opinion, the provisions analyzed by the court in *Failes* appear to be verbatim to those contained in the REPSA in this case. *See id.* at 552-53. Because Shepard's failed claims against Sun River relate to the real estate transaction, Sun River was properly awarded attorney fees under the REPSA.

2. The Attorney Fees Requested By Sun River Were Reasonable

The attorney fees requested by Sun River at the trial court level were reasonable. When a party is entitled to attorney fees, the fees requested by the party must be reasonable. *See Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086, 1089 (1995). The starting place for determining the reasonableness of fees is using the lodestar method. *Id* at 847. The “lodestar” fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer's reasonable hourly rate of compensation. *Id* (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983)). The court has discretion in determining how to calculate the appropriate fees. *See Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024, 1028 (2009). The court should have an objective basis in determining the amount of the award. *Id* (citing *Bowers*, 100 Wn.2d at 599). The reasonableness of the fees awarded are reviewed for abuse of discretion. *See Steele v. Lundgren*, 96 Wn. App. 773, 780, 982 P.2d 619, 623 (1999).

In this case, the trial court had an objective basis for awarding attorney fees in the amount of \$7,641.00. This amount was based on a detailed transaction list submitted by Sun River’s attorney. *CP at 288-298*.

No multiplier was sought by Sun River. Considering that the case lasted several months and consisted of multiple hearings in front of the trial court, there is nothing to suggest that the amount of fees awarded were excessive or otherwise improper. As a result, the amount of attorney fees awarded by the trial court was reasonable.

F. The Court Should Award Sun River Attorney Fees On Appeal

Pursuant to RAP 18.1, Sun River is requesting reasonable attorney fees and expenses related to the appeal. Under RAP 18.1, the court may award attorney fees as allowed by applicable law. *See* RAP 18.1. As previously discussed *supra* in Section (E)(1) of this brief, Sun River is entitled to attorney fees for disputes relating to the transaction (including appeals) under the REPSA. Therefore, Sun River requests attorney fees if it is the prevailing party in the appeal.

RESPECTFULLY SUBMITTED this 23 of December, 2013



SHEA C. MEEHAN, WSBA #34087

BRET UHRICH, WBSA #45595

Attorneys for Respondent ERA Sun River Realty