

No. 29411-1-III

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

P.E. SYSTEMS, LLC, a Delaware limited liability company,

Appellant,

v.

CPI Corp., a Missouri corporation,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 10-2-02351-2

APPELLANT P.E. SYSTEMS, LLC'S BRIEF

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I. INTRODUCTION

Forty-two days after CPI Corp. (“CPI”) answered P.E. Systems, LLC’s (“PES”) Complaint for breach of contract and breach of good faith and fair dealing, the Trial Court dismissed PES’s entire case under CR 12(c). In doing so, the Trial Court refused to treat CPI’s motion as one for summary judgment as required by CR 12(c), refused to consider evidence PES presented, and refused to allow PES an opportunity to conduct necessary discovery. Instead, the Trial Court did not consider all conceivable facts that could support PES’s claims and incorrectly found that the Consulting Agreement was an unenforceable “agreement to agree.”

Based on the Court’s incorrect ruling, PES immediately requested leave to amend its Complaint. The Trial Court exacerbated its error and incorrectly denied PES’s Motion to Amend to assert causes of action for quantum meruit/unjust enrichment, Consumer Protection Act Violations and tort theories. The Trial Court erred, depriving PES of the opportunity to have its claims decided on the merits. Consequently, the Trial Court’s CR 12(c) dismissal should be reversed and the matter remanded.

II. ASSIGNMENTS OF ERROR

A. Assignments Of Error.

1. The Trial Court erred by granting CPI's Motion for Judgment on the Pleadings.
2. The Trial Court erred by not considering the Declaration of Nicholas D. Kovarik and the attached exhibits PES filed in opposition to CPI's Motion for Judgment on the Pleadings.
3. The Trial Court erred by excluding the admissible Exhibits to the Declaration of Nicholas D. Kovarik.
4. The Trial Court erred by not converting CPI's Motion for Judgment on the Pleadings to a Motion for Summary Judgment pursuant to CR 12(c).
5. The Trial Court erred by not allowing discovery so additional evidence could be presented.
6. The Trial Court erred by denying PES's motion to amend its complaint.
7. The Trial Court erred by granting CPI's Motion for Statutory Costs.

B. Issues Presented.

1. Under CR 12(c), is a Plaintiff allowed to present evidence in response to documents attached by the Defendant to its Answer?
2. Under CR 12(c), when evidence is presented to the Trial Court in response to a motion for judgment on the pleadings, should the Trial Court convert the motion to a motion for summary judgment?

3. When an agreement provides a formula to calculate a baseline for the purposes of determining the consulting fee under that agreement, do genuine issues of material fact exist with regard to the parties' intent?
4. Is the July 2009 Consulting Agreement a valid and enforceable contract?
5. Where a Trial Court finds a contract is unenforceable, does justice require a Plaintiff be entitled to amend its complaint to assert claims for quantum meruit/unjust enrichment, Consumer Protection Act Violations and tort theories if there is no prejudice to the Defendant?

III. STATEMENT OF THE CASE

A. Factual Background.

The credit and debit card industry is extremely large and highly competitive. (C.P. 54-55, 68). When a merchant desires to accept debit and credit cards as payment for goods or services it will contract with a processor to process those transactions. Each processing agreement is different, but the fees a merchant must pay are generally similar. The total debit and credit card processing fees paid by the merchant are broken up into three categories: 1) Assessment; 2) Interchange; and 3) Mark-up. (C.P. 53, 59). Assessment is a fee charged by Visa and MasterCard to merchants and issuers as a condition of membership. (C.P. 60). Interchange fees are paid by the merchant to the bank that issued the credit card

used in the transaction. (C.P. 61). Interchange fees are primarily positioned as compensation to the issuing bank for the risk of fraud and as an incentive to the issuing bank. (C.P. 61). Mark-up is the fee charged by the processor to process the transaction. (C.P. 67-68). Processing is a commodity industry because there exists thousands of vendors that offer the same service. (C.P. 67).

PES is an independent, highly specialized consulting firm that analyzes debit and credit card processing costs for clients. (C.P. 4, 48, 52). In order to be compensated for its services, PES enters into binding agreements with its clients, known as Consulting Agreements. These Consulting Agreements provide that PES will analyze the previous 12 months of merchant processing costs and determine if the amount the client is being charged can be reduced. (C.P. 4, 48). The results of PES's analysis are provided to the client in a confidential report. (C.P. 50-75). Should the Client elect to implant PES's recommendations to lower the client's debit and credit card processing costs, PES is paid by receiving a consulting fee of 50% of any savings realized. (C.P. 48).

In order to determine a baseline to measure the amount of any savings, PES needs to determine the client's historic cost. (C.P. 48). Due to the fact that the Client's historic cost is unknown to PES at the time it enters into the Consulting Agreement, the Consulting Agreement itself sets forth a formula to calculate historic costs. (C.P. 48). The historic cost formula, as set forth in the Consulting Agreement, is the total Visa/MasterCard processing costs divided by the total Visa/MasterCard revenue. (C.P. 48, 50-75).

The result of that historic cost calculation is then set forth and agreed upon in Addendum A simply as a procedure to allow the clients an opportunity to double-check the calculations. (C.P. 48). Importantly, however, the historic cost formula is set forth in the Consulting Agreement and is not susceptible to further negotiation. Therefore, when PES enters into its Consulting Agreements, there is no further agreement to be made in the future. Rather, the client has the opportunity to agree that the math was performed correctly and pursuant to the formula contained in the Consulting Agreement. (C.P. 48).

On or about July 10, 2009, CPI and PES entered into a Consulting Agreement. (C.P. 4, 48). PES then obtained CPI's merchant processing statements and performed the analysis. (C.P. 4). On August 12, 2009, PES delivered its proprietary cost savings program to CPI demonstrating that it could save over \$280,000 a year. (C.P. 4-5, 50-75).

Upon performing the analysis of CPI's processing environment, PES took the total Visa/MasterCard processing costs and divided it by the total Visa/MasterCard revenue, just as the Consulting Agreement provides. (C.P. 48, 58). The result of the calculation showed CPI's historic cost baseline was 1.655998%. (C.P. 58). Pursuant to the terms of the Consulting Agreement, CPI was to pay PES 50% of the savings actually realized. (C.P. 4-5, 48). The savings realized are determined by looking at the merchant processing statements and comparing those effective rates against the historic cost baseline of 1.655998%. (C.P. 4-5, 48, 50-75).

However, CPI breached the Consulting Agreement by refusing to produce its merchant processing statements and refusing to pay PES its consulting fee earned despite the clear and

unequivocal language in the Consulting Agreement to the contrary.
(C.P. 4-6, 48).

B. Procedural History.

On June 8, 2010, PES filed its Complaint against CPI for breach of contract and breach of good faith and fair dealing. (C.P. 3-7). On August 13, 2010, CPI filed its Answer to Complaint and Affirmative Defenses. (C.P. 13-16). CPI also attached evidence to its Answer, a copy of the July 10, 2009 Consulting Agreement to the Answer as Exhibit A. (C.P. 18-21).

Shortly thereafter, on August 27, 2010, CPI moved the Trial Court for judgment on the pleadings under CR 12(c). CPI asserted that the July 10, 2009 contract was an unenforceable agreement to agree. (C.P. 22-27). Because CPI had introduced evidence in addition to the Complaint, PES submitted a declaration that provided a copy of the contract as Exhibit A and a copy of the August 12, 2009 presentation as Exhibit B to explain the intent of the parties. (C.P. 35-75). CPI filed an untimely motion to strike Exhibit B to the Declaration of Nicholas D. Kovarik. (C.P. 76-80).

On September 10, 2010, the Trial Court heard oral argument on CPI's Motion to Dismiss. (R.P. 1, 3) (C.P. 102). PES pointed out to the Court that the July 10, 2009 Consulting Agreement is not an unenforceable agreement to agree because the contract provides a mathematical formula to determine the historic cost baseline which is the very term CPI argued needed to be agreed upon later. (R.P. 9-18). The reason behind this open term, but yet having the Consulting Agreement provide the mathematical calculation, is because at the time of signing the Consulting Agreement, PES does not know CPI's credit card volume or its credit card fees. (R.P. 9-18). Despite the Consulting Agreement being based on a formula, the Trial Court incorrectly granted CPI's motion to dismiss under CR 12(c). (C.P. 117-18).

Based on the ruling, PES moved to amend its Complaint to assert causes of action for quantum meruit/unjust enrichment, Consumer Protection Act Violations and tort theories. (R.P. 22). PES had not previously pled quantum meruit/unjust enrichment because, under Washington law, if a valid contract exists, a claim for quantum meruit/unjust enrichment cannot be asserted. (R.P. 22-23).

Likewise, CPA violations and tort theories could not be asserted if a contract was in place. (R.P. 22-23). Despite the lack of prejudice to CPI, the Trial Court denied PES's motion. (C.P. 119-20).

Finally, the Trial Court awarded CPI its statutory costs. (C.P. 121-23). On September 28, 2010, Judgment was entered against PES. (C.P. 124-26). On October 1, 2010, PES appealed to this Court for review of the Trial Court's decisions. (C.P. 127-140).

IV. ARGUMENT

A. Standard Of Review.

1. Judgment On The Pleadings.

A Trial Court's granting of judgment on the pleadings under CR 12(c) is reviewed de novo. Gasper v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 634-635, 128 P.3d 627 (2006). Judgment on the pleadings should only be granted when the non-moving party can prove no set of facts consistent with the Complaint which would entitle such party to relief. City of Moses Lake v. Grant County, 39 Wn. App. 256, 258 (1984). Thus, the Trial Court employs the same standard as it does under CR 12(b)(6). Id. All of the factual allegations in the complaint are to be taken as true "*since the*

purpose of a judgment on the pleadings is to determine whether a genuine issue of fact exists, not to determine issues of fact.” Id.

If matters outside the pleadings are presented to the Court, a Rule 12(c) motion is converted to a Rule 56 motion for summary judgment. Id. Where the motion is treated as one for summary judgment, “all parties ***shall*** be given the reasonable opportunity to present ***all*** [pertinent] material....” Id. at 259 (alteration in original) (citation omitted) (emphasis added).

2. Motion To Amend.

Leave shall be freely given when justice so requires. CR 15(a). A Trial Court’s denial of a motion to amend pleadings is reviewed for an abuse of discretion. Bank of America NT & SA v. David W. Hubert, P.C., 153 Wn.2d 102, 122, 101 P.3d 409 (2004). A Trial Court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 77, 684 P.2d 692 (1984)). A Trial Court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the

applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 47, 940 P.2d 1362 (1997).

B. The Trial Court Erred By Not Applying The Correct Legal Standard To CPI's Motion.

A CR 12 motion, including a motion for judgment on the pleadings, should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 635, 128 P.3d 627 (2006); Fondren v. Klickitat County, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). This is because it is a general policy to decide cases on the merits. See Lane v. Brown & Haley, 81 Wn. App. 102, 106, 912 P.2d 1040, 1042 (1996). The Trial Court erred when it did not apply the correct legal standard when deciding CPI's motion for judgment on the pleadings. Thus, it should be reversed.

1. The Trial Court Was Required To Convert CPI's Motion For Judgment On The Pleadings To A Motion For Summary Judgment.

CR 12 (c) states:

*After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion **shall be***

*treated as one for summary judgment and disposed of as provided in rule 56, and **all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.***

CR 12(c) (emphasis added).

Here, the Trial Court was required to treat CPI's motion as a motion for summary judgment because material outside the pleadings were presented to and not excluded by the Trial Court as inadmissible. PES submitted the Declaration of Nicholas D. Kovarik in opposition to CPI's motion for judgment on the pleadings. (C.P. 45-75). This declaration contained two exhibits. (C.P. 45-75). Exhibit A was a copy of the July 2009 Consulting Agreement. (C.P. 45-75). Exhibit B was a copy of the August 2009 presentation that showed CPI the historic cost calculation referred to in the Consulting Agreement. (C.P. 45-75) This evidence reaffirmed and established the intent of the parties.

CPI convinced the Trial Court to not consider Exhibit B to the Kovarik Declaration, not because it was inadmissible, but rather because it argued the Trial Court could only consider the pleadings under CR 12(c). (R.P. 31-33). When the Trial Court did not consider Exhibit B to the Kovarik Declaration, it stated:

When counsel [CPI's attorney] indicated on the record that this was they're asking for Judgment on the pleadings, that's all the Court can consider at that. So it was a Judgment on the pleadings, and that's what I ruled on.

So you pled breach of contract and covenant of good faith. They made a motion under CR 12, which is the Court can only basically look at the pleadings and the ruling on the pleadings, and this was not a contract.

*So that's all the Court considered at that time, which is one of the reasons I granted their Judgment. ...**So, therefore, under CR 12 that's all the Court can consider.** Your [PES] exhibit that you added and stuff was more for a Summary Judgment.*

(R.P. 31-32) (emphasis added).

CPI erroneously led the Trial Court to believe that it could not consider any evidence that was not attached the pleadings. *Id.* However, this is directly contrary to the plain language of CR 12(c). Under CR 12(c), the Trial Court was required to convert the motion to a motion for summary judgment and consider all material that was pertinent to the motion. CR 12(c).

CPI's argument caused the Trial Court to misapply CR 12. Had the Trial Court properly applied CR 12, the motion would have been converted to a motion for summary judgment, and PES would have been given a reasonable opportunity to present all material

pertinent to the motion. More importantly, PES would have been given an opportunity to perform discovery to show that no further agreement was necessary under the terms of the July 2009 Consulting Agreement. Thus, the Consulting Agreement was valid and enforceable.

If CPI's argument and the Trial Court's erroneous application of CR 12 were correct, a defendant could always simply attach evidence to its Answer, then move for judgment on the pleadings to effectively prevent the plaintiff from submitting any rebuttal evidence. This would lead to unjust results, like the one at bar. Therefore, by rule, when the plaintiff submits admissible evidence outside of the pleadings, the motion must be converted to one for summary judgment. Therefore, the Trial Court erred by not following the mandate of CR 12.

2. Even If The Trial Court Did Not Convert CPI's Motion On The Pleadings To A Motion For Summary Judgment, It Was Required To Consider Every Conceivable Fact Including Exhibit B To The Kovarik Declaration.

Motions under CR 12(c) apply the same standard as motions under CR 12(b)(6). A plaintiff states claim upon which relief can be

granted “if it is possible that facts could be established to support allegations in the complaint.” McCurry v. Chevy Chase Bank, 169 Wn.2d 96, 101 (2010) (emphasis in original). Thus, dismissal under CR 12(b)(6) “is warranted only if the court concludes, beyond a reasonable doubt, that the plaintiff cannot prove ‘any set of facts which would justify recovery.’” Kinney v. Cook, 159 Wn.2d 837, 842 (2007) (citations omitted) (emphasis added). The court presumes all facts alleged in plaintiff’s complaint as true and may consider hypothetical facts supporting the plaintiff’s claims. Id. Such motions should be granted “only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” Id., citing Hoffer v. State, 110 Wn.2d 415, 420 (1988) (emphasis added). As a result, CR 12 motions to dismiss are rarely granted.

In McCurry v. Chevy Chase Bank, 169 Wn.2d 96 (2010), plaintiff borrowers brought a class action against the defendant home lender alleging fax and notary fees charged as a result of the payoff of the loan violated the loan contract and Washington’s Consumer Protection Act. The Trial Court granted the defendant’s motion to

dismiss and the court of appeals affirmed. Id. When plaintiffs appealed to the Washington Supreme Court, defendant urged the court to adopt the stricter federal standard for a motion to dismiss. Id. at 101.

In reversing the Trial Court and Court of Appeals' dismissal of plaintiffs' claims, the McCurry Court specifically declined to adopt the heightened pleading standard under Fed. R. Civ. Pro. 12(b)(6) adopted in Bell Atlantic v. Twombly, 500 U.S. 544 (2007). The McCurry Court reaffirmed the longstanding dismissal standard in Washington, that a plaintiff's complaint will withstand a motion to dismiss if it sets forth a "conceivable" set of facts to the support the claims. McCurry, 169 Wn.2d at 102.

Here, the Trial Court erred when it did not consider any conceivable set of facts that could justify recovery because the Trial Court admitted that it did not consider the August 12, 2009 presentation, which confirmed the actual historic cost calculation and the fact that the Consulting Agreement was valid and enforceable. (C.P. 45-75) (R.P. 31-33). In taking the allegations in the Complaint as true and then considering any set of conceivable

facts that could justify recovery, the Trial Court simply should not have granted CPI's motion.

The allegations in the complaint clearly allege that a valid contract exists and that contract was breached causing damages. If the August 12, 2009 presentation was considered as a conceivable fact, it shows that the historic cost was calculated for CPI. Thus, that presentation supplied the result of the math formula that was in the Consulting Agreement and there was nothing left to negotiate.

In Washington, extrinsic evidence is admissible to explain the context surrounding the formation of an agreement and to determine the intended meaning of what is written. Berg v. Hudesman, 115 Wn.2d 657, 667 (1990) (adopting the "context rule"); see also Keystone, 353 F.3d at 1073. Extrinsic evidence may be used regardless of whether the contract language is ambiguous. Berg, 115 Wn.2d at 669.

If the Trial Court would have considered all conceivable facts, then it necessarily would have considered the extrinsic evidence surrounding the July 10, 2009 Consulting Agreement. The extrinsic evidence would establish that the Consulting Agreement

between PES and CPI is an enforceable contract and that CPI fully understood all terms, including that Addendum A was merely to verify PES's historic cost calculations, and that CPI intended to form a binding agreement with PES.

The Trial Court erred when it failed to consider PES's presentation, extrinsic evidence and any set of conceivable facts that could justify relief. Thus, the Trial Court should be reversed.

C. The July 10, 2009 Consulting Agreement Is Valid And Enforceable.

The issue of extrinsic evidence aside, the Trial Court erred by ruling as a matter of law that the July 10, 2009 Consulting Agreement was unenforceable. CPI and PES made a fully binding agreement and agreed upon all material terms. (C.P. 48).

CPI claimed that the July 10, 2009 Consulting Agreement was an unenforceable "agreement to agree." CPI argued Keystone Land & Development Company v. Xerox Corporation, 152 Wn.2d 171 (2004). However, CPI's application of Keystone is misguided. The Keystone holding actually points to three types of agreements, only one of which is unenforceable.

In Keystone, the Court went to great lengths to categorize the different types of agreements and associated legal rules governing contractual reliability. Parties have made a fully binding contract when they have agreed on all material terms and realized their agreement in a final written document. Id. However, if the parties have not yet reached a fully binding contract, their negotiations will fall into one of three categories. First, an agreement with open terms exists where all material terms are supplied and the parties intended to be bound to the key points provided, in which case any remaining terms may be supplied by a court or another authoritative source, such as the Uniform Commercial Code. Id. at 176. Second, an agreement to negotiate exists where the parties exchange promises to conform to a specific course of conduct during negotiations. This is an enforceable contract, and a party will be liable for breach where it fails to conform to the course of conduct agreed upon. Id. Third is an agreement to agree. This agreement is the only type of agreement that is unenforceable. Id. at 175-76.

The Keystone court addressed the issue of whether an exchange of letters between a potential buyer and seller of real

property which communicated offers, counter-offers, and acceptances could give rise to an enforceable agreement when both parties expressly agreed in the correspondence that they would have to negotiate, draft and sign a formal purchase and sale contract. Id. at 174-175. The court correctly noted that this was an unenforceable “agreement to agree” requiring “*a further meeting of the minds of the parties and without which it would not be complete.*” Id. at 175.

On the other hand, where negotiations are to the point where the parties have definitely agreed to the terms but have not yet executed a final written instrument, an enforceable contract exists. See Restatement (Second) of Contracts § 29, comment a (1981). Where mutual manifestations of assent of the parties are present, a contract will not be prevented from forming on the basis of intent to later formalize the agreement or supply a non-material term. Id.

Washington courts have held that an open term contract is enforceable as long as there is reasonable certainty of terms in order for the court to provide a basis for determining breach and the appropriate remedy, and there is a manifestation of assent. See 16th Street Investors, LLC v. Morrison, 153 Wn. App. 44, 55 (2009); see

also Morris v. Maks, 69 Wn. App. 865 (1993) (a valid and enforceable contract exists so long as the subject matter is agreed upon, the terms are stated in informal writings, and the parties intended to have a binding agreement). The court may test the contract based on the surrounding circumstances to determine if it is complete and therefore valid. Bloom v. Christensen, 18 Wn.2d 137 (1943).

Here, there are no facts to support the conclusion that any future meeting of the minds was necessary between the parties for the Consulting Agreement to be complete. The Consulting Agreement stated:

(3) Client's Historic Cost will be determined, based upon the data provided by Client, by taking Client's total Visa and MasterCard credit and debit card costs divided by Client's total Visa and MasterCard credit and debit card revenue which reflects Client's accurate Historic Cost. Once Historic Cost is calculated PES will analyze the specific Merchant Processing services cost and create a proprietary Cost Savings Program. Client's Historic Cost will be set forth and mutually agreed to by the parties in Addendum "A" which is incorporated by reference herein.

Should Client decide to go forward and implement any part of PES Cost Savings Program, either by itself, by

a third party or by using PES services, this Historic Cost becomes the baseline which the parties will use to measure "Program Cost Savings". [PES receives 50% of all Program Cost Savings as a consulting fee].

(C.P. 48) (emphasis added).

This provision, which CPI relies upon in support of the proposition it entered into just an "agreement to agree," only provided CPI with the opportunity to verify PES's calculations based on the contractually agreed-upon formula. (C.P. 48, at ¶¶ 3-4). The sole purpose of Addendum A is to provide a mechanism for the client to verify PES's mathematical calculations. It did not provide for a future "agreement" or negotiation.

CPI and PES made a fully binding agreement and agreed upon all material terms. (C.P. 48). The Consulting Agreement is sufficiently definite such that, under the most basic contract interpretation principles, CPI's acceptance resulted in an enforceable contract and the ability of a court to fix exactly the legal liability of the parties. The "historic cost" that CPI argued required further agreement is, in fact, fully provided in a mathematic formula that was expressly agreed to by CPI in the Consulting Agreement. (C.P. 48). Furthermore, PES performed the calculation and provided

it in PES's cost savings presentation on August 12, 2009. (C.P. 50-75). This presentation demonstrated that the historic cost was 1.655998%. (C.P. 50-75).

Even if the Consulting Agreement between PES and CPI is construed as an open term agreement, it is valid and enforceable, because all material terms were provided and assented to such that it provides a basis for determining the existence of a breach and giving an appropriate remedy. (C.P. 48, 50-75).

The Trial Court erred by failing to presume the truth of the allegations in the Complaint, i.e. that the parties entered into a valid and binding contract. (C.P. 4-5). Judgment on the pleadings was improper at the stage in the proceedings that the case was in because nothing established, as a matter of uncontested fact, that the Consulting Agreement was an unenforceable agreement to agree. As such, the Trial Court erred when it found the July 10, 2009 Consulting Agreement to be unenforceable. Thus, the Trial Court should be reversed.

D. PES's Motion For Leave To Amend Its Complaint Should Have Been Granted.

Additionally, the Trial Court erred by denying PES's motion to amend. Leave to amend should be freely given except where prejudice to the opposing party would result. Honan v. Ristorante Italia, Inc., 66 Wn. App. 262, 272, 832 P.2d 89 (1992). CR 15(a)'s purpose is to "*facilitate proper decisions on the merits;*" however, "*[t]he touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party.*" Quality Rock Products, Inc. v. Thurston County, 126 Wn. App. 250, 273, 108 P.3d 805 (2005). CR 15(a) also serves to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (citing Caruso v. Local Union No. 690, 100 Wn.2d 343, 349, 670 P.2d 240 (1983)).

The Trial Court considers "*undue delay, unfair surprise, and jury confusion*" when deciding whether justice requires an amendment. Wilson v. Horsley, 137 Wn.2d 500, 505-506, 974 P.2d 316 (1999). Where the opposing party is prepared to meet the new

issue, amendment should be allowed. Quackenbush v. State, 72 Wn.2d 670, 672, 434 P.2d 736 (1967) (citing Bowers v. Good, 52 Wash. 384, 386-387, 100 P. 848 (1909)).

Here, the Trial Court erroneously ruled that PES's contract was unenforceable. As a result, PES immediately requested leave to amend the Complaint to allege causes of action for quantum meruit/unjust enrichment, Consumer Protection Act Violations and tort theories. (R.P. 22).

These causes of action were not included in the original Complaint, because the existence of a valid contract precludes tort claims and claims for quantum meruit/unjust enrichment. See Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 604, 137 P.2d 97 (1943) (citing Schneider v. Allis-Chalmers Mfg. Co., 196 Wis. 56, 219 N.W. 370 (1928); see also Johnson v. Whitman, 1 Wn. App. 540, 463 P.2d 207 (1969)). Thus, since the Trial Court dismissed the contract claims, the quantum meruit, unjust enrichment and tort claims could then properly be asserted. However, the Trial Court abused its discretion and denied leave to amend.

Justice required that PES be able to bring an action for quantum meruit/unjust enrichment, CPA violations and other tort theories. The Trial Court abused its discretion when it did not allow this amendment. There was no prejudice to CPI in allowing the amendment. The case was only 94 days old. No discovery had taken place and the facts that supported the proposed amended claims were known by the defendant. Thus, the Trial Court's refusal to allow the amendment was in error and should be reversed.

V. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1 and the valid and enforceable contract between PES and CPI, PES respectfully requests an award of reasonable attorney fees and costs incurred below and on Appeal.

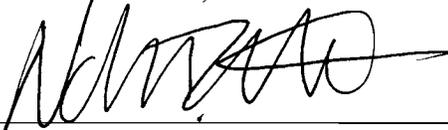
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VI. CONCLUSION

Pursuant to the foregoing, the Trial Court should be reversed and this case remanded back to the Trial Court for further proceedings.

DATED this 28th day of February, 2011.

DUNN & BLACK, P.S.



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Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of February, 2011, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|------------------|---------------------------------|
| <input checked="" type="checkbox"/> | HAND DELIVERY | J. Michael Keyes |
| <input type="checkbox"/> | U.S. MAIL | Whitney J. Baran |
| <input type="checkbox"/> | OVERNIGHT MAIL | K&L Gates, LLP |
| <input type="checkbox"/> | FAX TRANSMISSION | 618 W. Riverside Ave., Ste. 300 |
| <input type="checkbox"/> | EMAIL | Spokane, WA 99201 |



NICHOLAS D. KOVARIK