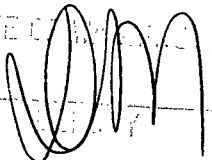


Court of Appeals No. 45589-7-II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BRADLEY C. HOGGATT and CONNIE HOGGATT, husband and wife,

Respondents,

v.

LUIS A. FLORES,

Appellant¹

RESPONDENTS' BRIEF

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¹ Respondents have maintained the case title consistent with the pleadings in the trial court pursuant to RAP 3.4. Compliance with the court rule is the sole reason for the difference in the case title between Respondents' Brief and Appellant's Brief.

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I. INTRODUCTION

The Respondents, Bradley and Connie Hoggatt, innocently sold a parcel to the Appellant Luis Flores that had not been legally separated from their remaining land. But instead of assisting the Hoggatts to fix what all agreed was a simple procedural problem, *or immediately demanding that the transaction be rescinded*, Flores tried to exploit the circumstances and strong-arm the Hoggatts.

When Flores refused to cooperate, the Hoggatts sought and obtained judicial relief. After giving Flores every opportunity to state whether he truly intended to seek rescission under RCW 58.17.210, the trial judge granted an injunction to allow the Hoggatts to bring the property into compliance with the law.

Flores, who, at best only “reserved” his statutory right of rescission, appealed this judgment to this court. And because Flores did not stay the injunction, the Hoggatts completed the short-plat and brought the property into compliance while the case was on appellate review

The court, in a published opinion,² affirmed the injunction and ruled that the Hoggatts, (as well as Flores) not only had a right but a “statutory duty” to bring the parcel into compliance with the platting laws.

On remand, and despite the fact that the parcel had been a legal lot of record for over five years, Flores, for the first time, affirmatively sought

² *Hoggatt v. Flores*, 152 Wn. App. 862, 218 P.3d 244 (2009) (hereafter “*Hoggatt I*”).

to rescind the conveyance. But Flores sought a remedy that, simply put, was untimely and contrary to the statute. Neither the statute nor common law authorized this untimely request. In short, Flores no longer had legal standing to demand rescission under the statute. The trial court therefore made the correct factual and legal ruling.

II. STATEMENT OF ISSUES

The Hoggatts do not assign error to the trial court's order granting summary judgment in their favor, but do restate the Issues as follows:

- A. RCW 58.17.210 permits a purchaser, **as an alternative** to having a parcel brought into compliance with the platting laws, to rescind the conveyance of an illegally-created parcel. But the law also permits (and even requires) the parties to fix the mistake and make the parcel legal.³ In this case, Flores did not equivocally demand a rescission until after the Hoggatts had rendered the parcel legal. Does Flores have standing to demand a rescission under the statute?
- B. RCW 58.17.210 permits a purchaser to rescind the conveyance of an illegal parcel. Can a purchaser rescind a conveyance under the statute if they wait until after the seller has cured the defect?
- C. Rescission is an equitable and extraordinary remedy that is within the court's broad discretion.⁴ But a person must promptly and unequivocally seek to rescind the transaction. In this case, Flores initially tried to exploit the Hoggatts' innocent mistake by trying to renegotiate the terms of the conveyance. He then took a wait-and-see approach during the litigation. But now, after the Hoggatts have expended time and money to make the parcel legal, Flores wants to rescind the conveyance. Is Flores entitled to Rescission?

³ *Hoggatt I*, 152 Wn. App. at 869.

⁴ *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 2006); *Nervik v. Transamerica Title Ins. Co.*, 38 Wn. App. 541, 547-48, 687 P.2d 872 (1984).

III. COUNTERSTATEMENT OF THE CASE

Mr. and Mrs. Hoggatt offer the following counterstatement of the case based on undisputed facts contained in the record.⁵

A. Hoggatts sold the Property to Flores in 2004.

The Hoggatts owned a residence and seven acres in Cowlitz County. They legally divided the property into three one-acre lots, leaving the home on the remaining four-acre lot. They then sold the three one-acre lots but kept the four-acre lot.

In 2004, the Hoggatts sold the house and one acre to Flores for \$249,900 (“Property”).⁶ Flores borrowed 80% of the purchase price by mortgaging the Property; he later borrowed another \$20,000 by way of a second mortgage.⁷ Flores has lived in the house ever since.

Unbeknownst to anyone,⁸ the Property conveyed to Flores was not a legal lot of record because the Hoggatts had failed to comply with the County’s short-plat requirements before splitting the home and one-acre

⁵ The facts herein recited are taken almost entirely from the Hoggatts’ Memorandum in Support of Motion for Summary Judgment contained in Clark County CP 875 L. 21 through 880 L. 6. Section III.G., below, was not taken from the Hoggatts’ Memorandum and is separately referenced to the record pursuant to RAP 10.3(5).

⁶ Clark County CP 913 (Flores Dep. September 1, 2010 P. 6 L. 23 through P. 7 L. 5). The Property sold to Flores may be larger than one-acre, but *Hoggatt I*, 152 Wn. App. at 864 referred to Flores’ Property as consisting of one-acre and the specific parcel size is not material to this action. Further, Flores never objected to this characterization in the trial court, so for purposes of consistency, the Hoggatts have elected to refer to the Flores Property as consisting of one acre.

⁷ Clark County CP 913 (Flores Dep. P. 7-8).

⁸ It seems amazing that no one, including Flores’ lender, his title company or Cowlitz County, caught the problem.

from the remaining three-acres. This defect did not come to light until 2007 when the Hoggatts applied to build their home on the remaining three acres.

In an effort to remedy the defect, the Hoggatts approached Flores about signing a short-plat application. Flores said he would but only if the Hoggatts agreed to: (1) pay all of his attorney's fees; and (2) sign a covenant not to subdivide their remaining property for at least 25 years. Flores never indicated a desire to rescind the conveyance; he instead communicated his desire to keep the home. He just wanted the Hoggatts to promise not to further divide their remaining three-acres, despite what zoning permitted.

The Hoggatts agreed to pay Flores' legal fees but objected to adding additional land-use restrictions to their remaining parcel. Flores refused to sign.

B. Flores refused to cooperate with Hoggatts to make the Property legal, necessitating a lawsuit filed by the Hoggatts to seek an Injunction.

Because Cowlitz County would not process the short-plat application without Flores' signature, the Hoggatts filed this lawsuit to either (1) require Flores to cooperate in making the Property legal under RCW 58.17.210, or (2) to allow the county to accept the application without his signature.

Flores filed an Answer and Counterclaim dated June 20, 2008⁹ where he asserted the Property was sold in violation of RCW 58.17.210.¹⁰ But instead of unequivocally demanding a rescission, Flores merely stated he “**reserve[d]** the right to seek all relief allowed by RCW 58.17.210 to include rescission, damages in amounts to be proven at time of trial, and reasonable attorney’s fees.”¹¹ He never offered or demanded to rescind.

C. Trial Court Granted Summary Judgment and Ordered Cowlitz County to Process the Short-Plat Application.

The Hoggatts moved for summary judgment on their request for injunctive relief. At the August 18, 2008 hearing, the trial judge, in an attempt to fashion an appropriate remedy, flat-out asked Flores whether or not he wanted to rescind.¹² Flores answered the Judge’s question in writing as follows:

At this point, Mr. Flores continues to hope that Mr. and Mrs. Hoggatt will see fit to honor their promise to Cowlitz County and limit the short-plat to two lots. If they do not, and if he cannot force them to, he is *leaning toward the remedy of rescission*. His doing so, of course, hinges on the court’s willingness to follow the rules set out in *Busch v. Nervik, supra*. **His investigation is ongoing, however, and his point of view may change.**¹³

⁹ Cowlitz County CP 1-2.

¹⁰ *Id.* P. 2.

¹¹ *Id.*

¹² Clark County CP 917 L. 14-17.

¹³ *Id.* P. 923 (emphasis added).

Believing he had given Flores plenty of opportunity to announce his unequivocal intent to rescind, the trial court ordered Cowlitz County to accept the Hoggatts' short-plat application so that they could bring the property into compliance with the platting laws.¹⁴ Flores appealed the court's injunction **but never** obtained a supersedeas bond to stay enforcement of the trial court's order.

D. Cowlitz County approved the Short-Plat and Flores' Parcel was deemed Legal on April 8, 2009.

In accordance with the trial court's ruling, and while the case was on appeal, Cowlitz County processed and approved the short-plat on April 8, 2009. Flores' Property has therefore been a legal lot of record since 2009.¹⁵

E. Court of Appeals upheld Injunction and ruled that Each Party had a Legal Duty to make the Parcel Legal.

On October 26, 2009, the Court of Appeals in *Hoggatt 1* upheld the injunction¹⁶ in a published opinion:

When an owner of property subdivides it illegally and sells a parcel, both seller and purchaser have a statutory duty to conform the property to the subdivision laws. The aggrieved purchaser may elect either to rescind or to recover damages, but when the purchaser obstructs the seller's efforts to

¹⁴ *Id.* P. 787.

¹⁵ *Id.* P. 911.

¹⁶ Neither counsel for the Hoggatts nor counsel for Flores was counsel for the parties during *Hoggatt 1*. From the record, it does not appear that the Court of Appeals was made aware during the proceedings of *Hoggatt 1* that the short plat had been recorded on April 8, 2009.

conform the property by insisting on conditions not required by law, a trial court does not err by entering an injunction in favor of the seller allowing the compliance process to proceed.¹⁷

F. On Remand, Cowlitz County Superior Court ruled that Flores was not Entitled to Rescission.

The case was remanded to Cowlitz County on January 4, 2010. Upon remand, no significant action was taken in the trial court until Flores moved for partial summary judgment on March 30, 2012.¹⁸ Flores asked the court to rule that, although his Property was now in compliance with RCW 58.17.210, he was still entitled to a rescission under the statute.¹⁹

The court orally denied the motion on May 11, 2012.²⁰ Judge Gary Bashor subsequently issued a written Ruling on Reconsideration:

The issue presented in the case at bar is: “does a purchaser under RCW 58.17.210 have an absolute right of rescission as claimed by the Defendant? The ruling this court issued is to the contrary. RCW 58.17.210 offers two alternative remedies for a purchaser. 1. Make the property comply and award damages suffered by the illegal subdivision OR 2. Rescission. The statute clearly lists rescission as an alternative remedy.²¹

¹⁷ *Hoggatt I*, 152 Wn. App. at 864.

¹⁸ Clark County CP 204-10.

¹⁹ *See id.* CP 207 L. 13-19. It should be noted here that Flores essentially failed to demand rescission in his 2012 motion for summary judgment. Requesting a ruling that he possessed “a right to rescind the transaction” is different from unequivocally demanding the transaction be rescinded.

²⁰ *Id.* CP 17.

²¹ *Id.* CP 108 L. 8-13.

And then, with regard to Flores' conduct, Judge Bashor made the following finding of fact:

[Mr. Flores'] position that he has never taken a position inconsistent with a rescission request is not well taken. His initial position apparently was that he would be fine with the seller making the lot comply so long as they agreed to limitation on the rest of the property. The parties were arguing over the process for compliance and the terms to be exacted therefore.²²

Id.

G. Clark County Superior Court ruled that Flores was not Entitled to Rescission.

The case was subsequently transferred to Clark County.²³ The trial court granted the Hoggatts summary judgment on the basis that Flores was not entitled to a rescission so many years after his statutory right to rescind was triggered.²⁴ Flores has once again appealed the trial court's ruling.

IV. ARGUMENTS

A. Summary Judgment was Proper because there were no Disputed Issues of Material Fact and the Application of RCW 58.17.210 clearly Favors the Hoggatts.

1. The Standard of Review is both *De Novo* and Abuse of Discretion.

The trial court correctly ruled on summary judgment that the statutory window for Flores to rescind the conveyance closed when he

²² *Id.* L. 17-21.

²³ *Id.* CP 13, 44-45.

²⁴ *See id.* CP 946-47.

failed to timely and unequivocally exercise his right under RCW 58.17.210.

The key issue -- the interpretation of RCW 58.17.210²⁵ -- is one of law and therefore subject to *de novo* review.²⁶

But because the essential facts supporting Flores' untimely and inequitable demand is not in dispute, the trial court's denial of his request for rescission is also subject to the "abuse of discretion" standard of review.²⁷

While granting summary judgment in cases of equity may not always be appropriate, a court can, when there is only one conclusion that can be drawn from the evidence, deny or grant equitable relief.²⁸ One need look no further than this court's decision in *Hoggatt I* to uphold the trial court's issuance of an injunction on summary judgment.²⁹

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²⁵ See Flores' Response to the Hoggatts' memorandum supporting summary judgment. *Id.* CP 926-36. Flores did not dispute any material facts asserted by the Hoggatts in the trial court.

²⁶ See *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2003).

²⁷ *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460, 45 P.3d 594 (2002) ("We review the application of equity for an abuse of discretion."); accord *Willener v. Sweeting*, 107 Wn.2d 388, 397, 730 P.2d 45 (1986) (holding trial court's judgment in equity "did not abuse its discretion").

²⁸ See generally *Cornish Coll. of the Arts, v. 1000 Ltd P'ship*, 158 Wn. App. 203, 220, 242 P.3d 1 (2010).

²⁹ *Hoggatt I*, 152 Wn. App. at 871.

2. Flores is not entitled to rescission as a matter of law.

Flores is not entitled to a rescission for the following legal reasons.

First, Flores cannot dismiss the plain language of RCW 58.17.210 and seek or expect rescission **after** the property has been made to comply with the subdivision statutes.³⁰ Rescinding the transaction now could not possibly further the purpose of the subdivision statute since the key purpose (remedial) was accomplished when the Property was formally and properly platted in 2009. While Flores may have been able to immediately seek rescission when he discovered the problem in 2008, his failure to timely act means that he no longer meets the legal requirements to seek a rescission.³¹

Second, Flores is not entitled to a rescission because he failed to promptly, diligently and unequivocally seek rescission.

And finally, Flores' unclean hands in attempting to strong arm the Hoggatts also bars him from seeking equity.³²

The trial court therefore properly granted summary judgment.

RCW 58.17.210 only permits a purchaser to seek rescission if the subject parcel does not comply with the platting laws.³³ This is a temporal

³⁰ See Appellant's Brief, P. 6, 11-12.

³¹ See Clark County CP 207 L. 13-19. This assumes, taken in the light most favorable to Flores, that his request for an order affirming he had a *right* to rescind constitutes a *demand* to rescind. Hoggatts do not believe that an order confirming a certain right exists is the same as an order granting execution pursuant to a declared right.

³² See *Cornish*, 158 Wn. App. at 216-218 ("Equity jurisprudence requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands" and such determination can be made at summary judgment).

requirement. Because the parcel has been legal since April 8, 2009—long before Flores demanded rescission—there is no statutory basis for him to seek rescission now.

B. RCW 58.17.210 Prohibits the Development of Illegally-Created Parcels and Allows either the Buyer or Seller to Correct the Defect.

RCW 58.17.210 provides as follows:

No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. **The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice.** All purchasers' or transferees' property shall comply with provisions of this chapter and each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may **as an alternative to conforming his or her property to these requirements**, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

(Emphasis added).

³³ The statute expressly states that rescission may be used only “as an *alternative to conforming*” property to the subdivision requirements. RCW 58.17.210 (emphasis added). Since rescission can only be used as an alternative to taking the property through the platting process, it clearly has no application to property that has previously been made to conform to subdivision requirements.

1. The statute requires that an illegal parcel either be made legal, or the buyer, as an alternative remedy, may rescind the transaction.

The meaning of RCW 58.17.210 is plain,³⁴ remedial³⁵ and clearly designed to promote the effective and legal use of land. In addition to requiring the buyer and/or seller to make the parcel legal, the statute allows purchasers *the option* to either obtain damages or, if the lot cannot be made legal—or the purchaser prefers not to go through the process to make the lot legal—to rescind the transaction.³⁶

Despite the Appellant’s attempt to argue otherwise, the statute is remedial and not punitive.³⁷ The purpose is to ensure that lots comply with the platting laws.³⁸

³⁴ In analyzing a statute, the Court must give meaning to each of the words used. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (“[E]ach word of a statute is to be accorded meaning.”); *see also City of Seattle v. St. John*, 166 Wn.2d 941, 945, 215 P.3d 194 (2009) (stating that the court’s primary goal in interpreting a statute is to give effect to the legislature’s intent). Washington courts presume the legislature used no meaningless or superfluous words, and interpret a statute in a manner that gives effect to all of the words used. *Roggenkamp*, 153 Wn.2d at 624. Courts will not add words where the legislature has chosen to exclude them. *Clark County Pub. Util. Dist. No. 1 v. Dep’t of Revenue*, 153 Wn. App. 737, 747, 222 P.3d 1232 (2009) (“In other words, if a statute specifically designates the things on which it operates, we infer the legislature intended all omissions.”). “Where the statute’s meaning is plain and unambiguous, we derive legislative intent from the plain language of the statute.” *Seattle*, 166 Wn.2d at 945.

³⁵ *See* RCW 58.17.010.

³⁶ *See Crown Cascade v. O’Neal*, 100 Wn.2d 256, 259-62, 668 P.2d 585 (1983).

³⁷ Remedial statutes typically afford a remedy, or better a remedy already in existence. *Bayless v. Community College Dist. No. XIX*, 84 Wn. App. 309, 312, 927 P.2d 254 (1996). Punitive statutes, on the other hand, are typically criminal statutes, or civil statutes so punitive in nature that a civil label, alone, will not be dispositive. *See State v. Schmidt*, 100 Wn. App. 297, 300 n.7, 996 P.2d 1119 (2000). Statutes that provide for treble damages or penalties, for example, would be punitive rather than remedial.

The statute's first sentence prevents the development of illegally-created parcels. But the second sentence provides an exception for "innocent purchasers for value." The third sentence then requires that "all purchasers' or transferees' property shall comply" with the law and then affords the purchaser the ability to recover any damages that he or she may have incurred in bringing the property into compliance.

As this Court noted in *Hoggatt I*, the statute, by referring to the "purchasers" or the "transferees" of property, does not limit who can or must rectify the defect. The court instead ruled that either (or ideally both) the buyer or seller have a right and the "statutory duty to conform the property to the subdivision laws."³⁹

RCW 58.17.210 then grants in the fourth sentence, "as an **alternative to**" bringing the property into compliance, the purchaser has the right to "rescind" the conveyance. But much to Flores' chagrin, the statute **does not** state that rescission is available **after** the property is brought into compliance with the subdivision requirements.⁴⁰

While remedial statutes are liberally construed, *Jametsky v. Olsen*, 179 Wn.2d 756, 765, 317 P.3d 1003 (2014), the liberal construction standard may not be used to expand the reach of a statute beyond what the legislature intended. *State v. J.P.*, 149 Wn.2d 444, 456, 69 P.3d 318 (2003). In other words, the court cannot turn a blind eye to the express language contained in the statute or provide a victim with a "blank check." *Id.* (quoting *State v. Vineyard*, 50 Wn. App. 888, 895, 751 P.2d 339 (1988)).

³⁸ RCW 58.17.010; RCW 58.17.210.

³⁹ *Hoggatt I*, 152 Wn. App. at 864.

⁴⁰ *See, e.g., Clark County Pub. Util. Dist No. 1*, 153 Wn. App. at 747 (stating courts do not add words where the legislature has chosen to exclude them).

As the trial court found—because the facts are not in dispute—Flores never sought rescission **until after** the property was brought into compliance. By then, he no longer had standing to seek such relief.

2. Flores suffered no harm by the conveyance of the illegal parcel.

a. The Parcel was already developed.

It is undisputed that the platting defect did not affect Flores’ rights in the Property. In this case, Flores moved into and has lived in the home ever since the 2004 conveyance. He was able to borrow money to buy the Property and even was later able to refinance his home.

In addition, the Property has been legal since April 8, 2009. In fact, had Flores simply cooperated (i.e. complied with his “statutory duty”⁴¹), instead of trying to exploit the Hoggatt’s innocent mistake, his Property would have been made legal within a very short time after the defect was discovered.

In sum, Flores got what he purchased—a home on one-acre of land.

b. Flores was an innocent purchaser.

Although there is no evidence that he was ever denied a permit or was otherwise adversely affected by the parcel’s temporary platting defect, it seems clear Flores would have been protected as an “innocent

⁴¹ *Hoggatt I*, 152 Wn. App. at 864.

purchaser.” The second sentence of RCW 58.17.210 provides a safe haven for those, such as Flores, who innocently purchase an illegally-created lot. Under this provision, an innocent purchaser for value can obtain permits and develop their property.

In short, Flores simply was unaffected by the fact that the Property was not properly subdivided.

3. Because the Parcel is now a Legal Parcel of Record, Flores has no basis to seek a rescission.

Flores seeks to rescind a sale that occurred approximately ten years ago—for Property that has been in compliance with the platting laws since April 8, 2009. **Simply put, he seeks a remedy that has never been permitted by a Washington court.**⁴² And there is good reason for this.

Under the statute, rescission is an “alternative” remedy to “conforming his or her property to [the subdivision] requirements.” RCW 58.17.210 (emphasis added). But once the subject property complies with the law, there is no statutory basis (or standing) to seek a rescission.

As this court stated, the law permits either (or both) the buyer and seller to fix the problem of an illegal parcel:

When an owner of property subdivides it illegally and sells a parcel, **both** seller and purchaser have a statutory duty to conform the property to the subdivision laws. The aggrieved purchaser **may elect either to rescind or to recover**

⁴² After diligent research, counsel has found no Washington case permitting rescission for violation of the Washington subdivision statute after the property has been made to conform with RCW 58.17.

damages, but when the purchaser obstructs the seller's efforts to conform the property **by insisting on conditions not required by law**, a trial court does not err by entering an injunction in favor of the seller allowing the compliance process to proceed.

Hoggatt I, 152 Wn. App. at 864 (emphasis added).

Although they needed judicial intervention to overcome Flores' shenanigans, the Hoggatts fulfilled their legal obligation to make the Property legal.

So, based on the plain language of RCW 58.17.210,

Flores no longer has the right to seek rescission. He has what he purchased—a home on a properly-platted parcel.

C. Flores is not Entitled to the Equitable Relief of Rescission

Flores does not have standing to seek rescission under the statute because he did not unequivocally make a demand for rescission until after the Property came into compliance with the law.

Regardless, RCW 58.17.210 does not supersede the Court's inherent equitable power to grant rescission. Even if the Court were to interpret RCW 58.17.210 as allowing rescission—five years after a platting violation is fully cured—Flores would not qualify for such an equitable remedy.

Division II of the Court of Appeals has specifically held that the statutory remedies contained in RCW 58.17.210 “simply *augment* the usual panoply of measures which flow from a purchaser's common law

right of rescission.”⁴³ And in accordance with long standing case law, the trial court is in the best position to balance the equities and decide whether to grant such relief.

Merely because the right of rescission is conferred by statute does not mean the court can ignore the common law principles that govern such remedies.

The common law of rescission requires that the party promptly, unequivocally and clearly announce his intent to rescind the transaction and to act in accordance with that intent. Simply “reserving” the right to rescind, or indicating that one is “leaning” toward that option, after several years of knowing the basis for a rescission, falls well short of what the law requires.

Not only does Flores fail to satisfy the statutory requirements for rescission, he also fails to meet the common law requirements for this type of equitable remedy.⁴⁴ “Rescission” or “to rescind” is both a term of legal art to describe an action and a judicial remedy. To “rescind” a transaction means to abrogate it or annul it.⁴⁵ So while a rescission is the act of

⁴³ *Nervik*, 38 Wn. App. at 547.

⁴⁴The right under RCW 58.17.210 to rescind is an augmentation of the common law rules of rescission. *Nervik*, 38 Wn. App. at 547 (holding the remedies contained in RCW 58.17.210 “simply *augment* the usual panoply of measures which flow from a purchaser’s common law right of rescission. We so hold.”). As an equitable remedy, the court has broad discretion in shaping the relief. *See id.* at 547; *Bloor v. Fritz*, 143 Wn. App. 718, 739, 180 P.3d 805 (2008). “Equity includes the power to prevent the enforcement of a legal right, when to do so would be inequitable under the circumstances.” *Mendez*, 111 Wn. App. at 460.

⁴⁵ *Nervik*, 38 Wn. App. at 547.

abrogating a contract, a party can also, under the right circumstances, seek the judicial remedy of rescission.⁴⁶

Had Flores timely demanded—and was ready, willing and able to perform—a rescission when he first learned of the platting defect, this lawsuit may have never occurred. Instead of being held hostage by Flores’ refusal to cooperate, the Hoggatts would have been able to accept the rescission and move forward to short plat the Property without Flores’ signatures. But instead of offering to rescind, Flores unsuccessfully attempted to strong-arm Hoggatts into renegotiating the terms of the conveyance by adding restrictions to their remaining property.

1. A Demand for Rescission must be Prompt, Unequivocal and the Party Claiming Rescission must not continue to benefit from use of the Property.

A party that seeks rescission must promptly, unequivocally and clearly announce this intent, and act in accordance with that intent.⁴⁷ The rescinder’s conduct must also be consistent with his or her unequivocal intention to rescind:

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he remains silent, and continues to treat the property as his own, he will be held to have waived the objection,

⁴⁶ See generally *Jones v. Grove*, 76 Wash. 19, 135 P. 488 (1913).

⁴⁷ *Wilson v. Pearce*, 57 Wn.2d 44, 53, 355 P.2d 154 (1960).

and will be conclusively bound by the contract, as if the mistake or fraud had not occurred.

Wilson, 57 Wn.2d at 53 (buyers waived their right to rescind when they failed to timely announce their intent to disaffirm the contract) *quoting Coovert v. Ingwersen*, 37 Wn.2d 797, 226 P.2d 187 (1951)).⁴⁸

Power v. Esarey, 37 Wn.2d 407, 224 P.2d 323 (1950) provides another example. In that case, the buyers purchased a grocery store from the sellers. The buyers sought to rescind the transaction on the basis that the sellers had misrepresented the boundary line. The court found the sellers had indeed made an honest mistake of fact in representing the boundary line. However, in determining the buyers had waived the right to rescind the sale, the trial court relied upon two key rules: (1) that “**actions for rescission must be promptly commenced**” and (2) the rule, as stated in 9 Am. Jur. P. 389, that:

If a person claims that a contract or conveyance was procured by fraud, **he must elect to rescind promptly or he will be barred from relief** upon the ground of having ratified the transaction. If he proceeds to execute the contract with knowledge that fraud has been perpetrated on him, or **continues to receive benefits under the contract**

⁴⁸ The Coovert case provides another example of purchasers waiving their right to rescind a transaction by continuing to take advantage of the property in their possession, using the property “as [their] own.” *Coovert*, 37 Wn.2d at 803 (quoting 9 Am. Jur. 389, § 45). There, the Washington Supreme Court reversed the trial court’s decision granting rescission because the homeowners had continued using the defective furnace “for their own benefit up to and [through] the trial of the case.” *Id.* at 804. Further, the buyers’ mere instruction to the seller’s representative to remove the furnace was “at the very most, a notice of their desire to rescind.” *Id.* (The statement itself, without something more—without actions toward the property that were consistent with rescission—did not constitute a valid rescission.) The same could be said of Flores’ attempt to get the Cowlitz County Superior Court to rule he had “right” to rescind rather than asking the court to actually rescind the transaction. Clark County CP 207 L.17-19.

after he has become aware of the fraud, **or if he otherwise conducts himself with respect to it as though it were a subsisting and binding engagement**, he will be **deemed to have affirmed and waived his right to rescind**.

Id. at 411-12, 417 (emphasis added).

In *Power*, the buyers' waited two years to seek rescission. *Id.* at 412. They also continued to make payments under the contract and tried to sell the property. *Id.* The trial court found these actions, taken as a whole, acted to waive the buyers' right to rescind. *Id.* The Washington Supreme Court affirmed the trial court on appeal and adopted the waiver rule as stated in American Jurisprudence quoted above. *Id.* at 417-18.

The Washington Supreme Court in *Weir v. Sch. Dist.*, 200 Wash. 172, 180-81, 93 P.2d 308 (1939) also announced that the demand for rescission must be made with "reasonable promptness" or it will be waived. *Weir* continues to be cited in 17A Am. Jur. 2d Contracts § 572 (2014) as a source supporting the majority rule.

Thus, the remedy of rescission is only available if: (1) the buyer's decision to rescind is promptly made, asserted and offered to the seller, (2) the buyer unequivocally adheres to that decision, and (3) the buyer immediately ceases efforts to benefit from the property and quits treating the conveyance as a "binding engagement."

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2. Flores' Actions and Statements have been anything but Prompt and Unequivocal and He has continued Using the Property for His own Benefit.

Flores' decision to rescind the transaction was anything but prompt or unequivocal. At best, he was equivocal about whether he wanted to rescind the transaction. He also continued to use the property long after he learned of the statutory grounds for rescission.

In fact, to this day, Flores has not amended his Answer (he only "reserved" the right to seek rescission)⁴⁹ and therefore has yet to unequivocally seek rescission. While he asked for a court order stating he had a "right" to rescind some three years after the Property was brought into compliance, and some five years after initially learning of the platting defect, **he still has not expressly or unequivocally demanded rescission, or even offered to rescind.**⁵⁰

Remember, at the critical time when the trial court was attempting to fashion the appropriate remedy, Flores represented that he was not sure whether he wanted to rescind the transaction or not. When directly asked, Flores said that his "preference" was to get the Hoggatts to agree to a covenant restricting future development of their remaining property.⁵¹

He also advised the court that while he was "**leaning toward the remedy of rescission**"⁵² he was not certain and that his decision may

⁴⁹ Cowlitz County CP 2 L. 3-5.

⁵⁰ See Clark County CP 207 L. 17-19 (seeking only a ruling he has a "right" to rescind).

⁵¹ Clark County CP 919 L. 20-24.

⁵² *Id.* P. 923 L. 3 (emphasis added).

“hinge” on the “court’s willingness to follow the rules set out in *Busch v. Nervik*. . . .”⁵³ Flores added that “[h]is investigation is ongoing, however, and his *point of view may change*.”⁵⁴

Despite being given a golden opportunity to advise the court what he wanted, Flores chose to remain equivocal, almost aloof. The trial court therefore properly found that Flores waived any right he had to seek rescission and allowed the Hoggatts to move forward to cure the defect.

Flores argues that he has consistently maintained his right to a rescission. But as pointed out above, his current statement does not match what he represented to the trial court, when it mattered most.⁵⁵ He instead chose to “reserve” his right and to remain equivocal on what he wanted. But now, once the Hoggatts have spent time and money to bring the property into compliance, Flores wants to rescind the transaction. He simply is too late and has waived the right to seek a rescission.

- a. Flores’ request to rescind was neither prompt nor unequivocal.

Flores purchased the property in 2004. After being informed of the plat violation in 2007, Flores failed to give any oral or written indication

⁵³ *Id.* L. 3-4.

⁵⁴ *Id.* L. 5-6 (emphasis added).

⁵⁵ Appellant’s Brief P. 10. Even if Flores had unequivocally demanded rescission at the time of filing his counterclaim on June 23, 2008—and further assuming he had unequivocally maintained such demand throughout the litigation—he may still have waived his right to timely rescind given he first learned of the illegal plat in 2007.

of his intention to rescind the sale. In fact, Flores was agreeable to sign the short plat application to make the Property a legal parcel but only if he could extract a personal benefit from the Hoggatts in the form of a restrictive covenant that was beyond the original agreement.⁵⁶

Flores never mentioned rescission at any time until filing his Answer a year after learning of the platting defect. And as quoted above, his Answer and subsequent court writings were ambiguous, equivocal, almost calculating.

“Reserving” the right to ask for rescission, and taking a wait-and-see approach (“leaning toward the remedy of rescission”) while at the same time reserving the right to change his “point of view”—do not, even taken in the light most favorable to Flores, remotely constitute a “prompt or unequivocal demand to rescind.” Even then, these waffling statements were not made by Flores until approximately one year after learning of the subdivision violation and at the express direction of the trial court. Flores’

⁵⁶ The Court of Appeals in *Hoggatt I* was less than impressed with respect to Flores’ selfish and greedy attempt to extract significant concessions from the Hoggatts in the latter’s attempt to do the right thing. The Court of Appeals stated in pertinent part:

Flores cites no principle of law that allows him to demand that the Hoggatts surrender valuable rights in their property in exchange for his signature on the subdivision application. . . . He may not, however, demand that the Hoggatts agree to restrict further development of their land. Allowing Flores to hold up corrective action on the subdivision until his *personal* demands have been met would be a violation of RCW 58.17.210”

Hoggatt I, 152 Wn. App. at 870.

failure to promptly and unequivocally seek rescission prevents him from seeking it now.

- b. The Parcel was made legal before Flores ever demanded rescission.

As stated above, Cowlitz County approved the short-plat on April 8, 2009, long before the Court of Appeals upheld the trial court's decision in *Hoggatt I*. By failing to seek a stay of the trial court's order, and allowing the short-plat to be recorded pending the appeal, Flores has waived his right to challenge the fact that his Property was brought into compliance with RCW 58.17.210 before he sought rescission upon remand.

- c. Flores has continuously used the Property in a manner to benefit himself.

As set out above, a party who truly seeks rescission cannot continue to treat the property as his own or reap continued benefits from the transaction he seeks to rescind.

In this case Flores has never offered to tender the Property back to the Hoggatts. He has continued to live in and enjoy the house and Property. He was also able to obtain the original purchase money mortgage and obtained a \$20,000 second mortgage on the home. He was never denied building permits.

Such are not the actions of a party who promptly and unequivocally rescinds a conveyance.

3. It would be inequitable to allow Flores to pursue rescission.

It would be inequitable to allow Flores to pursue rescission. “The first maxim in equity” is that one “who seeks equity must do equity.”⁵⁷ A similar rule is that those who come into equity must come with clean hands.⁵⁸

Here, Flores’ actions have been less than equitable. He attempted to coerce a restrictive covenant from the Hoggatts. He also refused to comply with his statutory duty to bring the Property into compliance with the platting laws. (The Hoggatts performed all of the work; Flores merely needed to sign his name.) He also played games with the court when asked a pretty simple and concise question: Do you want to rescind or not?

V. CONCLUSION

The trial court correctly ruled that Flores lacked legal standing under the statute to seek rescission after the property was brought into compliance with the law. Regardless, any right he may have possessed was lost when he failed to promptly and unequivocally demand or offer a rescission. Moreover, Flores’ decision to continue to reap multiple benefits from the subject Property means that he waived the right to rescind.

⁵⁷ *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 581, 304 P.3d 472 (2013)

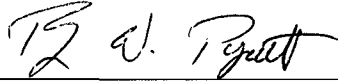
⁵⁸ *Id.*

The Court should therefore uphold the trial court and rule that Flores is not entitled to a rescission.

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Respectfully Submitted,

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