

No. 63051-2-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

J.E. EDMONSON and NAOMI I. EDMONSON,
Plaintiffs,

v.

IVAN G. POPCHOI and VARVARA M. POPCHOI,
Respondents,

v.

CSABA KISS,
Appellant .

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANTS

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RCW 18.86.0107

RCW 64.04.0308

I. INTRODUCTION

The Popchois' brief says a lot, but means little. This appeal expressly accepts the trial court's findings of fact, yet the Popchois' Brief devotes 24 pages to reciting those undisputed facts. The eight pages of argument generally restate the applicable law, but it is not until page 37 of their 39-page brief that the Popchois reach the two specific legal questions raised in this appeal.

The first issue is whether a seller to whom an adverse possession claim is tendered under a statutory warranty deed has the right to settle the tendered claim and pay the buyer's damages, or whether the buyer may tender the claim to the seller and retain control over the defense. In support of their argument that the buyer does retain such a right, the Popchois offer three paragraphs of argument without a single citation to any authority.

The second issue is whether a buyer who discovers an encroachment that is unknown to the seller has a duty to disclose that encroachment to the seller. This is a question of first impression in Washington. In less than two pages of argument, the Popchois again restate general principles of law, but never reach the specific questions raised in this appeal.

The Popchois' lengthy discussion of everything but the two legal issues presented in this appeal is not accidental. No authority permits a party who tenders the defense of a claim to then dictate how the claim will be defended. Similarly, Washington law imposes a duty of good faith and disclosure of material facts not just on sellers, but on all parties to a transaction. This Court should reverse the judgment for the Popchois and remand for entry of judgment in favor of Kiss.

II. FACTUAL BACKGROUND

The Popchois are quick to point out that the trial court's findings of fact are verities on appeal, but even quicker to ignore the verities that they dislike. It is a verity that the Popchois had a survey done before they agreed to purchase the property. CP 141-42 at ¶ 4. It is a verity that the survey disclosed an encroachment. CP 142 at ¶5. The Popchois have never denied that they knew about the encroachment at the time.

It is a fact that the Popchois refused to cede the right to control the defense to the adverse possession claim as part of their tender. That is the argument they successfully made to the trial court and the argument that they maintain in their brief.

Those are the facts that matter in this appeal. The remaining facts may add to the context, but are no more than a distraction from the legal issues at hand.

III. LEGAL ANALYSIS

A Tender of a Deed Warranty Claim Includes the Right to Compromise the Claim and Pay Damages.

It is noteworthy that the Popchois cannot offer a single authority for their proposition that the tender of claim does not include the right to control the defense. The ramifications of the rule suggested by the Popchois and adopted by the trial court would be extreme. The party who successfully tendered a claim would be relieved of the consequences, but could still insist upon a costly and imprudent defense. The party who accepted the tender would find itself compelled to do far more than it ever bargained.

Although Washington law beyond *Petersen-Gonzales v. Garcia*, 120 Wn.App. 624, 86 P.3d 210, 213 (2004) is sparse, tenders of the right to defend claims is a universal concept subject to generally acknowledged principles. One of those principles is that the party who accepts the tender thereby acquires the right to control the defense.

The California Court of Appeals aptly summarized the relationship created by the tender of claim in *Truck Ins. Exchange v. Unigard Ins. Co.*, 79 Cal.App.4th 966, 979, 94 Cal.Rptr.2d 516, 525 (2000)

The insured-insurer relationship is based on the premise that, in the event of a claim, occurrence, or suit, the insured will tender the defense to the insurer, which will provide a defense and control the litigation with the full cooperation

of the insured. “When the insurer provides a defense to its insured, the insured has no right to interfere with the insurer's control of the defense....” (*Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 787, 84 Cal.Rptr.2d 43.)

In *Bruce v. Junghun*, 912 N.E.2d 1144, 1148 (Ohio App. 2009), the court acknowledged the “valuable right of the insurer to be able to control the defense of actions in which the insurer may be required to pay the judgment.” In *Milroy v. Allstate Ins. Co.*, 151 P.3d 922, 927 (Okla. App. 2006), the Oklahoma Court of Appeals stated that: “The contractual duty to defend includes the right to control the course of the defense of the liability claim and to decide on litigation strategy.”

In this case, Kiss accepted the tender, conditioned only on the Popchois’ verification that they were tendering the right to defend rather than the duty to defend as dictated by the Popchois. At that point, the Popchois had two choices; they could tender the claim with the right to control the defense, in which case they would be entitled to recover damages that were caused by a loss or settlement of the claim; or they could elect not to tender so that they would retain control over the defense. Even after electing not to tender the right to defend the claim, the buyer still retains the right to recover damages as long as notice of the claim was provided to the seller. *See generally Mellor v. Camberlin*, 100 Wash.2d 643, 648, 673 P.2d 610, 613 (1983) (“Generally, a covenantee may not

recover damages against a covenantor for breach if no notice is given, as the latter is deprived of a fair opportunity to defend title.”).

In this case, Kiss accurately foresaw that the cost of defending the claim and the damages from the likely outcome outweighed the cost of simply conceding the claim and paying the Popchois’ damages. He was not required to inform the Popchois of his determination, but he did so to avoid misunderstandings and disputes. It is undisputed that the Popchois expressly rejected Kiss’s right to control the defense, and maintain that position in this case. Exhibit 9. By failing to make a proper tender of the right to defend, the Popchois lost any right to attorney fees they incurred because of their own decision to defend the claim themselves instead of recovering the damages to which they were entitled. *Mastro v. Kumakichi Corp.*, 90 Wn.App. 157, 951 P.2d 817, 820 (1998).

B. Concealment of a Material Fact Is A Defense to a Deed Warranty Claim.

The Popchois address their failure to disclose the encroachment only in passing. Brief of Respondent at 38-39. Their argument consists of a citation to *Foley v. Smith*, 14 Wn.App. 285, 539 P.2d 874 (1975), in which the Court of Appeals held that a buyer’s prior knowledge a title defect did not in itself bar a claim for breach of a deed warranty.

Foley certainly remains good law, but it does not stand for the rule advanced by the Popchois. It is one thing to say that a buyer's claim is not barred merely because the buyer knew of a title defect, and another altogether to infer from that rule that a buyer may conceal such knowledge from the seller, particularly when negotiating for extensions of the closing date.

Washington has but one rule of disclosure for buyers, sellers and brokers in real estate transactions:

The duty to disclose material facts has also been recognized in real estate transactions. In *McRae v. Bolstad*, 101 Wash.2d 161, 162-65, 676 P.2d 496 (1984), the purchasers of a home successfully prosecuted an action under the CPA when the sellers failed to disclose sewer and drainage problems. In holding that the claim satisfied the CPA's public interest element, the court determined that the seller's failure to disclose material facts about the property was an unfair and deceptive act or practice. *McRae*, 101 Wash.2d at 165-66, 676 P.2d 496. The court also noted that the "failure of a salesman to disclose information has long been recognized as the basis for an action under RCW 19.86." *McRae*, 101 Wash.2d at 166, 676 P.2d 496 (citing *Testo*, 16 Wash.App. at 51-52, 554 P.2d 349).

Griffith v. Centex Real Estate Corp., 93 Wash.App. 202, 215, 969 P.2d 486, 492 (1998). It would be a strange rule indeed that required disclosure from sellers but permitted concealment by buyers.

The term "material fact" has been defined by the legislature in the context of real estate transactions as "information that substantially

adversely affects the value of the property or a party's ability to perform its obligations in a real estate transaction, or operates to materially impair or defeat the purpose of the transaction.: RCW 18.86.010(9); *see Luxon v. Caviezel* 42 Wash.App. 261, 265, 710 P.2d 809, 811 (1985); *Mitchell v. Straith*, 40 Wash.App. 405, 411, 698 P.2d 609 (1985).

Popchoi knew about the encroachment before they purchased the property from Kiss. CP 1401-42 at ¶¶ 4, 5. After the agreement was executed, the parties executed no less than seven separate extensions of the closing date Exhibit 101. Popchoi had eight separate opportunities to disclose his knowledge that impaired the purpose and performance of the transaction, but he remained silent. Popchoi's sole obligation was to inform Kiss that Popchoi's offer required Kiss to do something that he could not do. By concealing his knowledge, Popchoi deprived Kiss of the opportunity to try to resolve the encroachment the neighbor, the opportunity to reject Popchoi's offer and seven opportunities to decline the request for extensions of the closing date.

The law should not reward a buyer's concealment of a material fact in a real estate transaction any more than it would reward a seller for concealing a termite infestation. This Court should adopt the narrow rule that when a buyer knows of a warranty breach, but the seller does not, and

the buyer nonetheless closes the transaction, that buyer may not seek relief for breach of that warranty after closing.

IV. CONCLUSION

RCW 64.04.030 is a commonsense statute intended to ensure the stability of land ownership and the fairness of real estate transactions. It was never intended to be a trap or device for buyers to acquire more than they knew the seller could convey. For that reason, this Court should hold that a buyer who conceals a material fact from a seller cannot thereafter seek relief from an innocent seller.

In the same vein, this Court should reaffirm that the warranties set forth in RCW 64.04.030 are no different from any other indemnity device. The measure of damages for breach of those warranties is well established, and buyers may not both demand that the seller defend a claim and dictate to the seller how that defense will be managed. The law across the country has struck a fair and deliberate balance between the right to full indemnity and the right to decide when the fight has been lost. This Court should preserve, not upend that balance.

DATED this 14th day of October, 2009.

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DECLARATION OF SERVICE

I, Leslie Rothbaum, am over the age of 18 years, and based on my personal knowledge, state as follows:

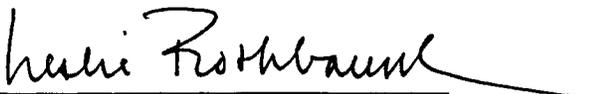
On October 14, 2009, I caused true and correct copies of the Reply Brief of Appellants to be served on the persons listed below by depositing them, properly addressed and postage pre-paid, in the U.S. Mail to

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Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14 day of Oct, 2009 at Seattle, Washington.



Leslie Rothbaum