

00547-2  
No. 665472

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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LUIN and SHIRLEY LEISHER,

Appellant,

v.

COMMONWEALTH LAND TITLE COMPANY OF PUGET SOUND,  
LLC and SEAWEST INVESTMENT ASSOCIATES, LLC,

Respondent.

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BRIEF OF RESPONDENT/CROSS-APPELLANT

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Christopher R. Osborn, WSBA  
#13608  
Nicole Guerrero Diven  
#40811  
Attorneys for Plaintiff  
Seawest Investment Associates, LLC

**FOSTER PEPPER PLLC**  
1111 Third Avenue, Suite 3400  
Seattle, Washington 98101-3299  
Telephone: (206) 447-4400  
Facsimile No.: (206) 447-9700

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## I. INTRODUCTION

This case arises from the failure of a seller of real property, Appellants Luin and Shirley Leisher (the “Leishers”), to comply with the requirements of Chapter 64.06 RCW (the Seller Disclosure Act, or the “Act”). Under the Act, a seller is required to provide a seller disclosure statement (“Form 17”) to the buyer of residential real property. If the seller fails to do so, the Act affords the remedy of rescission to the buyer right up until the close of the transaction. Although the Leishers had ample time to do so, they never provided a Form 17 to Respondent/Cross-Appellant Seawest Investment Associates, LLC (“Seawest”).

The Act takes into account the reality that complete rescission of a real estate transaction may be impossible when certain “agreed disbursements” have been made, and provides that these disbursements are not subject to refunding. Unfortunately, the Act does not describe what these “agreed disbursements” consist of. When viewing the Act in light of its purpose to protect buyers of residential real property, and through the lens of a real estate transaction, it is reasonable to conclude the deposits and extension fees paid by Seawest to the Leishers are not such “agreed disbursements” and must be subject to Seawest’s rescission and so refunded by the Leishers. If this Court were to hold otherwise, the Act

would be rendered ineffective in many transactions and the Act's purpose of protecting buyers will not have been achieved.

It was Seawest's exercise of its rights under the Act that led the parties to this lawsuit. When the Leishers refused to honor Seawest's rescission of the parties' real estate purchase and sale agreement (the "REPSA"), Seawest filed suit for rescission. In the alternative, Seawest also sought recovery in contract for the Leishers' unexcused failure to timely close the transaction. Seawest fully prevailed on its claim for rescission under the Act and continued to seek judgment on its breach of contract claim. Only much later did the trial court dismiss that claim. When Seawest petitioned for an award of its attorneys' fees, the trial court refused to award any fees or costs incurred after the order granting rescission. Despite the fact that any remedy that Seawest could have achieved under its breach of contract claim would have been inconsistent with its rescission of the transaction, the breach of contract claim remained a central issue to the lawsuit. The Leishers had filed a third-party complaint against Respondent Commonwealth Land and Title Company of Puget Sound, LLC ("Commonwealth"). The issue at the heart of the Leishers' claim was that Commonwealth caused the untimely closing of the transaction, absent which Seawest would not have exercised its right to rescind the transaction under the Act. Thus, the issues at the heart of

Seawest's breach of contract claim remained the central piece of the litigation throughout the trial and judgment. Seawest's continued participation in the litigation was important and necessary to all the parties and Seawest should be awarded its fees and costs incurred until the trial court dismissed its breach of contract claim.

In summary, this Court should affirm the trial court's decision that the \$869,883.37, consisting of earnest money deposits and fees for the extension of the REPSA, that Seawest paid to the Leishers is fully refundable to Seawest under the Act. This Court should also reverse the trial court's refusal to award contractual attorneys' fees to Seawest it incurred until it was dismissed from the litigation and remand the case for a determination of an appropriate award.

## **II. STATEMENT OF ERRORS**

### **Restatement of Appellants' Statement of Errors**

1. a) The trial court erred in requiring the Leishers to repay to Seawest earnest money deposits and other fees it paid to the Leishers pursuant to the parties' REPSA. b) The trial court erred when not excluding the Leishers' payment to their broker when requiring the Leishers to refund all moneys paid to them by Seawest. (Appellants' Assignment of Error 1).

### **Respondent/Cross-Appellant's Statement of Errors**

2. The trial court erred in refusing to award Seawest, the substantially prevailing party, its contractual attorneys' fees incurred after it was dismissed from the lawsuit when the parties' REPSA provides for attorney's fees for the substantially prevailing party in "any lawsuit ... aris[ing] in connection with the [REPSA]...." (Respondent/Cross-Appellant's Assignment of Error 1).

### **III. STATEMENT OF THE CASE**

Seawest learned that the Leishers' property was for sale when the Leishers' unlicensed real estate broker, Jon Crittenden, first visited Seawest's office. [CP 234-235] Crittenden was unknown to Seawest, but represented that he was a friend of the Leishers. [CP 235] Crittenden told Seawest that he could act as a facilitator on the Leishers' behalf to put together a deal between the parties for the sale of the Leishers' property. [CP 235] Thereafter, Crittenden brokered the transaction between Seawest and the Leishers until the REPSA was negotiated and signed on November 4, 2004. [CP 235]

The REPSA required Seawest to deposit \$100,000 as earnest money, which Seawest did on December 15, 2004. [CP 15] The REPSA also required Seawest to later deposit an additional \$650,000 into escrow, which Seawest did on January 14, 2005. [CP 15]

The REPSA provides that time is of the essence. [CP 56-58 at Ex. A] On January 25, 2007, the parties executed an extension agreement, agreeing to extend the closing date to no later than February 13, 2008. [CP15] Pursuant to that agreement, Seawest was required to pay \$6,000 per month, starting February 13, 2007, until the transaction closed. [CP 15] The parties later executed a second extension agreement extending the closing date to August 31, 2008, and requiring Seawest to pay \$6,500 per month, starting on February 20, 2008. [CP 15-16]. On August 20, 2008, the parties executed a third extension agreement extending the closing date to September 30, 2008 and requiring Seawest to continue making monthly extension payments of \$6,500 until the date of closing. [CP 16] Seawest paid a total of \$47,883.37 pursuant to the second and third extension agreements. [CP 16] Each extension agreement expressly states that it “is part of the Purchase and Sale Agreement dated September 30, 2004” between the parties. [CP 16]

Pursuant to the REPSA, Seawest made earnest money deposits and extension payments to the Leishers totaling \$869,883.37. [CP 235] From these payments, the REPSA provided that \$75,000 was to be paid by the Leishers to Crittenden from these payments for “love and affection.” [CP235]

As the closing date for the transaction drew near, the parties ultimately agreed on an October 2, 2008 closing date. [CP 16] The transaction did not close on October 2, 2008, however, because the deed was not deposited into escrow as required by the REPSA. [CP 235] Thereafter, Seawest wrote the Leishers' counsel advising that the Leishers breached the REPSA by failing to timely close and that the Leishers had failed to provide Seawest with a Form 17 as required by the Act. [CP 235] The letter advised that Seawest had elected to exercise its right of rescission pursuant to the Act and requested the return of the payments made to the Leishers. [CP 235-236] The Leishers did not return the payments and this action was commenced. [CP 236]

On January 8, 2009, Seawest moved for partial summary judgment seeking rescission of the REPSA entered into with the Leishers, based on the Leishers' failure to provide Seawest with a Form 17. [CP 988] Since the REPSA had not closed, Seawest argued that it was entitled to rescind the REPSA under RCW 64.06. [CP 988] The trial court granted Seawest's motion and entered its order on February 6, 2009, awarding Seawest \$869,883.37 and its attorneys' fees and costs. [CP 988] However, the parties acknowledged a dispute regarding the amount owed pursuant to the order, which they agreed should be determined upon further motion. [CP 988]

On April 10, 2009, Seawest and the Leishers argued Seawest's Motion to Establish Amount Owed and for Attorneys' Fees and Costs. [CP 988] The trial court once again granted Seawest's motion and entered an order establishing the amount owed as \$794,883.37. [CP 988] The new order reflected an adjustment to Seawest's award, excluding the \$75,000 fee paid by the Leishers to Crittenden. [CP 988]

On October 9, 2009, Seawest moved for a determination that the \$75,000 payment made by the Leishers to Crittenden should not be excluded from its award because the obligation was solely the Leishers, and because Crittenden was unlicensed. [CP 989] The Leishers opposed Seawest's motion and simultaneously moved for "revision" of all the trial court's prior orders relating to Seawest's rescission claim. [CP 989] The trial court denied the Leishers' motion for revision on November 16, 2009, prior to the scheduled summary judgment hearing. [CP 989]

On December 4, 2009, the trial court entered the final order for Seawest's rescission claim, which increased Seawest's judgment amount by \$75,000 – the amount paid to the unlicensed broker. [CP 989] None of the three parties sought entry of a judgment, nor did any party move for dismissal of Seawest's breach of contract claim. [CP 989]

After the trial court's rulings, both the Leishers and Commonwealth continued to conduct discovery directly related to both

Seawest's rescission claim and Seawest's breach of contract claim. [CP 989] Both the Leishers and Commonwealth served interrogatories and document requests on Seawest and noted and took multiple depositions, including a 30(b)(6) deposition of Seawest. [CP 989] Seawest also participated in a mediation with the Leishers and Commonwealth. [CP 989] Only once the Leishers had the full benefit of Seawest's participation in the lawsuit as a party did they move to have Seawest's claim for breach of contract dismissed and Seawest removed as a party. [CP 991] Noting that Seawest's remedy of rescission was inconsistent with any remedy it would receive if it prevailed on its breach of contract claim, the trial court dismissed Seawest's breach of contract claim. [CP 1004-1005]

On June 9, 2010, Seawest filed its Motion for Award of Attorneys' Fees and Costs and Entry of Judgment seeking recovery of its attorneys' fees. [CP 1006-1013] In opposition, the Leishers, who had waited over ten months to request the trial court to dismiss Seawest's breach of contract claim and enter final judgment in Seawest's claim, and who had used this time to engage Seawest in discovery on the very issues at hand in Seawest's breach of contract claim, argued that Seawest should not receive any attorneys' fees after the December 4, 2009 summary judgment hearing. [CP 1030-1040] The trial court accepted the Leishers' position,

and limited Seawest's attorneys' fees to those incurred prior to December 9, 2009. [CP 1052-1053]

#### IV. ARGUMENT

##### A. **The Trial Court Correctly Construed the Language of RCW 64.06.030.**

##### 1. **Seawest's Construction of the Act is Better Because it Comports with the Purpose of the Act and the Court's Discretion in Fashioning the Equitable Remedy of Rescission.**

The trial court properly construed the language of RCW 64.06.030 in a manner consistent with the Act's goal of protecting buyers of real property when granting Seawest full rescission. The construction that the Leishers propose would afford buyers incomplete or no relief, which was not the legislature's intent when drafting the Act. The Act provides for rescission as follows:

If the buyer elects to rescind the agreement [pursuant to the Act] ... the buyer shall be entitled to immediate return of all deposits and other considerations less any agreed disbursements paid to the seller, or to the seller's agent or escrow agent for the seller's account ....

RCW 64.06.030.

Unfortunately, the Act does not define "agreed disbursements." Reasonable analysis of the Act makes clearer what the legislature intended to be reimbursable under the Act.

The primary objective of statutory interpretation is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. American Continental Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P.3d 864 (2004) (citing State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002)). This is done by considering the statute as a whole, giving effect to all that the legislature has said, and by using related statutes to help identify the legislative intent embodied in the provision in question. In re Parentage of J.M.K., 155 Wn.2d 374, 387, 119 P.3d 840 (2005) (citing State, Dept. of Ecology v. Campbell v. Gwinn, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). If after this inquiry, the statute can be reasonably interpreted in more than one way, then it is ambiguous and it is appropriate to resort to principles of statutory construction to assist in interpretation. Id. (citing State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 242-43, 88 P.3d 375 (2004); Campbell & Gwinn, 146 Wn.2d at 12). Such construction may include the consideration of legislative history. Cherry v. Municipality of Metropolitan Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991) (citing Dept. of Transp. v. State Employees' Ins. Bd., 97 Wn.2d 454, 458, 645 P.2d 1076 (1982)). Strained, unlikely or absurd consequences resulting from a literal reading are to be avoided. Dept. of Transp. v. State Employees' Ins. Bd., 97 Wn.2d at 458 (citing State v. Neher, 112 Wn.2d 351, 771 P.2d 330 (1989)).

The Leishers' interpretation of the Act suggests that all consideration delivered ("disbursed") to the seller is not refundable to the buyer. This simply does not make sense, as it would render the relief of rescission meaningless unless consideration was held by a third party. In fact, there would be no rescission at all, and no relief at all, otherwise. It is appropriate, then, to look at the legislative history.

The Final Bill Report for the Act stresses that the Act was intended to protect buyers of residential real property. The Final Bill Report emphasizes that the purchase of residential real property "is [for most individuals] the most significant and largest financial transaction in which they will ever participate." Final Bill Report, S.S.B. 6283, 53rd Leg., Reg. Session (Wash. 1994). It also provides that seller disclosure statements "assist buyers" and thus "[i]t is believed that [these disclosures] should be required by law." Id.

The first version of the bill to create the Act read as follows:

... [T]he buyer shall be entitled to immediate return of all deposits and other considerations paid to the seller or to seller's agent or an escrow agent for the seller's account, and the agreement for purchase and sale shall be void.

S.B. 6283, 53rd Leg., Reg. Session (Wash. 1994).

It is clear from reading the first version of the bill that despite the eventual addition of the language "less any agreed disbursements,"

deposits and other considerations paid to the seller were meant to be returned to the buyer upon rescission. The amended bill, which became the Act, was likely meant to be construed in this manner:

[T]he buyer shall be entitled to immediate return of all deposits and other considerations, less any agreed disbursements, paid to the seller, or to the seller's agent or an escrow agent for the seller's account ....

(Emphasis added).

This interpretation comports with the dynamics of a typical real property transaction and the limitations on the equitable powers of a court when granting the remedy rescission. To accomplish the remedy of rescission, the trial court should restore the parties to the position they would have occupied had they not entered into the contract. Bloor v. Fritz, 143 Wn. App. 718, 739, 180 P.3d 805 (2008). Whether by common law or by statute, the trial court's duty remains the same – to exercise equitable discretion in the unwinding process, to restore the *status quo ante*. Hornback v. Wentworth, 132 Wn. App. 504, 512, 132 P.3d 778 (2006), review granted, 158 Wn.2d 1025, 152 P.3d 347 (2007). Where a full rescission is impossible because of the intervening rights of third parties, courts have an inherent equitable power to do justice where the rights of the contracting parties are complicated with the rights of innocent third parties. Taylor v. Balch Land Development, 6 Wn. App. 626, 631-

32, 495 P.2d 1047 (1972) (citing Yount v. Indianola Beach Estates, Inc., 63 Wn.2d 519, 387 P.2d 975 (1964)).

Interpretation of the Act to exclude disbursements *to third parties* is precisely in accord with the law. There can be no doubt that it is this consideration of third parties that the legislature was acknowledging when the bill was amended to include the language excluding “agreed disbursements” from a buyer’s rescission. This construction of the Act comports with the realities of a real property transaction where disbursements are often made to third-parties from the proceeds of earnest money or other consideration given by the buyer to the seller, with the parties’ joint consent. In that event, true and complete rescission is not possible and it would work an injustice to require the seller to bear that expense unilaterally. It would not be reasonable to allow a seller to avoid the consequences of the Act by simply requiring that all money paid by the buyer pursuant to the REPSA be disbursed to the seller. The remedy of rescission under the Act would be rendered meaningless.

**2. The Trial Court Correctly Concluded that the \$100,000 Earnest Money Deposit and the Additional \$650,000 Deposit Are Subject to the Rescission.**

The trial court correctly ruled that the \$100,000 earnest money deposit and the additional \$650,000 deposit paid by Seawest to the Leishers are subject to rescission under RCW 64.06.030. [See CP 173-

174, 230-231] The Leishers argue that the \$100,000 earnest money deposit and the additional \$650,000 deposit are, in fact, “agreed disbursements” because they were paid out of escrow to the Leishers and are nonrefundable pursuant to the terms of the parties’ REPSA. Br. of Appellants, pp. 16-17.

A decision which would include “non-refundable earnest money” deposits and other types of deposits into the scope of “agreed disbursements” would completely render RCW 64.06.030 meaningless and leave buyers with no real remedy under RCW 64.06.030. Surely the legislature did not intend this result in an Act created to protect buyers.

Nevertheless, because a promissory note and deed of trust were issued evidencing the \$100,000 earnest money payment and the additional \$650,000 deposit, and because these documents note that these monies are nonrefundable absent the seller’s default, the Leishers argue that the \$100,000 earnest money payment and the additional \$650,000 deposit are not refundable under the Act. Br. of Appellants, pp. 16-19. The promissory note and the deed of trust do not stand alone; they were issued in connection with the parties’ REPSA for purposes of the earnest money payment and additional deposit alone, and therefore fall within the scope of the Act.

Moreover, the language in these agreements stating that the deposits are nonrefundable absent seller default does not exclude these payments from rescission. The legislature did not distinguish between refundable and nonrefundable deposits when providing that deposits are refundable under the Act – and it certainly would have been odd for the legislature to do so when all deposits are refundable under the Act.

Furthermore, the promissory note and deed of trust evidencing the \$100,000 and \$650,000 payments demonstrate that the earnest money deposit and the additional deposit had not been earned and were not the sort of payments to be viewed under the Act as “disbursements.” It is worth pointing out that even if notions of “fault” or “legal excuse,” as those terms are used in the note, were relevant, it is the Leishers who were at fault and the Leishers who lacked the legal excuse for failing to comply with the Act.

**3. The Trial Court Correctly Concluded that the Extension Fees Totaling \$119,883.37 are Subject to the Rescission.**

The trial court also correctly concluded that the extension payments made to the Leishers in consideration for the extended closing of the REPSA were “consideration” subject to rescission under the Act. [See CP 173-174, 230-231] These extension fees were consideration pursuant to the REPSA and not an agreed disbursement to be made to a

third party. Nevertheless, the Leishers argue that because the extension fees were not applied to the purchase price, they are neither a deposit nor consideration under RCW 64.06.030. Br. of Appellants, pp. 19-20. The extension fees were not paid pursuant to a separate contract. In fact, each of the extension agreements explicitly provides that it is a part of the parties' REPSA. [CP 16, Ex. B.] Because the extension fees were paid as "consideration" for the parties' REPSA, these extension fees should be subject to Seawest's rescission and refunded to Seawest.

**4. The Trial Court Correctly Concluded that the \$75,000 Payment Made by the Leishers to Pay Jon Crittenden is Subject to the Rescission.**

**a. Crittenden Was Acting as the Leishers' Real Estate Broker and Not Seawest's.**

The trial court correctly concluded that Seawest should be reimbursed for the Leishers' \$75,000 payment to Crittenden. [CP 230-231] The payment to Crittenden is subject to the rescission because Crittenden was acting as the Leishers' broker and not Seawest's.

A "real estate broker" or "broker" is defined by chapter 18.85 RCW as follows:

(1) [A] person, while acting for another for commissions or other compensation or the promise thereof, or a licensee under [chapter 18.85 RCW] while acting in his or her own behalf, who:

(b) Negotiates or offers to negotiate, either directly or indirectly, the purchase, sale, exchange, lease, or rental of

real estate or business opportunities, or any interest therein for others.

RCW 18.85.010. Crittenden's actions throughout the course of the transaction place him squarely within the definition of a real estate broker. Crittenden approached Seawest and indicated that he was acting on behalf of the Leishers to facilitate the sale of the Leishers' property. [CP 234-235] While acting on the Leishers' behalf, he brokered the agreement between the Leishers and Seawest. [CP 234-235]

The Leishers' own testimony confirms Crittenden's role. In the Leishers' Opposition to Plaintiff's Motion to Strike Inadmissible Testimony, the Leishers characterize the relationship with Crittenden as follows:

[C]ommunications between Mr. Aatai and the Leishers was through an authorized intermediary (Mr. Jon Crittenden) or were put into writing and then conveyed to the Leishers by Mr. Crittenden....

[CP 166]

The Leishers' clear understanding was that Mr. Crittenden had authority to convey offers and other significant information from the Leishers to Mr. Aatai, both orally and in writing.

[CP 167] By the accounts of both parties, Crittenden was acting as a real estate broker on behalf of the Leishers.

A seller's broker's fees, which the REPSA expressly provides are to be paid by the Leishers, are not the type of "agreed disbursements" that the legislature intended to be excluded from funds returnable to the buyer following a rescission resulting from the seller's failure to comply with the Act. "Disbursements" from the earnest money in a real estate transaction, prior to closing, are not unusual. Escrow will typically make disbursements from the escrow account, agreed to by both parties, for the benefit of one of the parties. For example, if a buyer deposits money into escrow, the parties may agree that funds can be disbursed for the buyer's feasibility study, chargeable to the buyer's account. On the other hand, a buyer may deposit funds into escrow and the parties may agree that such funds can be disbursed to the seller's mortgage. In that event, the seller's account would be charged. The legislature likely intended disbursements made for the buyer's account to be deducted from the amount of funds to be returned to the buyer. It makes no sense, however, that the legislature would use the Act to reallocate the parties' obligations, forcing the buyer to be responsible for disbursements made for the seller's account. Such reallocation would be to the detriment of the buyer, and it is unlikely that the legislature intended that result when the Act is meant to protect buyers.

The Leishers are asking that this Court reallocate their obligation to pay Crittenden to Seawest. The REPSA explicitly makes it the

*Leishers'* responsibility to pay any real estate agent and broker fees. [CP 240] In the same provision that summarizes the payment to Crittenden for "love and affection," the Leishers agreed to "pay all real estate agents and brokers fees, if any, due in connection with this Agreement to any broker or agent with whom Seller has contracted and shall indemnify, defend and hold Purchaser harmless with respect thereto." [CP 240] Thus, the disbursement from the earnest money from the Leishers to Crittenden was not intended by the parties to be Seawest's obligation, but rather a charge against the Leishers' proceeds at closing.

**b. Crittenden Was Unlawfully Acting as a Broker; and it Would be a Violation of Public Policy to Require Seawest to Compensate Him for His Criminal Conduct.**

While Crittenden was acting as a real estate broker on behalf of the Leishers, he was not licensed to do so. RCW 18.85.100 states that "[i]t is unlawful for any person to act as a real estate broker...without first obtaining a license therefore." A person acting as a real estate broker in violation of RCW 18.85.100 cannot bring a lawsuit to collect their broker's fees. RCW 18.85.100. Moreover, and more significantly, any person acting as a real estate broker in violation of RCW 18.85 is guilty of a gross misdemeanor. RCW 18.85.340.

When construing RCW 18.85.340, Washington courts have found that proof of a violation of the statute does not require a showing of intent. State v. Waymire, 26 Wn. App. 669, 670, 614 P.2d 214 (1980). Therefore, even if Crittenden lacked the intent to act as a real estate broker, the Court should look to the nature of Crittenden's actions to determine if his conduct falls within the RCW 18.85.010 definition of a real estate broker. Both the Leishers and Seawest have described Crittenden's conduct as putting that conduct squarely within the coverage of RCW 18.85.010.

The Court should not condone Crittenden's illegal conduct by allowing the Leishers to force Seawest to pay him. Washington courts will not enforce an agreement "that has a tendency 'to be against the public good, or to be injurious to the public'" because such an agreement "violates public policy." Scott v. Cingular Wireless, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (internal citations omitted). See also State v. Noah, 103 Wn. App. 29, 50, 9 P.3d 858 (2000) ("Contract terms are unenforceable on grounds of public policy when the interest in its enforcement are clearly outweighed by a public policy against the enforcement of such terms"); King v. Riveland, 125 Wn.2d 500, 511, 886 P.2d 160 (1994) ("[A]n agreement is contrary to public policy [when] it has a "tendency to be evil,' to be against the public good, or to be

injurious to the public.”). The courts have followed the rule of the Restatement (Second) of Contracts and have held that an agreement that violates public policy may be void and unenforceable. *Id.* (citing Restatement (Second) of Contracts § 178 (1981)).

Forcing Seawest to pay Crittenden’s broker fees makes no sense, especially considering that if Crittenden attempted to bring an action to collect his fees, he would be unable to do so. By deducting Crittenden’s fees from Seawest’s award, both Crittenden and the Leishers will end up with a result that benefits everyone but the innocent party – Seawest. As a matter of public policy, Seawest should not be responsible for paying Crittenden’s broker fees. This Court should not ratify Crittenden’s unlawful activities and the payment to Crittenden for these activities by requiring Seawest to forfeit this disbursement.

**c. It is Inequitable to Require Seawest to Pay the Leishers’ Broker Fees.**

Requiring Seawest to pay Crittenden’s broker fees is also inequitable. Whether rescission is by application of common law or statute, the court’s duty remains the same – to exercise *equitable discretion* in the unwinding process, to restore the *status quo ante*. Hornback, 132 Wn. App. at 512 (emphasis added). In exercising equitable discretion, a court should properly balance the equities between the parties

in adjusting their respective gains and losses while unwinding the contract.

Id.

When the trial court first rescinded the REPSA, the trial court ruled that the entire sum paid to the Leishers by Seawest, \$869,883.37, consisted of deposits and other considerations under RCW 64.06.030. [CP 173-174] However, the trial court then deducted \$75,000 from this award as an “agreed disbursement” because the Leishers disbursed that amount to a third party, Crittenden. [CP 230-231] The trial court, however, after considering the issue again, ultimately concluded that the \$75,000 payment to Crittenden was subject to the rescission. [CP 627-628] The payment to Crittenden “for love and affection” was expressly provided for in the REPSA and was to be disbursed by the Leishers from the earnest money and deposits paid by Seawest. [CP 243]

The obligation to pay Crittenden was not Seawest’s. Seawest had no relationship with Crittenden prior to the transaction. Rather, Crittenden’s involvement in the transaction was solely a product of the relationship he had with the Leishers as a real estate broker. The payment to Crittenden is characterized by the REPSA as the Leishers’ obligation alone. It is inequitable for Seawest to bear the cost of the Leishers’ business relationship with Crittenden when it was the Leishers’ own actions that resulted in the REPSA being rescinded. The trial court

properly exercised its inherent equitable powers, relieved Seawest of the burden of the Leishers' monetary obligation to Crittenden, and ordered the Leishers to reimburse the \$75,000 to Seawest.

**B. The Trial Court Improperly Denied Seawest, the Substantially Prevailing Party, Its Attorneys' Fees.**

The trial court abused its discretion when denying Seawest its attorneys' fees incurred after it granted summary judgment on Seawest's rescission claim. The Court of Appeals may overturn a trial court's attorney fee decision when there is a clear showing of abuse of discretion. Under RCW 4.84.330, if a contract provides for attorney fees, the court must award them to the prevailing party. Riss v. Angel, 80 Wn. App. 553, 563-64, 912 P.2d 1028 (1996). In Washington, a prevailing party or substantially prevailing party is the one that receives judgment in its favor at the conclusion of the entire case. Harmony at Madrona Park Owners Ass'n v. Madison Harmon7 Development, Inc., 160 Wn. App. 728, 253 P.3d 101, 107 (2011) (citing Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001)).

The parties' REPSA expressly provided for attorneys' fees:

[I]f Buyer or Seller institutes suit against the other concerning this agreement, the prevailing party is entitled to reasonable attorneys fees and expenses.

[CP 1009] Despite the fact that Seawest was the substantially prevailing party, the trial court improperly limited Seawest's recovery of its attorneys' fees to those fees incurred prior to December 9, 2009. The trial court's ruling with respect to Seawest's attorneys' fees was improper for a couple of reasons.

First, Seawest was not "unsuccessful" in its breach of contract claim. Rather, Seawest's breach of contract claim was dismissed because any remedy that could be afforded Seawest in connection with the claim would be inconsistent with the relief of rescission that had been granted earlier in the case. Seawest's breach of contract claim was never litigated on the merits and, in fact, is still a viable claim should this Court reverse the relief of rescission already granted to Seawest.

Moreover, any attorneys' fees generated by Seawest for the transaction not timely closing were generated as a direct result of the Leishers' conduct and for the benefit of the Leishers in their litigation against Commonwealth. After the trial court entered its rulings in connection with Seawest's rescission claim, the Leishers did not move to dismiss Seawest's breach of contract claim. To the contrary, the Leishers took full advantage of the fact that Seawest was still a party to the lawsuit. Both the Leishers and Commonwealth continued to conduct discovery directly related to both Seawest's rescission claim and Seawest's breach of

contract claim. [CP 989] Both the Leishers and Commonwealth served interrogatories and document requests on Seawest and noted and took multiple depositions, including a 30(b)(6) deposition of Seawest. [CP 989] The Leishers waited almost five months before seeking to dismiss Seawest's breach of contract claim. [CP 974-986] Once the trial court dismissed that claim, the Leishers never proposed entry of a judgment and in fact, during that time, the parties completed a mediation. [CP 989] In fact, instead of requesting that the trial court enter a final judgment in the matter, the Leishers filed a motion for "revision" of the trial court's rulings in favor of Seawest ten months after the trial entered its first order on summary judgment in favor of Seawest. [CP 290-410] These attorneys' fees and costs are squarely within the scope of the attorneys' fees provision contained within the parties' REPSA.

Second, the language of the attorneys' fee provision does not limit Seawest's ability to collect its attorneys' fees and costs as the prevailing party for the post-dismissal activities of Seawest's counsel in this matter. In fact, the language in the attorneys' fees provision contemplates awarding Seawest its post-dismissal fees and costs to Seawest because these fees and costs arise from Seawest's suit against the Leishers concerning the REPSA.

This Court has recognized the wide scope of “an action on a contract” for purposes of a contractual attorneys’ fee provision. In Cornish College of the Arts v. 1000 Virginia Ltd. Partnership, 158 Wn. App. 203, 235-36, 242 P.3d 1 (2010), Cornish College of the Arts (“Cornish”) sued 1000 Virginia Ltd. Partnership (“Virginia Ltd.”) for specific performance of an option to purchase and damages for wrongful eviction. During the course of the litigation, Virginia Ltd. sought to remove the action to bankruptcy court, where it attempted to reject the option to purchase in the parties’ contract. Id., at 235. The bankruptcy court denied Virginia Ltd.’s motion to reject the option agreement and dismissed its bankruptcy petition. Id. The trial court awarded Cornish its attorneys’ fees for defending the bankruptcy action, and these fees were upheld by this Court. Id. This Court noted that “[i]n Washington, ‘an action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.’” Id., (quoting Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993)). This Court further noted that Cornish’s involvement in the bankruptcy proceedings “was initiated to protect its contractual rights.” Id.

Here, Seawest remained involved in the lawsuit after rescission was granted to protect its interests. Knowing that the possibility of appeal

was highly likely, Seawest remained in the lawsuit to protect its alternative claim of breach of contract. The Leishers and Commonwealth took full advantage of Seawest's participation, rather than complain of it, and treated Seawest like a party until it no longer suited either of them.

**a. Seawest's Attorneys' Fees and Costs are Reasonable.**

Seawest's fees and costs incurred in the lawsuit are reasonable, as evidenced by the multiple declarations of Seawest's attorney, Christopher Osborn. [See CP 1014-1029, 1046-1051, 1061-1075] The legal and factual issues in the case were hard fought. [CP1016] Nevertheless, discovery was reasonable and accomplished efficiently in an effort to keep attorneys' fees and costs low. [CP 1016] In fact, Seawest's counsel repeatedly sought to bring a resolution to the matter. [CP 1047]

**V. CONCLUSION**

The trial court properly construed the Act and the intent of the legislature when it ordered the Leishers to return the \$869,883.37 paid to them by Seawest. This Court should affirm that ruling. The trial court, however, abused its discretion when refusing to award Seawest its attorneys' fees and costs after December 9, 2009, despite the fact that Seawest completely prevailed. This Court should reverse the trial court's decision to limit Seawest's attorneys' fees and remand the matter to the

trial court for a determination of an appropriate award of attorneys' fees  
and costs.

RESPECTFULLY SUBMITTED this 26th day of July, 2011.

FOSTER PEPPER PLLC



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Christopher R. Osborn, WSBA  
#13608

Nicole Guerrero Diven WSBA  
#40811

Attorneys for Plaintiff  
Seawest Investment Associates, LLC