

No. 45589-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
COURT OF APPEALS
BY [Signature]

LUIS FLORES, a married man as his separate capacity,

Appellant,

vs.

BRADLEY C. HOGGATT and CONNIE J. HOGGATT, husband and
wife, and their marital community,

Appellees.

APPELLANT'S BRIEF

By DARREL S. AMMONS
Attorney for Appellant

WSBA # 18223
DARREL S. AMMONS
ATTORNEY AT LAW, P.L.L.C.
1315 14th Avenue
Longview, WA 98632
Telephone: (360) 501-8090
Fax: (360) 501-8064

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUE PRESENTED 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 4

 1. Pursuant To RCW 58.17.210, The Defendant Is
 Entitled to Rescission..... 4

 2. The Appellant Has Requested Statutory Rescission
 In His Counterclaim Based Upon RCW 58.17.210. 12

E. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

<i>Busch v. Nervik</i> , 38 Wash. App. 541, 687 P.2d 872 (1984).....	5, 12
<i>Carlsen v. Global Client Solutions, LLC</i> , 171 Wash.2d 486, 256 P.3d 321 (2011).....	10
<i>Ford Motor Co. v. City of Seattle, Executive Services Department</i> , 160 Wash.2d 32, 156 P.3d 185 (2007)	5
<i>Geschwind v. Flanagan</i> , 121 Wash.2d 833, 841, 854 P.2d 1061 (1993).....	5
<i>Gilmore v. Hershaw</i> , 83 Wash.2d 701, 521 P.2d 934 (1974)	5
<i>Graham Thrift Group, Inc. v. Pierce Cy., Country Park, Inc.</i> , 75 Wash.App. 263, 877 P.2d 228 (1994).....	5
<i>Hoggatt v. Flores</i> , 152 Wash.App. 862, 218 P.3d 244 (2009)	2, 7
<i>Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.</i> , 168 Wash.App. 56, 277 P.3d 18 (2012).....	8, 11-12
<i>Prezant Associates, Inc. v. Washington State Department of Labor & Industries</i> , 141 Wash. App. 1, 165 P.3d 12 (2007)	10
<i>Sienkiewicz v. Smith</i> , 97 Wash.2d 711, 649 P.2d 112 (1982)	9
<i>State v. Groom</i> , 133 Wash 2d 679, 947 P.2d 240 (1997).....	5
<i>State v. Mollich</i> , 132 Wash.2d 80, 936 P.2d 408 (1997).....	5
<i>Valley Quality Homes, Inc. v. Bodie</i> , 52 Wash.App 743, 763 P.2d 840 (1988).....	5

Statutes

RCW 58.17.300	6
26 U.S.C. § 7203; 6651 (a) (1).....	8
RCW 58.17.210	1, 3-12

Other Authorities

William B. Stoebuck, Wash.Prac., Real Estate § 5.8 (2d ed)	7
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Appellees' Motion for Summary Judgment and dismissing the Appellant's Counterclaim.

B. ISSUE PRESENTED

1. Does RCW 58.17.210 entitle a purchaser of real property to statutory rescission where the seller sold property to the purchaser in violation of RCW Chapter 58.17 and, after the sale, the seller corrected the illegal subdivision?

C. STATEMENT OF THE CASE

In 2004, the Appellees sold an illegally subdivided lot to the Appellant in violation of RCW Chapter 58.17. The Appellees have not denied their illegal conduct. Appellees answered Defendant's Counterclaim as follows:

Plaintiffs admit that they sold to the defendant real property that had not been subdivided pursuant to RCW Chapter 58.17 and Cowlitz County Code 18.34.

Cowlitz County CP 75; P.1, Lines 18-21.

Appellees filed a Complaint requesting an injunction.

Specifically, Appellees requested the court to order the Appellant to

participate in the Appellees' application to correct the illegally subdivided property. However, the Appellant declined. Therefore, the trial court ordered that the application could be submitted to the county without the Appellant's participation. Summary Judgment was entered in favor of the Appellees relating to the request for the injunction. Cowlitz County CP 20; P2, Lines 1-13.

The Appellant appealed. Division I affirmed the trial court's decision. As part of the ruling, Division I stated as follows:

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 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 v. Flores, 152 Wash App. 862, 218 P.3d 244 (2009)

On September 27, 2013, Appellees filed a Motion for Summary Judgment requesting the Clark County¹ Superior Court to

¹ Appellant's counterclaim was filed in Cowlitz County in June of 2008. After that, nine trial dates were scheduled over the course of five years. The first trial date in 2009 was cancelled by the court due to the Appeal of the injunction. Thereafter, the Appellees requested and were granted a continuance of the January 18, 2011 trial date. Six trial dates were bumped by the Cowlitz County Superior Court due to court congestion. The November 2013 Clark County trial date was stricken as a result of Summary Judgment. Defendant requested a change of venue to Clark County because of the inability of Cowlitz County to try the case. His request was granted. Cowlitz County CP 164; P1, L. 16-25; P.2, L.1-5.

dismiss the Appellant's Counterclaim. Clark County CP 7. The Appellant's Counterclaim, filed on June 23, 2008, states as follows:

As and for a counterclaim, defendant alleges that plaintiffs sold property to him in violation of the provisions of RCW Chapter 58.17 and other regulations of Cowlitz County. As a result, defendant reserves 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.

WHEREFORE, defendant prays plaintiffs take nothing by their complaint; that he be awarded relief sought pursuant to RCW Chapter 58.17; and that the Court grant such other and further relief as may be allowed by law.

Cowlitz County CP 6; P.2, Lines 1-9.

On November 15, 2013, the Clark County Superior Court granted the Appellees' Motion for Summary Judgment as follows:

Based on the above findings, IT IS ORDERED:

1. Plaintiffs' Motion for Summary Judgment is granted.
2. Defendant has no right to rescind his purchase of property from Plaintiffs based on RCW 58.17.210

Clark County CP 24.

D. ARGUMENT

1. Pursuant To RCW 58.17.210, The Defendant Is Entitled to Rescission.

The Appellant requested rescission in his June 23, 2008 counterclaim pursuant to RCW 58.17.210.

RCW 58.17.210 states 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].

The court in *Busch v. Nervik*, 38 Wash. App. 541, 687 P.2d 872 (1984) stated in part as follows: “Rescission is an express, statutory remedy under RCW 58.17.”

The court, in *State v. Groom*, 133 Wash 2d 679, 947 P.2d 240 (1997), stated in part as follows:

We also note that however much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be. We simply have no such authority. *State v. Mollichi*, 132 Wash.2d 80, 87, 936 P.2d 408 (1997); see *Graham Thrift Group, Inc. v. Pierce Cy., Country Park, Inc.*, 75 Wash.App. 263, 267, 877 P.2d 228 (1994). This is true even if the results appear unduly harsh. *Geschwind v. Flanagan*, 121 Wash.2d 833, 841, 854 P.2d 1061 (1993).

“Where a statute is clear on its face, its plain meaning should be derived from the language of the statute alone.” *Ford Motor Co. v. City of Seattle, Executive Services Department*, 160 Wash.2d 32, 156 P.3d 185 (2007).

The court in *Valley Quality Homes, Inc. v. Bodie*, 52 Wash. App 743, 763 P.2d 840 (1988) stated in part as follows:

RCW 58. 17. 210 provides for rescission when the mandates of RCW 58.17 are violated. [emphasis added]

Similarly, the court in *Gilmore v. Hershaw*, 83 Wash.2d 701, 521 P.2d 934 (1974) stated in part as follows:

RCW 58.17.210 provides in part that a vendee of land divided in violation of the chapter may, as an alternative to conforming his property to the chapter's requirements, rescind the sale. [emphasis added]

The common theme in the statute, as well as the cases that interpret RCW 58.17.210, is that it is the violation that triggers remedies available to the purchaser and also criminal consequences to the seller under RCW 58.17.300. Just as the seller correcting the violation, after the fact, would not prevent the imposition of criminal penalties, correcting an illegal subdivision, after the fact, would not prevent or block an innocent purchaser's statutory remedies. The statute clearly gives the purchaser the option to rescind once the violation has occurred. There is no provision in the statute that would cancel the purchaser's right to rescind after the fact of the violation.

The court of appeals, in this case, stated in part:

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

Hoggatt v. Flores, 152 Wn App 862, 864 P.3d 244 (2009).

University of Washington Law Professor, William B. Stoebuck, in his Washington Practice Volume on Real Estate, comments on RCW 58.17.210 in part as follows:

The section applies to both 'long' and short subdivisions, since both are governed by 'this chapter' and by 'local regulations.'

Purchasers or transferees of illegally divided land are permitted certain forms of damages under RCWA 58.17.210. In the alternative, they are permitted to rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby. A court of appeals decision interprets this last provision to incorporate all the usual elements of 'common law' (equitable) rescission, augmented by the special costs the statute lists. Transferors upon an earnest money agreement to sell illegally platted land are not, however allowed to rescind; the statute allows the purchaser, not the vendor, to rescind. The state supreme court has held that a purchaser who wishes to go ahead with an earnest money agreement to purchase illegally platted land may have specific performance against the vendor. [emphasis added]

William B. Stoebuck, Wash.Prac., Real Estate § 5.8 (2d ed)

Professor Stoebuck's writing supports the premise that the remedies available under RCW 58.17.210 are one-way, i.e., in favor of the purchaser and not the seller.

There is nothing found in any statute, case or treatise that would allow a seller to escape the consequences of RCW 58.17.210, after the seller has violated the statute.

There are numerous provisions in the law where the legislature, or Congress, has imposed both criminal and civil consequences for illegal conduct. For example, the IRS code imposes civil penalties and criminal penalties for failure to file necessary tax returns. 26 U.S.C. § 7203; 6651 (a) (1). Filing a return, late, after a violation, does not excuse the violator from either civil or criminal consequences.

As with taxes, land use and development laws are serious and important to maintain an orderly society. Consequences for violations can be harsh and unforgiving.

A recent decision rendered by the Court, in *Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wash.App. 56, 277 P.3d 18 (2012) states in part as follows:

Moreover, the trial court's ultimate conclusion – that a deed issued in violation of the provisions of chapter 58.17 RCW is unenforceable – is irreconcilable with that statutory scheme. Although RCW 58.17.210 provides that certain permits may not be issued on illegally subdivided property, this section exempts an innocent purchaser from these consequences,

indicating that at minimum, such purchases are permissible. Furthermore, this section stipulates that any purchaser – innocent or not – may recover damages incurred as a result of buying land that has been subdivided in violation of either state or local regulations. RCW 58.17.210. Alternatively, the purchaser may choose to “rescind the sale or transfer and recover costs ... occasioned thereby”. RCW 58.17.210. A statutory scheme that leaves the choice of remedies to the discretion of the purchaser clearly contemplates that illegally subdivided land may be bought and sold. Moreover, if, as the trial court determined, such transfers could be voided at the request of a third party, the purchaser would be deprived of these statutory remedies. Such an outcome would undermine the legislature’s statutory scheme governing the regulation of subdivisions.

The legislature’s determination that a purchaser may elect a remedy in an action against the seller of illegally subdivided land is irreconcilable with the trial court’s determination that the deed was – as a matter of law – unenforceable. The court erred by determining that, because the quitclaim deed resulted in an illegal subdivision, the deed could not be enforced. [emphasis added].

Regarding the purpose of RCW 58.17.210, the Supreme Court in *Sienkiewicz v. Smith*, 97 Wash.2d 711, 649 P.2d 112 (1982) stated as follows:

Essentially, the thrust of Laws of 1969, 1st Ex.Sess., ch. 271, s 20 and Laws of 1974, 1st Ex.Sess., ch. 134, s 10 is the protection of the public at large and innocent purchasers for value against violations of the platting statute. The remedies are limited to rescission or damages, although the prosecuting attorney may seek injunctive relief on behalf of the public. Those who are knowingly in violation of the

effective platting and subdivision statutes may not avail themselves of the remedies accorded by the latter two sections. These two sections do not address the precise issue with which we are here concerned; that is, whether a purchaser may specifically enforce an earnest money agreement which is in violation of the platting and subdivision statutes. [emphasis added]

Remedial statutes are construed liberally in favor of the persons aimed to be protected. *Carlsen v. Global Client Solutions, LLC*, 171 Wash.2d 486, 256 P.3d 321 (2011) (remedial statute enacted to stem debt adjustment industry deceptive practices should be construed liberally in favor of consumers); *Prezant Associates, Inc. v. Washington State Department of Labor & Industries*, 141 Wash. App. 1, 165 P.3d 12 (2007) (WISHA and its regulations are remedial and therefore liberally construed to carry out the purpose of protecting workers).

In the present case, it is uncontested that the Appellees sold the Appellant an illegal lot in 2004. The Appellant was an innocent purchaser. The Appellees concede this. Clark County CP 8, P 11, L 15-26. Since filing the counterclaim, the Appellant has maintained that he is entitled to rescission under RCW 58.17.210.

The court in *Sienkiewicz* states that the broad purpose of RCW Chapter 58.17 is for “the protection of the public at large and

innocent purchasers for value against violations of the platting statute.” [emphasis added]. It is undisputed that the Defendant is an innocent purchaser for value. RCW 58.17.210 provides remedies to the purchaser and is therefore a remedial statute. Because it is a remedial statute, RCW 58.17.210 should be construed liberally to protect Mr. Flores, the innocent purchaser of an illegal lot.

The recent *Newport Yacht Basin Association of Condominium Owners* case makes it clear that RCW 58.17.210 is “a statutory scheme that leaves the choices of remedies to the discretion of the purchaser ...”. In that case, the court reversed the trial court in its determination, in part, because the trial court’s determination would have deprived a purchaser of statutory remedies under RCW 58.17.210. “Such an outcome would undermine the legislature’s statutory scheme governing the regulation of subdivisions.” The court stated, “The legislature’s determination that a purchaser may elect a remedy in an action against the seller of illegally subdivided land is irreconcilable with the trial court’s determination that the deed was unenforceable.”

In summation, RCW 58.17.210 clearly gives the Appellant the right to rescind the transaction with the Appellees. Nowhere in

the language of the statute does it give the court discretion to deny rescission under the statute where the seller corrects the illegal lot after the fact. As stated in the recent *Newport Yacht Basin Association of Condominium Owners* case, the statute leaves the “choice of remedies to the discretion of the purchaser ...”. Reading the statute any other way would be error.

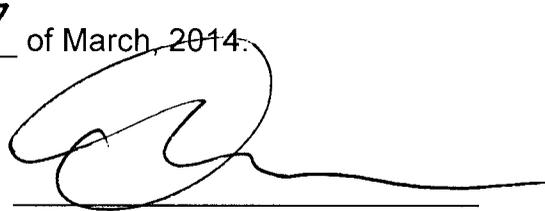
2. The Appellant Has Requested Statutory Rescission In His Counterclaim Based Upon RCW 58.17.210.

The Defendant’s claim for rescission is statutory, based upon RCW 58.17.210. It is the legislature that has given the innocent purchaser the right to rescission not the court, or common law. The rescission remedy is made available by the legislature, and not equity. See *Busch v. Nervik*, 38 Wash. App. 541, 687 P.2d 872 (1984). It is correct that equitable principals may be utilized to supplement the statutory rescission remedy. *Id.* However, there is no authority that the Appellant must prove any more than violation of RCW 58.17.210 to be entitled to rescission. Simply put, the Appellant must only show that he was sold an illegal lot, in violation of RCW Chapter 58.17. The Appellees have admitted this.

E. CONCLUSION

Based upon the foregoing, the Appellant requests that this court reverse the trial court's grant of Summary Judgment.

Respectfully Submitted this 27 of March, 2014.

A handwritten signature in black ink, appearing to read 'Darrel S. Ammons', written over a horizontal line.

Darrel S. Ammons
WSBA #18223
Attorney for Appellant

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DECLARATION OF SERVICE

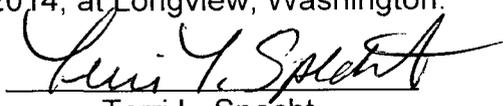
I, Terri L. Specht, declare as follows:

On March 27, 2014, I deposited in the United States mail a true and correct copy of Appellant's Brief, postage affixed, addressed as follows:

Bradley W. Andersen
Landerholm, PS
PO Box 1086
Vancouver, WA 98666-1086

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 27, 2014, at Longview, Washington.


Terri L. Specht