

FILED

DEC 22 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 286576

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Francis Clark and Shannon Hoerner-Clark, husband and wife,
Appellants

v.

JR's Quality Cars, Inc., Viroj "Lee" Ritdecha, Salesperson, and
Capital Indemnity Corp., Respondent

APPELLANTS' REPLY BRIEF

UNIVERSITY LEGAL ASSISTANCE

Alan L. McNeil, WSBA # 7930

Attorney for Appellants

P.O. Box 3528

Spokane, WA 99220-3528

(509) 313-5791

TABLE OF CONTENTS

A. RESTATEMENT OF THE CASE 1

B. ARGUMENT..... 2

 I. Bushing applies..... 2

 II. The Anti-“Bushing” Statute itself suggests this is the proper interpretation. 4

 III. JR’s did commit Bushing by leaving the contract open to future acceptance and by failing to adhere to the statutory requirements of unwinding the agreement before altering the deal. 6

 IV. JR’s had total possession of the vehicle..... 8

 V. Expert Witness Robert Oster as Department of Licensing investigator..... 9

 The March 13, 2008 contract is an attempt to modify the earlier contract 9

C. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>Plouse v. Bud Clary of Yakima, Inc</i> 128 Wn. App. 644, 645, 648, 116 P.3d 1039 (2005)	2, 10
<i>City of Algona v. City of Pacific</i> , 35 Wn. App. 517, 522, 667 P.2d 1124 (1983)..	7
<i>CKP, Inc. v. GRS Const. Co.</i> , 63 Wn. App. 601, 620, 821 P.2d 63 (1991).....	7
<i>Banuelos v. TSA Washington Inc.</i> , 134 Wn. App. 607, 141 P.3d 652 (2006) ...	2, 3
<i>Wagner v. Wagner</i> , 95 Wn.2d 94, 103, 621 P.2d 1279 (1980)	10

Statutes

RCW 46.70.021(4)	4
RCW 46.70.021(5)	4, 9
RCW 46.70.180(4)(a).....	4, 6, 8
RCW 46.70.900.....	5
RCW 47.70.....	9

Other Authorities

Rob McKenna, “Ask the AG” Column, <i>Avoiding Car Sale “Bushing” Scams</i> (Feb. 28, 2008), http://www.atg.wa.gov/askcolumn.aspx?&id=19188 , ¶ 2, (Appendix 1).....	4
--	---

A. RESTATEMENT OF THE CASE

On March 13, 2008, Francis Clark and his wife Shannon Hoerner-Clark (the Clarks) were sold a 1995 Chevrolet truck for \$7,324.00 from Lee Ritdecha, a salesman at Respondent's JR's Quality Cars, Inc. CP 59 (Findings of Fact). The Clarks used a Sebring for a down payment with JR's agreement to pay off the Defendant's loan for the Sebring. *Id.* Shortly after signing the contract, the Clarks testified Mr. Ritdecha made a reference to him that JR's would not honor the signed contract. (Trial Testimony, p. 37, L 8). Not knowing what to make of that statement, Plaintiff left the lot. *Id.* Lee Ritdecha left his job and home not long afterward and could not be found for trial. (Resp. p. 5). However, testimony was clearly given by a bank officer who talked to Mr. Ritdecha that his purpose in making the apparently unfavorable loan was to fix the Sebring and re-sell it, thus rendering the deal favorable. CP 125, (Trial Testimony II).

JR's then changed the written agreement, and developed a new contract which absolved JR's from the requirement of paying off the Sebring and replaced that burden onto the Clarks. CP 94, (Plaintiffs' cites in Memo. Mot. Recons). That second agreement, altered only by the replaced burden of the Sebring payoff requirements, was signed by both

parties on March 13, 2008; *five* business days after the original agreement was made. *Id.*; *see also* CP 110-113.

B. ARGUMENT

I. Bushing applies

Respondents have argued that Washington's Anti-Bushing Statute does not apply to the facts of this case. Resp. 7. Respondent accurately presents the description of "bushing" given by the Court of Appeals, Division 3, in *Plouse v. Bud Clary of Yakima, Inc.* as "the practice...where the car dealer obligates the buy, but leaves the dealer room to change the terms of the deal for more than three days." 128 Wn. App. 644, 645, 116 P.3d 1039 (2005). The statute indeed applies when the contract is "subject to the dealer's...future acceptance, and the dealer fails...to deliver to the buyer or lessee the dealer's signed acceptance." 128 Wn. App. at 648.

Respondents contend that because the first contract was signed, there can be *a priori* no "bushing." This conclusion is contrary to the Court's stated meaning of "bushing." It is a process of wheedling unsophisticated buyers into agreements that seem favorable at first, but are switched after they sign, at which point they are bullied or duped into making and keeping a second agreement or, in some cases, a third agreement or more. The facts here are largely different than either *Plouse* or *Banuelos v. TSA Washington Inc.*, 134 Wn. App. 607, 141 P.3d 652

(2006). Indeed, those cases hinged on signatures. But neither dealt with a situation where there was immediate repudiation upon sealing the original deal and then actually compelled to sign a second agreement.

The facts here are simple. The Clarks were given a very enticing deal by JR's to trade in their poorly running Sebring for a new truck. JR's promised to pay off the Sebring. Immediately after consummating that promise, Mr. Ritdecha, the salesperson, told the Clarks that JR's would not actually be paying off the Sebring. This left the Clarks confused. They did not know what to make of that situation. They did not know Mr. Ritdecha planned to fix up the Sebring and then sell it to pay off the loan. CP 125 (Trial Testimony II). The Clarks were in a lurch wherein they supposedly owned a car, but were made unsure as to the conditions that were actually being placed upon them. Then, for whatever internal reasons JR's had in mind, five days later, JR's had the Clark's return to the dealership where JR's switched the one vital piece of the agreement that was most favorable to the Clark's (they pay-off of the Sebring) back to JR's favor and had them sign an agreement that modified that one and only point. They did not unwind the original agreement and begin new negotiations. They simply acted as if the first agreement had no binding value, altering that one important point with no new consideration from (or discussion with) the Clarks.

This is exactly the kind of “switcheroo” or “yo-yo sales” practice the legislature was trying to resolve in passing the anti-bushing laws. See Rob McKenna, “Ask the AG” Column, *Avoiding Car Sale “Bushing” Scams* (Feb. 28, 2008), <http://www.atg.wa.gov/askcolumn.aspx?&id=19188>, ¶ 2, (Appendix 1); See also RCW 46.70.021(5). It is a side-stepping of the rules in order to achieve the desired result of obligating the buyer to buy and subsequently changing the terms.

Signatures notwithstanding, the result is the same. Under this practice, an unsophisticated consumer is manipulated into believing they have a deal in writing in their hands, only to have it pulled away and replaced with something that looks very similar, but is definitely very different. The anti-“bushing” statute exists to stop “bushing.” Not promote signatures. It is noteworthy that a violation of this statute is a *per se* violation of the Washington Consumer Protection Act and is considered a deceptive practice. RCW 46.70.021(4).

II. The Anti-“Bushing” Statute itself suggests this is the proper interpretation.

RCW 46.70.180(4) renders unlawful:

Any act of “bushing” which is defined as...entering into a written contract...or agreement which:

(a) is subject to any conditions or the dealer’s...future acceptance, and the dealer fails or refuses within four calendar [i.e. business] days to inform the buyer...either:

(i) That the dealer unconditionally accepts...or

(ii) that the dealer rejects the contract or lease, thereby automatically voiding the contract or lease, as long as such voiding does not negate commercially reasonable contract...provisions pertaining to the return of the subject vehicle...and attorneys' fees authorized by law, and tenders the refund of any initial payment or security made or given by the buyer or lessee, including, but not limited to any down payment and tenders return of the trade-in vehicle.

Moreover, the section of RCW 46.70.900 entitled "Liberal Construction" states that a court:

shall liberally [construe the above provision] to the end that deceptive practices or commission of fraud or misrepresentation in the sale, lease, barter, or disposition of vehicles in this state may be prohibited and prevented, and irresponsible, unreliable, or dishonest persons may be prevented from engaging in the business of selling, leasing, bartering, or otherwise dealing in vehicles in this state and reliable persons may be encouraged to engage in the business of selling, leasing, bartering and otherwise dealing in vehicles in this state.

The anti-"bushing" statute does not mention the word "signature" in relation to the dealer at all. Indeed, the language of the statute defines "bushing" as "entering into a contract." This does not suggest a one-sided entering into, but the creation of a bilateral agreement. Thus, whether or not the dealer signs is not the ultimate point of the act. However, the factor that must be present, according to the legislature, is that the "prospective buyer" has signed, suggesting the concern that the buyer has

bought the car. Even though JR's signed the original contract, by repudiating the agreement after signing it, JR's "rejects the contract...thereby automatically voiding the contract." RCW 46.70.180(4)(a), and unlawfully "bushing" the agreement.

Therefore, in liberally construing the anti-"bushing" statute, this court should determine that any amount of open-endedness on the part of the dealer, whether found in the contract itself, or retro-actively foisted upon it through anticipatory repudiation results in a rejection of the contract. Doing so renders the agreement "contingent" or open to "future acceptance" and is therefore "bushing" and is deceptive and unlawful statutorily.

III. JR's did commit Bushing by leaving the contract open to future acceptance and by failing to adhere to the statutory requirements of unwinding the agreement before altering the deal.

A. Future Acceptance

Respondent highlights the issue: whether the first contract was open to "future acceptance," per RCW 46.70.180(4)(a), when JR's signed it. JR's admits to an anticipatory breach or repudiation of the contract. Resp. 13. By doing so they suggest that their actions cannot be construed as "bushing" under the statute because they simply used a different means of changing the original deal than the one described in the statute. This

begs the question whether repudiation of a contract renders it open to “any conditions” or “future acceptance.”

Anticipatory repudiation, or breach, “occurs when one of the parties to a bilateral contract either expressly or impliedly repudiates the contract prior to the time for performance.” *CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991). “The law requires a positive statement or action indicating distinctly and unequivocally that the repudiating party will not substantially perform his contractual obligations.” *Id.* This repudiation places the injured party in a moment of “election whether to sue upon an anticipatory breach or await continuing performance.” *City of Algona v. City of Pacific*, 35 Wn. App. 517, 522, 667 P.2d 1124 (1983).

That moment of election is an open-ended decision making moment where a consumer is left to wonder if the car dealer is *actually* going to honor the deal. It is that election that creates a back-door approach to “future acceptance.” In essence, by way of anticipatory repudiation the dealer can return to a sealed agreement and shove a wedge into it, negating his or her signature and leaving it open for the injured party to wonder whether or not the agreement will move forward, stagnate, or fall apart.

The result of this scenario is nonetheless “bushing.” As the *Plouse* Court stated above, this method still leaves the dealer room to alter the deal to his or her favor beyond the time four-day period.

B. Voiding and Unwinding the Contract

By leaving the contract open to future acceptance, JR’s further committed “bushing” according to the statute by failing to return the Sebring and completely unwind the deal before returning to the negotiation table. Since there was a major change to the initial contract, the deal would need to be completely voided. CP 115, 116; RCW 46.70.180(4)(a). To properly void the contract within the meaning of the statute, the 2002 Sebring needed to be returned to the Clarks and the contract negotiations had to start all over again. The owner of JR’s, Kenneth Vandenburg, candidly admitted that unwinding was not done. CP 106. Since the Final Purchase Order was not signed within *four* business days and the owner admits the deal was not unwound, the court must find that the anti-bushing statute was violated.

IV. JR’s had total possession of the vehicle

Respondents suggest that JR’s had not received down-payment because they were not in possession of the car. Yet they admit that the car was on JR’s lot. JR’s had the keys. JR’s was in control of the vehicle.

The idea that the Clarks were “free to remove the car at their convenience” is simply untrue.

V. Expert Witness Robert Oster as Department of Licensing investigator

The Department of Licensing is a named enforcement agency in RCW 47.70. *See* RCW 46.70.021(5). Mr. Oster’s career involves investigating statutory violations. RP. 81. If anyone knows what “bushing” is and how it is done, it is Robert Oster. To be sure, Mr. Oster’s opinion of *these* facts is insightful. Being fully aware of the statute and its requirements, he gets right to the heart of the matter by stating that “Bushing, again, has to do with a time period and a change in the contract’s conditions or terms.” RP 74. It is the result of the activity that matters, and less the means of bringing that result about.

The March 13, 2008 contract is an attempt to modify the earlier contract

Finally, JR’s argues that because a second contract exists, that fact alone goes to show that it is valid and should govern in a battle over the two contracts. This argument is incomplete and it further deflects from the issue presented before the court.

The second contract is a modification of the first. There is no other possible reason for JR’s to present the second contract other than to

modify the terms of the first contract that JR's saw as unsavory for itself. They are the same agreement with the sole exception of *who* will pay off the Sebring. And in the event of modification there must be "consideration separate from that of the original contract." *Wagner v. Wagner*, 95 Wn.2d 94, 103, 621 P.2d 1279 (1980); (App. Br. 14). The Clarks did not have a negotiating option in the second agreement. JR's required them to sign in a take-it-or-leave-it state after unilaterally altering the agreement to its own benefit, after receiving the Clarks consideration to the first agreement. To allow one party to control the flow of favor in the modification to itself without newly bargained-for consideration from the other party is nearly re-stating the definition of "bushing" put forward by the *Plouse* court: obligating the buyer to buy, but leaving room for the dealer to change things. 128 Wn. App. at 645.

C. CONCLUSION

JR's acts and practices were unfair, deceptive, and above all confusing. By signing the first contract while almost simultaneously commenting that they weren't *really* signing the contract, they left the agreement open to future acceptance. JR's subsequently altered the terms of the Clark's automobile purchase while failing to unwind the deal during the time they were supposed to. This put JR's in an unfairly superior bargaining position—they have one signed agreement already beholding

the Clark's to buy, and they have the trade-in vehicle; while the Clarks are left with no negotiating leverage at all. This type of dealing is common. The legislature needed to pass a strict law against it.

Even without the bushing violation, the second contract on March 13, 2008 is still invalid because there was no unambiguous mutual intent and no new and separate consideration from that of the original contract.

Appellants ask this court to Reverse the September 24, 2009 Judgment and find the second March 13, 2008 contract invalid. Appellants also ask this court to find Appellees breached the first March 6, 2008 contract and find Appellees liable in damages.

DATED this 22nd day of December, 2010.

UNIVERSITY LEGAL ASSISTANCE


ALAN L. McNEIL, WSBA #7930
Attorney for Appellants