

FILED

NOV 10 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 286576

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FRANCES CLARK and SHANNON HOERNER-CLARK,
husband and wife,

Appellants,

v.

JR'S QUALITY CARS, INC., VIROJ "LEE" RITDECHA,
Salesperson, and CAPITOL INDEMNITY CORP.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Plaintiffs raise two issues on appeal arising from the trial court's denial of their Motion for Reconsideration. First, they argue that JR's Quality Cars ("JR's") violated Washington's anti-bushing statute, RCW 46.70.180(4), when, on March 13, 2008, Plaintiffs and JR's entered into a Final Purchase Agreement. Second, Plaintiffs argue that the March 13, 2008, contract was an invalid modification of the March 6, 2008, contract, asserting it lacked mutual intent and new consideration.

As to both assignments of error, Plaintiffs' contentions are legally and factually unsustainable. A cursory review of the relevant case law and the facts shows that the anti-bushing statute does not even apply to the facts of this case. In addition, the March 13th contract is not a modification of the March 6th contract; rather, it is a perfectly valid, new contract, and its terms govern to the extent that they are inconsistent with the March 6th contract. The Court should reject Plaintiffs' theory that the March 13th contract was an invalid modification of the March 6th contract because Plaintiffs' have made no showing that the parties ever intended to modify the March 6th contract. There is nothing on the

face of the March 13th contract nor implied by the parties actions that suggests a modification was intended. On the contrary, the testimony at trial simply demonstrates that the parties entered into a new contract. Accordingly, the trial court properly denied Plaintiffs' Motion for Reconsideration as to the above-referenced issues.

II. STATEMENT OF THE CASE

Respondent JR's Quality Cars, Inc. ("JR's"), is owned by Kenneth VanderBurgh and has been a licensed used car dealer in Spokane, Washington, since 1997. *Report of Proceedings ("RP")* 190. Mr. VanderBurgh received the majority of his experience by working for his father who has sold cars in Spokane for over 50 years. *RP* 190. In October, 2007, Petitioners Francis Clark and Shannon Hoerner- Clark (the "Clarks") purchased a 2002 Chrysler Sebring from JR's. *RP* 10. On February 1, 2008, the Clarks experienced an engine problem with the vehicle and brought it to JR's to diagnose the problem. *RP* 49. The Clarks had financed the vehicle through American General, and their balance owed was approximately \$4,300.00. *RP* 34

On March 6, 2008, the Clarks entered into a Purchase Agreement with JR's for the purchase of a 1995 Chevrolet 1500

pickup. *RP* 202. The contract signed on March 6, 2008, is clear in its description of the transaction. The 2002 Sebring was to be traded in at a value of \$4,500, with the underlying loan of \$4,300 to be paid by JR's and the \$200 surplus applied towards the down payment of the new truck. *RP* 33-36. To this day, no one knows why JR's wrote the Purchase Agreement in this manner because the salesperson, Lee Ritdecha, cannot be located.

The Clarks testified that immediately following the signing of the March 6th contract they were told by Mr. Ritdecha that JR's would not be paying off the underlying loan on the Sebring. *RP* 119. JR's strongly denies this allegation. Interestingly, at no point did the Clarks protest the alleged renunciation of the March 6th contract. *RP* 120. Instead, the Clarks simply left the dealership fully aware that JR's had no intention of honoring the original contract. *RP* 120. A week later, on March 13, 2008, the Clarks returned to complete the deal and pick up the truck. *RP* 122. While at JR's, the Clarks signed a Final Purchase Agreement that did not discuss JR's obligation to pay-off the Sebring. *RP* 122; *RP* 204. As to the operative effect of the March 13th contract, neither party is able to articulate whether it was to replace or modify the

March 6th contract. Therefore, the March 6th and March 13th contracts are separate agreements.

At all times the Clarks knew that the terms of the March 13th contract were different from the terms of the March 6th contract, but chose to move forward regardless of that knowledge. *RP 122*. The bottom-line is that the Clarks knowingly and voluntarily signed a new contract under which they were to pay-off the underlying loan on the Sebring.

III. LEGAL ARGUMENT

A. Standard of Review

This Court reviews a trial court's denial of a motion for reconsideration for abuse of discretion. *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 497, 183 P.3d 283 (2008). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *Id.* An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court. *Id.* Accordingly, if a trial court's ruling is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Showalter v. Wild Oats*, 124 Wash.App. 506, 101 P.3d 867 (2004).

B. The Trial Court Properly Found That JR's Did Not Violate Washington's Anti-Bushing Statute.

1. Washington's Anti-Bushing Statute Does Not Apply to the Facts of This Case.

There are two cases which interpret and analyze Washington's anti-bushing statute, RCW 46.70.184(4), *Plouse v. Bud Clary of Yakima, Inc.*, 128 Wn.App. 644, 116 P.3d 1039 (2005), and *Banuelos v. TSA Wash, Inc.*, 134 Wn.App. 603, 141 P.3d 652 (2006).

In *Plouse*, Plaintiff and Defendant car dealer signed a purchase agreement on April 22, 2003, for the sale of a truck. The agreement set forth the financing, with the car dealer obligating itself to find a lender to accept those terms. Plaintiff gave the dealer a trade-in vehicle, and a check for \$2,000.00 as down payment, and the dealer gave Plaintiff possession of the truck. Defendant contacted six finance companies, which refused to finance the transaction. A seventh company finally agreed to finance the deal on May 1, 2003, which date was more three days after the contract was signed. Plaintiff then sued the dealer, alleging its failure to either finance the deal within three days or to

void it, was an act of “bushing,” in violation of RCW 46.70.180(4)(a) (subsection 4(a) of the statute was amended in 2007, changing the dealer’s obligation to sign the contract or return the buyer’s down payment and trade-in from three days to four days). The trial court held that the anti-bushing statute did not apply. In affirming the decision, the appellate court acknowledged that RCW 46.70.180(4) prohibits the practice known as “bushing,” and as to the practice, the court stated:

The practice is essentially one where the car dealer obligates the buyer to buy, but leaves the dealer room to change the terms of the deal for more than three days.

Plouse, 128 Wn.App. at 645. As to when the statute applies to a contract, the court stated:

That statute then applies only 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***.”

Id. at 648 (emphasis added).

The court then applied the applied the facts of the case to the statute. It emphasized that the dealer’s signature on the April 22, 2003, agreement formed a binding contract, and therefore was not subject to the dealer’s “future acceptance.” *Plouse*, 128 Wn.App. at 648. Put simply, the dealer’s signed acceptance rendered the statute inapplicable.

In the present case, we have the same situation. Like *Plouse*, in which the dealer signed the contract, JR's signed the March 6th contract. This formed a binding contract which constituted JR's signed acceptance as required by the statute, and was not subject to JR's "future acceptance." There is nothing in this contract stating that it was contingent upon or subject to JR's "future acceptance." Because the contract contained JR's signed acceptance, it was in compliance with RCW 46.70.180(4).

Turning to the March 13th contract, like *Plouse*, it was also signed by the Clarks and JR's. And, like the March 6th contract, it was a binding contract, fully accepted by JR's, and not subject to JR's "future acceptance." Accordingly, the purchase and sale of the Chevy pickup did not violate Washington's anti-bushing statute.

In *Banuelos*, Plaintiffs signed a purchase order for the purchase of a van from Defendant car dealer (Hertz). They gave Defendant a trade-in vehicle, and a \$1,000.00 down payment check, and the Defendant agreed to arrange financing for the remaining amount of the purchase price. Of utmost importance, and unlike *Plouse* and this matter on appeal, the car dealer ***did not sign the purchase order*** at any time. By not signing the contract,

the court ruled that the agreement was subject to the Defendant's "future acceptance" and, therefore, Washington's anti-bushing statute applied.

The following day, Defendant obtained loan approval from a lender, subject to Plaintiffs' proof of income. Plaintiffs could not provide proof of income because they were unemployed. Thus, financing was not approved, and Defendant told Plaintiffs to return the van. Subsequently, the van was returned, and Plaintiffs picked up their trade-in vehicle. However, Defendants had deposited Plaintiffs' payment check, and refused to return the down payment until the check cleared its bank. It was over two weeks later that Defendant finally returned Plaintiffs' down payment.

Plaintiffs then brought suit against the Defendant, alleging its failure to return their \$1,000.00 down payment within three days of their agreement was a violation of RCW 46.70.180(4). The trial court agreed, and judgment was entered against the Defendant, who appealed.

The appellate court affirmed. It was clear that Defendant did not sign the purchase order, and thus, the contract was subject to the Defendant's "future acceptance." Hence, pursuant to the statute, Defendant was required to return Plaintiffs' trade-in

vehicle and down payment within four days. Defendant's failure to return the down payment was "bushing," in violation of the statute.

In distinguishing the case from *Plouse*, the appellate court stated:

In *Plouse*, the dealer failed to provide financing within three days after both the buyers signed the purchase agreement. This court held the bushing statute did not apply because the dealer's acceptance was unconditional with the dealer signing the purchase agreement.

Banuelos, 134 Wn.App at 611 (emphasis added).

Clearly, the relevant facts in this case are nearly identical to those in *Plouse*, and unlike those in *Banuelos*, because JR's signed the March 6th and the March 13th contracts. Neither contract was subject to JR's "future acceptance." In its written decision on August 13, 2009, the trial court found that the March 6th contract "was clear in its description of the transaction." The trial court made no finding that the March 6th contract was subject to JR's "future acceptance." This Court should not disturb the trial court's findings of fact.

In arguing that JR's conduct constituted "bushing," the Clarks assert that JR's did not sign or reject a purchase order before the end of the fourth business day, as required by RCW

46.70.180(4). The Clarks' argument ignores the simple and unmistakable fact that both the Clarks and JR's signed a binding purchase order on March 6, 2008, and then subsequently entered into a Final Purchase Agreement on March 13, 2008. The Clarks' factual narrative fails to mention the factor most heavily relied on by the *Plouse* court in finding that RCW 46.70.180(4) did not apply – that JR's signed the March 6, 2008 purchase order. Relying on the holding in *Plouse*, JR's could not have possibly committed "bushing" because it signed the purchase order on March 6, 2008. As a result, the anti-bushing statute doesn't even apply to the facts of this case.

2. Even If RCW 46.70.180(4) Does Apply (Which it Does Not), it Still Remains That JR's Did Not Commit Bushing.

As stated in *Plouse*, if the purchase agreement is subject to the dealer's "future acceptance," the dealer has four days to either (1) deliver to the buyer the dealer's signed acceptance, or (2) void the contract and return the down payment and trade-in vehicle or certificate of title to a trade-in. Because JR's voided the purchase order immediately after signing it, and because JR's had yet to collect the down payment on the pickup or the certificate of title to

the trade-in, JR's could not have possibly violated RCW 46.70.180(4).

Assuming the Clark's version of the events is true, JR's complied with RCW 46.70.180(4) because it voided the agreement and never took possession of the Clarks' down payment or certificate of title to the trade-in under the March 6th contract. Repudiation of a contract before there has been a breach by nonperformance is called an anticipatory breach or (the more precise form) anticipatory repudiation. *Wallace v. Kuehner*, 111 Wn.App. 809, 816, 46 P.3d 823 (2002). Such repudiation is an express or implied assertion of intent not to perform a party's obligations under the contract prior to the time for performance. *Id.* In this matter, Lee Ritdecha expressly rejected the March 6th contract when he said that he would not honor the terms of the purchase order. *RP* 119. According to the Clarks, Mr. Ritdecha unambiguously rejected the terms of the purchase order when he stated that he would not perform the contract pursuant to its terms, i.e., JR's would not pay off the underlying loan on the Sebring. This constituted a rejection under RCW 46.70.180(4).

As for the down payment and the certificate of title on the trade-in, the record clearly indicates that neither were delivered to

JR's under the March 6th contract. *RP* 210. Unlike *Banuelos*, where the court found that Defendant had committed bushing because it failed to return Plaintiffs' down payment within four days, JR's never received a down payment at all. It follows that JR's could not have committed "bushing" when it never retained possession of the Clarks' down payment or the certificate of title on the Sebring in the first place.

Finally, there was nothing further JR's could do as far as return of the trade-in is concerned because the trade-in was left at JR's a month earlier due to mechanical problems. Until a certificate of title was delivered to JR's, the Clarks were free to remove the car at their convenience.

3. The Testimony of Plaintiffs' Expert Witness, Robert Oster, Ignored the Analysis Set Forth in *Plouse* and *Banuelos* and Was Based on an Incomplete Understanding of the Facts.

The testimony of Robert Oster was plainly inconsistent with RCW 46.70.180(4) and the decisions in *Plouse* and *Banuelos* because he failed to apply the law to the facts of the case. In addition, Mr. Oster based his opinions on a very narrow understanding of the facts because he failed to review the two most important documentary exhibits in the case – the March 6th and

March 13th contracts. *RP 75*. Finally, although Mr. Oster is a Department of Licensing investigator, he has no formal legal training and, as a result, his testimony fails to take into account the interplay between facts and legal authority. In short, Mr. Oster's testimony must be taken with a grain of salt.

Rather than take a well-reasoned approach in opining whether "bushing" did, in fact, occur, Mr. Oster makes blind conclusions. For example, he opines that, based on the number of days between the two contracts, "bushing" did occur. *RP 74*. In reaching his conclusion, Mr. Oster fails to ask a critical question – whether the statute even applies in the first place. Clearly, the statute only comes into play if a contract is subject to a dealer's "future acceptance." In *Plouse*, and in this matter, the contracts were signed by the dealer, and were not subject to the dealer's "future acceptance." As a result, the number of days between the contracts is immaterial to whether "bushing" occurred because RCW 46.70.180(4) is inapplicable.

What is more, Mr. Oster failed to even examine the language of the two contracts themselves. *RP 73*. Instead, he simply looked at the dates on the contracts and jumped to uninformed conclusions without referring to the pertinent case law

and the terms of the contracts. Had Mr. Oster performed even a cursory review of the contracts and the relevant case law, he would have noticed that the contracts were not subject to JR's "future acceptance" and, therefore, RCW 46.70.180(4) did not apply.

This Court should interpret the statute consistent with *Plouse* and *Banuelos*, rather than Mr. Oster's flawed and incomplete analysis of the case.

C. J.R.'S Did Not Breach the March 6th Contract Because the Terms of the March 13th Contract Prevail.

The circumstances surrounding the execution of the March 13th contract are simple and undisputed. Both of the Clarks testified that Mr. Clark did in fact sign the March 13th contract voluntarily and intelligently. *RP* 86-87; *RP* 127. In fact, Mr. Clark testified that, prior to signing the March 13th contract, he was fully aware that its terms differed from those of the March 6th contract. *RP* 86-87. The documentary evidence and testimony shows that the March 13th contract was an independent contractual arrangement. There was never any discussion or any indication that the March 13th contract was intended to modify the March 6th contract. Although neither the Clarks nor JR's have a valid explanation for why they entered into two separate contracts, the

unmistakable fact remains that Mr. Clark voluntarily signed the March 13th contract to purchase the Chevy pickup. The Court should hold the Clarks to the express terms of the March 13th contract.

The March 13, 2008, contract is a valid and binding contract and its terms govern to the extent that they are inconsistent with terms of the March 6, 2008, contract. When a second contract between the same parties deals with the same subject matter as the first, but it does not state whether it is intended to discharge or replace the first, the contracts must be interpreted together, and the second agreement prevails if there are any inconsistencies. *Durand v. HIMC Corp.*, 151 Wash.App. 818, 830, 214 P.3d 189 (2009); *Flower v. T.R.A. Indus., Inc.*, 127 Wash.App 13, 29, 111 P.3d 1192 (2005) (quoting *Lynch v. Highley*, 8 Wash.App. 903, 911, 510 P.2d 663 (1973)). As it stands, there is no evidence from trial testimony or from the language of the contracts themselves that states whether the March 13th contract was intended to be a modification of the March 6th contract. As a result, both contracts must be interpreted together and, in the event they are inconsistent with each other, the second contract controls. *Durand v. HIMC Corp.*, 151 Wash.App. at 830.

Using the above formula, J.R.'s did not breach the March 6th contract because the terms of the March 13th contract prevail.

1. The March 6th and March 13th Contracts Should Be Interpreted Together and the Terms of the March 13th Contract Must Control.

Washington courts have consistently agreed that when a second contract between the same parties deals with the same subject matter as the first, but does not state whether it is intended to discharge, modify, or replace the first, the contracts must be interpreted together, and the second contract prevails if there are any inconsistencies. *Durand*, 151 Wash.App. at 830; *Flower*, 127 Wash. App at 29.

In *Durand*, an employee signed a formal offer agreement (contract 1) on March 24, 2005. *Durand*, 151 Wash.App. at 823-824. On the same day, Durand signed an employment agreement (contract 2) containing a five-year commitment. *Id.* The purpose of contract 2 was to formalize the terms of the original terms of contract 1; however, contract 2's termination and severance provisions were entirely different than those of contract 1. *Id.* The employer argued that the termination and severance provisions from contract 1 should control whereas the employee argued that the terms of contract 2 should control. *Id.* at 830. Paying

particular attention to the holdings of *Flower* and *Lynch*, both the trial court and the appellate court upheld contract 2 and its termination and severance provisions to the extent that they were inconsistent with contract 1. *Id.*

In *Flower*, an employee entered into an at-will employment contract on May 13, 2002. *Flower*, 127 Wash. App at 23. On June 4, 2002, the employee signed a new contract stating that he would not be fired for anything short of serious misconduct. *Id.* at 23. On July 17, 2002, the employee was fired without cause. *Id.* at 24. The employee filed suit alleging breach of contract. *Id.* Although the employer had the case dismissed on summary judgment, the appellate court reversed and remanded for trial on the issue of whether the June 4, 2002, contract governed. *Id.* at 41.

The facts in the present case are much like those in *Durand* and *Flower* because there were two contracts between the same parties regarding the same subject matter. Similarly, as in here, in both *Durand* and *Flower*, contract 2 did not state whether it discharged or modified contract 1. In resolving the apparent inconsistencies between contracts 1 and 2, the courts in *Durand* and *Flower* relied on Washington's long-standing rule for interpreting inconsistent contracts, which holds that the second

contract's terms will govern to the extent that they are inconsistent with those of the first contract. Most importantly, both appellate courts made it abundantly clear that the above rule was not limited to employment contracts, but were rules of general application. *Durand*, 151 Wash.App. at 830; *Flower*, 127 Wash.App. at 30. As such, this Court should apply the same rule to the March 6th contract and the March 13th contract, and affirm the trial court's holding that the terms of the March 13th contract govern.

2. The Clarks Theory That the March 13th Contract Modified the March 6th Contract is Unsupported by Law or Fact.

The Clarks argue that the March 13th contract is an invalid modification of the March 6th contract because it lacked mutual intent and new consideration. As a result of the alleged invalid modification, the Clarks argue that the terms of March 6th contract govern and that the March 6th was breached. The above theory is contrary to Washington law and unsupported by the evidence.

The March 13th contract should not be interpreted as an attempted modification of the March 6th contract. As a stated in *Flower*, the intent of the parties may be discerned from the actual language of the agreement. *Flower*, 127 Wash.App. at 30. The Clarks' theory fails because neither party testified that the March

13th contract was to modify the March 6th contract nor does the language of the March 13th contract indicate any intent to operate as a modification. The Clarks never attempted to elicit any testimony or offer any evidence at trial to support their theory that the March 13th contract was a modification of the March 6th contract. Accordingly, their theory cannot hold water.

Instead, the trial court properly viewed the two contracts as independent agreements that should be interpreted together, with the inconsistent terms of the March 13th contract controlling. There is not one shred of evidence to suggest that the parties intended the March 13th contract to operate as a modification.

When there is no modification, new consideration is not required for the March 13th contract to be enforceable. Instead, both contracts are separate agreements, and must be interpreted together, with the March 13th contract controlling to the extent that there are any inconsistent terms. *Durand*, 151 Wash.App. at 830; *Flower*, 127 Wash.App. at 30. Because the terms of the March 13th contract prevail, JR's could not have breached the March 6th contract. The trial court's holding should be affirmed.

IV. CONCLUSION

Based on the foregoing and undisputed evidence, the Clarks have failed to prove that JR's violated Washington's anti-bushing statute, RCW 46.70.180(4). In fact, the Clarks have failed to show that the statute is even applicable because the March 6th contract was not subject to JR's "future acceptance." JR's could not have possibly violated a statute that never applied to its conduct from the outset.

Additionally, the Clarks have failed to present any evidence that the March 13th contract was intended to modify the March 6th contract. As such, we are left with two separate contracts that must be interpreted together. In so far as they are inconsistent, Washington law holds that the later one (March 13th) prevails. Accordingly, J.R.'s did not breach the March 6th contract.

JR's and Capitol Indemnity respectfully ask this Court to affirm the trial court's denial of Plaintiffs' Motion for Reconsideration on two grounds: (1) that JR's did not violate Washington's anti-bushing statute and (2) that JR's did not violate the March 6th contract because the terms of the March 13th contract prevail.

RESPECTFULLY SUBMITTED this 9 day of November, 2010.

YUSEN & FRIEDRICH

By 
Alexander Friedrich, WSBA # 6144

DECLARATION OF SERVICE

Vanessa Stoneburner declares:

On November 9, 2010, I mailed a copy of the
foregoing document by United States first-class mail, with
proper postage affixed, to:

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

EXECUTED THIS 9th day of November, 2010 at

Seattle, Washington.


Vanessa Stoneburner