

FILED

OCT 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 295508

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

SCOTT AND GAYLENE YOUNG, husband and wife,

Respondents/Cross Appellants,

v.

BOB FRANK CONSTRUCTION, LLC, a Washington limited liability
company,

Appellant/Cross Respondent.

APPELLANT/CROSS RESPONDENT BOB FRANK
CONSTRUCTION, LLC'S REPLY BRIEF

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I. REPLY ARGUMENT

Bob Frank Construction respectfully requests that it be awarded the full amount of damages incurred related to the actual costs to construct the subject property; as well as the monthly carrying costs, and closing costs incurred from completion of construction in April 2008, until June 24, 2011, when the home sold.

Bob Frank Construction also requests that the trial court's April 11, 2011, order awarding attorneys' fees and costs to the Youngs be reversed, and the judgment entered on April 20, 2011, be vacated.

Finally, Bob Frank Construction requests the court to affirm the trial court's decision that the Youngs were not entitled to receive a seller disclosure statement.

A. THE TRIAL COURT ERRED WITH RESPECT TO THE AMOUNT OF DAMAGES AWARDED TO BOB FRANK CONSTRUCTION.

Preliminarily, it should be noted that the subject property located at 5206 S. Camus was transferred from Bob Frank Construction and subsequently sold by the transferee to a third party on June 24, 2011. As a result, specific performance is no longer an available remedy as Bob Frank Construction can no longer give the Youngs title to the property.

Although specific performance may no longer be an available remedy, at the trial court Bob Frank Construction alternatively requested

and provided evidence regarding the actual cost of construction, the monthly carrying costs, and estimated closing costs incurred as a result of the Youngs' refusal to purchase the home. Furthermore, the trial court erred when it set an arbitrary damages cut-off date. Based on this evidence, and the trial court's error, Bob Frank Construction requests the Appellate Court to award it the actual cost of construction, plus the monthly carrying costs from completion of construction to the date of sale, plus the closing costs; less the amount received from the sale of the home and amount already awarded by the trial court.

The trial court's May 24, 2010, Findings of Fact and Conclusions of Law support the conclusion that Bob Frank Construction prevailed on its claim of quantum meruit and breach of a contract implied in fact, and is entitled to these damages. See Appellate Brief, 19-20. The trial court awarded Bob Frank Construction some damages under that theory, but the damages awarded were inadequate based on the evidence presented.

1. **Bob Frank Construction Consistently Requested Damages Under Quantum Meruit in the Complaint, in its Trial Brief, at the Trial, in Closing Argument, and in Post-Judgment Motions.**

Quantum meruit was an alternative contract claim pled to allow Bob Frank Construction to recover even if the Purchase and Sale Agreement was voided. (CP at 27-28); see Young v. Young, 164 Wn.2d

477, 485, 191 P.3d 1258 (2008) (quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact); Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 850, 110 P.3d 232 (2005) (even a party performing services under a void contract may recover for work actually done under quantum meruit); Caughlin v. Int'l Longshoremen's and Warehousemen's Union, Local No. 37-C, 52 Wn.2d 656, 659-60, 328 P.2d 707 (1958) (quantum meruit/implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances).

Bob Frank Construction has not asserted a new theory of recovery for the first time on appeal, and is not seeking a different measure of damages on appeal. Quantum meruit was an alternative contract claim pled by Bob Frank Construction in its Answer and Counterclaims. (CP at 27). Quantum meruit was also addressed in Bob Frank Construction's Trial Brief, in witness testimony and written exhibits submitted at trial, and in closing argument.

The case law cited by the Youngs on these issues does not support their position, and it is disingenuous for the Youngs to assert that Bob Frank Construction is raising these issues for the first time on appeal.

In its Counterclaims, in discovery, in its Trial Brief, and at the trial, Bob Frank Construction consistently asserted an alternative theory of

quantum meruit and requested damages. (CP at 27-28; 334-340); (RP at Feb.1, 2010, 372-77). Bob Frank Construction presented evidence at trial by way of testimony and documentation regarding the actual cost of construction to support the quantum meruit theory and an award of damages there under. (RP at Jan. 27, 2010, 95-144; RP at Jan. 28, 2010, 299-300); (Ex P-40; D-105). At trial, counsel for Bob Frank Construction meticulously walked Mr. Young through several months' worth of emails to establish the intentions of the parties and a meeting of minds regarding construction of the subject property to establish the quantum meruit/ implied contract claim. (RP at Jan. 27, 2010, 95-144). Moreover, Bob Frank Construction addressed the issue of quantum meruit and the other alternative theories in closing argument. (RP at Feb.1, 2010, 460-468).

The damage theory of recovering carrying costs was not a new theory raised for the first time in the appeal. Bob Frank Construction provided the Youngs with evidence of the carrying costs in discovery, and presented evidence at trial regarding the monthly carrying costs. (RP at Feb. 1, 2010, 373-377). The Court awarded a portion of these carrying costs in the form of interest. (CP at 2415). Notably, Defendant's Trial Exhibit-118 sets forth the carrying costs Defendants seek to recover on appeal, i.e., utilities, additional interest, insurance, property taxes, and homeowner's association fees. Defendant's Motion for Clarification

simply asked the court to award these other carrying costs until the time the home sold, which was completely proper under CR 59 because the evidence of the initial carrying costs had already been admitted at trial through Defendant's Exhibit 118. (CP at 2234-2245).

Based on the claims and the evidence presented, the trial court correctly determined that there was a contract implied in fact between the parties, and concluded in the May 24, 2010, Findings of Fact and Conclusions of Law that Bob Frank Construction prevailed on its claim of quantum meruit. (CP at 2413-2417); see Young v. Young, *supra*.

The Youngs cite Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 137 P.2d 97 (1943), for the proposition that Bob Frank Construction cannot simultaneously assert that there was an express and implied contract. However, the Youngs misinterpret Chandler and failed to include in their argument a key part of the rule on this issue. Chandler reads, "A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, *in contravention of the express contract.*" Chandler, 17 Wn.2d at 604 (emphasis added). The Youngs left out the final clause of the rule because it destroys their argument. In this case, Bob Frank Construction was not asserting quantum meruit *in contravention* of its alternative contract claim. The

only difference between an implied contract and an express contract is the mode of proof. Caughlin, 52 Wn.2d at 660. In this case, the claims were pled in the alternative, were based on the same facts, acts, and conduct of the parties, and sought the same remedies.

Evidence was presented to the trial court establishing the amount of damages. See supra; Appellate Brief, pp. 33-38. Bob Frank Construction is entitled to recover money damages for the actual cost of labor, materials, and services provided under quantum meruit. See Powers v. Hastings, 93 Wn.2d 709, 713-17, 612 P.2d 371 (1980) (“clear and unequivocal” evidence standard applies where specific performance sought, but lesser standard applies where damages sought); Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact); Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 850, 110 P.3d 232 (2005) (even a party performing services under a void contract may recover for work actually done under quantum meruit); Losli v. Foster, 37 Wn.2d 220, 232, 222 P.2d 824 (1950) (damages recoverable in quantum meruit were actual cost of labor and materials).

Based on (i) the law regarding the measure of damages for quantum meruit, part performance, and promissory estoppel; (ii) the trial

court's findings and conclusions finding a contract implied in fact; (iii) the trial court's findings and the evidence presented at trial regarding the essential terms of the implied in fact contract; and (iv) the evidence presented at trial of the cost of labor, materials, and monthly carrying costs incurred by Bob Frank Construction in reliance on the Youngs' representations, the damages awarded to Bob Frank Construction by the trial court were inadequate and in error. Furthermore, there was no basis in law or fact for the trial court's completely arbitrary September 30, 2010, damages cut-off date.

2. **Bob Frank Construction is Entitled to Recover Damages Under the Theory of Quantum Meruit/ Contract Implied in Fact.**

As set forth in the Appellate Brief, there was indeed a contract implied in fact based on acts and conduct of the parties. See Appellate Brief, 18-20, 26-31. This evidence, along with the May 24, 2010, Findings of Fact and Conclusions of Law, also establishes the terms of the contract and shows that this was not just an agreement to agree, but that there was mutual assent between the parties as to the terms and performance by Bob Frank Construction. See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 162 P.3d 1153 (Div. 1, 2007) (evidence established that contract existed between contractor and subcontractor).

Mutual intent may be deduced from the circumstances and the parties' acts. Kintz v. Read, 28 Wn.App. 731, 734-35, 626 P.2d 52 (Div.1, 1981); City of Everett v. Sumstad's Estate, 95 Wn.2d 853, 631 P.2d 366 (1981) (the law will not imply a promise to pay for services contrary to the intention of the parties, as where it is obvious that there was no intent on the part of either party that payment should be made, although, if the recipient of services should, as a reasonable man, have understood that the performer expected compensation, the actual belief of the recipient as to such matter is immaterial).

The manifestation of mutual assent requires that each party to the contract either make a promise or begin performance. Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn.App. 846, 22 P.3d 804 (Div. 1, 2001); Restatement (Second) of Contracts § 18 (1981). The trial court erred when it determined that there was no mutual assent in this case because the May 24, 2010, Findings of Fact and Conclusions of Law establishes mutual assent by the conduct of the parties. (CP at 2413-2417).

The evidence is clear that the Youngs and Bob Frank Construction agreed that Bob Frank Construction would build a custom house for the Youngs at 5206 Camus Lane similar to the home built on 5117 Camus Lane, but with several changes and upgrades. (CP at 2414). The Youngs

made payment of \$1,250 to reserve the lot they had selected for their home. (CP at 2413-2414). The parties had a series of meetings over time addressing specific inquiries and requests by the Youngs including, but not limited to, a theater room, driveway, retaining walls, windows, interior structures such as walls and stairway rotations, at the house, all consistent with custom home construction. (CP at 2414). The parties continued to meet, discussed a detail allowance sheet, and construction started. (CP at 2414).

As of May 17, 2007, the parties agreed to \$1,040,600, but with reference to potential further adjustments. (CP at 2414). On May 17, 2007, the Youngs paid Bob Frank Construction \$50,000, and construction by agreement was moving forward. (CP at 2414).

The Youngs continued to communicate with Bob Frank Construction regarding significant construction additions, modifications, alterations, requests, and materials for the house, and allowed construction to continue until April 1, 2008. (CP at 2414, 2415). To its detriment, Bob Frank Construction reasonably relied on the Youngs actions, and expended significant time, labor, and money responding to their requests and constructing the house in expectation of completing construction and subsequent sale to the Youngs. (CP at 2416).

The Youngs committed to purchase the house, and the Youngs knew that Bob Frank Construction was relying on their commitments, representations, and actions as it actually performed by constructing the Youngs' custom home as they directed. (CP at 2416). By April 1, 2008, when the Youngs gave notice of rescission and indicated that they weren't going to buy the house, the vast majority of the construction was completed, resulting in an injustice to Bob Frank Construction. (CP at 2417); see also Appellate Brief, 27-31.

Furthermore, the trial court determined that Bob Frank Construction proved the theory of promissory estoppel, and promissory estoppel does not require mutual assent as to any terms, it merely requires a promise which is justifiably relied upon to a party's detriment. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435, 442 (1994).

As set forth in the Appellate Brief, the trial court record in this case establishes that, in addition to making promises to one another, both parties began performance, *e.g.*, the Youngs paid \$50,000; Bob Frank Construction constructed the house. See Appellate Brief, 19-20, 26-31.

An agreement to convey an estate in real property, though required by the statute of frauds to be in writing with the formal requisites specified for a deed, may be proved without a writing, given sufficient part performance. Miller v. McCamish, 78 Wn.2d 821, 826, 479 P.2d 919

(1971). Part performance is sufficient where two of the following three factors are found: (1) delivery and actual possession; (2) payment or tender of consideration; (3) making of permanent, substantial, and valuable improvement. Berg v. Ting, 125 Wn.2d 544, 556, 886 P.2d 564 (1995); Kruse v. Hemp, 121 Wn.2d 715, 724-25, 853 P.2d 1373 (1993); Powers v. Hastings, 93 Wn.2d 709, 717, 612 P.2d 371 (1980). The trial court's May 24, 2010, Findings of Fact and Conclusions of Law establish that there was a payment of consideration when the Youngs paid Bob Frank Construction \$50,000, and that Bob Frank Construction made permanent, substantial, and valuable improvements to the subject property. (CP at 2414-2417); see Appellate Brief, 26. As a result, two of the three required elements exist, and the statute of frauds does not prevent Bob Frank Construction from recovering damages in this case.

As noted at the beginning of this Reply, Bob Frank Construction recognizes that specific performance is no longer an available remedy, and that it is limited to a recovery of damages. As a result, Bob Frank Construction does not need to prove the terms of the contract by "clear and unequivocal" evidence. See Powers v. Hastings, 93 Wn.2d 709, 713-17, 612 P.2d 371 (1980) ("clear and unequivocal" evidence standard applies where specific performance sought, but lesser standard applies where damages sought). Furthermore, Bob Frank Construction isn't

relying solely on part performance to recover damages in this case. As set forth above, and in the Appeal Brief, Bob Frank Construction presented evidence at trial to establish the existence and terms of a contract implied in fact by the circumstances and the acts of the parties. See Appellate Brief, 18-20, 26-31.

Bob Frank Construction is not relying on the trial court's finding of promissory estoppel for removal of the agreement from the statute of frauds. As a result, the Youngs citation to Berg v. Ting, 125 Wn.2d 544, 886 P.2d 564 (1995), for the proposition that promissory estoppel cannot be the basis for enforcing a real estate transaction is moot. As set forth above, it's the doctrine of quantum meruit and part performance that remove this matter from the statute of frauds.

The Youngs' reliance on Sea-Van Investments Assoc. v. Hamilton, 125 Wn.2d 120, 881 P.2d 1035 (1994), for the proposition that 13 material terms are required in a real estate contract is misplaced. Sea-Van was a case involving a claim for breach of written contract and the issue was whether a valid contract was ever formed. Notably, there was no quantum meruit claim at issue in that case, and the parties in that case did not partially perform. Sea-Van and the 13 material terms discussed therein have no bearing or precedential value in a claim for quantum meruit where both parties have partially performed.

B. THE TRIAL COURT ERRED WHEN IT AWARDED ATTORNEYS' FEES AND COSTS TO THE YOUNGS.

The trial court's award of attorneys' fees and costs to the Youngs was an abuse of discretion. The Youngs did not prevail or substantially prevail on any of their claims, and they did not successfully defend Bob Frank Construction's breach of contract claim. As a result, the Youngs should not be awarded fees and costs under any theory of recovery.

The Youngs cite Marassi v. Lau, 71 Wn.App. 912, 859 P.2d 605 (1993), to support their argument for the recovery of attorneys' fees, but Marassi is not factually on point and should not govern the decision in this matter. In Marassi, the court determined that a proportionality approach was appropriate because the plaintiff sought recovery for multiple distinct and severable breaches, there was no counterclaim for relief, and the plaintiff only prevailed on two of seven claims presented. Marassi, 71 Wn.App. at 916-17, 920. The Marassi court distinguished the claims therein from a situation where a party was suing on a single breach of contract, with several damages theories. Id. Specifically, the court distinguished Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn.App. 762, 774, 677 P.2d 773 (1984) (finding that a party does not prevail on an issue simply because damages awarded to opposing party on that issue were not as high as prayed for).

In this case, the Youngs alleged seven distinct and severable claims: (1) Conversion; (2) Quantum Merit/Unjust Enrichment; (3) Violation of RCW 64.06.040(3) and 64.060.030; (4) Intentional Misrepresentation; (5) Negligent Misrepresentation; (6) Uniform Declaratory Judgments Act – Unenforceability of Purchase and Sale Agreement; and (7) Consumer Protection Act Violation. (CP at 6-10). Bob Frank Construction counterclaimed, asserting breach of contract claim under four alternative theories: (1) breach of purchase and sale agreement with addendum, (2) breach of construction contract, (3) wrongful rescission, and/or (4) quantum meruit and unjust enrichment. (CP at 24-28).

The trial court entered Findings of Fact and Conclusions of Law and a Judgment in favor of Bob Frank Construction establishing that it prevailed on its claim for breach of contract under the theory of quantum meruit/contract implied in fact. The May 24, 2010, Findings of Fact and Conclusions of Law specifically establish that the Youngs did not meet their burden on alleged issues of action, that the trial court denied the Youngs' damages or any other relief, and ordered that the Youngs' claims are denied and that they take nothing. (CP at 2413-2417); (CP at 2669-2670).

As a result, Marassi and its progeny are not applicable. The Youngs asserted seven distinct claims and did not prevail on any of them. Furthermore, the Youngs did not successfully defend Bob Frank Construction's counterclaim for breach of contract. The trial court concluded that the Youngs breached a contract implied in fact, and awarded Bob Frank Construction a Judgment on that breach claim.

In regard to the mutuality of remedy issue, it is extremely significant that the court in Kaintz v. PLG, Inc., 147 Wn.App. 782, 790, 197 P.3d 710 (2008), Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004), and Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn.App. 188, 197, 692 P.2d 867 (1984), awarded fees to the prevailing party under the mutuality of remedy theory only after the opposing parties' were entirely unsuccessful on their claims and it was determined that the contract's unenforceability was dispositive of the entire matter. Kaintz, 147 Wn.App.715; Labriola, 152 Wn.2d at 842; Herzog, 39 Wn.App. at 197. In each of those cases, the opposing party was entirely unsuccessful and recovered no damages or relief. Even the Marassi court recognized the significance of the fact that the plaintiffs were entirely unsuccessful. Marassi, 71 Wn.App. at 916.

In this case, the trial court's determination that a written purchase and sale agreement never existed was not dispositive of the entire matter

and did not prevent Bob Frank Construction from prevailing on its contract claim of quantum meruit/unjust enrichment. Bob Frank Construction's claims were not dismissed and the Youngs did not prevail on any of their claims. Judgment was entered in Bob Frank Construction's favor.

Thus, there is no support for an award of fees under the mutuality of remedy theory and the trial court's decision to the contrary is in error.

The trial court did not award any damages or relief to the Youngs on any of their claims. The Youngs did not prevail on the contract issue just because the money damages awarded to Bob Frank Construction were not as high as it prayed for. As stated above, a lower-than-prayed-for damage award is not sufficient to prevail on an issue. Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn.App. 762, 774, 677 P.2d 773 (1984).

The trial court denied all the Youngs' claims and awarded relief only to Bob Frank Construction. Thus, the Youngs are not entitled to recover attorneys' fees under any theory. However, if it's determined that the trial court's May 24, 2010, Findings of Fact and Conclusions of Law somehow provides relief to the Youngs, then there is no singularly prevailing party in this matter, so neither party is entitled to attorneys'

fees. Alternatively, both parties prevailed on major issues so there is no prevailing party and no fees can be awarded.

With respect to Bob Frank Construction's request for vacation of the April 20, 2011, Judgment, the record establishes that (1) the Youngs did not properly serve a copy of the proposed judgment on Bob Frank Construction, (2) Bob Frank Construction did not approve the form of the proposed judgment, (3) Bob Frank Construction did not waive notice of presentment, (4) the April 20, 2011, Judgment was signed and entered without a presentment, and (5) the April 20, 2011, Judgment was signed and entered prior to the five-day notice requirement.

The dollar amount of the judgment entered was different than the proposed judgment provided to Bob Frank Construction. The dollar amount of the judgment is significant, and failure to allow requisite notice before entry was improper and prematurely started interest running on the Judgment. As a result, the Judgment should be vacated.

C. BOB FRANK CONSTRUCTION WAS NOT REQUIRED TO PROVIDE THE YOUNGS A SELLER DISCLOSURE STATEMENT.

The trial court determined that a seller disclosure statement was not required because there was no mutual acceptance of a written agreement between the parties. (CP at 2416). The Youngs have appealed this issue and argue that they were entitled to "rescind[] the alleged

contract” because Bob Frank Construction breached a duty under RCW 64.06. The Youngs misstate the trial court record on this issue and are not entitled to the relief requested.

The Youngs’ argument is flawed for several reasons: First, the Youngs’ argument rests on the erroneous assumption that the trial court ruled that Bob Frank Construction had a duty to provide the Youngs a seller disclosure statement. However, the trial court never ruled that Bob Frank Construction was required to provide the Youngs a seller disclosure statement. Second, the trial court determined that there was no written agreement, and the Youngs are not arguing that there was a written agreement; thus, without a written agreement, there was nothing to rescind. Finally, an interpretation of RCW 64.06, *et seq.*, that would require Bob Frank Construction to provide a seller disclosure statement to the Youngs in this case would be clear error and in contravention of the plain language of the statute.

It is well recognized that “statutes in pari materia must be construed together.” State v. Houck, 32 Wn.2d 681, 684, 203 P.2d 693, 695–96 (1949). A review of the plain language of the applicable subsections of RCW 64.06, *et seq.*, establishes that a seller disclosure statement was not required in this case, and thus that the Youngs had no right of rescission.

RCW 64.06.015 sets forth the duty of a seller of unimproved real property, and reads:

In a transaction for the sale of unimproved residential real property, the seller shall, unless the buyer has expressly waived the right to receive the disclosure statement under RCW 64.06.010, or unless the transfer is otherwise exempt under RCW 64.06.010, deliver to the buyer a completed seller disclosure statement.

Notably, this subsection became effective on July 22, 2007, which was subsequent to the date the parties began their course of dealing on March 21, 2007. Prior to July 22, 2007, a seller who contracted to sell unimproved real property had no duty to provide disclosure statements to a buyer. See RCW 64.06.005 (2007) (requiring only seller of “residential real property,” which was defined at the time as “real property consisting of, or improved by, one to four dwelling units” to provide disclosure statements to purchasers).

RCW 64.06.030 sets forth the timeframe in which the seller must fulfill its duty under RCW 64.06.015, and reads:

Unless the buyer has expressly waived the right to receive the disclosure statement, not later than five business days or as otherwise agreed to, *after mutual acceptance of a written agreement between a buyer and a seller for the purchase and sale of residential real property*, the seller shall deliver to the buyer a completed, signed, and dated real property transfer disclosure statement.

(emphasis added).

Thus, the statutorily-prescribed timeframe in which a seller must provide a disclosure statement is clear – the same must be accomplished no later than five days *after mutual acceptance of a written agreement* between a buyer and a seller for the purchase and sale of residential real property. RCW 64.06.030 was in existence prior to the legislature’s enactment of RCW 64.06.015, and was left unchanged by the legislature when it enacted RCW 64.06.015.

RCW 64.06.040(3) sets forth the remedy available to a buyer where a seller fails to provide a seller disclosure statement within the timeframe provided for in RCW 64.06.030:

If the seller in a residential real property transfer fails or refuses to provide to the prospective buyer a real property transfer disclosure statement as required under this chapter, the prospective buyer’s right of rescission under this section shall apply until the earlier of three business days after receipt of the real property transfer disclosure statement or the date the transfer has closed. [...]

(emphasis added). Significantly, the plain language of this subsection provides for the remedy of rescission only where a seller fails to provide a disclosure statement “as required under this chapter” (i.e., no later than five business days *after mutual acceptance of a written agreement* between a buyer and a seller for the purchase and sale of residential real property). Like RCW 64.06.040(3), this remedy provision was in existence prior to

the legislature's enactment of RCW 64.06.015, and was left unchanged when the same was enacted.

In this case, a right of rescission never arose under the plain terms of RCW 64.06, *et seq.* Contrary to the Youngs' assumption in their briefing, prior to entering the May 24, 2010, Findings and Conclusion, the trial court never determined that the parties entered into a written agreement that would trigger the duty to provide a seller disclosure statement. Furthermore, the trial court never reached the issue of whether Bob Frank Construction was required to give the Youngs a seller disclosure statement by a date certain:

Substantial justice is done by this recognition that there is some right of rescission until three days after closing after July 22nd. I don't want to go so far as to say it is the Seller's duty to give the statement on "X" date. That is going to depend on each case and its circumstances.

(RP at Dec. 12, 2008, p. 10, ll. 9-14). As a result, the Youngs' assumption that Bob Frank Construction breached a duty to provide a seller disclosure statement is erroneous.

After reviewing the above-cited subsections of RCW 64.06, *et seq.*, it's clear that the obligation to provide a seller disclosure statement is triggered only *after the mutual acceptance of a written agreement* between a buyer and a seller for the purchase and sale of residential real property. The subsection begins with "[i]f" the seller fails to provide the disclosure

statement as required (after mutual acceptance of a written agreement), *then* rescission rights are given to the buyer.

Because the trial court determined that there was no mutual acceptance of a written agreement, a plain reading of the statute makes it clear that Bob Frank Construction had no obligation to provide a seller disclosure statement to the Youngs. As a result, rescission under RCW 64.06.040 was never a potential remedy for the Youngs.

Bob Frank Construction and the Youngs have not argued on appeal that there was a written agreement, or mutual acceptance of a written agreement, for the purchase of residential real property. As a result, the Youngs' argument for rescission necessarily fails because the triggering event (mutual acceptance of a written agreement) never occurred to give the Youngs their requested remedy (rescission).

D. NO ATTORNEYS' FEES SHOULD BE AWARDED ON APPEAL.

As set forth above, there is no basis under which the Youngs are entitled to recover their attorneys' fees in this matter. As a result, the Youngs are not entitled to recover attorneys' fees on appeal.

II. CONCLUSION

For the foregoing reasons, Bob Frank Construction respectfully requests that it be awarded the full amount of damages incurred related to

the actual costs to construct the subject property; as well as the monthly carrying costs, and closing costs incurred from completion of construction in April 2008, until June 24, 2011, when the home sold.

Bob Frank Construction also requests that the trial court's April 11, 2011, order awarding attorneys' fees and costs to the Youngs be reversed, and the judgment entered on April 20, 2011, be vacated.

Finally, Bob Frank Construction requests the court to affirm the trial court's decision that a Sellers' disclosure statement was not required.

RESPECTFULLY SUBMITTED this 3rd day of October, 2011.

LUKINS & ANNIS, P.S.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Mr. Matthew T. Ries
Stamper Rubens PS
200 Post Place
720 W Boone Ave
Spokane, WA 99201-2560

- | | |
|-------------------------------------|-----------------------------|
| <input type="checkbox"/> | U.S. Mail |
| <input checked="" type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input type="checkbox"/> | Telecopy (FAX) 509-326-4891 |

Attorney for Plaintiffs and Counterclaim
Defendants



Joyce Whittle