

**FILED**

**SEP 30 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

CASE NO. 315860

WHITMAN COUNTY CAUSE NO. 11-2-00145-6

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

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SARA G. ARROYO,

Respondent/Plaintiff

v.

GLORIA J. FISCHER,

Appellant/Defendant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHITMAN COUNTY

The Honorable David Frazier, Judge

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REPLY BRIEF OF APPELLANT

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Presented by:

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A. INTRODUCTION

Respondent does not dispute that the Agreement and Note in this case were binding documents when they were signed. The only dispute is whether those documents were properly rescinded. As a matter of law, the documents were not rescinded, because there was no meeting of the minds as to the consequences of such rescission. When their relationship ended, Appellant believed, based on Respondent's statements, that Respondent was giving her the Kennewick house, and thus believed there was no reason to continue to enforce the Agreement. Respondent believed – apparently – that she would provide no capital or labor inputs towards the house, yet she would be a full half-owner of the house. Thus, the parties did not have a mutual intent as to the consequences of failing to enforce the Agreement and Note. Because there was no mutual intention as to those consequences, there was no meeting of the minds, and no rescission of the original Agreement.

B. ARGUMENT

1. Legally Operative Rescission Requires a Meeting Of The Minds as to the Consequences of Such Rescission.

Respondent argues that the Agreement and Note in this case have been rescinded. But it is abundantly clear – indeed, it is the basis of the present lawsuit – that the parties lacked a mutual understanding as to their

respective ownership rights in the Kennewick property. Because there was no meeting of the minds, there is no legally operative rescission.

In re Estate of Lyman, 7 Wn. App. 945 (Div. I 1972), controls. In Lyman, the Court stated:

As in the case of any other contract, the parties are free to abandon it by mutually manifested intention clearly shown. Conduct manifesting an intention to abandon a contract is sufficient if the conduct of one party is inconsistent with the continued existence of the contract and that conduct is known to and acquiesced in by the other.

Whether the parties have mutually abandoned a contract between them depends on their mutual intention to effect such a result. As stated in In re Estate of Wittman, supra:

[A]ll parties to the contract must assent to its rescission and there must be a meeting of their minds.

Uncommunicated subjective mutual intention to abandon is not enough. The intention of each party, to be legally operative, must be a manifested intention. In the absence of words, there must be conduct, or if there be both words and conduct, such words and conduct together must provide sufficient evidence from which a fair inference of their intention may be ascertained.

**Intention manifested in the manner described consists both of foresight of the consequences to follow from an act and a desire to do the thing foreseen.** O. Holmes, Common Law 53 (1881), states it this way:

Intent again will be found to resolve itself into two things; **foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act.**

Lyman, at 948-949 (emphasis added, citations omitted).

Also supportive of this principle is Martinson v. Publishers Forest Products Co., 11 Wn.App. 42 (Div. I 1974), which was relied upon by Respondent. Indeed, Martinson was decided by the Washington State Court of Appeals, Division I – the same court that decided Lyman – only 16 months after Lyman, and two of the same Justices concurring in Lyman concurred in Martinson. In Martinson, the Court stated:

Whether a contract has been abandoned by the mutual consent of the parties is a finding to be made by the trial court based upon the facts and circumstances surrounding the transaction. The inquiry of the trial court is to determine what, if any, new aim and purpose the parties had in mind. As In re Estate of Wittman ... declared:

An agreement of rescission must itself be a valid agreement. Thus, **all parties to the contract must assent to its rescission and there must be a meeting of their minds.**

Martinson, at 49 (emphasis added, citations omitted).

In the present case, there is no legally operative rescission, because there was no meeting of the minds as to the consequences of failing to enforce the Agreement. Appellant testified that when their relationship ended, Respondent told her the Kennewick house was hers, thus there was no need to enforce the Agreement and Note. RP 126, lines 2-13. Appellant understood the consequence of abandonment of the Agreement to be that she was the sole owner of the house.

Respondent had a different understanding. She believed that she was entitled to half of the net proceeds from the sale of the house, despite

the fact that she had contributed next-to-nothing to the expenses and upkeep of the house.

The trial court found that the parties had not enforced the Agreement. That finding is not disputed, but it does not resolve the issue. The critical issue is not whether the parties failed to enforce the Agreement, but whether the parties had a mutual understanding as to the consequences of failing to enforce the Agreement. It cannot be disputed that the parties lacked such a mutual understanding. Indeed, the absence of agreement on that point is why a lawsuit was filed: Respondent believed she was entitled to half the net proceeds from the sale of the house, and Appellant believed she was entitled to 100% of the net proceeds.

Because there was no agreement as to the consequences of rescission, there was no meeting of the minds, and thus no rescission. Therefore, the Agreement and Note have not been properly rescinded, and are fully enforceable.

According to the terms of the Agreement, Respondent is substantially indebted to Appellant, in an amount that greatly exceeds the trial court's award to Respondent in this case.

2. The Court's Memorandum Decision Clearly Demonstrates That Pre-Judgment Interest Was Awarded.

Respondent suggests that Appellant is confused regarding the calculation of attorney fees. There is no confusion. The Declaration of Gary Libey states, “We believe that at least two-thirds of the legal fees (i.e., \$10,000), and all of the costs (i.e., \$4,651) were directly related to the legal work concerning the forgery.” CP 11. The sum of these amounts is \$14,651, yet the trial court awarded the Respondent \$18,419.26 in fees and costs. CP 47. It is the difference between these amounts (\$18,419.26 minus \$14,651 = \$3,768.26) which represents pre-judgment interest.

The Court clearly stated that the basis for awarding more than only those fees and costs related to the forged deed was because, “the court feels that some consideration should be given to the fact that Arroyo has been deprived of the use of her monetary interest in the property for 30 years, and that Fischer has gained substantially from the effects of inflation on property values over time.” Those considerations are the classic reasons for awarding pre-judgment interest. However, pre-judgment interest is not available on a non-liquidated claim, and Respondent does not dispute that the claim in this case is non-liquidated.

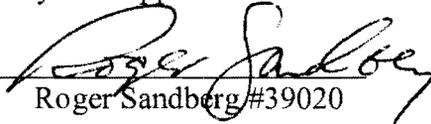
3. Respondent Is Not Entitled To Attorney Fees On Appeal.

No issue in this appeal relates to the allegedly forged deed. Appellant specifically stated in its opening brief that she was not appealing that issue. Brief of Appellant, page 7. Thus, it strains understanding why considerations related to the allegedly forged deed

would serve as a basis for an award of attorney fees on appeal. Each party should bear her own attorney fees.

RESPECTFULLY SUBMITTED: This 27<sup>th</sup> day of September 2013.

Esser & Sandberg  
Attorneys for Appellant

By   
Roger Sandberg #39020

ATTORNEY'S CERTIFICATE OF SERVICE

I certify that on the 27<sup>th</sup> day of September 2013, at my direction, the foregoing Brief of Appellant was served on the following:

Court:

Renee Townsley, Clerk  
Court of Appeals  
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Spokane, WA 99201

Mailed, postage  
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 Hand Delivered  
(original + one copy)  
 Faxed to:

Counsel for Respondent:

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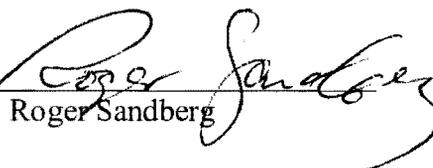
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DATED: This 27<sup>th</sup> day of September 2013.

  
\_\_\_\_\_  
Roger Sandberg