

FILED  
COURT OF APPEALS  
DIVISION II

10 OCT 29 PM 4:09

NO. 40455-9 II

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY  \_\_\_\_\_  
DEPUTY

---

**PAUL EISENHARDT and ELIZABETH CHANEY EISENHARDT,**  
as Trustees of the 1995 Eisenhardt Living Trust,  
Respondent/Cross-Appellant,

v.

**MARILYN J. BAXTER,** a single woman,  
Appellant

**LEE CORBIN and LAILA CORBIN,** husband and wife; **BOBBIE NUTTER and JOHN DOE NUTTER,** husband and wife; **TERESA GOLDSMITH and JOHN DOE GOLDSMITH,** husband and wife; **NEW OLYMPIC ENTERPRISES, INC. d/b/a JOHN L. SCOTT PORT TOWNSEND,** a Washington corporation; **JIM FOX and JANE DOE FOX,** husband and wife; **VALERIE SCHINDLER and JOHN DOE SCHINDLER,** husband and wife; **HOOD CANAL REAL ESTATE, INC.,** a Washington corporation d/b/a **WINDERMERE HOOD CANAL;** and **GOODING, O'HARA & MACKEY, P.S.,** a Washington corporation,  
Cross-Respondents.

---

APPEAL FROM SUPERIOR COURT FOR JEFFERSON COUNTY  
STATE OF WASHINGTON  
THE HONORABLE CRADDOCK VERSER

---

**BRIEF OF CROSS-RESPONDENTS**

---

Steven Goldstein, WSBA #11042  
Lori W. Hurl, WSBA #40647  
BETTS, PATTERSON & MINES, P.S.  
One Convention Place, Suite 1400  
701 Pike Street  
Seattle, WA 98161-1090  
(206) 292-9988  
Attorneys for Lee Corbin and Laila Corbin

Daniel P. Mallove, WSBA#13158  
Meredith A. Sawyer, WSBA# 33793  
LAW OFFICE OF DANIEL P. MALLOVE,  
PLLC  
2003 Western Avenue, Suite 400  
Seattle, WA 98121  
(206) 239-9933  
Attorneys for Bobbie and John Doe Nutter,  
Teresa and John Doe Goldsmith, and  
New Olympic Enterprises d/b/a  
John L. Scott Port Townsend

David L. Martin, WSBA #1241  
Keith J. Kuhn, WSBA #34965  
LEE, SMART, COOK, MARTIN &  
PATTERSON  
1800 One Convention Place  
701 Pike Street  
Seattle, WA 98101-3929  
(206) 624-7990  
Attorneys for Gooding, O'Hara & Mackey, P.S.

David C. Daniel, WSBA #34410  
DEMCO LAW FIRM, P.S.  
5224 Wilson Avenue South, Suite 200  
Seattle, WA 98118  
(206) 203-6000  
Attorneys for Jim and Jane Doe Fox,  
Valerie and John Doe Schindler, Hood Canal  
Real Estate, Inc., d/b/a Windermere Hood Canal

**TABLE OF CONTENTS**

I. Introduction ..... 1

II. Issue Pertaining to the Remaining Defendants on Appeal ..... 3

III. Statement of the Case ..... 3

IV. Argument ..... 4

    A. The Standard of Review for an Order Granting  
        Summary Judgment. .... 4

    B. The Trial Court Properly Dismissed the  
        Eisenhardts’ Claims Against the Remaining  
        Defendants. .... 4

        1. By Granting Rescission and Related  
            Consequential Damages, the Eisenhardts  
            Were Made Whole ..... 4

        2. There Can Be No Joint and Several Liability  
            for Rescission Among the Remaining  
            Defendants ..... 9

    C. The Eisenhardts Cannot Establish Their Entitlement  
        to Recover Any Additional Damages That Were  
        Not Included in the Judgment. .... 11

V. Conclusion ..... 13

## TABLE OF AUTHORITIES

### Cases

	<b>Page</b>
<i>Bloor v. Fritz</i> , 143 Wn. App. 718, 180 P.3d 805 (2008).....	7, 8, 10
<i>Busch v. Nervik</i> , 38 Wn. App. 541, 687 P.2d 872 (1984) .....	10
<i>Degel v. Majestic Mobile Manor, Inc.</i> , 129 Wn.2d 43, 914 P.2d 728 (1996).....	4
<i>Doherty v. Metro Seattle</i> , 83 Wn. App. 464, 921 P.2d 1098 (1996) .....	4
<i>Hangman Ridge Training Stables v. Safeco Title Insurance Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	13
<i>Hornback v. Wentworth</i> , 132 Wn. App. 504, 132 P.3d 778 (2006) .....	7
<i>In re Marriage of Hughes</i> , 128 Wn. App. 650, 116 P.3d 1042 (2005) .....	5
<i>Jackowski v. Borchelt</i> , 151 Wn. App. 2d 1001, 226 P.3d 514 (2009), <i>review granted</i> , 168 Wn.2d 1001, 226 P.3d 780 (2010).....	7, 8, 9
<i>Lange v. Town of Woodway</i> , 79 Wn.2d 45, 483 P.2d 116 (1971).....	12
<i>Schaaf v. Highfield</i> , 127 Wn.2d 17, 896 P.2d 665 (1995).....	4

### Statute

RCW 19.86, <i>et seq.</i> .....	13
---------------------------------	----

### Rule

CR 56(c) .....	4
----------------	---

Defendants Lee and Laila Corbin, Bobbie and John Doe Nutter, Teresa and John Doe Goldsmith, New Olympic Enterprises, Inc. d/b/a John L. Scott Port Townsend, Jim and Jane Doe Fox, Valerie and John Doe Schindler, Hood Canal Real Estate Inc., d/b/a Windermere Hood Canal, and Gooding, O'Hara & Mackey, P.S. (collectively referred to as "the remaining defendants") submit this response to plaintiffs Paul and Elizabeth Eisenhardt's ("the Eisenhardts") cross appeal.

## I. INTRODUCTION

This lawsuit involves the Eisenhardt's purchase of a condominium from defendant Marilyn Baxter ("Baxter"). The Eisenhardts sued Baxter for failing to disclose known material defects in the condominium. In addition to Baxter, the Eisenhardts also named several other parties as defendants including, the realtors involved, the president and secretary of the condominium Homeowner's Association, and Homeowner's Association's CPA (the "remaining defendants").

In November 2009, the trial court granted the Eisenhardts' request for summary judgment rescission against Baxter. In connection with the rescission, the court awarded the comprehensive consequential damages requested by the Eisenhardts. The court also held that rescission effectively dismissed all of the Eisenhardts' causes of action against the remaining defendants. The Court then concluded that the only claims

remaining in this action were Baxter's claims against her own realtors, Fox, Schindler and Windermere Hood Canal. (CP 666). The Eisenhardts now cross appeal and contend that the trial court improperly dismissed their claims against the remaining defendants.

The sole reason the Eisenhardts are pursuing the remaining defendants on appeal is because the Eisenhardts are currently unable to collect on the full amount of their judgment from Baxter. However, the Eisenhardts' collection efforts are not relevant or material to the liability of the remaining defendants. The Eisenhardts sought and were granted rescission of the purchase and sale agreement from Baxter - relief that the remaining defendants could not provide as they were not parties to the agreement. The Eisenhardts' collection efforts do not change the nature of the relief sought or granted. The trial court's order of rescission and related consequential damages made the Eisenhardts whole and the court properly dismissed their other claims against the remaining defendants.

The remaining defendants now submit this response to the Eisenhardts' cross appeal.

**II. ISSUE PERTAINING TO THE REMAINING DEFENDANTS ON APPEAL**

Whether the trial court erred in dismissing the Eisenhardts' causes of action against the remaining defendants in its Memorandum Opinion and Order on Entry of Judgment, entered on March 3, 2010:

- Where, on motion for summary judgment, the Eisenhardts elected the remedy of rescission, the trial court granted the relief requested, and the Eisenhardts were made whole?
- Where the remaining defendants, as non-parties to the purchase and sale agreement, cannot be jointly and severally liable for rescission as a matter of law?  
and
- Where the Eisenhardts cannot establish their right to recover any additional damages that were not included in the Judgment?

**III. STATEMENT OF THE CASE**

For purposes of this appeal, the remaining defendants accept the Eisenhardts' factual background and procedural history of this case.

#### IV. ARGUMENT

##### A. **The Standard of Review for an Order Granting Summary Judgment.**

The appellate court reviews the facts and law with respect to summary judgment de novo. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). The appellate court will make the same inquiry as the trial court, and view the facts and their reasonable inferences in the light most favorable to the non-moving party. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

The appellate court should affirm summary judgment when “the pleadings, affidavits, depositions, and admission on file demonstrate there is no genuine issue concerning any material fact, and that the moving party is entitled to judgment as a matter of law.” *Doherty v. Metro Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996); CR 56(c). Summary judgment should be affirmed if reasonable persons could reach only one conclusion from all the evidence.” *Doherty*, 83 Wn. App. at 468.

##### B. **The Trial Court Properly Dismissed the Eisenhardts’ Claims Against the Remaining Defendants.**

1. The Trial Court Granted the Specific Remedy the Eisenhardts Elected to Pursue: Rescission of the Purchase and Sale Agreement and Related Consequential Damages from Baxter.

The Eisenhardts argue that the rescission remedy ordered by the trial court should have no impact on Eisenhardts’ claims against the

remaining defendants. The Eisenhardts contend they should be able to obtain both rescission from Baxter and monetary damages from the remaining defendants. There is no merit to this argument.

The Eisenhardts' complaint sought recovery in the alternative, either: (1) rescission, including monetary damages related to the rescission, OR (2) monetary damages related to their causes of action. Indeed, both the body of the complaint (at paragraphs 3.17 and 3.18) and the prayer for relief ask for alternative relief. The prayer specifically requests:

- “1. That the court award a judgment of rescission, restoring the parties to their original position, with all purchase monies repaid by defendants to plaintiffs.
2. That the court award monetary damages associated with the rescission, including loan and escrow fees incurred by Plaintiffs toward purchase of the property, costs to relocate, lost wages, etc., in an amount to be proven at trial.
3. That, in the alternative, the court award monetary damages in favor of plaintiffs for the causes of action indicated herein, plus interest at the judgment rate from the date of the closing of the transaction through to judgment, and thereafter until collected . . .”

(CP 665, emphasis added).

The phrase, “in the alternative” means a choice between two or more possibilities – it *does not* mean both. It must be emphasized that a court has no jurisdiction to grant relief beyond that sought in the complaint. *In re Marriage of Hughes*, 128 Wn. App. 650, 658, 116 P.3d

1042 (2005). Moreover, the Eisenhardts implicitly acknowledge, based on the language used in their complaint, that recovery of both remedies would be duplicative and thus the remedies are requested in the alternative.

Here, the trial court awarded the Eisenhardts precisely what they pled in their prayer for relief and requested in their summary judgment motion against Baxter, namely: rescission of the contract with Baxter and all consequential damages related to the rescission. The consequential damages requested by the Eisenhardts and awarded by the trial court were comprehensive and included:

- Purchase price of \$689,000 plus closing costs of \$43,325.92.
- \$2,532.16 paid to Construction Defect Consulting and \$2,100 paid to Anderson Payton. The special assessments paid 7/2/08, 8.27/08, 9/15/08, 10/5/08, 11/7/08, and 8/1/09, for a total of \$3,886.69.
- The mortgage interest in the amount of \$11,047.
- Homeowners' association dues in the amount of \$6,764.
- \$17,226.04 for the cost of repairs and property taxes.
- \$14,759 was deducted as rental income from the condominium.
- \$465.00 in costs.

- \$28,380 for attorney's fees.

(CP 692)

By granting the specific relief requested by the Eisenhardts, the trial court correctly concluded that the Eisenhardts had no further damages. The rescission order put the parties back in the position they would have been in had no purchase and sale agreement been formed and no sale had taken place. *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006). Thus, the Eisenhardts' claims against the remaining defendants were properly dismissed because the Eisenhardts would be unable to prove an essential element of those remaining claims, namely damages.

The Eisenhardts' reliance on *Bloor v. Fritz*, 143 Wn. App. 718, 180 P.3d. 805 (2008), and *Jackowski v. Borchelt*, 151 Wn. App. 2d 1001, 226 P.3d 514 (2009), *review granted*, 168 Wn.2d 1001, 226 P.3d 780 (2010), for the proposition that they can obtain both rescission against the seller/Baxter and monetary damages against the remaining defendants is misplaced.

In *Bloor*, the buyers sued the sellers, real estate agents, and county for failing to disclose that the subject property had been used as a methamphetamine lab. The case proceeded to trial and the court held that the sellers were liable for rescission of the transaction and consequential

damages related to the rescission including, the purchase price, accrued interest and foreclosure fees. The trial court also held that all of the defendants, including the seller, were jointly and severally liable for other damages including, emotional distress, loss of personal property, loss of income, damage to the buyers' credit, and attorneys' fees.

The issues on appeal pertained to whether there was sufficient evidence to support the trial court's findings regarding liability and whether rescission was a proper remedy. The appellate court affirmed on all counts, except with respect to the amount interest awarded on the purchase price in connection with the rescission.

It must be emphasized that while *Bloor* did allow the buyers to obtain rescission against the seller and monetary damages against all defendants, this was not the holding of the case. In fact, *Bloor* did not specifically consider or address the issue raised here, namely whether the rescission of the purchase and sale agreement and award of consequential damages as to the seller, barred the buyers' claims against the other defendants due to a lack of damages. This issue was never raised, briefed or considered by *Bloor*. Moreover, the remaining defendants have found no published Washington cases that have specifically addressed this issue.

Likewise in *Jackowski, supra*, the appellate court did not consider the issue presented here. Rather, the issue in *Jackowski* was whether the

economic loss rule barred plaintiff's claim for rescission. The court concluded that it did not.<sup>1</sup>

In sum, the Eisenhardts elected to pursue the remedy of rescission against Baxter and were successful. Allowing the Eisenhardts to seek additional monetary damages from the remaining defendants is contrary to the Eisenhardts' prayer for relief, motion for summary judgment, and would result in a duplicative recovery. Thus, the trial court's dismissal of those claims was proper.

2. There Can Be No Joint and Several Liability for Rescission Among the Remaining Defendants

The Eisenhardts' argue that the remaining defendants are jointly and several liable for rescission solely because they have been unable to fully collect the consequential damages awarded in the judgment from Baxter. Essentially, the Eisenhardts are claiming that the remaining defendants are jointly and severally liable for any shortfall in the Eisenhardts' ability to realize their rescission remedy. (Baxter's brief, p. 42.)

This argument is fundamentally flawed and the Eisenhardts cite no authority to support it. The remedy of rescission is only possible between

---

<sup>1</sup> We note that *Jackowski* has been accepted for review by the Washington Supreme Court and its current precedential value is uncertain.

the parties to the contract. Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Bloor v. Fritz*, 143 Wn. App. 718, 739, 180 P.3d 805 (2008) (citations omitted). Rescission means to abrogate or annul and requires the court to fashion a remedy to restore the parties to the relative positions they would have occupied if no contract had ever been made. *Busch v. Nervik*, 38 Wn. App. 541, 547, 687 P.2d 872 (1984). The circumstances of each particular case must largely determine what is necessary for one party to do in order to place the other in status quo. *Id.* at 547-48.

Because the remaining defendants were not parties to the purchase and sale contract, they cannot affect a rescission of the contract. Only Baxter, as the seller, was capable of rescinding the purchase and sale contract. Consequently, the remaining defendants cannot, as a matter of law, be liable (or jointly and severally liable) for rescission or for the associated consequential damages.<sup>2</sup>

Furthermore, the fact that the Eisenhardts are currently unable to collect on the full amount of their judgment from Baxter does not mean

---

<sup>2</sup> It should also be noted that *Bloor, supra*, cited by Eisenhardts for other reasons, held that only the sellers were liable for rescission and related consequential damages. The other defendants were not held liable for rescission.

they will be unable to collect in the future. For example, Baxter may receive an inheritance or gift, win the lottery, or obtain highly compensated employment. The Eisenhardts may discover additional unknown or undisclosed assets of Baxter. All of these are potential resources that could be used to satisfy the Eisenhardts' judgment in the future. If the Eisenhardts are now able to obtain a judgment against the remaining defendants for Baxter's current shortfall, and later the Eisenhardts obtain the full amount owed from Baxter, this would clearly constitute a duplicative recovery.

In sum, the remaining defendants cannot be jointly and severally responsible for rescission as that remedy is only available from Baxter as the seller. The Eisenhardts' frustrated collection efforts do not change the nature of this legal remedy.

**C. The Eisenhardts Cannot Establish Their Entitlement to Recover Any Additional Damages That Were Not Included in the Judgment.**

The Eisenhardts argue that the relief afforded by the trial court's rescission order did not exhaust the Eisenhardts' range of damages and thus the Eisenhardts should be able to recover these additional damages from the remaining defendants (Baxter's brief at p. 41). This argument is not well taken.

First, in support of this argument the Eisenhardts refer to damages alleged in their complaint at paragraph 3.17 that were not included in the trial court's judgment for rescission, namely relocation and moving expenses and loss of work. (CP 49.) However, the Eisenhardts expressly acknowledge in this very paragraph that these additional damages *are associated with rescission*. The Eisenhardts' failure to seek inclusion of these additional damages in their judgment for rescission does not create liability on the part of the remaining defendants for such damages.

Second, as set forth in paragraph 3.18 of their complaint, the alternative damages sought by the Eisenhardts - in the absence of an award for rescission - is the diminution in value or cost to repair the subject property. (CP 45, 50.) However, because the Eisenhardts have already been awarded rescission of the purchase and sale contract, they cannot obtain a judgment against the remaining defendants for diminution in value or the cost to repair as this would result in a duplicative recovery. Under the election of remedies doctrine, a party may not disaffirm the contract, and then sue to enforce the contract. The doctrine of election of remedies is premised on the belief that a plaintiff should not recover twice for the same wrong. *Lange v. Town of Woodway*, 79 Wn.2d 45, 49, 483 P.2d 116 (1971). Here, the Eisenhardts elected rescission as their

remedy – not the loss of value or cost to repair the condominium. They are bound by this election.

Third, the only other damages the Eisenhardts are arguably entitled to recover from the remaining defendants are the treble damages potentially available under their Consumer Protection Act claim, as these damages were not awarded in the rescission judgment. *See* RCW 19.86, *et seq.* (The remaining defendants note that treble damages were not specifically requested by the Eisenhardts in their complaint.)

However, based on the trial court's order of rescission, the Eisenhardts cannot recover these damages either. Treble damages would only be available if the Eisenhardts can satisfy the five elements of a CPA claim, including proximately caused damages. *Hangman Ridge Training Stables v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). As stated previously, the trial court properly concluded that by granting rescission, the Eisenhardts have been made whole and cannot satisfy the damages element of any of their remaining claims.

## V. CONCLUSION

The trial court properly dismissed the remaining defendants when it granted the Eisenhardts rescission of the purchase and sale contract and awarded consequential damages. By virtue of this judgment, the Eisenhardts have been made whole. The remaining defendants cannot be

held jointly and severally liable for rescission. Consequently, the remaining defendants respectfully request that this court uphold the trial court's dismissal of the Eisenhardts' claims against them.

RESPECTFULLY SUBMITTED this 29 October, 2010.

BETTS, PATTERSON & MINES, P.S.

By Steve Goldstein  
Steven Goldstein, WSBA #11042  
Lori W. Hurl, WSBA #40647  
Attorneys for Lee Corbin and Laila Corbin

LAW OFFICE OF DANIEL P. MALLOVE, PLLC

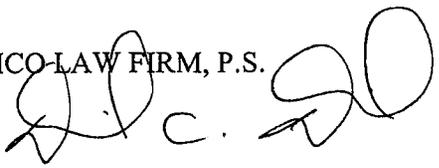
By Dan Mallove by S.B. per email authority  
Daniel P. Mallove, WSBA#13158  
Meredith A. Sawyer, WSBA# 33793  
Attorneys for Bobbie and John Doe Nutter,  
Teresa and John Doe Goldsmith, and  
New Olympic Enterprises d/b/a  
John L. Scott Port Townsend

LEE, SMART, COOK, MARTIN & PATTERSON

By Keith Kuhn by S.B. per email authority  
David L. Martin, WSBA #1241  
Keith J. Kuhn, WSBA #34965  
Attorneys for Gooding, O'Hara & Mackey, P.S.

DEMCO LAW FIRM, P.S.

By



---

David C. Daniel, WSBA #34410  
Attorneys for Jim and Jane Doe Fox,  
Valerie and John Doe Schindler, Hood Canal  
Real Estate, Inc., d/b/a Windermere Hood Canal

COURT OF APPEALS  
DIVISION II  
10 OCT 29 PM 4:10  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

DECLARATION OF SERVICE

I, Laraine Green, am competent to testify to the matters set forth herein and make this declaration of my own personal knowledge and belief.

1. On Friday, October 29 2010, I served the following documents: (A) **Brief of Cross-Respondents; and (B) Declaration of Service** on the following counsel of record VIA Email and a hard copy VIA ABC Legal Messengers: (a) Kelly DeLaat-Maher, Maher Ahrens Foster Shillito, PLLC, 1145 Broadway, Suite 610, Tacoma, WA 98402, Attorneys for Plaintiffs, Email: [kdmaher@mafslaw.com](mailto:kdmaher@mafslaw.com); (b) Earl M. Sutherland and Danielle M. Evans, Reed McClure, Two Union Square, 601 Union Street, Suite 1500, Seattle, WA 98101-1363, Attorneys for Defendant Marilyn Baxter, Email: [esutherland@rmlaw.com](mailto:esutherland@rmlaw.com), Email: [devans@rmlaw.com](mailto:devans@rmlaw.com); (c) David C. Daniel, Demco Law Firm, P.S., 5224 Wilson Avenue South, Seattle, Suite 200, WA 98118, Attorneys for Third-Party Defendants, Fox, Schindler and Hood Canal Real Estate d/b/a Windermere Hood Canal, Email: [ddaniel@demcolaw.com](mailto:ddaniel@demcolaw.com) ; (d) John F. Jenkel, Forsberg & Umlauf, P.S., 901 Fifth Avenue, Suite 1700, Seattle, WA 98164, Attorneys for Defendant Marilyn J. Baxter, Email: [jjenkel@forsberg-umlau.com](mailto:jjenkel@forsberg-umlau.com); (e) Keith J. Kuhn, David L. Martin, Lee Smart, P.S., Inc., 1800 One Convention Place, 701 Pike Street, Seattle, WA 98101-3929, Attorneys for Defendant Gooding, O'Hara & Mackey, P.S., Email: [kjk@leesmart.com](mailto:kjk@leesmart.com), [dldm@leesmart.com](mailto:dldm@leesmart.com); and (f) Daniel P. Mallove, Meredith Ann Sawyer, Law Offices of Daniel P. Mallove, PLLC, 2003 Western Avenue, Suite 400, Seattle, WA 98121, Attorneys for Defendants Nutter, Goldsmith, New Olympic Enterprises d/b/a John L. Scott Port Townsend, Email: [msawyer@dpmlaw.com](mailto:msawyer@dpmlaw.com); [dmallove@dpmlaw.com](mailto:dmallove@dpmlaw.com); and (g) **Scott Wood, Foley & Mansfield, L.L.L.P., 1111 Broadway, 10th Floor, Oakland, CA 94607,**

**Attorneys for Plaintiffs Paul Eisenhardt and Elizabeth Chaney Eisenhardt, as Trustees of the Eisenhardt 1995 Living Trust; Email: [swood@foleymansfield.com](mailto:swood@foleymansfield.com).**

I declare the foregoing to be true and accurate to the best of my knowledge under penalty of perjury.

  
Laraine Green

Executed this 29th day of October, 2010, at Seattle, Washington.