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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Appeal No. 47065-9-II
Superior Court No. 12-2-13905-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STEVEN CHASE and IVA HAUKENES

Plaintiffs/Appellants,

v.

GARAGE PLUS STORAGE, LLC,
a Washington limited liability company,

Defendant/Respondent.

RESPONDENTS' RESPONSE BRIEF

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I. INTRODUCTION

The only issue on appeal is whether the trial court abused its discretion in striking plaintiffs' jury demand. It did not and based upon the facts and what transpired in this case, this is a frivolous appeal. Plaintiffs' trial counsel admitted before trial that plaintiffs' "primary remedy" was equitable in nature in the form of "rescission of the contract" (RP 45) and further, plaintiffs' trial counsel did nothing to prepare for this trial - failed to timely file witness and exhibit lists; failed to timely file plaintiffs' portion of the Joint Statement of Evidence; failed to file a neutral statement of the case (required in jury trials); failed to timely file plaintiffs' trial brief; failed to file proposed jury instructions (obviously, required in jury trials); and failed to file any form of responsive pleading to defendants' counterclaims. RP 11-44, CP 22-26, 27-32, 39-40, 70-75, 76-78. Finally, many of the exhibits presented by the plaintiffs on the first day of trial were excluded by the trial court in accordance with the defendants' objections. RP 11-44, CP 22-26, 27-32, 39-40, 44-45, 48-49, 70-75, 76-78. Clearly, this information was in the trial record and the record on appeal and therefore, was known to the plaintiffs before the appeal was filed. In that plaintiffs admitted that their primary relief was based upon equitable principles, plaintiffs cannot present, on appeal, legally debatable issues or legitimate arguments for an extension of the law. As such, this appeal is advanced without reasonable cause and is frivolous.

The trial court did not abuse its discretion in striking plaintiffs' jury demand. Instead, the trial court reviewed all factors presented and followed the plaintiffs' "lead" that their primary claim for relief was based solely upon

equitable principles. Accordingly, plaintiffs' appeal should be dismissed with prejudice, the trial court's decision should be affirmed, and the defendants should be awarded reasonable attorney's fees and costs on appeal pursuant to RCW 4.84.185 and RAP 18.9.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not commit error in striking the jury demand in that the plaintiffs admitted and their pleadings confirmed that their "primary remedy" was equitable, in the form of "rescission of the contract"; and

2. The plaintiffs' appeal is frivolous in violation of RCW 4.84.185 and RAP 18.9.

III. RESPONSE TO ISSUES ON APPEAL

1. When plaintiffs alleged claims are both legal and equitable, and the plaintiffs admit and their pleadings confirm that their primary remedy is equitable (rescission of the contract), does a trial court abuse its discretion by striking the plaintiffs' jury demand? **No.**

2. Is the plaintiffs' appeal frivolous in violation of RCW 4.84.185 and RAP 18.9 and if so, should the defendants be awarded reasonable attorney's fees and costs? **Yes.**

IV. STATEMENT OF THE CASE

A. The plaintiffs' "primary remedy" was equitable in nature.

The defendant Garage Plus owns storage units. The parties executed a Real Estate Contract for the plaintiffs' purchase of Unit H-37 from the defendant Garage Plus. CP 95-101, 50-55. Said transaction was closed by an independent escrow company (Rainier Title, Escrow No. 615557) and

signatures were notarized. Said Contract was recorded in the offices of the Pierce County Auditor on March 28, 2011, under recording number 201112120278. CP 95-101, Ex 5. The defendants agreed in part to pay when due the monthly payments, condominium assessments, and electric bills. Further, the defendants agreed not to remove any improvements, including car lifts, from the Unit until the Real Estate Contract was fully performed and fully paid. Ex 5.

Despite the Contract's provisions, the plaintiffs failed to pay monthly payments, condominium assessments/dues, utility/electrical bills, and property taxes. RP 113-114, 135-136. In addition, the plaintiffs wrongfully removed two car lifts from the Unit valued at \$7,130.00. Ex 2.

The plaintiffs in this case sought primarily equitable relief. Plaintiffs requested in their Amended Complaint (CP 95-101), a "permanent injunction" and a "complete rescission" of the Garage Plus Real Estate Contract and an "order declaring the [Real Estate] Contract void". Further, the plaintiffs affirmatively stated on more than one occasion in their Amended Complaint that "plaintiffs can only be adequately compensated by a complete rescission of the contract". CP 95-101. And, further, in open court on the first day of trial, the plaintiffs admitted that their "primary remedy" was "equitable relief" and confirmed that any damage award without equitable relief was not enough in that plaintiffs would "still [be] stuck with this unit". RP 45-46. As such, it is obvious that any claim to damages by the plaintiffs was an "alternative" form of relief. CP 95-101. This too, was admitted and confirmed by the plaintiffs in open court on the first day of trial:

MR. BRITTON: Because there's also equitable relief demanded. And the primary remedy we're looking for

is rescission of the contract, because if all we're going to do is award money damages then they are still stuck with this unit with people that they are afraid of.

RP 45-46, Lines 22-25, 1.

In addition, also on the first day of trial, despite repeated requests from the defendants, the plaintiffs had not, and could not, provide evidence of their specific amount of alleged damages. When “pushed” by the Court for a response, plaintiffs’ trial counsel stated:

MR. BRITTON: ...I think the damages are self-evident....

RP 7, Lines 10-12.

THE COURT: Do you have a dollar amount for that, at least, so I understand what you’re talking about?

...

MR. BRITTON: ...And the real estate Purchase and Sale Agreement that they signed includes monthly payment terms. And they change from month to month to month, but they are making a fixed monthly payment. I want to say it was \$830, but it is definitely in the exhibits. \$815 a month was the monthly payments.

THE COURT: So how many months?

MR. BRITTON: From October of 2012 on.

THE COURT: So do the math for me. I’m trying to get a dollar amount.

...

RP 8, Lines 1-2, 11-20.

Even on the first day of trial, plaintiffs had not “decided”, and certainly were not clear, on what their damages were. Further, plaintiffs’ trial counsel, apparently in support of damages, cites only to a “Purchase and Sale

Agreement” that would have obviously merged, at closing, into the parties’ Real Estate Contract. It is obvious that plaintiffs primary relief was equitable in nature. Any claim to damages was “alternative”, at best. Despite this, the plaintiffs improperly filed a jury demand.

B. The plaintiffs failed to comply with the Court’s Case Schedule, the Court’s Pretrial Order, Civil Rules, and Evidence Rules.

In preparation for trial, the defendants complied with the Civil Rules, Evidence Rules, the Pierce County Local Rules, the Court’s Case Schedule (CP 61-62), and the Court’s Pretrial Order (CP 113-116). This was acknowledged by plaintiffs’ counsel on the first day of trial:

MR. BRITTON: ...They [defendants] are very technically proficient. They don’t miss filing dates. That’s very obvious....

RP 12-13, Lines 25, 1.

On the other hand, the plaintiffs were not “technically proficient” and miserably failed to follow the aforementioned rules and orders. Despite the clear requirements of the Case Schedule, the Court’s Pretrial Order, and numerous requests from the defendants, the plaintiffs failed to timely file witness and exhibit lists, their portion of the Joint Statement of Evidence, a neutral statement of the case (required in jury trials), their trial brief, and proposed jury instructions (required in jury trials). Further, the plaintiffs failed to file a required responsive pleading (RP 11-44. CP 22-26, 27-32, 39-40, 70-75, 76-78) and a number of their proposed exhibits were excluded by the Court in accordance with the defendants’ objections. RP 11-44. CP 22-26, 27-32, 39-40, 44-45, 48-49, 70-75, 76-78.

Despite the plaintiffs’ complete failure to follow the rules and

requirements and despite defendants' continued objections, the Court reluctantly decided to proceed with a bench trial:

MR. DAVIES: Which there isn't anything timely in front of you. That's kind of the point. That put us kind of behind the eight ball from at least two months ago, trying to follow that pretrial order and get all of this stuff done. I guess what I'm saying is they can defend - - they being Mr. Chase and Ms. Haukenes - - can certainly defend against our counterclaims. But I think, based on their failure to follow the rule, no, they should not be able to call witnesses or put on exhibits as to their claims in their underlying suit...

THE COURT: Case law is pretty clear that that's a pretty harsh remedy. I'm looking for anything less than that. I can't strike all of that. I don't think that's fair. It's too harsh.

MR. DAVIES: All right. How do we deal with the lack of a responsive pleading? I mean, to me, then maybe a better way to look at that is certainly no affirmative defenses. And I don't know, I mean - -

THE COURT: I don't know if any of the witnesses [plaintiffs] have any knowledge with regard to your counterclaims.

MR. DAVIES: I don't know who the witnesses were even going to be...

RP 43, Lines 19-25; RP 44, Lines 1-16.

THE COURT: ...Try to have a conversation about resolving the case, or at least narrow the issues. And then we'll start with the bench trial tomorrow with the orders in limine that I've granted. And I need those orders signed so I can deal with that....

RP 46, Lines 11-15.

Based upon the plaintiffs utter disregard of rules and court orders, plaintiffs' limited appeal presents an interesting question if this Court were to grant the plaintiffs' request and remand this case for a trial by jury: to what point in the proceeding would the remand be effective - the first day of trial? As stated above, the plaintiffs admitted that their "primary remedy" was equitable in nature and plaintiffs did nothing to prepare for a bench trial, let alone a jury trial - untimely witness and exhibit lists, no Joint Statement of Evidence, no trial brief, no neutral statement of the case, and no jury instructions. Therefore, theoretically, from a trial standpoint, plaintiffs have no case to remand to and as such, any relief requested by the plaintiffs should be denied.

V. ARGUMENT

A. The type of action determines if a party has a right to a jury trial.

1. **Plaintiffs primary remedy was based upon equitable principles and therefore, there is no right to a jury trial.**

The plaintiffs' admitted "primary remedy" was equitable in nature in the form of "rescission of the contract". As such, the trial court did not abuse its discretion in striking plaintiffs' jury demand. This is especially true in that determining whether a case is primarily equitable in nature or instead, is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse. *Allard v Pac. Natn'l Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983); *Brown v Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980); *Coleman v Highland Lumber, Inc.*, 46 Wn.2d 549,

283 P.2d 123 (1955).

The right to a trial by jury starts with Article I, §21, Constitution of Washington.¹ This right is further defined by state statutes and rules: “An issue of law shall be tried by the court.” RCW 4.40.050; “An issue of fact, in an action for the recovery of money only, or of specific real or personal property, shall be tried by a jury, unless a jury is waived, as provided by law.” RCW 4.44.060; “All questions of fact other than those mentioned in RCW 4.44.080, shall be decided by a jury.” RCW 4.44.090; “Any party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury.” RCW 4.48.010; “...At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury...” CR 38(b); and “The trial of all issues so demanded shall be by jury, unless... the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of the state.” CR 39.²

The remedy sought by the parties is an important factor in determining whether the claim is legal or equitable for purposes of determining whether there is a right to a jury trial. U.S.C.A. Const. Amend. 7. In this case, as stated above, plaintiffs primary relief was equitable

¹The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto. Article I, §21, Constitution of Washington.

²The effect of CR 38 and 39 is to vest in the trial court wide discretion in cases involving both legal and equitable issues, to allow a jury on some, none, or all issues presented”. *Brown*, supra at 367.

(rescission of the contract) and any claim to damages was incidental, as best. The adjustment arising out of rescission of a contract is made upon equitable principles and each case is dependent upon its own facts and upon the nature and character of the subject matter of the contract. *Hunt v Marsh*, 40 Wn.2d 531, 244 P.2d 869 (1952); *Knapp v Hoerner*, 22 Wn.App. 925, 591 P.2d 1276 (1979). It is clear that if the civil action is purely equitable in nature, there is no right to a jury trial. *Brown v. Safeway Stores, Inc.*, supra; *Rohrer v. Synder*, 29 Wash. 199, 69 P. 748 (1902); *Evergreen Freedom Foundation v. Washington Education Assoc.*, 111 Wn. App 586, 49 P.3rd 894 (2002). *Green v. Hooper*, 149 Wn. App 627, 205 P.2d 134 (2009); *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App 706, 846 P.2d 550 (1993). Further, where any one of the main issues is equitable in nature, the trial court, in the exercise of its sound discretion, may deny the jury trial. *King Aircraft Sales, Inc. v. Lane*, supra. In determining whether a case is primarily equitable in nature, for which there is no right to a jury trial, the trial court should exercise its sound discretion with reference to factors including who seeks the equitable relief, whether the person seeking equitable relief also demands the jury trial, whether the main issues are primarily legal or equitable, whether equitable issues present complexities affecting orderly determination by the jury, and whether equitable and legal issues are easily separable. *Brown v. Safeway Stores, Inc.*, supra.

In exercising its sound discretion, the trial court in this case considered the factors identified in *Brown*:

THE COURT: ...- - in terms of the jury demand and looking at the factors that were cited in Plaintiffs' opposition to Defendants' motion to strike, it's

who is seeking the equitable relief, well that's Plaintiff. Whether the person seeking equitable relief also demands a jury trial, that's Plaintiff. Whether the main issues concern primarily matters of law or equity, seems like most of them are equity. Whether the equitable issues present complexities that will affect the orderly determination of what issues by the jury. There's a lot of complexities here that I think would be really difficult from the very beginning. That was my concern is I presided over hundreds and hundreds of jury trials and this just is - - gets to be - - they can handle all sorts of complex things but this is too may, kind of, odd claims. Whether or not the legal and equitable issues can be legally separated. I think I could separate them but I think it's kind of a waste of energy because you would be retrying the same facts, basically.

Anyway, so I'm going to strike the jury demand. I think that it should probably be a bench trial.

RP 44, Lines 22-25; RP 45, Lines 1-17.

The trial court did not abuse its discretion in deciding to strike plaintiffs' jury demand. This decision is supported by the factors cited in *Brown*, plaintiffs' admission that their "primary remedy" was based upon equitable principles in the "form of rescission of the contract", and further, plaintiffs' pleadings: plaintiffs sought a "preliminary injunction"³; plaintiffs sought a "complete rescission" of the contract⁴; plaintiff sought an "order declaring the [Real Estate] Contract void"; and plaintiff affirmatively stated on more than one occasion that "the plaintiffs can only be adequately

³An injunction is an equitable remedy. *Evergreen Freedom Foundation v Washington Education Assoc.*, *supra*.

⁴Rescission is an equitable remedy. *Hunt v Marsh*, *supra*; *Knapp v Hoerner*, *supra*.

compensated by a complete rescission of the contract”. CP 95-101. Although the plaintiffs “alternatively” pled for damage relief, it is clear that the primary relief sought by the plaintiffs was equitable. Therefore, the trial court’s action in striking the jury demand was consistent with Washington law, including *Brown* and related cases, and was not a “clear abuse” of discretion.

2. Washington law supports the conclusion that the trial court did not abuse its discretion in granting the defendants’ motion to strike the jury.

A review of a number of Washington cases supports and confirms the decision of the trial court in this case. In *Brown*, supra, the Court held that the decision to strike the jury was not an abuse of discretion in that the relief sought by the plaintiffs was primarily equitable in nature. The plaintiffs’ claims included breach of a lease agreement, that the defendant acted in bad faith, that the defendant engaged in unfair competition, and that the defendant interfered with contractual rights. Even though the Court acknowledged that there was a mixture of legal and equitable claims, plaintiffs relief was primarily equitable and therefore, there was no right to a jury trial.

In *Bird v Best Plumbing Group, LLC*, 175 Wn.2d 756, 287, P.3d 551 (2012), the plaintiff brought an action for trespass and negligence. The Court held that it was not an abuse of discretion in denying a right to a jury trial to determine the reasonableness of a proposed settlement.

In *Estates of Foster*, 165 Wn.App. 33, 268 P.3d 945 (2011), the Court held that there is no right to a jury trial in an action for breach of fiduciary duty and further, that even if the action is one for money damages, it may nevertheless, be primarily equitable and therefore, there is no right to a jury

trial.

In *Green v Hooper*, supra, neighbors brought an action for ejectment and to quiet title. The Court held that such an action is both equitable and legal but since it was primarily equitable (quiet title), the trial court did not abuse its discretion in denying a request for a jury trial.

In *Evergreen Freedom Foundation v Washington Education Assoc.*, supra, the Court held that when combined with a claim for injunctive relief, like the case at hand, a claim for restitution or civil penalties is merely incidental. As a result, there is no right to a jury trial.

In *King Aircraft Sales, Inc. v Lane*, supra, the Court held that although the remedy is “akin to damages”, the jurisdiction and underlying action were equitable in nature. Therefore, there was no right to a jury trial.

It is clear that the trial court in this case did not abuse its discretion in deciding to strike plaintiffs’ jury demand. This is especially true in that all of the cases cited above held that there was no right to a jury trial, but none of the cases, unlike the case at hand, involved an admission in open court by one of the parties that their primary relief was equitable in nature. This fact, combined with plaintiffs’ pleadings and the equitable relief sought by plaintiffs, and plaintiffs’ statement that they could only be adequately compensated by a complete rescission of the contract, clearly confirms that the decision of the trial court in striking the jury was not an abuse of discretion.

3. The law cited by the plaintiffs does not support their position.

The plaintiffs cite two cases⁵ in support of their argument that the trial court abused its discretion in striking plaintiffs' jury demand. Both cases can be easily distinguished from the case at hand. *Auburn Medical* involved a construction dispute for payment for work not contemplated by the parties' contract. Plaintiffs' claims included, arguably, legal (money damages) and equitable theories of recovery (quantum meruit). The Court properly decided that a jury should decide this case stating at 904:

The court has been called upon to construe a contract, determine if a breach occurred, and determine what damages, if any, flow therefrom. It is well settled that these are legal issues.

Obviously, *Auburn Medical* involved solely an issue of law and the recovery of money damages. Therefore, consistent with Washington law, a jury was appropriate.

In *Reed*, the plaintiff brought an action to recover a commission upon the sale of real estate. Interestingly, unlike the case at hand, *Reed* does not involve a mixture of claims based upon both legal and equitable theories. Further, also unlike the case at hand, the defendants in *Reed* did not seek rescission of the contract but instead, pleaded only fraud. As such, this defense was purely legal and the defendants had a right to a jury. However, as noted by the Court in *Reed* at 284: "If the action or defense was one to rescind a contract, then it would be a case to be tried in equity". Once again, as stated previously, the type of action determines if a party has a right to a jury trial. The defendants in *Reed* sought only relief based upon fraud. Therefore, a jury was appropriate. If, however, the defendants had sought

⁵ *Auburn Medical, Inc. v Lydig Const., Inc.*, 89 Wn.App. 893, 951 P.2d 311 (1998); *Reed v Reeves*, 160 Wash. 282, 294 p. 277 (1923).

rescission of the contract, as was done by the plaintiffs in the case at hand, the action would have been equitable and there would have been no right to a jury.

The law cited by the plaintiffs does not support a finding that the trial court abused its discretion. Instead, said authority is consistent in supporting the trial court's decision granting defendants' motion to strike the jury.

B. The defendants are entitled to an award of reasonable attorney's fees and costs.

The plaintiffs' claims are frivolous, advanced without reasonable cause, and are without merit pursuant to RCW 4.84.185 and RAP 18.9. The plaintiffs presented no legally debatable issues, no legitimate arguments for an extension of the law, and no debatable issues upon which reasonable minds might differ. See *Graves v P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980); *Eugster v City of Spokane*, 139 Wn.App. 21, 156 P.3d 912 (2007); *Johnson v Jones*, 91 Wn.App. 127, 955 P.2d 826 (1998). Plaintiffs admitted in open court that their "primary remedy" was "equitable" in the form of "rescission of the contract". Further, plaintiffs' pleadings sought primarily equitable relief. Money damages were secondary and incidental. Plaintiffs' trial counsel did nothing to prepare for a jury trial. All of the aforementioned factors were known to the plaintiffs before the appeal was filed. Therefore, the defendants should be awarded reasonable attorney's fees and costs. RCW 4.84.185; RAP 18.9.

VI. CONCLUSION

The trial court did not err in striking plaintiffs' jury demand. Accordingly, the trial court's decision should be affirmed and the defendants

should be awarded reasonable attorney's fees and costs.

DATED this 30th day of July, 2015.

COMFORT, DAVIES & SMITH, P.S.

By: 

Steven W. Davies, WSBA #11566
of attorneys for Respondents

CERTIFICATE OF SERVICE/MAILING

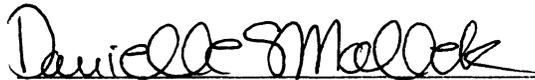
I certify that on the 28th day of July, 2015, I caused a true and correct copy of Respondents' Response Brief to be served on the following in the manner indicated below:

Michael McAleenan, Esq.
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1501 Dock St.
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in the manner indicated:

ABC Legal Services

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


Danielle S. Mallek