

No. 295508

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

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**SCOTT YOUNG and GAYLENE YOUNG,**

**Respondents/Cross Appellants,**

**v.**

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

**Appellant/Cross Respondents**

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**RESPONDENTS/CROSS APPELLANTS'  
REPLY MEMORANDUM**

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**ORIGINAL**

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## I. REPLY ARGUMENT

Scott and Gaylene Young have cross-appealed two issues. First, the Youngs appealed the Trial Court's ruling that the Youngs were not entitled to a property disclosure statement since there was no mutual acceptance of a written agreement between the Youngs and Bob Frank Construction, LLC. (Conclusion of Law No. 2, CP 2416). Because the Youngs continued to have the right to receive the property disclosure statement through closing of the transaction, they had the corresponding right to send a notice of rescission prior to closing. The Youngs should therefore be returned the money and deposits that they previously paid to Bob Frank Construction, LLC.

Second, the Youngs cross-appealed the Trial Court's award of damages that was premised upon a promissory estoppel theory. (Conclusion of Law Nos. 12 -17, CP 2416-17). This theory was a "fall back position" for Bob Frank Construction, LLC, and it was only relied upon once it became apparent that there never existed a contract between the parties. No reported Washington Court opinion has ever partially enforced a real estate transaction based simply on a promissory estoppel theory. The Trial Court committed legal error when fashioning an award of damages based upon promissory estoppel, and the Youngs respectfully request that this Court reverse that portion of the Trial Court's decision.

A. **The Youngs Should Be Returned The Money They Paid Pursuant to RCW 64.06.010 et seq.**

Bob Frank Construction, LLC does not dispute a property disclosure statement is required for a transaction involving the sale of improved and unimproved real property. Bob Frank Construction, LLC does not dispute that a failure to provide a property disclosure statement grants the Youngs the right to rescind the transaction. The only defense that Bob Frank Construction, LLC makes is that because there is a dispute as to *when* the property disclosure statement needs to be provided, Bob Frank Construction, LLC was not required to provide the disclosure statement. However, Bob Frank Construction, LLC does not address in its Reply Brief the fact that if this transaction continued through closing, the Youngs would have three (3) days after the closing to provide their notice to rescind the transaction. The Youngs properly exercised their right to rescind the transaction once it became apparent that their dispute with Bob Frank Construction, LLC was irreconcilable.

1. **There is no dispute that this is the type of transaction that requires a seller's disclosure statement to be provided.**

Bob Frank Construction, LLC acknowledges that a seller is required to provide a buyer with a property disclosure statement for the sale of improved residential real property (RCW 64.06.020) and unimproved residential real property (RCW 64.06.015). Bob Frank

Construction, LLC makes a comment in its brief that the law changed requiring the disclosure for unimproved residential property as of July 22, 2007. (App. Reply Brief p. 19; see also App. Brief p. 18-20). This comment, however, is of no significance or consequence to Bob Frank Construction, LLC's argument as to whether the property disclosure statement is required to be provided in this case. Bob Frank Construction, LLC's new theory on appeal is that the transaction occurred over the course of a year through the exchange of emails, various proposals, and other written correspondence. (App. Reply Brief p. 4). Under this newly raised implied in fact contract theory, Bob Frank Construction, LLC is apparently arguing that the formation of the contract occurred at some point in time over the course of a year, and apparently ten (10) months past the change in the statute. (July 22, 2007 – April 1, 2008 when the Youngs gave the Notice of Rescission). Bob Frank Construction, LLC cannot, and does not argue that the change in the law in July 22, 2007 somehow makes the disclosure statement inapplicable. The change in the law as of July 22, 2007 is immaterial to this case.

2. **Bob Frank Construction, LLC's only defense is that the property disclosure statement was not yet due to the Youngs.**

Bob Frank Construction, LLC's argument is apparently that the Youngs are not entitled to receive a property disclosure statement because

it had not yet become due. Bob Frank Construction, LLC is relying upon RCW 64.06.030, which provides:

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.

Bob Frank Construction, LLC then makes a contradictory argument in its brief regarding why it believes that the Youngs have no right to receive a property disclosure statement by stating:

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.**

(App. Reply Brief. pg. 18) (emphasis added). Bob Frank Construction, LLC further states:

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 or 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.

(App. Reply Brief. pg. 22).

Bob Frank Construction, LLC's argument quoted above defeats its main argument on appeal, which is that there is an implied in fact contract

which entitles Bob Frank Construction, LLC to damages. Bob Frank Construction, LLC is apparently conceding that there never was a contract (express or implied) that was ever formed between the parties, and therefore there is no basis for the Youngs' remedy for rescission. The Youngs obviously agree that a contract was never formed, and thus Bob Frank Construction, LLC's appeal should be dismissed.

Despite Bob Frank Construction, LLC's apparent self-defeating statements in its brief, it continues to seek over \$882,420.89<sup>1</sup> in damages against the Youngs for the construction costs premised upon an implied in fact contract theory it has raised for the first time on appeal. (App. Brief. pg. 31 and 34). Bob Frank Construction, LLC apparently believes there is some type of amorphous contract formed between the parties which justifies an award of damages. If Bob Frank Construction, LLC is going to continue to argue that there exists an implied contract, then the Youngs would have the right of rescission afforded under RCW 64.06.030. Moreover, the Trial Court partially enforced the transaction by way of a promissory estoppel theory, and awarded Bob Frank Construction, LLC damages. This was a legal error, which will be addressed below, but it

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<sup>1</sup> As explained in the Youngs' Response Brief, this damage figure was never raised at the time of trial, nor requested by Bob Frank Construction, LLC at the time of trial. Bob Frank Construction, LLC has also already sold the house, so it is apparently asking this Court to be paid twice for the home. This new damage claim is clearly without any merit.

shows why this rescission issue is still relevant and necessary in this appeal.

It is difficult to follow the reasoning and arguments that Bob Frank Construction, LLC is attempting to advance on appeal. Bob Frank Construction, LLC wants this Court to find that there existed an implied in fact contract that is apparently based upon the exchange of written emails, various written proposals, and other written correspondence.<sup>2</sup> But because Bob Frank Construction, LLC cannot point to a specific date when formation of this alleged contract occurred, nor attempt to define what those terms actually are, Bob Frank Construction, LLC wants to argue that there was never any duty to provide it. Under this argument, Bob Frank Construction, LLC seeks to get the best of both worlds by having this Court enforce some amorphous form of a contract, and simultaneously deny the Youngs of any rights they may be entitled to receive under the property disclosure act to have a start date of disclosure. Such an interpretation and argument is nonsensical. The Youngs hope that the Court will not entertain this newly raised implied in fact contract argument and theory that Bob Frank Construction, LLC has raised for the

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<sup>2</sup> Once again this theory was never argued at the trial court level. In its reply memorandum, Bob Frank Construction, LLC has not once cited to the record showing that it briefed and argued the motion to the Trial Court Judge.

first time on appeal, and which it has failed to support with any similar and supporting case law.

However, even if the Court does consider this new implied in fact contract theory, the interpretation is contrary to the language and purpose of the statute. The duty to provide a disclosure statement does not merely happen at one specific time. Rather, the statute is written so that there is an ongoing duty to disclose information to the buyer about the property up until the time of closing.

**(1) If, after the date that a seller of real property completes a real property transfer disclosure statement, the seller learns from a source other than the buyer or others acting on the buyer's behalf such as an inspector of additional information or an adverse change which makes any of the disclosures made inaccurate, the seller shall amend the real property transfer disclosure statement, and deliver the amendment to the buyer.** No amendment shall be required, however, if the seller takes whatever corrective action is necessary so that the accuracy of the disclosure is restored, or the adverse change is corrected, at least three business days prior to the closing date. Unless the corrective action is completed by the seller prior to the closing date, the buyer shall have the right to exercise one of the following two options: (a) Approving and accepting the amendment, or (b) rescinding the agreement of purchase and sale of the property within three business days after receiving the amended real property transfer disclosure statement.

RCW 64.06.040(1) (emphasis added).

If Bob Frank Construction, LLC is going to argue that there existed some type of contract premised upon writings exchanged between the

parties, then there was an ongoing duty to provide a property disclosure statement up until the date of closing as required by RCW 64.06.040(1). Since it is undisputed that Bob Frank Construction, LLC did not provide this disclosure statement to the Youngs, they had the right to rescind the transaction pursuant to RCW 64.06.040(3).

3. **The Youngs had the right to rescind the transaction because they had the right to receive the disclosure statement through closing.**

Bob Frank Construction, LLC wants to direct the attention of this Court on when the duty to provide the disclosure statement began, and thus starting the five day requirement under RCW 64.06.030. It wants to distract the Court's attention away from the buyer's statutory right to receive the seller disclosure statement that occurs up until three days after closing as set forth in RCW 64.06.040(3). Bob Frank Construction, LLC argues in its brief that the trial court never determined whether Bob Frank Construction, LLC had a duty to provide a disclosure statement, and selectively quotes the oral ruling of Judge Tompkins. (App. Reply Brief p. 21 citing RP at Dec. 12, 2008, p. 10, ll. 9-14). The reality is that Judge Tompkins correctly ruled that a buyer has a right to a seller disclosure statement, and that right continues until three days after the closing of the transaction.

As I reviewed the briefing, the authorities as noted, it is very clear that the legislature has determined that on and after July 22, 2007 buyers of improved and non-improved real property have a right to rescind agreements if they haven't received disclosure statements. On that date, July 22nd, the legislature gave effect to the public policy, particularly in the area of environmental, but in sales in general, that buyers need to know what they are buying. That moment in time gives rights to buyers that they didn't have before that time.

(RP at Dec. 12, 2008, p. 6, ll. 10-19) (See CP 4263-64 and 4244-52 for the legislative history as to the reason for the amendment of the statute that Judge Tompkins references in her oral ruling.)

I will admit sometimes I have used the term the "seller's duty" to provide a disclosure statement. In reality this period of time, July 22, 2007 to the point of closing, is really a buyer's right. On July 22, 2007 I am satisfied the public policy of the state of Washington was to recognize that buyers prior to closing have a right to know what they are buying. The statute is not specific about when a seller must provide a disclosure statement in that time frame, and it would be impossible to satisfy the five-day requirement based on the fact that that had already passed. The importance of that kind of information is such, however, that a seller would take a risk that any time between July 22nd and closing a buyer would have a right to rescind if it didn't receive the disclosure statement. The existing statutory scheme on the effective date of the changes, still preserved the opportunity to rescind before closing.

(RP at Dec. 12, 2008, p. 7, ll. 21-25, p. 8, ll. 1-11).

Judge Tompkins correctly recognized that since the right to receive a property disclosure statement continues until closing, it does not matter if or when a written agreement is entered into for the purchase of the

property. The seller simply proceeds at its own risk that the buyer may rescind the transaction through closing if the seller fails to provide a seller disclosure statement. This is clearly a correct interpretation of RCW 64.06.040(3) which provides:

(3) If the seller in a 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, unless the buyer has otherwise waived the right of rescission in writing. Closing is deemed to occur when the buyer has paid the purchase price, or down payment, and the conveyance document, including a deed or real estate contract, from the seller has been delivered and recorded. After closing, the seller's obligation to deliver the real property transfer disclosure statement and the buyer's rights and remedies under this chapter shall terminate.

Judge Tompkins continued to explain the ongoing right of the buyer in her oral ruling as follows:

Defendants have raised good arguments with regard to, well, when is a seller supposed to know when they are to provide the disclosure statement? Sadly, the statute is not clear with regard to how many days after whatever event may take place. It is almost a forward looking deadline that gives us two time periods: Right to rescind after the disclosure statement is given, which is not very helpful. The other option is the right to rescind if no disclosure statement is made three days after closing.

So that establishes the ongoing right to rescind if the statement is not provided. That was the Court's basis, was really focusing on this new right that was in place and covers this buffer period between what we know to be

purchase and sale agreements coming into place after the new statute, and those sales that are out there who haven't closed yet, are just pending. We know the legislative intent was to provide information to people about what they were buying and up until the point of closing was certainly an opportunity for the parties to continue to negotiate so they would know what they are buying and what they are selling and what those terms were.

Again, the Court's prior reference to the "seller's duty" isn't as helpful as just recognizing it is the buyer's right and the seller's risk if that document isn't provided. The buyer has the opportunity to invoke that rescission right if no statement is provided, not only at closing, but the buyer has three days after closing to give notice of rescission so that is a date certain that can provide some guidance, though certainly it isn't ideal.

(RP at Dec. 12, 2008, p. 8, ll. 12-25, p. 9, ll. 1-15).

Since the Youngs had the right to receive a property disclosure statement up through closing, there is no need to address if and when a contract was entered into between the parties. The only analysis is whether a disclosure statement was provided to the Youngs up to and prior to closing. It is undisputed that the answer is "no." The Youngs are therefore entitled to the remedy in RCW 64.06.030, which is the "immediate return of all deposits and other considerations" they paid to Bob Frank Construction, LLC.

**4. There would be a duty to provide the disclosure statement at the time of closing.**

Even if the Court accepts Bob Frank Construction, LLC's argument that there is only a duty to provide a disclosure statement once a

written contract is mutually accepted between the buyer and seller, this clearly would have occurred at the time of closing, and the Youngs could have exercised their rights to rescind the transaction at the time of closing. There is no dispute by Bob Frank Construction, LLC that if this transaction proceeded to closing, a formal written agreement would have been executed for the purchase of the residential real property. Bob Frank Construction, LLC would obviously not transfer the title of the property to the Youngs without some further written agreement in place which addressed at a minimum what the final price would be and how it would be paid. It would not be transferred without a written deed. Bob Frank Construction, LLC acknowledged that there would be further written agreements executed between the parties at the time of closing. (App. Brief p. 10-11). This is consistent with what the Youngs expected. (Jan. 27, 2010, RP 28-31; Jan. 28, 2010, RP 275-76). At some point in the future prior to closing, the formal written contract documents would have been prepared, and the time would have commenced to provide the Youngs the seller disclosure statement. RCW 64.06.030.

There is no logical reason why the Youngs could not provide Bob Frank Construction, LLC the notice or rescission of the transaction before closing. That is to say, there is no logical reason why the Youngs could not provide their notice of rescission earlier than perhaps they were

required to do. RCW 64.06.040(3) merely provides the last time in which a buyer may provide its notice of rescission, which is three days after closing.

Following Bob Frank Construction, LLC's argument that the right to provide a notice of rescission does not arise until after a written contract was mutually agreed upon would lead to absurd results. Bob Frank Construction, LLC's would have the Youngs allow the construction to continue for several more months even after the transaction and relationship had broken down and the Youngs knew that they did not want to proceed with purchasing the property. The parties would then proceed to closing, and prepare all of the necessary documents, and then the Youngs would be entitled give their notice of rescission pursuant to RCW 64.06.040(3). It makes no logical sense to require such conduct that would not benefit either party. The Youngs acted promptly when they learned of the huge disparity between the appraised value of the house, and the price range that Bob Frank Construction, LLC wanted the Youngs to pay. The Youngs learned about the appraisal on March 17, 2008. (Finding of Fact No. 23, CP 2414). Once Mr. Young learned of the extremely low appraisal, he immediately called Bob Frank, who simply laughed the matter off. (Jan. 27, 2010, RP 49-51). Mr. Young also emailed the appraisal to Bob Frank on March 17, 2008. (Pl. Ex. 26).

Within two weeks the Youngs weighed their options and on April 1, 2008, sent a letter to Bob Frank Construction, LLC indicating that they would rescind the transaction unless they could come to an agreement on a price more in line with the appraised value. (Finding of Fact No. 24, CP 2414). After the parties could not reach an agreement, the Youngs exercised their right of rescission pursuant to RCW 64.06.030 and RCW 64.06.040, and allowed Bob Frank to finish the house out as he deemed fit to sell it on the open market. Bob Frank Construction, LLC complained about the two week delay that the Youngs waited before issuing their notice of rescission. (App. Brief p. 13). Bob Frank Construction, LLC would have been outraged if the construction was allowed to proceed for three (3) additional months; and after all of the necessary paperwork was prepared and exchanged for the sale and closing of the property, the Youngs then provided their notice of rescission as permitted by RCW 64.06.040(3).

Interpreting this type of requirement would clearly lead to an absurd result. There is no reason why the Youngs would need to wait until that late date to provide their notice of rescission. If anything, the Youngs provided their notice of rescission earlier than they needed to under the statute. That is clearly a reasonable course of action considering the situation. It is clearly a reasonable interpretation of the statutes to allow for the Youngs to provide the notice of rescission prior to closing,

and to be afforded the remedy in RCW 64.06.030.

Bob Frank Construction, LLC is a sophisticated builder and company. As Bob Frank testified in trial, the company is a subsidiary of Greenstone Corporation, which is the largest residential developer in the Spokane area. (Jan. 26, 2010, RP 290-91). As such, Bob Frank Construction, LLC had all of the paperwork and forms drafted and available to enter into a residential transaction. On the same day Bob Frank met with the Youngs, Bob Frank Construction, LLC entered into a detailed contract for the purchase of the property with Scott and Karrie Fay. (Ex. P-37). When the transaction is handled with realtors present and according to the normal process, Bob Frank Construction, LLC includes a document entitled "NEW CONSTRUCTION TRANSFER DISCLOSURE STATEMENT". This document provides a limited disclosure, and has the buyers waive their rights to a Transfer Disclosure Statement under RCW 64.06.020. (See pg. 7 to Ex. P-37; Jan. 26, 2010 RP 322-323). Bob Frank Construction, LLC was aware of the disclosure requirements and had the tools available to address the disclosure requirement. However, because Bob Frank Construction, LLC was attempting to gouge the Youngs for an enormous profit on the proposed house, Bob Frank instructed the realtors to stay out of the transaction, and thus the standard package of forms was not completed. (Jan 26, 2010, RP 231). Bob Frank is responsible for

creating the situation. It is appropriate that the Youngs be allowed to recover their deposit and other funds pursuant to RCW 64.06.030, since they properly rescinded the transaction.

**B. The Trial Court's Award of Damages to Bob Frank Construction, LLC Based Upon Promissory Estoppel Must Be Reversed.**

Bob Frank Construction, LLC's main argument going into trial was that there existed an express contract based upon the March 21, 2007 Real Estate Purchase and Sale Agreement form. (Ex. P-4). When Bob Frank conceded under cross examination that the document was never intended to be contract for the purchase of the property, Bob Frank Construction, LLC moved to a fall back theory of promissory estoppel and asked for damages of \$60,000 for the loan interest on the house. This was a theory that was never pled as a counterclaim, and only referenced in their briefing shortly before trial when their main contract theory had serious evidentiary deficiencies. Bob Frank Construction, LLC recognizes that there is no case in Washington that has ever enforced a contract for the purchase of real estate under the theory of promissory estoppels. That is why Bob Frank Construction, LLC has only spent one paragraph addressing the promissory estoppel theory in its Reply Brief, and it spends the vast majority of its brief contending that there was an implied in fact contract between the parties. This implied in fact contract theory was

never pled, nor argued by Bob Frank Construction, LLC at the Trial Court level. Although Bob Frank Construction, LLC denies that it is a newly raised argument and theory on appeal, the Court will take notice that Bob Frank Construction, LLC has not provided any citations in its briefs to the Clerk's Papers, or the Report of Proceedings where the implied in fact contract theory was briefed or argued to the Trial Court. The only argument Bob Frank Construction, LLC makes is that it requested in its counterclaim quantum meruit. However, this quantum meruit claim was always referenced by Bob Frank Construction, LLC as the remedy tied to the theory of promissory estoppel. Amazingly, Bob Frank Construction, LLC also argues that the Trial Court concluded that there was an implied in fact contract in the Court's Findings of Fact and Conclusions of Law. There are no such findings, and there are certainly no such conclusions of law regarding such a theory. Conclusions of Law Nos. 12 through 17 track the elements of promissory estoppel as that was the theory requested by and advanced by Bob Frank Construction, LLC at the Trial Court level.

Bob Frank Construction, LLC's counsel was candid with the Trial Court when arguing regarding the competing motions for attorneys fees, that the promissory estoppel theory was used as a fall back position once its contract theory collapsed during trial.

THE COURT: Was it your position that the contract

argument was that it amounted to a finding of purchase and sale agreement for that home?

MR. PINCOCK: Your Honor, the plaintiffs contend that Bob Frank testified that it wasn't. But that's in the Court's purview of what --

THE COURT: What was your position in the lawsuit?

MR. PINCOCK: Our position was that it was a binding contract just similar to what the plaintiffs' position was and that alternatively we had our quantum meruit unjust enrichment theory. So we had alternative theories of recovery just like the plaintiffs did.

THE COURT: You didn't prevail on the binding contract issue.

MR. PINCOCK: Correct.

THE COURT: And do you agree that that was the primary focus of your efforts in coming to court, that that would be declared by the Court a binding purchase and sale agreement for that home with the purchase price being in excess of a million dollars.

MR. PINCOCK: I can't say that that was our primary focus, no, Your Honor, **because promissory estoppel became a very important part of this case and the testimony established --**

THE COURT: You wouldn't have needed it, though, if I found it was a binding contract.

MR. PINCOCK: That's true, but there were summary judgment motions and everything --

THE COURT: **That's a fall back position.**

MR. PINCOCK: **It was.** And there were summary judgments motions brought on all those things, I think twice, and it was never affirmatively ruled on one way or the other. So all of those issues were brought to trial and a lot of that trial was spent on Ms. Fulgham going through emails between Mr. Young and Mr. Frank **determining and establishing promissory estoppels.**

(Jan. 28, 2011 RP p. 17, ll. 5-25, p. 18, ll. 1-13) (emphasis added).

The reason why Bob Frank Construction, LLC spends so much time on the issue of the implied in fact contract theory is because proving

an oral contract is the narrow gate by which Washington courts have allowed a contract to be enforced when a contract is required to be in writing to satisfy the statute of frauds. Washington courts have never enforced the sale of real estate based simply upon the conduct of the parties on a theory of promissory estoppel. This was explained by the Washington Supreme Court in the case of Berg v. Ting, 125 Wn.2d 544, 886 P.2d 564 (1995).

Bob Frank Construction, LLC argues in its Reply Brief that Berg v. Ting, is distinguishable because Bob Frank Construction, LLC is relying upon part performance to remove the agreement from the statute of frauds, and not the theory of promissory estoppel. (App. Reply Brief p. 12). Even if there is part performance to get past the statute of frauds, that is merely the first hurdle. Washington Courts have consistently required the plaintiff to establish the terms of the parties' contract in order to allow enforcement of the transaction *in addition* to part performance. Berg v. Ting, 125 Wn.2d at 561-562.

The Court in Berg v. Ting considered and rejected the same type of argument being made by Bob Frank Construction, LLC in this case. The Bergs argued that the fact that the Tings withdrew their opposition to the subdivision proposal in exchange for an easement was sufficient part

performance to show that there existed a contract. The Court disagreed because the performance alone provided no evidence as to the terms of the contract. Berg v. Ting, 125 Wn.2d at 558.

The Tings aptly point out that while the nonmonetary consideration in this case may provide some evidence of the existence of some kind of contract, it reveals nothing about the character or terms of any contract. We agree. In this case the evidentiary function of the doctrine of part performance is not satisfied by consideration alone.

Berg v. Ting, 125 Wn.2d at 558.

In rejecting the adoption of promissory estoppel as a basis to enforce a contract for real estate, the Court explained that the purpose of the part performance test exception to the statute of frauds is to allow a plaintiff to prove the terms of the contract. Because promissory estoppel does nothing to establish the terms of the parties' contract, the Court rejected it as a theory by which to enforce a real estate transaction subject to the statute of frauds.

We decline to follow § 129 in this case. Application of § 129, and in particular comment *d*, to enforce the grant of easement would run counter to the evidentiary function underlying this state's part performance doctrine. The agreement does not contain an adequate description of the servient estate. Nothing about the consideration given, unique or otherwise, reveals anything about any real property transaction, and certainly nothing about the servient estate. **We point out that where specific performance is sought, the party relying on the part performance doctrine must prove by clear and unequivocal evidence the existence and all the terms of**

**the contract. However, that proof is *in addition to establishing that there has been part performance.*** The three factors we have recognized have independent evidentiary import apart from the extrinsic evidence which must be presented to establish the existence and terms of the contract. Applying § 129 would require abandoning the evidentiary function of the part performance doctrine in this case, and leave the establishment of the servient estate to extrinsic evidence alone—a result at odds with the statute of frauds.

Berg v. Ting, 125 Wn.2d at 561-562. “The ‘clear and unequivocal’ evidence standard applies where specific performance is sought but a lesser standard applies where damages are sought.” Berg v. Ting, 125 Wn.2d at 556-57 (citing Powers v. Hastings, 93 Wn.2d at 713-17, 612 P.2d 371, 375 (1980)).

Even though Bob Frank Construction, LLC has abandoned its claim for specific performance, it still must prove the terms of its alleged contract, although the standard of proof would be less. That is the major deficiency in Bob Frank Construction, LLC’s analysis. Bob Frank Construction, LLC has not proven, nor attempted to prove, the terms of the supposed contract between the parties.

Bob Frank Construction, LLC does not dispute that there are thirteen (13) material terms necessary for a real estate contract:

(a) [T]ime and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and

utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

Sea-Van Investments Associates, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994). Bob Frank Construction, LLC's only attempt to distinguish the Sea-Van case is by arguing that it did not involve a claim for quantum meruit or part performance. (App. Reply Brief p. 12). This attempt to distinguish the case misses the point. As clearly set forth in Berg v. Ting, a party must prove part performance *in addition* to proving the terms of the parties' purported contract. The court in Sea Van identifies what those terms are in the contract that must be proven. Bob Frank Construction, LLC knows that it had the burden to prove these terms to establish a breach of contract claim. That is why Bob Frank Construction, LLC tried throughout the lawsuit, and for the first two days of trial, to argue that Plaintiff's Exhibit 4 was in fact a fully binding contract for the purchase of real property. During the opening statement, Bob Frank Construction, LLC's attorney, Michelle Fulgham, argued:

After the Lot Reservation Agreement is reviewed, the Youngs signed it and this form became the foundation and they kept doing addendums to this. **The agreement fulfills all of the material terms necessary for a contract, Your Honor.** Because they kept signing addendums some of these **original provisions for attorneys' fees**, that the parties agreed to pay cash, that the buyer has the right – the seller has the right of specific performance if there's a

breach, a lot of these terms from the original purchase and sale agreement which was amended carry through.

(Jan. 25, 2010 RP 116) (emphasis added). When that argument failed, Bob Frank Construction, LLC admittedly shifted to a promissory estoppel theory as a “fall back position.” The problem is that there is no law to support this promissory estoppel theory to enforce a real estate transaction. It clearly contradicts the proof that the Supreme Court has required a plaintiff to establish as explained in the Berg v. Ting case. Bob Frank Construction, LLC’s attempt to shift to an implied in fact contract theory on appeal similarly fails the burden of proof required in Berg v. Ting. Similar to a promissory estoppels theory, Bob Frank Construction, LLC simply asks the Court to look at the parties’ conduct and find that there existed some type of amorphous and undefined implied contract between the parties. This argument clearly fails, just as the promissory estoppels theory fails.

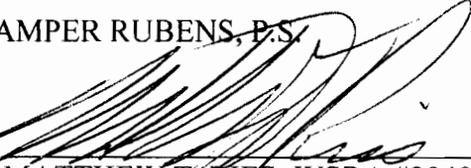
For the reasons outlined above, it was clearly an error of law for the Trial Court to simply look past the deficiency in Bob Frank Construction, LLC’s evidence, and nevertheless award damages based upon a promissory estoppels theory. The Youngs respectfully request that the Court reverse the Trial Court’s ruling on that portion of the judgment.

## II. CONCLUSION

For the reasons outlined above, the Youngs respectfully request that the Court reverse the Trial Court's award of damages to Bob Frank Construction, LLC premised upon a promissory estoppels theory. The Youngs further request a refund of the money that they paid to Bob Frank Construction, LLC for the improvement of the property because they properly rescinded the transaction pursuant to RCW 64.06.040(3).

RESPECTFULLY SUBMITTED this 2 day of November  
2011.

STAMPER RUBENS, P.S.

By: 

MATTHEW T. RIES, WSBA #29407  
Attorney for Respondents/Cross  
Appellants Scott and Gaylene Young

**CERTIFICATE OF SERVICE**

I hereby certify that on the 2 day of November 2011, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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LAUREL K. VITALE