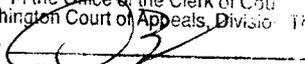


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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DAVID L. HORNBACK and SUSAN HORNBACK, husband and wife,

Plaintiffs/Appellants,

v.

KEN WENTWORTH and DIANE WENTWORTH, husband and wife,

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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IV. ASSIGNMENTS OF ERROR

Issues Pertaining to Appellants' Assignments of Error.

No. 1 Should the Grant County Superior Court have taken judicial notice of local Grant County subdivision and zoning ordinances and awarded rescission, damages and attorney fees pursuant to RCW 58.17.210 and the Grant County ordinances when the Hornbacks' parcel could not be conveyed to them and the Hornbacks could not obtain a building permit for their parcel because it was not subdivided or segregated from the parent parcel? (Appellants' Assignment of Error No. 1).

No. 2 Should the court have awarded statutory relief of rescission, damages and attorney fees pursuant to RCW 58.17.210 when the statutory elements for relief are met regardless of proof of the terms of a local short plat regulation? (Appellants' Assignment of Error No. 2).

No. 3 When a real estate contract is rescinded for a complete breach does prejudgment interest commence for each payment on the date of each payment or on the date the buyer first demands rescission? (Appellants' Assignment of Error No. 3).

Cross-Appellants' Assignments of Error

1. The trial court erred in calculating prejudgment interest at the statutory rate of twelve percent per annum, in lieu of the rate provided for in the contract. (CP 39).

2. The trial court erred in granting Hornbacks' request for common law rescission of the contract. (CP 31, 38-39).

Issues Pertaining to Cross-Appellants' Assignments of Error

No. 1 Whether a parties' written contract, which specifically provides for an interest rate, controls how prejudgment interest is to be computed. (Cross-Appellants' Assignment of Error 1).

No. 2 Whether Hornbacks are entitled to common law rescission of the contract where they acquiesced in Wentworths' purported non-performance under the parties' agreement. (Cross-Appellants' Assignment of Error 2).

No. 3 Whether Hornbacks are entitled to common law rescission of the contract where they failed to tender the full purchase price for the property. (Cross-Appellants' Assignment of Error 2).

No. 4 Whether Hornbacks are entitled to common law rescission of the contract where they failed to timely file their cause of action within the applicable three-year statute of limitations for a partly written and partly oral contract. (Cross-Appellants' Assignment of Error 2).

No. 5 Whether Hornbacks are entitled to common law rescission of the contract where they failed to provide any additional consideration to support a purported modification of the contract. (Cross-Appellants' Assignment of Error 2).

V. STATEMENT OF THE CASE

1. **Facts.** For purposes of this appeal, Defendants/Cross-Appellants Ken and Diane Wentworth (hereinafter "Wentworths") adopt the trial court's findings of fact as an accurate factual statement of this case. The trial court's findings of fact are attached hereto and incorporated herein as Appendix A.

2. **Procedural History.** Plaintiffs/Appellants David L. and Susan Hornback (hereinafter "Hornbacks") served Wentworths with this action on May 9, 2001. (CP 122-131). Wentworths filed an Answer on July 31, 2001, which was subsequently amended on January 24, 2003. (CP 134-37). The parties filed cross-motions for summary judgment which were heard October 3, 2001. An order denying both motions was entered October 12, 2001.

In September, 2004, the parties tried the case to the Honorable Evan E. Sperline in Grant County Superior Court. Judge Sperline personally prepared Findings of Fact and Conclusions of Law which were

entered October 6, 2004. (CP 31; 32-40). Both parties thereafter filed motions for reconsideration. (CP 41-42; 63-67; 45-46).

The motions were heard on January 28, 2005, after which Judge Sperline entered an Order granting part of the relief requested by Wentworths with respect to the date from which prejudgment interest was to accrue, but denying all other relief. (CP 106-107). Hornbacks filed their Notice of Appeal on February 17, 2005 (CP 111-18), and Wentworths cross-appealed.

VI. SUMMARY OF ARGUMENT

The trial court properly concluded that Hornbacks' are not entitled to statutory rescission under RCW 58.17 because Grant County local zoning ordinances do not require that a proposed segregation of real estate be completed prior to offering the property for sale.

In addition, the trial court properly determined that if prejudgment interest is at all recoverable, it began to accrue from the date Hornbacks' sought rescission of the contract. However, with respect to the cross-appeal, the trial court erred in ruling that the statutory rate of twelve percent per annum, and not the rate provided for in the contract, controls calculation of prejudgment interest.

The trial court also erred in concluding that Hornbacks are entitled to common law rescission of the contract under any one of several

theories, including: Hornbacks' waiver of the right to rescind by acquiescing in Wentworths' purported non-performance of the contract; Hornbacks' failure to tender full payment of the purchase price for the land; Hornbacks' failure to file this cause of action prior to the lapse of the statute of limitations, and; Hornbacks' failure to provide additional consideration to support a modification of the contract.

VII. ARGUMENT

A. The trial court properly concluded that Hornbacks are not entitled to statutory rescission and attorneys' fees under RCW 58.17.

Chapter 58.17 RCW applies to "subdivisions," defined as a division or redivision of land into five (or at local option, up to ten) or more lots. *See* RCW 58.17.020(1); RCW 58.17.020(6). The statute distinguishes subdivisions from "short-subdivisions," in which land is reconfigured into fewer lots, i.e, four (or at local option, up to nine) or less, and the regulation of which is handled at the local level. *See* RCW 58.17.020(6); RCW 58.17.030; RCW 58.17.060. In this case, pursuant to statutory authority, Grant County has adopted zoning ordinances relative to the subdivision and short subdivision of property. (CP 39-40, CL 11, 12; CP 142-43, Exhibits 19-23).

In addition, the statute protects purchasers of property from sellers who fail to abide by its requirements or by those set forth by local legislation:

[E]ach purchaser...may recover his damages from any person...selling...land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby.

RCW 58.17.210.

In the instant case, Hornbacks take issue with the trial court's decision that neither party presented evidence of the prevailing ordinance at the time the contract was entered into. (CP 39-40, CL 11, 12; Appellants' Assignment of Error 1). This argument, however, ignores the substance of the court's ruling.

In order for Wentworths to be liable under RCW 58.17, the trial court properly ruled that the parties' contract had to violate the local ordinance that applied "at the time it was entered into, that is, October 31, 1995, because it required a segregation which had not, as of that date been applied for or accomplished...." (CP 39-40, CL 11) (emphasis original).

As set forth below, the parties' agreement was not in violation of local ordinance, and thus RCW 58.17 does not apply irrespective of which

ordinance controlled at the time, **because none required Wenworths to finalize the segregation of the lot before undertaking to sell it.**

This issue came to the forefront in *Valley Quality Homes, Inc. v. Bodie*, 52 Wn. App. 743, 763 P.2d 840 (1988), *rev. denied* 112 Wn.2d 1008 (1989). In that case, plaintiff sought rescission of a real estate contract and attorneys' fees after learning that defendants were not willing to cover the costs to construct a sewer line, install a fire hydrant, and pay the engineer's fees. *Valley Quality Homes, Inc.*, 52 Wn. App. at 745, 763 P.2d 840. Plaintiff contended it was entitled to the relief sought because defendants purportedly violated RCW 58.17 by failing to file a final plat prior to selling the land. *Id.*, 763 P.2d 840.

Notably, the City of Moses Lake had enacted local ordinances establishing "major" and "short" subdivisions, which placed acreage requirements on each type of segregation of land. *Id.* at 746, 763 P.2d 840. The transaction in question constituted a "major" subdivision under local rule, and not a "subdivision" as that term is defined under the statute. *Id.*, 763 P.2d 840. Citing the trial court's memorandum opinion, this Court stated:

When chapter 58.17 does apply, a final plat of any "subdivision" must be filed before any sale of lots (58.17.200). This restriction does not apply to short subdivisions. This is so because the terms of 58.17.200 are exclusively subdivision terms, and not short subdivision

terms. The first line of that section limits its application to divisions into five or more lots, i.e., “subdivisions.” The term “final plat” is defined in reference only to subdivisions (58.17.020(5)) as distinguished from “short plat” (58.17.020(8)), which refers to short subdivisions.

In short, ch. 58.17 RCW embodies a concept of comprehensive minimum requirements for divisions of land into five (or, at local option, ten) or more lots, and leaves the detailed regulation of divisions into four (or, at local option, nine) or fewer lots to local regulation. **There is nothing I have been able to identify in the statute which requires final approval of a short plat before the sale of lots. RCW 58.17.030 clarifies that, if such a requirement exists, it must be found in the local subdivision ordinance.**

Id. at 748, 763 P.2d 840 (emphasis added).

Accordingly, this Court held that because Moses Lake City ordinance did not require a final plat be filed prior to sale, RCW 58.17.210 did not apply, and thus, plaintiff was not entitled to rescission or attorneys’ fees as provided by the statute. *Id.* at 748, 763 P.2d 840.

Not unlike the case in *Valley Quality Homes*, in this case, regardless of which local short-subdivision ordinance was in effect in October of 1995, Hornbacks have failed to show that the ordinance requires that Wentworths submit an application for a short plat and finalize the segregation of the lot **before** offering it for sale. In fact, the various provisions of the 1976 ordinance on which Hornbacks so heavily rely, as well as each subsequent version of the county ordinance which

Hornbacks have felt compelled to supply to the Court, are completely silent on this point (CP 142-43, Exhibits 19-23).

As such, the trial court properly held that Wentworths did not violate the applicable, local ordinance at the time the contract was entered into by failing to segregate Hornbacks' lot before selling it to them. Therefore, like the plaintiff in *Valley Quality Homes*, Hornbacks are precluded from recovering the relief provided under RCW 58.17.

B. The trial court properly concluded that prejudgment interest accrues from the date rescission was requested.

Prejudgment interest is permissible in civil matters at the statutory judgment interest rate under RCW 19.52.010 when a party to the litigation wrongfully retains funds belonging to another and the amount of the funds at issue is liquidated, i.e., the amount at issue can be calculated with precision and without reliance on opinion or discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998) (citing *Prier v. Refrigeration Engineering Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968)).

Further, “[t]he touchstone for an award of prejudgment interest is that a party must hold the use value of the money **improperly.**” *Id.*, 957 P.2d 632 (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)) (emphasis added). In effect, an award of prejudgment interest

compels a party that wrongfully possesses money belonging to another to disgorge the benefit. *Id.* at 430, 957 P.2d 632 (1998).

In this case, the trial court properly found that Hornbacks delayed requesting rescission of the contract until October 18, 2000, and thus, that prejudgment interest began to accrue the following day. (CP 37, FF 23; CP 39, CL 7; CP 106-07).

Indeed, there was nothing wrongful or improper with respect to Wentworths' possession of the funds that had been tendered prior to that time. The payments they had received were held pursuant to the parties' intent to enter into the real estate transaction. Therefore, if prejudgment interest is at all recoverable, the trial court did not err in concluding that it began to accrue when Hornbacks requested rescission of the contract.

C. **The trial court erred in allowing prejudgment interest at the statutory rate.**

On its face, RCW 19.52.020 provides that the statutory rate for calculating prejudgment interest only applies in the absence of a writing between the parties. *See* RCW 19.52.010 (“[e]very loan or forbearance of money...shall bear interest at the rate of twelve percent...where no different rate is agreed to in writing between the parties”). The statute further provides that an agreement in writing between the parties

evidencing the payment of money in installments over time constitutes a “writing” for purposes of the statute. *Id.*

In interpreting this provision, Washington courts have held that the writing requirement is satisfied if the parties have a written agreement which expressly states an interest rate or, at the very least, contains sufficient terms so that the determination of the rate is merely a matter of calculation. *Topline Equipment, Inc. v. Stan Witty Land, Inc.* 31 Wn. App. 86, 91, 639 P.2d 825 (1982).

Several other cases also hold that a written contract, which either specifies the interest rate or dictates how the rate may be determined, controls how interest is to be computed. *See, e.g., People’s Nat. Bank of Wash. v. National Bank of Commerce of Seattle*, 69 Wn.2d 682, 694, 420 P.2d 208 (1966) (holding that interest allowed at legal rate from date promissory note matures, where no other interest rate is provided for in the note); *McDowell v. Austin Co.*, 39 Wn. App. 443, 452, 693 P.2d 744 (1985) (holding that parties’ written agreement which provided for interest at statutory rate controls); *Merrick v. Peterson*, 25 Wn. App. 248, 255, 606 P.2d 700 (1980) (holding that contractual provision which allowed for “interest after default at the maximum rate permitted by law” controls).

Here, the parties reduced their agreement to perform the subject sales transaction to writing on October 31, 1995. (CP 34, FF 8). The

contract provides for interest at the rate of eleven percent (11%) per annum on all deferred payments from the date of the agreement through each respective principal paying date. (CP 142-43, Exhibit 1). The parties understood and agreed to these terms and the contract reflects their intent to be bound by them. The rate is governed by the parties' writing and thus, interest should accrue at 11% per annum. Consequently, the trial court erred in concluding that if interest is at all payable, the statutory rate should control. (CP 39, CL 7).

D. The trial court erred in granting common law rescission of the contract.

The trial court erred in concluding that Hornbacks are entitled to common law rescission of the contract (CP 38-39, CL 5-9) under any one of several theories, including: Hornbacks' waiver of the right to rescind by acquiescing in Wentworths' purported non-performance of the contract; Hornbacks' failure to tender full payment of the purchase price for the land; Hornbacks' failure to file this cause of action prior to the lapse of the statute of limitations, and; Hornbacks' failure to provide additional consideration to support a modification of the contract.

1. Hornbacks waived their right to rescission by acquiescing in Wentworths' purported failure to segregate the lot.

It is well established in Washington that a party in default cannot maintain an action for rescission if that party has not tendered

performance or established facts that would excuse performance.

Gillmore v. Green, 39 Wn.2d 431, 437, 235 P.2d 998 (1951) (citing *Eberhart v. Lind*, 173 Wn. 316, 319, 23 P.2d 17 (1933)).

In addition, a party seeking rescission of a contract must act promptly, once the grounds for rescission arise, in stating its intent to rescind, and no longer treat the contract as in existence. See *Town of La Conner v. American Constr. Co.*, 21 Wn. App. 336, 340, 585 P.2d 162 (1978); *Clover Park Dist. v. Dairy Prods.*, 15 Wn. App. 429, 433, 550 P.2d 47 (1976).

It follows then, that when a party fails to take steps to rescind within a reasonable time and instead follows a course of conduct inconsistent therewith, the party has waived its right of rescission and has instead chosen to continue the contract. *Id.* (citing *Fines v. West Side Implement Co.*, 56 Wn.2d 304, 352 P.2d 1018 (1960); *Coover v. Ingwersen*, 37 Wn.2d 797, 226 P.2d 187 (1951); *Prager's Inc. v. Bullitt Co.*, 1 Wn. App. 575, 463 P.2d 217 (1969)).

For instance, in the case of *Gillmore v. Green*, the vendee to a real estate contract attempted to rescind the agreement because the vendor had failed to tender a title report and title policy as he had agreed to do. *Gillmore*, 39 Wn.2d at 432, 235 P.2d 998. In the interim, the vendee

continued to make payments toward the purchase of the property. *Id.*, 235 P.2d 998.

The court held that the vendee's acquiescence in the nonperformance of the vendor's duty to deliver the title information "constituted a waiver of the right to rescind the contract" for its nondelivery. *Id.* at 435, 235 P.2d 998. More specifically, the court intimated:

Any act on the part of the purchaser treating the contract in force, when done voluntarily and with a knowledge of facts creating a right to rescind, amounts to a waiver of the right to rescind because of the existence of such facts. However, the acts evincing an intention to waive the right to rescind must be distinct and unequivocal, as, for example, by continuing negotiations after breach by the vendor on the basis of the continued existence of the contract; **or by making or promising to make payments of the purchase money thereunder....**

Id., 235 P.2d 998 (emphasis original) (quoting *Central Life Assurance Society v. Impelmans*, 13 Wn.2d 632, 647, 126 P.2d 757 (1942)).

Certainly, an analogy can be drawn here.

In this case, Hornbacks assert that Wentworths breached the agreement by failing to segregate and prepare to convey the lot Hornbacks sought to purchase by as early as January 10, 1996. (CP 15). Hornbacks were aware that Wentworths spent their winters in Mexico and thus would

be unable to provide a deed to the lot by that date. (CP 32-34, FF 1, 8).

Yet, Hornbacks took no immediate steps to rescind the contract.

To the contrary, and as the trial court recognized, when the Hornbacks experienced financial difficulties and were unable to pay the balance of the contract, they continued to promise Wentworths that the final \$10,000 was forthcoming, and that in August of 1999, three and a half years after Wentworths were purportedly required to perform, went so far as to tender an additional \$5,000. (CP 35, FF 11-13).

In addition, Hornbacks continued their search for a suitable mobile home, applied for financing, eventually contracted for the purchase of a mobile home, conducted leveling, excavation, and septic tank design work on the property, and applied for sewage and building permits, all in anticipation of paying the balance on the contract and receiving title to the segregated lot. (CP 35-36, FF 14, 16-17).

As was the case in *Gillmore*, Hornbacks' conduct in this case clearly evinces their acquiescence in Wentworths' purported failure to subdivide the subject lot as well as an intention to waive their right to rescind the contract. As such, the trial court's common law rescission of the parties' agreement was improper and Hornbacks should instead be held to the contract.

2. Hornbacks are not entitled to rescission because their duty to pay the contract in full was an implied condition precedent to Wentworths' duty to segregate the property.

A party's contractual obligation may be conditional, and whether a condition precedent or subsequent, such may be express, implied in fact, or constructive (implied in law). *Ross v. Harding*, 64 Wn.2d 231, 236, 391 P.2d 526 (1964) (citing 5 S. Williston, *Contracts*, § 668, at 152 (3d ed. 1961)).

A condition precedent "is an event occurring subsequent to the making of a valid contract which must exist or occur before there is a right to immediate performance." *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 556-57, 730 P.2d 1340 (1987) (citations omitted). The *Walter Implement* court explained:

Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract.

Walter Implement, Inc., 107 Wn.2d at 557, 730 P.2d 1340 (citing 5 S. Williston, *Contracts*, § 663, at 127 (3d ed. 1961)). In such instances, the law does not require a party "to do a useless act and tender performance" if the other party is unable or unwilling to perform that party's obligation

under the contract. *Willener*, 107 Wn.2d at 395, 730 P.2d 45 (citing *Jenson v. Richens*, 74 Wn.2d 41, 46, 442 P.2d 636 (1968)).

In the instant case, although the contract requires Wentworths to supply a warranty deed on January 10, 1996, the trial court properly found that they did not intend to segregate the lot and convey the deed until the following Spring. (CP 34-35, FF 9, 10). However, the contract does not state whether Wentworths obligation to prepare to provide the deed continued after Hornbacks were unable to pay the purchase price in the Spring of 1996. (CP 142-43, Exhibit 1). The contract's silence on this point creates an ambiguity and parol evidence is necessary to ascertain the intent of the parties. *See Spokane Helicopter Serv., Inc. v. Malone*, 28 Wn. App. 377, 382, 623 P.2d 727 (1981) (“[p]arol evidence is admissible to explain ambiguities or supply material omissions in a writing”).

When a contract clause is ambiguous, the parties may present parol or extrinsic evidence of their intent in order to resolve the ambiguity. *Panorama Village Condo. Owners Ass'n Bd. Of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 137, 26 P.3d 910 (2001). Parol evidence may be admitted solely to aid in the interpretation of the words employed, not to show intention

independent of the instrument. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

In other words, extrinsic evidence is admissible only if it "goes no further than to show the situation of the parties and the circumstances under which the instrument was executed . . ." *Id.*, 801 P.2d 222 (quoting *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

Here, an examination of the parties' situation and the circumstances under which their agreement was executed reveals a condition precedent implied in fact. From the beginning, both parties were functioning pursuant to an understanding that Wentworths would take steps to segregate the Hornbacks' lot as soon as Hornbacks tendered the payment for the property in full.

Indeed, the trial court found that the parties entered the contract on October 31, 1995, shortly before Wentworths departed for their winter residence in Mexico. (CP 34, FF 8). It further found that Hornbacks were required to tender payment in full on or before January 10, 1996, although Wentworths had not made any attempt to segregate the lot before they left the country and did not intend to do so until they returned the following Spring. (CP 34-35, FF 9-10).

The parties' situation following Wentworths' return from their winter residence in May of 1996 further supports the fact that both parties understood that Wentworths would take steps to segregate the lot as soon as Hornbacks paid the balance on the contract. As the trial court pointed out, "Wentworths assured Hornbacks they would wait for the final contract payment of \$10,000 until Hornbacks were able to pay it." (CP 35, FF 11).

Consequently, Wentworths refrained from initiating a forfeiture action (CP 35, FF 11) and, likewise, Hornbacks failed at that time to pursue allegations that Wentworths were purportedly in breach of the contract. In other words, both parties agreed to move forward under the assumption that Hornbacks would eventually be able to pay the balance on the contract, at which time Wentworths would perform the short-subdivision of the lot and convey the property.

Three years later, in August of 1999, the parties remained in this frame of mind, when Hornbacks agreed to pay the full amount of principal due. (CP 35, FF 11-13). However, Hornbacks only paid half the remaining principal balance, or \$5,000. (CP 35, FF 13). Shortly thereafter, the parties were informed of the zoning change. (CP 36-37, FF 17-19).

Nonetheless, the parties' situation and the circumstances at the time the contract was executed, as well as their conduct following the time performance was due, support the fact that both parties were functioning pursuant to an understanding that Wentworths would take steps to perform the short-subdivision of the property upon Hornbacks tendering payment for the lot in full.

Consequently, it was Hornbacks' failure to pay the contract balance at any time, including in August of 1999 (when they had agreed to pay the remainder of the principal and did not) that excused Wentworths' duty to subdivide the property. Thus, the trial court erred in permitting Hornbacks to rescind the agreement.

3. Hornbacks are not entitled to rescission because their claim is barred by the applicable three-year statute of limitations.

The six-year statute of limitations under RCW 4.16.040 applies to actions based upon a written contract. RCW 4.16.040; *Urban Dev. v. Evergreen Bldg. Prods.*, 114 Wn. App. 639, 650, 59 P.3d 112 (2002). A written agreement for purposes of this limitation period must contain all the essential elements of the contract, which include the subject matter, parties, terms and conditions, and price or consideration. *Browning v. Howerton*, 92 Wn. App. 644, 646, 966 P.2d 367 (1998).

If, however, resort to parol evidence is necessary to establish any one of these elements, the contract is partly oral and thus, the shorter three-year statute of limitations applies. *Id.* at 649, 966 P.2d 367; *see also* RCW 4.16.080(3). The policy underlying this rule recognizes the trouble in relying on parol evidence which tends to become more tainted with the passage of time. *Id.* at 650, 966 P.2d 367.

As noted above, parol evidence “is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing.” *Berg*, 115 Wn.2d at 669, 801 P.2d 222. As a rule of context, the parol evidence rule allows the court to consider the contract as a whole, its subject matter and objective, any subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations proffered by the parties in determining their intent. *Id.* at 667, 801 P.2d 222 (citing *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

By way of example, in *Browning*, the vendee brought an action for reformation of a real estate contract asserting that the parties were mutually mistaken as to the acreage which led to an inflated purchase price. *Browning*, 92 Wn. App. at 645, 966 P.2d 367. The vendee argued that the six-year statute of limitations should govern, but put on extrinsic

evidence of the error in calculating the acreage. *Id.* at 645, 650, 966 P.2d 367. Division II of the Court of Appeals held that the action was time barred under the three-year statute of limitations because parol evidence was necessary to modify a material term.

Not unlike the circumstances in *Browning*, in the instant case the contract is glaringly devoid of material terms and conditions with respect to Wentworths' obligation to segregate Hornbacks' acre. Specifically, it fails to provide whether and when Wentworths were required to perform in the event Hornbacks defaulted on the real estate contract prior to the time Wentworths intended to perform the short-subdivision of the lot. (CP 142-43, Exhibit 1; CP 34-35, FF 10).

Consequently, it follows that parol evidence is necessary to determine the intent of the parties as to the terms and conditions surrounding Wentworths' obligation to segregate Hornbacks' acre. Thus, the contract is rendered partly oral and the applicable three-year statute of limitations controls.

A statutory limitation period commences and a cause of action accrues when a party has the right to seek relief in the courts. *Browning*, 92 Wn. App. at 651, 966 P.2d 367 (citing *First Maryland Leasecorp. v. Rothstein*, 72 Wn. App. 278, 864 P.2d 17 (1993)). In this case, assuming for the sake of argument that Wentworths were required to perform

despite Hornbacks' failure to tender the final payment per the contract, the question arises as to when their performance would have been due. A review of the record reveals that if Hornbacks' cause of action accrued at all, it was prior to May of 1998.

When the parties entered into the contract on October 31, 1995, Wentworths had not made any application to have the subject lot subdivided. (CP 34-35, FF 9-10). And, as the trial court pointed out, Wentworths were contractually obligated to be prepared to convey title on January 10, 1996. (CP 34, FF 9). When Wentworths failed to do so, however, Hornbacks took no action at that time to enforce this provision.

Furthermore, when the Wentworths returned home from Mexico in the Spring of 1996, Wentworths did not proceed with the short-subdivision, but instead stated they would wait until Hornbacks were able to pay. (CP 35, FF 11). Again, Hornbacks failed to file suit to enforce their interpretation of the contract. This pattern continued at least through May of 1998, three years prior to the date Hornbacks finally filed this lawsuit.

As such, if the Hornbacks' cause of action accrued at all, it was any time between January 10, 1996 and May 8, 1998, and having filed this cause of action May 9, 2001, Hornbacks' rescission claim is time barred by the applicable three-year statute of limitations.

4. Hornbacks are not entitled to rescission because the contract was not properly modified.

In ordering common law rescission of the contract in this case, the trial court concluded that rescission was proper because of the “parties’ **mutual** modification of their contract.” (emphasis original). (CP 39, CL 8).

Proper modification of or subsequent agreement to a contract requires independent, additional consideration. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004). Consideration may include “any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.” *Id.* at 833, 100 P.3d 791 (citing *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)).

However, independent, additional consideration does not exist where “one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract.” *Rosellini v. Banchero*, 83 Wn.2d 268, 517 P.2d 955 (1974) (citing 15 Walter H.E. Jaeger, *Williston on Contracts* § 1826 at 487 (3d ed. 1972)).

By way of example, in *Rosellini*, the parties entered a time and materials contract for the construction of a building which was to cost

defendant no more than plaintiff's bid of \$56,146, plus tax and extras ordered by defendant. *Id.* at 269, 517 P.2d 955. Remarkably, plaintiff was to benefit from any cost savings below plaintiff's bid amount and plaintiff was to assume any risk of the costs exceeding the ceiling. *Id.*, 517 P.2d 955.

Defendant soon complained about the quality of the work performed by the plaintiff's crew, upon which the parties agreed to modify the original contract by reducing the maximum amount plaintiff could charge for the project to \$52,000. *Id.*, 517 P.2d 955. When the project was completed three weeks after the modification, plaintiff's cost bill exceeded \$64,000, whereupon plaintiff recorded a lien and initiated a foreclosure action. *Id.*, 517 P.2d 955.

The trial court held that the modified contract was void for want of consideration and thus, the original ceiling controlled. *Id.*, 517 P.2d 955. Division I of the Court of Appeals reversed, relying on the principle that settlement of a bona fide dispute is sufficient consideration to support modification of a contract. *Id.* at 270, 517 P.2d 955. However, the Supreme Court of Washington disagreed, finding no evidence of a bona fide dispute between the parties. *Id.*, 517 P.2d 955. The Supreme Court then reiterated the requirement that the second agreement must be supported by consideration. *Id.* at 273, 517 P.2d 955.

In so holding, the Supreme Court specifically rejected defendant's argument that his extension of the completion date for the contract, in and of itself, constituted adequate consideration. *Id.* at 273-74, 517 P.2d 955. To the contrary, the Court noted, "[i]f in fact a definite completion date had been agreed upon and an extension was granted by defendant, there would have been consideration." *Id.* at 274, 517 P.2d 955. Finding no evidence of a specific date by which the modified contract was to be performed, the Supreme Court reversed the Court of Appeals and reinstated the trial court's decision. *Id.* at 274, 275, 517 P.2d 955.

As was the case in *Rosellini*, in this case, Hornbacks cannot point to any independent, additional consideration which was required of them to support a modification of the contract. They were only ever obligated to pay \$20,000 for the property (CP 34, FF 7); they neither agreed with Wentworths on a specific date by which the segregation was to be completed and contract paid, nor granted an express extension for Wentworths to perform under the agreement. (CP 32-40). In short, Hornbacks did nothing to support the trial court's finding that the parties mutually modified their agreement.

The trial court erred in concluding (CP 39, CL 8) that the parties mutually modified their contract. Rather, had Hornbacks paid the

purchase price prior to September 1999, the original contract would have been fully performed.

E. Wentworths are entitled to attorneys' fees on appeal.

In the event Wentworths are deemed the prevailing party on appeal, they respectfully request an award of attorney's fees incurred in these proceedings. RAP 18.1. The prevailing party on appeal is entitled to an award of reasonable attorney fees pursuant to RCW 4.84.250. If awarded, Wentworths will submit the appropriate Affidavit of Fees in accordance with RAP 18.1(d).

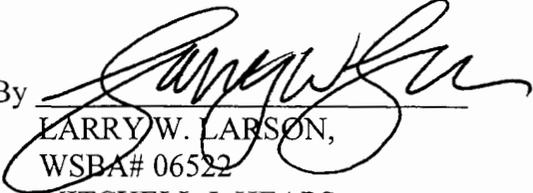
VIII. CONCLUSION

Based on the foregoing points and authorities, Wentworths respectfully submit that the Court affirm the Superior Court regarding the denial of statutory rescission and attorneys' fees under RCW 58.17 and the date from which prejudgment interest is to accrue, but reverse the trial court with respect to the rate of prejudgment interest and its conclusion that Hornbacks are entitled to common law rescission of the contract.

RESPECTFULLY SUBMITTED this 17th day of June, 2005.

LUKINS & ANNIS, P.S.

By


LARRY W. LARSON,
WSBA# 06522

MITCHELL J. HEAPS,
WSBA #35457

Attorneys for Defendants/Cross-
Appellants

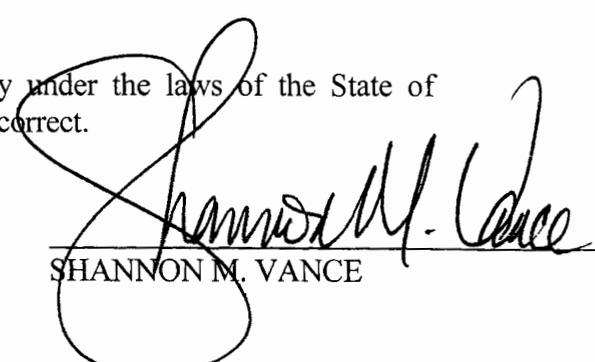
Ken and Diane Wentworth

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that on the 17th day of June, 2005, a true and correct copy of the foregoing BRIEF OF RESPONDENTS/CROSS-APPELLANTS was mailed, regular, first class mail, postage prepaid in the United States Mail to:

Carl Warring
Attorney at Law
1340 East Hunter Pl
Moses Lake, WA 98837

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



SHANNON M. VANCE

APPENDIX A



04-078772

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THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

DAVID HORNBACK and SUSAN
HORNBACK, husband and wife,

Plaintiffs,

vs.

KEN WENTWORTH and DIANE
WENTWORTH, husband and wife,

Defendants.

NO. 01-2-00491-0

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before the Court for bench trial on the 27th and 28th days of September, 2004, Plaintiffs DAVID HORNBACK and SUSAN HORNBACK personally appearing along with their counsel, Carl N. Warring, and Defendants KEN WENTWORTH and DIANE WENTWORTH personally appearing along with their counsel, Larry W. Larson; the Court having considered the testimony and exhibits admitted during trial, and the arguments of counsel, and being otherwise fully satisfied in the premises herein, now makes the following:

FINDINGS OF FACT

1. Plaintiffs DAVID HORNBACK and SUSAN HORNBACK ("Hornbacks") comprise a marital community residing in or near Moses Lake, Washington. Defendants KEN WENTWORTH and DIANE WENTWORTH ("Wentworths") comprise a marital community residing in or near Moses Lake, Washington. At all relevant times, it was the practice of Wentworths to spend 180 days each

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1 year, from October or November through April or May, residing in Mexico.

2 2. In 1986, Wentworths acquired a 10-acre parcel of undeveloped real property West of the City
3 of Moses Lake (Ex. 16). The parcel consists of a rectangle approximately 365 feet wide running
4 northerly 1320 feet from the north frontage road along Interstate 90 (Ex. 3). The parcel is bounded
5 on the East by proposed Road F N.E., which Wentworths developed as a gravel road.

6 3. In 1990, Wentworths sold the southerly 4 acres of the parcel to a developer, Sample. At
7 about the same time, Wentworths sold a parcel of approximately 1 acre to Snegosky (Ex. 17) by
8 means of segregation. Segregation of a single lot was permissible under the then applicable Grant
9 County subdivision ordinances. The ordinances permitted one segregation each 5 years, with a
10 minimum lot size of 1 acre, without compliance with platting procedures, so long as the newly created
11 lot would be occupied as a residence by its owners (Ex. 25). Wentworths had also segregated a
12 parcel from a Quincy-area farm as a residence for Ken Wentworth's son.

13 4. Wentworths had developed their residence in the area of about one acre, more or less, lying
14 between the parcels sold to Sample and Snegosky. As a consequence of the two sales, Wentworths'
15 remaining property consisted of two non-contiguous parcels sharing a single parcel number in County
16 records, that is, their residence parcel and the approximately 3.6 undeveloped acres lying northerly
17 of the Snegosky parcel.

18 5. In 1994, Wentworths experienced some flooding damage in their home and contacted
19 Hornbacks' business, Moses Lake Mobile Home Service, to complete some repairs. As a result of
20 this contact, Wentworths and Hornbacks became social friends. Their friendship continued through
21 1999.

22 6. During social contacts, Hornbacks expressed to Wentworths an interest in acquiring a rural
23 parcel, such as Wentworths enjoyed, on which to establish their home. As the parties discussed this
24 prospect in 1995, Wentworths indicated that the timing was right (five years since the Snegosky
25 segregation) to segregate off another lot of at least one acre. Wentworths showed Hornbacks the
26 northerly 3.6 acres, indicating they would divide it into 3 lots.

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - Page 2

1 7. After further discussions, the parties agreed that Hornbacks would purchase the middle of the
2 three lots for \$20,000, and that Wentworths would obtain and pay for a survey. Wentworths
3 obtained a survey from Boundary Engineering in Moses Lake (Ex. 3) in July, 1995, including a legal
4 description of the middle lot, consisting of approximately 1.19 acres.

5 8. During September, 1995, Wentworths prepared a rough draft of a written contract (Ex. 13)
6 which Hornbacks reviewed and approved. Ultimately, the parties reduced their agreement to a formal
7 written contract (Ex. 1) which they executed on October 31, 1995. They met at Washington Trust
8 Bank in Moses Lake, where their signatures on the contract were notarized, and where Hornbacks
9 paid Wentworths the remaining \$9000 (\$1000 earnest money had previously been paid) of the initial
10 \$10,000 payment required by the contract. Within a day or two, Wentworths departed for their
11 annual winter residence in Mexico.

12 9. Thereafter, neither Wentworths nor Hornbacks abided by the provisions of their written
13 contract. The contract required the final \$10,000 payment to be made in the form of a deposit to
14 Wentworths' bank account by January 10, 1996, but by that time, Hornbacks had encountered
15 financial difficulties in their business and were unable to pay. The contract required Hornbacks to
16 pay real property taxes as they became due, but they have never paid any taxes on their "lot." The
17 contract allowed Wentworths to pay taxes in Hornbacks' stead and add the amount to the contract
18 balance; Wentworths continued paying taxes on their entire parcel, but made no demand for
19 Hornbacks to pay them, nor added any amount to the contract balance when they later determined
20 a payoff amount. The contract required Wentworths to provide a statutory warranty deed upon
21 receipt of final payment (contractually due by January 10, 1996), but Wentworths were in Mexico
22 until Spring, had made no application to Grant County to segregate the parcel, nor any other
23 arrangement to obtain or provide a deed. The contract required Wentworths to obtain a title
24 insurance policy within ten days, but they made no attempt to do so, nor did Hornbacks pay any
25 attention to that provision.

26 10. Wentworths' intent at the time of the written contract was to complete the segregation and
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1 provide a deed upon their return in May. Near the time of entering into the contract, Wentworths
2 telephoned the Grant County Planning Department and were advised that segregation was available
3 as a means of conveying a parcel of at least one acre to Hornbacks. Hornbacks had no experience
4 in selling or purchasing real estate and no familiarity with the process of segregation, the requirement
5 of excise tax, or recording contracts. Neither party filed their contract in public records, nor did
6 Wentworths pay real estate excise taxes.

7 11. When Wentworths returned from Mexico in 1996, Hornbacks discussed with them the
8 financial difficulties and consequent litigation experienced by Hornbacks in their business.
9 Wentworths assured Hornbacks they would wait for the final contract payment of \$10,000 until
10 Hornbacks were able to pay it. This circumstance continued for three years, the parties occasionally
11 discussing infrequently and informally the Hornbacks' financial issues. Wentworths never made oral
12 or written demand for payment of the contract balance, nor took any action to forfeit the contract.

13 12. In the summer of 1999, Hornbacks' financial circumstances improved to a level which
14 permitted them to qualify for a loan to purchase a triple-wide mobile home and complete the land
15 payment. On or about August 29, 1999, Hornbacks telephoned Wentworths to obtain a pay-off
16 figure for the land purchase. Ken Wentworth prepared a handwritten accounting (Ex. 4) showing
17 the balance of principal and interest to be \$14, 679.27, and communicated that figure to Hornbacks.
18 Hornbacks agreed to meet Wentworths the following day to pay at least the principal owing. Ken
19 Wentworth volunteered that if Hornbacks would pay the principal, "we'll forget about the interest."

20 13. On August 30, 1999, Hornbacks paid Wentworths half of the remaining principal balance,
21 \$5,000 (Ex. 2). While Wentworths expected to receive the entire \$10,000 owing, there is no
22 evidence of any protest or other conversation between the parties accompanying the \$5,000 payment.

23 14. Hornbacks continued their search for an appropriate mobile home, eventually locating a
24 suitable one. In early September, 1999, they applied for financing with Mortgage Resources of
25 Spokane (Ex. 7). On September 24, they contracted to purchase the mobile home for \$58,764 (Ex.
26 11). By the terms of the purchase contract, Hornbacks were to provide their own financing, and fund
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1 the purchase by October 30. In early October, Hornbacks were tentatively approved for financing
2 through Interwest Bank, their anticipated loan being approximately \$90,000 at 8.474% (Ex. 10). The
3 required appraisal was completed on November 5, for which Hornbacks paid \$400 (Ex. 7).

4 15. On October 21, 1999, Security Title Guaranty completed a Preliminary Commitment for
5 Title Insurance relating to Hornbacks' purchase of real estate. The commitment identified the
6 property in question as the entire Wentworth estate, that is, their residential parcel and the non-
7 contiguous 3.6 acres from which Hornbacks' lot was to be segregated. On November 5, Security
8 Title Guaranty notified Hornbacks that the transaction had been placed with that company for closing
9 by Mortgage Resources (Ex. 15). Ultimately, in December, ²⁰⁰⁰1999, Mortgage Resources cancelled the
10 order. "5

11 16. In November, 1999, Hornbacks had leveling, excavation and septic system design work done
12 on their lot in anticipation of moving their mobile home in, paying a contractor \$890 for the work
13 (Ex. 5). On November 18, the contractor filed his septic design with the Grant County Health
14 District in support of Hornbacks' application for a sewage permit. On November 29, Hornbacks
15 completed their application for a sewage permit, paying Grant County a fee, all but \$50 of which was
16 eventually refunded (Ex. 8).

17 17. On December 7, 1999, Hornbacks applied to the Grant County Building Department for a
18 building permit, paying a fee of \$487.69 (a portion of which, \$234.99, was eventually refunded) (Ex.
19 9). Building Department staff wrote on the application that the Hornbacks' lot was to be 1.19 acres
20 segregated from a "parent" parcel of 5.82 acres. The staff advised Hornbacks that the segregation
21 could not be accomplished due to a change in Grant County subdivision ordinances.

22 18. At some time in the interim between October 31, 1995, when the parties executed their
23 written contract, and December 7, 1999, when Hornbacks applied for a building permit, Grant
24 County ordinances were amended to increase the minimum lot sizes required for segregation.
25 Previously, a minimum of 1 acre was required for both the parcel being segregated and what remained
26 of the "parent" parcel. By 1999, the minimum size for both parcels was 2.5 acres.

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - Page 5

1 19. Hornbacks also learned that it was necessary to remove their new triple-wide mobile home
2 from the seller's business premises by the end of December, as the business was closing. They
3 notified Wentworths in Mexico of what they had learned from the Building Department and of the
4 need to move their new home (Ex. 6). Wentworths advised they would address the segregation issue
5 when they returned from Mexico in the Spring.

6 20. Because their loan fell through due to the real estate problems, Hornbacks needed to re-
7 negotiate their purchase contract for the mobile home in order to continue to pursue their goal of
8 acquiring the home and land. The original contract was for the purchase price only, it being
9 anticipated that moving and set up costs would be funded by the bank loan. On December 17,
10 Hornbacks renegotiated with the mobile home seller, agreeing to pay \$71,459.06, at least in form (Ex.
11 12). The seller agreed to rebate to them the difference between the original selling price and the new
12 larger figure so that Hornbacks would have funds for moving and setting up the mobile home, and
13 to pay other bills.

14 21. The closure of the seller's business premises required Hornbacks to move the new mobile
15 home to a mobile home park, on Longview Street in Moses Lake, where they paid lot rent of \$185
16 a month. The rent increased in frequent increments, reaching \$295 in September, 2001. At that time,
17 the Hornbacks were able to sell their previous home, a single-wide mobile home on property they
18 owned in Cascade Valley, and move the triple-wide onto that property. The moving cost was
19 approximately \$2,500. During the interim, the single-wide was occupied by Susan Hornback's son,
20 who made the \$400 monthly payments on behalf of Hornbacks.

21 22. Upon Wentworth's return from Mexico in the Spring of 2000, they inquired of the Planning
22 Department regarding the availability of segregation of Hornbacks' lot, with the same lack of success
23 encountered by Hornback the previous December. Wentworths advised Hornbacks that they would
24 continue trying to get the conveyance accomplished, but were eventually unable to do so.

25 23. Hornbacks ultimately consulted an attorney, who requested return of their payments from
26 Wentworths, which the latter refused. This litigation ensued. Hornbacks seek rescission of the

1 contract pursuant to chapter 58.17 RCW or, in the alternative, under common law principles.

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4 Based upon the foregoing Findings of Fact, the Court now makes the following:

5 CONCLUSIONS OF LAW

6 1. This court has jurisdiction over the subject matter and the claims of these parties.

7 2. The parties entered into a valid and enforceable contract for the sale of adequately described
8 real property on October 31, 1995. By the terms of their contract, Hornbacks were required to pay
9 the remaining \$10,000 purchase price, together with interest at 11% per annum from the date of the
10 contract, on or before January 10, 1996. Wentworths were required, upon payment, to convey the
11 real property to Hornbacks.

12 3. The parties thereafter amended their contract, orally and by their conduct, to permit payment
13 of remaining principal and interest at a later date when the Hornbacks' financial circumstances
14 improved. Hornbacks were prepared to tender the remaining contract payment in November, 1999.

15 4. By November, 1999, performance of the Wentworths' obligation to convey became a legal
16 impossibility. If the performance of a duty is made impossible or impracticable by having to comply
17 with a governmental regulation not in existence at the time of the contract, that regulation is an event
18 the non-occurrence of which was a basic assumption on which the contract was made. Restatement
19 (Second) of Contracts § 264 (1981).

20 5. Because performance of the contract by Wentworths was legally impossible, tender of the
21 final purchase payment by Hornbacks would have been an utter futility, not required of them in order
22 to pursue rescission.

23 6. Rescission of a contract is an appropriate remedy where performance has become legally
24 impossible or impracticable. Rescission is an equitable remedy, under which the court must try, to
25 the extent possible and appropriate under the factual circumstances, to restore the parties to the
26 positions they occupied prior to entering their contract.

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FINDINGS OF FACT AND
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1 7. Hornbacks are entitled to a judgment of rescission and to recover from Wentworths the
2 payments made by Hornbacks, to wit., \$1,000 on 10/12/95; \$9,000 on 10/31/95; and \$5,000 on
3 8/30/99, together with interest at the statutory rate, 12%, from the date of payment to the date of
4 judgment.

5 8. Because the legal impossibility arose as a consequence of the parties' *mutual* modification of
6 their contract, the remedy should not include such consequential damages as might be appropriate
7 in an action for breach of the contract. Those sums each party spent in pursuit of their legally
8 impossible contract should remain the burden of the party making the expenditure. Thus, Hornbacks
9 are not entitled to the governmental and appraisal fees they paid, the interest differential on their
10 mobile home purchase, the lot rental incurred after December, 1999, or the costs incurred for
11 preparation of the lot for occupancy. Neither are the Wentworths entitled to an offset for the cost
12 of a survey, which in actuality was incurred by them in anticipation of entering their contract, not
13 pursuant to it.

14 9. Under the equitable remedy of rescission, each couple should bear its own attorney fees and
15 costs of suit.

16 10. Chapter 58.17 RCW regulates the subdivision of real estate. It distinguishes between
17 "subdivisions," involving the division of land into five (or, at local option, up to a maximum of nine)
18 or more lots, and "short subdivisions," involving division of land into fewer lots. For the most part,
19 chapter 58.17 leaves the regulation of short subdivisions to local legislators. RCW 58.17.060.
20 Subdivisions must comply with the statute, while short subdivisions must comply with local
21 regulations. RCW 58.17.030. A purchaser of land from a seller who does not comply with such local
22 regulations may recover "damages...including any amount reasonably spent as a result of inability to
23 obtain any development permit...as well as cost of investigation, suit, and reasonable attorneys'
24 fees..." RCW 58.17.210.

25 11. If the real estate contract between the parties was a violation of the Grant County ordinances
26 adopted pursuant to chapter 58.17 RCW *at the time it was entered into*, that is, October 31, 1995,

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28 NO. 01-2-00491-0
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - Page 8

1 because it required a segregation which had not, as of that date, been applied for or accomplished,
2 then Hornbacks would be entitled to recover the statutory damages and costs, together with any other
3 recovery authorized by the Grant County ordinances. However, the parties ^{had at trial} have not provided to the
4 court, ^{evidenced that} the provisions of Grant County subdivision ordinances as they existed in October, 1995. ^{1976 continued in effect} in

5 12. A subsequent version of the Grant County Short Plats and Short Subdivisions ordinance (Ex.
6 19), exempts from its provisions:

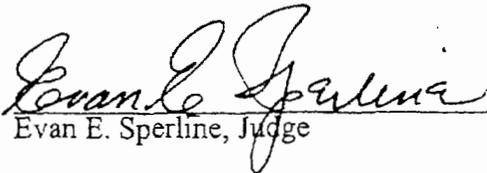
7 The division or segregation of unplatted land for an owner occupied residence pursuant to
8 Section V (B) (8) of the Grant County Zoning Ordinance; provided any subsequent division
9 of either of the two (2) parcels within a five (5) year period shall require a short plat or
major plat in conformance with the minimum lot size requirements in the applicable zoning
district, and this ordinance or the Grant County Platting and Subdivision Ordinance.

10 While "Section V (B) (8) of the Grant County Zoning Ordinance" was not admitted into evidence as
11 an exhibit, nor otherwise provided, the Court has obtained and reviewed that provision as it existed
12 in 1995. Section V (B) (8) provided as follows (under "USES PERMITTED" in "A
13 (AGRICULTURAL)" ZONES:

14 Any owner occupied residence which is located in the agricultural district may be segregated
15 in accordance with the Grant County Short Plat exemption once every five years, so long
16 as the segregation contains no less than one acre and the remainder of the original parcel
contains two acres or more.

17 13. There being no basis upon which the Court can determine that the 1995 contract violated
18 Grant County ordinances, Hornbacks have failed to prove the same; no further relief is therefore
19 appropriate beyond that set forth in Conclusion of Law No. 7 *supra*.

20 DONE IN OPEN COURT this 4th day of October, 2004.

21
22 
23 Evan E. Sperline, Judge
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