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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

Court of Appeals No. 63153-5  
Superior Court No. 08-2-0728-9

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Joel & Cherae ALMANZA

Plaintiffs/Appellees,

v.

Jay & Cindy BOWEN et al,

Defendants/Appellants.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANTS

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**ORIGINAL**

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### 1. Cases

**Alejandre v. Bull**, 123 Wn. App. 611, 616 (Div.III, 2004). **Reversed on other grounds** 159 Wn. 2d. 674 (2007) pp. 7, 8, 9.

### 2. Statutes

- a. RCW 64.06.030 pp. 4, 5, 7
- b.
- c. RCW 64.06. 070 p. 6

I.  
INTRODUCTION

Respondent's Brief is a memorandum in support of their Motion for Summary Judgment. They invoke RCW 64.06.030 to satisfy their threshold burden of demonstrating their right to relief under CR 56. Despite the fact that this law is meant to protect a buyer of real estate against undisclosed defects, Respondents make no mention of the condition of the subject property or how the purpose of the statute would be served under this fact scenario. Instead they say the statute should apply "(e)ven if it may seem unfair" (Respondent's Brief, p. 3) and that the reasons for rescission are "immaterial." This is the stance of a party seeking an "out" instead of a just and proper adjudication of law. The statute in question does not permit such a result.

The evidence shows that Respondents actually abandoned the contract to purchase a house from the Bowens because they had failed to sell their own home.

II.  
RESPONSIVE ARGUMENTS

**1. Whether the Almanzas properly exercised their right to rescind the purchase and sale agreement, entitling them to return of their earnest money deposit.**

The Almanzas contend that the statutes in question give Buyers clear and unambiguous rights to rescind. They do not address the

particular problem created by that portion of RCW 64:06.040(3) which states that the right of rescission shall apply until the earlier of,

1. three business days after the receipt of the real property transfer disclosure statement, or,
2. the date the transfer has closed.

Neither scenario occurred here. Consequently, there is no clear language in the statute from which we may derive the meaning the Almanzas rely upon to support their argument. They offer no explanation as to how a statute which so plainly creates a limited right of rescission can be interpreted to grant an unlimited right of rescission, i.e., how the shield turns into the sword.

Respondents also misspeak when they say the Bowens do not dispute whether they properly exercised their right to rescind. (Respondent's Brief, p. 3) Appellants discuss the issue more fully below.

**2 a. Whether RCW 64.06.030 must be strictly construed.**

The parties agree on the premise, but differ in its application. Moreover, the Almanzas over generalize a portion of Appellant's arguments where they state that "there is no waiver of the right to rescind for accepting part performance." This may be generally true, but it must be born in mind that the reason we strictly interpret the statute is that it drastically tilts the bargaining table in the Buyer's favor. This means that a Buyer must fully comply with all of its commands so that

the Seller is afforded any and all protection the statute provides against an unjust result.

**2 b. “RCW 64.06.030 does not extend an open-ended right for purchasers to rescind.”**

The Bowens agree with this premise as well. Far from stating “the opposite of what (RCW 64.06.070) actually states,” Appellants’ arguments comport with and assert the commands of the statute, and in particular, RCW 64.06.070, which Respondents quoted as follows:

“. . .nor shall anything in this chapter create any new right of remedy for a buyer of residential real property *other than the right of rescission exercised on the basis and within the time limits provided in this chapter.*

(Respondent’s Brief p. 5, emphasis added therein).

This clause does not expand the Buyer’s right to rescind; rather, it delineates and limits the remedy even further. Most importantly, a Buyer must demand rescission “on the basis of” RCW 64.06.030 to be entitled its relief relief. The Respondents walked out on the deal for different reasons, a fact which must be accepted as a verity here in summary judgment proceedings (CP 29) Under a strict interpretation such as the Respondent’s have urged, RCW 64.06.030 is therefore inapplicable. Whether they subsequently invoked the statute is a moot point, for it is impossible to rescind a contract that has already abandoned.

This clause provides an important protection from abuse to the Seller, prohibiting a Buyer from employing the statute as a device instead of as a substantive protection against undisclosed real estate defects. Thus, the reasons given for rescission are not “immaterial under the strictly construed language of RCW 64.06,” as it happens. Where the Buyer is required to seek rescission on the basis of the statute, s/he may not back out for other reasons and avoid the damages thus caused. This is the first and most important protect the statute gives to a Seller.

As to **Alejandre v. Bull**,<sup>1</sup> 123 Wn. App. 611, 616 (Div.III, 2004); **Reversed on other grounds** 159 Wn. 2d. 674 (2007), this case is directly applicable to this dispute. It sets forth a judicial interpretation of the statute upon which Respondents base their motion for summary judgment. The Bowens did not cite the case “in support of” the statement that “the effect of this statute is to give the buyer a three-day remedy to change his or her mind about the sale;” (Respondent’s Brief, p. 4) rather, they quoted this language *verbatim* to show our courts have carefully limited the right of rescission. Furthermore, **Alejandre** addressed and attached special significance to the language of RCW 64.06.070 which further limits the remedy by disclaiming any intent to create new rights.

In light of **Alejandre**, Respondent’s attempt to invoke the right to rescind months after abandoning the contract renders the statute inapplicable.

## **2 c. Whether Respondents complied with RCW 64.06.030**

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<sup>1</sup> Misspelled as Alejandro in Appellants’ Brief.

Nevertheless, the Almanzas assert that they “did everything under the statute” to rescind the Agreement. They also argue that the three day limitation was never commenced, and “the right never lost,” because the Form 17 was not delivered. (Respondent’s Brief, p.8)

In point of fact, the Almanzas failed to comply with the statute on many levels, the most fundamental being their failure to seek rescission on the basis of the statute. Under the strict interpretation such as the Respondents urge, they did lose the right to invoke the RCW 64.06.030 when they abandoned the deal and demanded return of earnest money because their own house didn’t sell.

That the Almanzas made a second try to recover earnest money 6 months later by invoking the statute is consequential indeed. Both the spirit and the letter of the statute require a Buyer to promptly assert his/her rights. This is another important protection the statute affords to a Seller.

**2 d. Whether the Almanzas expressly waived their right to disclosure.**

Respondents argue here that there is no construction of facts by which could have waived their right to rescind. To arrive there they must be granted favorable inferences even though they are the moving party, first by asking us to ignore the fact that they clearly expressed their decision to abandon the contract on other grounds. They also ask the Court to disregard certain important conditions in the contract calling for a walk-through after completion and performance of inspections. Likewise,

they elide the fact that the home was incomplete and being built to their specifications, all leading to the conclusion that they simply made an offer and then rescinded because they were dissatisfied with the Form 17 statement. A reasonable person could find instead that they waived the right to Form 17 because they promised not rescind except under the specific conditions in the contract.

As to whether the statute defers to such other agreements, RCW clearly states that the Buyer must rescind in writing in three days, or as otherwise agreed to. The evidence supports a finding that the parties made another agreement as to disclosure and rescission.

### III. CONCLUSION

RCW 64.06. is not a device. The language employed in the statute and **Alejandro v. Bull** tells us clearly that this law is no more than it purports to be: a protection against material non-disclosure which extends a three-day window to rescind to a Buyer who is dissatisfied with a Form 17 disclosure statement. It offers neither a “lifeline” for a Buyer to back out of a real estate deal with impunity nor a “do over” for the mistakes they make and resultant damages they may cause. The Almanzas' Motion for Summary Judgment invokes the statute in just that way.

For the reasons stated herein and in their previous briefing, the Respondent’s Motion for Summary Judgment should be denied and the case should be remanded for trial.

DATED THIS 13<sup>th</sup> day of August, 2009.

  
JOSEPH D. BOWEN, WSBA #17631