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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.

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BRIEF OF APPELLANTS

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**ORIGINAL**

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I.  
INTRODUCTION

This is a case about parties who seek to employ a carefully constructed and limited statute to break a contract with impunity.

Appellants/Defendants Jay and Cindy Bowen contracted to customize and sell an incomplete home to Appellees/Plaintiffs Joel and Cherae Almanza. After the Bowens went to great lengths to perform, the Almanzas refused to close and terminated their participation in the agreement. The Almanzas then instituted suit to recover earnest money, claiming the unqualified right rescind under RCW 64.06.030 because the Bowens deliver them a “Form 17” Seller Disclosure Statement. The evidence shows that the condition of the property had nothing to do with the Almanzas’ decision to back out of the deal. The controlling issue is thus whether a law designed as a “shield” to protect a real estate purchaser from undisclosed defects, may be used as “sword” to void a contract for reasons wholly unrelated to the condition of the subject property.

II.  
ASSIGNMENT OF ERROR

The trial court erred by entering the order of February 20th, 2009, granting Plaintiffs’ Motion for Summary Judgment.

III.  
ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- 1. Whether RCW 64.06.030 must be strictly construed as a derogation of common law.**
- 2. Whether RCW 64.06.030 extends an open-ended right to rescind to all purchasers of real estate.**
- 3. Whether Plaintiffs complied with RCW 64.06.030 and thus may invoke its relief.**
- 4. Whether the parties made other agreements regarding property disclosure, relieving Defendants of the duty to provide a Real Property Disclosure Statement.**

III.  
STATEMENT OF THE CASE

Plaintiffs Joel and Cherae Almanza agreed to purchase a home under construction from Defendants Jay and Cindy Bowen on July 14th, 2007. (CP 28;58-73) The Bowens succeeded to Kenneth and Dana Cuthbert's interest in the property after suit was filed. (CP 95) In reliance upon the agreement, Defendants expended considerable time and effort making alterations to the building, changing the floor plan, redesigning a bathroom, reducing the height of a wall, moving a closet location, and paving a driveway and parking area. (CP 70; 96).

Defendants did not provide a disclosure statement as required by and set forth in RCW 46.64.015, often referred to as a "Form 17." The parties instead agreed to a full inspection at Paragraph 14 of the subject contract. (CP 58; 96) The terms and conditions of the inspection are set forth in a standard realtor's document known as "Form 35." (CP 56; 76-

77) The parties also agreed “to do a final walk-through inspection of property within 5 days of closing.” (CP 70) Plaintiffs partially inspected various aspects of the parcel itself, accepted them “as is” and waived the right to rescind on these bases. (CP 64-68).

On August 23rd, 2007, Plaintiffs agent, Ryan LaComb, delivered a message to Jan Ellingson, Defendants’ agent. LaComb stated that Plaintiffs were backing out of the deal due to:

**“(t)heir home not selling even though they could have more time, lack of good communication from the seller/builder on budget info, etc. . .and they are going to look at other options at this time.”**

(CP 79) Plaintiffs asserted further justifications that “the contract does not have a closing date,” and “we are missing an initial on one addendum.” (CP 79) They did not cite the absence of a Form 17 disclosure statement (CP 56; CP 95)

Defendants refused to assent and demanded the earnest money. (CP 96). Plaintiffs then brought this suit, at which time they finally raised Defendants’ failure to comply with RCW 64.06.015 and/or .020, and requested rescission pursuant to RCW 64.06.030. (CP 2)

#### IV. SUMMARY OF ARGUMENT

Plaintiffs wrongly invoke RCW 64.06.030 as their basis for summary judgment. The remedy they seek is unavailable under proper construction of the statute. Consequently, they cannot meet their initial

CR 56 threshold burden of proving they are entitled to judgment as a matter of law. Assuming *arguendo* that the statute is operable, the evidence raises material fact issues requiring trial.

V.  
ARGUMENT

**1. Whether RCW 64.06.030 is in derogation of common law and as such must be strictly construed.**

A summary judgment motion is reviewed by an appellate court *de novo* with the Court undertaking in the same inquiry as the trial court under CR 56(c), viewing the facts of the case and the reasonable inferences from those facts in the light most favorable to the nonmoving party. **Sherman v. State**, 128 Wn.2d 164,183, 905 P.2d 355 (1995). The meaning of a statute is a question of law, but the question of whether an activity falls within a statutory definition is an issue of fact. **Clam Shacks of America, Inc. v. Skagit Co.** 45 Wn. App 346, 725 P.2d 459 (Div.I, 1986).

A statute in derogation of the common law must be strictly construed. **Lumberman’s Inc. v. Barnhardt**, 89 Wn.App 283, 949 P.2d 382 (Div.II, 1997). This is so even where a statute’s language instructs that it is to be “liberally construed.” **Id.** The rule of strict construction requires that we choose a “narrow, restrictive construction” over a “broader, liberal interpretation.” **State ex rel McDonald v. Whatcom County District Court** 19 Wn. App 429; (Div.I, 1978).

Under common law, rescission is only granted when “there is a mutual consent to rescind the contract,” or “a demand to rescind by one side with acquiescence by the other, a material breach by one party with a claim of rescission by the other.” **Woodruff v. McClellan** 95 Wn.2d 394 (1980) “Rescission is to be enforced in equity, and must, under all the circumstances of the particular case, be a just and equitable remedy.” **Burton v. Dunn** 55 Wn.2d 368, 372. (1960). Where one party accepts the other’s performance without asserting a breach as a ground for rescission of the contract until action is instituted, that party has waived of the right of rescission. **Longnecker v. Brommer** 59 Wn.2d 552,558 (1962). Rescission further contemplates the restoring of both parties to the positions they occupied had no contract been made. **Willener v. Sweeting**, 107 Wn.2d 388 (1986) The party claiming nonperformance of the other must establish as a matter of fact the party's own performance. **Id.**

An illusory promise is one that is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely discretionary on the part of the promisor. **King County v. Taxpayers of King County**, 133 Wn.2d 584, 600, 949 P.2d 1260 (1997). Generally an agreement that reserves the right for one party to cancel at his or her pleasure will not be recognized as a contract. **Mithen v. Board of Trustees of Central Wash. State College**, 23 Wn. App. 925, 932, 599 P.2d 8 (1979).

By comparison, RCW 64.06.030 extends to a Buyer a far more flexible right to rescind, qualified only as follows:

**“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. Within three business days, or as otherwise agreed to, of receipt of the real property transfer disclosure statement, the buyer shall have the right to exercise one of the following two options: (1) Approving and accepting the real property transfer disclosure statement; or (2) rescinding the agreement for the purchase and sale of the property, which decision may be made by the buyer in the buyer's sole discretion. If the buyer elects to rescind the agreement, the buyer must deliver written notice of rescission to the seller within the three-business-day period, or as otherwise agreed to, and upon delivery of the written rescission notice the buyer shall be entitled to immediate return of all deposits and other considerations less any agreed disbursements paid to the seller, or to the seller's agent or an escrow agent for the seller's account, and the agreement for purchase and sale shall be void. If the buyer does not deliver a written rescission notice to [the] seller within the three-business-day**

**period, or as otherwise agreed to, the real property transfer disclosure statement will be deemed approved and accepted by the buyer.”**

These are far different remedies. Where **Woodruff** sets forth a rather rigorous – and bilateral– application for rescission, RCW 64.06.030 grants buyer sole discretion to rescind. Where under common law a Buyer may have effectively waived his/her right to rescind by accepting part performance, no such relief is afforded to Sellers in the language of this law. Likewise, where a Seller would be entitled to an award returning them to their pre-contract position under the common law, the statute only affords such relief to Buyers. Buyers needn’t prove their own performance to invoke rescission under the statute, exactly opposite of what the case law requires. In sum, RCW 64.06.030 affords a Buyer the right to make and enforce an illusory promise, as defined above. In all of these respects the statute quite plainly derogates common-law, and therefore must be strictly construed.

**2. Whether RCW 64.06.030 extends an open-ended right to rescind to all purchasers of real estate.**

Washington courts construe a given statute so as to render it “purposeful and effective.” **Steele v. State ex rel Gorton** 85 Wn. 2d 585, 537 P. 2d 782 (1975). Conversely, statutes must not be construed in a manner that renders any portion thereof “meaningless or superfluous.” **Stone v. Chelan County Sheriff's Dep't**, 110 Wn.2d 806,

756 P.2d 736 (1988). Furthermore, courts may not “read into a statute matters which are not there,” or “modify a statute by construction.” **King Co. v. City of Seattle**, 70 Wn. 2d 988 (1967). A proper interpretation will “advance the purpose of the statute.” Accordingly, a statutory provision should be interpreted to avoid “strained or absurd” consequences that could result from a literal reading. **State v. The (1972) Dan J. Evans Campaign Committee**, 86 Wn.2d 503, 508, 546 P.2d 75 (1976). Likewise, “the spirit or the purpose of legislation should prevail over the express but inept language . . .”. **Alderwood Water Distr. v. Pope & Talbot, Inc.** 62 Wn.2d 319, 321, 382 P.2d 639 (1963).

Our courts have therefore ruled that “the effect of this statute is to give the buyer a three-day option to change his or her mind about the sale.” **Alejandro v. Bull**, 123 Wn. App. 611, 616 (Div.III, 2004). **Reversed on other grounds** 159 Wn. 2d. 674 (2007). Moreover, “and most significantly” the statute limits itself by stating that “nothing in this chapter extinguishes or impairs any rights or remedies of a buyer of real estate against the seller” and it further provides that “nothing in the chapter creates a new right or remedy for the buyer of residential real property.” **Id.**, citing **RCW 64.06.070**.

The operative question is thus whether Plaintiffs invoked the right of rescission within the time prescribed in RCW 64.06.030. If not, the particular language setting forth a three day limit is meaningless and ineffective. The unlimited and very new remedy pursued by Plaintiffs

requires this Court to read language into the RCW 64.06 which the statute does not contain. Specifically, they must ask us to insert the following: where the Seller has failed to provide a disclosure statement for any reason, Buyer may rescind at any time thereafter, Seller's demonstrable reliance upon the real estate purchase and sale agreement and Buyer's acceptance of performance notwithstanding. This construction would impermissibly modify RCW 64.06.030 by construction, fashioning a sword with which to escape a bargain out of the shield which was meant to protect the public against undisclosed defects in real estate sales. It affords a Buyer of real estate to enjoy the unfair advantage of extending an illusory promise indefinitely.

This Court showed in **Alejandro v. Bull** that the statute was not intended for such use and was only meant for a more limited, reasonable use. This reading serves both the spirit and the purpose of the statute, affording the Plaintiffs the protection intended by our Legislature while sparing Defendants from waste of the considerable effort and money they expended customizing the home to Defendants' tastes. It also prevents the "absurd consequence" of permitting Plaintiffs to back out of the contract for Defendants' lack of disclosure when the evidence plainly shows this had nothing to do with their decisions to quit the deal.

**3. Whether Plaintiffs complied with RCW 64.06.030 and may thus invoke its relief.**

A party seeking relief from a statute which is in derogation of common law must completely fulfill its requirements. **Lumberman's Inc. v. Barnhardt**, 89 Wn.App 283, 949 P. 2d 382 (Div.II, 1997). To invoke the remedy of rescission provided by RCW 64.06.030, the buyer must deliver written notice of intent to rescind to the seller within three days after receipt of the disclosure statement. Failing that, the disclosure statement is deemed accepted by the buyer.

The record demonstrates that Plaintiffs failed to make demand for rescission for some 6 weeks following contract execution, through a message transmitted by their realtor. They invoked RCW 64.06.030 even later in the day. Plaintiffs' rescission notice takes no exception to defects or Defendants' failure to provide a Form 17. They could have rescinded at the expiration of the 5 day window afforded to Defendants to make disclosure, but did not. The record thus demonstrates that RCW 64.06.030 is inoperable here and that the remedy it offers is unavailable. Plaintiffs therefore fail to meet their initial threshold under CR 56 and their motion must fail.

**4. Whether the parties made other agreements regarding property disclosure, relieving Defendants of the duty to provide a Real Property Disclosure Statement.**

These facts raise a sensible question: why did the Plaintiffs permit the disclosure statement deadline to pass without mention? The answer also resides in the undisputed record. As construction was incomplete,

the parties intended to perform a “walk-through” at a later date. There was no reason to make disclosure on a dwelling which did not exist. The parties also agreed to a standard inspection contingency in their contract.

Contrary to the premise of this suit, the mere fact that the Bowens did not tender Form 17 does not give the Almanzas the right to rescind *per se*. A buyer of residential real property may waive the right to receive the statutorily mandated disclosures by effect of the parties’ other contractual writings. See Alejandro v. Bull, supra, at 123 Wn. App. 616. Waiver is a factual issue that depends on all the circumstances of a given case for resolution. **Ferguson v. Jeanes** 27 Wn. App. 558, 561, 619 P.2d 369 (Div.I, 1980). The intention of a party in making a promise is also a fact question. **Berg v. Hudesman** 115 Wn. 2<sup>nd</sup> 657, 801 P.2d 222 (1990). Extrinsic evidence of the circumstances surrounding the formation of a contract is admissible to ascertain the intent of the contracting parties regardless of whether or not the meaning of the contract language is plain and unambiguous on its face. **Berg v. Hudesman**, supra.

In discerning the parties' intent, extrinsic evidence as to the entire circumstances is admissible, e.g., the “subsequent conduct of the contracting parties may be of aid;” and, “the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract.” **Id. adopting the Restatement (Second) of Contracts** 212, 214(c) (1981). Defendants are entitled to all reasonable inferences

and favorable constructions to be had from the evidence at this stage of proceedings. **Amant v. Pacific Power & Light Co.** 101 Wn. 785, (Div. III, 1975).

Applying these principles to the case at hand, it is reasonable to conclude that Plaintiffs promised not to seek rescission or other remedy for defects until Defendants completed construction. The contract plainly shows that Plaintiffs intended to afford Defendants the fair opportunity to address and remedy any defects uncovered in a final inspection. It is difficult to see why the Bowens would have performed such strenuous work customizing the home without this contractual understanding. It is even less likely that they would have removed the home from the market under the circumstances. Considered in proper context then, the facts raise these issues for trial;

(1) whether the Plaintiffs waived their right to receive the Form 17 statutory disclosure statement and rescind the agreement on that basis; and/or

(2) whether the parties had “otherwise agreed” to defer disclosure as contemplated by RCW 64.06.030.

These issues are inherently factual. A reasonable fact-finder could reach either or both determinations with this evidence, relieving the Bowens of the duty to provide the Almanzas Form 17. As Defendants are entitled to the benefit of all reasonable inferences at this stage of

proceedings, we should conclude that they did so. RCW 64.06.030 is therefore inapplicable and summary judgment should be denied.

VI.  
CONCLUSION

The Plaintiffs are seeking an “out” rather than fair and just relief. The condition of the Bowens’ house had nothing to do with the Almanzas’ demand for rescission. Plaintiffs caused substantial damage to Defendants, yet boldly invoked RCW 64.06.030 to retrieve their earnest money. It would be unjust to apply the statute so broadly as to abrogate Defendants’ right to recover under these circumstances, and unreasonable to conclude the Legislature intended such a result. The record demonstrates that while Plaintiffs failed to give notice in a timely manner, they did receive sufficient protection against non-disclosure of defects as the law commands. The evidence raises material issues of fact even if the statute were applicable. The Order of Summary Judgment should therefore be vacated and the matter remanded for trial.

Dated this 12<sup>th</sup> day of June, 2009

  
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