

No. 45589-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LUIS FLORES, a married man as his separate capacity,

Appellant,

vs.

BRADLEY C. HOGGATT and CONNIE J. HOGGATT, husband and
wife, and their marital community,

Appellees.

APPELLANT'S REPLY BRIEF

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**A. ADDITIONAL STATEMENT OF CASE IN REPLY
TO RESPONDENTS' BRIEF**

In his counterclaim, the Appellant alleged statutory rescission, not equitable rescission. The Respondents were aware that they sold an illegal lot to the Appellant in 2004. Cowlitz County CP 71; P3, Lines 13-16. However, the Appellant did not become aware that he was sold an illegal lot until May of 2007. Cowlitz County CP 83, P1, Lines 17-20; P5, Lines 4-7. Just over a year later, on June 23, 2008, the Appellant filed his counterclaim giving the Respondents notice of his claim for statutory rescission. Cowlitz County CP 6; P2, Lines 1-9.

The real estate transaction in this case closed in 2004. Cowlitz County CP 83, P1, Lines 2-23. Upon closing, Respondents were paid everything due to them under the purchase and sale agreement. There were no further contractual obligations to be fulfilled by either party. At no time did the Appellant take any actions that would prejudice the Respondents or that would lead them to believe that he would not be claiming rescission.

In the Respondents' brief, it is stated that the Appellant took out a second mortgage in the amount of \$20,000. The correct amount is \$20,482.23. The Respondents fail to disclose to this

court that the second mortgage was taken out in 2005, prior to the Appellant's knowledge of being sold an illegal lot in May of 2007. Clark County CP 17; Exhibit "B", P.2-3, Lines 1-25.

Because of the inability to get this case tried, due to court congestion in Cowlitz County, delay has occurred. However, the delay should not be attributed to the Appellant. Respondents state in their brief that the Cowlitz County Superior Court ruled that the Appellant was not entitled to rescission. That is inaccurate. The court failed to rule on the Appellant's entitlement to rescission due to material factual issues. Cowlitz County CP 149.

B. ARGUMENT

The Respondents make various claims focusing mainly on delay. The Appellant's reply to Respondents' claims follows herein below:

1. The Appellant Is Entitled To Rescission As A Matter Of Law.

The plain language of RCW 58.17.210 gives the right of rescission to an innocent purchaser upon being sold property in violation of the platting laws. The Respondents have admitted that they violated the platting laws. There is nothing in RCW 58.17.210 that would excuse the Respondents' illegal conduct after the fact by correcting the illegal lot. The act of selling the illegal lot triggered the right to rescission.

The Respondents have claimed unclean hands on the part of the Appellant without giving any supportive facts. However, the Respondents agree that the Appellant is an innocent purchaser, the group of purchasers that RCW 58.17.210 was intended to protect. *Sienkiewicz v. Smith*, 97 Wash.2d 711, 649 P.2d 112 (1982).

2. RCW 58.17.210 On Its Face, And As Interpreted By The Courts, Gives An Innocent Purchaser The Right To Rescission.

This is addressed in the Appellant's opening brief, pages 4-12.

3. RCW 58.17.210 Does Not Require A Showing Of Harm To The Innocent Purchaser As A Requisite For Rescission.

There is nothing in RCW 58.17.210, or the case law that interprets the statute, that requires an innocent purchaser to show harm as a requisite to claiming rescission. Instead, the statute gives the innocent purchaser a choice of claiming either damages or rescission. The choice is likely given because there are cases where damages are hard to prove or quantify. Therefore, the innocent purchaser is given a choice.

4. The Respondents' Correction Of The Illegal Lot, After The Fact, Does Not Eliminate An Innocent Purchaser's Right To Rescission Pursuant To RCW 58.17.210.

This is addressed in Appellant's opening brief page's 5-7.

5. The Appellant Claims Statutory Rescission Pursuant To RCW 58.17.210, Not Equitable Rescission.

This is not a case where the Appellant is required to prove an equitable basis for rescission. The elements required to be proved to entitle a purchaser to rescission under RCW 58.17.210 are:

1. innocent purchaser for value; and
2. violation of the platting laws.

Those facts have been admitted by the Respondents. The Appellant is not required to prove fraud, misrepresentation, or any other basis that might give rise to equitable rescission.

The court in *Busch v. Nervik*, 38 Wash. App. 541, 687 P2d 872 (1984) stated that the trial court could properly utilize equitable rescission principles in fashioning relief in a rescission claim under RCW 58.17.210. However, the *Busch* decision did not hold that a trial court could eliminate an innocent purchaser's right to statutory rescission pursuant to RCW 58.17.210. The right to rescission is a result of a legislative enactment. Therefore, the courts should not be

free to take the right of rescission away from an innocent purchaser.

6. The Appellant's Claim For Rescission Was Prompt. Further, The Respondents' Were Paid All Benefits Owed To Them Under The Purchase And Sale Agreement At Closing In 2004.

The Appellant made a claim for rescission in his counterclaim approximately thirteen months after he had knowledge that he was sold an illegal lot. The Appellant did not become aware that he had been sold an illegal lot until May of 2007.

Wilson v. Pierce, 57 Wash.2d, 44, 355 P 2d, 154 (1960) is not applicable to the present case. That case addresses a claim for equitable rescission based upon a claim of mistake or fraud.

In the present case the Appellant's basis for rescission is RCW 58.17.210, statutory rescission. After closing in 2004, there was no further performance due by the Appellant to the Respondents. The Respondents received full payment for the property when it closed in 2004.

The court in *McLain v. Kent School District, No. 415*, 178 Wash.App. 366, 314 P.3d 435, (2013) restated the equitable doctrine of waiver as follows:

Waiver is an equitable doctrine that can defeat a legal right where the facts show that the party relinquished a known right, or conduct shows the party relinquished known rights. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wash.2d 94, 106, 297 P.3d 677 (2013)

Most rights can be waived by contract or conduct. *Bowman v. Webster*, 44 Wash.2d 667, 669, 269 P.2d 960 (1954). “The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled. A waiver is the intentional and voluntary relinquishment of a know right, or such conduct as warrants an inference of the relinquishment of such right. [*Bowman*, 44 Wash.2d at 669, 269 P2d 960]

Schroeder, 177 Wash.2d at 106, 297 P.3d 677; see also *Jones v. Best*, 134 Wash.2d 232, 241, 950 P.2d 1 (1998) (waiver may be inferred from circumstances indicating intent to waive). To establish implied waiver, unequivocal acts or conduct must show an intent to waive; waiver is not to be inferred “from doubtful or ambiguous factors.” *Jones*, 134 Wash.2d at 241, 950 P.2d 1. The party claiming waiver has the burden to prove intent to relinquish a known right. *Jones*, 134 Wash.2d at 241-42, 950 P.2d 1

In the present case, there are no facts that would support waiver. Specifically, there is no evidence to show that the Appellant intentionally and voluntarily relinquished his right to rescission pursuant to RCW 58.71.210. Instead, the Appellant promptly asserted his right to rescission in his counterclaim filed in June of 2008. The Appellant remained prepared to try his rescission claim at each of the trial settings from July of 2009

through November of 2013. Due to court congestion, and the Summary Judgment ruling, the Appellant has not been afforded his opportunity to have his rescission claim determined by the court.

7. Correcting An Illegal Lot After The Fact Does Not Prevent Rescission Under RCW 58.71.210

There is no language stated in RCW 58.71.210 that would eliminate an innocent purchaser's right to rescission by correcting an illegal lot, after the fact, as required by the said statute.

The Appellant took out a second mortgage in 2005, prior to learning that he had been sold an illegal lot. The Respondents claim that the Appellant benefited from the property by taking out a second mortgage. However, the Respondents fail to mention to the court that the second mortgage was taken out in 2005, two years before the Appellant learned he had been sold an illegal lot. Therefore, the second mortgage cannot be claimed as a benefit to the Appellant for the purpose of claiming waiver.

8. There is no evidence to support a claim of unclean hands.

There is no evidence in the record to support a claim that the Appellant acted with unclean hands. The failure to assist the Respondents' in correcting the illegal lot is consistent with the Appellant's claim to rescind the transaction pursuant to RCW 58.17.210.

The clean hands doctrine is a defense to equitable rescission and other equitable remedies. In this case, the Appellant claims statutory rescission rather than equitable rescission. Therefore, the doctrine of unclean hands is not applicable.

C. CONCLUSION

The trial court erred in granting summary judgment. The Appellant requests this court to reverse the trial court and remand this case for trial on the issue of statutory rescission pursuant to RCW 58.17.210.

Respectfully Submitted this 10 of June, 2014.



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Transmittal Letter

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