

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

PAUL SIMMONS,

Plaintiff,

v.

WINDERMERE REAL ESTATE/
NORTHWEST, INC., et al.,

Defendants.

NO. 10-2-30838-5 SEA

DEFENDANTS' MOTION
REGARDING PRETRIAL MATTERS

I. INTRODUCTION

This is a securities act case set for trial in June 2012. The parties are mediating the case on February 28, 2012 and have opposing views on a number of matters relating to the scope of the trial. Determination of those matters before mediation would greatly increase the likelihood of settlement.

II. RELIEF REQUESTED

Defendants request that the Court grant an order *in limine* excluding certain proposed witnesses and areas of testimony and requiring plaintiff to make an election of remedies before trial commences.

III. FACTUAL BACKGROUND

Defendant Howard Johnson is a long-time friend and real estate broker of plaintiff Paul Simmons. Johnson has represented Simmons in several real estate investments over many years.

1 In 2007, Johnson introduced Simmons to a number of national companies selling tenancy in
2 common (“TIC”) interests in larger projects, and Simmons ultimately purchased two such
3 interests. Johnson was compensated by the sellers as a real estate broker. Like many real estate
4 investments made in 2007, the TICs purchased by Simmons have not done well.

5 In this action, Simmons is suing Johnson and his brokerage, Windermere Real
6 Estate/Northwest, Inc., alleging violations of the Washington State Securities Act, a number of
7 other common law claims, and violation of the Consumer Protection Act.

8 **IV. ISSUE PRESENTED**

- 9 1. Should the Court exclude expert testimony on the issue of whether the TICs were
10 securities under the Securities Act and whether the defendants violated the Act?
11 2. Should the Court exclude witnesses from the Department of Financial Institutions
12 who have no personal knowledge of the relevant facts?
13 3. Should the Court require plaintiff to elect between rescission and damages?

14 **V. EVIDENCE RELIED UPON**

- 15 1. Declaration of Matthew F. Davis and attachments thereto;
16 2. Files and records in this action.

17 **VI. LEGAL AUTHORITY**

18 **A. The Court Should Exclude Expert Testimony Interpreting the Securities Act.**

19 In his Disclosure of Possible Additional Witnesses, Simmons identified Mark McCloskey
20 as an expert witness to testify “as to whether the TIC investments at issue are securities under
21 Washington law and/or whether any or all Defendants violated such laws.” Exhibit 1 to Davis
22 Declaration. It would be hard to more clearly designate an expert witness’s testimony as
23 inadmissible.

24 Whether the TIC investments were securities is a matter of interpretation of the statutory
25 definition. RCW 21.20.005(17(a) defines securities as:

26 any note; stock; treasury stock; bond; debenture; evidence of indebtedness;
certificate of interest or participation in any profit-sharing agreement; collateral-

1 trust certificate; preorganization certificate or subscription; transferable share;
2 investment contract; investment of money or other consideration in the risk
3 capital of a venture with the expectation of some valuable benefit to the investor
4 where the investor does not receive the right to exercise practical and actual
5 control over the managerial decisions of the venture; voting-trust certificate;
6 certificate of deposit for a security; fractional undivided interest in an oil, gas, or
7 mineral lease or in payments out of production under a lease, right, or royalty;
8 charitable gift annuity; any put, call, straddle, option, or privilege on any security,
9 certificate of deposit, or group or index of securities, including any interest therein
10 or based on the value thereof; or any put, call, straddle, option, or privilege
11 entered into on a national securities exchange relating to foreign currency; or, in
12 general, any interest or instrument commonly known as a "security," or any
13 certificate of interest or participation in, temporary or interim certificate for,
14 receipt for, guarantee of, or warrant or right to subscribe to or purchase, any
15 security under this subsection. This subsection applies whether or not the security
16 is evidenced by a written document.

17 Statutory definitions present a question of interpretation for the Court, not a subject for expert
18 testimony. *E.g. Brin v. Stutzman*, 89 Wn.App. 809, 833, 951 P.2d 291, 304 (1998) (definition of
19 "investment advisor" in Securities Act is question of law); *State v. Walls*, 106 Wn.App. 792, 794,
20 25 P.3d 1052, 1054 (2001).

21 It is black letter law that expert testimony is not admissible on questions of law, including
22 statutory definitions.

23 Finally, Blue Cross argues that even if this court finds that the statute
24 encompasses partial mastectomies and applies to the consequences,
25 complications, and aftereffects of cosmetic surgeries, there are genuine issues of
26 material fact in this case that preclude summary judgment. In support of this
argument, Blue Cross relies on the statements of their medical expert, Dr.
Grauman, that mastectomies must involve the intent to remove all breast tissue
and that anything less would be considered a lumpectomy or tylectomy. However,
Dr. Grauman's expert opinion is not authoritative on the legal definition of
mastectomy as used in RCW 48.44.330. See *Cowiche Canyon Conservancy v.*
Bosley, 118 Wash.2d 801, 814, 828 P.2d 549 (1992) (stating that the meaning of a
statute's term is a question of law and is therefore not amenable to resolution
based on trial testimony). As previously discussed, we find as a matter of law that
"mastectomy" as used in RCW 48.44.330 includes a partial mastectomy that
leaves the breast deformed to a degree that a licensed physician deems that
reconstruction is medically necessary for the patient's complete recovery.

27 *Carr v. Blue Cross of Washington & Alaska*, 93 Wn.App. 941, 953-954, 971 P.2d 102, 108-09
28 (1999).

29 We view Mr. Beckman's testimony as giving improper legal conclusions. Under
30 ER 704, a witness may testify as to matters of law, but may not give legal
conclusions. See *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wash.App. 893, 899, 700
P.2d 1164 (1985); *Everett v. Diamond*, 30 Wash.App. 787, 791-92, 638 P.2d 605

1 (1981). Improper legal conclusions include testimony that a particular law applies
2 to the case, or testimony that the defendant's conduct violated a particular law.
3 *Hyatt*, 40 Wash.App. at 899, 700 P.2d 1164. Furthermore, [e]xperts may not offer
4 opinions of law in the guise of expert testimony. *Stenger v. State*, 104 Wash.App.
5 393, 407, 16 P.3d 655, *review denied*, 144 Wash.2d 1006, 29 P.3d 719 (2001).

6 *State v. Olmedo*, 112 Wn.App. 525, 532, 49 P.3d 960, 963 - 964 (2002).

7 Permitting McCloskey's proposed testimony that the TIC investments at issue were
8 "securities under Washington law" and that defendants "violated such laws" would be reversible
9 error and intrude on both the court's role with respect to questions of law and the fact finder's
10 role with regard to the facts. The Court should exclude such testimony.

11 **B. The Court Should Exclude Witnesses from the Department of Financial Institutions.**

12 In the Disclosure of Possible Additional Witnesses, Simmons identifies numerous
13 officials and employees from the Department of Financial Institutions ("DFI"), all of whom
14 "may testify regarding Washington state securities regulations, statutes, laws and related
15 administrative code sections and how these all relate to the TIC investments at issue and/or one
16 or more Defendants' conduct in connection therewith." Exhibit 1 to Davis Declaration. In
17 effect, Simmons would make DFI the judge and jury for securities violations.

18 For context, the Court should be aware that DFI has had no involvement of any kind with
19 either the TIC investments at issue in this case or with Simmons' complaint. None of the DFI
20 witnesses have any testimonial knowledge regarding the facts of this case. Simmons wants to
21 call them for their ad hoc interpretation of the statute. Just as he would have his expert witness
22 replace the Court's role as the interpreter of the statute, he would ask that the executive branch
23 agency charged with enforcing the statute be permitted to give unofficial interpretations.

24 It is true, of course, that DFI is the agency charged with interpreting and carrying out the
25 Securities Act. RCW 21.20.450. However, agencies can only interpret statutes by rulemaking in
26 interpretive statements in conformance with the Administrative Procedure Act, RCE Chapter
27 34.05. Specifically, rules must be adopted in compliance with RCW 34.05.328, and interpretive
28 statements in compliance with RCW 34.05.230. It should come as no surprise that agencies may
29 not have secret internal interpretations of statutes, but instead must make them publicly

1 available. RCW 34.05.230. Simmons has identified no rules or interpretive statements about
2 TIC investments.

3 DFI necessarily makes ad hoc interpretations of the Securities Act in its enforcement role
4 when it investigates a complaint and decides whether to take action under RCW 21.20.110 and
5 21.20.120. But DFI does not adjudicate complaints. Instead, charges by DFI are subject to a
6 hearing before an administrative law judge. The decision in such a hearing is subject to judicial
7 review. RCW 21.20.395(4); RCW 34.05.542(2). In other words, DFI investigates complaints
8 and makes charges as part of the executive branch of the government, but administrative law
9 judges and the courts decide those complaints as part of the judicial branch.

10 Simmons' attempt to have DFI representatives testify about what the statute means
11 (statutory interpretation) or whether defendants violated the law (a judge or jury question) is
12 wholly improper. Those witnesses should be excluded from trial unless they have relevant
13 factual knowledge.

14 **C. The Court Should Require an Election of Remedies.**

15 In this lawsuit, Simmons simultaneously seeks rescission and damages. While he
16 certainly is free to plead inconsistent causes of action (CR 8)(e)(2)), he is not entitled to seek
17 double redress for a single wrong. *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112, 942
18 P.2d 968, 971 (1997); *CHD, Inc. v. Boyles*, 138 Wn.App. 131, 140, 157 P.3d 415, 419 (2007).

19 It has long been the law that affirmance of a contract and an action for damages is
20 repugnant to an action for rescission. *Melby v. Hawkins Pontiac, Inc.*, 13 Wn.App. 745, 749,
21 537 P.2d 807, 810 (1975).

22 Mr. Wilkinson's argument for lost profits and mental distress under the rescinded
23 contract cannot be supported. The concept of election of remedies has as its sole
24 purpose the prevention of double redress for a single wrong. *Lange v. Woodway*,
25 79 Wash.2d 45, 49, 483 P.2d 116 (1971). The doctrine provides that if two or
26 more remedies exist which are inconsistent with one another, a party will be
limited to the one chosen. *Melby v. Hawkins Pontiac, Inc.*, 13 Wash.App. 745,
749, 537 P.2d 807 (1975). "Affirmance of the contract and a demand for damages
has been held inconsistent with a disaffirmance of the contract and a prayer for
rescission." *Melby, supra* at 749, 537 P.2d 807.

1 *Wilkinson v. Smith*, 31 Wn.App. 1, 13, 639 P.2d 768, 774 - 775 (1982).

2 In the specific context of the Securities Act, a court of Appeals decision holds that the
3 Act does not preempt other remedies, but that decision was made in the context of claims pled in
4 the alternative.

5 Plaintiff brought this action to recover damages arising from her purchase of
6 securities from the defendants. Her complaint contains three causes of action
7 based upon (1) a violation of the Washington Securities Act, RCW 21.20; (2) a
8 violation of the Consumer Protection Act, RCW 19.86; and as an alternative to
the foregoing causes of action (3) a claim against defendant Kirkingburg alleging
that by fraud and misrepresentation he had breached his fiduciary duty to her and
that he was a constructive trustee of her moneys.

9 *Kittilson v. Ford*, 23 Wn.App. 402, 404, 595 P.2d 944, 946 (1979). The Securities Act claim was
10 barred by the statute of limitations, and the trial court held that the plaintiff was barred from
11 pursuing her alternative claims for damages. The Court of Appeals disagreed:

12 The adoption by the trial court of the defendant's position is inconsistent with the
13 liberal construction given the Act by the courts and does not square with the
14 underlying protective purpose of that Act. Moreover, plaintiff's civil remedy for
15 fraud under the Act is different, and, in some ways, more restrictive than her
16 potential choice of remedies at common law. RCW 21.20.430 provides only for
17 rescission of the transaction and the award of interest; or, if the purchaser no
18 longer has the security, he may recover damages in the amount of the purchase
19 price less its value on the date of the disposition, plus interest. The Act does not
allow the purchaser to keep the security and recover damages as he may do in a
common law action for fraud or misrepresentation. *McInnis & Co. v. Western
Tractor & Equipment Co.*, 67 Wash.2d 965, 967, 410 P.2d 908 (1966). *Sigman v.
Stevens-Norton, Inc.*, 70 Wash.2d 915, 921, 425 P.2d 891 (1967). On the other
hand, the court may award *408 attorney fees under the Act; whereas, attorney
fees generally would not be allowed in an action based upon common law fraud
or misrepresentation.

20 In view of the difference between the statutory remedy and the common law
21 remedy, there is no reason why the two causes of action cannot co-exist. See
22 *Detwiler v. Glavin*, 377 Mich. 1, 138 N.W.2d 336, 339 (1965). Indeed, it would
23 be incongruent with the protective purpose and remedial nature of the Securities
24 Act to hold that the Act restricted a defrauded plaintiff to the remedy contained
25 therein. We think that the legislature intended to provide additional remedies to a
26 plaintiff, not to eliminate existing remedies compatible with the Act. Those other
remedies continue to be governed by their own statutes of limitation.
Consequently, we hold that the trial court erred in applying the limitation
provisions of the Securities Act as a bar to the plaintiff's second and third causes
of action.

1 *Id.* at 946-47 (footnotes omitted). Simmons likewise could pursue his damage claims as an
2 alternative to rescission under the statute, but he cannot pursue both at the same time because to
3 do so would be seeking a double recovery. The Court should require Simmons to make an
4 election of remedies at or before trial.

5 It bears mentioning that an election of remedies would not preclude Simmons from
6 presenting the legal theories of negligence or negligent misrepresentation. The Securities Act
7 has no scienter element, and one can violate the statute negligently or intentionally. *Aspelund v.*
8 *Olerich*, 56 Wn.App. 477, 482, 784 P.2d 179, 182 (1990) (“Scienter is not required in an action
9 for fraud or misrepresentation under The Securities Act of Washington.”); *Kittilson v. Ford*, 93
10 Wn.2d 223, 608 P.2d 264 (1980).

11 **VII. PROPOSED ORDER**

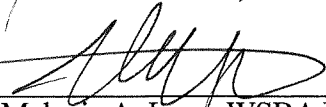
12 A proposed order is attached hereto.

13 **VIII. CONCLUSION**

14 Simmons’ claim must be based on the relevant facts that occurred between the parties and
15 the law as determined by the Court. Simmons has two different ways to pursue his claim, but
16 cannot use both simultaneously. The Court should exclude improper witnesses and limit
17 Simmons to a single form of relief at trial.

18 DATED this 13th day of February, 2012.

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