

No. 44719-3-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO

EDWIN D. COE and DONNA B. COE, Husband and Wife,

Plaintiffs-Respondents,

v.

REID NOEL as Guardian ad Litem for ROBERT M. NOEL, and NANCY
E. NOEL, Husband and Wife, and their marital community, and ERIC
NOEL as Successor Trustee for ROBERT M. NOEL and NANCY E.
NOEL, as Trustees of the Robert M. & Nancy E. Noel Family Trust,

Defendants-Appellants.

APPEAL FROM WAHAKIYAKUM COUNTY SUPERIOR COURT
(Hon. Michael J. Sullivan)

APPELLANTS' OPENING BRIEF

Richard L. Grant, WSBA #14791
Richard L. Grant, P.C.
1205 N.W. 25th Avenue
Portland, OR 97210
Telephone: (503) 222-7343
Attorney for Defendants-Appellants

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I. INTRODUCTION

This is a case where buyers of residential riverfront real estate, after having bargained for optional expert inspections, relied on their own expertise, and discovered after closing that the property had prior erosion issues. The buyers, although represented by their own agent, subsequently sued the 85-year-old former owners for fraud, misrepresentation, and rescission.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error

1. The trial court erred by failing to strike Donna Coe's Affidavit [Affidavit - CR.123] [Motion to Strike - CR.149] and by failing to sustain the Noels' specific Objections to it [Memo in Opposition - CR.142, p.2-5].
2. The trial court erred by entering a finding that "[T]he sellers elected not to disclose the erosion or resulting devaluation of the Form 17 statutory disclosures or in their conversations with the purchasers. . ."
3. The trial court erred by entering a finding that "[O]ne of the sellers (Nancy Noel) held a position on the local ad hoc 'Erosion Control Advisory Panel' which gave her superior knowledge of erosion issues in the area" which was based solely on Donna Coe's speculation as to Nancy Noel's knowledge.
4. The trial court erred by determining that an owner of real estate, who is represented by an agent and has had no prior contact or special relationship with a potential buyer who is also independently represented, owes fiduciary duties to that potential buyer.
5. The court erred in finding that "[T]he sellers/Defendants had a statutory and fiduciary duty to disclose the material facts surrounding the impact of erosion on the subject property and the tax devaluation made at their request."

5. The court erred in finding that the material facts of erosion were not readily available to the buyers.
6. The court erred in holding the sellers liable for claims arising from their alleged misrepresentations in the Form 17 disclosure statement and in failing to apply the RCW 64.06.050 exemptions.
7. The court erred in failing to hold that the Coes had waived their rescission claim by failing to advance their claim for over five years; by choosing to accept the Clerk's dismissal of their claims for failure to prosecute; by extensively remodeling and reconfigured the subject property three years into the pendency of the action; and by seeking dismissal for a second time via voluntary nonsuit.

B. Statement of Issues

1. Does a court err when it allows a moving party plaintiff to establish material facts in the context of a motion for partial summary judgment based solely on opinions, conclusionary statements, legal conclusions, hearsay, and misrepresentations contained in the plaintiff's own affidavit? (Assignments of Error Nos. 1, 2 and 3)
2. In the context of a motion for partial summary judgment, does a court fail to construe the evidence in the light most favorable to the non-moving party when it holds a property owner's prior appeal of a proposed increase in assessed value to constitute a request to devalue the property, when undisputed evidence shows that the owner had sought not to reduce the current assessed value, but to limit a \$154,200 increase to \$81,200? Does the court err when it then holds the results of the successful appeal to constitute a devaluation of the property? (Assignments of Error Nos. 1 and 2)
3. Does an owner of real property owe a prospective buyer fiduciary duties where both parties to the transaction are represented by agents; where neither party has met prior to the transaction; where no special relationship of trust or confidence exists between them; and when neither party knows or has reason to know of any special knowledge or expertise possessed by the other? (Assignments of Error Nos. 1, 3 and 4)
4. Is the owner/seller of a property obligated to voluntarily disclose a

prior successful appeal from a proposed reassessment of the land value for tax purposes, absent an inquiry from a potential purchaser, and when the matter is public record and easily available through the County Assessor's office? (Assignments of Error Nos. 3, 4 and 5)

5. Does a purchaser of residential riverfront real estate who reserves an optional contractual right to verify lot size, square footage, and encroachments, and subsequently receives notice that there are discrepancies in prior surveys, possible encroachments by the river, and that there is an easement attached to the property for the purpose of erosion control, have a duty of due diligence to investigate the prior surveys and the impact of the river on the property? Does the purchasers' failure to further investigate breach their statutory duty of due diligence? (Assignment of Error No. 6)
6. Does a purchaser of riverfront real estate who reserves an optional contractual right to obtain a "soils stability inspection" and to "seek additional inspections by specialists," and subsequently receives notice that the property is in a flood plain and contains fill material, have a duty of due diligence to obtain the reserved inspections? Does the purchasers' failure to obtain the inspections breach their statutory duty of due diligence"? (Assignment of Error No. 6)
7. Does the visible action of waves, tides and currents upon a riverbank, and the resulting cutbanks and visible erosion, constitute a *hidden* defect in riverfront property and, absent an inquiry from the buyer, is a seller required to disclose them when the contract is made contingent on the buyers' subjective satisfaction with the results of their own inspections? (Assignment of Error No. 6)
8. Does RCW 64.06.050 exempt defendants from liability for alleged errors or omissions on the Form 17 disclosure statement where there is no evidence in the record to support findings of intentional misrepresentation, concealment, or fraud, and where the plaintiffs expressly waived their misrepresentation, concealment, and fraud claims by admitting on the record that "[I]t is understood that Defendants may have *intended to be truthful*. . ." (Assignment of Error No. 7)
9. Did the Coes ratify the contract for the sale of the property and waive their claims for breach of contract, misrepresentation, fraud, and

rescission when they deliberately chose, after two years of inactivity, to accept the Clerk's dismissal for failure to prosecute; subsequently extensively remodeled and reconfigured the subject property; and moved the court, after five years, to dismiss their claims via an order of voluntary nonsuit? (Assignment of Error No. 8)

10. Did the Coes' procrastination and vacillation in pursuing their rescission claim for five years; their extensive remodel and reconfiguration of the subject property; their failure to obtain the proper permits and inspections; and their admissions in the record that the Noels intended to be truthful constitute a ratification of the contract and waiver of their claimed right of rescission? (Assignment of Error No. 8)
11. Does the Coes' election of the remedy of rescission bar their damage claims and require dismissal of their lawsuit?

III. STATEMENT OF THE CASE

A. Pre-Transaction Background

From April, 1992 until June, 2007, Robert and Nancy Noel ("The Noels") resided on the river front property located at 72 East Sunny Sands Road, on Puget Island, in the Columbia River [CR.143 (CSF)¹, Fact 1]. The property was owned by The Robert and Nancy Noel Family Trust ("The Trust") [CR.143 (CSF), Ex.1 p.31]. The property line extended from the road and into the river [CR.144 (Affidavit of Eric Noel "Aff. E.Noel"), Ex.A, p.5]. The portion of the land bordering the river consisted of sand

¹ CR 143 - Defendants' Concise Statement of Material Facts in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment. In reviewing the facts contained herein, the Coes, despite having had two opportunities to do so, filed no opposition to any of the facts stated in Defendants' Concise Statement of Material Facts (CR 143) or in Defendants' Statement of Supplemental Facts (CR 171). The facts, as stated, are well supported by admissible evidence and should be deemed uncontroverted.

fill material (dredge spoils) which had been placed there by the U.S. Army Corps of Engineers repeatedly over a period of many of years [CR.168 (Affidavit of Toni Robinson “Aff. T.Robinson”), ¶ 4]. In 1996, high water washed a portion of the spoils away, allowing the river to encroach further onto the property [CR.143 (CSF), Fact 2] [CR.168 (Aff. T. Robinson), ¶8].

From 1998 and through 2006, the land had an assessed value for tax purposes of \$118,800 [CR.143 (CSF), Fact 3]. In June of 2006, the Noels, then in their 80's and on a limited income, received notice from the Wahkiakum County Assessor that their land was being reassessed for 2007 tax purposes to \$270,000, which was to result in a 130% increase in their property taxes [CR.143 (CSF), Fact 4]. The Noels, along with ten other property owners, appealed the reassessment to the Board of Equalization (“BOE”) [CR.143 (CSF), Fact 5] [CR.145 (Affidavit of Richard Grant “Aff. R.Grant), Ex.C, p.6 and 9]. The Noels, remembering the loss of a portion of their beach in 1996, used that argument as one of the justifications for overturning the proposed reassessment of their land. The Noels prevailed, and the proposed increase was overturned [CR.143 (CSF), Facts 2 and 5].

In March, 2007, the Noels decided to relocate to an assisted living center near Portland in order to be closer to their doctors and family [CR.13 (Affidavit of Nancy Noel--“Aff. N.Noel”), ¶ 4] [Plfs. Ex.E]. They listed their home with Kay Cochran at Lower Columbia Realty in

Cathlamet for \$419,000, and began making arrangements to move [CR.143 (CSF), Fact 11]. The Noels completed the required Seller's disclosure statement and in the process disclosed that the property contained fill material and was located in a flood plain [CR.143 (CSF), Fact 26].

B. The Transaction

In late April or early May, 2007, Donna Coe located the property on the internet and employed Ken Ingalls to represent her and her husband as their real estate agent. [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.4, 10:25 - 11:2] [Ex.4 (CR.2 Complaint), p.2 ¶.3.3]. Mrs. Coe looked at the property, discussed it with her husband, and on May 7, 2007, tendered an offer for \$410,000 [CR.143 (CSF), Fact 12]. The Coes included a number of optional contingencies in the contract, including a buyer's optional "soils/stability inspection" clause, a buyer's optional "verification of the lot size, square footage, and encroachments to their satisfaction" clause, and the buyer's "physical inspection of the property to their own subjective satisfaction" clause [CR.143 (CSF), Facts 12-21]. On May 8, 2007, the Noels accepted the Coes' offer [CR.143 (CSF), Fact 22].

On May 8, 2007, Wahkiakum Title and Escrow Co. issued a preliminary title report to the Coes in which they were notified: (1) that there were possible discrepancies in prior surveys which may indicate shortages in area and encroachment; (2) that there was an easement on the

property for the installation of retaining dikes, bulkheads, and embankments, and for the deposit of dredge spoils; and (3) that water may cover part of the land. The Coes were notified as to the location of the prior surveys as well as the Auditor's file numbers, volumes, and the page numbers where they could be found. The preliminary title report also included a sketch of the property which appeared to show the encroachment onto it by the river [CR.143 (CSF), Fact 24].

On May 10, 2007, the Coes signed the Seller's Disclosure Statement and acknowledged their statutory duty "to pay diligent attention to any material defects that were known to them or could have been known to them by utilizing diligent attention and observation" [CR.143 (CSF), Fact 26], Subsequent to their signing of the disclosure statement, both of the Coes visited the property and inspected it themselves, including the river frontage and waterline [CR.145 (Aff. R.Grant), Ex.A, p.26]. However, despite their statutory duty, and despite having received notice: 1) that the property was contained fill material and was subject to flooding; 2) that there were possible shortages in area; 3) that there were encroachments; 4) that parts of the property may have been under water; 5), that there were discrepancies in prior surveys; 6) that there was an easement for the installation retaining dikes, bulkheads, and embankments, and for the deposit of dredge spoils, and despite having been given a sketch of the property showing river encroachment, the Coes neglected to make any

inquiries to anyone regarding past surveys, the dredge disposal permit, possible erosion, or anything else related to either the title report or the land [CR.143 (CSF), Facts 25-32]. They likewise failed to follow through on their reserved right to retain inspectors to examine the land or obtain a soils/stability inspection [CR.143 (CSF), Facts 28-32]. All of the information regarding the existence of fill material (dredges spoils), past flooding, and everything else contained in the preliminary title report was a matter of public record and easily available to anyone through the Wahkiakum County Assessor's office [CR.143 (CSF), Facts 6, 7, 10, 24(9)(10)(12) and 37]. The sale closed on June 7, 2007 [CR.143 (CSF), Fact 34].

C. Post-Transaction and Litigation History

On August 17, 2007, the Coes received a letter from the County Assessor's office inquiring as to whether they were aware that there had been an appeal of the Assessor's proposed increase in the assessed value of their property for 2007 tax purposes. The letter notified them that the Board of Equalization ("BOE") had overturned the Assessor's proposed increase, but that the matter would be revisited in 2010, at which time the assessment would probably increase [CR.143 (CSF), Fact 35]. The Assessor's letter became the impetus of this lawsuit. The Coes hired an attorney who checked the public records and confirmed that in 2006 the Noels had appealed the proposed increase in their taxes and had given the

history of erosion as a justification [CR.143 (CSF), Facts 2, 36-38]. With the knowledge that the information regarding both the appeal and erosion had been public record since 2006, the Coes filed their lawsuit for fraudulent concealment, misrepresentation, and rescission on January 2, 2008 [CR.143 (CSF), Fact 40].

In November, 2008, the U.S. Army Corps of Engineers, pursuant to the Dredge Disposal and Right of Entry Permit granted by the Noels in 1994 [Plfs. Ex.C, p.8-10], extended the beach from the former riverbank to the river by over 200 feet [CR.143 (CSF), Fact 41] [CR.171 (Defendants' Supplemental Statement of Material Facts--"SSF"), Fact 12], greatly improving the river frontage and desirability of the property [CR.171 (SSF), Fact 12]. On February 17, 2010, the Wahkiakum County Clerk notified the Coes that it was dismissing their lawsuit for want of prosecution [CR.10]. The Coes, their damages mitigated by the additional 200 feet of beach provided by the Corps of Engineers [CR.168 (Aff. T.Robinson), Ex.A, p.1-2 (compare photos)], decided to accept the Clerk's dismissal. [CR.143 (CSF), Fact 45], and began what became an extensive remodeling project on the house [CR.143 (CSF), Fact 44] [CR.171 (SSF), Fact 23]. The Noels, with a pending counterclaim for costs and attorney fees, moved to continue the action [CR.12].

In 2010, the County Assessor re-assessed the land value upward to \$283,300. [CR.143 (CSF), Fact 42]. Upon receipt of the notice, the Coes,

like the Noels had done four years earlier, appealed the re-assessment of their land. The BOE subsequently reduced the reassessment to \$249,600, which was still more than double its value at the time the Coes purchased it [CR.143 (CSF), Fact 43]. The Coes accepted the reappraisal and dismissed their appeal [Aff. R.Grant, Ex.A (Dep. D.Coe, p.13 (55:17 - 56:12))].

In February, 2012, the Coes sought for a second time to have their case dismissed by moving for an order of dismissal and voluntary nonsuit [CR 66]; however, after having learned that they would still be liable for attorney fees [CR.72], withdrew their motion a month later [CR.83].

In 2012, with Robert Noel suffering from dementia and Nancy Noel with severe anxiety disorder, the court, based on the recommendations of their physician and of a court appointed *guardian ad litem* [CR.113], held the Noels to be incompetent to assist in their own defense and appointed their son Reid to represent them as *guardian ad litem* [CR.86, 118 and 121]. Their son Eric, as successor trustee, was appointed to represent the Trust [CR.85].

In December, 2012, the Coes filed a Motion for Partial Summary Judgment [CR.125] seeking adjudication on the issues of whether the Noels had exclusive knowledge of the existence of erosion that was not readily ascertainable by the Coes; whether, based on that knowledge, the Noels had a had duty to disclose the existence of erosion; whether the

Noels breached that duty by withholding material facts; and whether a breach of that duty also breached the contract. The motion was supported almost exclusively by an affidavit of Donna Coe [CR.123]. The Noels moved to strike the affidavit [CR.149] and objected to it in their response [CR.142]. The Noels also filed an extensive statement of facts [CR 143] in opposition to the Coes' motion, along with 14 exhibits and affidavits [see CR 143, 144, 145]. None of the facts contained in the Noels' statement were disputed [CR 153].

The court granted the Coes' motion for partial summary judgment as to the Noels' breach of duty, but made no determination as to their liability on any of the Coes' claims [CR.159]². The Coes promptly moved for entry of judgment granting rescission [CR.162]. The Noels objected on the grounds that rescission was never addressed in the Coes' motion for partial summary judgment, and no judgement was granted as to any of the Coes' claims [CR.173].

The Noels subsequently filed their own motion for summary judgment [CR.172] supported by additional affidavits opposing the Coes' alleged right of rescission [CR.168-171, and 176]. On March 6, 2013 the

² It should be noted that the court made no announcement at the hearing (CR.154) as to its findings, intent, or anything else relating to the motion, but took the matter under advisement. Both parties submitted proposed orders (CR.155 and 156). The court signed the one submitted by the Coes' attorney, ex-parte, without modification (CR.150 and 160).

court entered judgment in favor of the Coes for rescission [CR.178]. The Noels moved for reconsideration [CR.181] and the court scheduled a hearing for the pending summary judgment motion (172) and the motion for reconsideration (181) to be heard together [CR.186]. The hearing was held on April 2, 2013 [CR.186], but the court announced no decision as to the motion for reconsideration and continued the summary judgment motion until May. With the time limit for appeal expiring, the Noels appealed the Judgment (178) on April 5, 2013 [CR.190]. On April 13, 2013 the court denied both pending motions [CR.196 and 197].

IV. ARGUMENT

A. Standard for Review

The Court reviews *de novo* an order granting summary judgment, "taking all facts and inferences in the light most favorable to the nonmoving party." *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012); *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Summary judgment is appropriate only if the moving party shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Jackowski v. Borchelt*, 174 Wn.2d at 729, citing *CR 56(c)*. Questions of statutory interpretation, are also reviewed *de novo*. See *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011) citing *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 426, 237 P.3d 274

(2010). In interpreting the meaning of a statute, the Court is to discern and implement the legislature's intent. If the Court concludes that the statutory language is unambiguous and legislative intent is apparent, the Court will not construe the statute otherwise. Plain meaning, however, may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 433 (Chambers, J. dissenting) quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

B. Argument 1 (Issue 1) - Donna Coe's affidavit should have been stricken and the Noel's properly stated objections to it should have been sustained.

The rules of summary judgment require that supporting and opposing affidavits be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein, CR 56(e), *Mostrom v. Pettibon*, 25 Wn. App. 158, 607 P.2d 864 (1980), and, where such personal knowledge is lacking, the affidavits shall be accorded no consideration. *Loss v. DeBord*, 67 Wn.2d 318, 407 P.2d 421 (1965). In a summary judgment proceeding, affidavits of the moving party are scrutinized with care. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874; 431 P.2d 216 (1967). Bare allegation of fact by affidavit without any showing of evidence is insufficient, *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955, 421 P.2d 674 (1966), and unsupported conclusory

statements and legal opinions cannot be considered. Marks v. Benson, 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991). A party cannot create a factual issue on summary judgment by submitting a declaration contradicting his earlier deposition testimony. McCormick v. Lake Washington Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511 (1999), nor can summary judgment be granted when the credibility of a material witness is at issue. Gingrich v. Unigard Sec. Ins. Co., 57 Wn. App. 424, 428, 788 P.2d 1096 (1990).

Moving party plaintiff Donna Coe submitted an affidavit [CR.123] in support of her Motion for Partial Summary Judgment that clearly violates Rule 56(e) as well as the cited authorities above. First, there is no statement showing affirmatively that she was competent to testify as required by the Rule. Secondly, it was not based on her own personal knowledge as required, but instead either misstates or “spins” the facts shown in her various exhibits for the purpose of creating “material facts” that don’t really exist. It is filled with her own speculation, conclusions of fact, and legal conclusions, and appears to have been drafted for the purpose of creating “evidence” to support the arguments in the Coes’ Motion for Partial Summary Judgment. Donna Coe’s affidavit is more of a legal argument than it is an affidavit as contemplated by the Rule 56(e), and is not admissible as evidence.

Of the 20 statements contained in the affidavit, only statements 3, 4,

7, and 12 state a “fact.” All of the others state opinions, conclusions, speculations, legal conclusions, and hearsay,³ and must be rejected. Statements 3 and 4 are refuted by Donna Coes’ deposition testimony, in which she denies questioning the Noels about surveys [CR.145 (Aff. R. Grant), Ex.A, p.33:24-25 and p.34:1] see also [CR.143 (CSF), Fact 32]. The existence of a meeting between the parties to discuss the Noels’ answers to specific questions in the Form 17 statement not only defies logic, but is disputed by the Coe’s realtor, Ken Ingalls. According to Donna Coe, Ingalls was present and gave his permission. However, Mr. Ingalls, during his deposition,, denied any knowledge of the meeting [CR.145 (Aff. R. Grant), Ex.B (Deposition of Ken Ingalls), p.6 (32:9-14)]. Statement 7, that the Coe’s relied on the alleged meeting in making their

³ Statement 5: “. . . should have been made known to us . . .” - speculation; Statement 6: “. . . should have disclosed . . .” - speculation; Statement 8: “We believed that the sellers had disclosed everything that they knew . . .” - speculation; Statement 9: “. . . our realtor . . . allowed us to have a discussion . . .” - hearsay; Statement 10: “The title report disclosed nothing about the specific event of this beach loss” - legal conclusion and assumes facts not in evidence; Statement 11: “As the court records reflect . . .” - hearsay; Statement 13: “My husband and I did all the right things . . .” . “There was nothing we could have done to find out . . .” - legal conclusion and speculation; Statement 14: “There was nothing in the report to demonstrate . . .” - conclusion and hearsay; Statement 15: “It wasn’t until after . . . that we had notice or awareness . . .” - legal conclusion; Statement 16: “Once aware . . .” - legal conclusion; Statement 17: “. . . Mrs Noel admitted not only that she knew about the avulsion but that she made a calculated decision not to disclose it . . .” - legal conclusion, hearsay, assumes facts not in evidence (avulsion); Statement 18: “Mrs Noel disclosed that she made this calculated decision to withhold material facts . . . giving her superior knowledge . . .” - hearsay, legal conclusion, & speculation; Statement 19: “The material fact that there had been a sudden erosion event . . . was not disclosed, nor was it disclosed that the property was being devalued” - legal conclusion, hearsay, assumes facts not in evidence (sudden erosion), & misrepresentation (being devalued); Statement 20: “having known this we would have. . .” - speculation. [CR.123] and [CR.149]

offer, is impossible because the offer was made 3 days before the meeting was alleged to have taken place [see CR.149, p.5, Statement 7]; and Statement 12, that the Noels never told the Coes about erosion assumes that an inquiry was made, when the undisputed fact is that the Coe's never asked [CR.143 (CSF), Fact 32]. None of the statements, 3, 4, 7, or 12, are supported by evidence as required by Meissner v. Simpson Timber Co., 69 Wn.2d at 955, and the discrepancies between Donna Coe's statements and her deposition testimony preclude summary judgment McCormick v. Lake Washington Sch. Dist., 99 Wn.App. at 111, and raise genuine questions about her credibility, Gingrich v. Unigard Sec. Ins. Co., 57 Wn.App. at 428.

The Noels, through their court appointed *guardian ad litem*, properly objected to the affidavit and moved to strike it [CR.149] as required by Parkin v. Colocousis, 53 Wn. App. 649, 652 (1989). The court erred by allowing it to be admitted, and further erred in using the inadmissible statements contained in it, over the Noels' objections, to support a grant of partial summary judgment.

C. Argument 2 (Issue 2) - The court failed to construe the evidence and all inferences therefrom in the light most favorable to the nonmoving party when it mischaracterized the Noels' appeal to the BOE to limit a proposed increase of their taxes as a request to have their property devalued.

When reviewing a summary judgment, the appellate court engages in the same inquiry as the trial court; both must consider facts and reasonable

inferences in a light most favorable to the nonmoving party and determine whether reasonable people could reach but one conclusion from all the evidence. *Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993).

It is uncontroverted fact that in June of 2006, the Noels, then in their 80's and on a limited income, received notice from the Wahkiakum County Assessor that their land value was to be reassessed for 2007 tax purposes, from \$118,800 to \$270,000, which was to result in a 130% increase in their property taxes [CR.143 (CSF), Facts 3 and 4]. The Noels, along with ten other property owners, appealed the reassessment to the Board of Equalization ("BOE") [CR.143 (CSF), Fact 5] [CR.145 (Aff. R.Grant), Ex.C, p.6 and 9]. In their petition to the BOE [Ex.C, p.6], the Noels certified as follows:

"[T]he undersigned petitions the Board of Equalization to change the valuation of the property described below . . . for taxes payable in 2007 to the amount shown in Item No. 3(b) on this form."

Under Item 3(b), "[Y]our estimate of true and fair value," the Noels entered the amount \$200,000 for the land.

It is clear from the evidence that the Noels did not petition for a decrease in their land value. Instead, they petitioned to have the proposed increase limited to \$200,000.

Pursuant to *Suarez v. Newquist*, 70 Wn.App. 827 (1993), a court considering a motion for summary judgment is required to consider facts and all reasonable inferences in a light most favorable to the nonmoving

party. Because uncontroverted evidence shows that assessed value of the land was \$118,800 for 2006 taxes, and the Noel's sought to have it revalued upward to \$200,000 for 2007 taxes, it was err for the court to construe that evidence in such a way to support findings that the Noel sought and obtained a *reduction* in assessed value; that the sellers elected not to disclose the resulting *devaluation*; that the material fact of *assessed value reduction* were not readily available to the buyers;"and that the sellers/Defendants had a statutory and fiduciary duty to disclose the *tax devaluation made at their request*.

D. Argument 3 (Issue 3) - There is no evidence to support, and no legal basis for a finding that the Noels owed the Coes fiduciary duties.

A "fiduciary relationship" is defined in Washington as a relationship where one party "occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for." *Liebergesell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980). A fiduciary relationship arises as a matter of law in certain contexts, but does not exist between a buyer and seller of real estate. In this case, the issue of whether a fiduciary duty existed between the parties was never pled. No reference to fiduciary duties appears anywhere in the record prior to the time the finding suddenly appeared in the Order granting partial summary judgment. Notwithstanding the fact that the issue was never raised, nowhere in the law is there any authority to support such a duty between a

buyer and seller who are both operating through agents in an arms-length real estate transaction. There is no evidence to suggest that parties had ever even met before the transaction, let alone had a special relationship giving rise to a duty between them.

The Coes base the existence of such a relationship on the unsupported allegation that Nancy Noel held a position on an erosion advisory board and had special knowledge⁴ as a result [see CR.123 (Donna Coe's Aff), ¶18 and CR.149 (Noel's Motion to Strike)]. However, at the time the Coes were contemplating the purchase or before the transaction closed, they had no idea whether Nancy Noel served on any kind of board. They had no idea as to Nancy Noel's knowledge on any subject They had never met her [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.5 (19:15-17)] [CR.123 (Donna Coe Aff), ¶ 6]. There is simply nothing in the record so support a finding that the Coes were in, or even believed they were in, a relationship with the Noels which justified an expectation that the Noels would care for the Coes' interests. There was no fiduciary relationship between the parties, hence no fiduciary duties⁵. For the Court to make that

⁴ There is nothing in the record to show that Nancy Noel, while serving on a volunteer advisory board, had any special knowledge of erosion beyond that generally known by the public, [CR.168 (Aff. T.Robinson), p.4 ¶10].

⁵ There were fiduciary duties, however, between the Coes and their realtor Ken Ingalls. That fact notwithstanding, the Coes chose not to include him in their lawsuit. The Noels raised the issue concerning the Coe's failure to join Ingalls in their Motion for Summary Judgment [CR.172, p.6-7]

unsupported finding is clearly reversible error.

E. Argument 4 (Issue 4) - The Noels had no duty to disclose the successful 2006 appeal of the proposed reassessment of their land for tax purposes, and no duty to disclose that they based their argument in support of it on erosion.

A duty to disclose an item of information in a business transaction generally does not arise unless a duty to disclose is imposed by a fiduciary or quasi-fiduciary relationship or some other special relationship of trust or confidence, disclosure is statutorily required, or disclosure is necessary to prevent a person from being misled by a partial or ambiguous statement of facts that are peculiarly within the defendant's knowledge and that are not easily discoverable by the person, *Van Dinter v. Orr*, 157 Wn.2d 329, 334, 138 P.3d 608 (2006), see also CR.159 (Order granting partial summary judgment), p.3, ¶ 2.1.

In the context of a real estate transaction, a seller's duty to speak arises where the defect would not be disclosed by a careful, reasonable inspection by the purchaser, *Jackowski v. Borchelt* 174 Wn.2d 720, 739; see also *Alejandre v. Bull*, 159 Wn.2d 674, 689 (2007).

Because there was no fiduciary relationship between the Noels and the Coes [see Argument 3, above], the issue before the Court is whether the Noels were required by statute to disclose the appeal of the Assessors proposed reassessment of their land, or whether disclosure was necessary to prevent the Coes from being misled by a partial or ambiguous statement

of fact that was “peculiarly” within the Noels’ knowledge and not easily discoverable by the Coes.⁶

1. There Was No Statutory Requirement

A seller’s duties to disclose are specifically identified in RCW 64.06.020, which requires a seller to fill out a Form 17 disclosure statement and deliver it to the prospective buyer. The Statute states in pertinent part:

“In a transaction for the sale of improved residential real property, the seller shall, unless the buyer has expressly waived the right to receive the disclosure statement under *RCW 64.06.010*, or unless the transfer is otherwise exempt under *RCW 64.06.010*, deliver to the buyer a completed seller disclosure statement in the following format and that contains, at a minimum, the following information:”
RCW 64.06.020(1).

The specific questions to be answered are listed in RCW 64.06.020. Nowhere in the statute does there exist a question concerning property value or tax assessments. Nor is there a question concerning the existence of erosion. The Court’s finding that “The sellers elected not to disclose the erosion or resulting devaluation in the Form 17 statutory disclosures” is

⁶ The Coes have made much out of the Noels’ statement in their Petition that they had lost 100 feet of land from the property due to erosion. It appears to be the Coes’ position that the Noels’ statement constitutes proof of the loss alleged, and that it required disclosure. The Noels, were in their 80s at the time they made their statement, Robert Noel had dementia, and they were recalling a flood that occurred ten years earlier in 1996 [CR.143 (CSF), Fact 2]. There is no evidence to corroborate actual amount of encroachment by the river .

meaningless because the questions don't exist.

2. There Was No Partial or Ambiguous Statement of Fact That Required Further Disclosure.

Pursuant to *Van Dinter v. Orr*, 157 Wn.2d. at 334, disclosure is necessary to prevent a person from being misled by a partial or ambiguous statement of facts that are peculiarly within the defendant's knowledge and that are not easily discoverable by the person. The Coes have never alleged nor demonstrated that they were misled by any partial or ambiguous statement made by the Noels. In fact, Donna Coe testified in deposition that the Noels made no representations at all other than those contained in the sellers disclosure statement. [CR.145 (Aff. R. Grant), Ex.A (Dep. D.Coe "Dep. D.Coe"), p.10 (43:13-15); p.23 (105:14-20)]

3. The Fact of the Successful Appeal of the Assessors Proposed Reassessment Was Not "Peculiarly" Within the Noels' Knowledge and Was Easily Discoverable by the Coes.

"Peculiarly" is defined as meaning "characteristic of only one person, group, or thing: distinctive" Merriam-Webster Dictionary, 2013 Edition. Knowledge of the appeal, the fact that the Noels argued that erosion was a reason for limiting the proposed increase to \$200,000, and the resulting reversal of the Assessor's reassessment was not "peculiar" or unique to the Noels. It was known to the Wahkiakum County Assessor and the Board of Equalization. It was also a matter of public record [CR.143 (CSF), Facts 36 and 37 Admitted] see also [CR.145 (Aff. R. Grant), Ex.A (Dep. D.Coe),

p.14 (16:13-18)]

All information concerning the appeal and all documentation supporting it would have been easily discoverable by the Coes through the County Assessor's office had they followed up on the exceptions listed in the preliminary title report concerning taxes [CR.143 (CSF), Fact 24 (1) and (9); Fact 32 g and h]. The availability of the records was made clear by the Coe's attorney who easily obtained the records himself prior to filing this lawsuit. There is simply no basis in fact to support the court's finding that the fact of the appeal and the fact that the Noels had argued "erosion" as a basis for it was not readily available to the Coes.

4. The Coes Never Inquired

Of course, the Noels would have had a duty to disclose the appeal, as well as the erosion, if they had been asked about it, but the undisputed fact is that Coe's never inquired [CR.143 (CSF), Facts 31 and 32(a), (b), (d), (e), (g), and (i)] see also [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.9 (34:9-11); p.18-19 (85:25 - 86:1) (86:2-5, 87:22-23, 88:7-9); p.21 (94:6-16); p.25 (110:18-24)].

Despite Donna Coe's admission in deposition that it would have been reasonable to have researched the tax history of the property, they conducted no such investigation [CR.143 (CSF), Fact 31] see also [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.24-25 (109:15-18; 109:22-25; and 110:1)]. An inspection of the tax history would clearly have

uncovered the appeal and the fact that the Noels argued “erosion” in their petition. A seller’s duty to speak arises where the defect would not be disclosed by a careful, reasonable inspection by the purchaser, *Jackowski v. Borchelt*, 174 Wn.2d 720, 739. To the extent that “erosion” is a defect in riverfront property, the Noels had no duty to disclose it because they were never asked and it would have been discovered by a careful and reasonable inspection.

Pursuant to *Van Dinter v. Orr*, 157 Wn.2d at 334, and *Jackowski v. Borchelt*, 174 Wn.2d at 739, the Noels had no duty to disclose the successful 2006 appeal of the proposed reassessment of their land for tax purposes, and no duty to disclose that they had argued “erosion” as a basis for the appeal.

F. Argument 5 (Issue 5) - The Coes’ reservation of an optional contractual right to verify lot size, square footage, and encroachments, imposed a duty of due diligence to investigate upon notice of discrepancies in prior surveys, possible encroachments by the river, and the existence of a permit attached to the property for the purpose of erosion control.

A buyer of residential real estate has a duty to pay diligent attention to any material defects known to the buyer or that can be known to the buyer by utilizing diligent attention and observation, *Alejandre v. Bull*, 159 Wn.2d 674, 698 (2007) citing to RCW 64.06.020(1)(II)(A). When a buyer includes an inspection addendum in a contract, that buyer has a duty of due diligence to take steps to protect himself, and to anticipate that the seller

might not have complete knowledge of the subject of the inspection. If, upon a reasonably diligent inspection, the buyer discovers a defect, his remedy is contractual, *Id.*

It is undisputed that the contract contained a “Property Condition Disclaimer” in which the Coes were “urged to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the property,” [Ex.1, p.0040 at 147] [see also Ex.2, p.4 at 152-153]. It is further undisputed that the contract included an optional “Square Footage/Lot Size/Encroachments” clause by which the Coes reserved a right to “verify lot size, square footage, and encroachments to their own satisfaction within the contingency period.” [CR.143 (CSF), Fact 18] [Ex.1, p.0045 at 9-10] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.11(48:2-18)]. The legal effect of including an optional inspection clause in a real estate contract was discussed by Justice Chambers in his concurring opinion in *Alejandre v. Bull*, 159 Wn.2d 674 (2007):

“[T]urning briefly to whether there is potential relief in contract, under the inspection addendum to the contract, the Alejandres were authorized to inspect the septic system and required to notify Bull if they found it unsatisfactory within 10 days. Fairly read, that contractual language put a duty of due diligence on the Alejandres to take steps to protect themselves and to anticipate that Bull might not have complete knowledge of the workings of an underground system. Cf. ex. 5 (‘Buyer acknowledges the duty to pay diligent attention to any material defects which are known to Buyer or can be known to Buyer by utilizing diligent attention and observation.’). Thus, it was the Alejandres’ duty, under the purchase and sale agreement, to

exercise due diligence and to satisfy themselves that the septic system was acceptable. If, upon a reasonably diligent inspection, they discovered the septic system was not in good working order, their remedy under the purchase and sale agreement was to rescind the contract or seek other contract remedies.”

Alejandre v. Bull, 159 Wn.2d at 698.

It is undisputed fact that subsequent to their inclusion of the inspection addendum in the REPSA, the Coes received the preliminary title report by which they were notified as follows:

(1) that there were possible discrepancies in prior surveys which may indicate shortages in area and encroachment;

(2) that there was a permit attached to the property for the installation of retaining dikes, bulkheads, and embankments, and for the deposit of dredge spoils; and

(3) that water may cover part of the land.

The Coes were also notified as to the location of the prior surveys as well as the Auditor’s file numbers, volumes, and the page numbers where they could be found. The preliminary title report also included a sketch of the property which appeared to show the encroachment onto it by the river [CR.143 (CSF), Fact 24].

In support of their Motion for Partial Summary Judgment the Coes included, as Exhibit C, a copy of the original Dredge Disposal and Right of Entry Permit which states in section 2:

“[T]his easement is necessary to preserve the property from loss due to erosion from Columbia river water, and is a perpetual easement, running with the land, and is binding on the

grantors heirs and assigns.”
[Plfs’ MPSJ, Ex.C, p,8-10 (Emphasis added)]

The due diligence, accepted by the Coes through their inclusion of the optional inspection clause, included a duty to *pay diligent attention* to any material defects that are known to the buyer or *can be known to buyer by utilizing diligent attention and observation*. The Coes were on notice that there were discrepancies in prior surveys, possible encroachments, and that water may be covering the land. The surveys [CR.144 (Aff of Eric Noel), Ex.A, p.5-7 (high water line)] [see also CR.176 (Affidavit of Calvin Hampton)], and the dredge disposal permit, included in their own evidence in support of their Motion for Partial Summary Judgment, clearly shows that erosion had been an issue for a number of years.

Knowledge of the erosion was clearly available to the Coes had they followed through on their duty to investigate. Their failure breached both their contractual and statutory duties of due diligence.

G. Argument 6 (Issue 6) - The Coes’ reservation of an optional contractual right to obtain a “soils stability inspection” and to “seek additional inspections by specialists,” created a duty of due diligence to obtain the reserved inspections upon notice that the property was in a flood plain and contained fill material. Their failure to obtain the inspections breached their contractual and statutory duties to “obtain professional advise or inspections of the property” and to “pay diligent attention to any material defects that were known to them or could have been known to them by utilizing diligent attention and observation.”

A buyer of residential real estate has a duty to pay diligent attention to any material defects that are known to the buyer or can be known to

buyer by utilizing diligent attention and observation, *Alejandre v. Bull*, 159 Wn.2d 674, 698 (2007) citing to RCW 64.06.020(1)(II)(A). When a buyer includes an inspection addendum in a contract, that buyer has a duty to diligently take steps to protect himself, and to anticipate that the seller might not have complete knowledge of the subject of the inspection. If, upon a reasonably diligent inspection, the buyer discovers a defect, his remedy is contractual, *Id.*

It is undisputed that the Coes included an optional “inspection addendum” in the contract which included an “inspection contingency” by which they reserved an “unlimited right” to inspect the property and included a specific right to obtain a “soils stability inspection” [CR.143 (CSF), Fact 15] [Ex.1, p.0043 at 5-9] [see also Ex.2, p.5 at 5-9], and an additional five days to seek additional inspections by specialists if recommended [Ex.1, p.0043, at 26-28] [Ex.2, p.5 at 26-28]. The Inspection Addendum included a clause labeled “ATTENTION BUYER” by which the Coes were notified that the inspection time period would not be extended and any inaction on the part of the buyer would WAIVE the inspection addendum, [Ex.1, p.043 at 24-25] [Ex.2, p.5 at 24-25]. It is further undisputed that the contract contained a “Property Condition Disclaimer” in which the Coes were “urged to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the property,” [Ex.1, p.0040 at 147] [see also Ex.2, p.4 at 152-153].

The inclusion of the optional inspection addendum imposed upon the Coes a duty of due diligence to satisfy themselves that the proper inspections were completed and the results were satisfactory.

It is undisputed fact that on May 10, 2007, the Coes received the Sellers Disclosure Statement and through it received notice of the following:

- a. that there were covenants, conditions, or restrictions which affected the property, [Ex.4 C, p.1 at 52];
- b. that the property contained fill material, [Ex.4 C, p.4 at 169] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.21 (94:6-16)];
- c. that the property was in a designated flood plain [Ex.4 C, p.4 at 172] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.21 (95:3-7)];
- d. that they should obtain and pay for the services of qualified experts, including engineers and land surveyors, to examine the specific condition of the property; [Ex.4 C, p.1 at 25-28] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.20 (93:15-21)];
- e. that they should obtain professional advise or inspections of the property or to provide appropriate provisions in the contract between themselves and the Noels with respect to any advice, inspection, defects, or warranties [Ex.4 C, p.1 at 28-30]; and
- f. that they had a duty to pay diligent attention to any material defects that were known to them or could have been known to them by utilizing diligent attention and observation. [Ex.4 C, p.5 at 220-222];

The duty of due diligence accepted by the Coes through their optional inspection clause included a duty to *pay diligent attention* to any material defects that are known to the buyer or *can be known to buyer by utilizing*

diligent attention and observation. The Coes were on notice that the property was located in a flood plain, and that it contained fill material. A soils stability inspection clearly would have revealed what was obvious to anyone who looked [CR.168 (Aff. T.Robinson), ¶ 5-6], that there was erosion occurring at the waterline.

The knowledge of erosion was clearly available to the Coes had they followed through on their contractual duty of due diligence. Their failure breached both their contractual and statutory duties of due diligence.

H. Argument 7 (Issue 7) - The visible action of waves, tides and currents upon a riverbank, and the resulting cutbanks and visible erosion, do not constitute a *hidden* defect in residential riverfront property and, absent an inquiry from the buyer, a seller is not required to disclose it when the contract is made contingent on the buyers' subjective satisfaction with the results of their own inspections.

A buyer of residential real estate has a duty to pay diligent attention to any material defects that are known to the buyer or can be known to buyer by utilizing diligent attention and observation, *Alejandro v. Bull*, 159 Wn.2d at 698, citing to RCW 64.06.020(1)(II)(A). The buyers inclusion in the contract of optional inspection addendums imposes a duty to diligently inspect. If he discovers a defect, his remedy is contractual, *Id.*

It is undisputed that the Coes included an additional addendum allowing them fifteen days in which to physically inspect the property to their subjective satisfaction and, at their option, to terminate the agreement within that time period [Ex.1, p.0041]. The inclusion of that optional

inspection addendum imposed a duty on the Coes to *pay diligent attention* to any material defects that are known to the buyer or *can be known to buyer by utilizing diligent attention and observation*.

The undisputed testimony of Toni Robinson, a realtor who also resided on Puget Island, and a regular visitor to the Noels' property, was that the existence of erosion along the river frontage in 2007 was obvious. That fact is confirmed by areal photographs of the property taken in 2006 and 2008 [CR.168 (Aff. T.Robinson), Ex.B, p.1 and Ex.A, p.1]. There were tides which added and removed sand from the beaches constantly and deposited driftwood all up and down the river, including on the Noel property. The changing tides and driftwood would have been clearly evident when the Coes inspected the property in 2007. In addition to the tides, there were big ships carrying grain, cars, and containers, which motored up and down the river every day, creating big wakes and waves that washed against the beach. The waves and tides created cut-banks as they washed sand away. Even a casual observer would have seen the cut-banks, driftwood, waves, and tides along the beach. All were visible from and affected the beach along the Noel's property. [CR.168 (Aff. T.Robinson), ¶ 5-6, and Ex.A, p.1]

The Coes had to have seen the obvious signs of erosion when they inspected the property, but were apparently unconcerned. To the extent that the action of the Columbia river on it's banks constitutes a "material

defect” the Coe’s either accepted it to their satisfaction or failed their duty “to pay diligent attention to any material defects that are known to the buyer or can be known to buyer by utilizing diligent attention and observation”. They cannot now complain that the erosion was concealed from them.

I. Argument 8 (Issue 8) - RCW 64.06.050 exempt the Noels from liability for any errors or omissions on the Form 17 sellers disclosure statement because there is no evidence in the record to support a finding of intentional misrepresentation, concealment, or fraud, and because the Coes expressly waived their intentional misrepresentation and concealment and fraud claims by admitting on the record that “[I]t is understood that Defendants may have intended to be truthful . . .”

RCW 64.06.050(1) provides that “[t]he seller shall not be liable for any error, inaccuracy, or omission in the real property ... disclosure statement if the seller had no *actual knowledge* of the error, inaccuracy, or omission.” *Jackowski v. Borchelt* 174 Wn.2d 720, 736 (2012) (*Emphasis added*). A real estate purchaser seeking rescission based on a negligent misrepresentation stated on the Form 17 disclosure statement must prove that the seller had actual knowledge of the alleged error, inaccuracy, or omission. *Id.* 737.

There is simply no evidence in the record to show that the 85-year-old defendants misrepresented⁷ or concealed⁸ any defect or material fact,

⁷ To the extent that the Coes allege common law misrepresentation or fraud, they must, present clear, cogent, and convincing evidence to show: (1) a representation of an existing fact (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5)

much less that they did so negligently⁹ or intentionally, during the course of the transaction with the Coes. The Coes allege in their Memo in support of their motion for partial summary judgment that the Noels incorrectly answered the following question on the Form 17 disclosure statement¹⁰:

intent by the speaker that the representation should be acted on by the claimant, (6) the claimant's ignorance of the falsity of the representation, (7) the claimant's reliance on the truth of the representation, (8) the claimant's right to rely on the representation, and (9) damages suffered by the claimant as a result, See *Williams v. Joslin*, 65 Wn.2d 696, 697(1965).

⁸ To support their concealment claim, the Coes needed to make an evidentiary showing: (1) that there was a concealed defect; (2) that the Noels knew of the defect; (3) that the defect presents a danger to the property, health, or life of the purchaser; (4) the defect is unknown to the purchaser; and (5) the defect would not be disclosed by careful, reasonable inspection by the purchaser, *Alejandre v. Bull* 688. App. 554; 739 P.2d 1188 (1987).

⁹ A plaintiff claiming negligent misrepresentation must prove six elements by clear, cogent, and convincing evidence: (1) That [the defendant] supplied information for the guidance of others in their business transactions that was false; (2) That [the defendant] knew or should have known that the information was supplied to guide [the plaintiff] in business transactions; (3) That [the defendant] was negligent in obtaining or communicating false information; (4) That [the plaintiff] relied on the false information supplied by [the defendant]; (5) That [the plaintiff's] reliance on the false information supplied by [the defendant] was justified (that is, that reliance was reasonable under the surrounding circumstances); and (6) That the false information was the proximate cause of damages to [the plaintiff]. *Borish v. Russell*, 155 Wn. App. 892, 906 (Wash. Ct. App. 2010) citing *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002).

¹⁰ The Order granting partial summary judgment, created by the Coes' attorney and subsequently signed by the court, contained a second question, "Is there any study, survey, project, or notice that would adversely affect the property[?]". The issue regarding this question from Form 17 was never pled, never argued, and reference to the question appeared for the first time in the Order. There is no indication in the Order that the Noels' answer, "No" was incorrect. A fair reading of the question shows that it required the Noels to speculate as to whether any studies, surveys, projects, or notices known to them at the time "would," as opposed to "has" or "is," have a negative impact on the property. Given that the only pending project was for the replenishment of the beach by the U.S. Army Corps of Engineers [CR.143 (CSF),

“Is there any material damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides?”
[CR.126, p.2, ¶1.2].

Notwithstanding the fact that two knowledgeable professionals testified by affidavit that the Noels’ answer of “No” was correct [CR.168 (Aff. T.Robinson), ¶ 8] [CR.176 (Declaration of Calvin Hampton), p.5,¶ 7(d)], Donna Coe admitted in deposition that the Noels might not have understood what was meant by “beach movements” in the Form 17 disclosure statement [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.23 (102:9-12)].

Since Donna Coe’s deposition, the Coes have apparently abandoned their claims based on intentional misrepresentation, concealment, and fraud, and have attempted to morph their claims into one based on negligence, writing in their Plaintiffs’ Memorandum of Authorities Regarding Equitable Relief (CR.161):

“[I]t is understood that Defendants may have *intended to be truthful*, but nonetheless are liable for misrepresentation because of *ignorance or carelessness*.”
Plfs.’ Memo, p.3 at 7-8 (emphasis added).

The Coes have made no showing that the Noels’ answers on the Form 17 disclosure statement contain errors, inaccuracies or omissions,

Facts 8-10] [CR.141 (Aff. E.Noel), Ex.B and C], and that the project was for the purpose of positively affecting the property, the Noel’s answer of “No” was reasonable.

much less the proof required by *Jackowski v. Borchelt*, that the Noels had actual knowledge of the alleged error, inaccuracy, or omission. Rather, Donna Coe's deposition testimony and the Coes' statement as to the Noels' intention to be truthful are dispositive. As such, the protections provided by RCW 64.06.050(1) apply to the Noels, both for their general liability, and pursuant to *Jackowski*, for rescission as well.

J. Argument 9 (Issues 9-10) - The Coes' procrastination and vacillation in pursuing rescission for five years; their extensive remodel and reconfiguration of the subject property to their own use; their failure to obtain the proper permits and inspections; and their admissions in the record that the Noels intended to be truthful constitute a ratification of the contract and waiver of their claims and right to rescission.

Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006). Where a party desires to rescind, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred, *Wilson v. Pearce*, 57 Wn.2d 44, 355 P.2d 154 (1960) quoting *Brown v. Vandal*, 40 Wn.2d 364, 368, 242 P.2d 1021 (1952). The U.S. Supreme Court has long applied the rule to real estate transactions, *Grymes v. Sanders*, 93 U.S. 55 (1876). A party seeking rescission is not permitted to play fast and loose. Delay and

vacillation are fatal to the right which had before subsisted McLean v. Clapp, 141 U.S. 429, 432 (1891). A party may resort to an action at law to recover damages, or he may have the transaction set aside by the rescission of the contract. If he choose the latter remedy, he must act promptly, "Announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him. Shappirio v. Goldberg 192 U.S. 232, 24 S. Ct. 259, 48 L. Ed. 419 (1904). The rule as stated in Grymes and McLean was adopted by the Washington Supreme Court in Aurora Land Co. v. Keevan, 67 Wash. 305, 310 (1912), and it has been controlling law ever since.

It is undisputed that the Coes filed their action on January 2, 2008 [CR.143 (CSF), Fact 40]. It is further undisputed that in November of 2008, the U.S. Army Corps of Engineers extended the beach between the former riverbank and the river by over 200 feet [CR.143 (CSF), Fact 41] [CR.171 (SSF), Fact 12] [CR.168 (Aff. T.Robinson), Ex.A, p.1-2 (compare photos)], greatly improving the river frontage and desirability of the property [CR.171 (SSF), Fact 12].

The Docket shows that from May 7, 2008 until February 15, 2011 the Coes did nothing to prosecute their claims [Docket, CR.9-18]. On February 17, 2010, after nearly two years of inactivity on the part of the Coes, the Wahkiakum County Clerk served the parties with notice of dismissal of the action for failure to prosecute [CR.10-11]. The Coes, their

damages mitigated by the additional beach provided by the U.S. Army Corps of Engineers [CR.168 (Aff. T.Robinson), Ex.A, p.1-2 (compare photos)], decided to accept the Clerk's dismissal of this action for their failure to prosecute [CR.143 (CSF), Fact 45] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.26 (114:22 - 115:5)]. The Noels, with a pending counterclaim for costs and attorney fees, moved to continue the action [CR.12].

Approximately three years after having filed their lawsuit [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.16 (75:24-25, 76:1-12)], the Coes undertook an extensive remodel of the house, and in the process removed two rooms, including a loft that was used by the Noels as an office and guest bedroom, and a bonus room that was used by Nancy Noel as a work area for creating stained glass artwork. The Coes also removed a pantry, and extensively remodeled the kitchen, bedroom, bathroom, and utility areas. [Ex.6, p.1, No. 15] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.15-17 (73:17 - 79:5)] [CR.168 (Aff. T. Robinson), p.4-5 ¶.6]. The remodel was done without the Coes having obtained the required building and electrical permits and inspections [CR.143 (CSF), Fact 45] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.17 (81:3-14)].

In February, 2012, the Coes sought for a second time to have their case dismissed by moving for an order of dismissal and voluntary nonsuit [Ex.12 (CR 66)] [CR.145 (Aff. R.Grant), Ex.A (Dep. D.Coe), p.16 (75:24-

25, 76:1-12)]. However, after having learned that they would still be liable for attorney fees [see CR.72], the Coes withdrew their motion a month later [CR.83].

1. The Coes Failed to Rescind the Contract Within the Required 15 Days

Under the terms of the purchase and sale agreement the buyers had 15 days from the date they signed to perform their duty of due diligence, to obtain any surveys and/or inspections to their satisfaction or to rescind the contract. The Coes also reserved an optional right to verify lot size, square footage, and encroachments to their own satisfaction, and received a Preliminary Title Report which indicated potential problems with boundaries, lot size, and erosion. Nevertheless, the Coes failed to further research the property, failed to order a survey or review past ones, failed to order a soil stability report, failed to have the property appraised and never notified the Noels of any intention to cancel their agreement.

The Coes admit that it wasn't until two months after closing that they finally investigated the information provided to them in the Preliminary Title Report and discovered that in 2006, the Noels had successfully appealed a \$154,200.00 increase in the assessed value of their property. Although the time limit for rescission, as agreed to by the parties, was 15 days, the Coes waited nearly seven months, well after the time limit had expired, before announcing their intent to rescind.

By neglecting to perform any due diligence or rescind the contract within the 15-day period; by acknowledging at closing that they had sole responsibility for determining its condition of the property [CR.143 (CSF), Fact 34 (5)]; and by acknowledging their satisfaction with the property [CR.143 (CSF), Fact 34 (4)] the Coes, under the terms of the contract, waived their right to rescind.

2. The Coes' Failure to Actively Pursue Rescission Constitutes Waiver

Waiver is defined as an intentional and voluntary relinquishment of a known right, *Panorama Residential Protective Asso v. Panorama Corp. of Wash.*, 97 Wn.2d 23, 28 (1982) citing *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). A waiver can be unilateral and without consideration. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 335, 493 P.2d 782 (1972)

The Coes twice *intentionally and voluntarily relinquished their right* to pursue their claims in this action. They failed to pursue their rescission claim for two years and, subsequent to the U.S. Army Corps of Engineers' replenishment of their beach, affirmatively¹¹ chose to accept the Clerk's

¹¹ The Washington Supreme Court has long held that intentional inaction constitutes affirmative conduct, *In re Miller*, 86 Wn.2d 712, 719, 548 P.2d 542 (1976) (intentional failure of nonresident to pay child support is commission of a tortious act under Washington's long-arm statute); *Adkisson v. Seattle*, 42 Wn.2d 676, 687, 258 P.2d 461 (1953) (intentional failure to act in disregard of the consequences may constitute wanton misconduct). The Coe's intentional inaction in accepting the Clerk's dismissal constitutes such affirmative conduct.

dismissal of their lawsuit. Two years later, they sought for a second time to have their claims dismissed by moving for an order of dismissal and voluntary nonsuit. Waiver occurs by the unilateral act of the party and does not require that the court affirm the act by dismissing the action, Gorge Lumber Co. v. Brazier Lumber Co., 6 Wn. App. 327, 493 P.2d 782 (1972). It is irrelevant that no affirmative action was taken by the court to dismiss the claims, or that the Coe's changed their mind later, their voluntary acts, alone, are sufficient to constitute waiver.

The Coes filed their lawsuit to rescind the contract on January 2, 2008. However, their first affirmative attempt to pursue the remedy wasn't until December 10, 2012, when they filed their Motion for Partial Summary Judgment (CR.123-127), well over five years after having closed on the property. The Washington Supreme Court has long held the rule to be "[t]hat one who seeks to avoid a contract which he has been induced to enter into by fraudulent representations of another touching the subject-matter of the contract, must proceed with reasonable promptitude upon discovering the fraud, or the right to rescind will be waived," Kellner v. Rowe, 137 Wash. 418, 242 P. 353 (1926) quoting Blake v. Merritt, 101 Wash. 56, 171 P. 1013. By failing to prosecute their action for rescission of the contract for over five years; and by twice seeking to have this action dismissed, the Coes have clearly not proceeded with the required "reasonable promptitude". Pursuant to McLean v. Clapp 141 U.S. at 432,

their “delay and vacillation are fatal” to any right they might have had to rescission.

3. Plaintiffs Ratified the Contract and Waived Rescission by Remodeling and Reconfiguring the House.

As discussed above, a party seeking rescission must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred, *Wilson v. Pearce*, 57 Wn.2d 44 (1960) quoting *Brown v. Vandal*, 40 Wn.2d 364, 368 (1952). The rule applies to real estate transactions, *Grymes v. Sanders*, 93 U.S. 55 (1876). Delay and vacillation are fatal to the right which had before subsisted *McLean v. Clapp*, 141 U.S. 429, 432 (1891). A party seeking rescission must act promptly, "Announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him. *Shappirio v. Goldberg* 192 U.S. 232, 24 S. Ct. 259, 48 L. Ed. 419 (1904). Washington has long adopted that standard *Aurora Land Co. v. Keevan*, 67 Wash. 305, 310 (1912).

It is undisputed that nearly three years after having filed this lawsuit to rescind the contract, the Coes, with full knowledge of all the alleged facts as stated in their Complaint, undertook an extensive remodel and reconfiguration of the house. It's clear that at some point during the

pendency of these proceedings, the Coes abandoned the idea of rescinding the contract and decided instead to convert the house to better suit their own needs. The Coes' extensive remodel of the house constitute ratification of the contract for purchase, and a waiver of their right to rescind it.

Contract rescission is an equitable remedy in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract. *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006). It was unconscionable for the court to allow the Coes to resurrect rescission after having altered the property by removing rooms and square footage so that it no longer fits the needs of the Noels.

It is abundantly clear that the Coes intentionally, voluntarily, and unequivocally waived their right to rescission, and their underlying claims as well. The court erred in granting rescission.

K. Argument 10 (Issue 11) The Doctrine of "Election of Remedies" Bars the Coes' Damage Claims and Necessitates Dismissal of This Action.

When a contract for the sale of real estate has been breached by the seller, the purchaser has the option to institute an action for specific performance of the contract or for damages resulting from the breach, or to seek rescission of the contract by returning possession of the property. contracted for, *McKown v. Driver*, 54 Wn.2d 46, 55 (1959). One is bound

by an election of remedies when all of the three essential conditions are present: (1) the existence of two or more remedies at the time of the election; (2) inconsistency between such remedies; and (3) a choice of one of them. *Id* at 55 citing Willis T. Batcheller, Inc. v. Welden Constr. Co., 9 Wn.2d 392, 403, 115 P. 2d 696 (1941); see, also, In re Wilson's Estate, 50 Wn.2d 840, 849, 315 P. 2d 287 (1957); Jordan v. Peek, 103 Wash. 94, 100, 173 P. 726 (1918); Lord v. Wapato Irr. Co., 81 Wash. 561, 583, 142 Pac. 1172 (1914). The prosecution to final judgment of any one of the remedies constitutes a bar to the others. Stewart & Holmes Drug Co. v. Reed, 74 Wash. 401, 405, 133 P. 577 (1913).

The Coes filed claims for breach of contract, misrepresentation, fraudulent concealment, and rescission [Ex.4 (CR.2)]. Upon prevailing on their Motion for Partial summary Judgment, they moved for entry of judgment pursuant to Rule 54 (CR.161-162). In their Plaintiffs' Memorandum of Authorities Regarding Equitable Relief (CR.161) "Plaintiffs' Memo," the Coes made their election of rescission clear, writing:

"[T]here is no adequate remedy at law and Rescission is the equitable remedy which will accord the appropriate relief in this action."
[CR.161 (Plaintiffs' Memorandum of Authorities Regarding Equitable Relief "Plaintiffs' Memo"), p.2 at 8-9]

"[T]here is no adequate remedy other than Rescission available to the Plaintiffs."
[CR.161 (Plaintiffs' Memo), p.5 at 4-6]

“[P]laintiffs ask that the relief granted be Rescission.”
[CR.161 (Plaintiffs’ Memo), p.8 at 2]

“[H]ere, Plaintiffs do not seek economic damages, and such an award would be inadequate to make them whole.”
[CR.161 (Plaintiffs’ Memo), p.9 at 10]

The Coes’ memorandum clearly indicates the existence of the elements in *McKown v. Driver*, 54 Wn.2d 46, 55 (1959), for determining an election of remedies. The Coes had a choice between economic damages and rescission; they indicated in their Memo that the two remedies were inconsistent; and they expressly chose rescission.

Because they elected rescission as their remedy, they cannot now pursue their damage claims. In the interest of speeding up the resolution of this case, the Noels respectfully request the Court to hold that the Coe’s damage claims are barred.

L. The Noels Are Entitled to Attorney Fees on Appeal

The Noels hereby request an award of reasonable attorney fees pursuant to RAP 18.1. The Rule provides that:

“[I]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court”.
RAP 18.1(a).

The applicable statutory authority is RCW 4.84.330, which provides that:

“[I]n any action on a contract or lease entered into after September

21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements”
RCW 4.84.330.

A contract which provides for attorney's fees to enforce a provision of the contract necessarily provides for attorney's fees on appeal. *Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 327, 525 P.2d 223 (1974); *Marine Enters. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 774 (1988).

The Residential Real Estate Purchase and Sale Agreement

(“REPSA”) contains an attorneys’ fees clause which states:

“[I]f Buyer or Seller institutes a suit against the other *concerning this Agreement*, the prevailing party is entitled to reasonable attorneys’ fees and expenses.”

[Plfs. Ex.A, p.4, ¶ q at 117-118 (Emphasis added)]
see also [Defs. Ex.2, p.4, ¶ q at 117-118]

The Coes brought claims for Breach of Contract, Misrepresentation, and Concealment, and sought the remedy of rescission [CR.2]. They brought a Motion for Partial Summary Judgment by which they sought a determination by the court that the alleged acts of the Noels constituted a breach of the contract between them, [CR.126, p.2, ¶1.8]. The Coes argued extensively an award of attorneys’ fees in their Plaintiffs’ Memorandum of Authorities Regarding Equitable Rescission [CR.161, p.8-11] based on the attorney fees clause in the contract, and the court awarded them attorneys’ fees in the Judgment (CR.178). There is no question but that the lawsuit

instituted by the Coes against the Noels “concerned” the Agreement between them and the contract is central to the dispute between them.

While it is true that the Complaint also alleged tort claims of misrepresentation and concealment, tort claims are based on a contract when they arise from the contract and the contract is central to the dispute, *Borish v. Russell, supra, citing Brown v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001).*

Where a lawsuit arises out of the contractual relationship created by a Real Estate Purchase and Sale Agreement, the RESPA provides for reasonable attorney fees and expenses to a prevailing party on suits “concerning this Agreement,” and the prevailing party complies with RAP 18.1, the party is entitled to attorney fees on appeal. *Id at 907.* The Noels, should they prevail in this appeal, are so entitled.

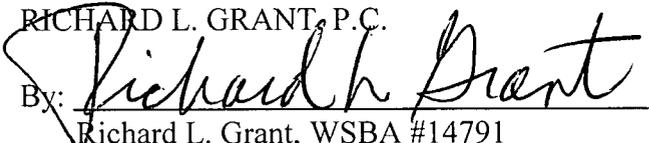
V. CONCLUSION

For all of the reasons outlined above, the Noels respectfully request the Court to reverse the Judgment of rescission entered against them, and to Order the action against them be dismissed.

DATED this 3rd day of October, 2013.

Respectfully submitted,

RICHARD L. GRANT, P.C.

By: 

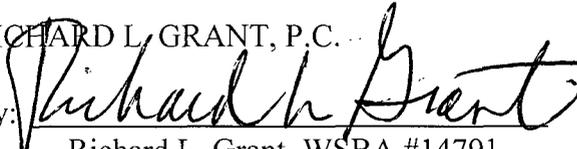
Richard L. Grant, WSBA #14791

Attorney for Defendants/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 3RD day of October, 2013, I served a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF on the following attorney for plaintiffs-respondents by e-mail and first class mail addressed to him at the address below, contained in a sealed envelope, with postage prepaid, and deposited in the United States Post Office at Portland, Oregon:

Vincent L. Penta, P.S.
P.O. Box 12
Longview, WA 98632
vlplaw@comcast.net

RICHARD L. GRANT, P.C.
By: 
Richard L. Grant, WSBA #14791
Attorney for Defendants-Appellants

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