38681-0

No. ~~83700-7~~

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RONALD and LANA RENFRO, a marital community; and RONALD and LANA REFNRO, in their capacities as Trustees of the RENFRO FAMILY TRUST, a Washington Corporation,

Appellants,

v.

PARAMINDER KAUR and JOHN DOE KAUR; MEHAR SINGH SANDU and JANE DOE SANDU; SUKDEV SINGH HOTHI and JANE DOE HOTHI,

Respondents,

SANTOKH RAM and JANE DOE RAM,

Defendants.

AMENDED BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Renfros' telling of the underlying case on appeal is an engaging story. Unfortunately for the Renfros, it does not portray reality.

A. Summary Judgment: A Simple Matter?

The underlying Defendants (herein referenced as the Buyers) brought a summary judgment motion that boiled down to one straight-forward issue. The Renfros indisputably failed to provide the statutorily required disclosures for a sale of residential property. The Buyers were thus entitled as a matter of law to rescind the transaction, and recoup their deposits.

But yet it took nine months - and several thousands of dollars - to achieve a hearing on this simple issue. The summary judgment saga was only a piece of the overall challenges defending this case. As one small illustration of the unusual difficulties, it cost the Buyers over $86,000 to take their defense just through summary judgment. This was not a decision rushed into by the trial court, and the Renfros had ample opportunity in the sixteen months between when their filed their complaint and when the trial court heard – at long last – the Buyers' summary judgment determination.

B. Contract Did Not Include Legal Waiver as a Matter of Law.

As the Court will see upon review of the overall procedural record, the trial court's determination on summary judgment is a sound one. The

trial court based its determination on the fact that the contract term at issue simply cannot, as a matter of law, operate as an *explicit* waiver of the statutorily required disclosures. The statute does not allow a party to contract out of the disclosures absent an *explicit* waiver. No reasonable person could conclude such a waiver existed in this case, and the trial court's conclusion should stand.

C. Renfros Had Ample Opportunity to Establish Waiver - Had it Existed.

Nor is there any basis for remand in the baseless assertion that the Renfros lacked opportunity to prove waiver. The simple truth of the matter is that the trial court gave the Renfros every opportunity to plead their case. The trial court had numerous legitimate opportunities to reject the Renfros' belated attempts to raise various issues long after they were timely. The trial court also had ample legal grounds to refuse to accommodate delay upon delay based on the Renfros' repeated failures to follow the civil rules or court procedure.

Nonetheless, the trial court allowed the Renfros again and again - with increasing prejudice to the Buyers - to gloss over the irregularities, and in some cases fatal flaws, so that she could hear everything the Renfros wished to offer.

As a key example, the trial court (contrary to the assertions by the Renfros on appeal) did in fact review the depositions proffered by the Renfros on their motion for reconsideration, in addition to having accepted

hearsay (and ultimately untrue and misleading) testimony from the Renfros' counsel on the content of those depositions as evidence before rendering her initial summary judgment decision.

To illustrate the extraordinary leeway given the Renfros by the trial court judge, the determination to allow such deposition testimony came after (1) there was never any waiver claim in the complaint; (2) the Renfros failed to make *any* discovery before the initial discovery deadline had come and gone; (3) the Renfros had notice since December of 2007 (seven months before Buyers finally filed their motion) that Buyers intended to bring a summary judgment motion on the issue of the disclosures, and yet had made *no* efforts to pursue this claim; (4) the Renfros had agreed, in the initial stipulation to continue trial, that no further discovery - *including depositions* - would be conducted until the summary judgment motion had been brought; and (5) the summary judgment motion had already been extended repeatedly to accommodate the Renfros.[1]

The Renfros still failed to make their case.

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[1] In order to quash any negative implications, the Buyers note that, as will be discussed further *infra*, the filing of the summary judgment for hearing when the Renfros' counsel would be on vacation was hardly a deed of deceit or ill-intent, as strongly implied in the Renfros brief, but rather a last-ditch and necessary effort to instill some order in the chaos.

D. Summary Judgment: Simple In the End.

But the inordinate focus on ultimately unfounded allegations of doing the Renfros wrong is a red herring. The sole relevant issue in this appeal is this: did the trial court error when it found, after giving the Renfros numerous opportunities to show otherwise, that no reasonable person could conclude that the contract clause at issue constituted an *express* waiver of the statutory disclosure requirements, as required by Washington law? The answer is simply no.

The contract term is not ambiguous. It stated that the written agreement signed by the parties did not include any further documentation as may be required by Washington law. That is true, it did not. The statute provides that such disclosures are to be provided within so many days of closing: they are not required to be *in* the purchase and sale contract.

What is clear is that there is *no* waiver, of *any* sort, in this language regarding the Buyers' right to receive any additional such documentation as may be required after signing the Agreement.

To the extent there was any ambiguity at all, it must be construed against the Renfros as their counsel, Mr. Clark, drafted the agreement.

And, ultimately, the very basis for the Renfros' appeal affirms the trial court's conclusion. The statute at issue, RCW 64.06, requires disclosures in any sale of residential property absent *express* waiver of the

statute. The very fact that this clause may be ambiguous proves the point: there can be no *explicit* and unequivocal waiver, as required by law and statute, where there is a vague contract term.

E. Alternative Basis to Uphold Trial Court: Renfros Indisputably Waived their Waiver Argument.

It should also be noted that even *if* the trial court (or this Court) found that the Renfros had managed to present some question of fact as to an explicit waiver, there remains the fact that any factual disputes as to whether or not there was an intent to waive are legally *irrelevant.* The Renfros waived their right to argue that the parties had supposedly "waived" the statutory disclosures long before the summary judgment issues went before the court.

The Renfros knew through their lengthy discussions with the Buyers before bringing their suit that the disclosures were an issue. *Not once* did the Renfros raise the assertion that they believed that the Buyers had waived such requirement. *Not once* did Renfros' counsel - who had drafted the contract, and thus language at issue - assert such waiver.

After over a year of litigation, it was only *after* the Renfros received the long-outstanding motion for summary judgment (filed June 13, 2008) that they served subpoenas to depose the Buyers (June 27, 2008); and it was not until their motion for reconsideration for the stay order that the Renfros even raised the issue of waiver.

Thus, while the trial court based its decision on the contract language and the evidence presented by Renfros, alternative grounds exist for the Appellate court to uphold the trial court's determination on the basis of the Renfros' waiver of their belatedly asserted waiver claim.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The Buyers respectfully disagree with the assignments of error set forth by the Renfros, for the reasons set forth below. The trial court made a sound decisions based on general language in a contract that does not reasonably constitute a waiver of any kind, much less an express waiver of the sort required by RCW 64.06 regarding residential real property disclosures.

Of particular import in framing the questions at issue, the Buyers note that the trial court *did* in fact consider the Buyers' deposition transcripts submitted (belatedly) by Renfros' counsel. Therefore this assignment is a procedural error, as the alleged wrongdoing did not in fact occur.

III. STATEMENT OF THE CASE

A. The Contract at Issue.

As the Renfros generally set forth, the parties entered into a contract for the purchase and sale of residential real property owned by the Renfros. CP 8-19. Pertinent provisions are as follows:

- ¶ 4. "Time and Place of Closing." Closing shall take place at the Law Offices of Bruce T. Clark, L.L.C. *[attorney for the Renfros]*, 3645 N. Pearl St., Tacoma, WA 98407, on the date this Agreement is signed by all parties. "Final Closing" shall mean the date on which title shall transfer to Purchasers, and recorded in the Pierce County Auditor's Office, which shall occur once the final payment is made in accordance with paragraph 1(b) above.

- ¶ 10 p.4 – "Remedies." If Purchasers fail or refuse to close this transaction on the date specified, it is agreed that the earnest money shall be forfeited to the Seller as the sole and exclusive remedy for such failure. If Seller fails or refuses to close this transaction on the date specified, the Purchasers shall have the right to specifically enforce this Agreement, or, at their election, to seek damages for the breach of this Agreement. **In any action brought to enforce this Agreement or for damages resulting from a breach thereof, the prevailing party shall be entitled to their reasonable attorneys' fees.**

- ¶ 21 p.6 – "Other Conditions." This Agreement **does not include such other and further documentation and disclosure forms as may be required under law** for the purchase and sale of real estate in the state of Washington.

Id. Notably absent from this Agreement is any reference to RCW 64.06. *Id.*, much less any waiver of the disclosures required under that statute.

Also notably absent from this Agreement is any language explicitly (or even implicitly) waiving the buyers' rights to receive the disclosures required under RCW 64.06 once an agreement is signed.

After signing the Agreement, the parties disagreed as to the true condition of the property. The parties all dispute what was represented by whom, both before the sale occurred and in the subsequent months. *See generally* CP 1-24, CP 48-52, CP 48-52, CP 53-65 (complaint and

responsive pleadings). However, these facts are not relevant to the legal question at issue in this appeal, which is whether or not there is a legally valid explicit waiver of the Buyers' right to receive the statutorily required disclosures for the purchase of residential property at issue in the parties' contract.

It is undisputed that the Renfros did not create or sign the required statutory disclosures until February 22, 2007. CP 20-24. Nor is there any evidence that these disclosures were served or otherwise delivered to the Defendant buyers until the filing and service of the Complaint in mid-May, where the disclosures were attached as an exhibit to the Complaint (though not referenced in the Complaint itself). *Id.*

But by then it was too late. The Buyers had made repeated requests for the disclosures. CP 717. When the Renfros persistently failed to provide the disclosures, the Buyers finally gave up, and rescinded the Agreement pursuant to RCW 64.06 by way of a letter dated February 7, 2007. CP 717-718.

There is no evidence on the record to refute the fact that the Renfros never provided Buyers the required statutory disclosures before the Buyers rescinded the sale pursuant to their statutory rights on February 7, 2007.

What is also relevant is that the Agreement was not recorded until May 14, 2007, under Pierce County Auditor No. 200705140078. CP 8.

Under RCW 64.06.040 the transaction at issue did not "close" until the Agreement was recorded; thus as a matter of law the Buyers had the statutory right under RCW 64.06.030 and -.040 to rescind the Agreement for any failure to provide the required disclosures, and to recover all monies paid, up until May 14, 2007.

After the rescission, instead of responding to the Buyers' requests for return of their earnest monies after rescission, the Renfros filed this lawsuit. CP 1-24.[2]

B. The Renfros Had Every Opportunity to Make Their Case.

As per the Renfros' quote of the trial court judge, "there are two sides to every story." It is one thing to discuss the facts in the light most favorable to a non-moving party on summary judgment. Quite another to omit key elements of the story altogether.

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[2] It is not relevant to the questions on appeal, but to the extent relevant to illustrate the ongoing delay tactics of the Renfros, it may be worthwhile to note that the Renfros took *five months* to correct a simple mistake, the mis-naming of counsel's own clients, in the complaint. The Renfros filed their original complaint May 14, 2007 (CP 1-24). The Renfros did not file a corrected amended complaint *with* leave of court (as required) until October 1, 2007 (CP 48-52). In between were several "amended" complaints filed without appropriate leave of court. The final First Amended Complaint can be found under CP 48-52; and the final Answer, Affirmative Defenses and Counterclaims to that corrected complaint can be found under CP 53-65. Any general references to claims raised in the Complaint or Answer herein should be read to refer both to the original and First Amended Complaint, unless specifically noted.

Contrary to the impression that the Renfros' appellate counsel valiantly attempts to paint, the Renfros had ample opportunity to uncover and present any facts that might have helped their case at the trial level. In fact, one might even say that the trial court bent over backwards to give the Renfros *every* opportunity to put their best case forward, despite repeated failures and omissions that could (and perhaps should) have warranted a swifter determination under the applicable law and civil rules.

A simple factual overview of the procedural pleadings belies the actual tenor of the underlying case. For purposes of this appeal, the Buyers will refrain from a blow-by-blow account of the litany of frustrations and irregularities, and simply supplement the record where necessary to illustrate the true course of events. For purposes of this response, Buyers will limit their rebuttal to those issues that relate directly to the Renfros key issues.

As part of their argument, perhaps to bolster the substantive argument, the Renfros assert as a basis for reversal that they somehow did not have an adequate opportunity to obtain or present their evidence of waiver. The Renfros try to create an illusion of victims of defendants who refused to cooperate and tried to thwart them at every turn. But this illusion dissolves like so much smoke in the breeze when faced with the actual procedural history of this case.

For example, the underlying record presents a very different story regarding the Renfros' early-2008 motions to compel than presented by Renfros' brief. A full accounting can be found in the Buyers' responsive pleading, supporting declaration and attached exhibits. CP 103-122. In brief, the Renfros served the Buyers with 71 interrogatories (as counted per the applicable civil rule) - over twice the 35 allowed by Pierce County Local Rule. While there was some delay in responding, there was no bad faith (CP 104, 110-11). The Buyers did respond to the essence of the Renfros' questions, and offered to answer any further requests once the Renfros re-drafted any additional requests to comply with the civil rules, or upon a mutually agreed set of questions per a CR 26(i) conference. In truth, the Buyers had already provided all substantive answers in their first response. CP 113-119.

Instead of making that phone call, the Renfros filed their motions to compel. *See, e.g.,* CP 111. If the hearing had proceeded the Renfros (or their counsel) would have been subject to sanctions. CP 103-109. The Buyers agreed to a CR 26(i) conference at the courthouse just before the hearing. The fact was that this conference simply confirmed that the Buyers had already provided all necessary information, as illustrated in part by the fact that there was no further motion or discussion before the court at the hearing in April of 2008.

In any event, there was absolutely no evidence of ill-will, much less any attempt to "evade" discovery or full disclosure of information. If the Renfros felt there was additional information lacking in response to their questions, they certainly would have been free to file a motion to compel or seek some other relief from the court. The fact the Renfros did not, and in fact never raised any further issue with the discovery until this appeal, says it all.

C. The Buyers' Attempts to Bring Their Summary Judgment Motion.

The Renfros make much in their brief alleging that the Buyers ambushed them with a summary judgment. It is true that the Buyers filed their summary judgment for hearing when the Renfros' counsel, Mr. Clark, would be unavailable per a duly filed notice of unavailability. The Renfros strongly imply underhanded dealing. But, to make such an allegation is to ignore the full facts.

While the Renfros' current counsel was not in the trenches at trial, a fair reading of the history of the long and arduous attempts to bring the summary judgment motion before the court (with due courtesies to the Renfros' counsel) belie the true nature of what happened. It cost the Buyers over $86,000 to defend themselves just through the summary judgment motion. CP 632-36. This was not a case of hasty action by the trial court, but rather a trying effort to bring the matter to hearing in face of the Renfros' continual – and expensive – delay tactics.

Notices of unavailability are certainly respected and appreciated modes of professional courtesy, which the underlying counsel - and the trial court - make every attempt to honor. In this case, it was the Renfros who abused the process. Notices of unavailability have no actual legal authority and cannot be utilized to hijack legal proceedings

This truly was an unusual case that thus took unusual measures, not because of the disrespect of the Buyers or their counsel, but rather because of the actions of the Renfros that made it impossible for the Buyers to do anything else short of suffering severe prejudice.

This issue ultimately is not (and should not be) an important or even relevant question on appeal. The bottom line is that the Renfros did get to have their depositions before the summary judgment was heard, and all counsel had due opportunity to participate.

However, to clear the record, the Renfros provide here a brief summary of how it came about that the Buyers finally filed their summary judgment, despite the Renfros' counsel's absence, in order to attempt to bring order out of chaos:

- The Buyers attempted for months to secure a mutually agreeable date (as a courtesy) for the summary judgment hearing starting in December of 2007. The Buyers first noted their motion for the end of February 2008, and agreed to continue the hearing until the discovery issues were resolved, knowing that the motion would otherwise be subject to a CR 56(f) motion.

- During the course of the discovery conferences, Buyers' counsel again attempted to discuss (as a courtesy) a cooperative time frame for the summary judgment motion with the Renfros' counsel (Mr. Clark). The time frame for such motion, per restraints of the initial case schedule, would fall during mid-April. Mr. Clark, a non-active CPA, claimed other tax-preparation obligations and thus requested - and Buyers agreed to - a continuance of the trial so that the summary judgment could be heard without putting the response time during tax season.

- When Mr. Clark failed to respond to general queries on available dates, the Buyers proposed two specific dates (including a date before Mr. Clark went on vacation, and a date afterwards). Mr. Clark ignored repeated requests as to his preference between these two dates.

- Mr. Clark served a notice of unavailability for several weeks of the summer only *after* it would be impossible to file for the Buyers' first suggested hearing date (when Mr. Clark would be in town).

- Mr. Clark ignored a suggestion to shorten time on the summary judgment so that it might be heard before he left for the summer. Nor did he respond to any other requests to come up with a mutually agreeable date.

- Because of the impossible position the Renfros put the Buyers in, and the repeated inability to get the Renfros' cooperation in setting the hearing, the Buyers proceeded with their motion so as to get it

on the record, setting it for the date suggested (and never objected to by Mr. Clark) in prior correspondence.

- There was every expectation that counsel could then discuss a firm date for reschedule. At a minimum, the Renfros had an opportunity to file a motion to continue to be heard before Mr. Clark's absence. The record shows that the Buyers had ample reason to believe that proceeding by filing the motion was the only course of action that could get the soonest possible hearing date, given the lengthy period of non-cooperative action by the Renfros.

- Instead, the Renfros served subpoenas to depose the Buyers on June 27, 2008, setting the depositions for the Buyers during the one week that Mr. Clark would be in town over the bulk of the summer (e.g., before a summary judgment motion could be brought while accommodating Mr. Clark's lengthy periods of unavailability). CP 166, 176-87.

- The Renfros served these deposition notices despite the previous agreement filed with the court *not* to conduct further discovery - specifically *including* depositions - until the summary judgment motion on the statutory disclosures could be set and heard. CP 665,669-670.

- The Renfros never filed a motion to continue, failed to make alternative arrangements, or take any other steps to properly re-set the motion. In effect, the Renfros simply ignored the hearing date.

- The Renfros reference in their Brief "lengthy arguments" by the undersigned counsel at the "ex parte" summary judgment hearing on July 18, 2008.[3] The insinuation is that counsel attempted to push the court into a ruling without Renfros' counsel present. That is simply not true.

  A reading of the full transcript referenced and cited by the Renfros[4] will reveal that in oral argument Buyers' counsel simply noted that there was ample basis to proceed with the motion given the history outlined above, referencing (but not discussing at length) the argument set forth in Buyers' first summary judgment Reply.

  Rather than argue these factors at length, counsel emphasized that Buyers anticipated that the hearing would be re-set at a time when Mr. Clark could appear. Counsel affirmed that the primary reason for proceeding with the hearing was to seek guidance from the trial court on how to proceed given the circumstances.

  The trial court re-set the motion and stayed the depositions pending a motion from Mr. Clark on why such motion should be heard. CP 164.

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[3] As a side note, the use of "ex parte" to describe a properly set hearing where opposing counsel fails to appear or appoint someone else to appear in his stead may be something of a misleading term.

[4] For some reason, the Buyers have never received a copy of the transcript ordered and cited by the Renfros, as required by RAP 9.5(a)(1). The transcript should be on the record, as the Renfros cite it in their Brief at 11. Therefore, the Buyers request the Courts' indulgence when they refer to the hearing transcript by identifying the appropriate date.

For further details as needed, the Renfros respectfully point the Court to the record (particularly the Buyers' Reply) for a full accounting of what led to this unfortunate - but ultimately necessary - measure. CP 808-907.

D. The Long-Awaited Summary Judgment Motion.

Buyers based their summary judgment on a straight forward premise: The Renfros had repeatedly failed to provide the disclosures required by RCW 64.06.005. *See generally* CP 144-160. The undisputed facts in this case led to several legal conclusions that in turn led to the trial court's ultimate summary judgment determination that, as a matter of law, the Buyers were thus entitled to rescind the contract per the statute.

The first set of facts at issue in the summary judgment relate to the status of the property as "residential" for purposes of applying RCW 64.06 *et seq.* [5] The Renfros do not dispute either these facts or legal conclusion that the property is "residential" for purposes of applying the statute in their appeal, and thus these elements are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

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[5] While not at issue the Renfros raise on appeal, the summary judgment addressed this element regarding applicability of RCW 64.06 *et seq.* as Renfros repeatedly insisted during the underlying proceedings that the transaction was "commercial," despite the clear applicability of the statutory definition of "residential" in the specific context of applying the statute.

The next set of factual issues on summary judgment relate to the core of this appeal: the whether or not disclosures were made, and whether or not they were required:

- FACT: There was no genuine issue or admissible evidence of material facts disputing the fact that Plaintiffs failed to provide the statutory disclosures before February 7, 2007. CP 20-24.
- FACT: There is no genuine issue or admissible evidence of material facts disputing the fact that Plaintiffs failed to record the Agreement before February 7, 2007. CP 8.
- *LEGAL CONCLUSION:* The Renfros thus failed to "close" the transaction pursuant to RCW 64.06.040.

The Renfros do not dispute either these facts or this legal conclusion in their appeal, which are thus again verities on appeal.

This conclusion is relevant once again to the applicability of the statute. Buyers are entitled to rescind for failure to provide the required disclosures up until closing, which had not occurred in this case when the Buyers rescinded the sale. RCW 64.06.040.

This next fact is the ***only*** element of the summary judgment at issue on this appeal:

- FACT: There is no genuine issue or admissible evidence of material facts disputing the fact that Defendants never explicitly waived the disclosure requirements under RCW 64.06 *et seq.*

The Renfros base their appeal on the this asserted fact regarding waiver, which is in turn relevant to whether or not Defendants were within their statutory right to rescind the Agreement for failure to provide the otherwise necessary disclosures.

This is the only relevant question on appeal: whether or not there was waiver. Most other discussion in the Renfros' Brief is ultimately a distraction from this core issue, including the attempts to imply (incorrectly) some sort of wrongdoing at the trial court level.

As will be discussed further below, the trial court was ultimately correct in concluding that there was no genuine issue, or admissible evidence of material facts sufficient to raise such an issue, that the Buyers never ***explicitly*** waived the statutory disclosures, as required to evade the statutory requirements

Finally, the following conclusions of law flow naturally - and necessarily - if the Buyers were correct in their previous factual assertions:

- *LEGAL CONCLUSION:* As a matter of law, the Buyers' rescission [presuming the disclosures applied] render the Agreement void as of February 7, 2007, entitling the Buyers to a judgment representing full recovery of any deposits paid plus a reasonable interest thereon.
- *LEGAL CONCLUSION:* As a matter of law, the Buyers were thus entitled to recover their attorneys' fees and costs pursuant to the

Agreement, or in the alternative, in defending this frivolous lawsuit.

- *LEGAL CONCLUSION:* As a matter of law, the Buyers were thus entitled to have all of the Renfros' claims dismissed with prejudice, as the Buyers did not breach the Agreement but simply exercised their statutory right to rescind the Agreement, given that Plaintiffs' entire claims rely on breach of contract.

E. The Wrangling over Depositions

As mentioned above, the trial court continued the original hearing date for the summary judgment[6] while striking the depositions, so as to give Mr. Clark the opportunity to (1) attend the hearing and (2) have time to bring a motion, should he wish, to contest the ruling regarding the depositions. CP 164.

The Renfros did file such motion, though it thoroughly failed to meet the requisite elements of CR 56(f). CP 165-190; CP 220-230.

The trial court nonetheless gave the Renfros the opportunity to hold the requested depositions. CP 259-60.

The Renfros did not even attempt to hold the depositions, however, until shortly before a response on the motion would be due. CP 372-386. The Renfros submitted a response based entirely on the hearsay unilateral

[6] By "original hearing date" the Buyers reference the date the original motion was heard; which was actually one week after the note for motion. The Court was in recess for the week that the motion was originally set, so on its own motion continued the hearing one week.

characterization by Renfros' counsel as to what was testified to at the depositions. CP 340-370. Despite the Buyers' strong objections to the same, both because of the inadmissible hearsay[7] and the fact that the inability to procure the transcripts rested with the Renfros' failure to timely set the depositions, the trial court denied the Buyers' motion to strike these hearsay portions and considered the Renfros' characterization of the testimony at face value in making her initial summary judgment determination. CP 390.

The trial court held - correctly - that no reasonable person could conclude that the contract language at issue could constitute an *explicit* waiver. The trial court based her decision on the reasoning set forth in the Buyers' various pleadings, finding that "the language in the contract cannot operate as a legal waiver." CP 287-88 (September 26, 2008 order).

The Renfros nonetheless attempted once again to submit the deposition testimony via their motion for reconsideration, this time attaching the actual transcripts.

Contrary to the Renfros' assertion in their brief, the trial court *did* review the transcripts before rendering her decision on reconsideration.[8]

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[7] For case law and evidence rule prohibition against such testimony in considering a motion for summary judgment, *see* CP 373-376.

[8] The Renfros do not offer any factual support on the record for their assertion that the trial court refused to review the depositions before rending her determination on reconsideration. A transcript of the hearing will show otherwise. The Buyers will consult with the Renfros as to

The trial court simply found - again, correctly - that there was nothing in these transcripts that overcame the failure to demonstrate an *express* waiver of the statutorily required disclosure in the contract. CP 926-927.

F. "Even If": The Renfros Waived their Waiver Claim Long Ago.

While the trial court based her decision on the contract and evidence presented, there remains an additional bases for rejection of the Renfros' waiver claim - ironically enough, through the doctrine of waiver.

The Renfros knew through their lengthy discussions with the Buyers before bringing their suit that the disclosures were an issue. *Not once* did the Renfros raise the assertion that they believed that the Buyers had waived such requirement. *Not once* did Renfros' counsel - who had drafted the contract, and thus language at issue - assert such waiver. *See generally* CP 824,905.

The Renfros filed several variations of their complaint, and *not once* did they assert waiver as a claim or affirmative defense. In fact, in these repeated versions of their complaint the Renfros argue that they *did* provide the disclosures. *See, e.g.,* CP 1-24; CP 48-52.

The Buyers began discussing a summary judgment on the statutory disclosure and rescission issue *seven months* before actually bringing the motion. Several of these months were spent specifically attempting to obtain a mutually agreeable hearing date for this important motion. *Not*

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whether a verbatim report of these proceedings have been ordered. The entire argument should be stricken as unsupported and untrue.

once did the Renfros raise the idea that the Buyers allegedly waived the statutory disclosure requirements.

The Renfros conducted discovery consisting of seventy-one interrogatories and numerous requests for production. *Not one* of these requests dealt with the allegation or claim of waiver. CP 123-139.

A year after the Renfros brought their suit, the deadline for discovery in the initial trial schedule had come and gone when the Renfros counsel (also an inactive CPA) requested (and Buyers agreed to) a continuance so that the summary judgment could be heard after his tax preparation season, with the condition that no more discovery – *including depositions* – would be had until the summary judgment motion was heard. CP 663-668. Furthermore, *not once* had the Renfros even attempted to take the deposition of either the Buyers or Santokh ("Sam") Ram (thus no attempt to seek testimony regarding the alleged wavier issue). CP 819-821.

The Renfros received the long-outstanding motion for summary judgment on June 13, 2008. CP 144-160. The Renfros did not serve subpoenas to depose the Buyers until June 27, 2008. CP 166, 176-87. It was not until *after* their motion for reconsideration for the stay order that the Renfros even raised the issue of waiver. CP 165-69.

Thus, while the trial court based its decision on the contract language and the evidence presented by Renfros, alternative grounds exist

for the Appellate court to uphold the trial court's determination on the basis of the Renfros' waiver of their belated waiver claim.

IV. ARGUMENT

The Renfros' portrayal of the underlying case is misleading and ultimately false.

All that is relevant here is that the Renfros' attorney drafted up a purchase and sale agreement that included a poorly drafted clause that said what it purported to say: that there were no additional documents provided at that time. There was no mention of a waiver of any sort, much less an *explicit* waiver of the statutorily required disclosures.

The trial court correctly found that the parties' contract language cannot serve as a legal waiver in this case, applying the statute at issue.

The trial court did not error when it found, after giving the Renfros numerous opportunities to show otherwise, that no reasonable person could conclude that the contract clause at issue constituted an *express* waiver of the statutory disclosure requirements, as required by Washington law.

The Renfros attempt to argue that there is outside evidence of an intent to waive the disclosures required by RCW 64.06. Neither the facts nor the law support this argument.

A. The Clause at Issue is Clear: There is Not Even a Hint of a Waiver.

This is not a case, as the Renfros assert, where contract interpretation turns on extrinsic evidence. The language at issue is simple:

> ¶ 21 p.6 – "Other Conditions." This Agreement **does not include such other and further documentation and disclosure forms as may be required under law** for the purchase and sale of real estate in the state of Washington.

Nowhere in this clause is there any *waiver* of the Buyers' right to receive the statutorily required disclosures.

This clause says what it says: that the signed agreement did not include any other potentially required documents. That is true, it did not. Nor would it, as the RCW 64.06 disclosures are typically provided after the parties sign an initial agreement. The statute itself generally provides for disclosures within five business days *after* mutual acceptance of a written agreement. RCW 64.06.30.

There would be no reasonable reason to expect that these disclosures would be included in the initial purchase and sale agreement. Thus, it is *unreasonable* to presume that the above language means anything other than what it says: that the disclosures were not part of the written agreement.

B. The Statute Would Requires an *Express* Waiver. That Does Not Exist Here.

Furthermore, the Renfros ignore a critical point. The statute twice states that the seller is obligated to provide the statutorily required disclosures unless the buyer ***expressly waives*** this requirement:

> **64.06.020. Improved residential real property--Seller's duty--Format of disclosure statement--Minimum information**
>
> (1) In a transaction for the sale of residential real property, **the seller *shall*, unless the buyer has *expressly waived* the right to receive the disclosure statement,** 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: [the rest of this section is a sample of the information to be disclosed]

And:

> **64.06.030. Delivery of disclosure statement—Buyer's options–Time frame**
>
> **Unless the buyer has *expressly waived* the right to receive the disclosure statement**, not later than five business days or as otherwise agreed to, after mutual acceptance of a written agreement between a buyer and a seller for the purchase and sale of residential real property, **the seller shall deliver to the buyer a completed, signed, and dated real property transfer disclosure statement**. ...

(emphasis added).

There is nothing in this contract that even *remotely* purports to waive any of the Buyers' rights with respect to RCW 64.06 disclosures. There is certainly no *express waiver* of such right.

Waiver is the intentional abandonment or relinquishment of a known right. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Development, Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). Such intent must be shown "*unequivocal* acts or conduct which are inconsistent with any intention other than to waive." *Id.* Waiver *will not* be inferred from doubtful or ambiguous factors. *Michel v. Melgren*, 70 Wn. App. 373, 379, 70 Wn. App. 373 (1993). Whether waiver has occurred is a question of law where reasonable minds could reach but one conclusion. *Harmony*, 143 Wn.2d at 361.

As the Renfros claim waiver, they bear the burden to prove those elements. To defeat summary judgment, they must provide sufficient admissible evidence to raise a genuine issue of material fact.

At a *minimum*, we have an ambiguous contract. If the clause is ambiguous, it cannot as a common sense matter be unequivocal as required for an express or even implied waiver. *Harmony,* 143 Wn. App. at 361. The trial court did not error in making her determination.

C. Parol Evidence is Not Admissible or Relevant Here.

Nor does the parol evidence rule help the Renfros. As the Renfros correctly note, the parol evidence rule may be admissible to determine the meaning of specific contract terms; but it cannot be used to show intention independent of the contract language, or to vary or modify those terms.

Appellants' Brief at 21, citing *Hearst Communications, Inc. v. Seattle Times co.*, 154 Wn.2d 493, 503, 115 P3d 262 (2005).

Ultimately, the problem for the Renfros is that you never even *get* to extrinsic evidence in this case. The contract clause speaks for itself. The purported after-the-fact interpretation that the Renfros came up with only in responding to the summary judgment motion – well over a year after the Renfros brought this litigation – is simply not a reasonable one. There is *nothing* in this language that waives *anything*. The Renfros interpretation is not reasonable – and thus does not create a basis upon which to delve into the parol evidence regarding the objective of the agreement. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 667-69, 801 P.2d 222 (1990)(one of factors considered is reasonableness of the parties' respective interpretations).

Summary judgment is proper if the record supports only one reasonable interpretation. *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 250-51, 46 P.3d 812 (2002). Where there is only one reasonable meaning of a contractual clause when viewed in context, that meaning necessarily reflects the parties' intent and summary judgment is proper. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn App. 1, 9, 937 P.2d 1143 (1997).

Whatever *reasonable* interpretations may be gleaned from the clause at issue, an express waiver of the residential real estate disclosures

provided in RCW 64.06 is not one of them. There is no mention of the statute, no mention of the disclosures otherwise required (other than to note they are not part of the present agreement), and certainly no waiver of any right to receive disclosures that are due *after* the signing of the agreement in question.

There simply is no genuine issue of material fact sufficient to defeat the trial court's reasonable interpretation of this clause as a matter of law. The Renfros argue that the contract language at issue is itself an express waiver of disclosures being required. The Renfros assert that this issue raises a material question of fact. It does not. Interpretation of the statute as applied to this contract are straight forward and classic questions of law.

Likewise, *Berg* distinguished between contract interpretation and contract construction. 115 Wn.2d at 668. As noted above (and in the abundant pleadings below) there is only one reasonable interpretation of the clause at issue: it cannot be construed to constitute a legal waiver of the statutorily required disclosures. From there, the trial court was well within its rights to issue a determination on the *construction* of the clause (e.., the legal effect) as a matter of law. *Id.*

A look at the holding in *Berg* itself is illustrative:

> [P]arol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the

> intention of the parties and properly construing the writing. **Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein**, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, **and not for the purpose of showing intention independent of the instrument. <u>It is the duty of the court to declare the meaning of what is written, and not what was intended to be written</u>**. If the evidence goes no further than to show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible.

Berg, 115 Wn.2d at 669.

And, as noted in the *Hollis* case also cited by Appellants, "admissible extrinsic evidence does not include: [e]vidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; [e]vidence that would show an intention independent of the instrument; or [e]vidence that would vary, contradict or modify the written word." *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.3d 836 (1999).

D. <u>Any Lingering Ambiguity Must Be Construed Against the Renfros, as the Drafters of the Agreement.</u>

Finally, if there *is* any ambiguity in the contested clause, they must be construed against the Renfros as their counsel (Mr. Clark) drafted the Agreement. *King v. Rice*, 146 Wn. App.662, 671, 191 P.3d 946 (2008). This is a final nail in the coffin of the Renfros' argument.

E. The Renfros had Ample Time and Opportunity to Make Their Case.

The Renfros strongly imply that they were never given proper opportunity to conduct the necessary discovery to rebut the summary judgment issue. Nothing could be further from the truth. As set forth above, the Renfros had every opportunity to do whatever they thought necessary to prepare their case. The trial court allowed the Renfros to add in a new party - despite the fact that the trial continuance had been requested (and agreed to by the Buyers) *only* to accommodate the Renfro counsel's tax season commitments, not to complicate the case or conduct additional discovery.

In fact, counsel had agreed, per the stipulated motion filed with the court by Renfros' counsel ex parte, *not* to conduct further discovery. CP 665.

The trial court nonetheless allowed this additional discovery before hearing the summary judgment motion.

Ultimately, regardless of the details of the process, it comes down to this: the trial court did not hear the Buyers' summary judgment motion until *sixteen months* after the Renfros filed their complaint, just a few weeks before trial. Certainly this should be enough time, and opportunity, to investigate and present the Renfros' case. Any failure to do so must rest with the Renfros. The various attacks and innuendos regarding the Buyers

or their counsel is just noise to distract from the real issue, which is that the Buyers could not prove their case and defeat summary judgment.

As emphasized during the underlying motion, the moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990). "If the moving party satisfies its burden, **the nonmoving party must present <u>evidence</u> that demonstrates that material facts are in dispute**." *Atherton*, 115 Wn.2d at 516 (emphasis added). The repeated problem in this case was the Renfros' failure to provide anything more substantive than vague allegations by counsel and largely unsubstantiated assertions.

"[T]he nonmoving party may "not rely on speculation [or] argumentative assertions that unresolved factual issues remain." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13 (1986); *see also Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998).

With respect to the allegations of waiver, with a careful reading of the underlying pleadings the Court will see that there is no *actual evidence* or even assertion that the Buyers and the Renfros specifically intended to waive the right to receive the statutorily required disclosure via the contract language at issue here. The statute requires specific and explicit waiver in order to supersede the required disclosures. RCW 64.06.020 and -.030.

There was no such waiver here; no admissible evidence sufficient to raise a genuine issue of material fact on the issue.

Once the moving party meets its burden, the burden shifts to the nonmoving party to show that a triable issue exists. *Doherty v. Mun. of Metro of Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). Even the Renfros recognized that the Court properly grants summary judgment where the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." CP 195, citing *Young v. Key Pharms. Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The Renfros simply failed to meet their burden. There is no evidence on the record – because no such evidence exists – that the parties intended to *explicitly* waive the statutory disclosures. On its face, the contract language does not even constitute a waiver, much less an explicit waiver of these specific disclosures as required by the statute. Even if there were *any* question, any ambiguity would be construed against the Renfros as the drafter.

The trial court's decision is sound, and should be upheld.

F. <u>The Renfros Waived Their Claim Long Ago.</u>

The trial court's decision is sound based on the contract itself and the other evidence before the trial court. But it should also be noted that there remains the fact that any factual disputes as to whether or not there

was an intent to waive are *irrelevant.* The Renfros waived their right to argue that the parties had supposedly "waived" the statutory disclosures long before the summary judgment issues went before the court.

The Renfros filed several variations of their complaint. Not *one* of these versions include a claim of waiver. In fact, in their own complaint (repeated again in the various versions), the Renfros argue that they *did* provide the disclosures.

Nor, as set out above, did the Renfros ever raise the issue of waiver in *any* of their lengthy correspondence with Buyers' counsel, despite having been advised of the fact that the failure to provide the disclosure was the basis for the Buyers' rescission under the statute.

CR 8(c) imposes a duty to plead waiver and other affirmative defenses "with certainty and particularity." *Bonanza Real Estate, Inc. v. Crouch*, 10 Wn. App. 380, 286, 517 P.2d 1371 (1974); *for policy considerations, see also Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). If a party does not affirmatively plead CR 8(c) defenses (including waiver), or raise the defense in a CR12(b) motion, such defenses are waived. *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981).

The Renfros did not raise waiver as a defense until filing their response to the Buyers' summary judgment motion. Not only is waiver not raised in the Renfros' pleadings as an affirmative defense (or any other

claim referenced), the disclosures themselves were created *after B*uyers' rescission, and served on the Buyers for the first time *with* the Complaint, and without any caveats. These are hardly acts consistent with the claim that Plaintiffs believed that no disclosures were due.

The Renfros then brought a lawsuit regarding a rescission based on requested disclosures, litigating it for *fifteen months* without ever raising an alleged waiver. The Renfros thus waived this affirmative defense.

Waiver must be pleaded with certainty and particularity as an affirmative defense in order to permit evidence to be admitted in support of that defense. *Bonanza*, 10 Wn. App. at 385. Thus, the Renfros' evidence regarding asserted waiver is *inadmissible* under Washington law, and as such, could not be utilized to defeat summary judgment.

G. Irrelevant Distractions.

1. Circumstances of Original Sale.

The Renfros' arguments over misrepresentation of property acreage and wetlands are ultimately irrelevant to the summary judgment motion - or this appeal. The Buyers based their rescission on the failure to provide the statutorily required real property disclosures. This narrow issue was the only one before the trial court on summary judgment, and is thus the only issue relevant on appeal.

2. Sam.

With respect to Santokh ("Sam") Ram, once again The Renfros trot out Mr. Ram as another villain in this transaction. However, this is just a distraction from the real issues. The Renfros first chose to name Mr. Ram in their lawsuit, and chose not to include Sam Ram in the next version. This was one of the more rational choices made by the Renfros during the course of the litigation, as Mr. Ram was not one of the purchasers or parties to the contract, and the Renfros based their entire case - in every variant of their complaint - on breach of contract. CP 1-24.

However, from the initial failure to ever assert any viable claims against Mr. Ram to the ultimate failure to serve Mr. Ram (despite several trial continuances), the fact is that the Renfros utterly failed to ever properly bring Mr. Ram's *alleged* involvement in the transaction at issue before the court. The complaint does not assert any claims beyond breach of contract claims. CP 1-24. It is undisputed that Mr. Ram was not a Buyer, and not a signatory to the agreement. CP 8-24 (agreement). Mr. Ram was never properly served, nor did the Renfros make any *timely* efforts to do so.

The Renfros did not even assert Mr. Ram as one of the necessary deponents in their substantial effort to obtain deposition of the three Buyers. There was no notice of the urgent "need" to depose Mr. Ram until the subpoenas filed in early September, and the Renfros' subsequent motion to compel. *See* CP 281; CP 261-63; 285-298; CP 314-329.

The Renfros did not seek permission to serve Mr. Ram by publication until *ex parte* motion presented and signed September 15, 2008, three months after they received permission to add Mr. Ram to this lawsuit yet just days before their motion to compel. CP 913-914;[9] CP 923-924.[10]

The Renfros' motion to compel Mr. Ram's deposition was heard a few days later, September 19, 2008, where the trial court denied the request based on the Renfros' failure to serve Mr. Ram since naming him (again) in this litigation on June 13, 2008. CP 164; CP 161-163(amended complaint); CP 925. There was (yet again) no CR 26 conference before the Renfros filed their motion to compel. CP 317.

And, yet again, the Renfros attempted to stall the summary judgment motion because of the failure to do something suddenly "critically urgent" (CP 263) at the eleventh-and-a-half hour, in *direct contradiction* to earlier promises to refrain from exactly the demand being made (CP 325).[11]

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[9] *See also* CP 713 (Order Continuing Motion to Amend for failure to attach proposed amended complaint filed May 30, 2008).

[10] While there is a hand-written note on the order that notice was given to defense counsel, the Buyers' never received any such notice or even knew of this order until told by Mr. Ram's counsel, Mr. Morgan, shortly before the motion to compel Mr. Ram's deposition.

[11] The other critical example being the signed commitment to refrain from further discovery - particularly depositions - as a condition of continuing the trial date. CP 669-670 (Order and Motion Re: Joint and Stipulated Motion to Continue Trial Date filed April 23, 2008).

The *alleged* misdeeds by Mr. Ram involve issues that are ultimately completely irrelevant to the issues at hand. This is just one more distraction in the ongoing attempt to discredit the buyers and gloss by the failures of the Renfros from the time the parties entered this transaction through the long and drawn-out litigation.

Nonetheless, the Buyers would emphasize the fact that *at no point* did they attempt to "hide" Mr. Ram or thwart legally valid attempts to involve him in the process. Any allegations to the contrary are unfounded and unprofessional. The Renfros claim in their brief, for example, that the undersigned counsel "had never revealed" Mr. Ram's marriage to Ms. Kaur. Appellants' Brief at 14. But the cited brief says no such thing - probably because it is not true. CP 262 (simply asserting that counsel is aware of the marriage, and complaining that despite not representing Mr. Ram personally that counsel "did not cooperate" in serving Mr. Ram).

It is true that the Buyers' counsel represented Mr. Ram only in his capacity as "John Doe Kaur" - e.g., the marital community of defendant buyer Paraminder Kaur. But there is nothing untoward about the Buyers' counsel declining to assist the Renfros in bringing suit against Mr. Ram or effecting appropriate service; or about the Buyers' counsel's respectful declination to accept service on behalf of someone not her client. The Renfros simply sought to short-circuit appropriate channels, and then blame others for their own procedural failures.

There are number of reasons that the Renfros' attempts to serve Mr. Ram through the Buyers' counsel was inappropriate - thus making it appropriate to resist the Renfros' efforts to undermine Mr. Ram's rights.

First, by the Renfros' own admission, Mr. Ram was not married to Ms. Kaur (the defendant buyer) when she was served with this lawsuit (CP 262)[12] - and thus is not, arguably, a legitimate "John Doe" Ram. Even if he were, representation of a "John or Jane Doe" extends logically only to the marital estate. The Renfros never made any claims against "Mr. John Doe Kaur" individually. Counsel for the marital estate cannot accept service on behalf of the husband under these circumstances. If the Renfros disputed this, there was plenty of time to bring an appropriate motion before the court to decide the issue.

However, the Renfros not only failed to bring such a motion, but instead - when it is far too late to correct the omission - point fingers at everyone else (from the undersigned counsel to Mr. Ram's personal attorney, Mr. Morgan) for the Renfros' own failures.

This is but one example of the impropriety - and inaccuracy - of the various allegations of "sneaky dealings" regarding Mr. Ram (among other things). There are a number of additional little "facts" asserted in Renfros' brief that do not stand scrutiny when compared against established fact. The Buyers respectfully submit, however, that these

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[12] Noting a marriage date of September 27, 2007 - seven months after the Buyers rescinded the contract at issue.

issues are mere red herrings and thus will not engage in a point-by-point discussion that detracts from the real issue here, beyond the illustrative example above. The Court can discern the truth in the record on appeal, when all pleadings are read in context and citations checked against the actual documents.

The real issue in this case is the Renfros' failure to provide the necessary statutory disclosures, and their attempts throughout the trial court process and this appeal to obscure their own failures with baseless accusations of wrongdoing on the other side.

The simple fact is that the Renfros had numerous opportunities to bring suit against whoever they felt a necessary party - and failed to do so. The Renfros had plenty of time to effect service on Mr. Ram - and failed to do so. The Renfros had plenty of time to depose Mr. Ram or anyone else they chose in the *sixteen months* between when they brought their lawsuit and when the trial court heard the summary judgment - and failed to do so.

There simply is no basis for overturning the trial court's determination,

H. <u>The Buyers are Entitled to Attorneys' Fees on Appeal.</u>

This dispute arises out of a contract that includes an attorneys' fees provision. CP 11 (¶ 10). Should the Appellate Court deny the Renfros'

appeal, the Buyers are entitled to their fees under both the contract and RAP 14.2.

V. CONCLUSION

Neither side should be made to expend yet more monies arguing about an issue that the Renfros actually waived long ago after failing to raise the issue until the eleventh hour, to the great prejudice of the Buyers. Even so, the trial court correctly concluded that the generalist language in the parties' contract could not reasonably be construed, as a matter of law, to constitute a legal waiver of the statutorily required disclosures. The Renfros urge the Court to uphold the trial court's long-awaited ruling.

RESPECTFULLY SUBMITTED this 23rd day of ~~October~~ December, 2009.

By: _____
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