

NO. 38681-0-II

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

RONALD and LANA RENFRO, a marital community; and RONALD  
and LANA RENFRO, in their capacities as Trustees of the Renfro  
Family Trust; and THE RENFRO FAMILY TRUST, a Washington  
Trust,

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.

REPLY BRIEF

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

COURT OF APPEALS  
DIVISION II

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## INTRODUCTION

Despite the old cliché, pounding the table while shouting empty rhetoric and insulting your opponents is no substitute for reasoned legal analysis, careful citation to the record, and relevant legal authority. All tolled, the first half of respondents' brief contains at least a dozen pages lacking any proper citation to the record. The number of aspersions cast throughout their brief – upon both counsel and the Renfros – is far higher.

The issue in this case is whether genuine issues of material fact preclude summary judgment. Specifically, whether the respondents' statements to the Renfros – which they do not deny – expressly waving any disclosures and demanding inclusion of the relevant contract language to that effect, may constitute a valid waiver of those disclosures. No legal authority holds otherwise. This Court should enforce the Renfros' right to a jury trial.

It is telling for the respondents to answer a brief challenging a summary judgment based on genuine issues of material fact by claiming that the “portrayal of the underlying case is misleading and ultimately false.” BR 29. Whether the Renfros' assertions are “ultimately” true is for a jury to decide. Personal attacks aside, this Court should reverse and remand for trial.

## REPLY RE STATEMENT OF THE CASE

### **A. The respondents do not deny key facts and procedure.**

While respondents engage to a remarkable degree in inference and innuendo, they simply fail to contradict the key facts set forth in the opening brief. They do not deny that they first approached the Renfros, who were not trying to sell their property, and expressly waived any disclosures in order to induce them to sell their property. BA 3-4. They do not deny that the REPSA contains provisions (a) giving respondents 10 days to inspect and object, which they did not; and (b) barring any extra-REPSA agreements. BA 4-5. They do not deny that they made substantial down payments, but then repudiated their agreement (allegedly due to the nonexistent extra-REPSA disclosures) when the Renfros refused to lower the price. BA 6-7. They do not deny that under the REPSA, their failure to make the remaining payments when due resulted in forfeiture of their down payments. BA 7.

As importantly, respondents do not deny the key procedural history. They do not deny that they failed to disclose to the Renfros that defendants Ram and Kaur are married, despite knowing that the Renfros were seeking to serve the elusive Mr. Ram. BA 14. They do not deny that the trial court refused to consider transcripts

of depositions it had specifically ordered to occur before rendering summary judgment. BA 15. Most crucially, they do not deny the evidence adduced in those depositions, including defendant Hothi's admission that the "Other Conditions" provision means that under "Washington State law you don't need any other document," "there's no need [for] any other papers." BA 19.

Rather than focus on these key facts and procedures, the respondents mostly focus on irrelevant, extra-record procedural history. BR 5-29. They argue that a "simple factual overview of the procedural pleadings belies the actual tenor of the underlying case" – a remarkable assertion. BR 14. On appeal, the "actual tenor" of the case is determined on a cold, hard record, not on extra-record innuendo. The Renfros accurately stated the record.<sup>1</sup>

**B. Respondents' "facts" are irrelevant or worse.**

The first ("A") section of respondents' Statement of the Case is an argument about what the REPSA says. BR 10-13; *but see* RAP 10.3(a)(5) ("A fair statement of the facts and procedure relevant to the issues presented for review, without argument").

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<sup>1</sup> At various points throughout their brief, respondents also argue at length about things that *they assert* are irrelevant. *See, e.g.*, BR 13 n.4. It is unclear why they do this.

Despite quoting the relevant provisions, respondents flatly argue (without authority) that there is no waiver provision in the contract. BR 10-11. These question-begging arguments are not facts.

Respondents' "B" section draws quite a few inferences about what "appellate counsel valiantly attempts" to do, or what "illusion" the Renfros "try to create," but says nothing of substance. BR 14-16. Respondents engage in various extra-record commentaries having no proper place in an appellate brief. *E.g.*, BR 14. Generally, what happens "in the trenches" stays in the trenches.

At BR 15 (and elsewhere in their brief) respondents apparently attempt to incorporate their trial court pleadings. This too is improper. See, *e.g.*, *Kwiatkowski v. Drews*, 142 Wn. App. 463, 499-500 & n.19, 176 P.3d 510, *rev. denied*, 142 Wn.2d 463 (2008) (citations omitted). This Court should disregard all such references/incorporations, express or implied.

Respondents' "C" section contains more commentary devoid of citations, which the Court should disregard. BR 16-17. Respondents then set forth 13 bullet points (the last three lacking actual bullets) all but two of which are unsupported by any citation to the record. BR 18-21. Again, the Court should disregard these unsupported, often extra-record commentaries and assertions.

In any event, nothing in section “C” is relevant or important. Respondents broadly argue that things said in the opening brief are “not true” or “misleading.” *E.g.*, BR 20-21 & n.7. The record speaks for itself on these points: respondents’ counsel asked for a stay of depositions pending summary judgment, which was granted *ex parte*. See, *e.g.*, BLACK’S LAW DICTIONARY, 657 (9<sup>th</sup> Ed. 2009) (*Ex parte* means “[d]one or made at the instance and for the benefit of one party only, and without notice to, **or argument by**, any person adversely interested” (second emphasis added)).

Respondents’ section “D” again is virtually all argument, no facts. BR 24. It recasts issues in a light more favorable to respondents. This is neither fact nor proper on summary judgment.

Respondents’ section “E” characterizes the discovery process in a light most *unfavorable* to the Renfros and their counsel. BR 24-26. The relevance and purpose are unclear. Remarkably, respondents claim that the order denying reconsideration is not in the record (it is at CP 926-27) and that the Renfros have not established that the trial judge refused to consider the depositions. BR 26 & nn. 13 & 14. On the contrary, the Order Denying Reconsideration says: “Plaintiffs’ motion is thus DENIED **in its entirety**, and this Court’s previously entered determination on

summary judgment on September 28, 2008 **shall stand unchanged.**" CP 927 (emphases added). Since the Judge refused to read the depositions on summary judgment, and this "shall stand unchanged," she refused to reconsider as to the depositions. There is no evidence to the contrary.<sup>2</sup>

Respondents' section "F" is another argument, but this time a new argument raised for the first time on appeal: that the Renfros "waived their waiver claim." BR 26-29. Aside from its improper placement in the facts, this argument runs afoul of RAP 9.12, under which this Court refuses to consider arguments not raised in the trial court. This argument too is discussed in the argument section.

**C. Structure speaks louder than words.**

Ignoring their lengthy "introduction" – which is unburdened by the record or the law – respondents' "facts" are twice as long as their arguments. This appeal's central point is that genuine issues of material fact preclude summary judgment. The very structure of respondents' brief belies their claim that no genuine issues exist. This Court should reverse and remand for trial.

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<sup>2</sup> Respondents state that they "will consult with the Renfros [*sic*] as to whether a verbatim report of these proceedings have [*sic*] been ordered." BR 26 n.13. No such "consultation" has occurred.

## REPLY ARGUMENT

### **A. The standard of review is *de novo*.**

The Renfros stated the correct standard of review, *de novo*. BA 19-20. They also set forth the correct standards regarding contract interpretation. BA 20-21. Respondents do not respond.

### **B. Genuine issues of material fact preclude summary judgment here.**

The Renfros argued that genuine issues of material fact preclude summary judgment here because (a) during negotiations, the respondents expressly waived any and all disclosures in order to induce the Renfros to sell their property (which was not otherwise on the market); (b) the parties placed the waiver provision in the contract to capture the respondents' express waiver; and (c) respondents' denial that they did waive disclosures creates a genuine issue of material fact. BA 21-26. In light of Mr. Hothi's own testimony that other documents were not required to close this transaction, it is simply impossible to conclude that no dispute existed on this question. *Id.*

#### **1. Respondents "expressly waived" all disclosures.**

Respondents first argue that the waiver clause is not a waiver clause. BR 30. They do so by emphasizing one part of the

clause at the expense of its true intent. *Id.* The REPSA refers to “**THIS AGREEMENT**” as respondents’ agreement to buy, and the Renfros’ agreement to sell, the Renfros’ property. CP 8. The waiver provision then states that “***This Agreement*** does not include such other and further documentation ***and disclosure forms*** as may be required under law . . . .” CP 13, ¶ 21 (emphasis added). The parties’ Agreement expressly waives the disclosures.

Respondents argue that the Renfros “ignore” the statute’s requirement that they “expressly waive[d]” the disclosures. BR 31-32. On the contrary, the Renfros quoted this language, with emphasis. BA 22. The respondents expressly waived disclosures, both orally and in writing, and a jury could reasonably so find. *Id.*

Respondents assert that “[i]f the clause is ambiguous, it cannot as a common sense matter be unequivocal as required for an express or even implied waiver,” relying solely on ***Harmony at Madrona Park Owners Assoc. v. Madison Harmony Dev., Inc.***, 143 Wn. App. 345, 177 P.3d 755, *rev. denied*, 164 Wn.2d 1032 (2008). BR 32. ***Harmony*** is an inapposite Condo Act case that says nothing of the kind. Rather, it says that waiver “is a question of fact, unless reasonable minds could reach but one conclusion.” 143 Wn. App. at 361.

In *Harmony*, a subcontractor argued that the general contractor had waived a negligence claim for a portion of the subcontractor's substandard work because the general directed the sub to change that work. *Id.* The subcontract specifically required that such change orders be in writing, and there were no such writings. *Id.* Thus, at most, *Harmony* stands for the unremarkable proposition that where a contract requires written change orders, the absence of a writing is not proof of a waiver. *Harmony* does not support the respondents' claims.

Moreover, the respondents' argument is not "common sense." BR 32. The REPSA is "ambiguous" solely to the extent that the Renfros relied on them to keep their word, never suspecting that they would suddenly demand disclosure forms they had previously expressly waived in face-to-face negotiations. The respondents' express waivers were unequivocal and the waiver provision unequivocally waives all disclosure forms. At the very least, this raises a question of fact for the jury.

## **2. Parol evidence is admissible.**

Respondents argue that the parol evidence (their express waiver of disclosures and testimony that the clause at issue confirms their waiver) is not admissible to prove the parties' intent

in negotiating the clause at issue. BR 32-35. Respondents rely on **Berg** and a few of its progeny, but they are contrary to respondents' position. *Id.* (citing, e.g., **Berg v. Hudesman**, 115 Wn.2d 657, 801 P.2d 222 (1990); **Hearst Communications, Inc. v. Seattle Times Co.**, 154 Wn.2d 493, 115 P.3d 262 (2005); **Hollis v. Garwall, Inc.**, 137 Wn.2d 683, 974 P.3d 836 (1999)).

These cases – and many others – recognize that where, as here, extrinsic evidence directly pertains to what the parties said when negotiating a specific contract provision and to what the parties agreed that specific provision meant, it is plainly admissible to interpret the express language of the contract. BA 20-21; see also **Tanner Elec. Coop v. Puget Sound Power & Light**, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996) (controlling authority quoted in the Renfros' opening brief that the respondents simply ignore). Since respondents deny that they expressly waived disclosures, genuine issues of material fact preclude summary judgment.

Also directly contrary to respondents' position is a case that they cite, but do not discuss, **Hall v. Custom Craft Fixtures, Inc.**, 87 Wn. App. 1, 937 P.2d 1143 (1997). BR 33. Respondents cite **Hall** for the unremarkable proposition that when only one reasonable meaning is possible, summary judgment can be proper.

*Id.* But **Hall** actually holds that genuine issues of fact precluded summary judgment in that case.

Hall sued his former employer for compensation due under a written employment contract (in the form of a letter) claiming that the signatories personally guaranteed his compensation. In granting summary judgment, the trial court found “not even a hint that this letter embodies any kind of personal guarantee of compensation.” 87 Wn. App. at 6. But in reversing, this Court (Judge Morgan writing) noted that when “analyzing the parties’ intent, a court must examine not only the four corners of any writing the parties may have signed, but also the circumstances leading up to and surrounding the writing.” *Id.* at 8. Any “question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.” *Id.* (quoting **Berg**, which was quoting and adopting RESTATMENT (SECOND) OF CONTRACTS § 212).

Indeed – and directly contrary to the respondents’ position here – this Court quoted Comment *b* to § 212 in rejecting the notion that extrinsic evidence may be considered by a jury only when a contract is first found to be ambiguous:

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

*Hall*, 87 Wn. App. at 8 (citing *Berg*, 115 Wn.2d at 667-68). Thus, “Agreements and negotiations prior to or contemporaneous with the adoption of a writing’ must be considered when determining ‘the meaning of the writing, whether or not integrated.’” *Id.* (citing *Berg*, 115 Wn.2d at 668 (quoting, *inter alia*, RESTATMENT (SECOND) OF CONTRACTS § 214(c) (1981); *Tanner*, 128 Wn.2d at 674)).

In sum, “[s]ummary judgment is not proper if the parties’ written contract, viewed in light of the parties’ other objective manifestations, has two (or more) reasonable but competing meanings.” 87 Wn. App. at 9 (citing *Tanner*, 128 Wn.2d at 674). Therefore, “summary judgment was not proper” in *Hall* because two reasonable readings were possible in light of Hall’s testimony about the negotiations leading up to signing the contract:

A reasonable person reading the March 14 letter could conclude, based on Hall’s description of the parties’ negotiations and the parties’ individual signatures on the March 14 letter, *either* that Jerald Dow and Darell Dow were

assenting to guarantee Hall's compensation and restrict their own, or that they were assenting only to restrict their own. We hold that the March 14 letter is susceptible of two reasonable but competing meanings, and that a trial is required on Hall's written contract claim.

87 Wn. App. at 10 (emphasis original).

The same is true here: regardless of whether the respondents claim (or the trial court found) that the document on its face is not an express waiver (which it is), the Renfros' testimony, together with Hothi's own admission that the waiver clause waives disclosure forms, precluded summary judgment in this case. This Court should reverse and remand for trial.

Respondents also try to use *Hollis, supra*, to their own ends. BR 35. But as the language they quote says, extrinsic evidence is precluded only if it (a) reflects a party's unilateral intent, (b) reflects an independent intent, or (c) contradicts, varies or modifies the contract language. *Hollis*, 137 Wn.2d at 695. Here, the extrinsic evidence reflects the parties' objectively manifested negotiations and interpretations of the very contract language at issue, without contradicting, varying or modifying it. Respondents orally waived all disclosures, and the contract says (a) disclosures are not included (CP 13, ¶ 21); (b) no other agreements exist (CP 12, ¶ 15); (c) respondents had 10 days to inspect and object (CP 10, ¶

7); and (d) the Renfros had already fully disclosed any defects known to them (CP 11, ¶ 8.b.). The Renfros' extrinsic evidence directly supports, and is in turn directly supported by, the contract language. Or at the very least, a jury could so find.

**3. Ambiguities are not “construed against the drafter” unless they remain unresolved after a jury considers the extrinsic evidence.**

Exploring the use of cliché pun as inapt metaphor, the respondents next suggest “a final nail in the coffin of the Renfros' argument”: the *construction* against the drafter doctrine. BR 35 (citing *King v. Rice*, 146 Wn. App. 662, 671, 191 P.3d 946 (2008)). *King* is a very recent, two-to-one Division One opinion that (again) does not actually say what the respondents assert and (again) reverses an improper summary judgment and remands for trial. Respondents' two-sentence “argument” is insufficient to preserve this issue on appeal, so the Court should disregard it.

In any event, respondents fail to hit the nail on the head, instead bending *King* to an inappropriate degree.<sup>3</sup> There, a seller had placed a “modular” living structure up on blocks on his property, never attaching it to the ground or to utilities. 146 Wn.

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<sup>3</sup> Sorry.

App. at 669. After closing, the buyer demolished the structure on the theory that it was attached to the real property, so it was transferred to the buyer in the REPSA. *Id.* at 667. The trial court granted summary judgment to the buyer on this theory, but Division One reversed: “Viewing these facts in a light most favorable to King and in light of the common law test outlined above, we cannot say as a matter of law that the structure was real property.” *Id.* at 669. The court reversed and remanded for trial.

The ***King*** case neither turns on nor applies the “construction against drafter” doctrine. Respondents thus provide no authority supporting their position. This Court should disregard their claim.

In any event, respondents are incorrect on the law. They fail to cite or discuss this Court’s recent decision in ***Forest Mktg. Enterprises, Inc. v. State***, 125 Wn. App. 126, 104 P.3d 40 (2005). There, this Court (once again) recognized that the “against the drafter” doctrine does not apply if extrinsic evidence resolves any ambiguities, and refused to apply that harsh doctrine:

Indeed, “[i]f the contract is ambiguous, the doubt created by the ambiguity will be resolved against the one who prepared the contract.” ***Felton v. Menan Starch Co.***, 66 Wn.2d 792, 797, 405 P.2d 585 (1965) (citing ***Sunset Oil Co. v. Vertner***, 34 Wn.2d 268, 208 P.2d 906 (1949)). But we do not always construe ambiguous contracts against the drafter:

“[d]etermination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

“If, after viewing the contract in this manner, the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter.”

***Roberts, Jackson & Assoc. v. Pier 66 Corp.***, 41 Wn. App. 64, 69, 702 P.2d 137 (1985) (quoting ***Stender v. Twin City Foods, Inc.***, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). Here, viewing the contract as a whole and in context, we can determine the parties’ intent. Thus, we need not construe the contract against DNR.

***Forest Marketing***, 125 Wn. App. at 132-33.

Again, the same is true here. Viewing together the parties’ pre-contracting negotiations, the contract language, and Hothi’s admission that the waiver clause is a waiver clause, a reasonable jury could determine that the respondents expressly waived all “disclosure forms.” This question is for the jury. This Court should reverse and remand for trial.<sup>4</sup>

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<sup>4</sup> Respondents’ argument § “E” makes bald assertions that “no evidence” exists that they waived. The evidence is ample, as discussed above.

**C. The trial court erred in refusing to consider respondents' depositions, and respondents failed to raise their new "waived the waiver" argument below, so this Court will not consider it under RAP 9.12.**

The Renfros' penultimate argument on appeal was that the trial court erred in refusing to consider the respondents' deposition transcripts. BA 26-27. As explained above in reply to respondents' "facts," the trial court's Order Denying Reconsideration unequivocally refused to reconsider and left the prior summary judgment ruling "unchanged." CP 927. Thus, the trial court improperly refused to consider the transcripts.

On the other hand, assuming *arguendo* (as the respondents claim despite the absence of any record in support) that the trial judge did consider the depositions on reconsideration, then it plainly erred in granting summary judgment. Respondent Hothi's own admissions that (a) the respondents were required to inspect and object within 10 days and failed to do so under the "Condition of Property" clause (CP 10, ¶ 7); and (b) no other documents were necessary under the "Other Conditions" clause (CP 13, ¶ 21), plainly preclude summary judgment. CP 422-23. Either way, this Court should reverse and remand for trial.

Respondents also attempt to raise a new issue for the first time on appeal: that the Renfros waived their waiver claim. BR 38-40. This Court correctly refuses to consider issues not called to the attention of the trial court. RAP 9.12; ***Building Indus. Assoc. of Wash. v. McCarthy***, \_\_\_ Wn. App. \_\_\_, ¶ 18, 218 P.3d 196 (2009) (citing ***Sourakli v. Kyriakos, Inc.***, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017 (2009)). The Court should disregard this new argument.

In any event, respondents are incorrect. The Renfros are the ***plaintiffs***, so they did not have to assert their claim that the respondents expressly waived all disclosures as an affirmative defense. CR 8(a) (“a short and plain statement of the claim showing that the pleader is entitled to relief”). The Renfros alleged that “not until two months AFTER The Agreement was signed” did respondents begin expressing dissatisfaction, long after the 10-day grace period allowed by the contract, “but nothing more.” CP 4. The Renfros further alleged that respondents breached their duty of good faith in negotiating the contract and anticipatorily repudiated their contract when purporting to “rescind” it. CP 4-5. These factual allegations are more than sufficient to meet the notice pleading requirements in this State.

Respondents also claim that “the Renfros’ evidence regarding asserted waiver is *inadmissible* under Washington law.” BR 40. They cite no case holding that parties may not submit relevant evidence regarding contract negotiations in response to a summary judgment under a contract, much less that a trial court abuses its discretion by considering such relevant evidence. The respondents’ claim is meritless.<sup>5</sup>

**D. The Renfros are entitled to fees on appeal, but the respondents are not.**

The Renfros properly briefed their request for fees. BA 28. The respondents have no response. If the Renfros prevail as they should, this Court should award them fees.

By contrast, respondents request “fees under both the contract and RAP 14.2.” BR 46. But RAP 14.2 concerns solely costs. They thus cite no legal authority for awarding them attorney fees. Our courts reject inadequate fee requests. See, e.g., ***Wachovia SBA Lending, Inc. v. Kraft***, 165 Wn.2d 481, 493, 200 P.3d 683 (2009) (denying contractual fee award even where party cited RAP 18.1). This Court should deny respondents’ fee request.

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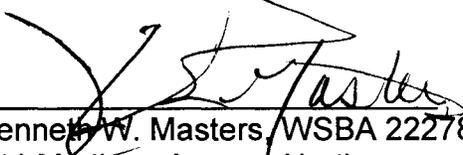
<sup>5</sup> Respondents spend their last five pages on what they aptly call “Irrelevant Distractions.” BR 40-45.

## CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse and remand for trial. It should also award attorney fees and costs to the Renfros.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of November, 2009.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 25<sup>th</sup> day of November 2009, to the following counsel of record at the following addresses:

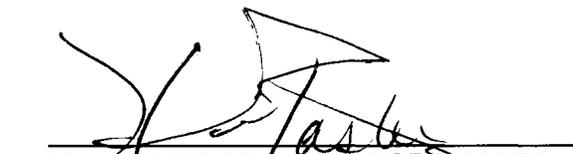
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