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COURT OF APPEALS  
DIVISION TWO

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No. 44719-3-II  
STATE OF WASHINGTON

COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION TWO

ORIGINAL

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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.

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

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**APPELLANTS' REPLY BRIEF**

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## **I. RESPONSE TO THE COE'S STATEMENT OF THE ISSUES**

The Coes have chosen not to directly address the issues set forth by the Noels in their Opening Brief. Rather, they have created their own statement of the issues and seek to address those instead. As a result, most of the Noels' arguments regarding their assignments of error are unopposed.

The Coes have asked the Court to note that the Noels did not appeal the trial court's denial of their motion to strike Donna Coe's affidavit [Respondent's Brief ("RB"), p.1]. Arguably, the denial of a motion to strike, standing alone, is not an appealable issue. However, the failure of the trial court to sustain the Noels' objections to Donna Coe's affidavit, the granting of a motion for partial summary judgment, and the subsequent entry of a judgment based on the inadmissible testimony contained in it is reversible error. The Noels' motion to strike, though not independently appealable, preserved the issue for review.

## **II. RESPONSE TO THE COES' STATEMENT OF THE CASE**

### **A. Factual Background**

The Coes state as a fact that:

“[M]onths after the sale closed, Coe was notified by the Assessor's office for Wahkiakum County that Noel had petitioned for a reduction in property value based on erosion loss of 100' feet of river frontage. CP 265.”  
[RB, p.2].

The Coes' statement is materially false and misleading. The Assessor's

letter, [CP 275], contained none of the information alleged by the Coes to have been included in it. In fact, Chief Deputy Appraiser Mike Funderburg stated that Donna Coe had told him that she knew about the appeal and the erosion (“scouring situation”) before ever having talked to him [CP 275, ¶ 2]. Additionally, the letter notified the Coes of the following:

“[M]y understanding as an appraiser is that there is not a value problem on frontage properties unless the buildings or habitability of the property is threatened. There is no evidence of any impending threat to this property that I could observe.” [CP 275, ¶.3].

In other words, in the opinion of the Assessor, the existence of erosion to the river frontage was *immaterial* to the actual value of the property. The Coes were further advised in the same letter that:

“Puget Island is not scheduled to be re-assessed until 2010. You should be able to enjoy the ability to have a very conservative tax bill at least till then.” [CP 275, ¶ 4]

In 2010, as predicted by Mr. Funderburg, the land value of the property was reappraised upward by \$173,000 to \$283,300. The Coes appealed and settled for an increase of \$140,200 to \$249,600. [CP 221, ¶ 42-43] see also [CP 273, ¶ 6]; [CP 279].

The Assessor’s letter, along with the subsequent increase in assessed value in 2010, support the Noels’ answer of “no” to the Seller’s Disclosure Statement question: “Is there any *material* damage to the property from fire, wind, floods, beach movements, earthquake, expansive soils, or

landslides?”

The Coes improperly submit as “fact” the contents of pre-litigation settlement negotiations between the parties’ attorneys [RB, p.2, ¶ 6]. Such negotiations are inadmissible pursuant to Evidentiary Rule 408. The Noels further Object to their inclusion as irrelevant.

The Coes again misrepresent the record by falsely stating that the Noels answered interrogatories which confirmed that they “chose not to disclose the erosion to Coe.” [RB, p.3]. The Coes cite to CP 165, 683, but the cited pages do not evidence any such “choice.” The Coes then falsely state as a material fact that:

“[N]ancy Noel testified in her Affidavit that she made the choice not to disclose the erosion even though she knew of its existence. CP 43.”  
[RB, p.3]

In truth, the Affidavit shows Nancy Noel’s testimony to be:

“[O]n March 17 2007 my husband and I filled out the Seller Disclosure Statement. [W]e considered each question carefully and answered each truthfully and in good faith as we understood them. [A]s we understood the question to be in the present tense and for the purpose of disclosing hidden damage, *we did not believe* that there was any existing material damage to the property resulting from fire, wind, floods, beach movements, earthquake, expansive soils, or landslides.”  
[CP 43-44, ¶ 5 (*italics added*)]

There is simply nothing in the record to support the Coes’ factual assertion that the Noels made a choice not to disclose erosion to the Coes. There were no questions asked on the Seller’s Disclosure Statement

regarding the existence of erosion, and the Noels, like the Assessor [CP 275], did not believe that there was any *material* damage resulting from either flood or beach movement.

The last paragraph in this section regarding depositions and Eric Noel [RB, p.3] is irrelevant and superfluous. The Court found both Robert and Nancy Noel to be medically incompetent to testify or to participate in this action and appointed their son Reid Noel to serve as their guardian ad litem. Eric Noel was appointed by the court to represent the Trust as successor trustee. The Coes have not appealed the trial court's appointments, and neither the depositions nor the allegations against Eric Noel have any bearing on the issues before this Court.

#### **B. Procedural Background**

Again, the Coes include a factual assertion which relies on the inadmissible evidence of settlement negotiations [RB, p.3, Sec.B, ¶ 1]. The Noels again Object as irrelevant and inadmissible.

The Coes then attempt to impeach Eric Noel by claiming that he intentionally misrepresented the fact that he was Attorney-in-Fact for his parents [RB, p.4].<sup>1</sup> Again, the Noels Object as to relevance.

The Coes go on to state that they moved for Partial Summary

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<sup>1</sup> It is true that Eric Noel was unable to produce the Power of Attorney when asked. However, he immediately obtained replacements and was subsequently appointed by the court to represent the Noel Family Trust.

Judgment on “material facts which were not in dispute.” [RB, p.4]. That statement is clearly false. Although the Coes did not specify what issues they wanted adjudicated in their actual Motion [CP 178], the facts alleged by the Coes in their memorandum in support of it [CP 181] were as follows:

1. That the material fact of erosion was not “readily ascertainable” by the Purchasers;
2. That the property had suffered “significant, non-routine, dramatic erosion;”
3. That the Noels failed to disclose that they had sought a *reduction* in property value “that was *pending at the time* they sold their property to the Plaintiffs;” and
4. That the Noels had a specific and *exclusive knowledge* of the avulsion.  
[CP 181-182]

Those facts were specifically denied by the Noels at partial summary judgment [CP 188- 191] as they are now.

The Noels filed an extensive Concise Statement of Material Facts [CP 209-516] in opposition to the Coes’ motion, which was supported by 307 pages of affidavits and exhibits. NONE of the facts stated in the Noels’ Concise Statement of Facts were denied, disputed, nor in any way controverted by the Coes at partial summary judgment, and they remain undisputed in these proceedings.

It is of no small significance that the Order Granting Plaintiffs’ Motion for Partial Summary Judgment [CP 690-693], as presented by the

Coes, contained only *one* of the requested findings. There was no finding of “significant, non-routine, dramatic erosion,” no finding that the Noels’ appeal was “pending at the time they sold their property to the Plaintiffs,” and no finding that “the Noels had a specific and exclusive knowledge of the avulsion [presumably ‘the erosion’].” Despite the fact that the findings contained in the Order differed dramatically from the findings requested by the Coes in their motion, the court, without explanation, granted the Coes’ Motion for Partial Summary Judgment anyway.

The Coes, in a footnote, appear to object to the inclusion of the Affidavits of Toni Robinson and Calvin Hampton as evidence for the Court’s consideration, allegedly because they were not before the trial court at “summary judgment.” [RB p.8, n.6]. However, the Coes’ motion was for an Order of *partial* summary judgment as to a number of alleged facts [CP 178, 181]. They *specifically* sought no judgment as to any of their claims [CP 659 at 15-18], and no judgment was granted. It was not until they moved for entry of judgment that the issues regarding rescission or final judgment were raised [CP 706-708]. The Docket shows that the Coes’ Motion for Entry of Judgment, [CP 927, No.144], was filed on February 21, 2013. The Noels responded with the affidavits in question on February 27, 2013, and on March 4, 2013 [CP 928, Nos.167-176]. All of the affidavits were before the court prior to the hearing on March 4, 2013 and prior to the entry of judgment on March 6, 2013 [CP 928, Nos.177-

178].

### III. REPLY TO THE COES' ARGUMENT

#### A. Re: Issue Raised by the Coes Concerning Alleged Duties.

The arguments of the parties, as they relate to the duties between them, can be reduced to the following: The Coes argue that the Noels had a statutory and common law duty to disclose the history of erosion and the encroachment of the river onto the subject property and that they failed to do so. The Noels argue that they truthfully answered every question asked of them; that the Coes had a statutory and contractual duty to diligently investigate the property; that the Coes were given sufficient notice as to the history of erosion and encroachment by the river, via the preliminary title report and the Form 17 Disclosure Statement; and that they failed to follow through on their contractual and statutory duties to investigate.

The Coes rely on three facts: 1) that the Noels answered “no” to two questions on the Form 17 relating to the existence of “*material* damage to the property” from beach movements,<sup>2</sup> and to the existence of surveys that “*adversely affect*” the property; 2) that Nancy Noel had knowledge of erosion issues on the island based on her involvement with an “advisory board;” and 3) that the Board of Equalization reversed the Assessor’s

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<sup>2</sup> The Coes allege damage from flooding for the first time in their Response Brief.

proposed re-assessment of the property for tax purposes based on evidence of “extreme erosion.” None of these facts are in dispute.

The Coes rely, without authority, on their own expansive interpretation of RCW 64.06.020 in support of their contention that the Noels had a *generalized* statutory duty to disclose the existence of erosion on the property, and to disclose the results of their successful tax appeal. The Noels, too, rely on RCW 64.06.020 to support their contention that the statutory duty to disclose is *limited* to truthfully answering the questions in the Seller’s Disclosure Statement and to provide it to the buyers. The Noels further contend that the same statute required the Coes 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.” The Noels further rely on RCW 64.06.050, which exempts sellers from liability for errors, inaccuracies, or omissions in the Seller’s Disclosure Statement unless they had *actual knowledge* of the error, omission, or inaccuracy.

The Coes cite to a variety of non-real estate cases, including *Sorrell v. Young*, 6 Wash.App. 220,491 P.2d 1312 (1971), in support of their contention that there is a common law duty to disclose information in a sales transaction when one party has knowledge of material facts related to that transaction that are not easily discoverable by the other.

Based on the Coes’ own cited authorities, their three undisputed facts

are insufficient to support their claim for rescission. The Coes must also provide uncontroverted evidence of the following: 1) that the Noels' answers to the questions on the Form 17 were actually erroneous; 2) that the Noels knew at the time that their answers were wrong; 3) that the existence of erosion was known exclusively or "peculiarly" by Nancy Noel; 4) that the Noels' answers were actually "*material*" to the Coes' decision to purchase the property; and 5) that the existence of erosion would not have been discovered by the Coes by "utilizing diligent attention and observation."

The Coes have made no showing as to any of those required findings. For starters, they have not shown that the Noels' answers were wrong. As to the Noels' negative answer regarding "material damage" from beach movement, etc., Kay Cochran (former Wahkiakum County Assessor) [709,711], Toni Robinson (Managing Broker of Lower Columbia Realty) [CP 718,720]; Calvin Hampton (the surveyor whose surveys are identified in the title report) [CP 827, 831]; and Wahkiakum County Chief Deputy Appraiser, Mike Funderberg, [CP 275] all concur with the Noels. Although the Board of Equalization did reverse the Assessor's proposed tax increase based on evidence of erosion, the results were only temporary, with the Assessor subsequently reassessing the land back upward in 2010, [CP 221, ¶ 42] [CP 273, ¶ 6] [CP 551, 55:4-56:12]. Donna Coe, herself, acknowledged in deposition that the lower tax assessment was not

materially related to the actual fair market value of the property, and may have actually been a “plus.” [CP 550-551, 53:18-54:17].

Even if reasonable minds could disagree as to the correctness of the Noels’ Form 17 answer, there is nothing in the record to demonstrate that they had knowledge that their answer was anything other than accurate. It is true that the Noels used the loss of frontage that occurred in 1996 to justify their appeal of the upward reassessment of their land in 2006.<sup>3</sup> However, it is clear that in the process of listing and pricing their home for sale in March of 2007 [CP 709-710, ¶ 2 and 7], the Noels learned what former County Assessor Kay Cochran, Realtor Toni Robinson, Surveyor Calvin Hampton, and Appraiser Mike Funderburg already knew; what Donna Coe acknowledged in deposition; and what the Board of Equalization finally realized when they reassessed the property back upward in 2010: that the history of erosion at the waterfront had no material bearing on the actual fair market value of the property.

As for the Noels’ negative answer regarding the existence of surveys

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<sup>3</sup> The Coes incorrectly argue that the Noels are equitably estopped from stating their belief as it existed in March of 2007 because they may have believed differently a year earlier. To establish equitable estoppel requires proof of: (1) an admission, statement or act inconsistent with a claim later asserted; and (2) reasonable reliance on that admission, statement, or act by the other party, *Department of Ecology v. Theodoratus*, 135 Wn.2d 582 (Wash. 1998). The Coes cannot show “reasonable reliance” on the Noels’ statement to the Board of Equalization regarding the existence of erosion because they were unaware of it until well after they purchased the property.

that “adversely affect” the property, the Coes have failed to show how the Noels’ negative answer was incorrect. They have failed to demonstrate how any survey could or did “*adversely affect*” the property. The question itself seems unclear and ambiguous. Although a survey may show the existence of a condition that might affect a property, the Noels are unsure, and unwilling to speculate, as to how a survey itself might “adversely affect” a property. The Coes have also failed to show that the Noels believed their answer to be inaccurate.

As pointed out by the Coes in their Response, “there were no surveys of record *commissioned by the sellers* which provide evidence of the flood-induced erosion of the subject property.” [RB p.20]. The Coes also point out “that the surveys were of *neighboring properties*.” [RB, p.29]. There is simply no proof that the Noels had any knowledge of their existence when they filled out the Form 17. The Coes, on the other hand, were notified by the title company that the surveys may have had discrepancies between them, and that there may have been:

“[M]atters. . .disclosed by surveys filed for record May 8, 1984, August 28, 1984, May 1, 1987, February 7, 1990, January 23, 1995, July 13, 1995 and April 1, 1998 under Auditor’s File Nos. 35773, 35968, 37849, 39838, 44626, 45116, and 48447 in Volume 3, 3, 3, 3, 5, 5, and 6 of Surveys, pages 3, 14, 65, 109,57,94 and 43. respectively, records of Wahkiakum County, Washington.”  
[CP 214-215, ¶ 24-25] [CP 252-253]

In other words, the record shows that at the time of the sale, based on their

receipt of the title report, the Coes had far greater knowledge of the surveys than did the Noels.

It is undisputed that the Noels made no statements to the Coes regarding the existence of erosion, surveys, or anything else regarding the condition of the waterfront other than their answers to the Form 17 questions [CP 218, ¶ 32] [CP 465, (105:14-20)]. Pursuant to their own authority, *Gronlund v Andersson*, 38 Wash.2d 60 (1951) [RB p.29], the Coes must prove, not only that the Noels' answers were wrong, but that the answers “*materially induced*” the Coes to enter into the contract. The Coes have offered nothing to support that contention. The Coes knew about the discrepancies in the past surveys, knew about the permit for erosion control, and knew that there were exceptions in the title report for encroachment by the river onto the property. They knew from the Form 17 that the property was in a flood plain and contained fill material. They personally inspected the waterfront and saw the waves and breakwater [CP 723, 725] put there for erosion control.<sup>4</sup> However, none of the material facts revealed to them deterred them from purchasing the property. In view of that fact, it strains logic to believe that the Noels' negative answer to the

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<sup>4</sup> The breakwater is the large structure of pilings that extends from the upstream corner of the property out into the river. It is plainly visible in the aerial photos of the property, as it was when the Coes inspected the property [CP 723-725] .

Form 17 question regarding material damage from beach movement<sup>5</sup>  
*materially induced* the Coes into buying the property.

Pursuant to their own cited authorities, the Coes have the burden of demonstrating that Nancy Noels' knowledge of erosion was "exclusively" and "peculiarly" hers and could not easily be discovered by the Coes, [citations at RB p.21-22]. However, the record shows the list of people and agencies with knowledge of the erosion issues at the property's river frontage was extensive. It included: neighbors [CP 456, 60:6-12]; real estate brokers [CP 718-721; CP 709-711]; surveyors [CP 827-831]; the Wahkiakum County Dept of Building and Planning [CP 729]; the Wahkiakum County Engineer [CP 408]; the Wahkiakum County Assessor's Office [CP 482-515]; the Board of Equalization [CP 486-488]; the Washington State Board of Tax Appeals [CP 493-494]; Farmers Insurance Co. [CP 409]; the U.S. Army Corps of Engineers [CP 528-529]; Wahkiakum Title and Escrow Co. [CP 517-526]; the editor, staff, and readers of The Wahkiakum Eagle newspaper [CP 528-529]; and both houses of Congress [CP 530-535]. The Coes have failed to demonstrate why, with the existence of all of those knowledgeable and publicly available resources, they could not have discovered the existence of erosion issues related to the property.

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<sup>5</sup> The Coes own realtor, Ken Ingalls, when asked about "beach movement," testified: "[I] don't even know what that means" [CP 478].

The Coes have Admitted that the Noels' tax appeal was public record [CP 456, (58:14-17), (60:16-18)]. All of the relevant records were located at the Assessor's office at the Wahkiakum County Courthouse [CP 482-483] and were stamped with the Assessor's stamp showing the date of receipt [CP 486]. Had the Coes followed up on the title report disclosure that there were taxes due on the property [CP 214-215, ¶.25(1)] [CP 252, ¶1 and 9], they would certainly have discovered the history of the tax appraisals and the appeal, but they failed to do so. They cannot now complain that the matter was concealed from them.

In their defense, the Noels rely on the additional undisputed facts: 1) that the Coes included three optional inspection addendums into the contract, including an option to verify property boundaries and encroachments; 2) that the Coes failed to follow through on the inspections that they had reserved for themselves in the contract; 3) that the Coes received a preliminary title report showing the existence of discrepancies in past surveys; 4) that the title report disclosed the existence of a dredge disposal permit for erosion control; 5) that the title report disclosed that there were taxes due on the property; 6) that the title report disclosed that there were exceptions for river water that might cover the land; 7) that the Coes received notice via the Form 17 Disclosure Statement that the property was in a flood plain and contained "fill material;" and, 8) that the Coes made no inquiries to anyone as to erosion,

flooding, surveys, the dredge disposal permit, or any of the exceptions disclosed to them in the title report. NONE of these facts, as stated in the Noels' Concise Statement of Material Facts [CP 209-516], are in dispute.

The undisputed facts, provided by both parties, shows clearly that the Coes have not met their burden of showing that the Noels had any contractual, statutory, or common law duties related to the transaction that they did not perform. The Coes, however, by failing to follow through on their contractually reserved inspections, and by failing to further inquire about the issues disclosed to them in the title report and on the Form 17, failed their contractual duty to inspect the property, and 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."

**B. Re: Appellant's Issue 1 - Donna Coe's Affidavit [632].**

The Coes argue generally that the exhibits contained in Donna Coe's affidavit should be admitted. However, all those exhibits exist elsewhere in the record. The Noels' objections rest not with the exhibits themselves, but with Donna Coe's stated allegations of fact contained in her affidavit. In particular, the Noels object to the unsupported allegation by Donna Coe that there was a private meeting between the parties for the purpose of confirming the Noels' answers to the questions asked in the Form 17 Disclosure Statement. Donna Coe declared:

“3) Prior to purchasing the property, on May 10, 2007, My husband and I met with Mr. and Mrs. Noel in there home at 72 E. Sunny Sands, to review the Seller’s Disclosure form.”  
[CP 119 (citations omitted)]

“4) We specifically discussed some of the questions on the disclosure form, including, *‘Is there any study, survey, or notice that would adversely affect the property?’ ‘Is there any material damage to the property from fire, wind, flood, beach movement, etc.?’* and, *‘Are there any material defects affecting the property that a prospective buyer should know?’* The Noels answered each of these questions in the negative.”  
[CP 119 (emphasis original)]

There is no corroborating evidence of such a meeting between the parties, and certainly no evidence to support the alleged fact as to the subject matter. There was no mention of the alleged meeting in Donna Coe’s prior affidavit [CP 91], and no allegation concerning it in the Complaint [CP 7]. It strains logic to believe that Donna Coe would have requested their realtor to leave the parties alone, and then, in private, have asked the Noels to verbally confirm their answers to only those questions which would support her summary judgment motion made five years later. The questions regarding material damage from “beach movements” and surveys that “adversely affect the property” were somewhat ambiguous. The Noels’ answers, “no”, were unremarkable and would not have been more memorable to Donna Coe than the other 111 questions the Noels answered. When asked in deposition about the Noels’ answers to other relevant questions, i.e., the property being in a flood plain, and the existence of fill material, Donna Coe either did not remember the answer

or was unconcerned [CP 463 (94:4-16) (95:3-7)].

In October of 2008, prior to their court declared incompetence, the Noels responded to the following interrogatory question from the Coes:

- Q. “[D]escribe in detail each conversation that the Plaintiffs have had with the Defendants from the first contact to the present date. . .”
- A. D]efendants acknowledge that they had a conversation with Plaintiffs when Plaintiffs personally inspected the property on May 10, 2007, and recall that Plaintiffs inspected the river front and the waterline, but cannot at this time recall the specifics of that conversation.”  
CP 674

Contrary to the Coes’ contention, the Noels’ interrogatory in no way supports the “meeting” alleged by Donna Coe to have occurred. It certainly does not support the alleged subject matter of the conversation.

Despite Donna Coe’s affidavit statement that Ken Ingalls “allowed” them to have a private meeting to discuss the disclosure statement, Ingalls testified in deposition that he had no knowledge of any such meeting:

- Q. “[D]o you know whether - - do you recall whether Mr. and Mrs. Coe would have met independently, without you being present, with Mr. and Mrs. Noel to go over this disclosure statement?”
- A. “[I] don’t know if they did. They could have. I mean, I don’t have any knowledge of that.”  
[CP 662]

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). The trial court erred by overruling the Noels' objections to Donna Coe's unsupported affidavit and by failing to hold that the Noels' interrogatory answers and Ken Ingalls' deposition testimony created a genuine issue as to whether the alleged meeting actually took place.

The Noels Objections to the rest of Donna Coe's affidavit have been discussed in detail in the Opening Brief and will not be rehashed here.

**C. Re: Appellants' Issue 2 - The court failed to construe the evidence and all inferences therefrom in the light most favorable to the nonmoving party**

The Coes make a token argument that there is a "subtle nuance" between the Noels' petition to limit the County's proposed tax appraisal of their land to \$200,000 and the Coes' allegation that the Noels petitioned to have their property value decreased [RB 17, E]. The rules of summary judgment require a court to construe that "subtle nuance" in favor of the Noels, Suarez v. Newquist, 70 Wn. App. 827, 855 P.2d 1200 (1993). The graph accompanying the affidavit of the Wahkiakum County Assessor, Bill Coons, illustrates the dramatic increase in tax assessed value that the Noels were facing at the time they appealed their appraisal [CP 379 (compare 2002-2006)]. The Noels' petition was to limit that increase to \$200,000 [CP 486, 3(b)]. The court erroneously entered findings that the Noels had sought and obtained a "tax devaluation," when in fact the Noels

had agreed to a substantial *increase* in assessed value of their land, from \$118,800 to \$200,000.

**D. Re: Appellants' Issue 3 - There is no evidence to support, and no legal basis for a finding that the Noels owed the Coes fiduciary duties.**

The Coes have provided no opposition to the Noels' argument, except to say that the court's finding was unnecessary [RB, p.23].

**E. Re: Appellants' Issue 4 - The Noels had no duty to disclose the successful 2006 appeal of the proposed reassessment of their land for tax purposes.**

As acknowledged by Donna Coe, and argued earlier in this Reply, the assessed value of this (or any) property is immaterial to its actual fair market value. There were no questions asked of the Noels regarding taxes, appraisals, or anything similar, either by the Coes directly or in the Form 17. There is no statutory requirement to disclose a property's tax history, and the Coes have failed to show that the Noels made any misleading or ambiguous statement of fact regarding the tax assessment or appraisal that needed to be clarified. The tax history, including the appeal, was public record, and easily discoverable through the Assessor's office at the Wahkiakum County Courthouse [CP 482]. The Noels had no duty to anticipate that the Coes might want the information and, absent any question posed to them, had no duty to disclose it.

**F. Regarding Appellants' 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.**

The Coes have failed to respond to the Noels' argument. It is undisputed that the Coes failed to verify *lot size, square footage, and encroachments*, after having received notice of a permit for erosion control, discrepancies in prior surveys, and possible encroachment by the river [CP 218, ¶ 29]. Their failure to conduct the inspections that they had reserved for themselves waives their right to complain that the encroachment of the river was not disclosed to them.

**G. Regarding Appellants' 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.**

The Coes have failed to respond to the Noels' argument. It is undisputed that the Coes failed to obtain the reserved inspections [CP 317-318, ¶ 28], after having received notice that the property was in a flood plain, contained fill material, and had a permit attached for erosion control. Their failure to inspect waives their right to complain that the existence of erosion was not disclosed to them.

**H. Regarding Appellants' Issue 7 - The alleged defects were not *hidden*, and the Coes' reservation of an optional contractual right to make the sale contingent on their subjective satisfaction with the results of their own inspections created a duty of due diligence.**

The Coes have failed to respond to the Noels' argument. Despite

having been advised in writing “to retain inspectors qualified to identify the presence of defective materials and evaluate the condition of the property,” [CP 259 at 147-153] [see also CP 290 at 147-153], the Coes chose to make the sale contingent on their own subjective satisfaction with *their own* personal inspection [CP 260]. Conditions at the waterfront were not hidden [CP 719-720, ¶ 5-7; 725 and 733 ], and the Coes were allowed to, and did, personally inspect. [CP 45, ¶ 8; 673]. The Coes’ failure to recognize or inquire about the obvious signs of erosion, after having received notice of potential problems via the title report and Form 17, waives their right to complain that the existence of erosion at the river front was not disclosed to them.

**I. Re: Appellants’ Issue 8 - RCW 64.06.050 exempts the Noels from liability for any errors or omissions on the Form 17 seller’s disclosure statement**

The Coes have failed to respond to the Noels’ argument, except to say that the Noels knew that erosion existed. As discussed earlier, there is no evidence to show that the Noels had any knowledge that their Form 17 answers contained any errors or omissions. As a result, the statute exempting them from liability applies.

**J. Re: Appellants’ Issues 9 and 10 - The Coes have waived their claims.**

The Coes provide a token argument that they filed suit within a reasonable time. While that may be an issue of fact, the Coes have

provided no authority to show how failing to move forward on their claims for five years, moving to have them dismissed entirely [CP 110-113], and extensively remodeling the subject property during the pendency of this litigation does not constitute waiver. As for their assertions the extensive remodel of the house constituted “necessary improvements,” the Coes have failed to provide any evidence of *necessity*.

The Coes state, without evidentiary support, that the loft was dilapidated and unsafe. Although they failed their contractual duty to inspect the land, the Coes did hire an inspector to examine the house [CP 452, (43:18 - 44:5)] [CP 474 (15:18-23)]. Their inspector would certainly have discovered a “dilapidated and unsafe” loft, yet the Coes provide no report from the inspector, or any other qualified professional, to support their contention as to its condition.

Donna Coe testified in deposition that the “remodel” [her words] also included, among other things, the removal of a wall between the kitchen and living room, the installation of all new flooring and granite counter tops, the combining of two small bedrooms into one larger one, the installation of new cabinets, the removal of a walk-in pantry, and the installation of an additional outside doorway to provide access to the bathroom for the kids [CP 457-459]. She also testified that the entire remodel was a do-it-yourself project by their son, Palmer, who, although he received compensation for his services, had no training in the trades

[CP 457-459 (73:25 - 74:13) (78:15-17)]. Palmer, an Oregon resident, was not an owner of the property [CP 8, ¶2.1 and 3.2]. Despite his removal of the loft, relocation of walls and extensive electrical work, Palmer Coe held neither the required contractor's license nor an electrician's license. There is no record of his being either bonded or insured as required by statute. In fact, his only credential was that his mother believed he was "handy." Donna Coe testified that the entire project was done without Palmer having pulled any permits, and without any of the required inspections. [CP 459 (81:10-13)]. Pursuant to RCW 18.27.020 (requiring a contractor's license), RCW 19.28.041 (requiring an electrician's license), and RCW 19.28.101 (requiring inspections), all of the work performed by Palmer Coe on the subject property was done illegally.

Pursuant to the Coes' own authority, the underlying purpose of rescission is to put the parties back in the same position they occupied prior to the contract between them [citations at RB p.31]. That is now impossible. The Noels sold the Coes a house with a separate living room and kitchen, and a loft over the living room that was used as an office and spare bedroom, a bonus/hobby room, and a large walk-in pantry [CP 298]. The Coes seek to return a house with less living space, no loft, no bonus/hobby room, no walk-in pantry, and with a combined living room and kitchen. In addition, the Coes seek to return a house that has been illegally remodeled without the required permits, which pursuant to RCW

64.06.020(1)I-4C(1-2), is a fact that all future owners will have to disclose.

The Coes attack the cases cited by the Noels as not being exactly on point. That is probably because if there has ever been a prior occasion where a party sought to rescind a real estate contract and waited five years before moving on their claim, sought to have it dismissed twice, and extensively and illegally remodeled the house while the action was pending, it is doubtful that any attorney would have pursued the claim to judgment. It is even more doubtful that any judge would have granted it. The legal principles governing rescission are the same, regardless of the subject matter. The Coes' argument to the contrary is without merit.

The bottom line is this: three years after the Coes purchased the property, and two years before they moved for rescission of the contract, the Coes completely and illegally reconfigured and remodeled the house so that it is substantially different than it was at the time it was sold. They cannot now give it back.

**K. Appellants' Issue 11 - The Doctrine of "Election of Remedies" Bars the Coes' Damage Claims and Necessitates Dismissal of This Action.**

The Coes have failed entirely to respond to the Noels' argument. The Coes made a choice as to whether to seek damages or rescission as their remedy. They elected rescission and pursued that claim to final judgment. For the reasons set forth in the Noels' Opening Brief and in this Reply, the

Coes' rescission claim cannot be granted. Under the doctrine of "Election of Remedies," their damage claims are now barred.

The Noels are now 90 years old, in failing health, and in assisted living in Oregon. The Coes are not much better. The Noels renew their plea for this Court, upon a holding that rescission was erroneously granted, to expedite the resolution of this case with an Order that it be dismissed pursuant to the doctrine of Election of Remedies.

#### IV. 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 21<sup>st</sup> day of January, 2014.

Respectfully submitted,

RICHARD L. GRANT, P.C.

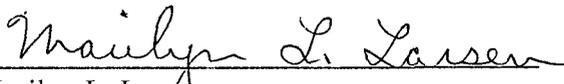
By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of January, 2014, I served a true and correct copy of the foregoing APPELLANTS' REPLY 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:

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CERTIFICATE OF SERVICE