

NO. 66278-3

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

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COUGAR MOUNTAIN PROPERTIES, LLC, a Washington limited liability company; KEN NELSON AND ANDREE NELSON, husband and wife and the marital community composed thereof; JOHN MURPHEY and ELLEN MURPHEY, husband and wife and the marital community composed thereof; J&L ENTERPRISES WA, LLC, a Washington limited liability company,

Appellants/Appellants,

v.

CITY OF BELLEVUE, a municipal corporation,

Defendant/Respondent.



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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Hon. Mary Yu)

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**REPLY BRIEF OF APPELLANTS**

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Bradford G. Moore  
Attorney at Law  
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(425) 453-8161  
*Attorney for Appellants/Appellants*

ORIGINAL

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## ARGUMENT IN REPLY

1. **There Was No Evidence of Any Wrongdoing, or Any Wrongdoer, to Trigger the Running of the Statute of Limitations.**

As it did in its summary judgment motion, again the City ignores the clearly stated rule that the statute of limitations does not begin to run until the plaintiff is aware that some wrongful conduct occurred. *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998). Certainly Mr. Murphey knew in 2005 that a rezone was now necessary to move the short plat application forward. However, there is absolutely no evidence in this record that Murphey (or any appellant) knew that the need for that rezone was the result of some wrongful conduct by anyone. There is also no evidence appellants knew the need for the rezone was the fault of the City.<sup>1</sup> Instead, all of the evidence is that the City actively misled the

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<sup>1</sup> There is no question the City knew its failure to disclose the density restriction was negligence, subjecting the City to liability: "ordinarily, a building permit applicant is responsible for ensuring his or her own compliance with codes, regulations, and ordinances. *Taylor*, 111 Wash.2d at 168, 759 P.2d 447; *Meaney*, 111 Wash.2d at 179, 759 P.2d 455. As the *Meany* court held: "It is only where a *direct inquiry* is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound. (*emphasis added*) 111 Wash.2d at 180, 759 P.2d 455." *Mull v City of Bellevue*, 64 Wash.App. 245, 252-253, 823 P.2d 1152 (1992).

appellants about why the rezone was needed, instead of admitting its role as the City now freely admits. See Section II, *infra*.

In *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wash.2d 315, 759 P.2d 405 (1988), following a plane crash, an investigation into the cause of the crash concluded that mechanical defect was not a cause of the crash. The deceased pilot's father did nothing until 11 years later when he learned that a similar aircraft had had takeoff problems similar to the sequence that resulted in his son's death. Only then did the father "...begin an investigation of the cause of the crash which killed his son."<sup>2</sup> During that investigation the father located an alleged defective piece of his son's airplane. The Court applied the discovery rule to these facts, and held that the statute of limitations was tolled:

On this record, there are no facts which causally connected the product to the harm. Plaintiffs had no more reason to believe that there was any defect in the aircraft than to disbelieve the accuracy of the official investigation that the cause of harm was pilot error and not the result of mechanical defect.

111 Wash.2d at p. 327.

Similarly, in *Orear v. International Paint Company*, 59 Wash.App. 249, 796 P.2d 759 (1990), the plaintiff was injured by

exposure to paints and solvents which he alleged were defective. This Court reversed a statute of limitations dismissal, and applied the discovery rule because the plaintiff had been unable to identify the identity of the defendant responsible for his injury:

Although no Washington court has explicitly decided whether knowledge or imputed knowledge of a particular defendant's identity is necessary for the cause of action against that defendant to accrue, we hold that such knowledge is necessary, absent countervailing statutory language.

59 Wash.App. at p. 255.

On the record before this Court, there is no evidence that any appellant knew or should have known that the need for a rezone involved any act or omission of the City of Bellevue. The only evidence on this issue is directly in opposition to that notion. There clearly is no evidence that any appellant knew or should have known that the City wrongfully failed to disclose the density limitation.

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<sup>2</sup> 111 Wash.2d at p. 318.

2. **City of Bellevue Personnel Misrepresented Why a Rezone was Needed.**

Contrary to the City's argument that 'Nothing in the record...even suggests that the City, prevented, in any way, discovery by Cougar Mountain of the facts necessary to bring a claim"<sup>3</sup>, the only evidence on this issue supports only one conclusion: That City personnel gave Mr. Murphey misleading reasons for the need for a rezone. This misdirection steered Murphey away from the truth (that the City had known about the undisclosed density restriction, at least back to the time of the initial pre-application conference, and had failed to disclose the restriction to Murphey), and directly toward other factors having nothing to do with the City's conduct, mistake, or "oversight". This is not a situation where the evidence is in conflict. Here, the only evidence in the record is that Murphey was misled by City of Bellevue personnel.

No one from the City ever suggested to Murphey that the City knew of this density restriction in 2003. CP 238. No one from

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<sup>3</sup> Brief of Respondent, p. 20.

the City ever suggested to Murphey that the City should have told Murphey about this density restriction at the pre-application conference in December 2003. CP 238.

Murphey's declaration is the only evidence in the record about what City personnel told him about the need for a rezone: that a newly imposed requirement from some outside agency or planning document had suddenly come up in June 2005. CP 237-238. Murphey's testimony about what he was told by City personnel as the reason for the rezone is completely unrebutted, and is the only evidence on that subject in this record. The City's statement that, "...in late June or early July of 2005, Folsom verbally informed Cougar Mountain of the oversight..." is not accurate.<sup>4</sup> There is no testimony that Murphey was ever told (let alone in 2005) that the need for the rezone was the result of an "oversight" or any other action or inaction of City. Murphey directly denied that word (or any word suggesting this problem was something the City knew or should have known) was ever used. CP 238. In addition, faced with Murphey's declaration in Cougar Mountain's response to the City's summary judgment motion

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<sup>4</sup> Brief of Respondent, pp. 12-13.

detailing the misleading explanation he was given, neither the City nor Mr. Folsom offered any rebuttal or contradiction to that testimony. So the record here contains no evidence Murphey was told the truth by City employees, and abundant evidence (the only evidence on this issue) that City personnel actively misrepresented and misled Murphey about the need for the rezone.

In *Allyn v. Boe*, 87 Wash.App. 722, 943 P.2d 364 (1997), Division II addressed the issues associated with a tortfeasor's concealment of its wrongdoing. Boe logged land adjacent to Allyn's property. Allyn observed trees on his property had been cut, and reported the theft to the sheriff's office. When questioned by the police, Boe "...denied cutting the trees even though he knew from a survey in 1988 that he had cut some of Allyn's trees."<sup>5</sup> Some years later Allyn matched a tree cut on Boe's land to a stump on Allyn's land. Applying the discovery rule to toll the statute of limitations, the court focused on Boe's knowledge of his wrongdoing and his concealment of that wrongdoing:

Boe knew in 1988, from the survey, that he had trespassed on the Allyn's property and cut down their trees. But he did not tell the Allyn's of the trespass.

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<sup>5</sup> 87 Wash.App. at p. 726.

Furthermore, when confronted by the sheriff, Boe denied cutting the trees. Mr. Allyn was forced to hire an investigator and timber expert to learn who had cut his trees. Thus, although Mr. Allyn learned of the trespass within the three-year period of the statute, he was frustrated in identifying the trespasser by Boe's denials and concealment.

87 Wash.App. at p. 737 (*emphasis added*).

On this record there is more than just a dispute about whether the City misled and concealed its wrongdoing. Murphey's declaration describing how the City misled him about the need for a rezone is unrebutted. There is no dispute on this issue: Murphey's declaration is the only evidence about that issue on this record.

**3. No Evidence Has Ever Been Offered that Appellants Suffered any Damage Until After October 2006.**

Murphy's declaration is the only evidence in the record on this issue. Murphey's declaration is unambiguous: "... we didn't experience any monetary or economic loss as a result of that requirement until after 2006, and certainly after October 2006..."<sup>6</sup>

The City cites to *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998).<sup>7</sup> That opinion, as well as the opinions cited in appellants' opening brief, all make clear that, under the discovery

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<sup>6</sup> CP 241

rule, the plaintiff must suffer "some appreciable harm."<sup>8</sup> Here, the City offered no evidence of any kind of any harm suffered by the appellants occurring until within the 3-year statute of limitations period. The only evidence in the record on this point is Murphey's unambiguous declaration that no harm had occurred until within the 3-year period.<sup>9</sup>

Again, the record on this issue is not one in which there is a factual dispute. The only evidence is that no harm had occurred.

#### **4. Conclusion.**

The City failed to offer any evidence that suggests appellants knew or should have known that the need for the rezone was the result of any party's wrongdoing, let alone that it was the result of the City's wrongdoing. To muddy the water even further, the City actively concealed its role and its wrongdoing, and misled the appellants about the City's role. In any event, neither harm nor damage of any kind resulted from the need to rezone the property until within the 3-year statute of limitations period.

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<sup>7</sup> Brief of Respondent City of Bellevue, p. 22.

<sup>8</sup> *Green v. A.P.C.*, 136 Wn.2d at p. 96.

<sup>9</sup> CP 241

On each of these three points the record is clear. The evidence here goes beyond just a factual dispute. Here, the only evidence supports the application of the discovery rule. The trial court's dismissal of the appellants' action against the City should be reversed.

RESPECTFULLY SUBMITTED, this 7<sup>th</sup> day of April, 2011.

A handwritten signature in black ink that reads "Bradford G. Moore". The signature is written in a cursive style with a horizontal line underneath it.

Bradford G. Moore, WSBA #7707  
1750 112<sup>th</sup> Avenue NE, Suite D-155  
Bellevue, WA 98004  
*Attorney for Appellants/Appellants*

**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the foregoing REPLY BRIEF OF APPELLANTS to be served on the following counsel of record via e-mail and legal messenger on this 8<sup>th</sup> day of April, 2011:

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Assistant City Attorney  
Office of the City Attorney  
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*Attorney for Defendant/Respondent*



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Charolette Mace, *Paralegal to*  
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Furthermore, when confronted by the sheriff, Boe denied cutting the trees. Mr. Allyn was forced to hire an investigator and timber expert to learn who had cut his trees. Thus, although Mr. Allyn learned of the trespass within the three-year period of the statute, he was frustrated in identifying the trespasser by Boe's denials and concealment.

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**3. No Evidence Has Ever Been Offered that Appellants Suffered any Damage Until After October 2006.**

Murphy's declaration is the only evidence in the record on this issue. Murphey's declaration is unambiguous: "... we didn't experience any monetary or economic loss as a result of that requirement until after 2006, and certainly after October 2006..."<sup>6</sup>

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rule, the plaintiff must suffer "some appreciable harm."<sup>8</sup> Here, the City offered no evidence of any kind of any harm suffered by the appellants occurring until within the 3-year statute of limitations period. The only evidence in the record on this point is Murphey's unambiguous declaration that no harm had occurred until within the 3-year period.<sup>9</sup>

Again, the record on this issue is not one in which there is a factual dispute. The only evidence is that no harm had occurred.

#### **4. Conclusion.**

The City failed to offer any evidence that suggests appellants knew or should have known that the need for the rezone was the result of any party's wrongdoing, let alone that it was the result of the City's wrongdoing. To muddy the water even further, the City actively concealed its role and its wrongdoing, and misled the appellants about the City's role. In any event, neither harm nor damage of any kind resulted from the need to rezone the property until within the 3-year statute of limitations period.

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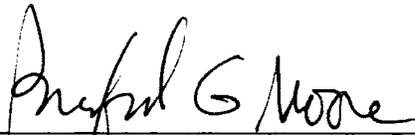
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RESPECTFULLY SUBMITTED, this 7<sup>th</sup> day of April, 2011.

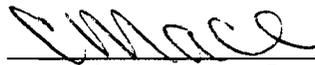
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I certify that I caused a copy of the foregoing REPLY BRIEF OF APPELLANTS to be served on the following counsel of record via e-mail and legal messenger on this 8<sup>th</sup> day of April, 2011:

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*Attorney for Defendant/Respondent*



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Charolette Mace, *Paralegal to*  
Bradford G. Moore, WSBA #7707  
Attorney for Appellants/Appellants

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<sup>1</sup> There is no question the City knew its failure to disclose the density restriction was negligence, subjecting the City to liability: "ordinarily, a building permit applicant is responsible for ensuring his or her own compliance with codes, regulations, and ordinances. *Taylor*, 111 Wash.2d at 168, 759 P.2d 447; *Meaney*, 111 Wash.2d at 179, 759 P.2d 455. As the *Meaney* court held: "It is only where a *direct inquiry* is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound. (*emphasis added*) 111 Wash.2d at 180, 759 P.2d 455." *Mull v City of Bellevue*, 64 Wash.App. 245, 252-253, 823 P.2d 1152 (1992).

appellants about why the rezone was needed, instead of admitting its role as the City now freely admits. See Section II, *infra*.

In *North Coast Air Services, Ltd. v. Grumman Corp.*, 111 Wash.2d 315, 759 P.2d 405 (1988), following a plane crash, an investigation into the cause of the crash concluded that mechanical defect was not a cause of the crash. The deceased pilot's father did nothing until 11 years later when he learned that a similar aircraft had had takeoff problems similar to the sequence that resulted in his son's death. Only then did the father "...begin an investigation of the cause of the crash which killed his son."<sup>2</sup> During that investigation the father located an alleged defective piece of his son's airplane. The Court applied the discovery rule to these facts, and held that the statute of limitations was tolled:

On this record, there are no facts which causally connected the product to the harm. Plaintiffs had no more reason to believe that there was any defect in the aircraft than to disbelieve the accuracy of the official investigation that the cause of harm was pilot error and not the result of mechanical defect.

111 Wash.2d at p. 327.

Similarly, in *Orear v. International Paint Company*, 59 Wash.App. 249, 796 P.2d 759 (1990), the plaintiff was injured by

exposure to paints and solvents which he alleged were defective. This Court reversed a statute of limitations dismissal, and applied the discovery rule because the plaintiff had been unable to identify the identity of the defendant responsible for his injury:

Although no Washington court has explicitly decided whether knowledge or imputed knowledge of a particular defendant's identity is necessary for the cause of action against that defendant to accrue, we hold that such knowledge is necessary, absent countervailing statutory language.

59 Wash.App. at p. 255.

On the record before this Court, there is no evidence that any appellant knew or should have known that the need for a rezone involved any act or omission of the City of Bellevue. The only evidence on this issue is directly in opposition to that notion. There clearly is no evidence that any appellant knew or should have known that the City wrongfully failed to disclose the density limitation.

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<sup>2</sup> 111 Wash.2d at p. 318.

2. City of Bellevue Personnel Misrepresented Why a Rezone was Needed.

Contrary to the City's argument that "Nothing in the record...even suggests that the City, prevented, in any way, discovery by Cougar Mountain of the facts necessary to bring a claim"<sup>3</sup>, the only evidence on this issue supports only one conclusion: That City personnel gave Mr. Murphey misleading reasons for the need for a rezone. This misdirection steered Murphey away from the truth (that the City had known about the undisclosed density restriction, at least back to the time of the initial pre-application conference, and had failed to disclose the restriction to Murphey), and directly toward other factors having nothing to do with the City's conduct, mistake, or "oversight". This is not a situation where the evidence is in conflict. Here, the only evidence in the record is that Murphey was misled by City of Bellevue personnel.

No one from the City ever suggested to Murphey that the City knew of this density restriction in 2003. CP 238. No one from

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<sup>3</sup> Brief of Respondent, p. 20.

the City ever suggested to Murphey that the City should have told Murphey about this density restriction at the pre-application conference in December 2003. CP 238.

Murphey's declaration is the only evidence in the record about what City personnel told him about the need for a rezone: that a newly imposed requirement from some outside agency or planning document had suddenly come up in June 2005. CP 237-238. Murphey's testimony about what he was told by City personnel as the reason for the rezone is completely un rebutted, and is the only evidence on that subject in this record. The City's statement that, "...in late June or early July of 2005, Folsom verbally informed Cougar Mountain of the oversight..." is not accurate.<sup>4</sup> There is no testimony that Murphey was ever told (let alone in 2005) that the need for the rezone was the result of an "oversight" or any other action or inaction of City. Murphey directly denied that word (or any word suggesting this problem was something the City knew or should have known) was ever used. CP 238. In addition, faced with Murphey's declaration in Cougar Mountain's response to the City's summary judgment motion

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<sup>4</sup> Brief of Respondent, pp. 12-13.

detailing the misleading explanation he was given, neither the City nor Mr. Folsom offered any rebuttal or contradiction to that testimony. So the record here contains no evidence Murphey was told the truth by City employees, and abundant evidence (the only evidence on this issue) that City personnel actively misrepresented and misled Murphey about the need for the rezone.

In *Allyn v. Boe*, 87 Wash.App. 722, 943 P.2d 364 (1997), Division II addressed the issues associated with a tortfeasor's concealment of its wrongdoing. Boe logged land adjacent to Allyn's property. Allyn observed trees on his property had been cut, and reported the theft to the sheriff's office. When questioned by the police, Boe "...denied cutting the trees even though he knew from a survey in 1988 that he had cut some of Allyn's trees."<sup>5</sup> Some years later Allyn matched a tree cut on Boe's land to a stump on Allyn's land. Applying the discovery rule to toll the statute of limitations, the court focused on Boe's knowledge of his wrongdoing and his concealment of that wrongdoing:

Boe knew in 1988, from the survey, that he had trespassed on the Allyn's property and cut down their trees. But he did not tell the Allyn's of the trespass.

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<sup>5</sup> 87 Wash.App. at p. 726.

Furthermore, when confronted by the sheriff, Boe denied cutting the trees. Mr. Allyn was forced to hire an investigator and timber expert to learn who had cut his trees. Thus, although Mr. Allyn learned of the trespass within the three-year period of the statute, he was frustrated in identifying the trespasser by Boe's denials and concealment.

87 Wash.App. at p. 737 (*emphasis added*).

On this record there is more than just a dispute about whether the City misled and concealed its wrongdoing. Murphey's declaration describing how the City misled him about the need for a rezone is unrebutted. There is no dispute on this issue: Murphey's declaration is the only evidence about that issue on this record.

**3. No Evidence Has Ever Been Offered that Appellants Suffered any Damage Until After October 2006.**

Murphy's declaration is the only evidence in the record on this issue. Murphey's declaration is unambiguous: "... we didn't experience any monetary or economic loss as a result of that requirement until after 2006, and certainly after October 2006..."<sup>6</sup>

The City cites to *Green v. A.P.C.*, 136 Wn.2d 87, 960 P.2d 912 (1998).<sup>7</sup> That opinion, as well as the opinions cited in appellants' opening brief, all make clear that, under the discovery

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<sup>6</sup> CP 241

rule, the plaintiff must suffer "some appreciable harm."<sup>8</sup> Here, the City offered no evidence of any kind of any harm suffered by the appellants occurring until within the 3-year statute of limitations period. The only evidence in the record on this point is Murphey's unambiguous declaration that no harm had occurred until within the 3-year period.<sup>9</sup>

Again, the record on this issue is not one in which there is a factual dispute. The only evidence is that no harm had occurred.

#### **4. Conclusion.**

The City failed to offer any evidence that suggests appellants knew or should have known that the need for the rezone was the result of any party's wrongdoing, let alone that it was the result of the City's wrongdoing. To muddy the water even further, the City actively concealed its role and its wrongdoing, and misled the appellants about the City's role. In any event, neither harm nor damage of any kind resulted from the need to rezone the property until within the 3-year statute of limitations period.

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<sup>7</sup> Brief of Respondent City of Bellevue, p. 22.

<sup>8</sup> *Green v. A.P.C.*, 136 Wn.2d at p. 96.

<sup>9</sup> CP 241

On each of these three points the record is clear. The evidence here goes beyond just a factual dispute. Here, the only evidence supports the application of the discovery rule. The trial court's dismissal of the appellants' action against the City should be reversed.

RESPECTFULLY SUBMITTED, this 7<sup>th</sup> day of April, 2011.

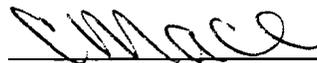
A handwritten signature in black ink, appearing to read "Bradford G. Moore". The signature is written in a cursive style and is positioned above a horizontal line.

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## CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing REPLY BRIEF OF APPELLANTS to be served on the following counsel of record via e-mail and legal messenger on this 8<sup>th</sup> day of April, 2011:

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