CASE NO. 101675-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 837460

OLASEBIKAN AKINMULERO

Appellants,

v.

ALLIED RESIDENTIAL – CARRIAGE HOUSE,

Respondent.

Appeal from the Superior Court of King County

Judge Chad Allred

No. 21-2-03580-5-KENT

Review from Court of Appeal division 1

No. 837460

PETITION FOR REVIEW

OLASEBIKAN AKINMULERO, Pro Se

3606 SOUTH 180TH STREET, #C35

SEATAC, WA 98188

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INTRODUCTION

Appalent has a lease agreement with Allied property management. A public owned apartment complex, managed on contract by Allied property management.

In 2019, in the thick of the COVID, there was a warning to tow appellant's vehicle for missing registration tab on the license plate. Appalent scheduled a visit to the DMV office in the Maple Valley to get a replacement. What actually happened was that there was vandalism of the tab, there were remnants left on the plate. Since it was not a renewal, it was prorated. Appellant decided to just renew for the following year, saving prorated fees. A copy of the registration and tab was given to the office, a copy was left on the dashboard of the vehicle and a note to that when the city is open, appellant will buy a license cover for the plate.

Come then, a year later, with no warning, the vehicle was towed. Therefore, when Allied manager refused to return the vehicle, instead it was auctioned (and the wrecking company threatened with a lawsuit to recover) A lawsuit was initiated in the Superior court.

The superior court cancelled already schedule jury trial and issued a summary judgement. That decision was appealed, and the Court of appeal decided on a De Novo. The decision is here by been requested for review.

IDENTITY OF THE PETITIONER

The Petitioner, Olasebikan Akinmulero respectfully requests the Court to accept review of the Court Appeals decision.

COURT OF APPEALS DECISION

On December 30th, 2022, the court of Appeals, Division 1 issued a decision to deny motion of reconsideration. A motion with clear and distinct material facts in the case.

On November 7, 2022, Court of appeals, Division 1 issued opinion, after a de Novo, on Superior court decision issued a summary judgement.

ISSUE PRESENTED FOR REVIEW

When ruling on summary judgement, the cardinal rule is that Appellant evidence must be accepted as true. The Respondent has burden of proof that evidence submitted by Appellant are not sufficient to establish triable issue of "material fact"

1. Did the Superior Court commit probable error and substantially limit, when the Court cancelled the remainder of the case schedule?
2. Summary Judgement is a serious damage to Justice as it deprived appalent the right to Jury trial. Did the Superior Court commit probable error and substantially limit. Violation of the Washington State Constitution such that review is warranted under RAP 2.3(b)(2)? The court on page 8, refused to consider argument in the reply brief as it was too late to consider. The dictionary meaning of De novo is: "from the beginning; anew". It is interesting therefore to complain that pleading was already in. Since the judge on appeal started the review all over, then therefore, cheering picking only document of evidence by the Respondent but rejecting Appellant document, is error in review or implicit expression of discrimination towards Appalent.
3. The court grant of Summary judgement is unconstitutional. In the case of Bender v. Monroe Township, No. 05-cv-216, 2007 WL 836865, The Third circuit court reversed District court grant of summary judgement, and that district court should have "allowed the jury to determine which version [was] to be believed. This ruling is a reaffirmation to the citizen significant path to Justice, Liberty, and freedom, when they can have their day in court. I was denied my day in court. Denied my right to state may case with witness and material facts.
4. On page 2, of the court decision, declaration of the community manager that Appellant vehicle was towed for expired license registration. The court however stated on page 6 of the ruling that "Even assuming a factual dispute about the status of Akinmulero's vehicle registration in March 2021, he fails to explain how that status was material to his claims" This is an error in judicial opinion. It is obviously a material fact when the Commuter submitted a declaration that the status of the vehicle in March 2021 was the reason the vehicle was towed. Appellant has the burden to show facts contrary to the community Manager. A significant reason summary judgement should not be granted arbitrarily.

5. The decision on both Superior court and Court of Appeals caused heavy financial burden on Appellant because of loss of vehicle. Unwarranted economic penalty. In the matter City of Seattle v. Long, this court agrees that some people can use their vehicle as residence. Theis court further stated that under Eighth Amendment, fines and tow charges violated "excessive fines" for mere infraction. Consequently, the loss of my vehicle, expenses to retrieve my belongings, stress and expense to acquire another vehicle were to excessive. Whereas no crime was committed or any violation of the law. In ability to articulate argument is not a question of the law. It is therefore unreasonable for the Court of appeal to make Allied unaccountable for the Economic, pain and suffering, as a result of summary judgment.
6. The purpose and intend use of Summary judgement is to relieve the court of unnecessary consumption of the court to deal with fictitious lawsuits. However, more time has been spent on the case, had the court not prevented due process by granting summary judgement.

STATEMENT OF THE CASE

A. The Superior court granted summary judgment in an error, denied Jury trial.
B. The court of appeals granted discretionary review
C. Court of Appeal decide on De Novo trial.
D. The decision affirmed the superior court decision. The court made decision not on facts, but on:
    i. Opinion that appellant did not articulate his argument. It is discriminative. In the legal sense, Discrimination is the unequal or unfair treatment of a person based upon some personal characteristic. In the **legal** sense, discrimination occurs when people of different groups or identities are valued and treated differently in the eyes of the law.
    ii. Appellate presented photocopies that were not authenticated. (The court at no point makes claim that the evidence were false documents or fabricated).
    iii. The decision also supported false statements by the attorney representing Allied that the vehicle was not properly registered.
    iv. Some language in the decision is uncharacteristic a of panel of judges engage in discrimination and denigrating litigants. It is unfair to separate or categorize litigants whereas the materials facts remain disputable.

E. Court of Appeal Rejected Motion for reconsideration. In the motion, colored copies of the photos that clearly show the vandalism were attached.

ARGUMENT

A. Articulate

The court should never be a setting for discrimination or with a biased opinion with strictly classification of people with matter before the court. It should not give difference to either parties on the ability to or in ability to fund a high-power lawyer.

It is Extremely disconcerting, that ordinary person, that does not belong to the elite class who cannot afford an attorney or who is an officer of court but do have material facts of a matter are hereby scared away from litigating in the court because of inability to argue against the improperly use of summary judgement. Since the Court of appeals finds that appellant arguments were erratic and not articulated, that finding is then therefore support reason to deny Summary judgement.

In a story by ABC news, on January 31, 2007, title A Biden problem: Foot in mouth.

"I mean, you got the first mainstream African-American who is articulate and bright and clean and a nice-looking guy," Biden said. "I mean, that's a storybook, man."

Biden choice of words is relevant here in this matter as it shows a serious discrimination of different groups of people and class. The use by this court is an extreme expression of prejudice and discrimination.

Biden later apologized for the comment. Obviously, there is something wrong with that type of language, it should never come from the court of justice. A place to maintain fairness and equality, regardless of race, greed, and class. This court must at least agree that it may be difficult prove a violation of any statute of the law, the statement is irresponsible and distasteful and of course evidence discrimination towards individuals with facts, but not a lawyer.

non-legal scholar. To see garbage language from politicians in any court of court, is a vivid sign of downward trend for justice. I am sure that the jury of my own peers would dismiss the case due to non-articulation of material facts. This do defeat Summary judgement and a reversal must be eminent.

In the legal sense, discrimination means something different. *Discrimination is the unequal or unfair treatment of a person based upon some personal characteristic.*

In the **legal** sense, discrimination occurs when people of different groups or identities are valued and treated differently in the eyes of the law. But the law can also combat discrimination, specifically targeting issues of inequity in both individual cases and on a grand scale. Municipal, provincial, federal, and international lawmakers can all enact laws that address maltreatment on the grounds of discrimination.

Discrimination means, at a very basic level, the act of separating out singular things or groups of things.

B. Errors in the Law

Summary Judgement are Case Killers, according to a distinguished legal scholar, Sharon J. Arkin (See Appendix 1)

CONSTITUTIONAL THAME: "Legal Scholars and judges believe that the summary judgement is unconstitutional when you look at Seventh Amendment which provides that……., the right of trial by jury shall be preserved be preserved."

- *Rice v. Clark* (2002) 28 Cal.4th 89, 96; *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 589, 722. ["to avoid summary judgment a showing need not be strong;, it need only be sufficient to raise a triable issue of fact."]
- Goberman v. Washington County Counsel, CV-00-1083-ST ..."[W]e **requires** very little evidence to survive summary judgment in a discrimination ... **sufficient to raise a triable issue of fact**.
- Summary judgement is a means of adjudicating a case without trial. It is not a proper means of judging material facts, but short cutting judicial trial to speed up cases in the court and avoid cases back log. It is a means of eroding the Cliches of "Our day in Court" (, 475 U.S. 574 (1986), Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
- In 13 Wn. App. 641, 536 P.2d 686, this Appellate court wrote, ASHWELL-TWIST v. BURKE "We find the record insufficient to support the granting of a summary judgment

to Burke". The copy of registration certificate from DMV, is a material of fact in the matter. Summary judgement was and still unwarranted, not necessary but a bias judgement.

- The matter case of *Gulnac v. South Butler County School District, 587 A.2d 699, 701* (a 1991) vacated the declaration judgement as advisory. Declaration judgement is to in effect, predict what may or may not happen. It seems to be forecasting how an unknown juniors will absorb legal arguments and evidence of both Appellant and respondent. The summary judgement ultimately decided a favorable for the respondents or Appellant. It precludes the wise or unwise reasoning of the jury. The use of Summary Judgement distorts jurisprudent process because the Judge predetermined evidence, testimonies, and the entire case to be useless, meaningless and no merits before a jury can hear the case. Summary judgement actions should not precede jury chance to hear the case.
- There were genuine issues of material facts to be presented to the jury during trial, just like the case of Crabtree No. 54951-4-II 23, Jillian Crabtree v. JEFFERSON COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 d/b/a JEFFERSON HEALTHCARE.
- a "genuine issue" and a "material fact." These uncertainties encouraged courts to adopt a restrictive standard for summary judgment. Several courts stated that so long as there was the **"slightest doubt as to the facts,"** a genuine issue of material fact existed within the meaning of Rule 56(c) and summary judgment was inappropriate. Some courts explained that even if the evidence favoring the non-movant was so slight that at trial the court would be compelled to grant the movant's motion for a directed verdict or judgment notwithstanding the verdict, the evidence would nevertheless be sufficient to create a genuine issue for purposes of defeating a summary judgment motion.
- 10 since its prophylactic function, when exercised, cuts off a party's right to present its case to the jury.
- Comment analyzes the extent to which the discretion inherent in the standard provides an avenue for judges to distort it and evaluates the constitutional consequences of doing so. Specifically, wrongful application of the summary judgment standard could run afoul of the Seventh Amendment guarantee to "preserve[]" the right to a jury trial in cases at law. Summary judgement denied my right to jury trial. This was not raised earlier, but it is withing the Appellate Court. RAP 2.5(a)(3) (Chmela v. State Dept. of Motor Vehicles, 88

Wash. 2d 385, 561 P.2d 1085 (1977) (statute not raised by parties); Bitzan v. Parisi, 88 Wash. 2d 116, 558 P.2d 775 (1977)

C. Authenticate:

The court deems evidence of photographs not visible, when noted in order that "Appalent submitted unauthenticated photographs". Page 3 of the order. Whereas, under the law of Washington state, Under RCW 5.44.040, public records are admissible as evidence without further authentication. The court has reasonably stated that the existence or nonexistence or alleged oral agreement should be treated as issue of fact, which the court ruled that it preclude summary judgement. See, e.g., Crown Plaza Corp. v. Synapse Software Systems, Inc., 87 Wash. App. 495, 962 P.2d 824 (Div. 1 1997); Hadaller v. Port of Chehalis, 97 Wash. App. 750, 986 P.2d 836 (Div. 2 1999). Unauthenticated document, Photographs not ear, License plate show fragment of 2020 tab, it must and remain issue of material fact.

In the Davis v. Cox, supreme court of Washington, 183 Wash.2d 269, **Washington State Supreme court said that without a jury trial to determine plaintiff's claim, summary judgement invades the jury's essential role of deciding debatable questions of fact.**

On page 6 of Court of appeal decision, line 6, The court wrote that the "The photograph does not provide evidence of theft or show that a 2021 registration tab was attached to the license plate or otherwise on the vehicle in March 2021. A photograph of the license plate which shows broken pieces of 2019/2020 TAB, is enough evident to forestall summary judgement. The case of Addick's v. S.H. Kress & Co, the decision implied that it is a matter of civil right matter where it is possible to demonstrate that the genuine issues of material fact can be presented to jury had the court allowed due process. It definitely presents a legitimate defeat for summary. It therefore should propagate the case to jury trial, because under the rule of evidentiary, both parties must show clear and convincing evidence to enable jurors' opportunity to weigh the gravity of substantial material facts.

D. Lease:

The trust of this case on vehicle detained without proper justification. The court relied on the testimony of the Allied manager. And the court seems to turn a contract lease into an argument of the law. Whereas it is biased to equate languages in the lease as a law. (See page 7 of the Appeals court decision). **In a 5-4 ruling of this court, on a recent matter of Tadych v. Noble Ridge** Construction, this court specifically rule as follows "A contract provision becomes substantively

unconscionable when it eliminates otherwise established statutory rights and is one sided, benefiting the contract drafter, is also not prominently set out in the contract, is not negotiated or bargained for, and provides no benefit to the affected party."

On the declaration of the document presented, the lease, which is a contract, rigged with language that benefited the landlord, and majority of the language are not statutory, meaning not enforceable in court to be defended by Attorney general of WA.

E. False statement to the Court

Both statutes, 18 U.S.C. §1621 and 18 U.S.C. §1623, criminalize essentially the same conduct. An individual commits perjury when, under oath, he willfully (under §1621) or knowingly (under §1623) makes a false statement as to a material matter. Also, Title 18, United States Code, Section 1001 makes it a crime to: 1) knowingly and willfully; 2) make any materially false, fictitious, or fraudulent statement or representation; 3) in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States

RCW 9A.76.175 Making a false or misleading statement to a public servant. - A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

(Sec. 1. RCW 2.48.210 and 1921 c 126 s 12 are each amended to read 15 as follows (16)..... and will never seek to mislead the (30) judge or jury by any artifice or false statement of fact or law;)

Respondent Brief, page 13, line 6: "He failed to comply with the terms of that rental agreement to keep the vehicle properly licensed". This statement with a collaboration document from the DMV is a false statement. The vehicle was legally licensed throughout the years 2018, 2019 and 2020. Sadly enough, this court seems to favor Respondent side of argument when the court declared, on page 3 of the decision that Appellant several documents were not authenticated.

F. Due Process Violation

When Trial was not granted, depriving Appellant right to present witnesses, it is violation of due process. In the case of **Sacred Heart Medical Center, No.90357-3, En Banc, The WA state supreme** court concluded that a testimony could sustain a verdict. It is therefore arguable that affirmation of the appeal court of Superior court granting summary judgment is equally erroneous and violation of due process not allowing trial by jury.

CONCLUSION

The civil right acts is a protection against discrimination based on race, National origin, Gender. The right guarantee individual right to litigate issues at the court without the penalty of classification in the wall of Justice. Suffering a defeat in the Court of Appeals for inability to articulate an argument to the satisfaction of a Judge/s, is and therefore violation of the US law under Civil right.

When there is uncertainty and the slightest chance of doubt or dispute in material Facts, a genuine issue of material fact existed, then, therefore, Summary Judgement cannot be the true or fair means of resolving a case in the court of law. Summary judgement is improper per rule 56

The legal process provides equitable relief to an injured party. But summary judgement, a discretion tool the court, to define what materials of evident judges find worthy or credible, is effectively providing no remedy. Justice is the method of settling disputes in a civil society that offers civil rights to all, implementing a jury to render judgement as nonacademic Jurist. The Court is the platform. The proceedings and judgement on this matter is the epidemy of what is wrong when bias towards a poor litigant who cannot hire a lawyer, dare go to court as pro Se, to settle a dispute. The outcome of this matter centered on pure discrimination on Appellant by how his argument were not articulated to the standard of the Court of Appeal.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, I delivered a true and accurate copy of the foregoing documents, brief, and Filing to the opposing Parties or Counsel, by regular U.S. Mail to the following address:

This document contains 3855 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respondent Legal Representative

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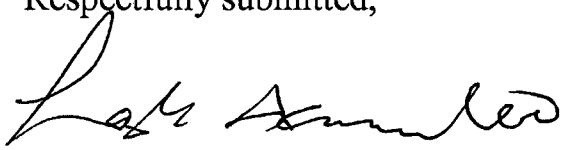
Respectfully submitted,



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Dated... December 30th, 2023

APPENDIX 1

https://www.advocatemagazine.com/article/2020-december/summary-judgment-motions-are-case-killers

Summary Judgment Motions Are Case Killers

This is nit-picky business, especially when it comes to admission of evidence

Sharon J. Arkin

2020 December

I have been doing law and motion and appeals for plaintiff firms for many, many years (please don't ask how many!). During most of those years, I did that work as an employee of a firm; for the last 11 years I've been retained by a variety of firms, both large and small, to do that work. So I've worked with a broad range of plaintiff law firms, in a variety of practice areas – but always on the plaintiffs' side.

It might just be me, but my sense is that more summary judgments get filed every year, and that a larger percentage of them get granted every year. This is surprising since the "purpose of the summary judgment is to weed out nonlitigable cases, not to pretry and dispose of doubtfully successful ones. Over and over again it has been said that the procedure is drastic and should be used with caution (citation); that the moving party's affidavits are to be strictly construed, those of his opponent liberally construed; and that 'doubt' is to be resolved against the moving party." (*Harding v. Mac Dougal* (1969) 275 Cal.App.2d 396, 399-400.)

And a "defendant moving for summary judgment must show the plaintiff's causes of action have *no merit.*" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, emphasis added.) In other words, summary judgment is not to be granted simply because a case is "weak" or because a "weak" showing was made in opposition. (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 187-188, superseded by statute on another point as recognized in *Rice v. Clark* (2002) 28 Cal.4th 89, 96; *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 589, 722. ["to avoid summary judgment a showing need not be strong; it need only be sufficient to raise a triable issue of fact."].)

One other important standard applicable to summary judgments is the oft-overlooked rule that *the opposing party's evidence must be accepted as true.* (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 746; *Nazir v. United Air Lines, Inc.* (2009) 178 Cal.App.4th 243, 254.) You would think that, with such stringent standards for granting summary judgment, they would rarely be granted and such grants would be even more rarely affirmed. You would be wrong.

Thus, it is critical that in opposing summary judgment, you take it seriously and do it right. Half-hearted or off-the-cuff oppositions will result in judgments against you; thoroughly researched oppositions with detailed and *admissible* evidence will save you from a judgment.

There are three critical aspects of your opposition to a summary judgment you should pay particular attention to in order to ensure that you have the best chance of getting the motion denied: (1) Your separate statement; (2) your evidence; and (3) objecting to the defense's evidence. You would think that the Memorandum of Points and Authorities ("MPA") would be on that list but, again, you would be wrong. Although I personally think that the MPA is critical, even a cursory review of appellate decisions

on summary judgment motion grants will find virtually all of them talking about the separate statement rather than the MPA. I'm not suggesting that you give the MPA short shrift by any means, but the other issues are even more important.

Preliminary considerations

In first reviewing the summary judgment motion, consider two things.

1. Has the defendant shifted its burden?

As discussed in *Aguilar,* a party moving for summary judgment has the initial burden to demonstrate either that: (1) The non-moving party does not have, and cannot reasonably obtain, evidence supporting their claim, *or* (2) Submit sufficient affirmative evidence to establish that there is no triable issue of material fact as to an element of the non-moving party's claim. (*Aguilar*, 25 Cal.4th at p. 854.)

As explained by the court in *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598 and cited with approval by *Aguilar,* at footnotes 19, 20, "a moving defendant now has two means by which to shift the burden of proof under subdivision (o)(2) of section 437c to the plaintiff to produce evidence creating a triable issue of fact. The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon. (*Union Bank v. Superior Court, supra*, 31 Cal.App.4th at p. 590.) Alternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action. (*Chevron U.S.A., Inc. v. Superior Court, supra*, 4 Cal.App.4th at pp. 552-553.)"

Thus, you should first look at the basis for the motion. If the defendant is moving for summary judgment on the basis that your discovery responses are factually devoid, review those responses. Many interrogatory responses by plaintiff counsel do, in fact, contain substantial "boilerplate," i.e., repeated, rote information not directly related to the specific facts in the case. But if you've done a good job actually providing specific factual responses, even if there is also some "boilerplate" included, argue that the responses are factually sufficient to preclude defendants' reliance on those responses to shift its burden. If that's the only basis for the motion and you demonstrate that it is invalid, you should win without submitting any evidence at all. That being said, however, even if you believe you win on that basis, you should still submit evidence demonstrating the existence of disputed facts.

And if you haven't included sufficient factual detail about your case and the evidence you have or expect to have, then let that be a lesson for you in the future. In that case, you are going to have to rustle up the actual, admissible evidence you need in order to oppose the motion.

2. Do you need more evidence?

As soon as the motion is received, review it to see if there are gaps in the evidence you already have that you need to fill before you can substantively challenge the summary judgment motion. If you do, move quickly to request production of documents, notice deposition, talk to witnesses and the like. Be proactive and thorough.

If you haven't been able to get the evidence you need, either move ex parte to continue the motion under section 437c, subdivision (h) or request a continuance on that basis in your opposition. Look to *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395, for the standards to be applied to such continuance requests and what you must show in order to qualify for a continuance.

Given that the notice period for summary judgment motions is now 75 days, you may be hard-pressed to demonstrate why you don't have the evidence you need. But if you have tried to get the evidence you need and the other side has been dragging its feet, you can use that as good cause for the continuance; but document all the interactions and exchanges carefully so you can include the detailed information in your declaration in support of the section 437c, subdivision (h) request for a continuance.

The separate statement

Every summary judgment motion must be supported by a separate statement. The statement is supposed to set forth specific "material" facts and the *admissible* evidence "proving" each fact. California Rules of Court, rule 3-1350(h) actually lays out for you the format of the separate statement that is required by the rules. It's basically a two-column format. The left column sets forth the defendant's material facts sequentially with the supporting evidence set forth beneath each fact. In the moving papers the left column is blank.

In opposing the summary judgment motion, you must include a responsive separate statement that mimics the format of the one in the moving papers. In fact, California Rule of Court, rule 3-1350(i) requires the moving party to provide you, upon request, with an electronic (i.e., word processing) version of its separate statement that you can use as the basis for your separate statement.

In your responsive separate statement, you use the right-hand column. You are supposed to specifically state whether you dispute that material fact or if it is undisputed. You are not supposed to use the separate statement as a vehicle for setting forth objections, although that rule is frequently violated. When the defense makes some ridiculous statement of "fact" that is not supported by admissible evidence, it's really hard not to object to it in the separate statement. And frankly, so long as you also provide a substantive response, inserting objections at that point may make the court sit up and take notice whereas the formal written objections (to be discussed later) may be given short shrift.

If you dispute a specific material fact, you must then cite to the specific evidence you submit in opposition to the motion demonstrating that there is a conflict in the evidence. If you just object, you will be deemed to have admitted the fact, so never, never, never, just object without also disputing the fact and identifying the evidence you rely on. That is unless, of course, you really don't have any evidence to dispute that particular fact but you do have a valid objection to the evidence submitted by the defendant.

And don't panic if you have to admit that, for purposes of the summary judgment motion, the fact is undisputed. A response of "undisputed" in a separate statement on summary judgment is a concession only for purposes of the summary judgment motion. It is not evidence (because it is not under oath or verified); nor is it a judicial admission. (*Wright v. Stang Mfg. Co.* (1997) 54 Cal.4th 1218, 1224, fn. 2, *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 737.)

Frequently, the defendant's fact will be something like this: "John Jones testified in deposition that the light was green." That is not a proper material fact. The material fact is: The light was green. The evidence cited to support that statement is John Jones' deposition at the specified line and page numbers. When most of the "material" facts in a defendant's separate statement are framed in this improper way, I set forth an initial objection at the beginning of the separate statement, as follows:

INITIAL OBJECTION

Initially, plaintiff objects to the purported "material facts" submitted by defendants on the basis that they do not comply with the requirements of Code of Civil Procedure section 437c, subdivision (b)(1). As explained in *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 105-106: "At the threshold we observe that defendant has made our task – and that of the trial court – considerably more burdensome by its failure to comply with the requirement Code of Civil Procedure section 437c, subdivision (b)(1), that the moving party set forth '*plainly and concisely* all *material facts* which the moving party contends are undisputed.' (Italics added.) Instead of stating clearly those material facts which actually are without substantial controversy, defendant offers a number of obliquely stated 'facts' that are material only to the extent they are controverted, and uncontroverted only to the extent they are immaterial. For instance, defendant asserts various 'undisputed facts' in terms not of relevant *events* but of what a witness has *said* about events, e.g., two Safeway employees 'stated that Plaintiff followed them out of the store, telling them that he had moved Sandy Juarez out of the way by lightly/gently pushing her aside.' It seems indisputably true that Brian Sparks *so testified in deposition,* though there is no competent evidence of such a report by the other worker, Barbara Flagen-Spicher. But what Sparks (or for that matter Flagen–Spicher) might have said *in deposition* is not, as such, a material fact.' It is of interest only as *evidence* of a material fact, e.g., that plaintiff made a damaging admission about his confrontation with Juarez. That 'fact' is squarely controverted by plaintiff's declaration that he made no such statement. We emphatically condemn Safeway's attempt to circumvent that conflict by stating the supposed 'fact' in an attributive form.

"This stratagem takes an arguably even worse turn in Safeway's assertion of 'facts"' in the form of supposed *perceptions* by witnesses. Thus it is said to be undisputed that 'Brian Sparks overheard' something, and that 'Sandy Juarez and Staci Siaris both witnessed' something. Ordinarily, however, the perceptions of witnesses are simply not 'material facts,' as that term is used in the summary judgment statute. The relevant question is whether the *underlying* facts – the events or conditions witnesses say they perceived – are established without substantial controversy. Defendant merely clouds the inquiry into that question by formulating the operative facts in the intermediate form of a witness's perceptions or statements.

"We believe trial courts have the inherent power to strike proposed 'undisputed facts' that fail to comply with the statutory requirements and that are formulated so as to impede rather than aid an orderly determination whether the case presents triable material issues of fact. If such an order leaves the required separate statement insufficient to support the motion, the court is justified in denying the motion on that basis. (See § 437c, subd. (b)(1).)"

As identified below, defendants' separate statement violates these principles and the identified "material facts" should be stricken.

Is that hyper-technical and nit-picky? Sure. But you need to realize, accept and act on the fact that summary judgments in general are hyper-technical and nit-picky. The defense is not ever going to give you a pass, and you shouldn't give them one.

The most important thing you must do in your separate statement is specifically identify the precise evidence you are relying on for disputing the defenses' material fact. You cannot simply say, "See Smith Declaration." A hyper-technical court will tell you that it has no responsibility to go searching through your opposing evidence to find the bits and pieces that help you. Rather, you must provide the court

with a pin-cite to the specific line and page of the deposition, the paragraph of the declaration or the precise page of a multi-page exhibit.

Additionally, defendants will often craft their "material facts" in such a way that it appears they have shifted their burden but which, in fact, leaves out several material facts that demonstrate their liability. For example, an insurer may lay out the facts of the claim in a bad-faith case, e.g., when the claim was made, the communications between the parties and the fact that the policy limits were paid. But what they don't say is that the adjuster was nasty, unreasonably delayed payment and unreasonably applied depreciation.

When that happens, there are two things you can do. When they say, for example, that the full policy limits were paid on the claim, you can dispute that purported fact and point out the evidence that demonstrates the bad faith conduct. Alternatively, or in addition to that, you can add your own additional material facts to the separate statement.

In that case, once you have addressed the defendants' material facts, Code of Civil Procedure section 437c, subdivision (b)(3) allows you to set forth your own section in the separate statement. In that section you again use two columns. In the left-hand column you set forth your own material fact and in the right-hand column put the reference to your evidence that supports that fact.

In preparing your separate statement in opposition to the motion, be thorough and be precise. In reviewing the motion, the first place the judge will look to find out what the motion is about is the separate statement. Tell your factual story there and don't skimp on the time you devote to it.

Your evidence

The real heart of your opposition will be the evidence you submit.

You must have a strong grasp of the rules of evidence in order to make sure your evidence is admissible. On the other side of the coin, as discussed in the next section, you can often gain a huge advantage if you know the rules of evidence and your opponent does not.

You can use the declaration of your client, a declaration from a percipient witness, or an expert's declaration, depending, of course, on the issues. Although declarations are normally not admissible because they are hearsay, the summary judgment statute specifically permits submission of declarations as evidence in support of or in opposition to the motion. (Code Civ. Proc., § 437c, subd. (b)(1) and (b)(2).) But you must make sure that the statements made in the declarations (with the exception of experts) are based on personal knowledge.

And with regard to expert declarations, you must make sure that they pass the *Sanchez* test and if your expert cannot foundationalize a report that they rely on, you will have to get the declaration of the person who *can* foundationalize the report. (*People v. Sanchez* (2016)) 63 Cal.4th 665, 685-686.) I know it's a pain, but you *must* dot every "i" and cross every "t," especially with the evidentiary issues, or you, and your client, are doomed.

Also, when submitting declarations, always be sure that the declarations state that they are executed under penalty of perjury under the laws of the State of California.

You can also use the deposition testimony taken in the case, including your client's deposition, the deposition of the defendant or defendant's employees, and a deposition taken in the case of any other witness with relevant testimony.

You can also use deposition testimony taken in other cases, which often happens in product-liability cases. But if you use depositions from other cases, you must be sure to properly foundationalize the deposition as set forth in Evidence Code sections 1290-1292.

For example, to get such evidence admitted, you have to demonstrate that the deponent is unavailable as defined in Evidence Code section 1240 (e.g., the deponent is dead, out-of-state, or has a mental or physical illness that precludes their testimony). Note that the evidence establishing their unavailability must *itself* be admissible. I have opposed summary judgments where the defense has tried to rely on depositions in other cases to which my clients were not a party. In an effort to demonstrate that the deponent was unavailable, the defense counsel simply asserted that in their declaration. Not good enough because they don't establish a basis for personal knowledge (like going to the funeral). They have also used non-certified death certificates as exhibits. Again, not good enough. They have also used Social Security records downloaded from the Internet. Not good enough. A defense counsel once tried using a declaration of the deponent's doctor filed in another case years before, saying the deponent was too ill to have his deposition taken. Not good enough because counsel did not substantiate any basis for assuming that was still true. Oh, and because the declaration was signed in another state, and did not recite that it was signed under penalty of perjury under the laws of the State of California, the declaration was inadmissible in any event.

Evidence code may be changing

Note, however, that the application of Evidence Code sections 1290-1292 in summary judgments may be changing. In *Sweetwater Union High School District v. Gilbane Building Co.* (2019) 6 Cal.5th 931, the Court held, in an anti-SLAPP action where the plaintiff is required to establish a prima facie case in order to proceed, that submission of depositions from a different case was proper despite the fact that they are hearsay and otherwise subject to exclusion under sections 1290-1292. Although no published decision has yet held that the same analysis applies in the summary-judgment context, the *Sweetwater* court itself suggests that it should.

Again, this is nit-picky business and you have to be really careful every step of the way. The upside is that the defense has to be really careful too, and they often aren't – which leaves the door open for you to get the moving party's evidence excluded. And exclusion of the defendant's evidence supports an argument that defendant did not shift its burden.

You can also use the interrogatory responses of the moving party. But note that you *cannot* use the interrogatory responses of any *other* party against that defendant. (Code Civ. Proc., § 2030.410.) And, of course, you can use the admissions of the moving party, if there are any.

Documents submitted in opposition to the motion for summary judgment must also be admissible. For example, you, as an attorney, cannot foundationalize a document provided by your client; you must instead have your client foundationalize it by way of their own declaration. The exception is if the document has been produced under oath in response to a specific discovery request.

Government documents submitted for the truth of the facts asserted must be foundationalized by way of judicial notice, with submission of a copy of the document *certified by the issuing government agency*. (Evid. Code, § 1530, subd. (a).)

It is critically important that you pay close attention to admissibility issues and make sure your evidence is admissible. Learn the rules. But looking at the Evidence Code by itself is simply not enough. You need to know the cases and how the rules apply.

Objecting to the defense evidence

All the rules discussed above apply with equal force to the evidence submitted by the moving party. If the defense does not submit admissible evidence, their motion cannot be granted. As the court in *Nazir* explained, only material facts are to be included in the separate statement and if even a single material fact is insufficiently supported by the evidence submitted by the moving party or is adequately challenged by the opposing party, the motion should be denied. (*Nazir*, at 252.) Fundamentally, if the evidence submitted by the moving party is not admissible as to a material fact, you can argue that the defendant has not shifted its burden of proof.

So, comb through the defense's evidence with your nit-pick in hand and object to anything that is not admissible.

There is some conflict about when and how to object to the moving party's evidence. The Rules of Court mandate that evidentiary objections must be in writing, and again provide suggested formats to make reviewing and ruling on the objections easier and faster for the trial court – always a good thing. (Cal. Rules of Court, rule 3.3514.) But the summary-judgment statute itself states that objections not made at the hearing are waived. (Code Civ. Proc., § 437c, subd. (b)(5).) If, for some reason, you have not been able to file written objections before the hearing, be sure to request a court reporter and recite them into the record at the hearing. You may get pushback from the judge, but just politely remind the court that you are entitled to make your record and will do so as quickly and comprehensively as you can. But, really, written objections in one of the formats set forth in the rule is, by far, the best way to go.

Also, if you do the written objections, you can easily convert that document into a proposed order that you should also submit before the hearing. Simply insert lines for "Sustained" and "Overruled" so that the court can easily rule on the objections.

Your Memorandum of Points and Authorities

Do not neglect the MPA. Use it to tell *your* story, referencing *your* evidence as laid out in the additional material facts in your separate statement. Using your version of the events, you can then tailor your legal argument to that scenario, thereby providing the court with a cogent and coherent basis for denying the motion. Be as thorough as possible, raising every potential legal argument you can.

Conclusion

Take summary judgment motions seriously. They can end your case and just because the standard of review on appeal is de novo, don't assume that will help you. Appellate court judges themselves estimate that only about 35% of the summary judgments granted are reversed on appeal. Those are terrible odds, but if you pay attention and do the best job possible, you improve your chances enormously.

Sharon J. Arkin

Sharon J. Arkin is the principal of *The Arkin Law Firm*. She has been certified by the California State Bar, Board of Legal Specialization as an appellate specialist since 2001. In 2011 Ms. Arkin received the CLAY award from California Lawyer magazine as an Appellate Attorney of the Year and in 2012 was named one of the Top 50 Women Attorneys in Southern California by Los Angeles Magazine. E-mail: sarkin@arkinlawfirm.com.

Subject Matter Index

Motion for Summary Judgment

APPENDIX 2

WASHINGTON STATE DEPARTMENT OF LICENSING

Registration Certificate

Model Year	Make	Model	Body Style	Vehicle identification number (VIN)	Scale Weight
2005	SAA	9-5	Wagon	YS3ED59A953501292	3,620

Plate/Tag no	Tab/Decal no	Primary vehicle use type	Issue date	Exp date
AVE3366	Y529122	Passenger Vehicle	03/18/2020	06/05/2021
Plate/Tag no	Tab/Decal No	Vehicle use type	Issue date	Exp date

Gross Weight	Gr wt start date	Gross weight exp date	Fleet no	Equip no

Registered Owner

AKINMULERO, OLASEBIKAN N
3606 S 180TH ST
APT C35
SEATAC WA 98188-4341

Legal Owner

Same as Registered Owner

Brands/Comments: 1600/2015, BLUE, Display tab on back license plate only - front plate is still required, Other, Rebuilt

Anyone who knowingly makes a false statement may be guilty of a felony under state law and upon conviction shall be punished by a fine, imprisonment, or both.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and, as owner or authorized agent of the vehicle, it is free of any claim of lien, mortgage, conditional sale or other security interest of any person except the person or persons set forth as legal owners.

X _____
Signature of registered owner

3/18/20 _____
Date and place signed

X _____
Signature of registered owner

_____
Date and place signed

Y 529122
2021

TD-420-802 (R/12/16) Page 1 of 2

Vehicle Information: AVE3366 YS3ED59A953501292 2005 SAA 9-5 Wagon

Filing	Registration Filing	$4.50
Registration	License Plate Technology	$0.25
	Dept. of Licensing Service	$0.50
	Vehicle Weight	$25.00
	Registration License	$30.00
Service	Registration Service Fee	$8.00
Tax	RTA Excise Tax	$11.00

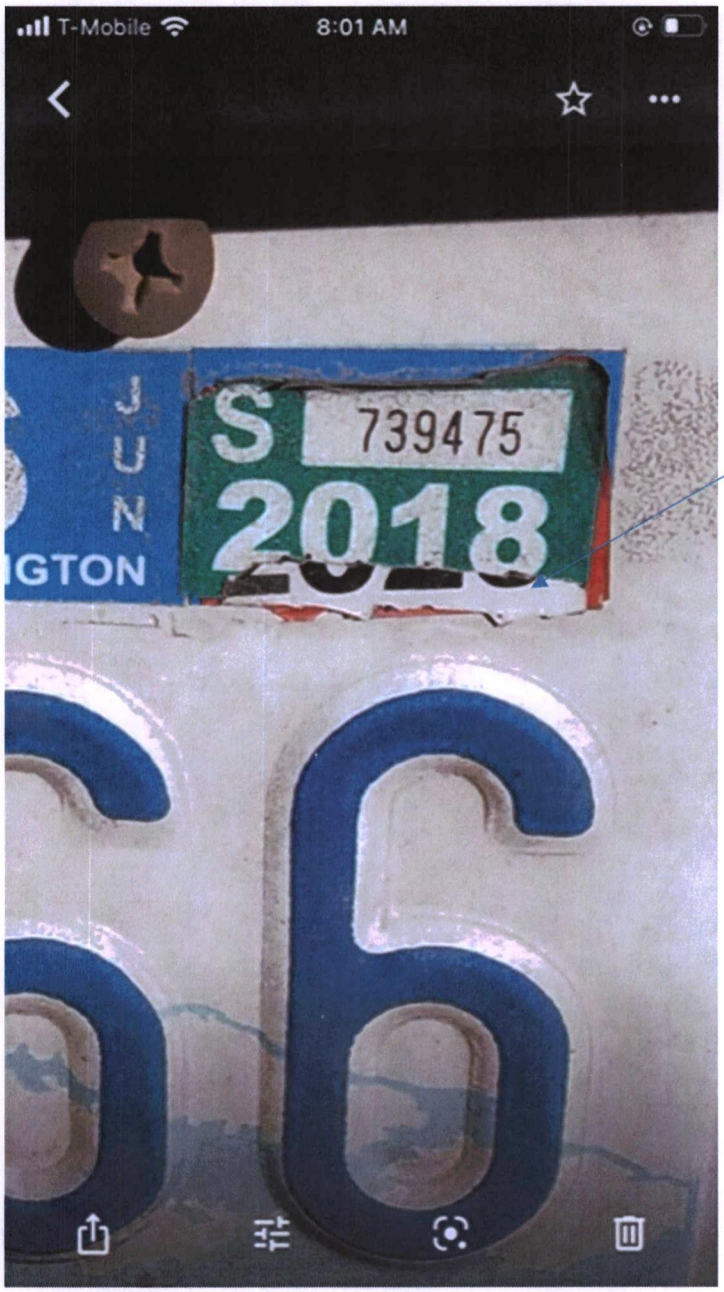
Fee Total: $79.25

Issue Date: 03/18/2020 You can get a copy of this cash/fee receipt detail at www.dol.wa.gov.

Skip a trip – go online www.dol.wa.gov

PICTURES OF FOUR SIDES OF VEHICLE TAKEN AT THE STORAGE YARD

NO SIGN OF ANY TOWING TAG



PICTURE TO VALIDATE CLAIM OF LARCENY ON TAB

FILED
11/7/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OLASEBIKAN AKINMULERO, Appellant, v. ALLIED RESIDENTIAL-CARRIAGE HOUSE, Respondent.	No. 83746-0-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Representing himself below and on appeal, Olasebikan Akinmulero challenges the summary judgment dismissal of a lawsuit against his landlord. Akinmulero contends the trial court erred in granting summary judgment because he raised genuine issues of material fact. Akinmulero also claims the court failed to properly follow the procedural rules for summary judgment. Finding no error, we affirm the dismissal**.**

I

On March 18, 2021, Akinmulero filed a complaint against Allied Residential-Carriage House Apartments, the owner and property manager of his apartment unit. The complaint alleged that Allied breached the residential lease agreement and violated a statewide moratorium on residential evictions[1] by taking "illegal

[1] On December 31, 2020, Governor Inslee issued a proclamation to extend an eviction moratorium first issued in March 2020, until March 31, 2021. See Proclamation of Governor Jay Inslee, No. 20-19.5 (Wash. December 31, 2020)

action to evict/detainer of property." Among other relief, Akinmulero requested the immediate "return [of] plaintiff's car from detention." Akinmulero attached to his complaint notices issued by the Department of Licensing, including a "Vehicle Impound Notice" indicating that, on March 8, 2021, an Allied employee authorized a towing company to remove and impound his vehicle.[2]

Allied filed a motion for summary judgment. Allied submitted declaration testimony of its "Community Manager," stating that in "March 2021" Allied had arranged for the removal Akinmulero's vehicle because the registration tabs had expired in 2018. According to the declaration, after the vehicle was "tagged for towing" the tenant failed to remove it or update the registration tabs, and on March 8, 2021, the vehicle was towed. Allied maintained that the lease explicitly authorized its action and the eviction moratorium did not restrict its ability to enforce rules stated in the lease related to parking and vehicles on its property. Attached to the declaration, the "Community Manager" supplied a copy of a Department of Licensing registration certificate showing that Akinmulero's vehicle's registration expired on June 5, 2018, documents related to the towing and eventual sale of the vehicle, a copy of the lease agreement, and a copy of the governor's proclamation related to evictions that was in effect in March 2021.

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https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-19.5.pdf; see also Proclamation of Governor Jay Inslee, No. 20-19 (Wash. March 18, 2020) https://www.governor.wa.gov/sites/default/files/proclamations/20-19%20-%20COVID-19%20Moratorium%20on%20Evictions%20%28tmp%29.pdf.

[2] That document informed Akinmulero of how to redeem his vehicle, remove personal property from the vehicle, and/or request a hearing to contest the impoundment.

In a "Cross Motion Opposition," Akinmulero argued that summary judgment was inappropriate because his vehicle was properly registered when it was towed and that there had been a prior "attempt to steal the registration tag off the license plate." Akinmulero asserted that he had provided a copy of the valid 2021 registration to the landlord and placed a copy on his dashboard. He characterized the landlord's removal of his vehicle as "eviction/detainer," and claimed that, unlike law enforcement, the landlord had no authority to enforce vehicle registration regulations.

In support of his written argument, Akinmulero submitted several unauthenticated copies of photographs purporting to depict his vehicle and license plate. He attached a copy of a registration certificate indicating that his vehicle registration was valid between March 2020 and June 2021 and that a 2021 decal was issued for the vehicle, a copy of a 2021 notice related to an outstanding balance of rent due for his apartment unit, and a copy of a March 19, 2021 e-mail message from "Management" relating to the circumstances of the impoundment. The registration certificate indicates it was issued March 18, 2020. Akinmulero did not submit any evidence under penalty of perjury and never claimed in any form that he had affixed current registration tabs to the vehicle license plates.

The court initially scheduled a videoconference hearing on the motion for February 4, 2022. The court later struck the hearing and rescheduled it for February 11, 2022 and the court's bailiff informed the parties that the court would consider the matter without oral argument. On February 10, 2022, the court

entered an order granting summary judgment and dismissed all claims against Allied with prejudice. The court denied Allied's request for attorney fees and costs based on a lease provision because Allied had failed to substantiate its request. Akinmulero appeals.

II

Summary judgment proceedings are governed by CR 56. A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." CR 56(c). Appellate courts review a summary judgment order de novo and perform the same inquiry as the trial court. Borton & Sons, Inc. v. Burbank Props., LLC, 196 Wn.2d 199, 205, 471 P.3d 871 (2020).

"In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact." Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

> If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion.

Id. (footnote omitted) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). "The nonmoving party may not rely on speculation, argumentative assertions, 'or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party

must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.' " Becker v. Wash. State Univ., 165 Wn. App. 235, 245-46, 266 P.3d 893 (2011) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). Although the evidence is viewed in the light most favorable to the nonmoving party, if a party bearing the burden of proof fails to make a factual showing sufficient to establish an element essential to that party's case, summary judgment is warranted. Young, 112 Wn.2d at 225.

III

Allied's showing through admissible evidence that it had the vehicle towed pursuant to the lease shifted the burden to Akinmulero under Young to come forward with specific admissible evidence showing a genuine issue of material fact. Akinmulero claims there was conflicting evidence about whether his vehicle's registration was valid in March 2021 and whether a previously-issued tab had been peeled off and "partially stolen from the car." But Akimulero did not assert, much less establish through admissible evidence, that a 2021 registration tab was ever affixed to his license plate.

Akinmulero filed no affidavit, declaration or other sworn testimony to establish a factual basis for his claims. CR 56(e) requires that evidence submitted be "[s]worn or certified" and either attached to or served with an affidavit. Alternatively, GR 13(a) allows submission of an unsworn statement in lieu of an affidavit if it contains the proper recitation that it was made under penalty of

perjury.[3] See SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 141, 331 P.3d 40 (2014) (evidence submitted on summary judgment must be admissible). The only photograph he provided, which purports to depict his license plate in March 2021, bears a tab that expired in June 2018 and is consistent with the apartment manager's declaration. The photograph does not provide evidence of theft or show that a 2021 registration tab was attached to the license plate or otherwise on the vehicle in March 2021.

Even assuming a factual dispute about the status of Akinmulero's vehicle registration in March 2021, he fails to explain how that status was material to his claims. See Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005) ("A material fact is one that affects the outcome of the litigation."). The eviction moratorium in place in March 2021 related to "Evictions and Related Housing Practices," and prohibited landlords, except under limited circumstances, from serving or enforcing "any notice requiring a resident to vacate any dwelling or parcel of land occupied as a dwelling." Proclamation of Governor Jay Inslee, No. 20-19.5 (Wash. December 31, 2020). It also prohibited the assessment of certain fees and rent increases on residential rental property. Proclamation 20-19.5. The moratorium did not proscribe the enforcement of rules pertaining to vehicles, parking, or tenants' personal property. See Proclamation 20-19.5. The Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, defines a "dwelling unit" as a

[3] Akinmulero appears to contend that he attested to the facts recited in his written argument under penalty of perjury because the certificate of service includes that language. But that document was limited to certifying his delivery of the "brief and Filing" to defense counsel.

"structure or that part of a structure which is used as a home, residence, or sleeping place" and includes, "single family residences and units of multiplexes, apartment buildings, and mobile homes." RCW 59.18.030(10). And the extensive preamble language of the governor's proclamation clearly articulates that the purpose of the measure was to prevent "housing instability," "homelessness," and reduce the likelihood that Washington residents would be evicted "from their homes" due to the economic conditions that arose from the COVID-19 pandemic. See Proclamation 20-19.5. Akinmulero does not show that either his vehicle or its parking spot should be viewed as a dwelling, and does not otherwise address the language of the moratorium or point to any specific provision. Since Akinmulero fails to show Allied's actions implicated the eviction moratorium, the alleged factual disputes did not prevent summary judgment.[4]

Similarly, while Akinmulero broadly claimed that Allied breached the residential lease agreement, nowhere in his complaint or response to summary judgment did he discuss the lease or any of its provisions. Nevertheless, according to the documentary evidence Allied supplied, the lease contains several provisions related to vehicles and parking, including the following:

> VEHICLES - Without notice and without liability, LANDLORD may remove any vehicle from any parking space or carport, which in LANDLORD'S opinion is parked illegally or which remains inoperable for a period of twenty-four (24) hours. For purposes of this agreement, the term inoperable means inoperable according to

[4] In reply, Akinmulero suggests that removing his vehicle was an "initial step" toward eviction based on outstanding back rent. But there is nothing in the record to indicate that the landlord initiated an eviction proceeding or that the removal of the vehicle was connected to rental arrears.

> Washington State law and includes any vehicle with expired license tabs.[5]

(Emphasis added) (boldface omitted). In light of this contractual language allowing the landlord to remove a vehicle from its premises if it displays "expired license tabs," Akinmulero does not explain how a dispute about the status of his registration or an alleged theft of "the previous year tab" creates an issue of fact as to breach of the lease. Instead, Akinmulero points out that reasonableness is generally a question for the trier of fact. Akinmulero presents no competent evidence that Allied's actions were unreasonable, particularly given the parties' contractual agreement to the removal of noncompliant vehicles. But, even if there were evidence of unreasonableness, such evidence would not establish Akinmulero's breach of contract claim, which would still require establishing that Allied failed to perform a contractual duty. See Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995) ("A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant."). Akinmulero does not dispute the terms of the lease or allege breach of any particular provision.[6]

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[5] Akinmulero claims there is a "question of [p]erjury" because the lease was amended and Allied failed to provide the amended agreement. But neither the January 2022 letter about the impending reinstatement of fees that were suspended during the eviction moratorium, nor the enactment of the moratorium itself, establishes that the lease was altered or amended.

[6] Akinmulero asserts that, to the extent the lease requires a tenant's vehicle to be moved every 24 hours, the provision is impossible to comply with, and therefore, invalid. But Akinmulero raises this, and several other issues, for the first time in his reply brief. "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, no evidence in the record indicates that Allied removed the vehicle because it had not been moved in a 24 hour period.

Insofar as Akinmulero claims the trial court erred in granting summary judgment because the apartment manager was not qualified to provide expert testimony interpreting the lease, he did not object below. This court generally will not address claims of error not raised in the trial court. See RAP 2.5(a). Even so, Allied did not offer the manager's declaration as expert testimony under ER 702. The manager's declaration testimony that the lease requires that "any vehicle parked on the property must have current registration tabs" appears to have been within the scope of her personal knowledge and rationally related to her perceptions. See ER 701 (lay witness may offer opinion testimony to the extent it is rationally based on the witness's perception, helpful to a determination of fact, and not based on technical, scientific or specialized knowledge).

IV

Akinmulero raises several arguments related to the trial court's procedure. First, he appears to challenge the trial court's decision to reschedule the hearing and strike oral argument. He provides no authority, however, to suggest that the court lacked discretion to adjust the date of the hearing or was required to allow oral argument. See Keck v. Collins, 181 Wn. App. 67, 96, 325 P.3d 306 (2014) (Korsmo, J., concurring) (decisions related to scheduling summary judgment hearings are reserved to trial court's discretion), aff'd, 184 Wn.2d 358, 357 P.3d 1080 (2015); see also King County Local Court Rules (KCLCR) 7(b)(4)(B) (outlining procedure for scheduling oral argument on dispositive motions). Although the King County Local Civil Rules start from the presumption that

dispositive motions such as summary judgment will be heard with oral argument, they do not alter the court's inherent authority to determine that argument is not necessary and rule on a dispositive motion based on the parties' written submissions. Akinmulero also fails to articulate any prejudice resulting from the trial court's resolution of the motion without oral argument.

Second, Akinmulero alleges a violation of "ex parte law" because he was not included in some e-mail communication between defense counsel and trial court staff. He appears to reference an inquiry from Allied's counsel to the court about setting a hearing on a motion to dismiss counsel intended to file. Communication to facilitate the scheduling of a hearing on a motion is not improper under the King County Superior Court Local Civil Rules. See KCLCR 7(b)(4)(B) ("The time and date for hearing shall be scheduled in advance by contacting the staff of the hearing judge."). Akinmulero fails to show any prejudice resulting from the fact he was not initially included in some scheduling e-mails, and further fails to show that any substantive communication occurred on an ex parte basis.

Third, Akinmulero alleges a "clear violation" of CR 56 when the trial court entered the order on summary judgment on the day before it was scheduled to consider the motion. At the time of the trial court's ruling, briefing had closed and all parties had had the appropriate opportunity to present evidence and argument on the motion. Akinmulero fails to explain how the court's consideration of the motion on the day before the noting date, when the motion was scheduled to be

heard without argument, was contrary to CR 56 or how he was prejudiced by the timing of the court's ruling.

V

Citing RCW 4.84.330, Allied requests attorney fees and costs on appeal. "Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to RAP 18.1(a)." In re Guardianship of Wells, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). RCW 4.84.330 provides,

> In any action on a contract or lease . . . where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

Allied refers to fees authorized by the "rental agreement" but does not cite to the record or describe any provision of the lease related to attorney fees. Allied does not address whether this action arose out of the contract such that a contractual fee-shifting provision would apply. See Boguch v. Landover Corp., 153 Wn. App. 595, 615-16, 224 P.3d 795 (2009) (action is "on a contract" when a contract is central to the dispute and the claim alleges a breach of a specific contractual term, irrespective of other legal duties imposed under the law). Nor does Allied indicate whether the provision at issue is bilateral or unilateral and, "[b]y its terms, RCW 4.84.330 applies only to contracts with unilateral attorney fee provisions." Kaintz v. PLG, Inc., 147 Wn. App. 782, 786, 197 P.3d 710 (2008).

RAP 18.1(b) requires more than a bald request for attorney fees on appeal. Boyle v. Leech, 7 Wn. App. 2d 535, 542, 436 P.3d 393 (2019). "The party

requesting fees on appeal is required by RAP 18.1(b) to argue the issue and provide citation to authority in order to advise the court as to the appropriate grounds for an award of attorney fees and costs." Blueberry Place Homeowner's Ass'n v. Northward Homes, Inc., 126 Wn. App. 352, 363 n.12, 110 P.3d 1145 (2005). Allied's argument is inadequate to establish its entitlement to attorney fees and costs on appeal.

We also decline to award attorney fees to Akinmulero, who requests an award of fees for the first time in his reply brief and is not the prevailing party on appeal. Moreover, as a general matter, pro se litigants are not entitled to attorney fees for their work representing themselves. See Mitchell v. Dep't of Corr., 164 Wn. App. 597, 608, 277 P.3d 670 (2011). Both parties' fee requests are denied.

Affirmed.

Birk, J.

WE CONCUR:

Coburn, J.

Brunson, J.