No. 46434-9-II

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

CHARLES F. SMITH and BARBARA DUSZYNSKA, husband and wife,

Appellants

vs.

LLOYD ROOSEVELT REICH and JOYCE REICH, husband and wife,

Respondents.

REPLY BRIEF

Brian H. Wolfe, WSBA No. 04306
Brian H. Wolfe, P.C.
105 W. Evergreen Blvd., Suite 200
Vancouver, WA 98660
Telephone: (360) 693-5883
Facsimile: (360) 693-1777

David Schultz, WSBA #33796
Knapp, O'Dell & MacPherson
430 NE Everett Street
Camas, WA 98607-2115
Telephone: (360) 834-4611
Facsimile: (360) 834-2608

Fedex 4/15/15

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

I.

STATEMENT OF THE CASE

As pointed out by Respondents in their Brief, there is a lengthy history of conflict between Appellants Charles F. Smith and Barbara Duszynska, and Lloyd and Joyce Reich. The conflict precedes their ownership of their respective properties by virtue of an Agreement entered into by their predecessors known as the Water System Easement and Agreement executed in 1981. This Agreement was entered into by Kennedy and Butler and others as a result of placing a well and pump on the Smith side of a boundary line and placing the mechanical equipment on the Reich side of the boundary line.

This arrangement satisfied the respective parties for a period of time until there was an encroachment of the fence between the properties and the well was "pumped dry".

Counsel spends nine and one-half (9½) pages repeating the history of this case and the Findings of Fact entered by the Trial Court, which has no place in this Appeal, other than to try to get the Appellate Court Justices' attention on the history between these parties. Duckworth v. Bonney Lake, 91 Wn. 2d 19, 586 P.2d 860 (1978), clearly sets forth the lack of importance of these Statement of Facts:

> ". . . Although the Duckworth's rely heavily upon the trial court's finding of facts and conclusions of law to support the Summary Judgment, this reliance is misplaced. The function of a summary judgment proceeding is

> to determine whether a genuine issue of material fact exists. It is not, as it appears to have happened here, to resolve issues of fact or to arrive at conclusions based thereon. State ex rel. Zembel v. Twitchell, 59 Wn. 2d 419, 367 P.2d 985 (1962). Consequently, the findings of fact and conclusions of law entered here are superfluous and may not be considered to the prejudice of the City. [citations omitted]
>
> One who moves for Summary Judgment, in this case, the Duckworth's, must prove by *uncontroverted facts* that no genuine issue of material fact exists. This is true whether the opponent, i.e., the City, has the burden of proof on the issue at trial.
> Duckworth v. Bonney Lake supra pp. 21-22.

While facts are ultimately important in any case, the facts in this case are not as relevant to this Appeal it is the process undertaken by Respondent and the Trial Court in this matter. The Trial Court's obligation is to move a case along in an expedient and inexpensive way, while balancing justice between the parties.

II.

ISSUES FOR REVIEW

1. Whether the Appellant waived their right to challenge the issue relating to CR 56(f), Continuance by failing to raise the issue to the Trial Court.

2. Whether the Trial Court abused its discretion in failing to grant Appellants a Continuance pursuant to CR 56(f).

3. Whether the Trial Court properly granted Summary Judgment.

4. Whether the Trial Court properly granted CR (12)(b)(6), Motion to Dismiss the Claim of Illegal Watering.

III.

ARGUMENT IN REPLY

1. Appellants waived their right to challenge the issue relating to CR 56(f) Continuance by failing to raise the issue to the Trial Court.

Respondents assert that RAP 2.5 is a rule that precludes the Appellant from raising an issue at the Appeals Court level that was not raised in the Trial Court. While RAP 2.5 suggests that the Appellate Court may refuse to review any claim of error which was not raised in the Trial Court, RAP 1.2 reads as follows:

> "a. Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance of these rules, except in compelling circumstances where justice demands, subject to the restrictions in Rule 18(a)(b)."

Appellants Smith and Duszynska remind the Court of Appeals that they made an effort to raise CR 56(f) by asking for a continuance, which was never addressed by the trial court. (RP 10) When the Appellant Smith tried to explain the factual background between the parties, and sought direction from the trial court, the trial court refused to entertain

those comments. (RP 9)

Respondents rely on Nguyen v. Sacred Heart Medical Center, 97 Wn. App. 728, 987 P.2d 634 (1999), for the statement that Appellate Courts will limit their review to claims argued before the Trial Court. However, that case points out an exception carved out by the Washington Supreme Court in Kruse v. Hemp, 121 Wn. 2d 715, 853 P.2d 1373 (1993), where it was stated:

> "In Kruse, the court held that a reviewing court may perform all acts necessary or appropriate to secure fair and orderly review and waive our Appellate rules when necessary to serve the ends of justice." Nguyen v. Sacred Heart Supra page 733.

In point of fact, the trial court in the Smith/Duszynska matter never gave Appellant Smith an opportunity to discuss the CR 56(f) rule.

Prior to the March 13, 2014 hearing on Summary Judgment, Appellant Smith did accomplish two (2) procedural matters. First, he filed a proposed Amended Complaint and a Motion for Leave to Amend the Complaint, and secondly, served Respondents Reich with subpoenas to appear on the date of the Summary Judgment.

The first move, the Motion for Leave to Amend the Complaint, was an effort to respond to Respondent Reichs' Motion under CR 12(b)(6), which asserts that he failed to state a claim in his original complaint.

The second procedural matter that Appellant Smith undertook was to issue of Subpoenas on Reichs. (RP 3) Both Respondents Reich, through their attorney and the trial court, knew full well by the attempt to

obtain the subpoenas that Appellant Smith fully intended to have live testimony at the Motion for Summary Judgment.

Respondents argue that Appellants Smith "waived" his right to challenge the applicable of CR 56(f). A waiver is the intentional and voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. Schroeder v. Excelsior Management Group, LLC 177 Wn 2d 94, 297 P3d 677 (2013). It quoted favorably from Bowman v. Webster 44 Wn 2d 667, 269 P2d 960 (1954). This doctrine ordinarily applies to all rights or privileges to which a person is legally entitled. But in the case at bar, if the trial court would not let the Appellants Smith get a word in to discuss his continuance or CR 56 or CR 56(f), then how can he be determined to have intentionally and voluntarily relinquished that right? Accordingly, when you couple this definition of "waiver" with RAP 1.2, even though a pro se party is expected to comply with the rules, then it can only be concluded that, that said party did not waive his right to challenge this issue.

2. The Trial Court properly denied Appellant oral request for a continuance.

Midway through the arguments on the Motion for Summary Judgment on May 13, 2014, Appellant Smith asked for a continuance. The Trial Court acknowledged that "Motion for Continuance is on the table." (RP 10) Looking through the balance of the report of proceedings, (RP 10), there is no indication that the Trial Court ever came back to that motion

on March 13, 2014.

The Motion for Summary Judgment may be continued properly under CR 56(f), it states:

> "(f) when Affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit, facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just."

When the Motion for Continuance was made, the trial court should have walked through this subsection (f). What was the reason the affidavits in opposition to the motion could not be available? What would be the essence of the statements in contravention? And lastly, would the evidence sought by the opponent raise a genuine issue of fact. None of that questioning was done by the trial court and yet it is clear that a Motion for Continuance cannot be denied unless those three (3) elements are investigated. Coggle v. Snow, 56 Wn. App. 499, 784 P.2d 554 (1990).

While it is awkward to accuse the trial court of Draconian insistence on compliance with the rule CR 56, one can only come to that conclusion in reading the Report on Proceedings. On at least two (2) serious occasions, Appellant made an effort to lay out facts that he could have brought forward by affidavit, but the Trial Court cut him off, stating that this was not the trial, nor the time for recitation of facts. (RP 9) (RP 8) Appellant had a survey in his hand to show the court, but the court cut him

off. Yet the cases cited above clearly require the trial court to investigate whether any of the issues, which the opponent wants to bring forward, has any bearing on the Motion. In fact, the Coogle case, states that the Court has a **duty** to give the party a reasonable opportunity to complete the record before ruling on the case. It further noted that the trend of modern law, in 1990, was to interpret the court rules and statutes to allow a decision on the merits of the case not be constricted by the rules. The rules are to be construed to secure the just, speedy, and inexpensive determination of every action. Instead, this trial court encourages an appeal, (RP 8) rather than take the time to walk Mr. Smith through the steps.

Appellant Smith's testimony should have been allowed. In Leland v. Frogge, 71 Wn. 2d 197, 427 P.2d 724(1967), under the old rules of Pleading Practice and Procedure, the testimony of Defendant/Appellant was allowed as part of the Motion for Summary Judgment. That rule was picked up and brought forward by the case Landberg v. Carlson 108 Wn. App. 749, 33 P.3d 406 (2001). The Court of Appeals in Division III had quite a discussion on oral testimony at summary judgment hearings, it stated:

> "The function of summary judgment is to determine whether there is a genuine issue of material fact requiring a formal trial." [citation omitted] Summary Judgment is a procedure for testing the existence of a party's evidence. Cofer v. County of Pierce, 8 Wn. App. 258, 505 P2d 476 (1973). In a summary judgment hearing, "[t]he evidence before the judge is that

> contained in the pleadings, affidavits and admissions and other material properly presented. " Chase v. Daily Record, Inc. 83 Wn. 2d at 42, 515 P.2d 154 (1973) and Lealand v. Frogge, 71 Wn. 2d 197, 427 P2d 724 (1967).
>
> . . .
>
> In Washington, a trial court may allow oral testimony at a summary judgment proceeding. See Leland v. Frogge, 71 Wn. 2d at page 202. (noting prevailing appellant relied not upon affidavits but upon other evidence including testimony); Lampson Universal Rigging, Inc. v. Wash. Pub. Power Supply Sys., 44 Wn. App. 237, 721 P.2d 996 (1986) (upholding use of evidentiary hearing to resolve summary judgment motions). . . . .
>
> . . . Given the foregoing, we considered the better practice is to allow trial court discretion to permit oral testimony at a summary judgment hearing."
> Landberg v. Carlson, supra pp. 753-755.

The Court goes on to discuss other cases from other states concerning allowing oral testimony at Summary Judgment hearing. In the Landberg case, no notice was given beforehand that the Landbergs intended to rely on oral testimony. It concluded that the court may deny the judgment or order a continuance under CR 56(f). It concluded:

> "Logic and common sense require a ruling in advance of a summary judgment hearing to prevent oral testimony. At such time, the court may consider why Affidavit, deposition, interrogatory, or other similar evidence is unavailable and whether a continuance may be necessary as provided by CR 56(f). And CR 56(f) requires a proper motion supported by Affidavit".
> Landberg v. Carlson supra, page 756.

Note that the Landbergs also appeared pro se.

Appellants' Smith and Duszynska submit that the trial court abused its discretion in failing to grant Appellants' Motions for Continuance in at least two respects: one, it absolutely refused to allow Appellant Smith to explain what the facts are that he believes he could bring forward by refusing him any latitude in making comment. (RP 9)

Secondly, both the Trial Court and the Respondents' attorney were put on notice that the testimony was going to be a function of the Motion for Summary Judgment. It was not the testimony of Appellant by rather the testimony of Respondents Reich that was sought. Appellant Smith served a Subpoena on Reichs (RP 3), which was noted by Reich's attorney (RP 3). So while the Appellate Court in Landberg concluded that local rules required some prior notice of a desire to take testimony, in a Motion for Summary Judgment and concluded that testimony could be allowed if properly noticed, Appellant Smith submits that there was notice by virtue of the subpoena request. The Trial Court failed to follow up on that subpoena request and fell into the black hole of violating its standard. That standard is:

> "The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion."
> Coogle v. Snow, supra page 507.

By failing to listen to Appellant Smith in his efforts to give testimony, and by failing to walk through the issues presented by CR 56(f),

the trial court did not give Appellant Smith his day in court. It, in a Draconian way, ignored the Motion for Continuance or denied it, and in either event approved the Respondents Reichs' Motion for Summary Judgment, and based that order on untenable grounds and for untenable reasons. As stated in Coogle, the trial court had a **duty** even though a pro se party is driving him nuts.

3. The Trial Court Findings of Fact and Order granting Summary Judgment should be affirmed.

Even if the Court of Appeals should decide that Appellant Smith did not properly respond to Respondents Reichs' Motion for Summary Judgment, as outlined in the preceding paragraph, then the Court of Appeals still must address the validity of the Order granting Summary Judgment. As pointed out by Respondent in its Response brief, the Appellate Court reviews a summary judgment granted by the trial court *de novo* and engages in the same inquiry as the trial court. Both the Appellate Court and the trial court must deny a Motion for Summary Judgment if the records show any reasonably hypothesis which entitles the non-moving party to relief. Mostrom v. Pettibon, 25 Wn. App. 158, 607 P2d 864 (1980), Morris v. McNicol, 83 Wn. 2d 491, 519 P2d 7 (1974).

Addressing those issues, Appellant Smith as a party appearing "pro se" was caught off guard by not having an appropriate Affidavit at the time of the hearing on summary judgment. But he was denied a continuance under CR 56(f) or the request was ignored. But even then it is not too late.

The case of Applied Industrial v. Elton, 74 Wn App. 73, 872 P2d 87 (1994) provides us the following principles of law:

> "In the context of a summary judgment, unlike a trial, there is no prejudice to any findings if additional facts considered.
> Meridian Mineral Co. v. King County, 61 Wn. App. 195, 810 P2d 31 (1991)
>
> Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a final order has been entered.
> Meridian Mineral Co. v. King County, 61 Wn. App. at 202-203.
>
> Here it was permissible for the trial court to entertain the motion for reconsideration. The only problem is that, in so doing, the trial court reached the wrong legal conclusion as to the construction of RCW 78.08.090."
> Applied Industrial v. Elton, page 77.

With those principles in mind, the Court of Appeals is asked to review the sworn testimony of Appellant Charles Smith contained in his Affidavit in Support of his Motion for Reconsideration. Therein, Mr. Smith makes the following assertions of fact which are counterdictatory to the affidavit of Respondent Lloyd Reich and the Findings of Fact entered by the trial court. (CP 295-382) First at page 2 of 15, he reasserts the existence of the water system easement being 130 feet from the property line. At page 4 of 15, he asserts that he has no access to the Reichs property to inspect or repair the electrical and mechanical material contained therein. He is not even able to shut off the electricity if things go bad. That assertion is found on page 5 of 15. On page 7 of 15 and 8 of 15,

he asserts that he has repeatedly observed Reichs irrigating more than one acre of lawn. That is a question of fact. Even though Reichs assert in their affidavits that they have not irrigated more than half an acre and Vickie Kline repeats they assertion, there is still a question of fact of how many acres they actually irrigate from this well site. Then on page 9 of 15 and 10 of 15, he points out that the well water level was depleted so that the water pump was no longer submersed. That initial pump was lowered but the water has since dissipated and they are continuing times when the water in the well is unable to be used by Plaintiff. There has been absolutely no determination by either party what is causing that. Why is the water being depleted in the well? These are all questions of fact that the trial court could have still addressed even under a motion for reconsideration filed after the entry of the order granting summary judgment. It is repeated in LaPlant v. State at 85 Wn. 2d 154, 531, P2d 299 (1975), that is the trial court's function to determine whether such a genuine issue exists. There must be uncontroverted facts.

Here it is appropriate to repeat the principle from Coogle v. Snow case, supra, that the trial court has a **duty** to give each party a reasonable opportunity to complete the record. It should have been done before ruling on the case. It still shows that there are genuine issues of material fact and the trial court could have reversed itself and let those issues be tried.

There is also a principle of law that the court must determine whether or not there is a material fact which determines the outcome of the case, even though it is not addressed by either party in the Motion for Summary Judgment. In the case between Smith and Duszynska and the Riechs the primary issue is whether the well used by the two parties was "pumped dry" and secondly, what caused that? Neither of those issues were addressed by Respondent Rieichs' Motion for Summary Judgment nor by the trial court in entering the Order Granting Summary Judgment. (CP 289-294)

A second material issue is the interpretation of the original contract entitled "Water System Easement and Agreement," and how parties on each side of a fence are to have access to the well and pump on the one hand and the mechanics and electrical connection on the other hand. The third issue is how much irrigation the Riechs were doing on their property. The Affidavit of Agent Kline was hearsay at best and asserts that the Riechs told him that they irrigate less than a one-half (½) acre from the Smith well and therefore it must be true.

4. The Court should uphold the CR 12(b)(6) motion to dismiss claim of illegally watering.

Respondent Reich made a Motion as Defendant to dismiss a portion of Appellants' Complaint under CR 12(b)(6) for failure to state a claim upon which relief can be granted. In the motion he incorporated the Affidavit of Vickie Kline, an agent for the Department of Ecology. Use of

extrinsic evidence turns the CR 12(b)(6) motion into a motion for summary judgment under CR 56. So the question then becomes, is there a genuine issue of material fact and should Appellant Smith be allowed to bring extrinsic evidence of his own.

Whether the Respondents Reichs are in violation of Washington State Water Law really begs the question. Ms. Kline chose to not enforce the irrigation aspect against Respondents Reich because she took their word for it that they were no watering lawn and garden areas exceeding one-half acre. There is nothing in her Affidavit of November 8, 2012 and her letter of July 17, 2009, attached thereto other than she took their word that they were not watering in excess of one-half acre. She admits in her letter on July 17, 2009 that it would be very time consuming to measure the lawn and garden areas responding to the complaint of Appellant Smith.

Appellant Smith in his affidavit for reconsideration, states unequivocally that he has observed the Respondents Reich water more than a one-half acre. That certainly brings us to a material issue of fact.

Furthermore the underlying effort of Appellant Smith is not to enforce the state law, which should be a function of the Department of Ecology, but rather to make sure that Respondents Reich lived up to their part of the water agreement wherein their property was to share water equally with the Smith property and not have a result causing the water flow to disappear. A Water System Easement and Agreement executed in

1981, was recorded in the records of Skamania County, Washington under Auditors File No. 92091 at 79 page 402 (CP 295-382) and became a covenant which ran with the land. A restrictive covenant, also known as this shared well water agreement runs appurtenant to the land and becomes a property right. A court's primary objective in interpreting a restrictive covenant that runs with a parcel of land is to determine the intent or purpose of the covenant. Hollis v. Garwall, Inc. 137 Wn. 2d 683, 974 P2d 836 (1999).

Subsequent owners over the benefited land can enforce the covenant against subsequent owners of the burdened land. The practical significance of enforcing a covenant law is that the benefitted party enforcing the covenant may recover damages for breach as well as get a judicial order that specifically enforces the covenant. A property right is protected by the United States Constitution when an individual has a reasonable expectation of entitlement deriving from existing rules that stem from an independent source, such as state law. Asche v. Bloomquist 132 Wn. App. 784, 133 P3d 475 (2006).

Section 2 of the above stated agreement provides that Kennedy and Butler, the originators under the agreement, shall share equally in the water produced by said well for domestic purposes. In addition they were to limit their respective uses of water to a quantity which will permit an uninterrupted supply of water to both properties. So the issue is not whether or not the State of Washington Department of Ecology will

enforce one of its rules, but whether or not that rule may be used to be demonstrative in the actually use of water and the actually amount of property being irrigated.

Something has caused the Appellant Smith's well to lose its continuous water supply. There is only one other person or family who has access to that water supply. The Smith family and the Reich family are bound by the covenant known as the Water System Easement and Agreement described above. If the language of a promise or contract is unclear then is may be void for uncertainty. Sandeman v. Sayres 50 Wn. 2d 539, 314 P2d 428 (1957). But a court will not take lightly to invalidate the promise for uncertainty but first would seek to review the ambiguity. What is still unclear, the court may rely on parole evidence to explain the ambiguity. And there is the rub. In People's Mortgage Company v. Vista View Builders 6 Wn App. 744, 496 P2d 354 (1972), the Court held:

> "The use of parole evidence being required to explain the ambiguities that appear in the correspondence previously viewed, the entry of summary judgment is premature.
>
> . . .
>
> . . .
>
> [W]here the contract is ambiguous and there is a genuine factual issue as to its meaning, summary judgment should be denied. CF Nashem v. Jacobson 6 Wn. App. 363, 492 P2d 1043 (1972). Peoples Mortgage v. Vista View, supra 750.

If the court ruled on Respondent Reichs motion under CR 12(b)(6) then it did so inappropriately. It could have only have granted that under CR 56 and then all the previous argument concerning how Appellant Smith gets his message to the court has been previously discussed. The entry of an order dismissing the claim was again "draconian" in its use by the trial court.

IV.

CONCLUSION

The essence of the appeal by Appellants Charles Smith and Barbara Duszynska, is one of procedure although the substance of their argument cannot be ignored. They are without water in a well that was supposed to be jointly owned and maintained with Respondents Reich. That relationship goes back to the Water System Easement and Agreement dated and recorded on 1981. Respondents Reichs made an effort to rid themselves of this matter by their motion for summary judgment and, unfortunately, the trial court was taken in. One can only speculate that he has little patience with the pro se party, nonetheless the rules require him to have patience with that pro se party and make sure that person has full opportunity to present his case. The assertions by Respondents that Appellants have waived their rights to challenge the issue are to be ignored. The request for continuance was properly made, but the steps to be taken were ignored by the trial court in draconian fashion. Because of all of that the trial court is

findings of fact and Order Granting Summary Judgment and his order dismissing the claim for over use of water should all be reversed.

RESPECTFULLY SUBMITTED this 15th day of April, 2015.

BRIAN H. WOLFE, P.C.

By: _____

Brian H. Wolfe, WSBA No. 04366
Attorney for Appellants' Smith and Duszynska
105 W. Evergreen Blvd., Suite 200
Vancouver, WA 98660

No. 46434-9-II

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

CHARLES F. SMITH and BARBARA DUSZYNSKA, husband and wife,

Appellants

vs.

LLOYD ROOSEVELT REICH and JOYCE REICH, husband and wife,

Respondents.

CERTIFICATE OF SERVICE

Brian H. Wolfe, WSBA No. 04306
Brian H. Wolfe, P.C.
105 W. Evergreen Blvd., Suite 200
Vancouver, WA 98660
Telephone: (360) 693-5883
Facsimile: (360) 693-1777

Attorney for Appellants Charles F. Smith and Barbara Duszynska

I certify under penalty of perjury under the laws of the State of Washington that, on April 15, 2015, I caused Appellants' Reply Brief to be filed with the Court of Appeals (original and one copy); and caused to be served on the persons listed below in the manner shown:

David Schultz, WSBA #33796
Knapp, O'Dell & MacPherson
430 NE Everett Street
Camas, WA 98607-2115
Telephone: (360) 834-4611
Facsimile: (360) 834-2608
Email: da_schultz@hotmail.com

- ☐ hand delivery via messenger
- ☒ overnight delivery
- ☒ mailing with postage prepaid
- ☐ copy via email

Counsel for Respondents

DATED this 15th day of April, 2015 at Vancouver, Washington

Brian H. Wolfe, P.C.

Roberta Woelke

Roberta Woelke, assistant to Brian H. Wolfe