IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Case No. 46434-9-II



CHARLES F. SMITH AND BARBARA DUSZYNSKA

Appellants

v.

LLOYD ROOSEVELT REICH AND JOYCE REICH,

Respondents

# RESPONDENTS' BRIEF

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A. STATEMENT OF THE CASE

1. On February 1, 2012, Charles Smith and Barbara Duszynska, appellants, filed a "Complaint, Breach of Contract, Encroachment" action. CP 1-8. On February 24, 2012, Lloyd and Joyce Reich, respondents, filed an "Answer and Affirmative Defense and Counterclaim. CP. 13-74. On March 19, 2012, the appellants filed an "Answer to Counterclaim." CP. 75-77.

2. On January 30, 2014, the respondents filed the "Defense CR 12(b)(6) Motion to Dismiss." CP. 89-92. The motion related to the appellants' claims that the respondents were "illegally watering," and committed perjury during a Small Claims Hearing. The appellants did not file any responsive briefing or offer any argument in opposition. The Motion to Dismiss was considered by the Court on March 13, 2014. RP. 12-13.

3. On January 30, 2014, the respondents filed the "Motion for Summary Judgment" (CP. 93), "Memorandum in Support of Motion for Summary Judgment" (CP. 94-112), "Affidavit of Lloyd and Joyce Reich" (CP. 113-133), "Affidavit Supporting Summary Judgment by Vicky Cline (CP. 134-138), "Affidavit Supporting Summary Judgment by Ken Hoffman" (CP. 139-141), and "Affidavit Supporting Summary Judgment by Attorney" (CP. 142-194). The appellants were served copies of these documents on January 31, 2014, along with a Citation setting a hearing on the motion for summary judgment and motion to dismiss on March 13, 2014.

4. The affidavit of counsel attached documents which were attached to the Answer, and included Exhibit "A": Water System Easement and Agreement; Exhibit "B": The original survey of the short plat regarding the real property in question, completed by Olson Engineering, filed and recorded as Parcel No. 6 of Jack Spring Survey Recorded in Book 1, page 139 of Surveys, Skamania County Auditor's Records; Exhibit "C": Small Claims Cause S03-08; Small Claims Cause S04-02; Small Claims Cause S07-21; Small Claims Cause S09-25; and Small Claims S10-06 (each attachment included the claim filed, and the judgment therein); and Exhibit "D": Petition and Affidavit for Order to Show Cause Why Claim of Lien Should Not Be Stricken and Other Relief Granted, Order to Show Cause Why Claim of Lien Should Not be Stricken and Other Relief Granted, and Order on Show Cause RE Claim of Lien/Judgment. CP. 142-194.

5. The appellants did not file any responsive pleadings, motions, or affidavits to contest the motion for summary judgment. RP. 3. The appellants did not file a CR 56(f) motion for a continuance. The appellants did not file a CR 56(f) affidavit stating good reason for delay in obtaining the desired evidence, did not state what evidence would be established through the additional discovery, and did not demonstrate how the desired evidence would raise a genuine issue of material fact. RP. 1-13. The respondents' motion for

summary judgment was filed 729 days after the appellants initially filed their complaint.

6. Prior to the hearing, the trial court had reviewed all the pleadings, responses, motions, memorandum, and affidavits in the court file. RP. 11-13. The trial court had also fully reviewed the appellants' motion for leave to amend their complaint. The trial court verified with the appellants that it was basically the same complaint but added case law. RP. 2-3. The trial court discussed the summary judgment procedures with the appellants. RP. 3-4. The trial court verified the appellants were aware of Court Rule 56. The trial court directly asked the appellants why they did not comply with Court Rule 56. RP. 4.

7. The trial court conducted the hearing on the motion for summary judgment and motion to dismiss on March 13, 2014. RP 1-13. The court gave both parties an opportunity to present argument. Towards the end of the hearing on summary judgment the appellants stated: "may I ask for a continuance." RP 10. This was done only after it was clear that the hearing was not going in the appellant's favor. The respondents did not agree to the continuance. The appellants did not state good reason for delay in obtaining the desired evidence, did not state what evidence would be established through the additional discovery, and did not demonstrate how the desired evidence would raise a genuine issue of material fact. RP. 1-13.

8. The appellants only argued that their Court Rule 15 motion would overcome the motion for summary judgment and motion to dismiss. The Reiches responded to the motion for leave to amend at the hearing, and cited case law on point. RP 5-6. Further, the appellants acknowledge that the amended complaint only added case law, and did not change the facts alleged. Clearly the trial court had compared the two complaints. RP. 6. The motion for leave was considered by the court, however, it was not timely. The motion for leave was filed March 7, 2014, and served on the respondents on March 10, 2014. The appellants acknowledged their motion was not timely. RP 6.

9. At this point in the hearing, the trial court stated "Mr. Smith I'm going to let you respond again because I want to make sure that you understand what's going on. There are certain rules regarding motions for summary judgment which have to be followed in every case. I cannot make an exception for you out of all the other citizens that appear in this court." RP. 6. "And one of those is that Summary Judgment is a way for court to preclude issues that should not go to trial. Sometimes that's the entire case. Sometimes it's just a portion of the case." RP. 6-7. "But what you have to do is cite into the record judicially cognizable facts and the only way you can do that is by submitting a Memorandum of Law and adding to that affidavits and exhibits. And that's the way it's done." RP. 7. "So in response to [respondents] motion which is quite long with exhibits you should have prior

to eleven days from – in the past – from now at least submitted your own Memorandum of Law as to why Summary Judgment is not the appropriate response today for the court and supported that with affidavits to show that there is some remaining issue of fact that needs to be adjudicated by a fact finder – either a Judge or jury. And you did none of those things." RP. 7. The court further discussed the motion to amend the complaint and how that was not a response to summary judgment. The court then stated "I'll let you respond before I make a ruling." RP. 7. In response, the appellants stated that the respondents were "guilty of fraud" and cited to Court Rule 60. RP. 8. On appeal, the appellants did not challenge the denial of the motion for leave to amend, nor did the appellants challenge the finding that the gravamen of the amended complaint was the same as the original complaint.

10. The trial court confirmed with the appellants that both the breach of contract issue, and the encroachment issue were previously litigated in small claims court. RP. 10.

11. The trial court entered the following findings of fact based upon the undisputed factual record:

> 1. a) That at all material times herein, plaintiffs, Charles Smith and Barbara Duszynska, husband and wife, resided in Skamania County, Washington. Plaintiffs resided at 181 Spring Lane, Skamania County, Washington.
>
> b) That at all material times herein, defendants, Lloyd Reich and Joyce Reich, husband and wife, resided in Skamania

County, Washington. Defendants resided at 151 Spring Lane, Skamania County, Washington.

c) The property in question is located in Skamania County, Washington. The legal descriptions set forth in the Water System Easement and Agreement, in the records and files herein, describes the properties in question, and is herein incorporated by this reference.

d) The Water System Easement and Agreement, and Original Survey and Short Plat regarding the property in question, filed and recorded with the Skamania County Auditor as Parcel No. 6 of Jack Springs Survey Recorded in Book 1, Page 139 of Surveys, and Skamania County District Court Small Claims Actions referenced herein, are herein incorporated into these findings.

e) The terms of the Water System Easement and Agreement set forth the plain language of the contract executed in 1981. Term two provided, "Kennedy and Butler shall share equally in the water produced by said well for domestic purposes...and will, insofar as possible, limit their respective use of water to a quantity which will permit an uninterrupted supply of water to both properties based upon the capacity of the well." The defendants sufficiently limited their water use consistent with term two. The defendant did not breach said agreement.

f) The defendant did not irrigate more then half an acre for domestic purposes. The Affidavit and Findings of Vicki Cline are incorporated herein. The defendants are in compliance with State water laws.

g) In 2005, Kenneth Hoffman, a professional land surveyor, helped the Reiches establish a property line between the respective properties. Using three undisturbed monuments set by D. Olson on the common property line, he found the defendants' fence to be completely on the defendants' property. In 2005 the fence did not encroach upon plaintiffs' property.

h) On January 28, 2007, Kenneth Hoffman went back to the Reichs' property and examined the fence line again. At this time, the northerly corner post had been disturbed and was leaning substantially southerly. Without being able to use the disturbed post, he noted a small portion (¼ inch to ½ inch) of one post encroached upon the plaintiffs' property. Between 2005 and 2007 the northerly most corner post had been disturbed in the area that someone on plaintiffs' property had been observed operating a bulldozer.

i) Approximately one month after Mr. Hoffman informed the Reiches that a small portion of one post encroached upon the plaintiffs' property, Mr. Reich moved the fence post in question approximately four inches towards the defendants' property.

j) The defendant's fence does not encroach onto the plaintiff's property.

k) The plaintiff's have previously brought four small claims actions against the defendant. Each of the actions were fully litigated. Each of the actions concern matters addressed in this claim. Skamania County District Court Small Claims Cause S03-08, filed by plaintiff, regarded interpretation of the Water System Easement and Agreement and oral contracts between the parties, and was fully litigated. Plaintiffs' claim was for monetary damages of $264.81, and was denied after trial. Skamania County District Court Small Claims Cause S04-02 was filed by defendants against the plaintiff, and regarded breach of oral contract by Plaintiff to pay $60.00 per year to cover the cost of electricity relating to the shared well contract. The matter was fully litigated, and judgment in the amount of $94.00 was entered in defendants' favor. Skamania County District Court Small Claims Cause S07-21 was filed by plaintiff against defendants, claiming the fence encroached upon plaintiff property, and only sought money damages in the amount of $927.50. Plaintiff chose said forum, the matter was fully litigated, and the plaintiffs' claim was denied after trial. Skamania County District Court Small Claims Cause S09-25, regarded breach of oral contract by plaintiff to pay $60.00 per year to cover the cost of electricity relating to the shared well

contract. Judgment was entered following trial in defendants' favor for $168.00. Skamania County District Court Small Claims Cause S10-06, regarded plaintiff's claim for $927.50 for encroachment of defendant's fence, and $1,899.29 for bad faith in relation to the shared well agreement, plus costs, totaling $2,908.79. Plaintiff chose the forum, the matter was fully litigated, and again the claims were denied after trial. These portions of the complaint are barred based on the doctrine of claim preclusion, and based upon the doctrine of issue preclusion.

l) The well was drilled on plaintiff's property in 1979, approximately 130 feet north of the common boundary. The Water System Easement and Agreement was executed on February 23, 1981. The defendants purchased their parcel from the Butlers in 1981. In 1981 time, both parcels in question were raw land. Defendants contracted with Reich Well Drilling in 1991 to install a pump, and pressure tank. The pump is located on plaintiff's parcel. The pressure tank is located on defendant's parcel. The electricity to operate the pump is completely supplied by the defendants. The cost of installing the pump was $1,503.38, and was paid in full in 1995. The plaintiff paid defendants $751.69 on December 19, 2001 (50% of the costs to install said pump and pressure tank), and agreed to pay $60.00 per year towards the electricity used to operate said pump thereafter. The cost associated with installing a separate electrical metering system would be significant for both parties. The lawsuit is outside of the statute of limitations. Knowledge or reasonable opportunity for discovery of the cause of action has been present since 1991, there has been an unreasonable delay in commencing this action, and it is inequitable to enforce plaintiffs' claim. These portions of the complaint are barred based upon violation of the statute of limitations, the doctrine of laches, and the doctrine of equitable estoppel.

m) The enforcement of the requirement that "Kennedy and Butler shall share equally in the expense of the installation of a pump in said well and that upon the installation of such pump, a separate electrical metering system shall be installed for such pump and Kennedy and Butler or their respective successors in

> interest to the above described property shall equally share the cost of electrical service to such pump" twenty-one years after the pump was installed, and eleven years after the parties reached an agreement regarding equally sharing the cost of electrical service fails to serve the intended purpose of said agreement. Portions of the Water System Easement and Agreement's duration were limited by implication."
>
> 2. "No genuine issue of material fact exists on plaintiffs' claims for relief as set forth within their Complaint against defendant, and therefore defendants' Motion for Summary Judgment is hereby granted."
>
> 3. "Further, the court finds that the plaintiff's claim that the defendants irrigate approximately more then one acre of lawn and garden area in violation of Washington State Water Law fails to state a claim upon which relief can be granted because plaintiff can prove no set of facts consistent with the complaint which would entitle plaintiffs to relief."
>
> 4. "Further, the court finds that the plaintiff's claim that the defendants on or about February 2, 2010, committed perjury by stating under oath and on record before pro tem Judge Baker that defendants possess an electrical permit for service to the shared well fails to state a claim upon which relief can be granted because plaintiff can prove no set of facts consistent with the complaint which would entitle plaintiffs to relief." CP. 289-294.

12. Based upon these findings of fact, the trial court granted the motion for summary judgment, and dismissed the appellants' complaint. CP 289-294.

13. The appellants sought reconsideration based upon CR 59. CP 295-382. The respondents filed a Response to Motion for New Trial and Reconsideration. CP. 386-388. An order striking the improper portions of the

appellants' affidavits was entered. CP. 394. The court heard argument for the motion on May 15, 2014. RP. 20-35. The appellants did not argue that the court should have granted a CR 56(f) motion to continue. Rather, the appellants argued that "substantial justice" was not done, and admitted that it was a mistake to not file affidavits in response. RP. 20-23, 30-34. The court entered an order denying the motion for reconsideration. CP. 400.

14. The appellants asserted one assignment of error: "[t]he Trial Court abused its discretion by failing to grant Appellant a Continuance pursuant to CR 56(f)." The trial court's unchallenged findings of fact set forth in the order granting the motion for summary judgment are verities on appeal.

B. ISSUES FOR REVIEW

1. Whether the Appellant Waived His Right to Challenge the Issue Relating to a 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 the CR 12(b)(6) Motion to Dismiss the Claim of Illegal Watering

C. ARGUMENT IN RESPONSE

1. The Appellants Waived Their Right to Challenge the Issue Relating to a CR 56(f) Continuance By Failing to Raise the Issue to the Trial Court.

The Reiches, respondents herein, submit that Charles Smith and Barbara Duszynska, appellants herein, failed to preserve the issue relating to a CR 56(f) continuance for appeal. As such, the court need not consider the merits of the appellants' argument.

As a general rule, courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A party may raise "the following claimed errors for the first time in the appellate court: (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). These errors are not presented in this case.

It is a fundamental principle of appellate litigation that a party may not assert on appeal a claim that was not first raised at trial. *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule is grounded in notions of fundamental fairness and judicial economy. See 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A trial court should be given the opportunity to respond to and correct mistakes at the time they are

made to avoid unnecessary retrials and appeals. *Smith v. Shannon*, 100 Wn.2d at 37.

The rule that appellate courts will generally limit review to claims argued before the trial court is especially true for summary judgment proceedings. *Nguyen v. Sacred Heart Medical Center*, 97 Wn.App. 728, 987 P.2d 634 (1999); RAP 9.12. The appellate court will only consider the evidence and issues called to the attention of the trial court when considering an appeal of an order for summary judgment. RAP 9.12. Issues not raised to the trial court on summary judgment may not be advanced on appeal. *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995); *Hodge v. Raab*, 151 Wn.2d 351, 88 P.3d 959 (2004).

Court Rules further define the means by which an error must be preserved at the trial court. See CR 7, CR 43, CR 46, CR 51, and CR 56. The rules require parties to inform a trial court of the rules of law they wish the court to apply, and the facts for them to consider. While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse failure to seek correction of an error once the complaining party becomes aware of it. *Balandzich v. Demeroto*, 10 Wash.App. 718, 726, 519 P.2d 994 (1974); see also CR 46 (a party must make known action which he or she desires court to take), CR 7(b)(describing how a party shall make motions for an order), CR 56(c)(describing the summary judgment

proceedings), and CR 56(e)(describing the required form of the affidavits, and specifically noting "[i]f he does not so responds, summary judgment, if appropriate, shall be entered against him). Objections based on a theory not presented to the trial court cannot be raised for the first time on appeal. *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961).

In the context of this case, on January 30, 2014, Lloyd and Joyce Reich, respondents, filed a Motion for Summary Judgment which was is based upon the Affidavit of Ken Hoffman, the Affidavit of Vicki Cline, the Affidavit of Lloyd and Joyce Reich, the Affidavit of Defense Counsel, Memorandum of Law, the records and files therein, including the exhibits attached to the defendant's Answer, which include the Water System Easement and Agreement, all judgments relating to said matter, and the original survey of the short plat completed by Olson Engineering in 1978. The appellants were personally served a copy of the citation for motion for summary judgment, and the motion, supporting affidavits and documents on January 31, 2014.

The appellant did not file a responsive memorandum, or any affidavits in response. RP. 1-13. The appellant did not file a motion pursuant to Court Rule 56(f) outlining the reasons why he could not present by affidavit the facts essential to justify opposition, or why he needed additional time to file affidavits. The appellant did not file an affidavit outlining the reason justifying a continuance. RP. 1-13.

The appellants only action of record was to file a motion for leave to amend their complaint pursuant to Court Rule 15. The motion was filed on March 7, 2014. The court specifically addressed the CR 15 motion with the appellants. RP. 4. The respondent cited case law during the hearing that provided the court with the basis to deny the motion for leave to amend. "The trial court did not abuse it's discretion in denying a request for leave to amend made on the day summary judgment motions were argued." RP. 5-6; *Bank of America NT v. David W. Herbert*, 153 Wn.2d 102, 122-123,101 P.3d 409 (2004). The only other theory offered by the appellants for not filing affidavits in response was that the respondents were "guilty of fraud" and Court Rule 60. RP. 8.

Prior to the March 13, 2014, hearing on summary judgment, the trial court reviewed the pleadings, motions, memorandum, documents, exhibits, and affidavits filed and properly before the court. The trial court considered the pleadings and argument of the parties during the summary judgment hearing March 13, 2014. RP. 1-13. The trial court specifically asked the appellant "what is the difference from the first complaint?" To which the appellant provided: "There is no case law cited. I have cited case law. I – in one of the pleadings I have removed with respect to asking for Contempt of Court." RP. 2.

As addressed in the trial courts order granting summary judgment, "the only action of record taken by the defendant was to file an untimely motion to amend the complaint on the day of the motion for summary judgment hearing, which was denied by the court. CP. 289-294. Further, as agreed by the plaintiffs on the record, the motion to amend the complaint did not change the gravamen of the complaint, as it continued to raise the same issues. The plaintiffs did not demonstrate a question of fact existed. The facts set forth in the defendant's affidavits are uncontroverted." CP. 290.

Towards the end of the hearing on summary judgment the appellants stated: "may I ask for a continuance." RP 10. This was done only after it was clear that the hearing was not going in the appellant's favor. The respondents did not agree to the continuance. The appellants did not present the reasons for the continuance in the form of a timely CR 56(f) motion, and supporting affidavit for such a continuance. Rather, as a last ditch effort, the appellant asked for a continuance. From the record, it does not "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." CR 56(f). The opposing party did not file an affidavit. CP. 378-388. If such a record was established, "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 may make such other order as is just." CR 56(f).

If a party opposing a summary judgment is for some reason unable to present evidence justifying his opposition, the party should submit a CR 56(f) affidavit stating the reasons preventing him or her from presenting by affidavit facts essential to justify opposition. *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 553 P.2d 107 (1976). The appellants did not file such an affidavit. The appellants did not file written motion for a continuance. The appellants did not orally offer good reason for the delay, did not orally state what essential evidence would be established through additional discovery, and did not orally demonstrate how the desired evidence would raise a genuine issue of material fact. RP. 1-13.

The appellants also did not argue this issue as a basis to the court in their motion for reconsideration. RP 20-23, CP. 387-388, CP. 400. The order granting summary judgment was entered April 17, 2014. CP. 289. The order denying the motion for reconsideration was entered May 15, 2014. CP. 400. The notice of appeal was filed June 13, 2014. The notice of appeal does not designate an error in failing to grant a CR 56(f) continuance. It is arguable, even with a liberal interpretation of the rules, that the notice of appeal filed for this purpose was untimely. RAP 5.2, RAP 5.3.

The appellant's only assignment of error on appeal is that the trial court abused its discretion by failing to grant appellant a continuance pursuant to CR 56(f). As this argument and the necessary supporting facts were not

called to the attention of the trial court, this court should not consider it for the first time on appeal. Therefore, no error occurred.

2 Trial Court Properly Denied Appellant's Oral Request for a Continuance.

Whether a motion for a continuance should be granted or denied is a matter discretionary with the trial court, reviewable on appeal only for manifest abuse of discretion. *Jankelson v. Cisel*, 3 Wn.App. 139, 473 P.2d 202 (1970). The abuse of discretion standard recognizes that deference is owed to the trial court because it is "better positioned than the appellate court to decide the issue in question." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)(quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S.Ct. 2447, 2459 L.Ed.2d 359 (1990)).

Further, a party who moves for a continuance must have exercised good faith and due diligence to prevent the need for delay. *Odom v. Williams*, 74 Wn.2d 714, 717-18, 446 P.2d 335 (1968). In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances

previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

The Appellants failed to exercise good faith and diligence to prevent the need for delay. They were aware of the court rules and elected not to file affidavits in response. They also did not file or serve a timely written motion or affidavit showing the materiality of the evidence expected to be obtained and the due diligence used to procure such evidence. See *Odom*, 74 Wn.2d at 717 (finding that the defendant did not comply with procedural requirements because he failed to file or serve any timely written motion or affidavit supporting his motion for continuance); *Makoviney v. Svinth*, 21 Wn.App. 16, 29, 584 P.2d 948 (1978), review denied, 91 Wn.2d 1010 (1979)(stating the plaintiff failed to comply with procedural requirements of CR 40(e) when he made an oral offer of proof but did not supply the required affidavit).

More specifically, a trial court does not abuse its discretion in denying a CR 56(f) request if the requesting party "(1) does not offer a good reason for the delay in obtaining the desired evidence; (2)...does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Manteufel v. Safeco Insurance Co.*, 117 Wn.App. 168, 175, 68 P.3d 1093 (2003). A denial can sufficiently be predicated on just one of these grounds. *Gross v. Sunding*, 139 Wn.App. 54, 68, 161 P.3d 380 (2007), CP. 386-388, CP 400.

It should be noted that "pro se litigants are expected to comply with the rules." *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn.App. 299, 310, 57 P.3d 300 (2002). The trial court was under no obligation to grant special favors to pro se litigants. "The law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws." *In re Marriage of Wherley*, 34 Wn.App. 344, 349, 661 P.2d 155 (1983).

Even assuming the appellants' procedural deficiencies were excusable, the trial court nevertheless acted within the proper limits of its discretion. The trial court denied the appellants' continuance after they failed to provide an oral basis for a continuance, and properly interpreted it essentially as a last ditch effort after unsuccessfully making their argument to the trial court. It should be noted that 729 days elapsed from the time that the appellants filed the action to the day that the respondents filed for summary judgment. This was a fact that the court was clearly aware. The trial court also has the ability to observe the parties, including their age and health, and factor that into their consideration.

In the end, the appellant was aware of the court rules, and made the choice not to follow the court rules. He was capable of working on the matter and filed motions, he simply made the conscious choice not to file affidavits

in response. As he later admitted, that was a mistake. RP. 23. As addressed to the trial court, the mistake was not a basis for reconsideration. RP. 26.

In this case, the appellants did not file a written motion or affidavit. The appellants failed to exercise due diligence. Further, the appellant did not offer a good reason for delay in obtaining the desired evidence, did not state what evidence would be established through the additional discovery, and did not demonstrate how the desired evidence would raise a genuine issue of material fact. The only information provided to the trial court, was the appellant asking the judge if he could ask for a continuance, and the respondents not agreeing to a continuance. RP. 1-13. The trial court, having reviewed the full record, and having satisfying himself through questioning the appellants and observing the parties, properly denied the oral motion lacking a sufficient factual basis for a continuance. The appellants have also made no showing that the error was manifest. Therefore, no error occurred.

3. The Trial Court's Findings of Fact and Order Granting Summary Judgment Should Be Affirmed.

Appellate Courts review a summary judgment granted by the trial court *de novo*. Generally, the appellate court engages in the same inquiry as the trial court. *Citizens for Responsible Wildlife Mgmnt. v. State*, 149 Wash.2d 622, 630, 71 P.3d 644 (2003); *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987). A motion for summary judgment is properly

granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c).

It should be noted that the appellants did not assign error to the trial court's findings of fact, and trial court's order granting summary judgment. *See State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995)(a reviewing court will generally not consider the merits of an issue if the assignments are deficient). A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignment of error is required. RAP 10.3(a)(4). A separated assignment of error for each finding of fact a party contends was improperly made must be included in the appellant's brief. RAP 10.3(g); and *see State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)(it is important to assign error to findings, because failure to do so will render those findings verities on appeal). This court should only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). As such, the appellants are not entitled to *de novo* review. The trial court's findings of fact are sufficient to support the order granting summary judgment.

Assuming *arguendo* this court considers the challenge *de novo*, as argued to the trial court, the purpose of a motion for summary judgment is to do away with a useless trial on a formal issue which cannot be factually

supported or on an issue which is legally insufficient to the outcome of the controversy even if factually supportable. *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998). Summary judgment will be granted, after considering the evidence in the light most favorable to the nonmoving party, if reasonable persons could reach but one conclusion. CR 56; *Van Nor v. State Farm Mutual Auto Insurance Co.*, 142 Wn.2d 784, 16 P.3d 574 (2001). Partial summary judgment may be made on any part of a claim, which the defendant requested as a possible alternative.

The function of summary judgment is to determine from the pleadings, affidavits, admissions, and other material evidence presented, whether there is a genuine issue of material fact requiring a formal trial. *Leland v. Frogge*, 71 Wn.2d 197, 427 P.2d 724 (1967). In order to demonstrate a genuine issue of material fact, the facts shown must be facts upon which the outcome of litigation depend, mere argumentative assertions are insufficient. *Blakely v. Housing Authority of King County*, 8 Wn.App. 204, 505 P.2d 151 (1973). The moving party bears the burden of proof. *Knox v. Mircrosoft*, 92 Wn.App. 204, 962 P.2d 838 (1998). Once the moving party demonstrates that there is no genuine issue of material fact present and that the party is entitled to judgment as a matter of law, the opposing party may not rest on the pleadings but must demonstrate that a triable issue remains. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 736 P.2d 249 (1987); CP. 386-388.

Respondents set forth their respective legal argument to the trial court, and facts in support of granting their motion for summary judgment from the various affidavits, memorandum, and documentation relating to each of the claims against them: (1) breach of contract, (2) failure to install separate electrical metering system, (3) excessive irrigation, in the event the court was inclined to consider evidence submitted outside the pleadings, and (4) encroachment. The respondents also set forth their argument and facts in the various affidavits, memorandum, and documentation in support of their affirmative defenses of issue preclusion and collateral estoppel, violation of the statute of limitation, the doctrine of laches, and the doctrine of equitable estoppel. The appellants did not file any affidavits demonstrating a triable issue remained. The facts set forth by the respondents were uncontroverted. The trial court properly entered findings of fact based upon the uncontroverted facts. CP. 289-294; CP 386-87.

Should the court choose to review the claimed issue which does not have an assignment of error, the record presented to the trial court is sufficient to support the findings of fact and order granting the motion. If necessary, *de novo* review will support this court affirming the findings of fact and order granting summary judgment.

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

Under CR 12(b)(6), the court must dismiss a complaint when a plaintiff fails to meet the pleading requirements. Dismissal of an action is appropriate if it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint which would entitle the plaintiff to relief. *Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006). In this case, the appellant failed to identify causes of actions which can be brought against the defendants. The portions of the claim for which dismissal based upon CR 12(b)(6) are sought related to illegal irrigation, and perjury. Appellants only contest the claim as it relates to illegal irrigation.

Appellants claimed that "defendants irrigate approximately more then one acre of lawn and garden area in violation of Washington State Water Law," and references interaction with Vicki Cline from the Washington State Department of Ecology compliance and enforcement representative. Neither the Department of Ecology, nor the Attorney General's Office determined a basis existed, and pursued action against the defendants for such a cause. In fact, according to the Affidavit of Vicki Cline, the department did not believe the defendants were in violation of the law. No action was taken by Ecology, but for closing the file as an unfounded allegation. CP. 134-138.

Regardless, the appellant did not present a claim upon which relief can be granted. In 1945, the Washington Legislature enacted a comprehensive ground water code to regulate and control allocation of public ground water.

Chapter 90.44 RCW. The Legislature rejected both the correlative rights and reasonable use doctrines and extended the prior appropriation principles of the surface water code to ground water. RCW 90.44.020; and see *Tenem Ditch Co. v. Thorpe*, 1 Wash. 566, 20 P. 588 (1889)(demonstrating that the doctrine of prior appropriation has been recognized since statehood). By expressly extending the prior appropriation doctrine to ground water, the Legislature extended the notion of public ownership to such water. RCW 90.44.040; A. Dan Tarlock, *Law Of Water Rights And Resources* 6.03[2](1988). In defining management of water as a public resource, the Legislature made the acquisition of rights dependent on compliance with an exclusive permit system. RCW 90.44.050, .055, .060; *Peterson v. Department of Ecology*, 92 Wn.2d 306, 596 P.2d 285 (1979)(emphasis added).

Water is *publici juris* and is available for private use, but is not subject to private ownership. RCW 90.03.010; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 583, 38 P. 147 (1894). While a person may obtain a right to the use of water in Washington, this right does not vest that person with an ownership in the water itself. *Rigney*, 9 Wash. at 583. The state maintains control of the use of water. See Chapter 90.03 RCW. An appropriator owns no title to water, and only obtains a personal property interest in the molecules of water diverted and has under his or her control and possession. *Department*

*of Ecology v. U.S. Bureau of Reclamation*, 118 Wn.2d 761, 767, 827 P.2d 275 (1992).

While the general rule is that ground water cannot be withdrawn from any aquifer without a permit issued by the Department of Ecology, the Legislature provided for four classes of exemptions under the ground water right permit system: (1) stock watering purposes; (2) the watering of a lawn or of an noncommercial garden not exceeding one-half in acre; (3) single or domestic uses in an amount not exceeding five thousand gallons a day; and (4) an industrial purpose in an amount not exceeding five thousand gallons a day. RCW 90.44.050. Recognizing that in some circumstances small withdrawals might affect the water system, the Legislature authorized the Department of Ecology to "require the person or agency making such small withdrawal to furnish information as to the means for and the quantity of that withdrawal." RCW 90.44.050. Whether a permit is required is determined by the Department of Ecology, not the plaintiff.

In this case, the Department of Ecology received a complaint alleging excessive use of public ground water from the plaintiff. The allegation was investigated by Vicki Cline, of the Department of Ecology. Mrs. Cline reviewed the multiple allegations by plaintiff, met with the plaintiff at his property, toured plaintiff's property, met with defendants, toured defendant's property, examined the well in question, and determined the allegation was

unfounded. Mrs. Cline closed the complaint by determining the allegation to be unfounded. CP. 134-138. The court had the ability to convert the CR 12(b)(6) motion to a motion for summary judgment, which was argued to the trial court. This is another basis to uphold the ruling.

However, the appellants lack the ability to enforce this claim in their pleadings. Pursuant to CR 12(b)(6), the pleadings fail to state a claim upon which relief can be granted. The claim could factually support the appellants' breach of contract allegation, which was addressed through summary judgment, but a neighbor cannot assert a claim of "illegal irrigation" generally against a private party, as that is the Department of Ecology's exclusive right. The trial court's finding and order granting dismissal should be affirmed. CP. 294.

The appellants cite to no law to support their contention that a private right to action using the state standards as to irrigation exists. All issues presented for review should be supported by legal argument. RAP 10.3(a)(6). Only supported issues should be considered on appeal. *Sollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999). Based upon the argument above, the respondents respectfully request this court affirms the dismissal of this portion of the complaint.

D. CONCLUSION

The trial court should be affirmed in all respects.

Respectfully submitted this 12 day of March, 2015,

By: _____

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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|---|---|---|
| CHARLES F. SMITH and BARBARA DUSZYNSKA,<br><br>Appellants,<br>vs.<br><br>LLOYD ROOSEVELT REICH And JOYCE RIECH,<br><br>Respondents. | ) | NO. 46434-9-II<br><br>AFFIDAVIT OF MAILING |

STATE OF WASHINGTON )
) ss.
COUNTY OF CLARK )

DAVID H. SCHULTZ on oath says:

1. That I am the counsel for the respondents, Lloyd and Joyce Reich, in the above-entitled appeal.

2. On March 13, 2015, I mailed two original of the Brief of Respondents' in the above-entitled matter to the Clerk of the Court of Appeals as follows:

Clerk of the Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454



KNAPP, O'DELL & MacPHERSON, PLLC
ATTORNEYS AT LAW
430 N.E. EVERETT STREET
CAMAS, WASHINGTON 98607

3. On March 13, 2015, I mailed a copy of Brief of Respondents' together with this Affidavit, and all attachments thereto, to the following individual:

Brian H. Wolfe
105 W. Evergreen Blvd. Ste. 200
Vancouver, WA 98660

David H. Schultz

SUBSCRIBED AND SWORN to before me this 13th day of March, 2015.

KIM D. LEWIS
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
JULY 20, 2016

Notary Public in and for the State of Washington, residing at Camas.
My commission expires: 7-20-2016



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