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№ 81199-1-I

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

WILSON LUU, Appellant,

vs.

SHERRI URANN, Respondent.

RESPONDENT'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW

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I. SUMMARY OF ARGUMENT

As discussed in §II below, despite Appellant Luu making much of Judge Craighead's application of King County Local Rule 7(b)(7), the purpose of the rule was served because at no time was Judge Craighead left with any misimpression as to Judge Rosen's previous ruling.

Fundamentally, Appellant Luu is appealing a grant of summary judgment; as discussed in §III below, nowhere in the Appellant's petition for review does Appellant identify the genuine issue of material fact that remained to be resolved at trial.

Although Appellant Luu's conduct constituted a rather egregious example of timber trespass, nothing in this case presents an issue of concern such that Supreme Court review is warranted.

II. RESPONDENT'S COMPLIANCE WITH KING COUNTY LOCAL RULE 7(B)(7) WAS DISCUSSED THOROUGHLY ON THE RECORD TO THE SATISFACTION OF JUDGE CRAIGHEAD

Appellant Luu contends that Respondent Urann violated King County Local Civil Rule ("KCLR") 7(b)(7), and that this violation was prejudicial. KCLR 7(b)(7) provides, in full:

> **(7) Reopening Motions.** No party shall remake the same motion to a different judge or commissioner without showing by declaration the motion previously made, when and to which judge or commissioner, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge or commissioner.

KCLR 7(b)(7).

If 'Judge A' rules on a motion, a litigant may not bring the same motion before 'Judge B' without disclosing, by declaration, five pieces of information:

1. The fact that the motion was previously brought;
2. When the motion was previously brought;
3. Before whom the motion was previously brought;
4. What result was obtained before 'Judge A;' AND
5. Any new facts or circumstances that would justify seeking a different ruling before 'Judge B.'

The intent of this rule is as clear as it is sound. Obviously, one superior court judge may not 'overrule' a fellow superior court judge, and KCRL 7(b)(7) ensures that the second judicial officer is fully aware of the prior hearing. In this case, Judge Craighead had all five pieces of information before her. In his Response to Ms. Urann's cross motion for summary judgement, Mr. Luu argued that the law of the case doctrine precluded Judge Craighead from revisiting Ms. Urann's motion for summary judgment. In her reply brief, Ms. Urann established that law of the case doctrine does not apply to denials of summary judgment. The entire issue of the propriety of Ms. Urann noting a cross motion for summary judgment was thoroughly discussed between Judge Craighead and both attorneys at the time the summary judgment motions were argued. *See* RP 73, line 21, through RP 76, line 14. That colloquy is attached hereto as an appendix for the court's convenience and will not be repeated here. Suffice it to say that Judge Craighead did not "waive" KCLR 7(b)(7); rather, she heard the motion because the five pieces of information required by the rule were disclosed to her in the briefing (although admittedly those pieces of information did not come in the form of a separate declaration). This is not a situation where Ms. Urann was unhappy with the ruling from Judge Rosen and simply sought a "do-over" before Judge Craighead. Mr. Luu's counsel herself acknowledged that additional information was now before Judge Craighead.

III. SUMMARY JUDGMENT WAS PROPER, BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT TO BE TRIED.

During oral argument before Judge Craighead, Ms. Urann's counsel stated "I'm going so far as to say on the record that we will accept as true the declarations that the defendant himself has put forward…". *See* RP 101, line 18. Such a statement would typically be unwise in the context of a summary judgment motion, but remains true. In her response to Mr. Luu's Motion for Summary Judgment, Ms. Urann painstakingly went through each declaration put forth by Mr. Luu to demonstrate that there was an absence of evidence needed to establish each element of Mr. Luu's claims. *See* CP 306-310. The *absence* of evidence to support any one (or more) elements of a claim is fatal to that claim for purposes of summary judgment.

IV. THE APPELLATE COURT DID NOT "JUDGE AND WEIGH" EVIDENCE AS TO THE NUISANCE CLAIM BY POINTING OUT THE REASONS MR. LUU'S PROFFERED EVIDENCE WAS SIMPLY INSUFFICIENT.

Mr. Luu argues that the Court of Appels weighed evidence relating to the nuisance claim. Mr. Luu argues that page 9 footnote 3 of the Court of Appeals opinion *demonstrates* that the Court erroneously weighed certain evidence and dismissed its value. He does not dispute the accuracy of the substance of the Court's words; rather, he characterizes the Court's explanation as weighing evidence.

> We note that the record is lacking in evidence that would establish the hedge was a nuisance – it includes two pest control receipts for yellow jacket and spider extermination and two vet receipts referring to treating Luu's dog for bee stings. None of these records reference the hedge. Luu's only declaration simply states that he "had been experiencing issues since moving in which [he] believed to be caused by the hedges."

See Court's Opinion, pp 9-10, footnote 3 (cited in Mr. Luu's Motion for Reconsideration at page 9).

The substance of the cited portion of the Court's opinion is an *explanation* as to why the record is "lacking in evidence that the hedge was a nuisance." Ms. Urann acknowledges that Luu's declaration states that he "had been experiencing issues since moving in which [he] believed to be caused by the hedges." Ms. Urann concedes that for purposes of summary judgment, a reviewing court must accept that this was a genuine belief. But it is axiomatic that mere allegations unsupported by evidence are insufficient to survive summary judgment. CR 56(c), (e); H.B.H. v. State, 197 Wn.App. 77, 93, 387 P.3d 1093 (2016); Martini v. Post, 178 Wn.App. 153, 165, 313 P.3d 473 (2013). A claim cannot rest on a speculative theory or an argumentative assertion of possible counterfactual events. *Id.* The nonmoving party must provide specific facts that demonstrate a genuine issue for trial, that would be admissible in evidence and that are supported by affidavits "made on personal knowledge." CR 56(c), (e).

Mr. Luu's evidence as to nuisance consisted entirely of his personal belief that the hedge was a nuisance, but he presented no admissible evidence to support his belief. This is the quintessence of a mere allegation, unsupported by any evidence (let alone admissible evidence).

V. CONCLUSION

The April 26, 2021 opinion of the Court of Appeals was entirely sound and should stand.

RESPECTFULLY submitted this 9th day of August, 2021.

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DECLARATION OF SERVICE

I swear/affirm under penalty of perjury that on the date set forth below, I served the Appellant's counsel with the document to which this Declaration is subjoined, via both e-mail and the Division I Court of Appeals E-Filing System.

DATED at Seattle , WA this 9th day of August , 2021.

David Ruzumna

LAW OFFICE OF DAVID RUZUMNA PLLC

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