

NO. 62952-2-I

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

---

DOUGLAS J. KEHRES, a single person, and JEANNETTE M. KEHRES,  
a single person,

Appellants.

v.

GREGORY L. URSICH and HEIDI J. GASSMAN, individually and as  
attorneys for LINVILLE URICH , PLLC, a law firm doing business in the  
State of Washington,

Respondents.

---

BRIEF OF RESPONDENTS

---

Joel Wright, WSBA No. 8625  
Marc Rosenberg, WSBA No. 31034  
Attorneys for Respondents  
Gregory L. Ursich, Heidi J. Gassman, and  
Linville Ursich, PLLC

LEE SMART, P.S., INC.  
1800 One Convention Place  
701 Pike Street  
Seattle, WA 98101-3929  
(206) 624-7990

2009 DEC 17 PM 3:09  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	1
III. STATEMENT OF THE CASE.....	3
A. Kehres represented themselves <i>pro se</i> as defendants in the underlying case. ....	3
B. Ursich appeared for Kehres for three months. ....	5
C. Kehres replaced Ursich as counsel. ....	9
D. This case was dismissed on summary judgment.....	10
IV. SUMMARY OF ARGUMENT .....	11
V. ARGUMENT .....	12
A. This court should affirm the superior court’s dismissal of this action. ....	12
B. Kehres has raised only two assignments of error, both of which lack merit.....	13
1. Kehres never moved for a CR 56(f) continuance. 13	
2. The Constitution does not guarantee the right to go to trial on a frivolous lawsuit that has been properly dismissed under CR 56. ....	16
3. Kehres continues to argue a theory that this court has already rejected.....	17
C. Kehres failed to support the elements of breach.....	19
D. Kehres failed to support the element of proximate cause. .	20
E. Kehres does not have a private right of action for alleged unethical conduct. ....	22
F. This court can affirm the superior court’s grant of summary judgment on the alternative ground that Kehres failed to provide supporting papers, and failed to raise an issue of fact under CR 56(e).....	24
G. Ursich moves for an award of attorney fees, pursuant to RAP 18.1, RAP 18.9, CR 11, and RCW 4.84.185.....	24
VI. CONCLUSION.....	26

**TABLE OF AUTHORITIES**

**Table of Cases**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 327, 106 S. Ct. 2548 (1986) .....	17
<b>Cases</b>	
<i>Alaska Nat'l Ins. Co. v. Bryan</i> , 125 Wn. App. 24, 104 P.3d 1 (2004) .....	16
<i>Baker v. Schatz</i> , 80 Wn. App. 775, 785, 912 P.2d 501 (1996) .....	24
<i>Better Fin. Solutions, Inc. v. Caicos Corp.</i> , 117 Wn. App. 899, 73 P.3d 424 (2003).....	13
<i>Briggs v. Nova Servs.</i> , 135 Wn. App. 955, 147 P.3d 616 (2006) .....	14
<i>Burmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359, 966 P.2d 921 (1998).....	14
<i>Butler v. Joy</i> , 116 Wn. App. 291, 65 P.3d 671 (2003).....	16
<i>Chapman v. Perera</i> , 41 Wn. App. 444, 704 P.2d 1224 (1985).....	25
<i>Cort v. Kehres</i> , 2006 Wash. App. LEXIS 1411 (2006) .....	17
<i>Craig v. Wash. Trust Bank</i> , 94 Wn. App. 820, 976 P.2d 126 (1999) .....	12
<i>Electrical Workers v. Trig Electric</i> , 142 Wn.2d 431, 13 P.3d 622 (2000).....	12
<i>Ernst Home Ctr. v. United Food &amp; Commercial Workers Int'l Union, Local 1001</i> , 77 Wn. App. 33, 888 P.2d 1196 (1995).....	16
<i>Green v. Cmty. Club</i> , 137 Wn. App. 665, 151 P.3d 1038 (2007).....	23
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 479, 824 P.2d 483 (1992).....	12
<i>Harrington v. Pailthorp</i> , 67 Wn. App. 901, 841 P.2d 1258 (1992).....	22
<i>Hash v. Children's Orthopedic Hosp. &amp; Med. Ctr.</i> , 110 Wn.2d 912, 915, 757 P.2d 507 (1988).....	12
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 259, 830 P.2d 646 (1992).....	22, 23
<i>In re Marriage of Greenlee</i> , 65 Wn. App. 703, 829 P.2d 1120 (1992) ....	25
<i>Kommavongsa v. Haskell</i> , 149 Wn.2d 288, 300, 67 P.3d 1068 (2003)....	20
<i>Lewis v. Bell</i> , 45 Wn. App. 192, 196, 724 P.2d 425 (1986) .....	16
<i>Lian v. Stalick</i> , 115 Wn. App. 590, 62 P.3d 933 (2003) .....	18
<i>Martin v. Johnson</i> , 141 Wn. App. 611, 617, 170 P.3d 1198 (2007).....	13

	<b>Page(s)</b>
<i>McKee v. American Home Prods. Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989).....	19
<i>Morgan v. PeaceHealth, Inc.</i> , 101 Wn. App. 750, 14 P.3d 773 (2000)....	16
<i>Mut. of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.</i> , 123 Wn. App. 728, 97 P.3d 751 (2004).....	16
<i>Pitzer v. Union Bank</i> , 141 Wn.2d 539, 556, 9 P.3d 805 (2000) .....	15
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 222, 67 P.3d 1061 (2003) .....	24
<i>Reed v. Streib</i> , 65 Wn.2d 700, 707, 399 P.2d 338 (1965).....	23
<i>Smith v. Myers</i> , 90 Wn. App. 89, 950 P.2d 1018 (1998).....	16
<i>Smith v. Preston Gates Ellis</i> , 135 Wn. App. 859, 147 P.3d 600 (2006).....	20, 21
<i>State v. Harrison</i> , 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) .....	18
<i>Stranberg v. Lasz</i> , 115 Wn. App. 396, 63 P.3d 809 (2003).....	16
<i>Vant Leven v. Kretzler</i> , 56 Wn. App. 349, 783 P.2d 611, (1989).....	16
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989).....	12, 19
<b>Statutes</b>	
RCW 4.84.185 .....	2, 24, 25, 26
<b>Rules and Regulations</b>	
CR11 .....	1, 2, 24, 25, 26
CR 56 .....	17
CR 56(c).....	23, 24
CR 56(f) .....	10, 13, 14
RAP 2.5(a) .....	13, 23
RAP 18.1 .....	14
RAP 18.9.....	2, 24, 26
RAP 18.9(a) .....	24, 26
Fed. R. Civ. P. 1.....	17
ER 602 .....	23
ER 901 .....	23

## I. INTRODUCTION

The superior court dismissed on summary judgment the claims alleged by plaintiffs/appellants Douglas Kehres and Jeannette Kehres (collectively “Kehres”) against defendants/respondents Gregory Ursich, Heidi Gassman, and Linville Ursich, PLLC (collectively “Ursich”).

In regard to the allegation of legal malpractice, Kehres failed to present evidence of breach of duty or proximate cause. The court also held that there is no private right of action for breach of ethics rules, and dismissed this claim, which also was unsupported by Kehres even had such a right of action existed.

Ursich also requests fees and costs for having to defend against this frivolous lawsuit after Kehres was directed to become familiar with CR 11 in the underlying case, and was advised the claims were frivolous by the superior court in this case.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

Ursich does not assign any error to the trial court’s decision.

### *Issues Pertaining to Assignments of Error*

Ursich disagrees with the statement of issues set forth by Kehres and believe that the primary issues on appeal are more properly stated as follows.

A. Did the trial court act within its discretion in dismissing Kehres' case, where:

1. Kehres did not present the testimony of any expert, nor indicate that they could obtain any expert testimony, required to show what the standard of care was or how it was breached as required to support any professional negligence claim;

2. Kehres failed to otherwise show any breach;

3. Kehres is supporting their argument on breach using an argument already rejected by this court in related proceedings;

4. Kehres failed to show proximate cause where they did not show that they would have been better off "but for" some act or omission by Ursich, especially where all material orders in the underlying case upon which Kehres is claiming damages were entered while Kehres was acting *pro se*;

5. Kehres does not have a private right of action for alleged unethical conduct; and

6. Kehres has not shown unethical conduct even if such a cause of action existed.

B. Whether this court should assess attorney fees and costs against Kehres under RAP 18.1, RAP 18.9, CR 11, and RCW 4.84.185 because this appeal is frivolous.

### III. STATEMENT OF THE CASE

**A. Kehres represented themselves *pro se* as defendants in the underlying case.**

On September 26, 2002, Kehres executed a Purchase and Sale Agreement (“PSA”) to sell real property to Joseph Cort and Warren Anderson (“Cort & Anderson”). CP 4, 44-51, 55, 98, 128, 231, 301.

On March 24, 2004, Cort & Anderson filed a Complaint against Kehres in the underlying case, alleging that Kehres breached the contract to sell the real property, and requesting specific performance and damages. CP 53-58, 302-03; RP 6.

On April 12, 2004, Kehres filed a Notice of Appearance indicating that they were appearing *pro se*. CP 61-62, 303.

On June 23, 2004, Cort & Anderson moved for partial summary judgment, requesting an order for specific performance. CP 71-76.

On July 30, 2004, the underlying superior court entered a partial summary judgment order, ordering Kehres to sell the property as provided in the PSA, and take all actions necessary, including signing the boundary line adjustment on the property. CP 96-99, 303-04. This order was entered while Kehres was *pro se*, and it was not appealed. CP 304; RP 6.

On August 24, 2004, Kehres filed a motion that requested the court to set a closing date and require Cort & Anderson to pay a fee to extend

the PSA, CP 101-07, 304-05, which was basically the same argument made in their own failed motion for summary judgment. CP 78-85.

On August 26, 2004, Cort & Anderson filed a response that argued, among other things, that the order on summary judgment was clear, that it was Kehres's responsibility to take action on the closing, and that their actions showed a bad faith pattern of obstruction. CP 109-14.

On August 31, 2004, the underlying superior court denied Kehres motion, and added to the order handwritten notes that directed Kehres to read and become familiar with Civil Rule 11. CP 116-18; RP 7.

On November 1, 2004, Cort & Anderson moved for an award of attorney fees and costs under the terms of the PSA, noting that Kehres had not appealed the order compelling specific performance. CP 120-24.

On November 12, 2004, the superior court entered a Judgment and Order granting attorney fees to Cort & Anderson. CP 126-30. It also entered Findings of Fact that: (1) the parties entered into a written PSA on real property; (2) Kehres repudiated the PSA and that Cort & Anderson brought suit; and (3) Cort & Anderson prevailed on the action for specific performance and that this order was not appealed. *Id.* Based upon these Findings, the underlying superior court concluded that Cort & Anderson were the prevailing party and that the fees and costs requested should be awarded from the sale of the property. *Id.* RP 7.

These three orders were entered while Kehres was *pro se* and the appeal period passed without Kehres appealing any order. RP 6-7.

**B. Ursich appeared for Kehres for three months.**

On February 2, 2005, Kehres signed a Fee Agreement with Ursich that advised Kehres that litigation entails uncertainties, that Ursich could not guarantee success, but would strive to represent Kehres within the bounds of the law and keep them reasonably informed. CP 132-34; RP 7.

On February 4, 2005, Ursich appeared on behalf of Kehres in the Underlying Litigation. CP 136. Ursich tried to resolve the case for Kehres, who were in a very bad position, having lost every significant issue that they had argued *pro se* before Judge Alsdorf. RP 7.

On February 9, 2005, Cort & Anderson's attorney forwarded to Ursich the orders discussed above, and letters sent to Kehres. CP 138.

Ursich investigated the matter and determined that Kehres's wish to avoid specific performance was likely not possible. CP 140-42. The PSA appeared normal, no deviation from the terms appeared material, there were no grounds to vacate the orders, and the appeal period had run for each order. CP 36. The primary issue seemed to be the remaining boundary line adjustment ("BLA"), which Kehres claimed was not accurate. *Id.* Ursich believed it would be best to settle in order to keep

Kehres from being exposed to further liability. *Id.* Ursich discussed the case with Kehres and advised them of this analysis. *Id.*

On February 18, 2005, Ursich sent a letter to plaintiffs' counsel, "cc"ed to Kehres, discussing settlement, but raising five issues, including the BLA and other points related to the PSA and property. CP 36, 144-46.

On February 28, 2005, Kehres sent a letter to Ursich stating they had received an offer on the property from someone else, and wanted to offer plaintiffs money expended in the lawsuit, which the court already had awarded, in exchange for a release of the *lis pendens*. CP 37, 148.

On the same day, February 28, 2005, Ursich sent a letter to Kehres expressing concern that Kehres could face more liability if they did not adhere to the court's orders. CP 37, 150-51. The letter stated that the order demanding specific performance was not entered with irregularity, and that the best option was to try to settle the matter in order to avoid more liability, which could include a contempt order from the court. *Id.* Ursich encouraged Kehres to seek a second opinion and, if agreed to in writing by Kehres, offered to make their file available to other attorneys to review for the purpose of obtaining an additional opinion. *Id.*

On March 2, 2005, Ursich sent a letter to Kehres expressing concern about Kehres's February 28, 2005 letter on the "settlement offer." CP 37, 154-55. The letter expressed concern that Kehres did not appear to

intend to comply with the order demanding specific performance. *Id.* Ursich again advised Kehres that the court could sanction Kehres in a contempt order for a refusal to honor the order to specifically perform. Ursich requested that Kehres schedule a meeting to discuss this. *Id.*

On March 18, 2005, Kehres mailed a memorandum to Ursich in response, discussing alleged oral agreements related to the PSA and describing a view of how the boundary should be drawn. CP 37, 157-58.

On April 7, 2005, an internal e-mail reflects that Kehres called that morning, stated that they wanted to hire another attorney, and that all work on the Kehres file should stop. CP 37, 160.

On April 8, 2005, Ursich sent a letter to Kehres reviewing the case, recommending they comply with the order to specifically perform, and advising that if they do not, they should expect opposing counsel to seek a contempt order. CP 37, 162-66. The letter stated that Ursich had done everything possible to obtain concessions from Cort & Anderson to make the transaction close consistent with the written terms of the PSA. *Id.*

On April 14, 2005, Ursich sent a letter to Kehres regarding several voicemail messages from Kehres on their new representation by attorney R. Drake Bozarth, and the boundary line dispute, and Ursich's likely withdrawal as Kehres' attorney. CP 38, 168-69.

On April 15, 2005, Cort & Anderson moved for a contempt order against Kehres for failing to comply with the order to specifically perform on the PSA. CP 38, 171-78.

On April 18, 2005, Ursich sent a letter to Kehres forwarding the Motion to Show Cause and Notice of Intent to Withdraw. CP 38, 184-86.

On April 18, 2005, Kehres sent Ursich a letter, noting their disagreement with portions of the BLA, and stating: “We cannot sign the BLA until it conforms to the Vacant Land Purchase and Sale Agreement and its Addendums.” CP 38, 188-90. Kehres continued to argue points made in their failed opposition to summary judgment. *Id.* RP 8. The Notice of Intent to Withdraw was also filed with the court on this date. *Id.*

On April 20, 2005, Kehres sent a letter to Ursich again disputing the BLA and stating that the map gives land to Cort & Anderson without compensation to Kehres. CP 38, 192-94.

On April 22, 2005, Ursich sent a letter to Kehres: (1) advising of the deadline to file and serve a response to the Motion for an Order to Show Cause is April 27, 2005; (2) asking whether Kehres wanted Ursich to respond to the motion or whether Kehres intended to file and serve their own response; (3) stating that Ursich’s withdrawal was effective May 2, 2005; and (4) advising that there was still time to try and settle the matter if Kehres wanted them to try. CP 38, 196; RP 8.

On April 26, 2005, attorney John Hathaway sent a letter to Ursich advising Kehres had retained him as counsel and that he would respond to the contempt motion, provide a Notice of Withdrawal and Substitution, his legal assistant would be picking up the file, and he requested to discuss the matter after he was familiar with the file. CP 38-39, 198; RP 8-9.

On April 27, 2005, a Notice of Withdrawal and Substitution was filed with the court, in which Ursich withdrew and Hathaway substituted in as counsel. CP 39, 200-01.

Ursich's representation of Kehres spanned three months, from February 2, 2005 to April 27, 2005. CP 39, 136, 200-01, 205-06; RP 7-9.

**C. Kehres replaced Ursich as counsel.**

The underlying case continued with a torturous history, having at least two interim appeals. CP 203-13. Ursich did not represent Kehres during this time and has limited knowledge of what occurred.

On June 17, 2005, Hathaway sent a letter to Ursich requesting a declaration for the contempt hearing. CP 39, 215-17.

On June 22, 2005, Ursich provided the declaration. CP 39, 219-24.

On July 26, 2005, the underlying superior court entered a contempt order against Kehres for failure to heed the court's order for specific performance, and Kehres appealed. CP 207. The result was an unpublished opinion on the contempt order, in which this court held,

“Kehres was in plain violation of the specific performance order.” CP 231. This opinion reflects Kehres resistance in complying with the order to specifically perform, and an analysis as to why Kehres reasoning was incorrect on the legal issues. *Id.*

On November 21, 2007, the court in the underlying case again denied Kehres’ argument that the PSA had lapsed, holding:

The court concludes that as a result of the legal effects of Judge Alsdorf’s ruling on summary judgment, the VLPSA did not lapse by its terms on or after Sept. 30, 2004 when the buyers did not close on or after that date. The sellers remain obligated to complete the sale per Judge Alsdorf’s orders.

CP 244-47.

**D. This case was dismissed on summary judgment.**

On April 18, 2008, Kehres filed this lawsuit against Ursich asserting: (1) malpractice, and (2) unethical conduct. CP 249-56.

On December 31, 2008, the superior court dismissed Kehres’ complaint against Ursich on summary judgment. CP 33-34. In fact, upon review of the record before it, the superior court found that Ursich “seems to have been extraordinarily careful and diligent on his clients’ [behalf],” RP 11, found Kehres’s lawsuit to be frivolous, and held that further litigation of these issues should result in Rule 11 sanctions. RP 13-14.

Kehres never moved for a CR 56(f) continuance.

#### IV. SUMMARY OF ARGUMENT

The superior court properly dismissed Kehres's complaint on summary judgment. Kehres alleged two claims: legal malpractice and breach of the ethics rules.

In regard to the legal-malpractice claim, Kehres did not support the elements of breach or proximate cause. Kehres did not present testimony from any expert, or indicate that they could obtain any expert testimony, required to show what the standard of care is and how it was breached, as required to support any professional-negligence claim. Even if there was no such requirement, they did not show how the actions complained of constituted a breach of the standard of care. Kehres also failed to show that they would have been better off "but for" some act or omission by Ursich, since all material orders in the underlying case upon which they allege damages were entered while Kehres was acting *pro se* and prior to representation by Ursich. Kehres is also supporting their position with an argument that has already been rejected by this court.

In regard to the claim for breach of the ethics rules, no such private right of action exists and, Kehres did not show unethical conduct even if such a cause of action existed.

Ursich also requests that this court consider whether this is a frivolous appeal for the purpose of awarding fees and costs.

## V. ARGUMENT

### A. This court should affirm the superior court's dismissal of this action.

This court's review of an order granting summary judgment is *de novo*, and the order may be affirmed on any basis supported by the record. *Electrical Workers v. Trig Electric*, 142 Wn.2d 431, 434-435, 13 P.3d 622 (2000). Summary judgment standards are well established. The moving party bears the burden of producing evidence showing the absence of an issue of material fact. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Moving defendants may satisfy their burden by showing an absence of evidence to support a plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). If the moving party carries its burden, the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue of fact requiring a trial. *Hash*, 110 Wn.2d at 915. A moving party is entitled to summary judgment when the non-moving party fails to make a sufficient showing on an essential element of its case in which it has the burden of proof. *Young*, 112 Wn.2d at 216.

To defeat summary judgment in a negligence case, Kehres is required to "show an issue of material fact as to each element – duty, breach of duty, causation, and damages." *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999). *See also Hansen v. Friend*, 118

Wn.2d 476, 479, 824 P.2d 483 (1992).

Affirmation of the superior court's dismissal order is appropriate. Kehres's claims against Urisch are for: (1) professional negligence, and (2) breach of the ethics rules. CP 251-53. This matter is controlled by settled law, Kehres did not submit the evidence necessary to establish elements necessary to support their claims, and the superior court was within its discretion in granting summary judgment.

**B. Kehres has raised only two assignments of error, both of which lack merit.**

**1. Kehres never moved for a CR 56(f) continuance.**

Kehres's first assignment of error is that the superior court "erred at Summary Judgment for not continuing the matter" under CR 56(f) to permit additional discovery. App. Br. at 2. There was no pending discovery requests at the time of the motion, and Kehres did not make either a written or oral motion for a continuance under CR 56(f).

As an initial matter, the appellate court will generally not review an issue raised for the first time on appeal. *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (citing RAP 2.5(a); *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 912-13, 73 P.3d 424 (2003)). Kehres has apparently abandoned all issues asserted in response to summary judgment, and dedicated the Brief of Appellants primarily to the argument that a CR 56(f) continuance should be granted, even though

they did not request a continuance in the superior court.

Kehres did not file a CR 56(f) motion in response to the motion for summary judgment. “CR 56(f) requires the opposing party to file an affidavit and state the reasons why additional time is necessary.” *Briggs v. Nova Servs.*, 135 Wn. App. 955, 961-62, 147 P.3d 616 (2006). “[A]n oral request for a continuance does not appear to comply with the requirement in CR 56(f) that such a request be made by affidavit.” *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 368, 966 P.2d 921 (1998). No written CR 56(f) motion to continue was ever filed by Kehres.

Beyond that, Kehres did not move orally to continue the summary judgment hearing. Kehres implicitly admits they never made a CR 56(f) motion where they argue: “Kehres was not aware of her medical condition. If she had known, she **would have** asked for a continuance.” App. Br. at 3 (emphasis added). The superior court’s ruling also reflects that no CR 56(f) motion was made where it holds: “The Kehres have not troubled themselves with even an argument that they could present and expert in the future who would opine that Mr. Usich’s performance fell below the standard of care.” RP 10-11.

In addition, after Ursich moved for summary judgment, Kehres’s papers were untimely filed, even after Ursich had provided these *pro se* plaintiffs with the date by which responsive materials were due. CP 271,

273, 279-92. Kehres did not provide declarations in support of the response to summary judgment. CP 271, 273-76. Ursich moved to strike Kehres's materials as untimely and portions of the brief as unsupported. CP 271-76. But the superior court denied Ursich's motion to strike, and accepted the statements in the Kehres brief as if they had been provided in a declaration. RP 3, 4.

Kehres does not even claim that they could have presented additional documentary evidence at oral argument, only that Ms. Kehres had a sore throat and could have presented more oral argument if she had been feeling better. But the superior court reviewed the briefs and supporting papers, and heard oral argument from both parties, and made the appropriate decision based on the evidence, and lack thereof.

A court may deny a motion for a continuance when (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party 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.

*Pitzer v. Union Bank*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000).

Even if they had moved for a continuance, which they did not, Kehres does not offer a good reason for delay, show what evidence would have been established through additional discovery, or how such evidence would raise a genuine issue of material fact. The rule that a continuance is

properly denied where a moving party has failed to show a reason for the delay and to specifically identify how such information would have raised a genuine issue of material fact has been consistently upheld. *See, e.g., Alaska Nat'l Ins. Co. v. Bryan*, 125 Wn. App. 24, 104 P.3d 1 (2004); *Mut. of Enumclaw Ins. Co. v. Patrick Archer Const., Inc.*, 123 Wn. App. 728, 97 P.3d 751 (2004); *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003); *Stranberg v. Lasz*, 115 Wn. App. 396, 63 P.3d 809 (2003); *Morgan v. PeaceHealth, Inc.*, 101 Wn. App. 750, 775, 14 P.3d 773 (2000); *Smith v. Myers*, 90 Wn. App. 89, 950 P.2d 1018 (1998); *Ernst Home Ctr. v. United Food & Commercial Workers Int'l Union, Local 1001*, 77 Wn. App. 33, 888 P.2d 1196 (1995); *Vant Leven v. Kretzler*, 56 Wn. App. 349, 783 P.2d 611, (1989); *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986).

Kehres should not be permitted to raise a new issue on appeal, but even if considered, Kehres did not request a continuance, and a continuance would have been properly denied by the superior court had one been requested. The Kehres's first assignment of error lacks merit.

**2. The Constitution does not guarantee the right to go to trial on a frivolous lawsuit that has been properly dismissed under CR 56.**

Kehres's second assignment of error is that the superior court erred by failing to provide them with their constitutional right to a jury trial. App. Br. at 3-4. But the Constitution does not give a plaintiff the right to

drag defendants into a jury trial on a frivolous lawsuit that has been properly dismissed under CR 56. If this were not the case, all summary judgment proceedings would be unconstitutional. Every published opinion in which a court has granted summary judgment dismissal of a case attests to the meritless nature of this argument by Kehres. If Kehres's argument were accepted, then all these decisions would have to be reversed to provide the nonmoving party with a jury trial. To the contrary, the U.S. Supreme Court has held:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [] Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1 ... Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548 (1986).

The superior court presided over a case in which there were no genuine issues of material fact, and Ursich was entitled to judgment as a matter of law. There was no error, and the judgment should be affirmed.

**3. Kehres continues to argue a theory that this court has already rejected.**

Kehres continues to argue a theory of the underlying case that has already been rejected by this court in *Cort v. Kehres*, 2006 Wash. App.

LEXIS 1411 (2006), CP 231-39, and which is now the law of the case.

*See, e.g., State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003);

*Lian v. Stalick*, 115 Wn. App. 590, 62 P.3d 933 (2003). In *Cort v. Kehres*,

this court held:

Kehres was ordered to “sell the real property described in the Complaint for Specific Performance,” and to “take any and all necessary action to perform” the VLPSA, including “signing the boundary line adjustment ... and otherwise cooperating and performing the Agreement and proceeding to close the purchase and sale of the real property.”

CP 235.

In order to proceed toward closing, Kehres had to sign a final BLA map. The January BLA map shows the sale property as it is depicted in Exhibit B to Addendum II and in the BLA application. Thus, when Kehres refused to sign the BLA map, he did so in plain violation of the court’s specific performance order.

The trial court’s findings also reflect Kehres’s failure to cooperate in general, in violation of the specific performance order. The court found that “the Defendant has made and continues to make different requests and demands regarding the [BLA] map and other matters,” and “continually changes his demands about which property lines need adjustment.” The court stated that “Mr. Kehres has made it very clear that if he believes that the map is not accurate, and regardless of any ruling of the Court against his stated positions, he will not sign the March map.”

The court did not abuse its discretion by holding Kehres in contempt of the specific performance order because he refused to cooperate, sign the final BLA, and proceed toward closing.

CP 236-37.

Yet Kehres continues to argue that Judge Alsdorf's order requiring specific performance, CP 96-99, 303-04, stands for the proposition that the Purchase and Sale Agreement expired on September 30, 2004 and that enforcement of the superior court's order meant that the property did not need to be sold. App. Br. at 1-2, 4-6, 9, 11. Based on this court's own rulings in regard to Judge Alsdorf's order, it is frivolous for Kehres to continue to argue to this court that Ursich failed to properly follow the intent of Judge Alsdorf's order. As shown below, the superior court properly granted summary judgment dismissal to Ursich, and its order should be affirmed.

**C. Kehres failed to support the elements of breach.**

In a claim against a professional, a plaintiff must provide expert testimony to establish what the standard of care is and how it was allegedly breached. RP 10-11; CP 24, 295 (citing *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 706-08, 782 P.2d 1045 (1989)).

[T]he standard of care required of professional practitioners ... must be established by the testimony of experts who practice in the same field. The duty of physicians must be set forth by a physician, the duty of structural engineers by a structural engineer and that of any expert must be proven by one practicing in the same field -- by one's peer.

*McKee*, 113 Wn.2d at 706-08 (citing *Young*, 112 Wn.2d 216).

Kehres did not support the element of breach with expert testimony, failing to establish what the standard of care was and how it

was allegedly breached. CP 295. The superior court held that Kehres did not indicate that they could obtain such testimony in the future. RP 10-11. Likewise, Kehres did not provide any support in this court that there is any attorney that could or would testify that Ursich fell below the standard of care. The malpractice claim was properly dismissed on this ground alone.

In addition, Kehres also did not show that any acts or omissions by Ursich fell below the standard of care, either in superior court, CP 24-25, 296; RP 11, or in Appellants' Brief. Kehres notes their disagreements with Ursich, but no evidence is presented that such disagreements fall below the standard of care. CP 296. There is no issue of fact in regard to the element of breach, and dismissal of the negligence claim was appropriate. RP 10-11.

**D. Kehres failed to support the element of proximate cause.**

To establish proximate cause, Kehres must show they would have been better off "but for" some act or omission by Ursich. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003); *Smith v. Preston Gates Ellis*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006). Kehres did not show how they would be better off if Ursich had acted as Kehres asserted they should have. RP 12. Kehres's alleged damages were caused by a combination of three orders entered against them while they were *pro se*, CP 96-99, 116-18, 126-30, 296, and Kehres's own refusal to abide by the order demanding that they specifically perform on the BLA.

Only a couple pages of Kehres's response to summary judgment addressed Ursich's representation, CP 296, 306-08, and there are no other grounds asserted on which Kehres's claims are based. Most of Kehres's disapproval is that Ursich did not treat Kehres with sufficient respect. *Id.* The primary allegation against Ursich in regard to the representation appears to be two statements allegedly made by Ursich. CP 307. Without conceding the truth of this allegation, even if these statements were made, Kehres did not show that they proximately caused any damages – especially since Kehres claims to have disregarded the alleged advice.

Kehres also alleges that Ursich authorized a BLA map without their approval. CP 308. Kehres did not present evidence regarding this assertion, and Ursich presented sworn testimony on behalf of Kehres at the contempt hearing that Ursich did not authorize a BLA map. CP 219-24. There were negotiations regarding the BLA map, but that is all.

Kehres finally asserts that Ursich declined to represent them at the contempt hearing and withdrew from representing them. CP 308. Kehres did not show that this was a breach of the standard of care or that it proximately caused damages – especially since successor counsel John Hathaway substituted in for the hearing. CP 196, 198, 200-01.

Kehres failed to show the element of proximate cause and summary judgment was properly granted by the superior court. RP 12-13.

**E. Kehres does not have a private right of action for alleged unethical conduct.**

Kehres's second claim was for "unethical conduct," but breach of an ethics rule provides only a public/disciplinary remedy, not a private remedy. *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992). Kehres has not assigned any error to dismissal of the claim for breach of the ethics rules. While Ursich would not condone unethical conduct if the claim was true, Kehres's claim for unethical conduct was not properly before the court in a civil action, and was properly dismissed. RP 9. And even if such a claim existed, Kehres did not state a claim. In their complaint, Kehres made the following claims:

1. That Ursich advised them that the order demanding specific performance of Kehres did not require specific performance from the buyers. This statement was both ethical and accurate. *See* CP 96-99.

2. That Ursich allegedly advised Kehres that if they would not sign the BLA, the property might be taken by eminent domain. Ursich's advice is well documented, and the documents do not reflect that this statement was made. CP 132-34, 150-51, 154-55, 162-66, 168-69. But even if it were made, and even if it were an error, it would not have been unethical. Even if the statement were applied to Kehres's legal malpractice claim, they did not show that it caused any damage.

3. That Ursich collaborated with plaintiffs' counsel to file a contempt charge against them for not agreeing to the BLA. CP 254. Kehres did not present evidence at any time to support this absurd claim.

Kehres added allegations in response to summary judgment, including that Ursich did not treat them with sufficient respect, CP 307, made statements regarding the law that Kehres believes were inaccurate, *id.*, and allegedly sat and talked with opposing counsel in the courtroom at the contempt hearing after having withdrawn as counsel. CP 308-09. Kehres did not provide any declaration to support these allegations, and cannot merely substitute allegations in their brief for allegations in the pleadings. *Reed v. Streib*, 65 Wn.2d 700, 707, 399 P.2d 338 (1965); CR 56(e); ER 602; ER 901. But even if Kehres had supported their allegations with sworn testimony, they still failed to show any breach of ethical conduct by Ursich. CP 297. Therefore, this claim was also properly dismissed.

In fact, Kehres has not even addressed this claim in Appellant's Brief, raised it as an issue, or identified the decision as an error, so this court may consider the issue abandoned on appeal. "It is a long-standing rule that abandoned issues will not be addressed on appeal." *Green v. Cmty. Club*, 137 Wn. App. 665, 151 P.3d 1038 (2007)(citing cases and RAP 2.5(a)).

**F. This court can affirm the superior court’s grant of summary judgment on the alternative ground that Kehres failed to provide supporting papers, and failed to raise an issue of fact under CR 56(e).**

An appellate court may affirm summary judgment on an issue not decided by the trial court provided that it is supported by the record and is within the pleadings and proof. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); *Baker v. Schatz*, 80 Wn. App. 775, 785, 912 P.2d 501 (1996) (“an appellate court may affirm a trial court’s disposition of a summary judgment motion on any basis supported by the record”).

After Ursich moved for summary judgment, Kehres’s papers were untimely filed, even after Ursich had provided these *pro se* plaintiffs with the date by which responsive materials were due. CP 271, 273, 279-92. Kehres did not provide declarations in support of the response to summary judgment. CP 271, 273-76. Ursich moved to strike Kehres’s materials as untimely and portions of the brief as unsupported. CP 271-76. The superior court denied the motion to strike. RP 3, 4. Although the superior court did not base its decision on Kehres’s deficiencies, this is an alternative basis upon which to affirm the decision of the superior court.

**G. Ursich moves for an award of attorney fees, pursuant to RAP 18.1, RAP 18.9, CR 11, and RCW 4.84.185.**

Pursuant to RAP 18.1, RAP 18.9(a), CR 11, and RCW 4.84.185, Ursich requests an award of attorney’s fees on appeal. An appeal is frivolous and a recovery of fees warranted “if no debatable issues are

presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” *In re Marriage of Greenlee*, 65 Wn. App. 703, 710, 829 P.2d 1120 (1992) (quoting *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985)).

A *pro se* plaintiff may be subject to CR 11 sanctions if three conditions are met: (1) the action is not well grounded in fact, (2) it is not warranted by existing law, and (3) the party signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action.

*Harrington v. Pailthorp*, 67 Wn. App. 901, 910, 841 P.2d 1258 (1992).

Similarly, RCW 4.84.185 provides that, in any civil action, the court may find that the action was frivolous and advanced without reasonable cause, and require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action. Ursich was restrained and did not seek attorney fees in the superior court. Yet, after the superior court’s stern warning and explanation as to why their claim is frivolous, Kehres continues to litigate this matter on appeal. RP 13-14. Kehres persists in their action against Ursich despite the lack of facts or law to support such a claim. Kehres’s appeal presents no debatable issues and is frivolous, and Ursich is entitled to costs and attorney’s fees on appeal.

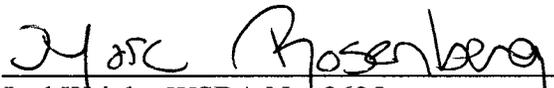
## VI. CONCLUSION

This court should affirm the decision of the superior court. In regard to Kehres's two assignments of error: (1) Kehres never requested a CR 56(f) continuance, so it was not error for the superior court not to have continued the hearing *sua sponte*, and (2) the Constitution does not guarantee the right to go to trial on a frivolous lawsuit that has been properly dismissed under CR 56.

The superior court properly dismissed the claims against Ursich when Kehres failed to show the elements necessary to support a claim of negligence, Kehres does not have a private right of action for alleged unethical conduct, and Kehres did not support such a claim even if it did. This court should also award attorney fees to Ursich, pursuant to RAP 18.1, RAP 18.9(a), RCW 4.84.185 and CR 11.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of December, 2009.

LEE SMART, P.S., INC.

By:   
Joel Wright, WSBA No. 8625  
Marc Rosenberg, WSBA No. 31034  
Attorneys for Respondents  
Gregory L. Ursich, Heidi J. Gassman, and  
Linville Ursich, PLLC

**CERTIFICATE OF SERVICE**

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on December 16, 2009, I caused service of the foregoing on each and every attorney of record herein:

**VIA CERIFIED U.S. MAIL**

Mr. Douglas J. Kehres  
Ms. Jeannette M. Kehres  
20219 - 75th Avenue NE  
Kenmore, WA 98028

DATED this 16<sup>th</sup> day of December, 2009 at Seattle, Washington.

  
\_\_\_\_\_  
Jean Young, Legal Assistant