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NO.: 67771-3-I

DIVISION ONE OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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TAE HO CHUNG AND JANE DOE CHUNG AND  
THE MARITAL COMMUNITY COMPOSED  
THEREOF, APPELLANTS

v.

NEW GRACE INVESTMENT, INC.,  
RESPONDENT

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This is a simple case involving a Commercial Lease and Respondent's termination of the Lease due to Appellants' failure to pay the monthly payments. The Appellants signed a Commercial Lease, took possession, began to make tenant improvements, made three monthly payments and then stopped making payments. The Appellants defaulted and failed to cure the default. Thereafter the Respondent terminated the Lease and took action to mitigate its damages.

Eventually, following extensive discovery, the trial court properly entered Summary Judgment in favor of Respondent.

Now, however, the Appellants claim that they should be treated differently and receive special consideration because they are Korean. They ask the Court to apply "Asian Legal" rules of evidence and "Asian Legal" rules of procedure. However, even as Korean pro se litigants they are required to comply with the same rules and procedures that all litigants in Washington State courts must abide by. The Appellants failed to comply with the rules of evidence and now on appeal they cannot complain about the quality their defense.

## **II. RESTATEMENT OF ISSUES**

2.1 Should pro se litigants be required to comply with Washington State rules of evidence and court rules?

2.2 Did the Appellants' Response to the Motion for Summary Judgment comply with the court rules and rules of evidence?

2.3 Did the trial court properly enter summary judgment after it reviewed the admissible evidence and concluded that summary judgment was appropriate?

## **III. PROCEDURAL HISTORY**

3.1 Appellants, Mr. and Mrs. Tae Chung, commenced a small claims action against Jong Hwang in Snohomish County District Court, South Division, cause # S10-499 on November 12, 2010.<sup>1</sup> CP

17. Jong Hwang is the principal of New Grace Investment, Inc., the Respondent herein.

3.2 On December 15, 2010, Respondent filed a Complaint for Breach of Contract and Monies Owed. CP 404-440

3.3 Appellants filed a pro se Notice of Appearance on January 4, 2011.

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<sup>1</sup> The small claim suit sought recovery of Defendant Chung's deposit paid to New Grace under the terms of the Commercial Lease at issue in this case. New Grace then filed suit against Chung in Snohomish County Superior Court and Chung's small claims action was transferred to the Superior Court action.

3.4 A Motion for Default was noted for January 25, 2011 and Appellants appeared and requested additional time to Answer. The Motion was continued and Appellants served Respondent with Defendants' Answer, Affirmative Defenses and Counterclaims on January 28, 2011. CP 398-403. The Motion for Default was stricken.

3.5 The parties engaged in extensive discovery exchanging interrogatories and request for production of documents. CP 17-18. Appellants served Respondent with hundreds of interrogatories and requests for admission. *Id.* Respondent objected to Appellants' Second, Third and Fourth sets of Interrogatories and Request for Production of Documents. CP 17-18.

3.6 The parties also exchanged numerous requests for admissions, which were timely answered. Appellants served Respondent with over one hundred (100) Requests for Admission. CP 17-18. Respondent answered all of the requests.

3.7 Following discovery, Respondent brought its Motion for Summary Judgment, which was granted on August 26, 2011.

#### **IV. STATEMENT OF THE CASE**

4.1 Respondent owns the commercial building located at 16911 Highway 99, Lynnwood, WA 98037 (the "Building"). CP 330. Respondent and Appellants entered into a commercial Lease Agreement dated July 11, 2007 (the "Lease") for two units in the building (the "Premises"). CP 331.

4.2 The Lease was for a term of five years commencing on September 1, 2007 and expiring on August 31, 2012. CP 331. Appellants were required to pay a monthly base rent of \$2,216.67 and monthly common area maintenance charges ("CAM" or "NNN"). CP 331.

4.3 Appellants were entitled to three months free base rent but were required to pay the NNN charges starting on the commencement date, September 1, 2007. CP 331-332

4.4 Appellants paid the deposit of \$3,742.32 and began paying the monthly NNN charges in September 2007. CP 332. Appellants also paid the NNN charges for October 2007 and November 2007. CP 332.

4.5 Upon taking possession of the Premises Appellants began making tenant improvements. CP 289&294. Appellants engaged

White Gold International, Inc., d/b/a Hanwoori Construction (“Hanwoori”), to construct the tenant improvements. CP 294 & 318. A dispute apparently arose between Appellants and Hanwoori regarding the tenant improvements. CP 318. Appellants directed Hanwoori to charge the costs of the tenant improvements to the Respondent, to perform work outside the terms of their contract, and refused to pay Hanwoori for the work performed. CP 319. Appellants did not complete the tenant improvements. CP 334.

4.6 Appellants did not pay the base rent or NNN charges from December 2007 forward. CP 289-290&295.

4.7 Paragraph 17.4 of the Lease mandates that

In no event shall Tenant have the right to terminate the Lease as a result of Landlord’s default and Tenant’s remedies shall be limited to damages and/or an injunction; and in no case may tenant withhold rent or claim a set-off from rent.

CP 351 (emphasis added).

4.8 Following Appellants’ failure to pay the monthly rent Respondent issued multiple Notices to Pay or Vacate the Premises. CP 334.

4.9 Appellants did not pay nor did they vacate the Premises.

CP 334. Appellants' failure to pay the rent and NNN charges after receiving the notice to pay was a "default and breach" of the Lease. CP

351. Thereafter, Appellants were advised that the Lease was being terminated pursuant to paragraph 17.2, which provides:

**Remedies.** In the event of a material default or breach by Tenant, Landlord may at any time thereafter, with or without notice or demand and without limiting landlord in the exercise of any right or remedy which Landlord may have by reason of such default or breach:

A. Terminate tenant's right to possession of the premises by any lawful means, in which case this Lease shall terminate and tenant shall immediately surrender possession of the premises to landlord. In this event, landlord shall be entitled to recover from tenant all damages incurred by landlord by reason of tenant's default including, but not limited to: the cost of recovering possession of the premises; expenses of reletting (including necessary renovation and alteration of the premises); reasonable attorney's fees and costs and any real estate commissions actually paid; the worth at the time of award by a court having jurisdiction of any unpaid rent or other charges owed by tenant to landlord which had been earned at the time of the termination; the amount by which the unpaid rent or other charges for the balance of the term after the time of such award exceed the amount

of such rental or other loss for the same period that tenant proves reasonably avoided; and that portion of the leasing commission paid by landlord according to the Lease applicable to the unexpired term of this Lease.

B. Maintain tenant's right to possession in which case this Lease shall continue in effect whether or not tenant shall have abandoned the premises. In this event, landlord shall be entitled to enforce all of landlord's rights and remedies under this Lease including the right to recover the rent as it becomes due under the Lease.

C. Pursue any other remedy now or afterwards available to landlord under the laws or judicial decisions of the state where the premises are located.

CP 334.

2.9 Upon termination of the Lease, Respondent took action to complete the tenant improvements and re-let the Premises. CP 334.

## V. ARGUMENT

### 5.1 Appellants must comply with the applicable Washington rules and procedures.

A pro se litigant is held to the same standard as a lawyer and is required to follow the applicable rules and procedures. *In re Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001). This standard applies to civil

matters and even to criminal cases where the litigant's liberty is at stake. *State v. Fritz*, 21 Wash.App. 354, 585 P.2d 173 (1978); *In re Marriage of Olson*, 69 Wash.App. 621, 626, 850 P.2d 527 (1993) (“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”) (quoting *In re Marriage of Wherley*, 34 Wash.App. 344, 349, 661 P.2d 155, review denied, 100 Wn.2d 1013 (1983)), see also, *Bonney Lake v. Delany*, 22 Wash.App. 193, 588 P.2d 1203 (1978) (the court declined to allow pro se litigant's intent to override litigant's actual action and stated “the rules of procedure apply equally to parties represented by counsel and parties who wish to take the risk of representing themselves).

If a pro se litigant fails to comply with the applicable rules and procedures, he or she will bear the consequences of his or her own representation and cannot on appeal complain of the quality of his or her defense. *State v. Fritz*, *supra*, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

In the case at bar, the Appellants acted as pro se litigants throughout the litigation. They engaged in answering the complaint, filing counterclaims, responding to motions, and engaged in extensive discovery (Appellants served Respondent with hundreds of

interrogatories, requests for production, and requests for admissions). Throughout the litigation, the Appellants were required to and did comply with the Washington court rules and procedures.

Now, however, the Appellants argue that the rules and procedures should not apply to them. The only basis for this argument is that they are familiar with Asian law and they claim, without any authority, that a cursive signature is the equivalent of a *dojang* and a *dojang* would have made their documents admissible. There are a number of significant problems with this argument.

First, the litigation concerned a Commercial Lease in Washington and Washington law applies. To allow a litigant in a Washington State action to submit testimony and evidence based upon their own interpretation of what would be allowed in a foreign courtroom would destroy Washington's Court Rules and Rules of Evidence.

The Appellants are in Washington, live in Washington and conduct business in Washington. They are parties to an action in a Washington Court and they decided to act as pro se litigants in the action. Consequently, they must comply with Washington court rules and rules of evidence: self serving statements of what "Asian" law would allow do not control.

Second, even assuming that the Appellant's signature is the equivalent of a *dojang* and a *dojang* would authenticate an Asian document, the vast majority of the documents attached to the Response to the Motion for Summary Judgment could not be authenticated by Mr. Chung's signature, whether or not it is a *dojang*. The documents attached to the Appellants' Response include documents purporting to be from the City of Lynnwood, the Washington State Department of Licensing, the Lynnwood City Fire Department, and Protocol Property Management. CP 43. Mr. Chung's signature could not authenticate the documents under ER 901.

Additionally, a significant number of the documents contained written assertions which the Appellants were apparently offering into evidence to prove the truth of the matter asserted. Consequently, the documents were inadmissible hearsay under ER 802. Mr. Chung's signature could not make the inadmissible documents admissible under ER 802.

The Appellants have not cited any authority to support their assertion that Asian legal principles should be applied in determining the admissibility of evidence in this action because there is no authority. Washington rules and procedures apply and the Appellants failed to comply with those rules and procedures. Although the

Appellants may have intended to comply with the rules, but their intention does not transform noncompliance into compliance. *Bonney Lake v. Delany, supra*.

Moreover, to the extent that Appellants mistakenly relied upon Asian legal procedures, and their reliance created the error for which they seek review on appeal, they cannot complain about their actions. They must bear the consequences of their own representation. *State v. Fritz, supra*.

#### 5.2 Appellants' Evidence was Properly Excluded

Summary judgment evidentiary rulings are reviewed de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). However, at summary judgment the trial court is allowed to consider only competent evidence. CR 56; *Davis v. West One Automotive Group*, 140 Wash. App. 449, 166 P.3d 807 (2007). The court cannot consider inadmissible evidence. *Jones v. State*, 140 Wash. App. 476, 166 P.3d 1219, 1228 (2007), rev'd on other grounds, 170 Wn.2d 338, 242 P.3d 825 (2010). As the trial court is only allowed to consider competent evidence, the appellate court's de novo review should likewise be limited to admissible, competent evidence.

The type of evidence on which summary judgment may be supported or opposed is set forth in CR 56(e), which provides

**Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e)(emphasis added).

a. *Affidavits*

Affidavits offered to support the position of a party at summary judgment must conform to what the affiant would be permitted to testify to at trial. *Blomster v. Nordstrom, Inc.* 103 Wash.App. 252, 11 P.3d 883 (2000). The affidavits (1) must be made on personal knowledge, (2) set forth such facts as would be admissible in evidence, and (3) show affirmatively that the affiant is competent to testify to the matters stated therein. *Id.*

After the moving party submits adequate affidavits to support summary judgment, the nonmoving party must set out specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain. *Id.*

The nonmoving party does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Johnson v. Recreational Equipment, Inc.*, 159 Wash.App. 939, 247 P.3d 18 (2011). Ultimate facts, conclusions of

fact, conclusory statements of fact, or legal conclusions are insufficient to raise a question of fact in the summary judgment context. *Id.*

In the case at bar, the Appellants did not submit any affidavits or verified testimony in compliance with CR 56(e). At most, the Appellants' Response is merely a laundry list of argumentative assertions, conclusions of fact, and conclusory statements, which are insufficient to defeat summary judgment. There was no admissible evidence before the trial court nor is there any on review; and, therefore, summary judgment was appropriate and should be affirmed.

b. *Documents*

Authentication or identification of a document is a condition precedent to admissibility. ER 901(a); *In re Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001). In *Connick*, a pro se criminal defendant brought a personal restraint petition and supported his petition with uncertified and unauthenticated photocopies of apparent court records. The Supreme Court determined the pro se litigant was held to the same standard as an attorney and stated:

It is beyond question that all parties appearing before the courts of this State are required to follow the statutes and rules relating to authentication of documents. This court will in future cases accept no less.

*Id.* at 458.

In the case at bar, Appellants attached numerous photocopies of various documents to their Response. None of the documents were authenticated by the Appellants; and, therefore, the documents were not admissible.

c. *Hearsay*

A party cannot rely on inadmissible hearsay in response to a summary judgment motion. *Lynn v. Labor Ready, Inc.*, 136 Wash.App. 295, 151 P.3d 201 (2006). The party's affidavits must be based upon personal knowledge. *Loss v. DeBord*, 67 Wn.2d 318, 407 P.2d 421 (1965) (where affiant's personal knowledge is lacking, affidavit will be accorded no consideration in ruling on motion for summary judgment). An affidavit that relates factual assertions that have been made to the affiant constitutes hearsay and does not "set forth facts which would be admissible in evidence," as required by CR 56(e). *Welling v. Mt. Si Bowl, Inc.*, 79 Wn.2d 485, 487 P.2d 620 (1971).

In the present action, the Appellants' Response contained numerous documents which were impermissible hearsay. The hearsay documents were inadmissible and were properly excluded from evidence.

The Appellants failed to comply with CR 56(e) and did not submit any admissible evidence or sworn or verified testimony establishing material issues of fact. The Appellants' laundry list of argumentative assertions is insufficient to prevent summary judgment and the trial court should be affirmed.

### 5.3 Summary Judgment was Appropriate

The appellate court reviews a motion for summary judgment de novo, but the court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wash.App. 424, 426, 878 P.2d 483 (1994).

#### a. *CR 56(f) Continuance*

In the present action the Appellant argues that the court should have granted a continuance under CR 56(f), which provides:

**(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be

The Appellants failed to comply with CR 56(e) and did not submit any admissible evidence or sworn or verified testimony establishing material issues of fact. The Appellants' laundry list of argumentative assertions is insufficient to prevent summary judgment and the trial court should be affirmed.

### 5.3 Summary Judgment was Appropriate

The appellate court reviews a motion for summary judgment de novo, but the court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wash.App. 424, 426, 878 P.2d 483 (1994).

#### *a. CR 56(f) Continuance*

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taken or discovery to be had or  
may make such other order as is  
just.

The trial court has discretion to grant or deny a request for a continuance under CR 56(f), and the trial court's decision will be upheld absent a showing of manifest abuse of discretion. *Gross v. Sunding*, 139 Wash.App. 54, 161 P.3d 380 (2007). The trial court can deny a continuance under CR 56(f) if "(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." *Id.* at 387.

Appellants herein failed to submit any affidavits requesting a continuance or establishing that a continuance was necessary to obtain additional discovery. The trial court did not abuse its discretion in not granting a continuance.

*c. The Trial Court did not improperly "peek" at the evidence.*

The Appellants assert that the trial court improperly mentioned alternative grounds in denying the motion for reconsideration. However, CR 56(e) states that if a nonmoving party does not respond to a motion for summary judgment, "summary judgment, if appropriate,

shall be entered against him.” CR 56(e)(emphasis added). Thus, even if a motion for summary judgment is unopposed, the trial court must determine if judgment is appropriate. That is what the trial court did in this action – determined that there were no issues as to any material fact and that Plaintiff was entitled to judgment as a matter of law. CP 11-13

*c. There Are No Material Facts at Issue*

This is a relatively simple case concerning Appellants’ breach of a commercial lease and the material facts are not in dispute. As set forth in Appellants’ answers to the Requests for Admissions (1) Appellants entered into a commercial lease with Respondent; (2) Appellants took possession of the premises, paid monthly NNN charges, and made improvements to the premises; (3) Respondent provided Appellants with the Premises and (4) Appellants failed to make the monthly payments. CP 294-296.

Pursuant to the terms of the Lease, Respondent terminated the Lease, took action to mitigate its damages and is entitled to damages caused by Appellants’ breach of the Lease..

The Appellants’ Response to the Motion for Summary Judgment seems to focus on their relationship with the contractor building the tenant improvements. Appellants’ dispute with their contractor does not create a material issue of fact as to Respondent’s

claims. Nevertheless, assuming *arguendo* that Respondent failed to comply with the Lease, pursuant to section 17.4 of the Lease, if after 30 days written notice of a specific failure to perform an obligation the landlord does not perform the obligation, then the tenant's remedies are limited to damages or an injunction, and in "no event shall the tenant have the right to terminate this Lease . . . and in no case may the Tenant withhold rent or claim a set-off from rent." CP 351.

There was no written notice to the Landlord setting forth a specific failure to perform; and, therefore, the Respondent is not in default. However, even if there was notice, the Appellants were still obligated to comply with the Lease and pay the monthly rent. Appellants failed to comply with the Lease, failed to make the monthly payments. Consequently, there was no need for a trial on this matter and summary judgment was properly entered by the trial court

## **VI. CONCLUSION**

For reasons set forth above the trial court correctly entered Summary Judgment in favor of Respondent and the decision should be affirmed.

**VII. REQUEST FOR ATTORNEY'S FEES AND COSTS -**

The Lease Agreement provides that attorney's fees shall be awarded to the prevailing party in the case of litigation. Paragraph 24.14 of the Lease Agreement states:

In the event any action or proceeding is brought by either party against the other arising out of or in connection with this Lease, the prevailing party shall be entitled to recover its costs, including, but not limited to, reasonable attorney's and accountant's fees, incurred in such proceeding, including an appeal.

CP 353-54.

A Contractual provision for award of attorney fees at trial supports award of attorney fees on appeal. RCW 4.84.330; *Reeves v. McClain*, 56 Wash.App. 301, 783 P.2d 606 (1989). The Respondent should recover its reasonable attorney's fees and costs incurred in responding to this appeal.

Submitted on the 14 day of March, 2012.

  
\_\_\_\_\_  
Michael P. Jacobs, Attorney for Respondent

No. 67771-3-I

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
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TAE HO CHUNG, et ux.,

*Defendant/Petitioner,*

v.

NEW GRACE INVESTMENTS, INC.

*Plaintiff/Respondent.*

---

**CERTIFICATE OF SERVICE**

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