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OF THE STATE OF WASHINGTON

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DEPUTY

PAULA STONE and JOHN F. FANNING,  
wife and husband and the marital community composed thereof,

Plaintiffs-Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA

Defendant-Respondent.

Appeal from the Clark County Superior Court

RESPONDENT'S BRIEF

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pm 6/26/06

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**ANSWERING BRIEF OF DEFENDANT  
SAFECO INSURANCE COMPANY OF AMERICA  
RESPONSE TO ASSIGNMENTS OF ERROR<sup>1</sup>**

The trial court did not err when it granted defendant's motion for summary judgment on notice grounds.

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is there a genuine issue of material fact as to whether an insured homeowner complied with the notice provision of her insurance policy when making a claim for mold allegedly caused by water intrusion when the insured's own sworn testimony demonstrated that she was aware of the water intrusion at the time it happened but failed to promptly notify the insurance company so that it could take steps to mitigate any potential claim?

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1 Although plaintiffs have stated the issues they believe must be decided on this appeal, they have not articulated any specific assignments of error. Because plaintiffs offer argument and legal citation as to whether summary judgment was appropriate, defendant acknowledges that this court may reach the merits of that issue even though plaintiffs failed to properly assign that ruling as error. *See State v. Olson*, 126 Wn. 2d 315, 318-22, 893 P.2d 639 (1995)(failure to comply with rules not an impediment to review on merits if otherwise properly presented). As for their motion for reconsideration, however, plaintiffs offer no proper argument regarding the trial court's denial of that motion: they do not state the ground on which it was sought, they do not state the standard by which this court would review the ruling, and they do not offer any legal argument for reversing that ruling. For this reason, this court should not reach the merits of plaintiffs' complaints about that ruling. RAP 10.3(a)(3); *Ang v. Martin*, 154 Wn.2d 477, 486-87, 114 P.3d 637 (2005).

2. Does equitable estoppel apply to preclude an insurer from denying coverage for failure to give timely notice of a claim when there is no evidence that the insured's failure to give timely notice was the result of the insured's reliance on communications or conduct of the insurer?

3. What credence, if any, should a trial court give to a declaration filed in support of a motion to reconsider a grant of summary judgment when that declaration is not based on new evidence and directly contradicts the sworn deposition testimony of the declarant?<sup>2</sup>

#### **RESPONSE TO STATEMENT OF THE CASE**

Plaintiffs' statement of the facts and procedural background of the case includes inappropriate argument and unsupported and irrelevant conclusory statements regarding defendant's alleged motives. To the extent plaintiffs have made statements not supported by the summary judgment record, this court should disregard those statements.

Specifically, this court should disregard the following statement:

- "Safeco conducted its investigation with the aim of denying or minimizing the claim. Safeco denied the claim without performing a reasonable investigation of the water intrusion issues which [sic] caused the mold to develop in the home or the full extent of damage to the home." (Pls. Br. at 5). This is not a statement of fact. It is a conclusory and argumentative allegation with no

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2 This issue is relevant only if this court reaches the merits of plaintiffs' reconsideration motion

evidentiary basis in the summary judgment record. Further, it bears no relevance to the issues on appeal.

- “Safeco did not . . . make a good faith effort to minimize the risk of further damage from these conditions.” (Pls. Br. at 5). This is not a statement of fact, it is a conclusory and argumentative allegation with no evidentiary basis in the summary judgment record.

Further, it bears no relevance to the issues on appeal.

Defendant further objects to plaintiffs’ statement of the case to the extent that it relies on pleadings or other court filings that are not specifically part of the summary judgment record. The evidence in the summary judgment record is only that which the parties submitted in support of the motion, response and reply as provided and permitted by CR 56. Plaintiffs’ reliance on any other sources for their factual assertions is inappropriate.

Finally, plaintiffs appear to have abandoned all but their breach of contract claim for coverage. In response to defendant’s motion for summary judgment, plaintiffs announced their intention to abandon their claims for negligence, spoliation of evidence, tort of outrage and negligent infliction of emotional distress and concentrated their opposition to defendant’s motion on their claims for breach of contract and bad faith, along with their Consumer Protection Act claim.<sup>3</sup> (CP 388; Pls. Opp. To

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3 Along with their opposition to defendant’s motion, plaintiffs asked leave of the court to file a second amended complaint. The court did not rule on that request and the proposed second amended complaint was never filed.

MSJ at 2).<sup>4</sup> On appeal, plaintiffs offer legal argument only as to the breach of contract/coverage issues and make no reference to the bad faith or CPA claims.

### SUMMARY OF ARGUMENT

Plaintiffs' opening brief is a textbook example of misdirection. By attempting to focus this court's attention on an irrelevant argument, plaintiffs hope to distract this court from noticing that their appeal is without merit. Plaintiffs frame the central issue as one of causation. The real issue, however, is one of notice. Specifically, was defendant entitled to deny coverage of plaintiffs' mold claim because plaintiffs breached the notice provisions of their insurance policy? The answer to that question, as the trial court correctly concluded, is "Yes." The undisputed, and undisputable, evidence in the summary judgment record showed that plaintiffs were aware of a significant water intrusion event, an intrusion that they allege was the efficient proximate cause of the mold for which they filed their insurance claim, ten months before they gave any notice of that water intrusion to defendant insurer. By delaying notice, plaintiffs

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4 The Clerk's Papers in the present case are voluminous. In order to ensure that defendant's citations to the Clerk's Papers were correct, counsel for defendant reviewed the trial court file at the Clark County Superior Court against the Index of Clerk's Papers and made every attempt to reconcile the documents in defendant's file with those in the court file and the Index. Even having done so, defendant notes that its page numbers do not always match up with those cited by plaintiffs and, therefore, may not match up with the Clerk's Papers filed with this court. For this court's convenience, in addition to references to the Clerk's Papers, defendant will, when possible, offer additional identifying information for evidence cited.

prevented defendant from taking any steps to mitigate its losses. Further, there is no basis upon which to estop defendant from invoking the notice provision to deny coverage. There is no evidence of any connection between defendant's conduct and plaintiffs' failure to comply with the notice provision of their policy.

The trial court's assessment of the case was correct: plaintiffs knew of the water intrusions that caused the mold for which they filed a claim long before they advised defendant of those water intrusions. Plaintiffs' failure to notify defendant or take immediate remediation action exposed defendant to a substantially larger claim and prevented defendant from mitigating any potential loss.

## ARGUMENT

### 1. Standard of Review

This court reviews summary judgment orders de novo. *Morton v. McFall*, 128 Wn. App. 245, 252, 115 P.3d 1023 (2005). When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court, and considers the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.*

In a summary judgment motion, the moving party bears the initial burden of showing an absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue for trial. *Id.*; CR 56(e). If the nonmoving party

fails to make a showing sufficient to establish the existence of an element essential to that party's case, and if that party would bear the burden of proof as to that element at trial, then summary judgment is appropriate regardless of any other facts presented; a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Young*, 112 Wn.2d at 225.

2. There Is No Genuine Dispute Whether Plaintiffs Were Aware Of Water Intrusion Inside Their Bathroom Wall Many Months Before They Informed Defendant Of That Intrusion; Plaintiffs' Own Testimony Established That Fact.

Resolution of this appeal rests on one simple fact—plaintiffs knew of a sudden, large, discharge of water inside their bathroom wall in October 2001 and they did not notify defendant of the incident or take steps to clean up or dry out the water inside the wall. This failure was a breach of plaintiffs' obligation under their insurance policy issued by defendant and defendant was prejudiced by that breach.

For purposes of its summary judgment motion, defendant accepted the opinion of plaintiffs' experts that the mold for which plaintiff filed a claim in May 2002 was caused by the October 2001 water leak into the bathroom wall.<sup>5</sup> (CP 30; Def. MSJ at 4). Defendant also conceded that it was possible that these alleged water losses would have been covered losses under the insurance policy. (CP 30; Def. MSJ at 4). The issue was

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5 Plaintiffs have referred numerous times to two other water intrusion incidents - one in 1996 and another in June 2002. Plaintiffs presented no evidence of a causal link between the 1996 incident and their May 2002 claim. The June 2002 leak took place after plaintiffs filed their mold claim.

not, as plaintiffs would have it, whether the covered water intrusions were the efficient proximate cause of the mold. The issue was solely whether plaintiffs failed to inform defendant of the water intrusion in a timely manner as required by their insurance policy.

The insurance policy at issue in this case provides:

**SECTION I – PROPERTY CONDITIONS**

\* \* \*

3. **An Insured's Duties After Loss.** In case of a loss to which this insurance may apply, you must perform the following duties:

- a. cooperate with us in the investigation . . . of any claim;
- b. give immediate notice to us or our agent;

\* \* \*

- d. protect the property from further damage, make reasonable and necessary repairs required to protect the property . . . .

\* \* \*

- f. as often as we reasonably require:
  - (1) exhibit the damaged and undamaged property,
  - (2) provide us with records and documents we request.

\* \* \*

- g. “submit to us, within 60 days after we request, your signed,

sworn proof of loss which sets forth, to the best of your knowledge and belief:

- (1) the time and cause of loss;

\* \* \*

- (5) specifications of any damaged building and detailed repair estimates;
- (6) an inventory of any damaged personal property described in 3.e.;
- (7) receipts for additional Living Expenses incurred or records supporting the Fair Rental Value loss.”

\* \* \*

(CP 234; Deposition of Paula Stone, Ex. 1).

Plaintiffs cannot avoid the fact that the evidence in the summary judgment record established without question that they knew in October 2001 that water had gushed into their bathroom wall, that they had not properly cleaned it up, and that they had not given defendant notice of the incident at that time as required by their policy. In her sworn deposition testimony, plaintiff Stone described the October 2001 incident and admitted that she did not inform defendant of its occurrence:

A. My husband [Plaintiff Fanning] was in the bathroom at the time it happened.

Q. Okay. And what happened, to the best of your understanding?

A. He was in the bathroom and there was sort of a popping noise or sound in the tub, and then water started coming out of the tub.

It was – not out of the tub, but out of the pipe that had broke. It was just gushing out of there.

Q. Into the tub?

A. No, into the wall.

Q. Okay and did you – did he tell you about this, and you actually witnessed this?

A. I witnessed this.

Q. Okay. And what was done about this?

A. Well, we couldn't get it shut off there, so he went out to the street. He couldn't get the water shut off, so he had to come into the garage to get a key and come back out to the street. I think they call it a water main. And you use this key, and it turns off all the water, so that it would – so the water would stop flowing.

Q. Okay. And who repaired the pipe?

A. My husband repaired it.

(CP 205; Deposition of Paula Stone 100:19-111:16)(emphasis added).

\* \* \*

A. I just – can I clarify something?

Q. Sure.

A. When the water came out, it wasn't a leak. It was a gush.

(CP 205; Deposition of Paula Stone 113:4-7)(emphasis added).

\* \* \*

Q. Okay. What did your husband do to clean up the water that gushed out into the wall?

A. We turned off the water.

Q. But what did he do to clean it up?

A. It was in the wall.

Q. Did he do anything to clean it up that water?

A. We couldn't get to it.

Q. All right. Did you report that incident to Safeco in October of 2001?

A. No.

(CP 206; Deposition of Paula Stone 114:15-23)(emphasis added).

In addition to plaintiff Stone's deposition testimony, defendant offered a transcript of a recorded statement by Ms. Stone in which she specifically denied any water leaks in the bathroom. (CP 304-307; Aff. of Dana McCray in Support of Def. MSJ).

Plaintiffs responded to defendant's summary judgment motion. In their response, plaintiffs did not dispute that Ms. Stone had testified in her deposition as quoted by defendant. In fact, plaintiffs did not make any reference to that deposition testimony whatsoever. Accordingly, the summary judgment record contained the undisputed testimony of plaintiff Stone herself that (1) in October 2001, plaintiffs knew that water had "gushed" into and behind their bathroom wall, (2) they had not cleaned it up because they "could not get to it," and (3) plaintiffs also failed to timely report the June 2002 dishwasher leak to defendant. (CP 205-206, 215; Deposition of Paula Stone 100:19-111:16, 113:4-7, 114:15-23). In other words, at the time the trial court ruled on defendant's summary judgment motion, there was no genuine dispute as to the fact that plaintiffs had

failed to give defendant timely notice of the water damage that eventually led to the mold claim. Further, at the time the trial court ruled on defendant's summary judgment motion, plaintiffs had not provided the court any reason to question the accuracy of plaintiff Stone's deposition testimony.

3. Plaintiffs' Breach Of The Notice Provision Prejudiced Defendant By Substantially Increasing The Size Of The Potential Claim And By Preventing Defendant from Taking Steps to Control Remediation Costs.

Defendant acknowledges that where an insured breaches an insurance policy provision, it is nevertheless the insurer who bears the burden to establish that the breach prejudiced the insurer so as to excuse the duty to pay under the contract. *Pederson's Fryer Farms, Inc. v. Transamerica Insurance Co.*, 83 Wn.2d 432, 437 (1996). Defendant also acknowledges that the questions of whether the insured breached the contract and whether defendant was prejudiced generally present issues of fact. However, a question of fact may be determined on summary judgment as a matter of law if reasonable minds could reach only one conclusion from the evidence presented. *Wellbrock v. Assurance Co. of Am.*, 90 Wn.2d 234, 239 (1998), *rev den* 136 Wn.2d 1005.

The following factors are relevant to determining whether an insurer has been prejudiced by an insured's failure to give proper notice of a loss: (1) when the insured discovered the loss; (2) whether the delay in making a claim left the insurer without an opportunity to pursue a claim against a tortfeasor, to adequately defend the insured in an action brought by a third party, or to pursue subrogation claims; (3) whether the insured

destroyed evidence relevant to a policy exclusion; and (4) whether the insured failed to control remediation costs. *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 359, 997 P.2d 353 (2000).

In this instance, plaintiff Stone's deposition testimony established that plaintiffs failed to give appropriate notice to defendant and that plaintiffs failed to take appropriate steps to prevent further damage at the time of a loss or afterward. Reasonable minds cannot dispute that plaintiffs breached the contract.

Further, the undisputed evidence in the summary judgment record was that the type of toxic mold of which plaintiffs complained can begin to form within 48 hours of a water discharge or intrusion of the type that occurred in October 2001 and June 2002. (CP 310; Affidavit of Kelly S. Keeth, ¶ 3). Defendant submitted expert testimony that early remediation can completely prevent or greatly minimize any resulting mold after a water release. (CP 310; Affidavit of Kelly S. Keeth, ¶ 3). Plaintiffs did not refute that evidence with any evidence of their own. Further, defendant offered evidence of its program for immediate remediation of water releases. (CP 313-14; Affidavit of John Halladin, ¶ 4). Again, plaintiffs offered no evidence to refute the existence or effectiveness of such a program.

CR 56 E requires that, when a motion for summary judgment is properly supported by affidavits and evidence, the non-moving party may not simply rest on its allegations but must set forth specific evidence showing a genuine dispute as to a material issue of fact for trial. Plaintiffs

failed to carry their burden. Plaintiffs did not offer any evidence to refute defendant's expert's testimony as to the very short time lapse between the type of water discharge that occurred in plaintiffs' home in October 2001 and June 2002 and mold growth, nor did plaintiffs offer any evidence to refute defendant's expert's testimony that immediate remediation would have prevented such mold growth. In other words, defendant offered evidence proving prejudice and plaintiffs did not offer any evidence to create a fact question as to that prejudice. Without evidence to the contrary, the inevitable conclusion is that plaintiffs' failure to report the water losses to defendant and their failure to perform immediate and appropriate remediation substantially increased the cost of eventual remediation and prejudiced defendant by exposing it to a much larger potential claim than otherwise.

Just as they did below, plaintiffs attempt to avoid this inevitable conclusion by trying to distract this court with an extended argument about the causal connection between the water damage and the mold contamination claim. For purposes of summary judgment on the notice issue, defendant did not dispute a causal connection. In fact, plaintiffs' argument makes defendant's point: the October 2001 water discharge led to the mold formation because plaintiffs did not take proper steps to remedy the problem, steps that would have included immediately notifying defendant of the water leak.

4. Defendant Is Not Estopped From Denying Coverage Because Plaintiffs Were Not Relying On Any Statements Or Conduct By Defendant When They Failed To Provide Defendant With Timely Notice Of The Water Damage

Plaintiffs' estoppel arguments are without merit.<sup>6</sup> Plaintiffs' failure to give timely notice of the water intrusion incidents was not the result of any reliance by plaintiff on acts, statements or conduct of defendant or its agents. All the acts and statements cited by plaintiffs in support of their estoppel argument took place long after the time that plaintiffs should have notified defendant of the potential water damage claim had passed.

The elements of equitable estoppel are:

“(1) an admission, statement, or act inconsistent with a claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury which would result to the relying party if the first party were to contradict or repudiate the prior act, statement, or admission.”

*Colonial Imports v. Carlton Northwest*, 121 Wn. 2d 726, 734, 853 P.2d 913 (1993). Applied to an insurer, estoppel refers to a preclusion from asserting a right by the insurer when it would be inequitable to permit the assertion. *Buchanan v. Switzerland General Insurance Co.*, 76 Wn. 2d 100, 108, 455 P.2d 344 (1969). “It arises by operation of law and rests upon acts, statements or conduct on the part of the insurer or its agents which lead or induce the insured, in justifiable reliance thereupon, to act or

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6 Although plaintiffs refer in the heading for this portion of the argument to “Safeco Estoppel or Waiver of the Notice Requirement,” their arguments appear to address only the issue of estoppel. This is appropriate because, under Washington law, the acts by defendant that plaintiffs cite as a basis for their argument would not constitute waiver. RCW 48.18.470.

forbear to act to his prejudice.” *Id.* Generally, equitable estoppel is not favored because it has the effect of precluding a party from offering an explanation or defense that party would otherwise be able to assert. *Colonial Imports*, 121 Wn. 2d at 734-35. The law does not encourage enforcing such silence. *Id.* at 735.

In this case, as the basis for their estoppel argument, plaintiffs cite to communications from defendant that “encouraged and requested that Appellants provide additional facts or analysis to support additional damages or another cause that Appellant [*sic*] had not addressed.” (Pls. Br. at 25). Plaintiffs failed to demonstrate how any of those communications led them to change their position, or refrain from performing a necessary act, to their detriment. Specifically, plaintiffs failed to make any connection between defendant’s conduct and plaintiffs’ failure to give timely notice of the October 2001 water damage—not surprising, given that the conduct by defendant of which plaintiffs complain did not take place until after plaintiffs filed their mold claim in May 2002. As for the water intrusion from the June 2002 dishwasher leak, plaintiffs again offered no evidence of a connection between defendant’s conduct and plaintiffs’ admitted failure to notify defendant of that incident.

Further, there is nothing in defendant’s conduct or communications with plaintiffs to support an estoppel claim. This is best illustrated by a review of the facts of *Buchanan*, a case upon which plaintiffs place much reliance. In *Buchanan*, the plaintiff property owner was out of town when the building covered by his policy with the defendant was damaged by fire.

76 Wn. 2d at 102. The defendant insurer learned of the fire before the insured did, and made arrangements not only for an adjuster to inspect the premises but for certain repairs to be immediately undertaken. *Id.* When the insured returned to discover that his property had burned, he met with the insurance adjuster, who indicated to him that insurance would cover the costs of repair. *Id.* When the insured asked about the necessity of submitting a proof of loss, the adjuster indicated that he, or a firm he would engage for that purpose, would take care of that matter. *Id.* at 103. After the defendant insurer did not cover the repair costs, the insured initiated an action to recover his losses. *Id.* at 104. The defendant insurer contended that the insured had failed to comply with the policy's proof of loss requirement; the insured responded that there was a jury question as to whether his failure to file a proof of loss was a result of his justifiable reliance on the insured's adjuster's assurances that he would take care of that. *Id.* at 102. The Washington Supreme Court concluded that, if the insured's allegations about the adjuster's assurances were found to be true, and if it were further found that the insured was entitled to rely on those assurances and did so to his detriment, then the defendant insurer would be estopped from asserting nonliability based on the insured's failure to timely file a proof of loss. *Id.* at 109.

Here, plaintiffs were aware of the potential damage to their home from water intrusion long before defendant ever learned of a problem. Plaintiffs chose not to advise defendant of the October 2001 water intrusion, and plaintiff Stone specifically denied knowledge of any water

leaks in the bathroom when she was interviewed regarding the May 2002 mold claim. (CP 304-307). The time for plaintiffs to comply with the notice provision of their policy had long passed before defendant or defendant's agents did or said anything that could be considered as a basis for an estoppel argument; there is simply no evidence of a causal connection between defendant's conduct and plaintiffs' breach of the notice provision of their policy.

5. Plaintiffs' Motion For Reconsideration Was Without Merit; Plaintiffs' Late-Filed Declarations Should Not Be Considered As Evidence Creating A Genuine Issue Of Material Fact

The trial court did not abuse its discretion when it denied plaintiffs' motion for reconsideration.<sup>7</sup> "Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion." *Wagner Development, Inc. v. Fidelity and Deposit Co. Of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639, *rev den* 139 Wn. 2d 1005, 989 P.2d 1139 (1999)

Plaintiffs based their reconsideration motion on CR 59(4) and CR 59(9). (CP 623; Pls. Mot. for Recon. at 4). The former provides that a court's decision may be vacated based on "newly discovered evidence,

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<sup>7</sup> As noted above, plaintiffs did not assign error to the trial court's denial of their motion for reconsideration, nor did they file an amended notice of appeal after their motion for reconsideration was denied. Accordingly, this court should not reach the issues raised by plaintiffs in their opening brief regarding that motion and the declarations filed in support of that motion. However, in the event this court determines that it may reach that issue, defendant offers the following argument.

material for the party making the application, which he could not with reasonable diligence have discovered and produced at trial.” (Emphasis added). The latter provides that a court’s decision may be vacated on the ground that “substantial justice has not been done.”

Regarding CR 59(4), the trial court correctly rebuffed plaintiffs’ untimely attempt to create an issue of fact by submitting additional declarations. In each of those declarations, plaintiffs stated, in direct contradiction of Ms. Stone’s sworn deposition testimony, that they were unaware of the substantial water intrusion inside their bathroom wall at the time it occurred in October 2001. (CP 629; Dec. of Paula K. Stone ¶ 4; CP 633; Dec. of John Fanning, ¶ 14).

Plaintiffs’ attempt to contradict and explain away Ms. Stone’s deposition testimony is too little, too late. Plaintiffs were aware of defendant’s reliance on Ms. Stone’s deposition testimony at the time they initially responded to defendant’s summary judgment motion. All of the information and evidence upon which they relied for their motion to reconsider was available to them at the time they initially responded to defendant’s summary judgment motion. Plaintiffs did not offer any explanation of Ms. Stone’s testimony at that time. Instead, plaintiffs waited until they received an adverse decision and then tried to revise the record to include more favorable evidence. Even then, the “explanations” offered by plaintiffs were self-serving and unconvincing.

When evidence is available to a party, but simply not presented, it normally cannot be the basis for reconsideration. *Wagner Development, Inc.*, 95 Wn. App. at 907. A party’s realization that a first declaration was insufficient does not qualify the second declaration as newly discovered

evidence. *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989). Further, it has been well recognized that a party cannot create an issue of fact and prevent summary judgment simply by offering two different versions of a story by the same witness. *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 992 P.2d 511 (1999); *Selvig v. Caryl*, 97 Wn. App. 220, 983 P.2d 1141 (1999). This is particularly true when the party opposing summary judgment attempts to avoid prior deposition testimony. *Robinson v. Avis Rent-A-Car System, Inc.*, 106 Wn. App. 104, 22 P.3d 818 (2001); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 972 P.2d 475 (1999).

Plaintiffs' reconsideration declarations were nothing more than a blatant attempt to avoid an explicit prior admission under oath during deposition. Ms. Stone was given the opportunity to read her deposition and correct any perceived inaccuracies. She did not follow up on that opportunity. (CP 641-42, 645; Aff. of Mark E. Olmsted in Support of Def. Opp. to Pls. Mot. for Recon. ¶ 4 and Ex. 2).<sup>8</sup> The trial court was correct when it concluded that her belated attempt to "explain" her testimony was improper attempt at self-impeachment. (CP 652; Letter Ruling dated January 9, 2006).

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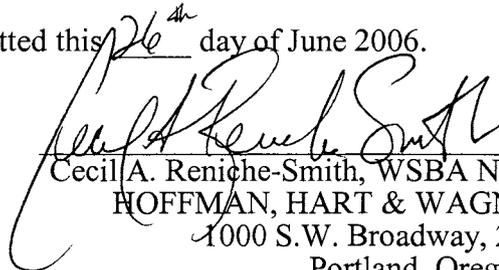
8 In their statement of the case, plaintiffs mention that "Ms. Stone was taking Benadryl [at the time of her deposition] and had concerns that it would inhibit her ability to give accurate and complete answers to questions." (Pls. Brief at 9). Plaintiffs did not raise this concern at any time below and, aside from their tangential reference to it in their factual summary, they do not offer any discussion, let alone legal argument, of the issue on appeal. In any event, Ms. Stone was advised that she would have the opportunity to review her deposition testimony for inaccuracies and correct those inaccuracies. (CP 185-186; Deposition of Paula Stone, 32:9-35:2). As noted above, she did not take advantage of that opportunity.

As for the application of CR 59(9), apart from mouthing the words that substantial justice has not been done, plaintiffs' motion for reconsideration offered no reasoned argument why the court should vacate its decision on that basis. In any event, this is not a case of an unjust result. Plaintiffs were not blindsided by the court's ruling; they were aware of defendant's position on summary judgment and of the deposition testimony upon which defendant based its motion.

### CONCLUSION

The trial court correctly concluded that plaintiffs were in breach of the notice provision of their insurance policy. Plaintiffs' continued invocation of the doctrine of efficient proximate cause is a red herring; the issue on summary judgment was not causation but simply whether plaintiffs had forfeited any right to coverage of their mold claim when they failed to notify defendant of the water intrusion that led to the mold's formation. The undisputed evidence in the summary judgment record proved that plaintiffs knew of the water discharge into their bathroom wall and of their dishwasher leak long before they finally gave notice of those incidents to defendant. The undisputed evidence further proved that, had plaintiffs provided defendant with more timely notice, defendant could have mitigated the potential mold damage.

Respectfully submitted this 26<sup>th</sup> day of June 2006.



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**AFFIDAVIT OF SERVICE**

STATE OF OREGON            )  
  )ss  
County of Multnomah        )

I, Cecil A. Reniche-Smith, having first been duly sworn, state that on June 26, 2006, I mailed a copy of the foregoing RESPONDENT'S BRIEF to plaintiff, postage prepaid and addressed as follows:

Daniel S. McMonagle  
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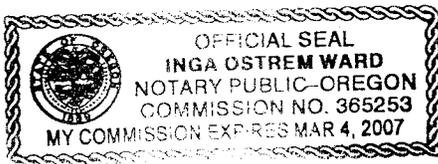
BY \_\_\_\_\_  
IDENTITY \_\_\_\_\_  
STATE OF OREGON  
06 JUN 28 PM 2:28

FILED  
COURT OF APPEALS

DATED at Portland, Oregon this 26<sup>th</sup> day of June 2006

*Cecil A. Reniche-Smith*  
\_\_\_\_\_  
Cecil A. Reniche-Smith, WSBA No. 37132

Sworn and signed before me this 26<sup>th</sup> day of June 2006.



*Inga Ostrem Ward*  
\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission Expires: 3-4-07