

**NO. 50174-1-II**

**COURT OF APPEALS, DIVISION II**  
**OF THE STATE OF WASHINGTON**

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**KEN SCHUMM,**

**Appellant**

**v.**

**KENNETH SPILLER and MICHAEELEEN SPILLER,**

**Respondents**

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**RESPONDENTS SPILLERS' RESPONSE BRIEF**

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**1. INTRODUCTION AND RESTATEMENT OF THE CASE**

This case involves the Plaintiff's purchase of a house in Thurston County which occurred between the time of the listing of the Mazama Pocket Gopher as a federal threatened species, and notification and implementation of any building restrictions due to the pocket gopher listing. In August of 2014 Kenneth & Michaelleen Spiller signed a Seller Disclosure Form (CP 36-40) pertaining to their house located on a residential lot in a developed subdivision, which they subsequently sold to Ken Schumm in December of 2014 (CP 17-32). Mr. Schumm wanted to build a large shop/accessory structure on the lot (CP 134-146), although had not made that a condition of the Purchase and Sale Agreement (CP 17-32, 185).

The pivotal issue centers on the inability of the Plaintiff (now Appellant) to provide any evidence that the presence of Mazama Pocket Gophers at the time of the Seller's Disclosure or Sale in 2014, caused a "material defect" or "unusual restriction on the subject property that would affect future construction or remodeling" (CP 36, 40), *and if* it did, whether the Spillers had knowledge of it which they failed to disclose.

The crux of this case and the basis upon which the Spillers prevailed on summary judgment, is that at the time of the Disclosure and Sale, the Spillers answered truthfully based on the knowledge they had at

the time, that there were no known “material defects” or “unusual restrictions” which would affect future remodeling or building additions; nor could the Spillers have anticipated any such building restrictions due to the presence of the gophers based on the information they knew or could reasonably ascertain. Mr. Schumm’s Complaint alleged that the Spillers committed fraud and breached the Purchase and Sale Agreement by failing to identify the presence of Mazama Pocket Gophers (CP 7-8). However, the Spillers had undertaken a major remodel of their home in 2011 but there were no impediments because of the gophers then (CP 14) [even though the Mazama Pocket Gopher has been a state threatened species since 2006 (CP 253).]

In May 2014, the gophers became listed as a federal threatened species (CP 45-46), but the Spillers were never notified of the listing (CP 14, 112) (in fact, there is no evidence to show that any specific notice was sent to any landowner). More importantly, there is no evidence that Thurston County’s interim screening process which Mr. Schumm later encountered was in effect at the time of the Seller’s Disclosure or Sale in 2014. Indeed, the facts demonstrate that there was no public notification of any building restrictions that were implemented or even being contemplated (CP 45-49, 86, 110-113). The Spillers had no knowledge of

any unusual restrictions because of the gophers that would affect future construction and remodeling of the home.

Personnel from U.S. Fish and Wildlife Service (USFWS) who visited the Spillers' property and met with them in September 2013 identified the presence of Mazama Pocket Gophers, but they did not identify any restrictions, or even any possible restrictions, that would affect remodeling or construction on the Spiller property; instead, they stated they "discussed with Mr. Spiller some of the practices that allow landowners to co-exist with pocket gophers, such as control of invasive plants and haying" (CP 14, 148-149, 265-266). Although Plaintiff initially filed unsigned Declarations purporting to come from USFWS personnel Brad Thompson and Mary Linders which contained text asserting that they had discussed building and land use restrictions with Mr. Spiller due to the gophers, the Declarations that Mr. Thompson and Ms. Linders actually signed omitted that text. Compare their unsigned Declarations at CP 129-132 and 208-210 with the signed versions at CP 148-149 and 253-254, and related discussion about the text discrepancies between the signed and unsigned Declarations at CP 187-188 and 259, 270 in which all reference to buildings, construction, and land use were removed from the signed Declarations.

At the time of the Seller's Disclosure and Sale, there were no known "unusual restrictions" or any "material defect" on the Spillers' built-out residential lot that would prevent future remodeling or construction due to the presence of the Mazama Pocket Gopher. Appellant's attempt at proof of evidence is not derived from any evidence or proof at all, but rather solely from his *speculation* that the federal listing in 2014 immediately carried with it Thurston County's building requirements which were sometime later imposed, albeit without any public notification (CP 45-49, 86, 110-113). The April 9, 2014 general press release (which was not sent to the Spillers (CP 14)) announcing the federal listing of the Mazama Pocket Gopher, mentions nothing about building restrictions (CP 45-46).

At the time of the seller's disclosure and sale in 2014, there is nothing to be found to identify any building restrictions because of the gophers, and as evidenced from the earlier 2013 federal agency visit, as well as the more recent signed Declarations from USFWS personnel (CP 148-149 and 253-254), there had been nothing to indicate to the Spillers that their discussion of "control of invasive plants and haying" with the USFWS personnel could translate or morph into building restrictions.

In researching this matter, the earliest documentation to be found identifying building requirements due to the gopher came from Thurston

County through a news release dated June 11, 2015 (CP 48-49), which explains the site visit requirement to screen for the presence of gophers before obtaining a building permit. Notably, however, this news release also does not identify any actual restrictions due to the presence of the gophers, only the requirement for site inspections. Moreover, this announcement came ten months *after* the Spillers' seller's disclosure and seven months *after* the sale.

Further corroboration that the Spillers had no knowledge of any gopher-related building restrictions is the Western Washington Growth Management Hearing's Board's decision in 2016 (CP 61-94) finding that Thurston County violated public notice requirements for implementing defacto code amendments known as the Interim Screening Process (e.g., the required site visits to screen for gophers) without proper public notice procedures to let the public know about these unpublished changes, and the County's failure to undergo any formal process to enact these defacto amendments as actual Code revisions (CP 86, 111-113). Mr. Schumm did not dispute these facts (CP 189).

Mr. Schumm was unable to identify any restrictions that were in place at the time of the Seller's Disclosure or purchase of the property in 2014, due to the Mazama Pocket Gophers, which would prevent the building of the accessory structure that he wanted. He was also unable to

produce evidence that the Spillers knew or could have known about these claimed restrictions in 2014 even if they had existed then. Mr. Schumm was completely without evidence to support his allegation that the Spillers committed fraud or breach of contract for allegedly failing to disclose these purported building restrictions. Even with the full benefit of after-the-fact public record research and Declarations from agency personnel (CP 148-149, 265-266), Mr. Schumm still could not produce any substantiation that such building restrictions were in effect at the time of the Seller Disclosure and Sale.

Without any evidence, Mr. Schumm did not meet his burden of proof of his Complaint to show how the Spillers could have committed fraud or breach of contract by failing to disclose alleged [non-existent] restrictions which they knew nothing about. The Trial Court agreed with the Spillers on these points. Quoting the Trial Court's ruling:

I need to find some evidence in the record indicating that as of that moment in time not only was there a restriction but also that the sellers knew or should have known about the restriction that would have put them in a position to disclose....

...

This is on before the Court on the defendant's motion for summary judgment. As has been discussed, these motions need to be construed with the evidence in favor of the non-moving party. That being said, the mere act of filing for summary judgment by the defendant in this case requires the plaintiff to satisfy a burden of production with evidence that, assuming to be true and construed in the light most

favorable to the plaintiff, would be sufficient for a jury to find in the plaintiff's favor. *What is required with that burden is the provision of evidence and not speculation.*

...

The Court does not find, however, any evidence in this record indicating that there were at that time any restrictions on the property related to the pocket gopher, and thus there certainly were not any restrictions based on this record that the seller would have had knowledge or should have known about.

Again, the Court does not find that the mere existence of a threatened species on one's property is sufficient evidence.... Something more must be established ... the Court finds it insufficient for the plaintiff's claims to survive summary judgment. Thus, the motion for summary judgment is granted and the claims are dismissed with prejudice.

Report of Proceedings (RP) at 7, 13 (emphasis added), 15-16.

## **2. RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES**

### **2.1 Response to Appellant's Allegation that Trial Court Erred in Granting Defendants' Motion for Summary Judgment and Determination there were No Issues of Material Fact regarding Seller's Disclosure Form Requirements.** (Appellant's Errors 1 and 2, and Issue 1)

Respondents concur with Appellant that in reviewing a summary judgment order, this Court evaluates questions of law *de novo* (Opening Br. at 6, citing to *City of Seattle v. State Dep't of Labor & Industries*, 136 Wn.2d 693, 694, 965 P.2d 619 (1998)).

A party may move for summary judgment by pointing out to the court that the nonmoving party has no evidence with which to meet its burden of proof at trial. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225,

770 P.2d 182 (1989). Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009); CR 56(c). If the nonmoving party fails to produce evidence in support of any critical element of its legal theory, summary judgment is proper on that theory.

Thus, as argued in the Defendants' motion briefing, to establish his prima facie case, Plaintiff must produce evidence that: (1) there was some defect or restriction lawfully in place such that the presence of Mazama Pocket Gophers at or near their property would have limiting effects on the use of that property; (2) the Spillers knew, at the time of sale, of such regulatory limitation; (3) that the Spillers' access to this information or actual knowledge was superior to that of Plaintiff's; (4) that the Plaintiff was entitled to rely on the absence of this information in his conclusion that there would be no regulatory limitations on the property relating to Mazama Pocket Gophers; and (5) a reasonable or diligent inspection or inquiry by Plaintiff would not have provided him with the missing information. Plaintiff has failed to produce any evidence on these elements. Further, nothing Plaintiff has produced can be stretched, through imaginative inference or construal, to be evidence of these requirements.

Indeed, some of the facts presented in by Plaintiff in his Response to the Defendants' Motion for Summary Judgment actually make summary judgment more proper, not less proper. For instance, the evidence Plaintiff intended to produce in Mr. Thompson's unsigned Declaration to show that the Defendants had verbal notice of some land use restrictions (even though Mr. Thompson's letter did not mention them) was removed from the Thompson Declaration before he signed it. That is the equivalent of striking of a key piece of proof at trial, and it is fatal to the claim. (Compare CP 129-132 and 208-210 with CP 148-149 and 253-254; see also CP 187-188 and 259, 270.)

On reconsideration, the process through which Plaintiff submitted the Declaration of Mary Linders was a repeat of what happened with Brad Thompson's Declaration. Plaintiff originally proposed language to identify that agency personnel had discussed building restrictions due to the Mazama Pocket Gopher. However, the signed version of Mary Linders' Declaration specifically omits the text concerning building restrictions that had been proposed in the unsigned version (compare CP 208-210 with CP 253-254). As signed, the Linders Declaration identifies no significant fact that was not already considered, either in briefing or during the oral argument of Defendants' Motion for Summary Judgment. The only new information in Ms. Linders' Declaration relays the gopher's status as a

State Threatened Species beginning in 2006<sup>1</sup>, but that neither changes any relevant facts nor provides any evidence that construction restrictions triggered by the presence of gophers were in effect at the time of the Seller's Disclosure or Sale in 2014.

The "evidence" produced by Mr. Schumm, both in his Response to Defendants' Motion for Summary Judgment and his Motion for Reconsideration, was presented first in a draft declaration, setting forth what the Plaintiff's counsel knew his required proof was, and in the subsequently signed version, which omitted substantial critical pieces of evidence necessary to establish a prima facie claim. The result is that Plaintiff's evidence, as presented, fails to establish the minimal production of evidence required to defeat a summary judgment. Moreover, this shortfall is apparent from Plaintiff's own documents, as it is revealed by comparing the declarations Plaintiff's counsel considered necessary and proper to those that were actually signed by the testifying witnesses.

2.1.1 *Plaintiff's Failure to Produce Essential Elements of his Case Renders Other Facts Immaterial*

Appellant's focus on appeal is his assertion there are material facts in dispute (Opening Br. at 6-8, 10). Defendants moved for summary

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<sup>1</sup> Note that the Spillers had significantly remodeled their house in 2011, at the time when the gopher was a listed as a State-threatened species, but encountered no building restrictions then (CP 253).

judgment under the standard in *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), which requires that, to survive summary judgment, a Plaintiff must provide evidence in support of each element of its required proof at trial. As argued by Defendants:

I agree you construe the evidence in favor of the non-moving party, but you have to have evidence to construe. There's an additional burden of production, and that is where the failure of the plaintiff's case is on a burden of production of evidence. So if there's no evidence to construe because it hasn't been produced, then you don't reach the construal of the evidence in favor of the non-moving party.

RP at 8-9.

Failing to provide such proof, all other facts become irrelevant:

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result: "In such a situation, ***there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.***" 477 U.S. at 322-23.

*Young v. Key Pharm, Id.*, at 225 (emphasis added in quoting *Celotex*).

The Trial Court's decision (quoted herein at pp. 6-7) comports with this U.S. Supreme Court holding emphasized above.

2.1.2 *Plaintiff Provided No Evidence of Breach  
of Contract or Fraud*

Plaintiff's Complaint alleged the Spillers committed fraudulent or negligent misrepresentation and breach of contract (CP 7-8), but was unable to offer any evidence or proof for his claims. It is not in dispute that the Spillers knew they had pocket gophers, but there is no evidence the gopher-related building restrictions that Mr. Schumm complains prevent him from building a shop existed at the time of Disclosure and Sale in 2014, and there is no evidence that the Spillers knew or could have known about such restrictions (refer to discussion herein at pp. 2, 5-6) and briefing to the Trial Court (CP 110-113, 116-120; 189, 192-193). Without the necessary evidence, Mr. Schumm cannot prove the fraud and breach of contract allegations in his complaint, and on that basis summary judgment for Defendants is justified. The Trial Court agreed with the Spillers, and the Court's rationale is fully set forth in its decision rendered during the summary judgment motion hearing (quoted *supra* at pp. 6-7); RP at 7, 13, 15-16).

The Brad Thompson letter and subsequent USFWS Declarations (CP 34, 148-149, 253-254) – on which Appellant relies as “evidence” (RP at 8) – specifically state what the USFWS discussed with Mr. Spiller, and that was: “some of the practices that allow landowners to co-exist with pocket gophers, *such as control of invasive plants and haying.*” (CP 149, 266). Emphasis in this quote is added because Appellant has omitted from his briefing this defining qualification by the USFWS employees of what their Declarations said they discussed with the Spillers (Opening Br. 7-8).

Although the unsigned USFWS Declarations prepared and filed by Defendant had contained references to placement of buildings (CP 130), land use practices and kill traps (CP 209-210), those statements were entirely removed from the Declarants’ signed versions (CP 149, 266). Further, these finalized edits in the Declarations of the USFWS personnel should be taken to indicate that the USFWS employees specifically did not discuss building or land use limitations with the Spillers. The remaining discussion item: “control of invasive plants and haying” is not an unusual restriction affecting construction or remodeling. The Spillers answered the Seller’s Disclosure questions about there being no material defects or unusual restrictions truthfully to their knowledge.

The Brad Thompson letter, USFWS Declarations in their final signed form, and the absence of any documentation to support Plaintiff’s

allegations, demonstrate the Plaintiff presented no evidence that the Spillers ever received information from which they could have reasonably concluded that material defects or unusual building restrictions were in place on their property at the time they signed the Seller's Disclosure and closed the Sale.

At the time of the Seller's Disclosure and Sale, the presence of Mazama Pocket Gophers did not equate with restrictions on the property that would affect future construction or remodeling, and thus there was nothing for the Spillers to disclose. The Spillers did not commit fraud or breach their contract, and Plaintiff was unable to provide anything in his defense against summary judgment to prove otherwise.

*2.1.3 Trial Court did Not Misinterpret Seller's Disclosure Form Requirements under RCW 64.06.020*

RCW 64.06.020 requires the Seller to explain any "yes" answers to the questions on the form which are asterisked. Appellant asserts that the Spillers' were fraudulent (CP 7-8) when answering "no" to the questions about "unusual restrictions that would affect future construction and remodeling" (CP 36) and "existing material defects" (CP 40). Appellant, however, failed to demonstrate that (1) the presence of the gophers caused a material defect or unusual restrictions affecting future construction and remodeling on the subject property at that time, or (2) that the Spillers

knew of but failed to disclose such defects or restrictions caused by the presence of pocket gophers.

Appellant states: “The Spillers answered ‘No’ in total disregard of the instructions by wildlife officials during their September 19, 2013 visit” (Opening Br. 3-4, 7). However, the USFWS personnel identified no such instructions. There is nothing in USFWS Thompson’s September 19, 2013 letter following that site meeting (CP 34) or in the *signed* Declarations of USFWS employees Thompson and Linders stating they discussed any restriction that could affect construction or remodeling (CP 148-149, 187-188, 259, 265-266).

Appellant appears to be arguing that the Trial Court should have determined the mere presence of the pocket gopher to be a material defect and unusual restriction (Opening Br. at 10). The Trial Court properly parsed the issues [quoted above at pp. 6-7] by first applying the summary judgment standard of assuming facts in favor of the non-moving party by presupposing that the Sellers knew the gopher was federally listed as threatened (RP at 6)<sup>2</sup>. The Judge further analyzed the circumstance from his own personal point of view, but ultimately concluded there was, first,

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<sup>2</sup> As a point of clarification, the Court is not overruling the Spillers’ declared statement that they did not know the gophers had been federally listed as threatened (CP 14), but rather is applying the summary judgment standard of assuming facts in favor of the non-moving party.

no evidence linking the threatened species gopher to restrictions affecting construction and remodeling that were in place at the time of Disclosure and Sale, and second, no evidence to show that the Sellers knew about any such restrictions (Opening Br. at 7; RP at 14-16). The Spillers answered the Seller's Disclosure form truthfully with the information they knew at the time.

#### 2.1.4 *Appellant's "Claims" are Not "Facts"*

On appeal to this Court, Appellant is attempting to elevate his claims or speculations as if they were actual evidence and facts. For example, Appellant has misconstrued the Trial Court's question of whether there was evidence about what having a threatened species on the property meant for the property owner at that time, as constituting a disputed material fact in and of itself (see discussion in Opening Br. at 7). The full discussion during the summary judgment motion on this point is:

THE COURT: Okay. Is there any evidence in the record about what having a threatened species on a property meant for a property owner at the time?

MR. MILLER: The testimony of Brad Thompson and his letter are the evidence.

THE COURT: Okay. Anything further, Mr. Miller?

MR. MILLER: That is it at this time.

RP at 8.

Read in context, the Trial Court was asking if Plaintiff had any actual evidence, because the Brad Thompson letter and Declaration, purported to be evidence, clearly are not, since neither the letter nor the signed Declaration identify any building or construction restrictions, and thus do not serve as proof to support Appellant's claims.

Appellant also claims, or speculates, that the USFWS invitation in its September 19, 2013 letter (CP 34) to the Spillers to participate in a voluntary conservation partnership equates to building restrictions that Sellers failed to disclose (Opening Br. 4-5), but again has not identified any actual or inherent restrictions. What is known is that the Spillers did not pursue the conservation partnership, did not know what it entailed, no one asked them again to participate, and in any case were not subject to it (CP 184); hence, there was no defect or unusual restriction caused by the mere invitation to join a voluntary conservation partnership.

The rationale used by the Trial Court for its determination that Plaintiff must produce evidence which, if true, could prove all essential elements of his claims in order to survive summary judgment (quoted above at pp. 6-7) is supported by *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). See also *Greer v. Tonnon*, 137 Wn. App. 838, 843, 155 P.3d 163 (2007) quoting *Young, Id.*, *Doherty v. Mun. of*

*Metro. Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996), and *Celotex*, *supra*.

2.2 Response to Appellant's Allegation that the Trial Court Erred in Denying Plaintiff's Motion for Reconsideration (Appellant's Error 3, and Issue 2)

Although the Trial Court did not identify the reason for its denial of Plaintiff Schumm's Motion for Reconsideration (CP 273), the Spillers' Motion to Strike Plaintiff's Motion for Reconsideration provided compelling procedural and substantive reasons to support its denial (CP 258-272). Appellant identifies that this Court is to review a denial of a motion for reconsideration for an abuse of discretion (Opening Br. at 9). There was no abuse of discretion, however, because Mr. Schumm clearly did not meet the requisite requirements for his motion for reconsideration: Plaintiff Schumm's Motion for Reconsideration failed to comply with Thurston County Superior Court Local Civil Rules 5(d)(1)(E) and 59(b)(1), and Local General Rule 30(c)(1) [copies of the cited Local Civil Rules are attached as Appendix A]. Mr. Schumm's Motion for Reconsideration also failed to both identify and fulfill any of the grounds at Civil Rule 59(a)(1-9) under which a Motion for Reconsideration may be considered, and failed to comply with the time requirements within which it must be filed and served, per CR 59(b) and CR 6.

2.2.1 *Motion for Reconsideration Failed to Show  
Compliance with CR 59(a) Criteria*

Mr. Schumm's Brief in Support of Motion for Reconsideration (CP 202-207) failed to identify any of the nine allowable grounds under CR 59(a)(1-9) for bringing a motion for reconsideration. Plaintiff identified: (1) no irregularity of proceedings; (2) no misconduct of the prevailing party; (3) no accident or surprise which Plaintiff could not have guarded against; (4) no newly-discovered evidence which is materially relevant, and which could not have been discovered prior to summary judgment; (5) nothing to indicate the Court's decision was the result of passion or prejudice; (6) no error in the assessment; (7) no evidence to show the decision was contrary to law; (8) no error in law is identified; and (9) provided nothing to indicate that substantial justice has not been done.

The briefing for Plaintiff's motion for reconsideration (CP 202-207) also missed fulfilling the requirements of CR 59(b) by failing to identify specific reasons in fact and law as to each ground on which his motion was based, and failing to offer any reason why Ms. Linders' Declaration submitted on reconsideration could not have been presented earlier with Plaintiff's response to Defendants' summary judgment motion (CR 56(f)). With the late submission of Mary Linders' signed and

significantly revised Declaration (CP 253-254), Plaintiff Schumm had not presented any new facts or issues that were not already considered by the Trial Court, and failed to present anything new for reconsideration that was not already addressed during the summary judgment motion.

*2.2.2 Motion for Reconsideration was Untimely Made to Trial Court*

In accordance with CR 59(b) and Thurston County Superior Local Civil Rule 59(b)(1), the due date for Plaintiff to file and serve his Motion for Reconsideration and supporting declaration was 10 days after entry of the Trial Court's February 17, 2017 Order<sup>3</sup>, making everything due February 27, 2017. Plaintiff's Motion for Reconsideration was filed one day late on February 28, 2017, as evidenced by the Court's copy-receive stamp (CP 255).

In addition, the Declaration of USFWS personnel Mary Linders that was filed on February 27, 2017 was unsigned. A signed, but significantly revised version, was filed and served February 28, 2017 (CP 253-254), meaning that her Declaration was both filed and served one day past its due date.

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<sup>3</sup> The Trial Court's Order Granting Defendants' Summary Judgment was signed and entered at the conclusion of the motion hearing on February 17, 2017 (RP at 17).

Further, Thurston County Superior LCR 59(b)(1) requires that briefs and declarations in support of a motion for reconsideration be timely filed and served. Under LGR 30(c)(1) if a document is e-filed past 5 p.m., it is considered filed the next business day. While the parties had agreed to accept documents by email, there was no agreement that after-hours service constituted timely service. Defendants were e-served at 6:26 p.m. on February 27, 2017 (CP 261), meaning they were served one day past the last date allowable to file for reconsideration under CR 59(b) and LCR 59(b)(1), and one day past the date they should have received Plaintiff's motion and supporting documents per Civil Rule and Local Civil Rule 59. Plaintiff's Request for Reconsideration clearly failed to comply with local and state court rules.

Due to these many procedural and substantive omissions in his motion for reconsideration, Appellant has provided nothing to demonstrate that the Trial Court's denial of reconsideration constituted an abuse of discretion.

**3. APPELLANT HAS AN UNTIMELY APPEAL, AND THIS COURT IS WITHOUT JURISDICTION TO HEAR IT**

As explained in Paragraph 2.2.2 above, Mr. Schumm submitted an untimely Request for Reconsideration to the Trial Court. Without a valid Request for Reconsideration, his appeal to this Court should have been

submitted within 30 days of the Superior Court's February 17, 2017 Order Granting Defendants' Motion for Summary Judgment (199-201), or by March 20, 2017. It was filed one week after that date.

The Washington Supreme Court, in *Schaeferco, Inc., v. Columbia River Gorge Comm'n*, 121 Wn.3d 366, 849 P.2d 1225 (1993), ruled that a belatedly-served request for reconsideration cannot extend the appellate appeal deadline. Because trial courts do not have the authority to extend the deadline for requests for reconsideration,<sup>4</sup> if a party's motion for reconsideration is untimely, then that party's subsequent appellate appeal must be based on the date of the lower court's original decision, even if the lower court rendered a decision on the untimely request for reconsideration.

The Commission argues that we lack jurisdiction to hear this case because the notice of appeal was untimely....

...

A trial court may not extend the time period for filing a motion for reconsideration....

Schaeferco filed the motion for reconsideration within 10 days of the Superior Court's July 2 order. However, it did not serve the motion on the Commission until July 16 – 4 days past the allowable time limit. Because Schaeferco's motion for reconsideration was not timely, it did not extend the 30-day limit for filing the notice of appeal. As such, the notice of appeal filed on September 9 was well outside the 30-day time limit.

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<sup>4</sup> CR 6(2) states that superior courts do not have discretion to extend the time for taking any action under CR 59(b) [e.g., motions for reconsideration].

...

We recognize that *Schaefco* raises many important issues.... However, it would be improper to consider these questions given the procedural failures of this case.

*Schaefco, Id.*, at 367-368.

Although a dissenting opinion in *Schaefco* argued for an exception to the rule because the party had relied on the trial court's consideration of its motion for reconsideration (*Id.*, at 369), the majority was not persuaded, and *Schaefco* has not been reversed.

In addition to the late service upon Defendants of Plaintiff's motion for reconsideration and supporting brief and declaration, the Spillers have two additional grounds for dismissal of Appellant's appeal due to noncompliance with CR 59, which were not present in *Schaefco*.

First, although Mr. Schumm's brief in support of his motion for reconsideration was filed with the superior court on February 27, 2017 (CP 202), the motion itself was not filed until February 28, 2017 (CP 255).

Second, the unsigned declaration of Mary Linders which was specifically intended to support Mr. Schumm's motion for reconsideration of summary judgment dismissal (CP 208-210), was unsigned and thus invalid.

"Unsigned affidavits should not be considered in ruling on summary judgment motions [citations omitted]" *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). It was

invalid not only because it was unsigned when it was filed on the last allowable day to move for reconsideration, but also because it was significantly different than the subsequently-signed version which was filed too late (CP 253-254). Plaintiff had improperly filed a draft unsigned Declaration of Linders as a placeholder in an attempt to meet the filing deadline. The signed version, however, did not merely substitute the signature page of the unsigned version, but eliminated key elements of support for Plaintiff's request for reconsideration of summary dismissal.

Pursuant to CR 6(d) and 59(b)-(c), LCR 5(d)(E) and 59(b)(1), a timely motion for reconsideration must be accompanied by timely filed, and served, briefing and declarations in support of the request for reconsideration, which Plaintiff failed to do. Further, the *signed* Linders Declaration presented nothing new to support the requested reconsideration, and provided nothing that could not have been previously submitted in opposition to Defendants' Motion for summary judgment. (See discussion above at Section 2.2.2).

Mr. Schumm was fully aware of the Spillers' objections to his late and noncompliant Request for Reconsideration, as evident through their Motion to Strike it (CP 267-272). The Trial Court entered its denial of reconsideration on March 6, 2017 (CP 277). There was adequate time for Mr. Schumm to have filed his Notice of Appeal within 30 days of the date

of the February 17, 2017 Order Granting Summary Judgment (e.g., by March 20, 2017), but he failed to do so, and instead filed one week too late on March 27, 2017.

**4. RESPONDENTS ARE ENTITLED TO AWARD OF FEES**

Appellant has identified that RCW 4.84.330 and the terms of the Parties' Purchase and Sale Agreement, provide for an award of attorneys' fees and costs to the prevailing party (Opening Br. at 11; CP 21). The Spillers believe they have both substantive and procedural bases on which the Court may determine them to be the prevailing party. Respondents request an award under RAP 18.1 to recover their attorney fees and costs incurred in defending against Plaintiff's claims, not only on appeal, but also from the inception of this matter beginning with Plaintiff's Complaint against them, in accordance with the attorney fee provision of the parties' contract.

**5. SUMMARY AND CONCLUSION**

The facts in this case demonstrate that there were no known "material defects" or "unusual restriction on the subject property that would affect future construction or remodeling" caused by the presence of the Mazama Pocket Gopher at the time of the Seller's Disclosure and Sale in 2014, and certainly none known by the Spillers. Plaintiff was unable to

offer any proof for his Complaint that the Spillers committed fraud or breach of contract:

- The USFWS employees who visited the Spillers' property in 2013 and found it had pocket gophers, did not identify any building restrictions, but rather stated the Spillers should continue "control of invasive plants and haying." They also identified no building restrictions when mentioning the voluntary conservation partnership to the Spillers (CP 149, 254).
- The 2014 news release announcing the federal listing of the Mazama Pocket Gopher (CP 45-46) contained nothing to indicate that the threatened-species listing would cause building restrictions, especially not on already-developed properties.
- Plaintiff has provided no evidence that at the time of the Seller's Disclosure and Sale in 2014, there were "material defects" or "unusual restriction on the subject property that would affect future construction or remodeling" and certainly none that were known by the Spillers.
- It was not until June 2015 (seven months after the Sale had closed) that Thurston County issued a news release identifying an Interim Screening Process to require properties to first have site inspections to determine if the gopher was present, as part of the building permit

process; however, even that announcement did not identify any building restrictions if the gopher was found (CP 48-49).

- The Spillers provided evidence to corroborate their position that they knew nothing about additional regulations due to the gopher, and cited to the Western Washington Growth Management Hearings Board's Decision finding that Thurston County had violated public procedures by imposing defacto regulations through the interim screening process which had not undergone any public notification or other procedures to amend the County's codes (CP 86).
- The Trial Court properly granted Defendants' motion for summary judgment, brought under the authority of *Young v. Key Pharm., Inc., supra*, and *Celotex, supra*, on the basis that Plaintiff had provided insufficient evidence to support his case (RP 15-16).
- Plaintiff's Motion for Reconsideration failed to comply with both the procedural and substantive requirements of CR 59 and LCR 59 (see discussion *supra* at pp. 15-18).
- Because Plaintiff's Motion for Reconsideration was untimely, Appellant's appeal to this Court should have been made within 30 days of the Superior Court's February 17, 2017 Order, or by March 20, 2017, but was not filed until March 27, 2017. See discussion *supra* at pp. 18-21).

Respondents ask the Court to find in their favor, and award them attorneys' fees and costs as allowed by the underlying contract and RAP 18.1.

DATED this 31 day of August, 2017.

  
Ben D. Cushman, WSBA #26358  
Attorney for Respondent  
Ben@deschuteslawgroup.com

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be filed with this Court, and electronically served upon Appellant's attorneys of record.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 14 day of August, 2017, in Olympia, Washington.

  
\_\_\_\_\_  
Doreen Milward

Allen Miller  
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mmoc@atmlawoffice.com  
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APPENDIX A

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**THURSTON COUNTY  
SUPERIOR COURT  
LOCAL COURT RULES  
2016**

*Effective September 1, 2016.*

- (F) Subpoenas;
- (G) Abstracts of judgments or filing of a judgment from another jurisdiction;
- (H) Minor settlements; or
- (I) Public Records Act Cases. Public Records Act cases have expedited scheduling under LCR 16, "Pretrial Procedure and Motions."

Further, a party requesting a trial de novo shall obtain a trial scheduling date under the procedure outlined in the Local Mandatory Arbitration Rules (LMAR 7.1).

(3) *Notice of Assignment and Notice of Trial Scheduling.* The court clerk will prepare and file a "notice of assignment and notice of trial scheduling" in accordance with these rules and court policy, on a form that the court approved. The clerk will provide one copy to the plaintiff or petitioner. The notice of assignment and notice of trial scheduling will designate the case title and cause number, the date of filing, the judge to whom the case is assigned, and the date for the trial scheduling.

[Adopted effective September 1, 2010; amended effective September 1, 2011, September 1, 2013, September 1, 2014.]

## LCR 5 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

### (d) Filing.

(1) *Time.* Briefs shall be submitted on the following schedules, unless the court orders otherwise or a state-wide law or rule provides otherwise:

(A) Trial briefs. Trial briefs shall be filed and served at least two days before trial.

(B) Appeals from administrative agency action. The petitioner's brief shall be filed and served not later than 45 calendar days before oral argument. The respondent's brief shall be filed and served 25 calendar days before oral argument. The petitioner's reply brief shall be filed and served not later than 15 calendar days before argument.

(C) Civil motions. Unless otherwise provided in these rules, briefs and all supporting materials for motions shall be filed and served before 12:00 noon, five court days before the hearing. Opposing briefs and materials shall be filed and served before 12:00 noon, two court days before the hearing. Reply briefs shall be filed and served before 12:00 noon, one court day before the date scheduled for hearing.

(D). Dispositive Motions. Motions for summary judgment (CR 56). motions filed under CR 12(b)(6), and motions filed under CR 12(c) shall be filed and served as provided in CR 56 and shall be scheduled on the court's dispositive motion session.

→ (E) Motions for Reconsideration. Motions for reconsideration shall be filed and served as provided in these local rules and state rules governing such motions (CR 59 and LCR 59).

(F) Sexually Violent Predator Annual Review Hearings. Annual review hearings regarding sexually violent predators shall be briefed on a schedule provided by the court when the court approves scheduling the hearing under LCR 7(b)(6).

(k) **Judge's Copy.** A copy of all briefs, attachments and exhibits shall be provided to the judge's judicial assistant at or before the time of filing the originals with the court clerk.

(1) *Generally.* Each judge's copy of a brief shall be identified as the judge's copy and shall identify the date, time, and the judge before whom the matter is scheduled to be heard in substantially the following format in the top left hand corner of the first page. If the brief does not meet these guidelines, it is subject to being returned:

## LCR 59 NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

### **(b) Time for Motion; Contents of Motion.**

 (1) *Procedures for Orders for Reconsideration.* Briefs and affidavits or declarations in support of a motion for reconsideration shall be filed and served when the motion is filed. At the time of filing, the moving party shall provide judge's copies of the motion, brief, affidavit, proposed order, and notice of issue to the judicial officer's assistant. Each judicial officer reserves the right to strike the hearing and decide the motion without oral argument. Moving parties shall comply with the state-wide rule governing reconsideration, CR 59. Briefs and materials opposing a motion for reconsideration, and reply briefs and materials shall be filed in accordance with the local rule for "service and filing of pleadings and other papers" (LCR 5).

[Amended effective September 1, 1994; September 1, 1997; February 9, 1999; September 1, 2000; September 1, 2003; September 1, 2004; September 1, 2007; September 1, 2010; September 1, 2011; September 1, 2013; September 1, 2014.]

## 8. PROVISIONAL AND FINAL REMEDIES (Rules 64-71).

### LCR 65 INJUNCTIONS

#### **(b) Temporary Restraining Order; Notice; Hearing; Duration.**

(1) *Procedure.* A party seeking a temporary restraining order shall appear on the civil ex parte calendar. The judicial officer will assess whether the matter should be heard by the assigned judge. The matter may be heard immediately on the ex parte calendar if appropriate, or may be scheduled for a later time or date.

[Adopted effective September 1, 2010. Amended effective September 1, 2016.]

## 10. SUPERIOR COURTS AND CLERKS (Rules 77-80)

### LCR 77 SUPERIOR COURTS AND JUDICIAL OFFICERS

#### **(o) Divisions of the Court, Assignments and Schedules.**

(1) *Divisions.* The divisions of the court are:

(A) Criminal Division. The Criminal Division will hear all criminal pretrial proceedings, including but not limited to preliminary appearances, arraignments, omnibus hearings and pretrial conferences, pretrial motions, changes of plea, sentencings, and noncompliance. The Criminal Division will also hear unlawful detainer hearings and trials, writs of habeas corpus in criminal matters, petitions for certificates of rehabilitation, and other matters as assigned.

(B) Family and Juvenile Court. The Family and Juvenile Court division will hear all matters brought pursuant to RCW Titles 11, 13, and 26, and truancy petitions filed in Superior Court. Other cases may be heard by the Family and Juvenile Court division as set forth in the Local Rule for Family and Juvenile Court Proceedings (LSPR 94.00).

(C) Trial. The Trial division will hear all civil matters except cases designated as Family and Juvenile Court cases and those special proceedings assigned to a different division by these rules or court order. A judge in this division will hear all matters in the cases assigned to the judge.

LGR 29 PRESIDING JUDGE IN SUPERIOR COURT DISTRICT AND LIMITED JURISDICTION COURT DISTRICT

**(a) Election, Term, Vacancies, Removal and Selection Criteria – Multiple Judge Courts.**

(1) *Election.* The Board of Judges shall elect a Presiding Judge and an Assistant Presiding Judge by majority vote at a Board of Judges meeting held during October or November of odd numbered years. Vacancies in the office of Presiding Judge or Assistant Presiding Judge shall be filled by majority vote of the Board of Judges at the first Board of Judges meeting held after the vacancy is known to exist.

**(g) Executive Committee.**

(1) *Membership.* The judges of the superior court, sitting as a whole as an executive committee, shall advise and assist the Presiding Judge in the administration of the court.

(2) *Liaison Judges.* Each judge shall be assigned responsibility for certain management areas and court functions. The responsibility of the assigned judge is to act as a liaison between the court and others concerned about court management or function. The superior court administrator shall keep a list of the liaison assignments that is available to the public.

[Adopted effective September 1, 2010.]

LGR 30 ELECTRONIC FILING

**(b) Electronic filing authorization, exception, service, and technology equipment.**

(1) The clerk may accept for filing an electronic document that complies with the court rules and the Electronic Filing Technical Standards. Electronic filing of documents and bench copies with the clerk using the Thurston County Clerk's eFile Service or an electronic service provider that uses the Clerk's eFile Service is permitted if the transmission of documents is done in a manner approved by the clerk. All electronically filed pleadings shall be formatted in accordance with the applicable rules governing formatting of paper pleadings, including GR 14.

(2) A document that is required by law to be filed in non-electronic media may not be electronically filed. The following documents must be filed in paper form, not electronically filed:

- (i) Original wills and codicils;
- (ii) Certified records of proceedings for purposes of appeal;
- (iii) Documents presented for filing during a court hearing or trial;
- (iv) Documents for filing in an aggravated murder case;
- (v) Administrative law review (ALR) petitions;
- (vi) Interpleader or surplus funds petitions;
- (vii) Documents submitted for in camera review under GR 15; and
- (viii) Affidavits for writs of garnishment and writs of execution.

(3) Electronic Transmission from the Court.

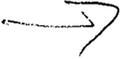
(4) *Attorneys.* The court or clerk may electronically transmit notices, orders, or other documents to all attorneys using the electronic mailbox address shown on the Washington State Bar Association's online Attorney Directory. It is the responsibility of all attorneys to maintain an electronic mailbox sufficient to receive electronic transmissions of notices, orders, and other documents.

(5) *Other parties.* The court or clerk may electronically transmit notices, orders, or other documents to any party who has filed electronically or has agreed to accept electronic documents

from the court by using the electronic address provided to the clerk. It is the responsibility of the filing or agreeing party to maintain an electronic mailbox sufficient to receive electronic transmissions of notices, orders, and other documents.

(6) Documents that are electronically filed do not need to be submitted to the clerk's office for filing on paper, unless paper is required under LCR 30(b)(2). However, parties are required to follow the local court rules regarding judge's copies, LCR 5(k).

**(c) Time for Filing, Confirmation, and Rejection.**

 (1) An electronic document is considered filed with the clerk when it is received by the clerk's designated computer during the clerk's business hours. Any document electronically filed with the clerk by 5:00 p.m. Pacific Time on a business day shall be deemed filed with the clerk on that date. A document filed after 5:00 p.m. or on a non-business day shall be considered filed on the next business day.

(3) The clerk may reject a document that fails to comply with applicable electronic filing requirements. The clerk must notify the filing party of the rejection and the reason therefore. The clerk may also reject a document under its faulty documents policy, which can be found on the clerk's web site.

**(d) Authentication of Electronic Documents.**

(3) *Court Facilitated Electronically Captured Signatures* -- Use of electronic filing by a party or attorney shall constitute compliance with CR 11's signature requirement. Documents containing signatures of third-parties (for example, affidavits and stipulations) may also be filed electronically as set forth in GR 30(d)(2). A copy of the electronically filed document with signatures shall be maintained in paper or electronic form by the filing party and made available for inspection by other parties or the court upon request.

**(e) Filing fees, electronic filing fees.**

(1) All statutory filing fees shall be collected and paid for electronically filed documents according to the methods approved by the Thurston County Clerk.

[Adopted effective September 1, 2013; amended effective October 26, 2015, September 1, 2016.]

LGR 33 REQUESTS FOR ACCOMMODATION UNDER THE ADA

**(b) Process for Requesting Accommodation.**

(1) Requests for accommodation under GR 33 shall be presented to either the Superior Court Administrator or the Assistant Superior Court Administrator, provided, that a need for accommodation that arises less than 48 hours before a scheduled hearing, may be presented to the judicial officer scheduled to hear the proceeding.

[Adopted effective September 1, 2007.]

**DESCHUTES LAW GROUP, PLLC**

**August 30, 2017 - 11:09 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50174-1  
**Appellate Court Case Title:** Ken Schumm, Appellant v. Kenneth Spiller, et al, Respondents  
**Superior Court Case Number:** 16-2-03934-8

**The following documents have been uploaded:**

- 7-501741\_Briefs\_20170830110041D2073276\_2344.pdf  
This File Contains:  
Briefs - Respondents  
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- allen@atmlawoffice.com
- doreen@deschuteslawgroup.com
- lisa@atmlawoffice.com
- mmoc@atmlawoffice.com
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**Comments:**

Respondents Spillers' Response Brief

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Sender Name: Doreen Milward - Email: Doreen@deschuteslawgroup.com

**Filing on Behalf of:** Benjamin D Cushman - Email: Ben@DeschutesLawGroup.com (Alternate Email: )

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