

FILED  
Court of Appeals  
Division II  
State of Washington  
12/19/2019 4:34 PM

Case Number 53127-5 II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

THE GERALDINE A. MANIATIS LIVING TRUST, et Al.,  
Respondents, Cross-Appellants.

v.

MALKIT SINGH et Al., Appellants, Cross-Respondents.

---

ON APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY

The Honorable Edmund Murphy  
Presiding at the Trial Court  
Superior Court Case No. 16-2-11515-8

---

RESPONDENT/CROSS APPELLANT TOSCH'S  
REPLY BRIEF

---

Elizabeth Powell, WSBA No. 30152  
Elizabeth Powell, PS Inc.  
535 Dock Street, Suite 108  
Tacoma, WA 98402  
(253) 274-1518

## TABLE OF CONTENTS

### Page Number

I. ARGUMENT 1

Tosch appeals the Court's determination that there is no water entering her property from the Singh and Minckler properties because that is inconsistent with the evidence provided at trial.

The Court's determination that no water was entering the Tosch property from the Singh/Minckler property was error. Tosch's open ditch is below the grade of the property line, so could not possibly have impacted the flow of the water from the Singh property, because the Singh/Minckler properties are uphill from Tosch's property.

VII. CONCLUSION

This Court should determine the trial Court erred in finding or concluding that the water from Singh's spring was completely re-routed, and also reinstate the trial Court's initial, correct decision to award the Trust and Tosch their fees and costs at the trial court under RCW 4.24.630, and should also award Tosch her fees and costs on appeal.

TABLE OF AUTHORITIES

Washington Case Law

*In re Estate of Reugh*, 10 Wash. App. 2d 20, 51, 447 P.3d 544, 562 (2019). 1

*Olympic Stewardship Found. v. Envtl. & Land Use Hr'gs Office*, 199 Wash. App. 668, 679, 399 P.3d 562, 567 (2017) 3  
Statute

RCW 4.24.630 ..... 1, 4

Rule

Wash. R. App. P. 10.3(a)(6). ....

## I. ARGUMENT

This Court should affirm the trial Court's original findings and conclusions entered December 19, 2018, with the exceptions articulated below. Tosch joins with the Trust in the Trust's argument that Defendants' motion for reconsideration was untimely. Tosch also joins the Trust in its arguments regarding the applicability of RCW 4.24.630.

The Tosch brief contains exact citation to the trial record, including the topographical exhibits admitted which show the slope at issue. Defendants assert that at "no time"<sup>1</sup> was there a northerly pipe running out of the old house, to the pond, and then north to the Tosch property line. The outflow was channelized. See Finding of Fact No. 15, which states that ". . . Water left the pond via a channel and ultimately a four (4) inch concrete drainpipe traveling to the north, depositing the spring and pond outflow onto the Tosch property, and not the Maniatis property". Finding of Fact No. 15.

Defendants on appeal have stopped arguing that "Tosch dug a ditch" and now assert that "Tosch built a berm",<sup>2</sup> but again, there is no evidence that Tosch's ditch re-routed water to the Trust. It couldn't, because Tosch's ditch is literally below the grade of the Trust and the

---

<sup>1</sup> Defendants Response/Reply Brief, P. 26 paragraph 2.

<sup>2</sup> Id, at 34

Minckler and the Singh property lines. Had the Court granted the motion for a site visit, this would have been immediately obvious.

Defendants argue that the Court found groundwater was flowing directly to the Tosch property, when in fact, what the Court found is that the water was re-routed to the Trust property, and thence to the Tosch property. Findings 26, 41, 44, 50, 54, and 56. There is no finding that the water flows downhill to the Tosch property, so the court could not have determined that was not trespass or waste.

Nowhere does the trial court say that the water flowing north does not constitute a trespass or waste, because the trial court found there was no water flowing north. *Id.* This is pure sophistry on the part of Defendants.<sup>3</sup>

The trial court specifically found that the water on Tosch's property is only coming from the Trust property. There is no finding that any water is directly entering the Tosch property from Defendant's property. Findings 26, 41, 44, 50, 54, and 55. Tosch objects to those findings, because they are not supported by any evidence whatsoever. Matt Simpson's testimony was that ground water was interfering with his

---

<sup>3</sup> Defendant's Response Reply Brief, at Page 29.

foundation – at the west end of the Tosch house, several yards west of the intersection of the Tosch, Trust and Minckler properties<sup>4</sup>.

The water emanates from a spring uphill on Defendant’s property. Defendant elected to develop the properties subject to restrictions imposed by the City of Tacoma. Tosch agrees with Defendants that Singh’s construction activities did not cause the water to completely change direction.

The Defendants should be ordered to abate the groundwater they unleashed on the Trust and on Tosch.

Tosch will happily cooperate with a City- approved, engineered plan to drain the groundwater from her property.

Defendant’s argument that this dispute is based on racial animus is not supported by any testimony and critically, was never argued to the trial court. A party may generally not raise a new argument on appeal that the party did not present to the trial court. *In re Detention of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). *In re Estate of Reugh*, 10 Wash. App. 2d 20, 51, 447 P.3d 544, 562 (2019).

Defendants mis-state the trial court’s findings continually in their arguments.

---

<sup>4</sup> Matt Simpson VRP 881:6-11

Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. A reviewing court does not consider claims unsupported by legal authority, citation to the record, or argument. Wash. R. App. P. 10.3(a)(6). *Olympic Stewardship Found. v. Env'tl. & Land Use Hr'gs Office*, 199 Wash. App. 668, 679, 399 P.3d 562, 567 (2017)

## VII. CONCLUSION

This Court should reverse the trial Court's findings that the water is only entering the Tosch property from the Trust property, or return this matter to the trial court with instructions to grant the motion for a site visit. This Court should also reverse the trial Court's finding that the Trust and Tosch are not entitled to their reasonable attorney fees and costs of suit as allowed by RCW 4.24.630.

Respectfully submitted this 19<sup>th</sup> day of December, 2019.

*Elizabeth Powell, PS Inc*

*Elizabeth Powell*  
Elizabeth Powell, WSBA No. 30152  
For Appellants Kerger and Tosch

DECLARATION OF SERVICE

Elizabeth Powell on oath states: On this day, I caused to be delivered to the Court, and to the persons listed below, the attached document via the Washington State Appellate Court's Portal:

Colleen Lovejoy, WSBA No. 44386  
James Fick, WSBA No. 27873  
Schlemlein Fick & Scruggs, PLLC  
66 S. Hanford St., Ste 300  
Attorneys for Singh and Ranjit  
[c.lovejoy@soslaw.com](mailto:c.lovejoy@soslaw.com)  
[jgf@soslaw.com](mailto:jgf@soslaw.com)

Stephen A. Burnham, WSBA No. 13270  
Campbell Dille Barnett  
3175 Meridian Ave  
Puyallup, WA 98371  
Attorney for Appellants/Cross-Respondents  
Minckler  
[steveb@cdb-law.com](mailto:steveb@cdb-law.com)

C. Tyler Shillito  
Matthew C. Niemela, WSBA No. 49610  
Smith Alling, P.S.  
1501 Dock Street  
Tacoma, WA 98402  
[tyler@smithalling.com](mailto:tyler@smithalling.com)

Amy Pivetta Hoffman, WSBA No. 35494  
APH Law PLLC  
PO Box 73040  
Puyallup, WA 98373  
[amy@aphoffman.com](mailto:amy@aphoffman.com)

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Tacoma, Washington this 19<sup>th</sup> day of December, 2019.

*Elizabeth Powell*

Elizabeth Powell WSBA No. 30152

**ELIZABETH POWELL PS INC**

**December 19, 2019 - 4:34 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53127-5  
**Appellate Court Case Title:** Geraldine A Maniatis Living Trust, et al, Resp/Cross-App v. Malkit Singh, et al, App/Cross-Resp  
**Superior Court Case Number:** 16-2-11515-8

**The following documents have been uploaded:**

- 531275\_Other\_20191219163134D2678177\_1880.pdf  
This File Contains:  
Other - Appellant Tosch's Response and Reply Brief  
*The Original File Name was 12 17 19 Appellants response reply Brief.pdf*

**A copy of the uploaded files will be sent to:**

- C.Lovejoy@soslaw.com
- jgf@soslaw.com
- mattn@smithalling.com
- maura@smithalling.com
- steveb@campbellbarnettlaw.com
- tyler@smithalling.com

**Comments:**

---

Sender Name: Elizabeth Powell - Email: powelllaw@comcast.net  
Address:  
535 DOCK ST STE 108  
TACOMA, WA, 98402-4629  
Phone: 253-274-1518

**Note: The Filing Id is 20191219163134D2678177**