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Court of Appeals
Division III
State of Washington

No. 341461

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

YAKIMA AIR TERMINAL – McALLISTER FIELD, an agency of the
City of Yakima and Yakima County, a municipal entity,

Appellants,

v.

RUSSELL HAROLD GILBERT and JANE DOE GILBERT, his wife,
and the marital community comprised thereof; and LYON WEIGAND &
GUSTAFSON P.S.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

More than six years ago, Russell Gilbert – a partner in the Yakima law firm of Lyon Weigand & Gustafson (Mr. Gilbert and the firm collectively referred to as “LWG”) – represented the Yakima Air Terminal-McAllister Field (“YAT”) in an unlawful detainer action against a problem tenant. Through skilled advocacy, Mr. Gilbert won the case at trial. However, the Court of Appeals later remanded the case to the trial court for findings on several issues for which the evidence conflicted, and then reversed the trial court based on those findings.

Facing wrongful eviction claims by its tenant, YAT turned on LWG, claiming that it was to blame for the outcome. But YAT’s complaint provided no information by which to discern what it claimed that LWG did wrong that would have changed the outcome. Instead, YAT alleged only that Mr. Gilbert “failed to meet the minimum standard of care.” CP 5. YAT’s responses to discovery asking it to identify the acts and omissions that formed the basis of its claim were equally evasive. Thus, 15 months after YAT made claims in litigation that gave it the right to pursue discovery regarding its claims against LWG, and nine months after LWG produced its files to YAT, LWG scheduled a summary judgment hearing and moved to compel a response to its discovery. At the same time, it asked that YAT not be allowed to take Mr. Gilbert’s deposition until it adequately answered LWG’s discovery, so that

Mr. Gilbert would have *some* inkling of what YAT claimed he did wrong in preparing for deposition, rather than face inquisition by ambush. The Court granted that motion, but did not otherwise limit YAT's discovery rights; it had full ability to seek documents, or depose or interview other witnesses (including its own employees) with knowledge of the underlying events.

YAT did not supplement its response in the months between when the Court ordered it to do so and the date to file summary judgment under the agreed schedule. Nor did it pursue other discovery. Thus, LWG filed its motion, challenging three elements of YAT's claim: breach, causation and damages. LWG pointed to the lack of response to its discovery, or otherwise of evidence of a breach of duty by Mr. Gilbert that would have produced a different outcome. In response, by then having had *17 months* to build its case, YAT submitted a lone expert's declaration opining as to what he would have done differently. Literally nothing else. It submitted no *evidence* of the underlying events. Nor did the expert opine that no reasonable attorney would have presented the case as LWG did, or how the expert's approach would have produced a different outcome. Nor did YAT seek a CR 56(f) continuance prior to or during oral argument (such a motion hastily brought after oral argument was properly denied). Based on the record – or lack thereof to be more precise – Judge Elofson granted summary judgment.

YAT belatedly sought a do-over, seeking reconsideration based on a supplemental expert declaration and declarations from two former YAT employees – nothing it could not have previously and timely submitted in response to LWG’s motion. These additional and untimely materials were improperly submitted under CR 59, largely inadmissible under CR 56(e), and failed to create a genuine issue of material fact in any event. Judge Elofson properly exercised his discretion to deny that motion.

YAT now appeals to save its broken case. But its arguments fail. Simply put, YAT failed to timely offer admissible evidence to establish questions of fact on all three challenged elements of its malpractice claim, and seeks only to engage in a fishing expedition by deposing Mr. Gilbert to discover such evidence – information it should have had before filing suit in the first place. The trial court’s rulings and dismissal on summary judgment should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in compelling YAT to respond to discovery asking it to identify the acts or omissions on which its claims were based, and precluding it from deposing Mr. Gilbert until it did so?

2. Did the trial court properly dismiss YAT’s claims against LWG for lack of evidence creating a question of fact on all challenged elements (breach, causation and damages), where YAT submitted no evidence

of the underlying events, and offered only an expert's declaration who did not opine that no reasonable attorney would have proceeded as did Mr. Gilbert, how Mr. Gilbert's actions caused the result, or what he should have been done differently that would have changed the outcome?

3. Did the trial court abuse its discretion in denying YAT's motion for a continuance under CR 56(f) where YAT's motion was untimely, and did not justify its delay in seeking the evidence, or identify what evidence it sought to obtain and could not timely offer in response to LWG's motion?

4. Did the trial court abuse its discretion in denying YAT's motion for reconsideration where YAT improperly submitted new evidence, much of which was inadmissible under CR 56(e), and where that evidence in any event failed to create an issue of material fact on all challenged elements?

III. STATEMENT OF THE CASE

YAT's recitation of the "facts" in its brief is a distorted narrative of the chronology that this case has run. Following are the undisputed facts as supported by *admissible* evidence, in proper sequence.

A. The Unlawful Detainer Action

This lawsuit arose out of an unlawful detainer action YAT brought against M.A. West Rockies Corporation ("M.A. West") in March 2010 – *more than six years ago* (the "Unlawful Detainer Litigation"). CP 907-11. M.A. West owned property abutting the YAT airfield on which it operated a

business supporting private plane uses (“fixed base operator” or “FBO”). It leased land from YAT through which M.A. West and its clients accessed the airfield. When M.A. West missed another rent payment (it was chronically late), YAT hired LWG and Mr. Gilbert to give notice of default and to pursue an unlawful detainer action when payment was not apparently received until Monday, March 29, 2010 (a check was slipped under the office door sometime between when YAT’s office closed on Friday, March 26, and when it reopened on the following Monday). M.A. West contended that it had tendered the rent on Friday, March 26, i.e., within a grace period; YAT contended that the payment was not tendered until the following Monday, and was inadequate in any event, such that the date of tender was not dispositive. Evidence on the date of tender was conflicting, as discussed below. At trial, Judge Lust of the Yakima Superior Court granted YAT’s request for unlawful detainer in June 2010. CP 797-98.

M.A. West appealed, but did not secure the judgment pending appeal. YAT eventually proceeded with the eviction by erecting a fence between M.A. West’s property and the leased property. Nearly two years after the trial court ruled, in January 2012, the Court of Appeals decided that the date of tender *did* matter, among other things, and remanded the case for a determination of that and other disputed factual issues. CP 712-13. *Had the evidence of the date of tender been undisputed, as YAT now claims, there*

would have been no need to remand the case for such factual findings!

Judge Lust made findings on those issues, and nearly two years after remanding the case (and nearly 3 ½ years after the original trial court ruling), in December 2013, the Court of Appeals reversed the result at trial based on those findings. CP 722-23. As a result, M.A. West eventually counterclaimed against YAT for wrongful eviction, claiming that the eviction destroyed M.A. West's FBO business and sought approximately \$10 million in damages, *even though such claims are foreclosed because it failed to secure the judgment on appeal!*¹ M.A. West's lender, the Lockwood Foundation, also sued YAT, claiming that it had also breached the lease by failing to give it 30

¹ “[A] trial court judgment is presumed valid, and unless the judgment is superseded, a judgment creditor has specific authority to execute on that judgment.” *Spahi v. Hughes-Northwest, Inc.*, 107 Wn. App. 763, 769, 27 P.3d 1233 (2001) *modified*, 33 P.3d 84 (Wash. Ct. App. 2001). While an appellant “is not obligated to supersede a judgment from which it is appealing,” it must “post security if it desires to stay enforcement of an adverse judgment pending appeal.” *Id.* at 770. A litigant who has failed to supersede a judgment related to loss of property is only entitled to restitution in the event that the trial court’s ruling is later overturned on appeal. RAP 12.8. Stated otherwise, the litigant is only entitled to be restored with possession of the property, or to receive whatever proceeds the judgment creditor obtained in disposing of the property. The litigant is not entitled to damages for loss of use of the property. *See, e.g., State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 47-48, 802 P.2d 1353 (1991) (where property had been seized and sold during appeal and could not be restored, court awarded plaintiff proceeds from sale but not lost income resulting from the seizure); *see also, Malo v. Anderson*, 76 Wn.2d 1, 5, 454 P.2d 828 (1969) (“A supersedeas bond does not operate against a judgment but against its enforcement. . . . If appellant’s knowledge of the pending appeal prevented her from doing anything with the property, except at her own risk, the appeal itself would act as a supersedeas.”).

days' notice of the default prior to pursuing the unlawful detainer action, and that by wrongfully evicting M.A. West, caused it to default on more than \$4 million in loans owed to Lockwood.

B. The Legal Malpractice Claim

Faced with these claims, YAT discharged LWG and then turned on it. Of course, YAT had access to its own files and witnesses, such that it could have pursued informal discovery regarding whether it had claims against LWG no later than December 2013, when the Court of Appeals reversed the trial court. Then in June 2014, YAT pled as affirmative defenses in two cases that Lockwood's and M.A. West's damages were caused by negligence on LWG's part. At that point, YAT had full authority under the civil rules to pursue discovery in support of that defense. Indeed, LWG produced its files to all parties in late 2014, in response to a subpoena duces tecum from Lockwood in the Unlawful Detainer Litigation. CP 1017-21.

Several months later, on February 9, 2015, YAT sued LWG for legal malpractice. CP 3-7. Yet despite having had access to its own files and witnesses for years, and to LWG's entire file for several months, the Complaint offered no information by which to understand what YAT claimed LWG did wrong. Instead, it noted that the trial court's ruling was reversed on appeal, and made the conclusory allegation that Mr. Gilbert "failed to meet the minimum standard of care of reasonable real estate-eviction lawyers in

the State of Washington in the same or similar circumstances.” CP 5. That single statement is the entirety of YAT’s negligence allegations. It failed to articulate any act or omission on Mr. Gilbert’s part that caused the outcome of the case, or what he should have done differently that would have produced a different outcome. Indeed, the Complaint failed to note that YAT – with Mr. Gilbert as its attorney – *actually prevailed at the trial court level*.

C. **The Motion to Compel and the Protective Order**

Faced with such sparse allegations, LWG served discovery directed to that precise question on February 17, 2015, less than ten days after being sued. YAT’s response on May 14, 2015, was no less opaque, as follows:

INTERROGATORY NO. 3: Identify each act or omission on the part of any Defendant that you claim fell below the standard of care.

ANSWER: Objection. This interrogatory calls for expert testimony by expert witnesses as to the standard of care. Additionally, defendant seeks a legal opinion from a lay-entity. Without waiving that objection, plaintiff incorporates by reference the Court of Appeals Division III unpublished decision of December 10, 2013 in the case *Yakima Air Terminal – McAllister Field v. M.A. West Rockies Corporation*, Court of Appeals Division III Cause No.: 29306-8-III.

CP 1024. Again, YAT failed to identify a single negligent act or omission on LWG’s part that caused the negative outcome on appeal, or what LWG could have done differently so that YAT would have prevailed.

Three months passed, during which YAT pursued no discovery in support of its claims. But in late August, after LWG initiated the meet and

confer process regarding YAT's non-response to LWG's discovery, YAT noted Mr. Gilbert's deposition. CP 1030-31. When LWG expressed that it needed YAT to respond to Interrogatory No. 3, in order to be able to prepare Mr. Gilbert for deposition, YAT declined to respond further. CP 1034. In the same email, LWG confirmed YAT's agreement to a summary judgment hearing in December 2015. YAT knew a dispositive motion was coming.

LWG then moved to compel YAT to respond to Interrogatory No. 3, and for a protective order prohibiting it from deposing Mr. Gilbert until it had done so. The thrust of the motion to compel was straightforward – YAT's complaint and interrogatory response provided no notice as to the nature of the claims against LWG. Without notice of what negligence he allegedly committed, LWG could not prepare a defense, had no way to prepare Mr. Gilbert for a deposition in which his conduct would be scrutinized, and indeed was prejudiced in those regards. In response, YAT claimed that it needed to depose Mr. Gilbert before it could respond further to Interrogatory No. 3. Stated otherwise – YAT impermissibly sought to use the discovery process to meet both its pleading and discovery obligations. In so doing, it put the cart before the horse, as those obligations arose many months before it sought to depose Mr. Gilbert. In truth, YAT sought to ambush Mr. Gilbert in the sort of unfettered fishing expedition barred by the Civil Rules.

On September 25, the trial court ordered YAT to answer Interrogatory

No. 3 “and to identify with specificity the acts or omissions giving rise to this action for legal malpractice that it claims fell below the standard of care.” CP 179. The order further “precluded [YAT] from taking the deposition of Defendant Russell Gilbert unless and until” it responded to “Interrogatory No. 3 in the manner identified above.” *Id.* But Judge Elofson did not prohibit YAT from seeking documents, or deposing other witnesses, or otherwise preventing YAT in building its case with testimony of witnesses other than Mr. Gilbert. He only required that YAT comply with its pleading and discovery obligations under the Civil Rules before examining Mr. Gilbert.

D. The Motion for Summary Judgment

Well aware that LWG would be filing a dispositive motion in November, YAT nevertheless did not supplement its answer to Interrogatory No. 3 or pursue any other discovery. LWG moved for summary judgment, arguing that there was no evidence sufficient to create a question of fact on three of the four elements of YAT’s legal malpractice claim: breach of duty; causation (including proximate cause); and damages. CP 182-87. To defeat the motion, YAT needed to offer evidence of the underlying events, what LWG did that fell below the standard of care, and how, in the absence of such negligence, YAT would have prevailed on appeal.

YAT’s opposition utterly failed in those regards. First, and perhaps at the most elemental level, it offered no actual – and admissible – fact evidence

of the underlying events. It submitted no testimony of current or former employees or other fact witnesses as to what had happened, or advice given by Mr. Gilbert. It submitted no documents related to the engagement – despite having had LWG’s file for nearly a year, as well as its own files. Nor did YAT seek relief under CR 56(f). Its evidentiary response consisted only of a lone declaration from Evan Loeffler, an expert with no testimonial knowledge of the underlying facts, who opined – in vague and conclusory fashion – that Mr. Gilbert’s work fell below the standard of care in various respects. In that regard, it is notable that as to various issues of trial judgment and strategy, Mr. Loeffler did not opine that no reasonable Washington attorney would have made the same choices as did Mr. Gilbert. And more significantly, Mr. Loeffler addressed only the element of breach, and did not address causation or damages: i.e. how, had Mr. Gilbert done things differently, the outcome on appeal would have differed. These omissions in the record – the lack of fact evidence, the matters regarding which Mr. Loeffler did not opine, and thus why the record did not create a question of fact, were addressed in detail in LWG’s reply. CP 203-13.

E. YAT Belatedly Files a CR 56(f) Motion and Judge Elofson Grants Summary Judgment

At the conclusion of oral argument on Friday, December 11, 2015, Judge Elofson did not deny the motion, but rather took it under advisement and stated that he would issue a ruling on the following Friday, December 18. RP 41:20-24. Apparently, and belatedly, realizing based on the exchange in oral argument that it had not met its burden under CR 56, YAT filed a CR 56(f) motion the following Tuesday, December 15, asking that it be heard on shortened time on Thursday, before Judge Elofson ruled on Friday. CP 216-17. The sole basis for the motion was that YAT had not yet deposed Mr. Gilbert. CP 222-29. Of course, the motion was untimely, as the Civil Rules require such motions to be brought *in advance* of a summary judgment hearing. But more to the point, YAT failed to justify why it had not deposed Mr. Gilbert or identify what facts it expected to establish in his deposition that could not be proven with other available evidence. It simply asked the court for leeway to engage in a fishing expedition. In effect, the CR 56(f) motion was yet another attempt to end-run the prior discovery order requiring that YAT first respond to Interrogatory No. 3, to develop some factual basis for its claims, which it should have had *before filing suit*.

Judge Elofson denied YAT's CR 56(f) motion, and the next day granted LWG summary judgment and dismissed the case. In his oral ruling,

Judge Elofson discussed the progression of the case, including YAT's failure to respond to Interrogatory No. 3. RP 44:15-45:18. He then discussed the various points raised in Mr. Loeffler's declaration, concluding:

There are suggestions of breach, but no identifiable breach. I can't find that anything that Mr. Gilbert did was actually the cause of the damage. And I don't think – see that Loeffler asserts any such. It's possible that there was, but I can't find anything that would allow me to make that conclusion. And it puts me in a bit of a quandary where I'm trying to guess what may or may not have happened, and I don't believe that that raises a fact. *There are no facts for me to rely on. There are only some assertions by Mr. Loeffler. And I can't -- because I can't find any causation, I can't really identify how Mr. Gilbert damaged anything.* . . . So I'm granting the motion for summary judgment.

RP 51:25-52:17 (emphasis added).

F. Judge Elofson Denies YAT's Motion for Reconsideration

Having failed to articulate a basis for its claims in response to discovery, as ordered by the Court, then having failed to meet its burden in opposing LWG's motion for summary judgment, YAT tried for a third bite at the apple. On December 28, 2015, it moved for reconsideration, submitting a new declaration from Mr. Loeffler, as well as declarations from two former YAT employees. CP 371-75, 474-840, 376-96, 397-400. But it offered no explanation as to why it failed to offer these materials in response to discovery or to LWG's motion.

As discussed below, YAT's motion was procedurally defective, and

factually insufficient to warrant reconsideration. First, YAT improperly submitted new evidence that it could have submitted in timely opposition to LWG's summary judgment motion, but didn't. Second, Mr. Loeffler had no testimonial knowledge of most of the documents attached to his supplemental declaration, rendering them inadmissible under CR 56(e). Third, the "facts" and opinions expressed in the declarations of Mr. Loeffler and the YAT employees failed to raise a genuine issue of material fact on all of the challenged elements. Specifically, they failed to link alleged breaches of duty to the outcome of the case. Judge Elofson denied YAT's motion for reconsideration on February 2, 2016, and subsequently entered final judgment and awarded LWG its costs. CP 843-45, 881, 1082-92.

IV. ARGUMENT

A. The Standard of Review

The Court's ruling on LWG's summary judgment is reviewed de novo. "The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The appellate court should uphold summary judgment whenever – as here – "the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Hutchins v. 1001*

Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 (1991).

The Court's other rulings on LWG's motion to compel and for protective order, YAT's CR 56(f) motion, and its motion for reconsideration, are not subject to de novo review, but rather are reviewed for an abuse of discretion. A trial court's discovery order is reviewed for "abuse of discretion." *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 73, 265 P.3d 956 (2011). "Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). An appellate court will find an abuse of discretion only on a clear showing that the court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006).

B. The Trial Court Properly Compelled YAT to Answer Interrogatory No. 3 and Precluded It From Deposing Mr. Gilbert Until It Did So

YAT claims that Judge Elofson's order prohibiting it from deposing Mr. Gilbert until it responded to Interrogatory No. 3 was a sanction of some kind. It is wrong. The Court's order merely recognized that YAT had failed to comply with its pleading and discovery obligations under the Civil Rules, and that a defendant is entitled to some notice of the nature of the claims

against it, and to a response to previously served discovery directed to that issue, in order to defend itself and prepare for examination in deposition.

YAT's Complaint failed to articulate *any* act or omission on Mr. Gilbert's part that fell below the standard of care; it simply averred in conclusory fashion that Mr. Gilbert "failed to meet the minimum standard of care of reasonable real estate-eviction lawyers in the State of Washington." CP 5. Rather than go to the time and expense – and burden on the Court – of motion practice under CR 12(e), which LWG was under no obligation to do, LWG pursued the information to which it was entitled through discovery. Within a few days of being served, LWG served Interrogatory No. 3, requesting that YAT "[i]dentify each act or omission on the part of any Defendant that you claim fell below the standard of care." CP 1024. LWG did not ask YAT to explain how or why any particular act or omission fell below the standard of care, but only to identify *what* acts or omissions formed the basis for its claim. It was a simple question to which LWG was entitled to a straightforward response, especially given that YAT had at that point sued LWG and presumably had some CR 11 basis for doing so.

CR 26 explicitly permitted LWG to inquire into "any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Doe v. Puget Sound Blood Cent.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). The broad scope of CR 26 is specifically designed to "provide parties

with the opportunity to learn more detailed information about the nature of a complaint.” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). In effect, all Interrogatory No. 3 asked YAT to do was comply with its pleading requirements under CR 8, pursuant to which LWG was entitled to “fair notice of what the claim is and the ground upon which it rests.” *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (quoting *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986)). YAT failed to identify even one act or omission giving rise to its claims in its complaint or in response to well framed discovery. YAT’s blanket assertion that it “satisfied the notice pleading requirement of CR 8(a)” is incorrect. Appellant’s Br. at 24.

This failure cannot be justified. Like Mr. Gilbert, YAT was involved in the Unlawful Detainer Litigation from beginning to end. It had access to all of its own witnesses and its own files. It had the opportunity to engage in informal discovery for years before facing LWG’s summary judgment motion. It had formal discovery available to it for 17 months prior, and was provided with LWG’s files before it sued and nearly a year before LWG’s motion. Under CR 11, YAT could not have filed suit without being able to articulate some response to Interrogatory No. 3, even if discovery might reveal further grounds for suit. It was obligated to plead those facts sufficiently to give LWG notice of the nature of the claims against it in the

Complaint, and whatever was pled, to disclose the basis for its claims in response to proper discovery. It failed, utterly, to do so.

Under these circumstances, the Court's order compelling YAT to answer Interrogatory No. 3, and precluding it from deposing Mr. Gilbert until it did so, was no "sanction." It was a legitimate exercise of the Court's authority to compel discovery, and to grant protective orders "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the discovery not be had [or] . . . may be had only on specified terms and conditions, including a designation of the time or place [or] . . . by a method of discovery other than that selected by the party seeking discovery." CR 26(c). The Court did not "exclude testimony as a sanction" for violation of a discovery order, and thus the *Burnett* factors do not come into play. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494-96, 933 P.2d 1036 (1997). It merely recognized that YAT had failed to comply with its pleading and discovery obligations, and that LWG had a right to "fair notice" of YAT's claim before Mr. Gilbert was deposed, so that he would not be prejudiced in preparing for examination. While the Civil Rules permit plaintiffs to discover information related to their claims, they are also designed to protect litigants from unsupervised "fishing expeditions." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 629, 818 P.2d 1056 (1991). LWG was entitled to have some idea of

what YAT claimed that Mr. Gilbert did – or didn’t do – that would have produced a different outcome, so that its most critical witness could prepare for examination on those subjects. Judge Eloffson articulated precisely this principle in his oral ruling:

The path that this case seems to have taken and culminating, I guess, with a motion for summary judgment, started to a certain extent with my order of – in September of this year, when I said that before Mr. Gilbert could be deposed, that the question regarding the allegation or the factual -- at least an assertion of what the -- what he did wrong had to be complied with in answer to the interrogatories.

. . . I guess I put it under the category of you’ve pointed your finger at this particular lawyer and said, ‘You’ve done me wrong,’ and I think you have a duty to say how you done him wrong, or how he did you wrong, rather, before you take his deposition.

RP 44:16-45:8.

There is no question that LWG was entitled to an answer to Interrogatory No. 3. Moreover, and particularly given the dearth of facts articulated in the Complaint, it was entirely reasonable and on very tenable grounds for the Court to require that YAT do so before expecting Mr. Gilbert to be able to answer questions about some aspect of a trial that took place over five years earlier, or an appeal briefed and argued more than three years earlier. YAT had ample sources of information upon which to articulate some basis for its complaint prior to examining Mr. Gilbert, and was not entitled to “hide the ball” in this fashion so as to ambush him in deposition. LWG

propounded Interrogatory No. 3 *six months* before YAT requested Mr. Gilbert's deposition. Mr. Gilbert, who was sued personally, was entitled to an opportunity to focus his preparation on whatever it was that YAT claimed he did wrong (to say nothing of seeking discovery and otherwise preparing a defense to the claim). If YAT had a CR 11 basis for filing suit, it was not entitled to shield that from the light of day until after it deposed Mr. Gilbert. Judge Elofson's order requiring YAT to respond to Interrogatory No. 3 before deposing Mr. Gilbert was well within his discretion.

C. The Trial Court Properly Granted Summary Judgment

A legal malpractice plaintiff must prove four elements:

(1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in the state of Washington. *Id.* at 261.

The mere fact that a client did not prevail is not proof of negligence on the part of counsel. "In the analysis of any legal negligence claim it is

important to understand that an attorney is not a guarantor of success and is not responsible for a ‘bad result’ unless the result was proximately caused by a breach of the attorney’s duty of care.” See *Clark Cnty. Fire Dist. No. 5 v. Bullivant Houser Bailey*, 180 Wn. App. 689, 701, 324 P.3d 743 (2014).

Consequently, the ultimate result of a case generally is irrelevant in evaluating whether an attorney’s conduct breached the duty of care. *Id.*

Further, “mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.” *Halvorsen v. Ferguson*, 46 Wn. App. 708, 717, 735 P.2d 675 (1986). Such matters are actionable only if no reasonable attorney would have taken such action under the circumstances. *Clark Cnty.*, 180 Wn. App. at 706 (merely providing expert opinion that judgement was erroneous or that attorney should have made different decision is not enough; expert must do more than disagree with attorney’s decision and must submit evidence that no reasonable attorney would have made same decision).

Finally, to prove proximate cause, a plaintiff must show that he or she would have prevailed or at least achieved a better result ***but for the attorney’s negligence***. *Estep v. Hamilton*, 148 Wn. App. 246, 256, 201 P.3d 331 (2008).

Thus, in order to avoid summary judgment, YAT had to offer evidence sufficient to create a genuine issue of material fact of (1) acts or omissions of Mr. Gilbert and LWG in the course of representing YAT at trial and on appeal in the Unlawful Detainer Litigation that (2) were not mere

errors in judgment or in trial tactics, (3) fell below the standard of care, and (4) but for which YAT would have prevailed on appeal. YAT failed to meet this burden in response to LWG's motion.

First, *it offered no factual evidence at all!* It submitted no declarations or depositions of current or former employees or third-party fact witnesses with knowledge of the engagement, nor documents related to LWG's work. Its "evidence" consisted of a lone expert declaration by Mr. Loeffler, who professed to have reviewed the complaint, the YAT/Noland Decoto Lease, the assignment of the Lease to M.A. West, the notice of default, transcripts from the trial, and unpublished appellate decisions in the underlying case. CP 195-202. None, save the appellate opinions, were in the record. He cited no interviews with YAT employees or other witnesses, or information provided to him by counsel, or any other evidence as the basis for his opinions. Nor did YAT offer such evidence independently. YAT cannot meet its burden at trial, or on summary judgment, simply by calling an expert and resting its case, without offering evidence of the underlying events.

Second, Mr. Loeffler's conclusory opinions did not create questions of fact on all elements. His ultimate opinions were stated as follows:

6. Based on my review of the above, my opinion is that Mr. Gilbert did not exercise the minimum standard of care for a landlord-tenant attorney when bringing and prosecuting an unlawful detainer action on behalf of Yakima Air Terminal-McAllister Field against its tenant, M.A. West Rockies

Corporation, Yakima County Superior Court case no. 10-2-00989-1.

and:

17. In my opinion, after a lawyer unfamiliar with the relevant terms of the lease or the fundamentals of landlord-tenant law has not demonstrated or complied with the minimum standard of care required of an attorney skilled in the area of landlord-tenant law in the State of Washington.

CP 196, 199. These conclusory opinions, standing alone or as marginally illuminated in the balance of his declaration (discussed below), were inadequate to carry YAT's burden of proof. Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689 (1993). An affidavit that fails to identify *facts* (as opposed to unsupported speculation or conclusions) is inadequate to create a question of fact precluding summary judgment. *Id.* at 25-26. The "facts" referenced in Mr. Loeffler's declaration have no support in the record and reflect only his speculation as to the underlying events, based only on the ultimate outcome. Negligence cannot be inferred simply based on the fact of a negative outcome. *Id.* at 26. As to matters of trial judgment and strategy, Mr. Loeffler did not opine that no reasonable attorney would have handled the case as did Mr. Gilbert, but rather only that he disagreed with Mr. Gilbert's decisions. Finally, and significantly, Mr. Loeffler *never* addressed the issues of causation or damages. His declaration was barren of

any opinion at all that but for Mr. Gilbert’s alleged errors, YAT would have prevailed on appeal, or how those errors otherwise injured YAT.

YAT’s reliance on *Woodward v. Lopez*, 174 Wn. App. 460, 300 P.3d 417 (2013), for the proposition that Mr. Loeffler’s declaration was sufficient to defeat summary judgment, even absent supporting fact evidence, is misplaced. There, the parties disputed whether an implied easement was created when a parcel of land was divided. The plaintiff submitted a detailed declaration from an environmental expert who analyzed the property and opined that an easement must have been intended because other areas of the property were wetlands over which to build any sort of road would have been “prohibitively expensive.” *Id.* at 472. The expert opinion, *along with other factual evidence*, was sufficient to defeat summary judgment because it was a highly detailed analysis of the land in question, and drew rational conclusions based on that analysis. Unlike Mr. Loeffler’s declaration, the expert report was not merely a series of conclusory allegations and unfounded opinions.

A brief analysis of the matters that Mr. Loeffler identified as falling below the standard of care underscores that summary judgment was proper.

1. The Alleged Defect in the Notice of Default Did Not Affect the Outcome of the Case Because M.A. West Did Not Raise It As a Defense

Mr. Loeffler first opined that the Notice of Default Mr. Gilbert sent on March 15 was “defective on its face” because it did “not contain the

necessary alternative language to pay rent ‘or vacate.’” CP 197 ¶ 9. He claimed that “ample case law” (never cited) holds that a landlord cannot pursue an unlawful detainer based on a notice without such language. Mr. Loeffler is incorrect,² but this is an academic issue because there was no evidence (nor did Mr. Loeffler express an opinion) that this affected the outcome of the case. Indeed, since M.A. West did not raise this issue as a defense (it challenged only whether notice was properly served, not the form of notice), it could not have affected the outcome as a matter of law, even if Mr. Loeffler is right (and he isn’t).

2. **There Was No Evidence That Failure to Give Noland Decoto, the Original Lessee, Notice of M.A. West’s Default Affected the Outcome of the Case**

Mr. Loeffler next observed that the Notice of Default did not reflect notice of M.A. West’s default given to Noland Decoto Flying Services, the original lessee, and that “[u]nder the terms of the assignment, Noland Decoto is still liable in the event of a breach” and “may have been able to cure the breach of lease with notice.” CP 197 ¶ 10. Apparently, no one told Mr. Loeffler that the Lease was acquired by M.A. West *out of Noland Decoto’s bankruptcy*, in which Noland Decoto was adjudged bankrupt and its obligations under the Lease discharged. CP 207 n.3. Further, this was also not

² Mr. Loeffler’s contention is incorrect as a legal matter, as discussed below in addressing Mr. Loeffler’s supplemental declaration submitted with YAT’s motion for reconsideration. *See infra*, Section E (4) at 45-46.

raised as a defense. Nor is there evidence that Noland Decoto could or would have cured the default had it been given notice. Once again, there is no proof that the failure to give Noland Decoto notice of default affected the outcome.

3. There Was No Evidence That YAT Told LWG That M.A. West's Lender (Lockwood) Was Secured by the Lease or Asked LWG to Give Lockwood Notice of Default

Mr. Loeffler next opined that LWG breached the standard of care because it did not give Lockwood, M.A. West's lender, 30 days' notice of M.A. West's default, which Paragraph 3 of the Lease required be given to any mortgagee of the Lease before commencing any unlawful detainer action." CP 198 ¶ 14. He claimed to have been informed (but cited no evidence, nor was evidence offered) that YAT "was aware there was a mortgage" and that the failure to notify the mortgagee "would have been a defense to an unlawful detainer action." CP 198-99 ¶ 14.

This contention was flawed on multiple levels. First, as was the case regarding the prior matters, there is no evidence that M.A. West raised this as a defense, and thus by definition it did not affect the outcome of the case. Nor is there evidence that Lockwood would have timely cured M.A. West's default had it been given notice. Indeed, *if* YAT in fact knew that Lockwood was secured by the Lease (as opposed to the abutting property owned by M.A. West), there is no evidence that it shared that information with Mr. Gilbert, asked him to inquire into that issue, or sought his advice in that

regard. YAT had its own files and access to its own witnesses, and LWG produced its files to YAT nearly a year before it moved. If there was evidence that LWG had reason to know that Lockwood was secured by the Lease (as opposed to the abutting property), or that YAT sought its advice about Lockwood's entitlement to notice, surely such evidence would have been submitted in response to LWG's motion. None was offered. Mr. Gilbert cannot be criticized for not giving notice to a mortgagee of the Lease of which it had no reason to know. And since it was not raised as a defense and there is no evidence Lockwood would have cured the default had it been given notice, there is no proof that failure to give it notice affected the outcome of the case.

4. There Was No Evidence That Giving M.A. West Ten Days' Notice of Default, Rather Than Three, Breached the Standard of Care or Affected the Outcome of the Case

Finally, in perhaps the most unclear portion of his opinions, Mr. Loeffler observed that the Notice of Default gave M.A. West ten days to cure its defaults, rather than the three days' notice required under the Lease and under RCW 59.12.030(3) for nonpayment of rent. CP 197-98 ¶ 11. He further noted that RCW 59.12.040 requires a landlord to wait one additional day before filing suit if service is made by posting and mailing, thus extending the ten days' time to cure until March 26, 2010, and that the Lease required three additional days if service is made by mail (thus extending the time to

cure until March 28, 2010). *Id.* ¶¶ 12-13. He claimed that in the transcript he reviewed (but was not offered into evidence), Mr. Gilbert “[r]epeatedly . . . states that rent was not received until the eleventh day after service of the notice” and that the transcript “is quite clear that the payment was tendered on March 26, 2010, which was a timely tender.” *Id.* ¶ 12; *see also* CP 199 ¶ 15 (transcript makes evident that the tenant complied with the notice in a timely manner). Based on this, he makes a quantum leap to conclude that Mr. Gilbert did not read the Lease. CP 197-98 ¶¶ 11-13.

That is rank speculation on his part, of course; there is no evidence that Mr. Gilbert did not read the lease since YAT didn’t answer Interrogatory No. 3 as the Court ordered and thus did not depose Mr. Gilbert. Nor would there be such evidence even had Mr. Gilbert been deposed. Moreover, a review of the Court of Appeals decisions reveals inherent fallacies in Mr. Loeffler’s speculative conclusions. Those rulings reflect that the breaches of the Lease Mr. Gilbert asserted at trial were not limited to the nonpayment of rent, but also the failure to timely replenish the deposit. CP 697-723. RCW 59.12.030(4) requires ten days’ notice for breaches other than nonpayment of rent. Nor is it clear which notice period governs the failure to replenish a deposit that was or can be applied to outstanding rent. The appellate rulings also reflect that notice was served by posting as well as by mail, rendering the Lease provision regarding service by mail irrelevant. CP 702.

Under the circumstances, and as would any prudent attorney, Mr. Gilbert took the most conservative approach and gave notice sufficient to cover the longer notice requirement in case it controlled, and M.A. West had paid the rent but not the deposit. And while perhaps Mr. Loeffler might have taken a more aggressive posture and posted notice of default on four days' notice, he never opined that giving ten days' notice breached the standard of care or caused damage to YAT. To the contrary, he acknowledged that "[t]here is no damage to the tenant that the landlord would provide additional time to cure a breach" and that "[t]here is no prohibition on giving a tenant additional time to comply by contract." CP 197-98 ¶¶ 11 & 13.

The appellate decisions also reflect that Mr. Gilbert argued to the trial court, and on appeal, that the deposit was or should be deemed to have been applied to outstanding rent, and that M.A. West's last payment was to replenish the deposit, and was not received until March 29, 2010 – 14 days after the notice was posted. Nor was the transcript so clear as to the evidence of when rent was tendered as Mr. Loeffler attempts to portray it. If it were, there would have been no need for the Court of Appeals to remand the case to the trial court to make factual findings on those issues.

Unfortunately for YAT, the trial court found the evidence of payment on March 26 more persuasive. Had it held otherwise, the payment would have been untimely (whether the deposit was applied to outstanding rent or

not) and the judgment affirmed. The unfavorable outcome on those issues, and ultimately in the Court of Appeals, is not proof of negligence. “[A]n attorney is not a guarantor of success and is not responsible for a ‘bad result’ unless the result was proximately caused by a breach of the attorney’s duty of care.” *See Clark Cnty.*, 180 Wn. App. at 701. “[M]ere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice.” *Halvorsen*, 46 Wn. App. at 717. Mr. Loeffler cited no errors in presenting the case, nor opined as to what Mr. Gilbert could or should have done differently that would have caused the trial court to rule otherwise. Nor does he offer an opinion sufficient to create a question of fact as to whether Mr. Gilbert’s actions are shielded under the attorney judgment rule as recognized in *Clark Cnty.*, 180 Wn. App. at 701-04. Absent such an opinion, there was no evidence to prove a breach of duty.

5. **The Trial Court Did Not Err in Refusing to Take Judicial Notice of Fact Assertions in the Related Cases**

Finally, YAT contends that Judge Eloffson should have taken judicial notice of facts reflected in the Court of Appeals decisions in the related – but separate – Unlawful Detainer Litigation and the Lockwood action. YAT suggests that he should have accepted – as undisputed fact for purposes of the summary judgment motion – that the rent payment was received on March 26, and that YAT knew of Lockwood’s secured interest in the Lease and was

entitled to 30 days' notice of M.A. West's default before an unlawful detainer proceeding was commenced. YAT then wants this Court to make the leap that these "facts" establish that Mr. Gilbert acted negligently. YAT is wrong.

First, courts can take judicial notice of "the existence of certain items in the record, such as the fact that the record contains a judgment," but cannot take "judicial notice of facts, otherwise disputed, that are mentioned in documents within the record, such as whether a defendant was negligent." *State v. Duran-Davila*, 77 Wn. App. 701, 705, 892 P.2d 1125 (1995); *see also* 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 201.9 (5th ed. 2015) ("[C]ourts are far less willing to take judicial notice" of "whether disputed facts were or were not found to be true" in a separate case.). To the extent issues in related actions are disputed – e.g., whether YAT knew that Lockwood was secured by the lease – they are not "facts" that the trial court should accept as true.

Second, the question at issue here is whether Mr. Gilbert's representation fell below the standard of care such that it affected the outcome of the case. Whether, e.g., YAT or LWG knew that Lockwood was secured in the Lease was not an issue in the Unlawful Detainer Litigation. Similarly, that the Court of Appeals remanded the case for additional findings, and later reversed the trial court's decision, does not establish that Mr. Gilbert acted negligently in presenting the case. Judge Eloffson

understood this distinction clearly:

I think the issue doesn't turn on wherever -- as Mr. Loeffler suggests -- that it was March 26th, and therefore, that was the conclusion of the trial court and the Court of Appeals, and that's the end of it. The issue is whether or not Mr. Gilbert as the attorney had a viable and arguable position on a payment received on the 29th. And I can't answer that. I don't know whether he did or not. I cannot assume that March 26th is -- is the only time that would have been reasonably considered.

....

So I find paragraph 12 [of Mr. Loeffler's declaration] and his conclusion that the Court of Appeals correctly dismissed the case to be without any help at all because we're not reviewing that appellate decision. We're reviewing whether or not Mr. Gilbert violated a duty owed to his client.

RP 49:25-50:20.

YAT's argument relating to judicial notice is legally faulty and beside the point. YAT was required to submit evidence creating an issue of material fact that Mr. Gilbert's representation fell below the standard of care so as to affect the outcome of the underlying case. It failed to do so.

D. The Trial Court Properly Denied YAT's Untimely CR 56(f) Motion

In contending that the trial court should have given it a continuance under CR 56(f), YAT identified only one source of evidence that it was denied: Mr. Gilbert's deposition. YAT's motion was merely an attempt to end-run the Court's prior discovery order, seeking to depose Mr. Gilbert to develop a factual basis for its claims, which the Civil Rules required that

YAT possess *before filing suit*, and which Judge Elofson ordered it to disclose before deposing Mr. Gilbert. He properly denied the CR 56(f) motion for two reasons: (1) it was untimely; and (2) YAT failed to identify what facts it sought to prove but could not without his deposition.

1. The CR 56(f) Motion Was Untimely

CR 56(f) states as follows in pertinent part:

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the [summary judgment] motion that for reasons stated, the party cannot present by affidavits facts essential to justify the party's opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. . . .

CR 56(f). A party opposing summary judgment must clearly request the continuance *in advance of the summary judgment hearing*. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989) (CR 56(f) provides remedy for parties who know of material witnesses and show good reason why they cannot obtain the testimony prior to summary judgment proceeding). LWG served its motion on November 11, 2015, and YAT filed its opposition on November 30, 2015, but did not include a request for relief under CR 56(f) in its response. Instead, it waited until December 15 – after the motion was argued and taken under advisement by the trial court – to seek such relief, on shortened time no less, and only three days before the trial court was expected to rule. CP 216-29.

That counsel for YAT noted at oral argument that Mr. Gilbert had not yet been deposed, and alluded to CR 56(f), was insufficient. Where “a continuance was never clearly requested . . . the trial court could not err” in granting summary judgment based on the evidence before it. *Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 615, 15 P.3d 210 (2001). Nor was YAT’s failure to depose Mr. Gilbert the result of LWG’s “unwillingness” to make him available; rather it was the result of YAT’s failure to comply with the Court’s discovery order – the condition precedent to it being allowed to depose Mr. Gilbert. Judge Eloffson so acknowledged in his oral ruling:

It was offered as a reason why the deposition couldn’t be taken was the schedules of other lawyers in collateral cases couldn’t be adjusted or accommodated to get the deposition done, but clearly, they weren’t going to be able to depose because the answer to the interrogatory had not been made.

RP 45:12-18. YAT did not timely request a continuance, and the Court was within its discretion in denying YAT’s untimely motion and adjudicating the summary judgment based on the record before it. *Bldg. Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 743, 218 P.3d 196 (2009) (“Where a continuance is not clearly requested, the trial court does not err in deciding a summary judgment motion based on the evidence before it.”).

2. YAT’s CR 56(f) Motion Failed on the Merits

YAT’s motion also failed under clearly articulated standards of Washington law. “A court may deny a motion for a continuance when ‘(1)

the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Pitzer v. Union Bank of Cal.*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000) (quoting *Tellevik v. Real Prop.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992)). Lack of “[o]nly one of the qualifying grounds is needed for denial.” *Gross v. Sunding*, 139 Wn. App. 54, 68, 161 P.3d 380 (2007).

It was not enough for YAT to simply point out that it had not yet been able to depose Mr. Gilbert. Its motion omitted critical components. First, it failed to specify what facts it hoped to prove through Mr. Gilbert’s deposition, or how that evidence would create a genuine issue of material fact on *all* of the elements challenged in LWG’s motion – breach, causation and damages. A trial court “properly den[ies] a motion for a continuance if the requesting party fails to indicate ***what evidence would be established through more discovery.***” *Colwell*, 104 Wn. App. at 615 (emphasis added). “[T]he party must provide an affidavit stating what evidence the party seeks ***and how it will raise an issue of material fact to preclude summary judgment.***” *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009) (emphasis added). YAT’s motion and supporting affidavits failed to address this requirement, just as YAT failed to explain the basis for its claims

in response to Interrogatory No. 3.

Had it done so, it would have begged the question why those facts could not be proven by other evidence, and if so, what “good reason” YAT had that it could not produce such evidence in response to LWG’s motion. YAT offered no explanation in this regard, or otherwise why it failed to amass *any evidence whatsoever* to support its claims. Its opposition was remarkable not because it offered no testimony from Mr. Gilbert, but rather because it included no evidence whatsoever – no declarations or depositions of YAT’s employees or third-party fact witnesses, nor documents from YAT’s or LWG’s files, nor even the trial transcript that Mr. Loeffler attempted to describe. This failure was even more notable given that YAT first alleged Mr. Gilbert’s supposed negligence *nearly 18 months* before the summary judgment hearing as an affirmative defense in the Unlawful Detainer Litigation and the Lockwood case, after which time YAT had the full panoply of discovery vehicles available by which to generate evidence to support its claims. CP 293. And of course, its former employees were available and willing to provide affidavits, as they ultimately did in support of YAT’s motion for reconsideration.

Even were there facts that could be proven only through Mr. Gilbert’s testimony, YAT offered no “good reason” for not answering Interrogatory No. 3 and deposing Mr. Gilbert in the months after the trial court granted

LWG's discovery motion, even though YAT knew of and had agreed to the date for the summary judgment hearing. In such circumstances, courts do not abuse their discretion when they deny motions for a continuance under CR 56(f). *See Winston v. State*, 130 Wn. App. 61, 65-66, 121 P.3d 1201 (2005) (Denying CR 56(f) motion because plaintiff should have completed discovery in two years preceding summary judgment motion); *Bldg. Indus.*, 152 Wn. App. at 742-43 (Denying 56(f) motion where party had "never made a single discovery request" over a four-month period prior to summary judgment hearing.); *Gross*, 139 Wn. App. at 68 (Denying 56(f) motion where plaintiff could "not demonstrate a good reason for delay in obtaining evidence.")

E. The Trial Court Properly Exercised Its Discretion in Denying YAT's Motion for Reconsideration

After failing to articulate a basis for its claims in response to discovery as ordered by the Court, then having failed to meet its burden in opposing LWG's motion for summary judgment, YAT wanted a third chance to save its case. On December 28, it filed a motion for reconsideration which the trial court properly denied for three reasons. First, it was procedurally defective in that YAT submitted new evidence that it could have timely submitted in opposition to LWG'S motion, but did not. Second, Mr. Loeffler had no testimonial knowledge over the materials included with his supplemental declaration, and those materials were thus inadmissible under

CR 56(e). Finally, Mr. Loeffler’s supplemental declaration, as well as the two declarations from former YAT employees, failed to raise a genuine issue of fact on all challenged elements of YAT’s claim.

1. Standards on a Motion for Reconsideration

“Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion.” *Wilcox*, 130 Wn. App. at 241. A trial court “abuses discretion when its decision is based on untenable grounds or reasons.” *Id.* CR 59(a) provides the exclusive grounds for reconsideration. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 496, 183 P.3d 283 (2008). A party must “identify the specific reasons in fact and law as to each ground [under CR 59(a)] on which the motion is based.” CR 59(b).

YAT moved under CR 59(a)(7) – which permits a court to reconsider a prior ruling where “no evidence” justifies the ruling or the ruling “is contrary to law” – and CR 59(a)(9), which is a “catch-all” provision permitting reconsideration where “substantial justice has not been done.” The trial court denied the motion without requesting a response from LWG, and was well within its discretion in doing so.

2. YAT Improperly Submitted New Materials With Its Motion for Reconsideration

YAT contends that nothing “prohibits the submission of new or

additional materials” under CR 59(a)(7). Appellant’s Br. at 45. But while CR 59(a)(4) permits the introduction of new evidence “which the party could not with reasonable diligence have discovered and produced” earlier, CR 59(a)(7) generally prohibits the introduction of new evidence. Nor does YAT contend that it could not have offered the evidence submitted in support of reconsideration in timely response to LWG’s motion. Its reliance on CR 59(a)(7) is simply an attempt to end-run the CR 59(a)(4) standard.

CR 59(a)(7) does not contemplate the introduction of new evidence. Rather, the rule permits a party to argue that a prior verdict or ruling was incorrect *based on the evidence at the time of the ruling*. See *Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001) (Under CR 59(a)(7) court reviews “evidence *in the record* . . . to determine whether, as a matter of law, there is no substantial evidence or reasonable inferences to sustain the verdict for the nonmoving party.”) (emphasis added); *GO2NET, Inc. v. CI Host, Inc.*, 115 Wn. App. 73, 90-91, 60 P.3d 1245 (2003) (refusing to consider declaration under CR 59(a)(7) because it “was not presented to the trial court at the summary judgment hearing and the party [did] not show [] that the declaration could not have been obtained earlier; therefore it [did] not qualify as newly discovered evidence). Contrary to YAT’s contention, “parties should generally not be given another chance to submit additional evidence” on a CR 59(a)(7) motion. *Meridian Minerals Co. v. King Cnty.*, 61 Wn. App.

195, 203, 810 P.2d 31 (1991). This is because parties cannot use a motion for reconsideration to get a “second bite at the apple.” 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice: Handbook on Civil Procedure* § 65.1 (2015-2016 ed.); *see also Jet Boats, Inc. v. Puget Sound Nat’l Bank*, 44 Wn. App. 32, 42, 721 P.2d 18 (1986) (on reconsideration under CR 59(a)(5)-(9), “the court must base its decision on the evidence it already heard at trial.”).

YAT cites no authority to the contrary. In *Chen v. State*, 86 Wn. App. 183, 937 P.2d 612 (1997), the court affirmed the trial court’s decision to strike the additional declaration submitted with a motion for reconsideration, and never even mentioned CR 59(a)(7). 86 Wn. App. at 191-92. *Chen* provides ***no support*** for the notion that CR 59(a)(7) entitles a party to present additional evidence. Nor do the other authorities YAT cites.³ In *Martini v. Post*, 178 Wn. App. 153, 313 P.3d 473 (2013), the court permitted the submission of additional evidence only because defendant “was previously aware of the evidence,” as well as plaintiff’s theory of the case, both of which were discussed in the complaint. 178 Wn. App. at 162. Consideration of additional evidence was only proper because it came as no surprise to the defendant, who therefore “suffered no prejudice.” *Id.* Such is not the case

³ *See also August v. U.S. Bancorp*, 146 Wn. App. 328, 347, 190 P.3d 86 (2008) (“[G]enerally, an issue may be raised in a motion for reconsideration when the issue is closely related to an issue previously raised and ***no new evidence is required.***”) (emphasis added).

here, where YAT failed to articulate the basis for its claims in its complaint or in response to discovery as ordered by the trial court. Indeed, YAT's conduct in *not* providing such information was willful and deliberate. Its procedurally flawed reconsideration motion was part of a broader pattern of obfuscation and failure to comply with the Civil Rules. Although the basis on which he denied the motion for reconsideration is not reflected in his order, Judge Elofson was well within his discretion to disregard the declarations submitted in support of reconsideration.

3. The Materials Submitted With Mr. Loeffler's Supplemental Declaration Were Inadmissible

CR 56(e) provides that “[s]upporting and opposing affidavits shall be made on personal knowledge” and shall set forth “facts as would be admissible in evidence.” *See also Ebel v. Fairwood Park II Homeowners’ Ass’n*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007) (Declarations “must be made on personal knowledge, set forth facts that would be admissible in evidence and show the affiant is competent to testify on the matter.”). “A trial court may not consider inadmissible evidence when ruling on a summary judgment motion.” *Id.* Where a declarant merely states that he “reviewed the documents” in question, but does not have “personal knowledge” of them, “he cannot satisfy the prima facie showing of authenticity required for admissibility.” *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122

Wn. App. 736, 750, 87 P.3d 774 (2004). In these circumstances, consideration of such materials on a motion for summary judgment amounts to an abuse of discretion. *Id.*

Mr. Loeffler, YAT's attorney expert, attached various documents to his supplemental declaration regarding which he has no testimonial knowledge, e.g. the Lease, the Notice of Default, complaints in the Unlawful Detainer Litigation and the Lockwood action, Lockwood's tort claim filings, and correspondence involving Mr. Gilbert, among others. CP 474-840. His claims stated that he reviewed these documents, but nowhere claims to have "personal knowledge" of them for purposes of authenticating them. Nor were they authenticated by any other witness. Further, many (e.g., the complaints, the Lockwood tort claim filings, among others) were rife with hearsay that could not be admitted to prove the truth of the matters asserted. With the possible exception of the Lease and the related assignment, which were both recorded documents, the documents attached to Mr. Loeffler's declaration were inadmissible under CR 56(e). Judge Eloffson had very tenable grounds to disregard this evidence in denying reconsideration.

4. YAT's Declarations Failed to Create a Material Issue of Fact Precluding Summary Judgment

In addition to being untimely, the declarations submitted by YAT in support of reconsideration are inadequate to raise a genuine issue of material

fact on all challenged elements. As Mr. Loeffler himself conceded in his supplemental declaration, the additional materials YAT submitted merely served to “illustrate” arguments that YAT had already made, which the trial court addressed in granting summary judgment. CP 474. YAT presented no “newly discovered” evidence that called the court’s prior ruling into question.

Mr. Loeffler’s supplemental declaration made three primary points that he claims demonstrate that Mr. Gilbert’s actions fell below the standard of care: (1) the failure to notify Lockwood of M.A. West’s default; (2) supposed defects in the Notice of Default that Mr. Loeffler claims deprived the trial court of jurisdiction; and (3) Mr. Gilbert’s decision to initiate and proceed with the Unlawful Detainer Litigation despite MA West’s attempt to cure its default under the lease. cursory examination of each of these issues reveals his opinions as speculation, misstatements of the law and unwarranted second-guessing of trial tactics and strategy. None warrant reconsideration.

Notification to the Lockwood Foundation. Mr. Loeffler first contended that “it was improper for Mr. Gilbert to commence the unlawful detainer action without first having provided notice to Lockwood as required in the lease.” CP 476 ¶ 6. But as noted above, this was never raised as a defense to in the Unlawful Detainer Litigation, nor is there evidence that Lockwood would have cured the default had it been given notice. Moreover, even had YAT been aware in 2010 (when M.A. West defaulted under the

Lease) that Lockwood had a secured interest in the Lease,⁴ there is no evidence that it informed LWG at that time of Lockwood's secured interest, asked Mr. Gilbert to investigate whether a secured interest existed, or that Lockwood's secured interest was recorded or otherwise in the public record. Nor does anything in Mr. Loeffler's declaration suggest otherwise. In fact, the email from Mr. Gilbert attached to Mr. Loeffler's declaration, dated February 10, 2012, indicates that YAT did *not* inform Mr. Gilbert of Lockwood's secured interest in the Lease. CP 733.

The Notice of Default. Mr. Loeffler again contended that Mr. Gilbert's failure to include the words "or vacate" was negligent and deprived the trial court of jurisdiction over the Unlawful Detainer Action. But as noted above, there is no evidence that M.A. West raised this argument as a defense in the Unlawful Detainer Litigation. Indeed, Mr. Loeffler admits that "the 'or vacate' concept . . . appears to have not actually been the topic of subsequent litigation." CP 481 ¶ 16. By definition it did not affect the outcome of the case.

⁴ The notice given to YAT on which Mr. Loeffler relies in this regard reflects that it was first noted as being in YAT's files in January 2012. CP 731. Mr. Redmond's declaration similarly notes only that the document was in the file, not when it was received. There is no evidence – e.g. a date received stamp, or otherwise proffered by YAT, that it received the notice on the ostensible date it was penned.

Further, it is a misstatement of the law. While the unlawful detainer statute contains detailed provisions on *how and when* a notice must be served, it is silent about the notice’s contents. RCW 59.12.040. Accordingly, courts distinguish between the “time and manner” requirements for service of notice, and the “form and content” of the notice under RCW 59.12. *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 640 n.1, 980 P.2d 311 (1999). Landlords must strictly comply with time and manner requirements, but substantial compliance is sufficient with respect to the “form and content” of the notice. If a notice is “sufficiently particular and certain so as not to deceive or mislead,” it substantially complies with RCW 59.12. *IBF, LLC v. Heuft*, 141 Wn. App. 624, 632, 174 P.3d 95 (2007). Thus, a landlord’s failure to include specific magic words in a notice – such as “or vacate” – does not deprive a trial court of jurisdiction over an unlawful detainer action. Here, that YAT intended to reclaim the leased property if M.A. West did not comply with the notice was inherently obvious. The notice substantially complied with RCW 59.12, and the trial court had jurisdiction.⁵

Initiation and Pursuit of the Unlawful Detainer Litigation. Mr.

⁵ The cases cited by Mr. Loeffler in his declaration are not to the contrary. *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 745 (1990) addressed a notice that provided no instruction on how to cure the default – it did not address a situation where a notice simply failed to contain the “or vacate” language. *Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007) dealt with whether the rules for calculating time to respond under the Civil Rules applied in the unlawful detainer context.

Loeffler's assertion that Mr. Gilbert should not have initiated the Unlawful Detainer Litigation because he did not "accurately assess" M.A. West's attempts to cure its default is just Monday-morning quarterbacking. In brief, Mr. Loeffler contended that Mr. Gilbert should have known that M.A. West tendered payment on March 26, rather than March 29, thus timely curing the default. CP 481-85 ¶¶ 16-26. His claim that what Mr. Loeffler disregards is that *when* M.A. West tendered payment was a *disputed issue of fact*. His conclusion that M.A. West tendered payment on March 26 is based on statements Rebecca Brown made during the unlawful detainer hearing. CP 483-84 ¶ 24. That testimony did not exist when the case was filed. What Mr. Loeffler ignores is Ms. Brown's letter returning M.A. West's payments, stating they were not received until March 29, rendering them untimely. Indeed, that the Court of Appeals had to remand the case for a finding on that issue proves the conflicting nature of the evidence on that issue:

On appeal, the airport argues that it proved, and the trial court implicitly found, that the checks were delivered by West to the airport on March 29. It relies on the letter attached as exhibit M to Mr. Goodspeed's declaration, which Ms. Brown was shown and identified when examined. That letter states:

We are returning to you the above referenced checks which we received on March 29, 2010. We are unable to accept them because they were not delivered to us within the time stipulated in the Notice with which you were served on March 15, 2010.

CP at 109. Once again, the airport's arguments as to why West

was in unlawful detainer after March 26 vary depending on whether West's \$2,920.56 payment was delivered to the airport on the 26th or the 29th. We need the trial court's finding on that score.

CP 710. Mr. Loeffler's contention that Mr. Gilbert was careless in initiating the action ignores that the evidence was at best in conflict when the case was filed, and even at trial. Like any good trial lawyer, Mr. Gilbert argued that the evidence and law supported his client's position – *and he was successful at trial*. That Judge Lust's ruling was later overturned on appeal after factual issues were resolved against YAT is not proof of negligence in filing or presenting the case. *Halvorsen*, 46 Wn. App. at 717; *Clark Cnty.*, 180 Wn. App. at 701.⁶

Finally, Mr. Loeffler points out that M.A. West's counsel raised the foregoing issues in a letter to Mr. Gilbert. *But that letter was sent in August 2010, i.e., after the trial had concluded – successfully for YAT!* That appellate counsel raised after the fact defenses that had not be raised at trial (e.g., the form of notice and failure to give notice to Lockwood) is not proof that Mr. Gilbert should have advised the prevailing party at trial to fold its tents. Nor

⁶ On a related point, Mr. Loeffler also contended that Mr. Gilbert negligently prepared the findings of fact and conclusions of law which Judge Lust entered, and which supported the writ of restitution in the Unlawful Detainer Litigation. CP 485-86 ¶¶ 27-28. This contention ignores the obvious fact that Mr. Gilbert could only prepare findings of fact based on what Judge Lust actually found. Judge Lust's initial failure to make a finding on the date that M.A. West tendered payment cannot be ascribed to Mr. Gilbert.

is it proof of negligence in continuing to prosecute the case. Significantly, M.A. West apparently did not feel strongly enough about its appeal to spend the modest amount necessary to supersede the \$21,000 judgment. Thus, YAT was within its rights to proceed with the eviction, and M.A. West's only remedy when the case was reversed was restitution – i.e., restoration of possession of the leased property. *See infra* n.1.

Under the circumstances, Judge Elofson had very tenable grounds to deny reconsideration, which was a proper exercise of his discretion.

5. Reconsideration Was Not Warranted Under CR 59(a)(9)

CR 59(a)(9) permits a court to reconsider a prior ruling on the ground that “substantial justice has not been done.” Courts recognize this rule as a catch-call provision that should only be utilized where none of the other eight grounds for relief enumerated in CR 59(a) apply. As such, “[c]ourts rarely grant reconsideration under CR 59(a)(9) for lack of substantial justice because of the other broad grounds afforded under CR 59(a).” *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010); *see also Kohfeld v. United Pac. Ins. Co.*, 85 Wn. App. 34, 931 P.2d 911 (1997) (“the ‘granting of new trials for the lack of substantial justice should be relatively rare, especially since [CR 59(a)] gives eight other broad grounds for granting new trials.’”) (quoting *Knecht v. Marzano*, 65 Wn.2d 290, 297, 396 P.2d 782 (1964)).

YAT articulated no independent, additional basis that would justify

reconsideration under the catch-call provision of CR 59(a)(9). For that reason – and all the reasons discussed above – Judge Elofson had very tenable grounds to deny reconsideration on this basis, and acted with proper discretion in doing so.

V. CONCLUSION

YAT had no basis to file this case. LWG did not guarantee a successful outcome, and there is no evidence of any mistakes in presenting the case but for which the outcome would have differed. The mere fact that a successful outcome at trial was reversed on appeal is not proof of negligence but for which YAT would have achieved a better outcome. After numerous motions and rounds of briefing, YAT never offered evidence or articulated any legal theory demonstrating a question of fact on all challenged elements of its claim. The trial court's discovery order, order granting summary judgement, order denying relief under CR 56(f), and order denying reconsideration should be affirmed.⁷

⁷ Because the motion for summary judgment was properly granted, the trial court's order granting statutory fees and costs was also proper and should be affirmed.

DATED this 2nd day of September, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 2nd day of September, 2016, a true copy of the foregoing was served on each and every attorney of record herein via email and U.S. Mail:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 2nd day of September, 2016.

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