

FILED

JUN 20 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34603-0-III .

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

WALLACE E. BACON, et ux,

Respondents,

v.

THOMAS MATULIS, et ux,

Appellants.

RESPONDENTS BRIEF

**J. Steve Jolley, WSBA #12982
Herman, Herman & Jolley, PS
12340 E. Valleyway
Spokane Valley, WA 99216
(509) 928-8310
Attorney for Respondents**

TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES1
II. STATEMENT OF THE CASE1
III. ARGUMENT5
 A. Matulis has submitted an improper brief5
 B. The trial court did not err in granting Bacons’ Motion for Summary
 Judgment8
 C. The trial court did not err in denying Matulis’ Motion for
 Continuance10
 D. Pursuant to RAP 18.1 Bacons request an award of attorney fees
 against Matulis12
IV. CONCLUSION13

TABLE OF AUTHORITIES

Table of Cases

<i>In re Estate of Lint</i> , 135 Wn.2d 518, 532, 957 P.2d 755 (1998).....	6
<i>State v. Thomas</i> , 150 Wn.2d 821, 868-69, 83 P.3d 970.....	6, 7
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	7
<i>Demelash v. Ross Stores, Inc.</i> , 105 Wn.App. 508, 527, 20 P.3d 447 (2001)	7
<i>Mangat v. Snohomish County</i> , 176 Wn.App. 324, 328, 308 P.3d 786 (2013).....	8
<i>Hutchins v. Fourth Ave. Assocs.</i> , 116 Wn.2d 217, 220 (1991).....	8
<i>In re Marriage of Rich</i> , 80 Wn. App. 252, 259 (1996).....	8
<i>Trummel v. Mitchell</i> , 156 Wn.2d 653, 670, 131 P.3d 305 (2006)	10
<i>Balandzich v. Demeroto</i> , 10 Wn.App. 718, 720, 519 P.2d 994 (1974)	10
<i>Turner v. Kohler</i> , 54 Wn.App. 688, 693, 775 P.2d 474 (1989).....	10, 11
<i>Davies v. Holy Family Hosp.</i> , 144 Wn.App. 483, 500, 183 P.3d 283 (2008).....	10
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 298, 494 P.2d 208 (1972)	10
<i>Old City Hall LLC v. Pierce County AIDS Found.</i> , 181 Wn.App. 1, 15, 329 P.3d 83 (2014).....	11
<i>Lewis v. Bell</i> , 45 Wn.App. 192, 196, 724 P.2d 425 (1986)	11
<i>Sternoff Metals Corp. v. Vertecs Corp.</i> , 39 Wn.App. 333, 341-42, 693 P.2d 175(1984).....	11
<i>Hume v. American Disposal Co.</i> , 124 Wn.2d 656, 673 (1994)	12

Statutes

RCW 4.24.630	9, 12
--------------------	-------

Regulations and Rules

RAP 10.3(a)(6).....	6, 7
RAP 10.4.....	6
RAP 10.7.....	7
CR 6	10
CR 56(f)	10, 11
RAP 18.1	12

I STATEMENT OF THE ISSUES

Bacons are not satisfied with Matulis' "Legal Questions" and therefore set forth the following issues.

[1] Did the trial court err in granting Bacons' Motion for Summary Judgment?

[2] Did the trial court err in denying Matulis Motion for a Continuance?

II STATEMENT OF THE CASE

In their First Amended Complaint, Bacons plead causes of action to quiet title to their one half of a vacated easement, for damages due to trespass and waste and for injunctive relief against Matulis. CP 10-14. The parties respective properties share a common boundary line. CP 42-55. The address of the Bacon property is 1327 E. Deer Park Milan Road, Deer Park, WA 99006. CP 42-55. The address of the adjoining Matulis property is 1517 E. Deer Park Milan Road, Deer Park, WA 99006. CP 42-55.

Bacons have never executed an easement in favor of Matulis nor given Matulis permission to install and maintain cable and electrical lines and facilities on, or under, Bacons' property for service to and for the benefit of the adjoining Matulis property. CP 42-55.

In April 2014, Matulis caused Inland Power and Centurylink to install and bury a power line and cable line and install a junction box on/under Bacons' property. CP 42-55. Matulis was able to persuade Inland Power and Centurylink to make the installation without an easement and without Bacons' permission by representing to said companies that the right of way for Perry Road extended north of E. Deer Park Milan Road along the common boundary line between Bacons' property and the Matulis' property. CP 42-55.

Matulis showed Inland Power, Centurylink and Mr. Bacon a Spokane County Engineer map and an Official Plat Map which both showed that the unopened right of way for Perry Road extended north of E. Deer Park Milan Road and for the length of the boundary line between the Bacon and Matulis properties. CP 42-55. Mr. Matulis representations induced Bacon not to take any action at the time to stop the installation of the described utilities on and under the Bacons' property. CP 42-55.

In point of fact the portion of the Perry Road Right of Way which extends north of E. Deer Park Milan Road was vacated in the 1890's based upon the non-use statute in effect at the time, Ballinger's Code Section 3803 which read:

Any county road, or part thereof which has heretofore been or may hereafter be authorized which remains unopened for public use for

the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time.

CP 42-55. Thomas Matulis was well aware of the vacation of the subject section of the Perry Road Right of Way before he caused Inland Power and Centurylink to make the utility installations on Bacons' property. CP 42-55. Mr. Matulis had received letters from Pat Harper, Spokane County Engineering Department April 12, 2013 and from Deputy Prosecuting Attorney David W. Huber July 31, 2012 advising Mr. Matulis that the extension of the Perry Road Right of Way had been vacated. See, Exhibits to Declaration of Wallace Bacon, CP 42-55.

Mr. Matulis intentionally caused Inland Power and Centurylink to trespass on Bacons' property for his benefit. Bacons sustained damages as a consequence of this trespass and were entitled to be compensated for the period of time this trespass commenced in April 2014 through the date Bacons' Motion for Summary Judgment was heard, May 27, 2016. CP 42-55. As the property owner it was Mr. Bacon's opinion that reasonable rent to receive utility services through his property was \$100 per month. CP 42-55. Mr. Bacon calculated his trespass damages to be \$2,400 (i.e., 24 months times \$100 equals \$2,400). CP 42-55.

In addition, by intentionally and wrongfully causing Inland Power and Centurylink to install the aforementioned utilities on the Bacon property, Mr. Matulis committed waste on the Bacon property and damaged Bacons' property. CP 42-55. Ugly excavation scars were caused to Bacons' property; the land was disturbed; and vegetation was killed. Mr. Bacon obtained restoration estimates from qualified contractors who estimated the restoration costs to be \$6,594.10. CP 42-55. In addition Bacons incurred costs and attorney fees to prosecute their waste claim against Defendants Matulis which they were entitled to recover under Washington's waste statute. CP 42-55.

Bacons moved for summary judgment against Matulis, Inland Power and Centurylink and the Motion was heard by Judge Cooney on May 27, 2016. CP 56-59. The matters/materials considered by the court are recited in the Order Granting Summary Judgment to be:

- [1] Plaintiffs' Note for Hearing dated April 15, 2016;
- [2] Plaintiffs' Motion for Summary Judgment dated April 15, 2016;
- [3] Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment dated April 15, 2016; and,
- [4] The April 15, 2016, Declaration of Wallace E. Bacon in Support of Plaintiffs' Motion for Summary Judgment and the Exhibits appended thereto.

CP 56-59. Matulis filed absolutely nothing in opposition to Bacons' Motion. RP 11:2-16.

After Judge Cooney announced the court's decision to grant Bacons' Motion for Summary Judgment, Matulis asked the court for a continuance. RP 13:19-23. After carefully reviewing the provisions of CR 56(f), the court denied Mr. Matulis' Motion for a Continuance. RP 18:16-19:5.

On May 27, 2017, the court entered: an Order Granting Summary Judgment, CP 56-59; Judgment Quieting Title and Ordering Injunctive Relief, CP 63-66; and, a Money Judgment against Matulis for Bacons' damages. CP 61-62. On June 21, 2016, the court entered Findings of Fact and Conclusions of Law Regarding Attorney Fees and Costs, CP 123-125; and, a Judgment against Matulis for Attorney Fees and Costs, CP 126-128.

July 15, 2016, Matulis filed a Notice of Appeal. CP 152-155. That same day the court entered Orders Denying Matulis' Motions for Reconsideration. CP 135-149 and 150-151.

III ARGUMENT

A. **Matulis have submitted an improper brief.**

Matulis' Brief contains a section entitled "Legal Questions" which sets forth eighteen questions. However, Matulis have cited no authorities

and has made no argument or analysis of their "Legal Questions". RAP

10.3(a)(6) requires the Appellants' Brief to contain:

The argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record. The argument may be preceded by a summary. The court ordinarily encourages a concise statement of the standard of review as to each issue.

In their Brief, Matulis fail to make any references to either the Clerk's Papers or the Verbatim Report of Proceedings. This omission violates RAP 10.4.

Pages 7-13 purports to be an Affidavit of Facts. This Affidavit is not part of the record on appeal and is not a matter which was brought to the attention of the trial court at the summary judgment hearing. RAP 9.2 provides in relevant part that: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."

It is not the function of an Appellate Court "to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). Moreover, Appellate Courts "will not review issues for which inadequate argument has been briefed or only passing treatment has been made." *State v.*

Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Generally, without argument and citation to authority, an Appellate Court will not review an assignment of error. RAP 10.3(a)(6). Also, Appellate Courts will not review an issue, theory or argument not presented at the trial court level. *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 527, 20 P.3d 447 (2001). "The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." *Demelash*, 105 Wn.App. at 527

Arguably, Matulis' Brief presents nothing for this Court to review. At best Matulis' Brief makes review extremely difficult for this Court; and makes a response by Bacons equally difficult.

RAP 10.7 sets out the Appellate Court's options if a party files an improper Brief. Bacons suggest, and request, that in the interests of avoiding further delays the resolution of this appeal, the Matulis Brief be accepted and that improper portions of the Brief either be stricken or disregarded by this Court. Clearly, all Maulis statements of facts which are not part of the record on appeal should be disregarded; and, all their

arguments which are not supported by citations to authority should be ignored.

B. The trial court did not err in granting Bacons' Motion for Summary Judgment.

Appellate Courts review a summary judgment de novo, engaging in the same inquiry as the superior court, and may affirm on any basis the record supports. *Mangat v. Snohomish County*, 176 Wn.App. 324, 328, 308 P.3d 786 (2013).

Summary judgment is properly granted when the pleadings, affidavits, depositions and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(C); *Hutchins v. Fourth Ave. Assocs.*, 116 Wn.2d 217, 220 (1991); and *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). Because Matulis submitted nothing in opposition to summary judgment, the trial court correctly determined that no genuine issue of fact existed.

The uncontroverted facts presented to the trial court in Wallace Bacon's declaration, CP 42-55 demonstrated beyond cavil that the Matulis did not have a utility easement on, across or under the Bacon property for the benefit of the Matulis property. Accordingly, the Court properly

entered an Order Quieting Bacons' title as to any utility easement for service to the Matulis property.

The uncontroverted facts also established that Matulis caused trespass and waste to be committed on the Bacons' property. RCW

4.24.630 provides that:

Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

Thus the Court properly entered an Order requiring Matulis to refrain from committing trespass or waste on the Bacons' property in the future or from causing others to do so. Additionally, the record supports the money Judgment entered against Matulis for Bacons' damages. CP 42-55.

Matulis failed to rebut facts presented by Bacons showing that Matulis caused trespass and waste to be committed on the Bacons'

property. Accordingly, the trial court properly entered an Order requiring Matulis to refrain from committing trespass or waste on the Bacons' property in the future or from causing others to do so.

C. The trial court did not err in denying Matulis' Motion for a Continuance.

Whether a motion for continuance should be granted or denied is a matter of discretion with the trial court, reviewable on appeal for manifest abuse of discretion." *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006) (citing *Balandzich v. Demeroto*, 10 Wn.App. 718, 720, 519 P.2d 994 (1974)); see also *Turner v. Kohler*, 54 Wn.App. 688, 693, 775 P.2d 474 (1989) (reviewing CR 56 motion for continuance for abuse of discretion); *Davies v. Holy Family Hosp.*, 144 Wn.App. 483, 500, 183 P.3d 283 (2008) (reviewing CR 6 motion for continuance for abuse of discretion). Abuse of discretion is not shown unless the discretion has been exercised upon a ground, or to an extent, clearly untenable or manifestly unreasonable." *Friedlander v. Friedlander*, 80 Wn.2d 293, 298, 494 P.2d 208 (1972).

The trial court based its denial of Matulis Motion for a continuance on CR 56(f) which states:

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated,

the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The purpose of CR 56(f) is to "allow a party to move for a continuance so that it may gather evidence relevant to a summary judgment proceeding." *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn.App. 1, 15, 329 P.3d 83 (2014). Thus, a remedy is provided "for a party who knows of the existence of a material witness and shows good reason why he cannot obtain the affidavit of the witness in time for the summary judgment proceeding." *Lewis v. Bell*, 45 Wn.App. 192, 196, 724 P.2d 425 (1986). Accordingly, a trial court's decision to deny a motion for a continuance is not an abuse of discretion where "(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." *Turner*, 54 Wn.App. at 693 (citing *Lewis*, 45 Wn.App. at 196; *Sternoff Metals Corp. v. Vertecs Corp.*, 39 Wn.App. 333, 341-42, 693 P.2d 175(1984)).

Matulis filed no affidavit stating any reason why he could not present an affidavit of facts which would justify his opposition to the motion. Moreover, Matulis did not make his motion until the court had already announced its decision. Manifestly, under the facts and circumstances of this case the trial court did not abuse its discretion in denying Matulis' Motion for a Continuance.

D. Pursuant to RAP 18.1 Bacons request and award of attorney fees against Matulis.

Pursuant to RAP 18.1, Bacons hereby move this court to award them reasonable attorney fees for defense of this appeal. The statutory authority for the requested award of reasonable attorney fees is RCW 4.24.630 which provides in relevant part that:

In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

Bacons note that in order to be entitled to attorney fees it was necessary for them to also prove there was no easement. In other words, the issues are very intertwined and segregation of fees would be extremely difficult.

In *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673 (1994) the Supreme Court held where "the trial court finds the claims to be so related

that no reasonable segregation of successful and unsuccessful claims can be made, there need be no segregation of attorney fees.”

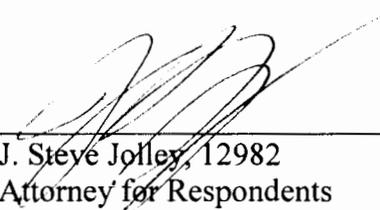
Similarly, in the present case the facts and law necessary to respond to Appellants’ waste arguments are completely intermixed with those necessary to respond to the other claims. For example, the question of whether there was a right of way easement at the time waste was committed was an issue common to all of Bacons’ claims in the trial court. Matulis precipitated this law suit through their wrongful conduct and they should bear the responsibility for the difficulty in segregating attorney fees. Accordingly, Bacons respectfully request that no segregation of fees be required on appeal.

IV CONCLUSION

Based upon the facts, points and authorities above Bacons respectfully request that this Court affirm the trial court and award Bacons reasonable attorney fees and costs on appeal.

Respectfully submitted this 19th day of June, 2017.

Herman, Herman & Jolley, P.S.

By: 

J. Steve Jolley, 12982
Attorney for Respondents
Bacon

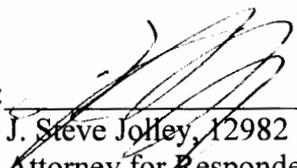
CERTIFICATE OF MAILING

J. STEVE JOLLEY, hereby certifies under penalty of perjury that on June 20, 2017, I deposited a copy of the preceding pleading in the U.S. Mail postage prepaid and addressed as follows:

MR. THOMAS MATULIS and
MRS. ELLEN M. MATULIS
1517 E. DEER PARK MILAN ROAD
DEER PARK, WA 99006

Dated this 20th day of June, 2017

Herman, Herman & Jolley, P.S.

By: 

J. Steve Jolley, 12982
Attorney for Respondents
Wallace E. Bacon, et ux