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NO. 65821-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JEFFREY MANARY,

Respondent,

v.

EDWIN A. ANDERSON,

Appellant.

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

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ORIGINAL

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I. ARGUMENT

In his response, Respondent Jeffrey Manary ("Manary") relies heavily on two main propositions: First, according to Manary, the revocable living trust ("the Trust") became irrevocable as to the Renton residence at issue ("the Property") when Eileen Greene died. Second, Manary maintains that, to transfer the Property from the Trust to Appellant Edwin Anderson ("Anderson"), Homer Greene had to have referred to the Trust in his Will. Neither is true. Manary also offers a plethora of other arguments that ultimately ask this Court to contort its way around the plain language of the Trust and the Super Will statute. These arguments also fail. Consequently, the facts remain that Homer[1] satisfied the requirements of RCW 11.11.020(1) when he made a specific bequest of the Property to Anderson in his, Homer's, Will, and that Anderson is thus entitled to Homer's interest in it.

A. Homer Greene retained the right to revoke his interest in the Property after his wife died.

The express terms of the Trust contradict Manary's position that the Trust became irrevocable as to the Property upon Eileen's death. Although Manary appears to ignore them, several Trust provisions clearly granted Homer the right to revoke his interest in the Property, even after Eileen's death:

[1] Because Homer and Eileen Greene shared the same last name, Appellant Anderson uses their respective first names only for clarity and intends no disrespect.

- Section 1.04: "All property ... conveyed or transferred to the Trustee(s) pursuant to this Declaration, which was community property ... at the time of such conveyance or transfer, shall retain its character ... as community property ..., during the Trustors' lifetimes." Clerk's Papers ("CP") 46.

- Section 1.06(c): "Each Trustor's power to amend, modify or revoke this Trust is limited to the extent of such Trustor's community and separate property interests." CP 46.

- Section 1.06(d): "The Survivor's Trust shall remain revocable by the Survivor, and as to revocation and amendment, as well as administration, the Survivor's Trust shall be governed by the rules of this Trust as initially established this day." CP 47.

- Section 1.06(f): "Upon the death or incapacity of *both of the Trustors*, this Agreement shall become irrevocable." CP 47 (emphasis added).

- Section 3.03: "At the Decedent's death, the [T]rustee shall allocate the Survivor's one-half interest in the community property and the Survivor's separate property to the Survivor's Trust." CP 52.

- Section 4.01: "The Trustee shall allocate to the Survivor's Trust the Survivor's interest in community property and the Survivor's interest in separate property ... The rights of revocation, amendment, modification or withdrawal shall continue to apply to the Survivor with respect to the Survivor's Trust." CP 53-54.

- Section 4.11: "The Survivor shall have, and shall retain, the powers of revocation, withdrawal, amendment, modification, beneficiary change, and other powers set forth in Article 4 with respect to the Survivor's Trust." CP 56.[2]

---

[2] It is undisputed that Homer did not create separate trusts after Eileen's death. However, the Trust provisions regarding the Survivor's Trust nevertheless demonstrate how each Trustor's respective separate and community property interests in Trust assets were to be treated throughout the life of the Trust, regardless of the specific form the Trust(s) took.

Manary points to Section 7.06 of the Trust as the sole method of removing the Property from the Trust. Br. of Respondent at 16. That provision, however, is not so restrictive. It speaks only of tasks the Trustee and Surviving Trustor "may" and are "authorized" to do. That is, the section is permissive. It in no way mandates what actions Homer, who during his lifetime was the Trustee, Surviving Trustor, and Beneficiary of the Trust, may or may not take with respect to his interests in the Property. It simply cannot be read as narrowly as Manary proposes. To do so would render the above-quoted provisions of the Trust nonsensical. Moreover, to the extent that the provision conflicted with Homer's rights under the Super Will statute, the statute should prevail.

Despite Manary's protestations to the contrary, the Property remained revocable as to Homer's one-half community property interest in it. Thus, the Super Will statute governs Homer's bequest to Anderson. Even if Section 7.06 applies as restrictively as Manary suggests, the Super Will statute still should direct any conflict between it and the language of the Trust.

B. The Super Will statute does not require that a specific reference to a nonprobate asset in a decedent's will also refer to the will substitute.

This is the primary issue before this Court. The Super Will statute requires that the owner of a nonprobate asset "specifically refer" to that asset

in his will to transfer the owner's interest in the asset to the person named in the will "notwithstanding the rights of any beneficiary designated before the date of the will." RCW 11.11.020(1).

Manary's position, that Homer's failure to refer to the Trust in his Will rendered his attempted bequest to Anderson invalid, is antithetical to the purpose of the Super Will statute and would lead to an absurd result. The statute was designed to make it easier for testators to change the beneficiary designation of a will substitute in a manner *independent of* that will substitute. *See* RCW 11.11.003(1) (one of the purposes of the statute is to "[e]nhance and facilitate the power of testators to control the disposition of assets that pass outside their wills[.]"); Cynthia J. Artura, *Superwill to the Rescue? How Washington's Statute Falls Short of Being A Hero in the Field of Trust and Probate Law*, 74 WASH. L. REV. 799, 807 (1999) ("Rather than requiring the testator to follow the established procedures for changing the terms of a will substitute, the superwill [sic] statute permits a testator to make those changes in his will."). Requiring a testator to also refer to the will substitute when changing that instrument in the testator's will would only frustrate these purposes. "It is axiomatic that courts will not interpret statutes so as to reach absurd results." *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 33 Wn. App. 413, 416, 655 P.2d 251 (1982).

Nor does the authority Manary cites for this proposition support his argument. This issue was not before the court in *In re Estate of Furst*, 113 Wn. App. 839, 55 P.3d 664 (2002). There, the decedent had made a general residuary bequest, not a specific one. *Id.* at 841-43; Br. of Appellant at 18. Moreover, the discussion in that decision regarding the decedent's attempted revocation of the will substitute is irrelevant to this case because the Super Will statute operates independently of the common law doctrine of revocation.

Manary also maintains that the statute "could arguably have been applied" if Homer had "tried to change the beneficiary of the Trust." Br. of Respondent at 14. This argument is unclear. If Manary means the Super Will statute would have applied if Homer had amended the Trust instrument to name Anderson as beneficiary, that position is mistaken. The statute clearly applies when the beneficiary designation of a will substitute has *not* been changed and is *contrary* to the provisions of a decedent's will. RCW 11.11.007 ("This chapter is intended to establish ownership rights to nonprobate assets upon the death of the owner, as between beneficiaries and testamentary beneficiaries.").

On the other hand, if Manary means that the statute would have applied if Homer had attempted to name Anderson as the beneficiary of the entire Trust in his Will, rather than leave Anderson a specific asset contained

in the Trust, that position also falls short. It invites this Court to render the "specific reference" requirement of RCW 11.11.020 (1) meaningless, which courts are loathe to do. *See Stroh Brewery Co. v. State, Dept. of Revenue*, 104 Wn. App. 235, 239-40, 15 P.3d 692, *review denied*, 144 Wn.2d 1002, 29 P.3d 718 (2001) ("In interpreting and construing a statute, we must give effect to all of the language, rendering no portion meaningless or superfluous.") This argument is also at odds with the very definition of a nonprobate asset, which expressly includes particular interests passing under a trust. RCW 11.11.010(7); RCW 11.02.005(15). Under any interpretation, Manary's position fails.

By stark contrast, simply interpreting the language of RCW 11.11.020(1) to mean precisely what it says not only supports Anderson's position, but is also consistent with the intent of the statute. *See* RCW 11.11.003(1) (one of the purposes of the statute is to "[e]nhance and facilitate the power of testators to control the disposition of assets that pass outside their wills[.]"); Artura, 74 WASH. L. REV. at 807 ("The superwill [sic] statute simplifies the disposition of an estate by permitting a testator to dispose of both probate and nonprobate assets through one instrument.").

Black-letter law regarding statutory interpretation further supports a plain reading of RCW 11.11.020(1)'s clear language. The Legislature could have included a requirement that the bequest of a nonprobate asset refer to the

will substitute, but it chose not to. Courts "will not read into [a] statute what is not there." *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). "Rather, courts seek to foster the purposes for which the statute was enacted." *Chelan County*, 33 Wn. App. at 416. This is particularly true where the statute itself requires that it be "liberally construed and applied to promote [its] purposes[.]" RCW 11.11.005.

Simply put, Homer did in his Will precisely what the Super Will statute requires: he named Anderson to receive a specific nonprobate asset, the Property, "notwithstanding the rights of any beneficiary designated before the date of the will." RCW 11.11.020(1). Therefore, Anderson is entitled to Homer's interest in the Property. The trial court's ruling to the contrary was erroneous as a matter of law.

C. Manary's remaining arguments also fail.

1. The Property is a nonprobate asset.

Manary's attempt to cast the Property as something other than a nonprobate asset strains credulity and the very definition of the term. He correctly notes that the Super Will statute at RCW 11.11.010(7) defines a "nonprobate asset" as the term is defined in RCW 11.02.005, and excludes, among other things, "[a] deed or conveyance for which possession has been postponed until the death of the owner[.]" Br. of Respondent at 9. However,

Manary's simplistic conclusion that the Property fits within this definition because no one could take possession of the Property until Homer died overlooks the real estate interests the Legislature actually intended to exclude from the statute: future interests. Artura, 74 WASH. L. REV. at 813.

Here, Homer did not transfer to the Trust, nor leave to Anderson, a future interest in the Property. He and Eileen deeded the Property to the Trust; it became a Trust asset at that moment, not at some point in the future. Homer and Eileen had possession of the Property and Homer remained in possession of it after her death. Homer later specifically left all of his interest in the Property to Anderson in his Will. Homer remained in possession of it until his death. The simple fact that the bequest to Anderson took effect when Homer died does not bring the asset within the exclusion pertaining to future interests. Indeed, if that were the case, *any* nonprobate asset disposed of in a decedent's will would arguably fall within that exclusion. That scenario would render the entire statute meaningless.

Moreover, Manary's contention that the Property could not be a nonprobate asset because possession of the property was deferred until Homer's death overlooks the very definition of the term. Nonprobate assets are "those rights and interests of a person having beneficial ownership of an asset that *pass on the person's death* under a written instrument or arrangement other than the person's will[,]" and includes "a right or interest

passing under a ... trust of which the person is grantor and that becomes effective or irrevocable *only upon the person's death*[.]" RCW 11.02.005(15) (emphasis added). This definition (indeed, the very concept of a nonprobate asset) clearly contemplates that possession of the asset, by anyone, will not occur until the owner's death. It obviously applies to the Property.

But even if the Property is not considered a nonprobate asset, it would then, by necessity, have to be a *probate asset,* one that is not governed by the Trust, but entirely by Homer's Will. Manary's position that the property is not a nonprobate asset for the purposes of the Super Will statute, but is somehow still subject to the terms of the Trust, is bizarre and this Court should reject it.

2. <u>The provisions of chapter 11.11 RCW designed to protect third parties do not, by their own terms, apply to this situation.</u>

Manary's attempts to escape the statutory provision that directly governs this case are as desperate as they are fruitless. He relies on, and misleadingly cites to, several sections of the statute that the Legislature specifically intended to protect third parties in possession of assets falling within the Super Will statute. "By enacting a superwill [sic] statute that provides protection to financial institutions and other third-party holders of will substitutes, the Washington legislature dispelled the concern that a

superwill [sic] provision would expose financial intermediaries to potential liability." Artura, 74 WASH. L. REV. at 817. Those sections patently do not apply here.

a. *The notice provisions*

First, Manary maintains the Super Will statute required Anderson to notify Manary of Anderson's interest in the Property within either six months of the admission of Homer's Will to probate or one year after Homer's death. A simple reading of the relevant provisions swiftly defeats this claim.

Among other things, the Super Will statute is designed to "[p]rotect any financial institution or other third party having possession or control over [an asset that passes outside of a will] and transferring it to a beneficiary duly designated by the testator, unless that third party has been provided notice of a testamentary disposition as required by this chapter." RCW 11.11.003(3). To facilitate that purpose, RCW 11.11.040 provides, in relevant part, that

> *In transferring nonprobate assets*, a personal representative, financial institution, or other third party may rely conclusively and entirely upon the form of the nonprobate asset and terms of the nonprobate asset arrangement in effect on the date of the owner, and a personal representative or third party may rely on information provided by a financial institution or other party who has possession or control of a nonprobate asset concerning the form of the nonprobate asset and the terms of the nonprobate asset arrangement in effect on the date of death of the owner, unless the personal representative, financial institution, or other third party has actual knowledge of the existence of a claim by a testamentary beneficiary.

(emphasis added).

A "third party" is "a person, including a financial institution, having possession or control over a nonprobate asset at the death of the owner[.]" RCW 11.11.010 (11). To ensure that the third party having possession of the asset has the "actual knowledge" described above, one must give the third party the notice described in RCW 11.11.050.

These provisions would have applied if, for example, a bank had been holding the Property pursuant to the Trust with instructions to transfer it in accordance with the Trust provisions when Homer died. The bank would have had the right to rely on the terms of the Trust and to transfer the Property according to its terms *unless* Anderson notified the bank of Homer's alternate disposition of the property in his Will.

That is clearly not the situation here. At Homer's death, no third party was holding, or ever held, the Property awaiting its transfer to someone. Anderson, the testamentary beneficiary, was in possession of the Property when Homer died; there was no one for him to give notice to. Nor does the statute require that notice be given in the reverse situation – i.e., for a testamentary beneficiary to give notice of the testamentary disposition to a beneficiary designated in the will substitute. Manary essentially argues that Anderson has no right to the Property because he, Anderson, did not deliver notice to himself (as the person in possession of the Property) of the terms of

Homer's Will. That position is nonsensical and is, again, contrary to the plain language of the statute.

b. *The six-month limitations period*

Next, Manary tries to apply a specific limitations period to the entire statute. This also fails to withstand the slightest scrutiny. The Super Will statute allows a *testamentary* beneficiary "entitled to a nonprobate asset *otherwise transferred to a beneficiary not so entitled*" to seek relief in the superior court. RCW 11.11.070 (2) (emphasis added). The testamentary beneficiary must seek that relief within six months of the admission of the owner's will to probate or one year from the date of the owner's death, whichever is earlier. RCW 11.11.070 (3).

Again, this limitations period would apply if, hypothetically, a bank had already transferred the Property to someone other than Anderson. Anderson would then have had either six months or one year to file a petition for relief in superior court. That is plainly not the situation here because the Property was never transferred to anyone following Homer's death; it was in the testamentary beneficiary's (Anderson) possession at that time. Thus, the limitations period in this provision simply does not apply.

Indeed, the provision Manary noticeably fails to cite expressly states as much: "The protection accorded to financial institutions and other third parties under RCW 11.11.040 *has no bearing on the actual rights of*

ownership of nonprobate assets as between beneficiaries and testamentary beneficiaries[.]" RCW 11.11.070 (1) (emphasis added).

3. The Super Will statute does not contemplate substantial compliance with a will substitute.

Finally, Manary contends that the Super Will statute does not eliminate the doctrine of substantial compliance that courts historically applied to analyze will substitutes. Br. of Respondent at 20. This argument does not get Manary very far for two reasons. First, he erroneously relies on the authority he cites, as it relates to how courts *used to* analyze a testator's attempts to change the beneficiary designation of a nonprobate asset *before* the advent of the Super Will statute. *See* Artura, 74 WASH. L. REV. at 808 (discussing pre-Super Will statute cases in which "courts resort to the doctrine of substantial compliance to effectuate the testator's intent" when the testator tried to change the beneficiary designation of a will substitute in a will); *Furst*, 113 Wn. App. at 842-43 (discussing common law revocation independently of Super Will statute analysis); *Rice v. Life Insurance Co. of North America*, 25 Wn. App. 479, 482, 609 P.2d 1387, *review denied*, 93 Wn.2d 1027 (1980) (pre-Super Will statute case discussing substantial compliance doctrine); *In re Estate of Button*, 79 Wn.2d 849, 852, 490 P.2d 731 (1971) (pre-Super Will statute case discussing common law revocation).

Second, this common law "substantial compliance" analysis pertains

only to the question of whether a testator sufficiently revoked the terms of a will substitute when attempting to alter the beneficiary designation in a later-executed will. As such, this analysis is irrelevant to the issue on appeal. Anderson is not arguing that Homer's conveyance of the Property to Anderson, in either the statutory warranty deed or his Will, operated to revoke the Trust pursuant to the common law requirements of revocation. Rather, Anderson's position is simply that, by operation of the Super Will statute, the specific reference to the Property in Homer's Will supersedes the terms of the Trust as to that particular asset. This is entirely consistent with the Legislature's intent in passing the Super Will statute. *See* F.B. Rep. on S.B. 6181, at 1, 55th Leg., Reg. Sess. (Wash. 1998) ("By writing his or her will, a person can supersede pre-existing beneficiary designations on ... certain ... limited assets in order to enable the terms of his or her will to govern the disposition of all those assets."). Contrary to Manary's position, the statute does not, and cannot, supersede pre-existing beneficiary designations and simultaneously permit an analysis of substantial compliance with the common law method of revocation.

D. This Court should deny the motion to strike.

Because the standard of review of a summary judgment ruling is *de novo*, a trial court's factual findings on summary judgment are "superfluous" and may be "disregarded" by an appellate court. 14A Karl Tegland,

Washington Practice, Civil Procedure, § 25:29 (2010). That is, assigning error to any part of the trial court's ruling here was likely unnecessary; however, Anderson chose to explain the specific portions of the court's decision supporting this appeal out of an abundance of caution. *Id.* at n. 7.

In any event, Manary can assuage his concerns regarding Anderson's first and second Assignments of Error at pages 9-19 of Anderson's opening brief. Manary is correct that Anderson did not argue that Homer referred to the Trust in his bequest of the Property to Anderson; indeed, Anderson's position is that the Super Will statue requires no such reference to transfer a nonprobate asset. Accordingly, this Court should deny the motion to strike.

II. CONCLUSION

The trial court erred as a matter of law when it ruled that Homer's specific devise of his interest in the Property to Anderson was ineffective, despite having satisfied RCW 11.11.020 (1). Manary offers no persuasive argument to the contrary. Rather, he invites this Court either to disregard the Super Will statute entirely or to strip its plain language of any meaning. This Court should decline Manary's invitation. Instead, it should reverse the trial court's order denying Anderson's motion for partial summary judgment and granting Manary's cross-motion, and should remand this case to the trial court with instructions to enter judgment in favor of Anderson as to a one-half interest in the Property.

Dated this 22 day of February 2011.

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CERTIFICATE OF SERVICE

Kristina Church being first duly sworn, on oath deposes and says: I am over the age of 18 years and am not a party t the within cause. I work at Curran Law Firm P.S. and on this date I caused to be served by ABC Legal Messengers a true and correct copy of the above **Reply Brief of Appellant** on the following persons set forth below:

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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 at Kent, Washington, this 23rd day of February, 2011.

Kristina Church

APPENDIX TO APPELLANT'S REPLY BRIEF

1. 14A Karl Tegland, *Washington Practice, Civil Procedure,* §25:29 (2010) 15

14A Wash. Prac., Civil Procedure § 25:29

Washington Practice Series TM
Civil Procedure
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Karl B. Tegland [a0]

F. Pretrial Motions and Related Matters
Chapter 25. Summary Judgment

§ 25:29. Appeal from summary judgment

Westlaw Databases

Washington Practice Series: Handbook on Civil Procedure (WAPRAC-HCP)
Washington Practice Series: Washington Summary Judgment and Related Termination Motions (2008 ed.) (WAPRAC-SUM)

Treatises and Practice Aids

Tegland and Ende, 15A Washington Practice: Washington Handbook on Civil Procedure § 69.36 (2009-2010 ed.)
Baker, 34 Washington Practice: Washington Summary Judgment and Related Termination Motions § 5:72 (2009-2010 ed.)

A summary judgment that fully determines a case is a final, appealable judgment. [1] By contrast, the denial of summary judgment is not appealable but may be subject to discretionary review. [2]

A summary judgment that determines only some issues in the case (often termed a *partial* summary judgment) is appealable if, but only if, the trial court makes an express determination, supported by written findings, that there is no just reason for delay. [3]

On appeal, the appellate court decides the case on a *de novo* basis, engaging in the same analysis as the trial court. [4] Both the law and the facts will be reconsidered by the appellate court. [5] Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. [6]

One 1997 case seems to depart from the general rules just mentioned, but the court's opinion does not purport to change the law, and the case may simply be an unintentional anomaly. Nevertheless, the case may have implications for appellate briefing. [7]

Evidentiary objections must be made, if at all, at the trial court level. An appellate court will not consider an evidentiary objection for the first time on appeal, even though appellate review is on a de novo basis. [7.50]

Other arguments not made at the trial court level need not be considered on appeal. [8] However, since the appellate court reviews summary judgment on a *de novo* basis, the general rule is less restrictive than it first appears to be. For example, in a 1989 medical malpractice action, the court was willing to consider plaintiff's argument—made for the first time on appeal—that the defendant's affidavits were insufficient to support a summary judgment because they amounted to mere conclusions. The court cited the time-honored notion that "the appellate court engages in the same inquiry as the trial court." [9]

RAP 9.12 contains detailed requirements about the record on appeal from summary judgment and should be consulted as necessary. [10]

a0 Of The Washington Bar.

1

Final judgment

Seattle-First Nat. Bank v. Marshall, 16 Wash. App. 503, 557 P.2d 352 (Div. 1 1976) (summary judgment was an appealable final judgment).

See generally § 34:26 (appealable orders and judgments).

2

Discretionary review

See § 25:25.

3

Partial summary judgment

See § 25:26.

4

De novo

See, e.g., Roger Crane & Associates, Inc. v. Felice, 74 Wash. App. 769, 875 P.2d 705 (Div. 3 1994).

5

Law and facts

On appeal from summary judgment, trial court rulings on the admissibility of evidence are reviewed de novo, even though the same rulings might be reviewed only for abuse of discretion in an appeal following a trial. Momah v. Bharti, 144 Wash. App. 731, 182 P.3d 455 (Div. 1 2008), as amended, (July 3, 2008) (admissibility of hearsay); State v. Montgomery, 163 Wash. 2d 577, 183 P.3d 267 (2008) (qualifications of expert).

Brouillet v. Cowles Pub. Co., 114 Wash. 2d 788, 791 P.2d 526, 60 Ed. Law Rep. 638 (1990).

6

Will be disregarded

Redding v. Virginia Mason Medical Center, 75 Wash. App. 424, 878 P.2d 483 (Div. 1 1994).

Findings of fact and conclusions of law that were filed as part of summary judgment to support argument for sanctions against opposing party, like any findings in an order granting summary judgment, were gratuitous, superfluous, and of no consequence on appeal from denial award of attorney fees. Skimming v. Boxer, 119 Wash. App. 748, 82 P.3d 707 (Div. 3 2004).

Where case on appeal was decided on summary judgment, any findings of fact are superfluous and subject to the de novo standard of review. Thongchoom v. Graco Children's Products, Inc., 117 Wash. App. 299, 71 P.3d 214 (Div. 3 2003).

7

Anomaly

Greater Harbor 2000 v. City of Seattle, 132 Wash. 2d 267, 937 P.2d 1082 (1997) (majority opinion by Smith, J.; concurring opinion by Johnson, J.; dissents by Madsen and Sanders, J.).

The case represents a departure from the general rules discussed above—that findings and conclusions are unnecessary on summary judgment, and that an appellate court reviews a summary judgment on a no novo basis. In *Greater Harbor*, an appeal from summary judgment, the Supreme Court refused to consider the appellant's argument because, the court said, the appellant had failed to assign error to the superior court's finding that the case involved no genuine issue of material fact.

Apparently under *Greater Harbor*, when appealing from the granting of summary judgment, the appellant must now specifically assign error in appellant's brief to the trial court's conclusion (however denominated in the summary judgment itself) that the case involved no genuine issue of material fact.

Of course, it is also possible that the Supreme Court simply misspoke and did not mean what it said. But until the Supreme Court says otherwise, the only prudent practice is to try to adhere to *Greater Harbor* when drafting the appellant's brief.

7.50

Will not consider

Bonneville v. Pierce County, 148 Wash. App. 500, 202 P.3d 309 (Div. 2 2008), review denied, 166 Wash. 2d 1020, 217 P.3d 335 (2009) (objection that document was hearsay would not be considered when raised for the first time on appeal).

8 **Need not be considered**

See, e.g., Sneed v. Barna, 80 Wash. App. 843, 912 P.2d 1035 (Div. 2 1996).

9 **The same inquiry**

Parkin v. Colocousis, 53 Wash. App. 649, 769 P.2d 326 (Div. 1 1989).

10 **Record on appeal**

The appellate court considers only evidence that was considered by the trial court, and that is contained in the record on appeal. See, e.g., Riojas v. Grant County Public Utility Dist., 117 Wash. App. 694, 72 P.3d 1093 (Div. 3 2003) (Court of Appeals would not consider declaration of passenger in second car when reviewing trial court's order granting motion for summary judgment that was filed by county public utility district in personal injury action brought by passenger in first vehicle, since declaration was not considered by trial court in its order).

Cross-reference

For a more detailed discussion of RAP 9.12 and the cases applying the rule, see Tegland, 3 Washington Practice: Rules Practice (6th ed.).

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