Supreme Court No. 89867-7
Court of Appeals No. 69413-8-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JACKSON J. MIKA

Plaintiff/Respondent/Petitioner

v.

JBC ENTERTAINMENT HOLDINGS, INC., a Corporation doing business in the State of Washington, JBC OF SEATTLE, WA, INC., a Washington business, a subsidiary of JBC ENTERTAINMENT HOLDINGS, INC.; MARQUIS HOLMS, an individual d/b/a BOSS LIFE ENTERTAINMENT, JANE DOE, husband and wife, and their community, GREG STEVENS, an individual, Husband and wife, and their community; TONY HUMPHRIES, an individual, Husband and wife, and their community

Defendants/Appellants/Respondents

PETITION FOR DISCRETIONARY REVIEW

Ms. Catherine C. Clark
THE LAW OFFICE OF CATHERINE C. CLARK PLLC
701 Fifth Avenue, Suite 4785
Seattle, WA 98104
Phone: (206) 838-2528
Fax: (206) 374-3003
Email: cat@loccc.com

Mr. Howard L. Phillips
PHILLIPS LAW LLC
3815 S. Othello Street
Suite 100-353
Seattle, WA 98119
Phone: (206) 725-0912
Fax: (206) 397-3253
Email: iidefend@aol.com

Attorneys for Petitioner Jackson J. Mika

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Treatises

I. IDENTITY OF PETITIONER

Jackson Mika, Respondent/Petitioner, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. DECISION BELOW

Review is sought of the following unpublished decision of the Division Two of the Court of Appeals: *Mika v. Stevens, et al.*, Docket No. 69413-8-I (December 23, 2013). A copy of the decision is in the attached Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Whether an appellate court may treat arguments raised at the trial court but not reasserted at the appellate court as waived when reviewing a case under the *de novo* standard of review?

Whether the record established a *prima facie* case of jurisdiction over Defendant Mr. Gregory Stevens?

IV. STATEMENT OF THE CASE

A. INTRODUCTION

This case involves two primary questions. One relates to the application of the *de novo* standard of review. The other to whether or not Mr. Stevens met his burden on summary judgment.

Mr. Jackson Mika sued Mr. Stevens, among others, as a result of injuries he sustained while at the nightclub Jillians in Seattle. Insofar as relates to this petition, Mr. Stevens moved for summary judgment claiming that Washington courts lacked jurisdiction over him. The trial court denied his motion and Mr. Stevens sought discretionary review in the Court of Appeals. The Court of Appeals reversed the trial court and dismissed Mr. Mika's claims against Mr. Stevens.

The Court of Appeals erred in two significant ways. First, it failed to engage in a *de novo* review of the trial court when it claimed that Mr. Mika waived arguments he made at the trial court but did not reassert at the appellate court in his briefing. There is no authority for this proposition either in the Rules of Appellate Procedure or in the decisional law of the State of Washington. This court should accept review of this case and address this practice.

Second, the Court of Appeals simply erred on the record before it. Mr. Stevens clearly stated that he had been to Washington State at least 6 times in a 10 year period. CP 97. However, he does not explain why he was in the state. As the moving party, Mr. Stevens failed to meet his burden. This also serves as a basis for this court to accept review.

B. FACTS

On March 21, 2010, Mr. Mika was injured while he was a patron at Jillian's night club in Seattle, Washington. He was shot. Mr. Mika has suffered severe personal injuries as a result. Mr. Mika filed suit against JBC Entertainment Holdings ("JBC") and its owners, Gemini Investors ("Gemini"), Alpha Capital Partners, LTD ("Alpha") and Mr. Greg Stevens. Mr. Stevens was also the majority owner, chief financial officer, and chief executive officer of JBC. Mr. Mika sued other defendants who are not a part of this appeal.

In May 2012, Mr. Stevens moved for summary judgment claiming a lack of personal jurisdiction in Washington State. Mr. Stevens claimed the following:

1. In March 2010, Mr. Stevens claimed to live in Kentucky. CP 97.
2. Mr. Stevens now lives in Nevada. CP 97.
3. He stated he had not lived in Washington. CP 97.
4. He stated he had not maintained an office or mailing address in Washington. CP 97.
5. He stated he did not possess a bank account or any other personal or real property in Washington State. CP 97.
6. He stated that he had travelled to Washington state approximately six times in the last decade. CP 97. Notably, Mr. Stevens does not explain what he did do in Washington State during these visits. CP 97.

7. He stated that JBC of Seattle, not JBC Holdings was responsible for the control and operation of Jillians. CP 97.

8. He stated that he was responsible for the company's overall profitability, not the day-to-day operations of the subsidiary companies. CP 97.

9. He stated that he had no hiring or firing authority for employees at subsidiary companies, nor was he responsible for the policies and procedures in place at Jillians'.

The trial court denied the motion. CP 505. Mr. Stevens' filed a petition for discretionary review with Division One of the Court of Appeals claiming probable error under RAP 2.3(b)(2). In early 2013, the Court of Appeals accepted review.

On December 23, 2013, the Court of Appeals reversed the trial court and dismissed the case against Mr. Stevens. The Court of Appeals decision focused heavily on Mr. Mika's argument in his response brief as the basis for the reversal. The court stated:

> However, the full argument advanced in Mika's response brief is that the new evidence obtained after Stevens filed his motion for discretionary review, but a month prior to this court granted review warrants a remand to the trial court to allow additional motion practice.

Slip Op. p 8-9. This new evidence related to the sale of JBC of Seattle to Gameworks while Mr. Mika's suit was pending. *Id.*

> At oral argument, Mika emphasized that Stevens had testified in his deposition that security at Jillian's was not

> necessary, suggesting Stevens admitted having a role in setting the security policy and thus constituting a basis for long arm jurisdiction based on tortious conduct. **Even if we were to consider this argument, which is not argued in Mika's response brief**, the record on appeal does not include the portion of the deposition in which Stevens initially made such a statement, so we are unable to examine the context of such a statement. The record before us reflects only that Stevens testified he did not believe the video surveillance was necessary. Stevens's counsel asked Stevens at the end of the deposition to clarify whether he thought other security measures were necessary and Stevens responded that the overall safety of the patrons at Jillian's was important. Given Steven's unrebutted testimony that in no responsibility for creating or implementing any of the safety policies or procedures, Stevens's comment on security policies do not create a genuine issue of material fact that he committed tortious conduct the subjecting himself to personal jurisdiction under the long arm statute.

(Emphasis added.) Slip Op. p. 10.

The court's statement that "even if we were to consider the argument" was error—the standard of review is *de novo* which requires that Mr. Stevens had to prove that there was not genuine issue of material fact as to whether or not personal jurisdiction existed. If and when he did that, then and only then, the burden shifted to Mr. Mika. The *de novo* standard of review is not an analysis of whether Mr. Mika submitted the proper argument in his appellate briefing but rather what was presented to the trial court. As is shown below, this Court should accept review of this case and rule on whether or not the Court of Appeals' practice of treating

arguments made at the trial court and not reasserted at the Court of Appeals as waived on cases involving the *de novo* standard of review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) governs petitions for review to this Court and sets forth the following considerations for review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

As is shown below, there is a practice, largely within unpublished decisions from the Court of Appeals, where the Rules of Appellate procedure are used to reduce review under a *de novo* standard of review. This practice is not authorized by the RAP nor by the decisional law of this state. The issues presented in this case involve all the standard set forth at RAP 13.4(b)(4).

A. THE *DE NOVO* STANDARD OF REVIEW REQUIRES A FULL REVIEW OF THE TRIAL COURT RECORD IRRESPECTIVE OF THE BRIEFING AT THE APPELLATE COURT

Under the *de* novo standard of review, the Court of Appeals engages in the same inquiry as the trial court and views the evidence in the light most favorable to the non-moving party, here Mr. Mika. *Roger Crane & Assoc., Inc., v. Felice*, 74 Wn. App. 769, 773, 875 P.2d 705 (1994). A reviewing court, on appeal, considers only such evidence as was admitted in the trial court. *Casco Co. v. Public Utility Dist. No. 1 of Thurston County*, 37 Wn.2d 777, 784, 226 P.2d 235 (1951). The Court of Appeals must also give the plaintiff the benefit of all reasonable inferences from the evidence presented. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). Further, *de novo* review involves an analysis of the application of the law by the trial court to the facts in the record. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (de novo review is limited to the legal conclusions the trial court drew from its findings of fact).

If the moving party does not meet their initial burden on summary judgment, a responding party need not respond at the trial court level. "If the moving party does not sustain ... [its]

burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials." *Jacobsen v. State*, 89 Wn.2d 104, 108-09, 569 P.2d 1152 (1977), *overruled on other grounds*, *Peeples v. Port of Bellingham,* 93 Wn.3d 766, 613 P.3d 1128 (1980). "If the moving party does not meet this initial burden, summary judgment may not be entered, regardless of whether the opposing party submitted responding materials." *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991).

The same should be true in the appellate court and in fact is. If a party chooses not to file a brief, then he or she only loses the right to oral argument. RAP 11.2(a). While admittedly a risky practice, the law does not require the filing of a brief. WASHINGTON APPELLATE PRACTICE DESKBOOK, ¶19.18 (Wash. State Bar Assoc. 3d ed. 2005). In theory, the non-moving party on a summary judgment motion could fail to respond at the trial court and at the appellate court and still survive. This is because the burden placed on the appellant remains unchanged under a *de novo* standard of review irrespective of which court they are in.

What is happening is that the Court of Appeals is using RAP 12.1 as a basis for effectively limiting the record on appeal and thus, minimizing the *de novo* standard of review. The rule states:

> (a) Generally. Except as provided in section (b), the appellate court will decide a case only on the basis of **issues** set forth by the parties in their briefs.
>
> (b) **Issues** Raised by the Court. If the appellate court concludes that an **issue** which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the **issue** raised by the court.

(Emphasis added.) RAP 12.1. The issue before the Court of Appeals here was whether or not jurisdiction existed over Mr. Stevens. This issue was raised in briefing at the Court of Appeals and at the trial court. What the Court of Appeals is taking issue with was the facts and legal arguments on which Mr. Mika focused. However, his focus in his brief does not alter the record or the *de novo* standard of review imposed upon the Court of Appeals in this case.

The Court of Appeals practice in treating arguments as waived (including assertion of certain facts) not made in an appellate brief but at the trial court is not envisioned by RAP 12.1 and does not comport with a *de novo* standard of review. RAP 12.1 addresses issues, not arguments relating to those issues. In *Gould*

v. Im, No 48098-8-II, an unpublished opinion from Division Two,[1] Judge Quinn-Brintall, in her concurring/dissenting opinion identifies the problem:

> Because Im fails to reraise this argument in his appellant's brief, the majority considers this issue waived. But because the trial court clearly misapplied the law in this case, I would invoke this court's inherent authority to consider issues briefed and presented to the trial court and to decide the appeal on that issue.[9] *State v. Aho*, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999); *State v. Carter*, 138 Wn.App. 350, 368, 157 P.3d 420 (2007); RAP 12.1(b). Here, the record clearly reflects that Gould presented no evidence that Im knew the Goulds were real estate speculators and intended to improve and immediately sell the house. The record further reflects that the trial court was presented with, and summarily rejected, the correct amount-lost rental value-of damages Gould should have received for Im's breach. In my view, the trial court simply misapplied Washington law regarding the proper method of calculating damages and awarded Gould an unwarranted windfall. Neither the common law, including 150 years worth of decisions affirming Hadley, nor Washington law, as seen in Thompson, support such an award. In these circumstances, I do not believe this court must turn a blind eye to the law and refuse to correct an obvious error. The measure of damages is a question of law which we should review and correct when our review of the record reveals error. *See, e.g., Farmer v. Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). Accordingly, I would affirm the reformation of the well maintenance agreement but I would remand to the trial court for recalculation of damages under the proper lost rental value formula.

---

[1] *Gould v. Im*, is not cited as authority for any proposition of law. Rather, it is provided to this court to identify a practice ongoing in unpublished opinions in this State and to point out that at least one Washington Judge has identified the issue. GR 14.1.

> [9] I note also that Im's appellate briefing argues that the damage award was impermissibly speculative and that the collapse of the housing market was unforeseeable by the parties. Although these arguments are not well formulated or conceived-*e.g.* Im focuses on whether damages would have been foreseeable.

Gould v. Im, Appendix B.

Additionally, RAP 12.1 does not contain any language similar to that contained in RAP 10.3(g) relating to assignments of error. There, the rule states in relevant part: "The appellate court will only review a claimed error which his included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." RAP 12.1 contains no similar warning regarding arguments presented at the trial court and not reasserted at the appellate court.

Further, the present case involves a summary judgment motion which is subject to RAP 9.12[2] which also states that only issues raised before the trial court are properly before the appellate court. However, there are some exceptions. This Court has stated that specific statutes not presented to the trial court but which are in

---

[2] The rule states: 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.

the same statutory scheme as those which were presented are properly before the appellate court.

> The other issue which defendant maintains was not raised below and therefore is not properly before this Court is plaintiffs' argument that RCW 49.44.090 and RCW Ch. 49.60 create separate and distinct causes of action. The record does not reveal any specific request by plaintiffs that the court consider the statutes independently from one another. In fact, no mention of RCW 49.40 4.090 is found in plaintiffs' memorandum opposing summary judgment. However, a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal. *State v. Fagalde*, 85 Wash. 2d 730, 732, 539 P.2d 86 (1975). Both RCW 49.44.090 and RCW Ch. 49.60 relate to discriminatory practices in employment. Therefore it is both appropriate and necessary for this court to consider these two obviously related statutes in determining whether plaintiffs' cause of action exists.

Bennett v. Hardy, 113 Wash. 2d 912, 918, 784 P.2d 1258 (1990).

Further, when the right to maintain the action is at issue, like here, new issues can be raised at the appellate court level even if not raised at the trial court level.

> Moreover, we recognize another exception to the general rule and have considered issues not raised below quote when the question raise affects the right to maintain the action." *Maynard Inv. Co., Inc. v. McCann*, 77 Wash. 2d 616, 621, 465 P.2d 657 (1970). *New Meadows Holding Co. v. Washington Water Power Co.*, 102 Wash. 2d 495, 498, 687 P.2d 212 (1984). The central issue of this case is Plaintiff's right to maintain their action. Under this exception consideration of RCW 49.44.090 is appropriate.

Bennett, 113 Wn.2d at 918.

The same should be true at the appellate court level as it is engaging in a *de novo* review of what the trial court did *i.e.*, that the failure to reassert an argument in a brief presented to an appellate court reviewing a matter under the *de novo* standard of review is not fatal to those arguments if they are presented to the trial court. In short, what is good for the trial court, should be good for the appellate court.

B. CONSIDERING THE ENTIRE RECORD, MR. STEVENS FAILED TO MEET HIS BURDEN ON SUMMARY JUDGMENT

As the moving party, Mr. Stevens was required to show that no genuine issues of material fact existed as to his claim that Washington courts lacked jurisdiction over him. As is shown below, he failed to do that.

There are two types of personal jurisdiction: general and specific. *Washington Equipment Mfg. Co. Inc., v. Concrete Placing Co. Inc.*, 85 Wn. App. 240, 244, 931 P.2d 170 (1997). General jurisdiction allows a non-resident defendant to be sued in Washington for any claim when "the defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's

contacts within the state." *Raymond v. Robinson*, 104 Wn. App. 627, 633, 15 P.3d 697 (2001).

Specific jurisdiction, on the other hand, is act specific, and is governed by Washington's "long-arm statute," which provides in pertinent part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits...to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;....

RCW 4.28.185(1).

Even if RCW 4.28.185(1)(a) or (b) is facially satisfied, the exercise of personal jurisdiction must comport with due process. "The Due Process Clause 'does not contemplate that a state may make binding a judgment...against an individual or corporate defendant with which the state has no contacts, ties, or relations.'" *Shaffer v. Heitner*, 433 U.S. 186, 216, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977) (*quoting International Shoe Co. v. Washington*, 326 U.S. 310, 319, 90 L.Ed. 95, 66 S.Ct. 154 (1945).)Therefore, for due process to be satisfied, the following factors must co-exist:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;

(2) The cause of action must arise from, or be connected with, such act or transaction; and

(3) The exercise of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice....

Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 767, 783 P.2d 78 (1989). That a non-resident's act had some impact in Washington is not alone sufficient under the Constitution to exercise personal jurisdiction. The plaintiff must present evidence that the defendant purposefully conducted activities in the state "invoking the benefits and protections of our laws." *Raymond v. Robinson*, 104 Wn. App. 627,637 15 P.3d 697 (2001).

General jurisdiction is appropriate when a nonresident defendant is "transacting substantial and continuous business within the state of such a character as to give rise to legal obligation." *Raymond v. Robinson*, 104 Wn. App. 627,633 15 P.3d 697 (2001).

To assert specific jurisdiction under RCW 4.28.185(1)(a), the facts must show that a defendant "purposefully did some act or consummated some transaction in" Washington, and that the plaintiff's alleged injuries arose from that act. *Raymond v.*

Robinson, 104 Wn. App. 627, 637, 15 P.3d 697 (2001). These inquiries cannot be satisfied on the record in this case.

Here, as Mr. Stevens made a motion for summary judgment, he had the burden to show an absence of a material fact. Mr. Stevens moving papers failed to meet this burden. At Page 2 of his own affidavit, Mr. Stevens stated that he had been to Washington State six times within the previous decade. CP 97. However, nowhere in his moving papers does Mr. Stevens explain why he was in Washington State or what he was doing in the State. Thus, as an initial inquiry, Mr. Stevens illuminated a genuine issue of material fact, to wit: What exactly was he doing in Washington State? This record does not answer the question that Mr. Stevens himself raised.

Given that, the burden did not shift to Mr. Mika, and even if it did, since Mr. Stevens admitted coming to Washington State for some unexplained reason, the record contains sufficient facts to support a *prima facie* case.

Cases involving employment discrimination claims are similar to challenges to personal jurisdiction and are therefore helpful to review. In such cases, Washington courts have largely adopted the federal burden-shifting scheme announced in

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006); *Kirby v. City of Tacoma*, 124 Wn.App. 454, 464, 98 P.3d 827 (2004), *review denied*, 154 Wn.2d 1007 (2005). Under the *McDonnell Douglas* burden-shifting scheme, like in challenges to jurisdiction, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *Hill*, 144 Wn.2d at 181. In cases involving challenges to personal jurisdiction, the party asserting jurisdiction, here, Mr. Stevens, is required to demonstrate, in his complaint, a *prima facie* showing of jurisdiction. *Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999). The party asserting jurisdiction has the burden of establishing its existence. *Bershaw v. Sarbacher*, 40 Wn.App 653, 655, 700 P.2d 347 (1985).

At the summary judgment stage, however, a plaintiff's prima facie burden is not "onerous." The "'requisite degree of proof necessary to establish a prima facie case . . . is minimal and does not even need to rise to the level of a preponderance of the evidence.'" *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App.

137, 152, 279 P.3d 500 (2012). Again, in employment cases, if the plaintiff succeeds in establishing a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Hill*, 144 Wn.2d at 181. If the employer then provides a legitimate, nondiscriminatory reason for its employment action, the burden shifts back to the plaintiff to produce admissible evidence sufficient to create a triable issue of fact as to whether the employer's articulated reason was "pretext" for discrimination and whether that discrimination was, in fact, a substantial factor in its employment decision. *Barker v. Advanced Silicon Materials, LLC*, 131 Wn.App. 616, 624, 128 P.3d 633, review denied, 158 Wn.2d 1015 (2006). If the plaintiff fails to make this pretext showing, the employer is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182. When applying the McDonnell Douglas three-part burden-shifting scheme, the court neither weighs evidence nor assesses witness credibility. *Barker*, 131 Wn.App. at 624. Rather, the court's "'job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is the jury's role, once a burden of production has been met.'" *Barker*, 131 Wn.App. at 624 (quoting

Renz v. Spokane Eye Clinic, PS, 114 Wn.App. 611, 623, 60 P.3d 106 (2002)).

The record here establishes that Mr. Stevens came to Washington State but it does not explain why. As Mr. Stevens was the moving party, Mr. Mika was entitled to all inferences in his favor which means, as the question is unanswered, we can infer that Mr. Stevens came to Washington State to conduct business, arguably related to Jillians. That is all that is needed to establish a *prima facie* case of jurisdiction over Mr. Stevens.

V. CONCLUSION

Mr. Mika's briefing at the Court of Appeals does not alter this simple truth of this case: the record established a *prima facie* case of jurisdiction over Mr. Stevens. The Court of Appeals' practice of treating arguments made at the trial court and not reasserted at the appellate court as waived does not comport with a *de novo* review nor does any Rule of Appellate Procedure or reported decision endorse this approach. RAP 12.1 does not say so as it only relates to issues, not arguments addressing issues. This court should accept review of this case and address this practice head on and disavow it.

Dated this 22nd day of January, 2014.

THE LAW OFFICE OF
CATHERINE C. CLARK PLLC

By: 
Catherine C. Clark,
WSBA 21231

PHILLIPS LAW, LLC

By: _____
Howard L. Phillips,
WSBA 17987

Attorneys' for Respondent Jackson J. Mika

Dated this 22nd day of January, 2014.

The Law Office of Catherine C. Clark PLLC

PHILLIPS LAW, LLC

By: _____
Catherine C. Clark,
WSBA 21231

By: _____
Howard L. Phillips,
WSBA 17987

Attorneys' for Respondent Jackson J. Mika

Appendix A

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

JACKSON MIKA, Respondent, v. GREG STEVENS, an individual, husband and wife, and their community, Appellant, JBC ENTERTAINMENT HOLDINGS, INC., a corporation doing business in the state of Washington; JBC OF SEATTLE, WA, INC., a Washington business, a subsidiary of JBC Entertainment Holdings, Inc.; GEMINI INVESTORS III, L.P., an entity, owner of JBC ENTERTAINMENT HOLDINGS INC.; ALPHA CAPITAL PARTNER, LTD., an entity, owner of JBC ENTERTAINMENT HOLDINGS, INC.; GAMEWORKS ENTERTAINMENT LLC, a corporation doing business in the state of Washington; MARQUIS HOLMES, an individual, dba BOSS LIFE ENTERTAINMENT, JANE DOE, husband and wife, and their community; TONY HUMPHREYS, an individual, husband and wife, and their community, Defendants.	No. 69413-8-I UNPUBLISHED OPINION FILED: December 23, 2013

VERELLEN, J. — Jackson Mika filed a negligence action after suffering a gunshot wound at Jillian's Billiards Club. Mika named Greg Stevens individually, as one of the corporate officers of Jillian's parent company, JBC Entertainment Holdings, Inc. We granted Stevens's motion for discretionary review of the trial court's denial of Stevens's motion for summary judgment based on lack of personal jurisdiction. Because Mika has not set forth prima facie evidence of either an act or transaction by Stevens within Washington out of which his negligence claims arise, we reverse the trial court's conclusion that it could exercise personal jurisdiction over Stevens.

FACTS

Jackson Mika suffered a gunshot wound on March 21, 2010 at Jillian's Billiards Club in Seattle. Along with other defendants not involved in this appeal, Mika sued JBC of Seattle, the entity that owned and operated Jillian's Billiards Club; JBC Entertainment Holdings, Inc. (JBC Holdings); Gemini Investors and Alpha Capital Partners, Ltd, two of the three owners of JBC Holdings; and Greg Stevens, the chief financial officer, chief executive officer, and third owner of JBC Holdings. Mika alleged that Stevens individually, along with the other corporate defendants, was negligent in failing to provide appropriate security policies at Jillian's.

a. Stevens's Motion for Summary Judgment Dismissal Based on Lack of Personal Jurisdiction

On May 29, 2012, Stevens moved for summary judgment based on lack of personal jurisdiction. In March 2010, the time of the accident at Jillian's, Stevens lived in Kentucky, but he has since moved to Nevada. His declaration submitted in support of his motion stated he never lived in Washington, never had an office or a mailing

address in Washington, and did not possess a bank account or any other personal or real property in the state. He has traveled to Washington approximately six times in the last decade.

Stevens's declaration also stated that JBC of Seattle, not JBC Holdings, was responsible for the control and operation of Jillian's. As the chief executive officer and chief financial officer of JBC Holdings, Stevens was responsible for the company's overall profitability, not the day-to-day operations of the subsidiary companies.[1] Stevens had no hiring and firing authority for employees at subsidiary companies, nor was he responsible for the policies and procedures in place at Jillian's. Nor was Stevens involved in organizing or approving events at Jillian's. Tyler Warfield, the chief operating officer of JBC Holdings, was responsible for day-to-day oversight of JBC's subsidiaries, including Jillian's.

Mika's opposition to Stevens's motion stated the court could exercise personal jurisdiction over Stevens because he had a personal role in setting security for the event at which Mika was injured. The court heard oral argument and denied Stevens's motion.[2] We granted Stevens's motion for discretionary review on February 22, 2013, determining the trial court had committed probable error under RAP 2.3(b)(2).

b. The Subsequent Sale of JBC of Seattle

Before Stevens filed his motion for summary judgment, Mika had deposed Stevens twice. At the second deposition, on December 20, 2011, Mika's counsel

[1] JBC Holdings owns various restaurants and other entertainment venues around the country.

[2] The court's order denying Stevens's motion for summary judgment also stated "the Defendant, Greg Stevens is subject to personal jurisdiction in this Court." Clerk's Papers at 506.

questioned Stevens about the sale of JBC of Seattle to Gameworks, which closed on October 14, 2011. Stevens testified that JBC Holdings was "Gemini's investment," but that the sale "would not have happened without my saying, yeah, I agree this is something that we should be doing."[3] Mika's counsel did not ask follow-up questions to determine whether Stevens was a co-owner of JBC Holdings.

On January 17, 2013, Mika deposed Gemini's CR 30(b)(6) witness, Matthew Keis. Keis testified that Gemini owned about 40 percent of JBC Holdings, that Stevens owned about 49 percent, and Alpha Capital the remaining 11 percent. Keis further testified that Stevens worked closely on the sale of JBC of Seattle and other properties of JBC Holdings to Gameworks, and was responsible for negotiation of many of the sale's terms. Stevens's name appears on the bill of sale of JBC of Seattle to Gameworks.[4] This transaction, evidence of which was not before this court when we granted discretionary review, is the sole basis for Mika's argument in his response brief that a Washington court may exercise personal jurisdiction over Stevens.

DISCUSSION

Washington courts may exercise either general or specific personal jurisdiction over a nonresident defendant.[5] A state court's assertion of general or specific

---

[3] Clerk's Papers at 483.

[4] We granted discretionary review on February 22, 2013. The deposition in which Mika learned of Stevens's ownership interest took place on January 17, 2013, just over a month before the order granting review. Stevens argues that Mika's raising the issue of the sale and Stevens's ownership interest is, in essence, raising new evidence on appeal. Mika did not file anything after January 17, 2013 in superior court to request a continuance or leave to file an amended complaint, or to supplement the record in this court pursuant to RAP 9.11.

[5] CTVC of Hawaii Co., Ltd. v. Shinawatra, 82 Wn. App. 699, 708, 919 P.2d 1243 (1996).

jurisdiction over a foreign defendant is subject to review for compatibility with the Fourteenth Amendment's due process clause.[6] Under International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement, a party has the burden of establishing certain minimum contacts between the defendant and Washington such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[7]

The requirements of International Shoe must be met as to each defendant over whom a state court asserts jurisdiction.[8] Where an individual who is also an officer of a corporation subject to Washington jurisdiction challenges the existence of personal jurisdiction, courts must ensure that exercise of jurisdiction is based on sufficient minimum contacts of the individual, not the entity.[9]

Where a dispute about personal jurisdiction is before the trial court in a summary judgment motion, we apply traditional CR 56 de novo review.[10] We consider the facts and reasonable inferences to be drawn therefrom in the light most favorable to the

---

[6] Goodyear Dunlop Tires Operations, S.A. v. Brown, __ U.S. __, 131 S. Ct. 2846, 2850, 180 L. Ed. 2d 796 (2011).

[7] 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); see also Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 654, 230 P.3d 625 (2010).

[8] Rush v. Savchuk, 444 U.S. 320, 332, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980); Huebner v. Sales Promotion, Inc., 38 Wn. App. 66, 70-71, 684 P.2d 752 (1984).

[9] See Huebner, 38 Wn. App. at 72-73.

[10] CTVC of Hawaii, 82 Wn. App. at 707-08.

nonmoving party.[11] The plaintiff has the burden of establishing that jurisdiction exists and need only establish a prima facie case.[12]

General jurisdiction exists if a nonresident defendant is transacting substantial and continuous business of such character as to give rise to a legal obligation, regardless of whether the cause of action is related to the defendant's contacts with Washington.[13] The plaintiff must show that a defendant's activities constitute doing business in the forum state.[14] Mika has failed to set forth any evidence whatsoever that Stevens engaged in substantial and continuous business in Washington. Stevens has traveled to Washington approximately six times and has no other contacts with the state. Because a Washington court may not exercise general personal jurisdiction over Stevens, Mika must put forth prima facie evidence of specific jurisdiction via the long-arm statute.

A Washington court may exercise specific personal jurisdiction over a nonresident defendant when the defendant's limited contacts give rise to the cause of action.[15] Washington's long-arm statute provides in part:

> (1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

---

[11] Id. at 708.

[12] Id.

[13] MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc., 60 Wn. App. 414, 418, 804 P.2d 627 (1991).

[14] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417-18, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

[15] RCW 4.28.185; MBM Fisheries, 60 Wn. App. at 422-23.

> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> . . . .
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.[16]

To satisfy the requirements of due process, a Washington court may exercise specific personal jurisdiction over a foreign entity only when, in addition to the requisites of the long-arm statute, the following elements are satisfied:

> "(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation."[17]

The quality and nature of a defendant's activities determine whether the contact is sufficient, not the "'number of acts or mechanical standards.'"[18] This requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."[19]

---

[16] RCW 4.28.185.

[17] CTVC of Hawaii, 82 Wn. App. at 709-10 (quoting Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 767, 783 P.2d 78 (1989)); see also Bartusch v. Oregon State Bd. of Higher Educ., 131 Wn. App. 298, 306, 126 P.3d 840 (2006).

[18] Freestone Capital, 155 Wn. App. at 653 (quoting Perry v. Hamilton, 51 Wn. App. 936, 940, 756 P.2d 150 (1988)).

[19] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

Stevens argues that Mika has failed to provide prima facie evidence supporting specific personal jurisdiction. In Mika's opposition to Stevens's motion for summary judgment, Mika argued Stevens committed tortious conduct by failing to provide reasonably safe premises for Jillian's patrons and failing to have a robust security policy.

However, the sole argument advanced in Mika's response brief is that the new evidence obtained after Stevens filed his motion for discretionary review, but a month prior to this court granting review, warrants a remand to the trial court to allow additional motion practice. Mika contends the new evidence, that Stevens was also a shareholder of JBC Holdings as well as the chief executive officer and chief financial officer, implicates Stevens in the allegedly fraudulent sale of JBC of Seattle to Gameworks while Mika's lawsuit was pending.[20] At oral argument, Mika focused upon Stevens's alleged responsibility for the security policy at Jillian's.

---

[20] Specifically, paragraph 33 in Mika's first amended complaint contends that Gemini and Gameworks participated in that sale and deprived JBC Holdings of an asset Mika might be able to pursue upon entry of a favorable judgment. Although the complaint contained allegations of fraudulent transfer against Gemini and Gameworks, Mika did not allege a fraudulent transfer cause of action against Stevens. We recognize that at the time Mika filed his complaint, he did not know of Stevens's role as 49 percent shareholder. However, even after Mika discovered this, he did not request leave to file an amended complaint and add the fraudulent transfer claim against Stevens.

We also note that the trial court has already determined the sale of JBC of Seattle to Gameworks was a bona fide business transaction. When Gemini moved for dismissal from the case on summary judgment, the trial court granted the motion because the sale was an arms-length transaction and Gemini had no liability as a result. Keis, Gemini's managing director, testified the sale of JBC Holdings' assets was necessitated by JBC Holdings' failure to generate sufficient cash flow to meet its financial obligations. The proceeds from the sale went to JBC Holdings' secured creditors and to windup of the corporation. The proceeds of the asset sale did not satisfy the outstanding debt, and the remaining balance was satisfied through collection of shareholder guarantees. Finally, none of the proceeds from the asset sale were

Whether we look to Stevens's alleged involvement in creation or implementation of Jillian's safety policies or to Stevens's involvement in the sale of JBC of Seattle to Gameworks, neither is sufficient under the long-arm statute to confer personal jurisdiction over Stevens.

a. Commission of Tortious Conduct Within Washington

Mika argued Stevens committed tortious conduct by failing to provide reasonably safe premises for Jillian's patrons and failing to have a robust security policy, thereby satisfying RCW 4.28.185(1)(b). A tortious act occurs in Washington when the injury occurs within the state.[21] An injury "occurs" in Washington for purposes of the long-arm statute "if the last event necessary to make the defendant liable for the alleged tort occurred in Washington."[22] "Jurisdiction may be asserted where a defendant's out-of-state conduct causes harm in the forum state."[23]

There is no indication in the record that Stevens was involved with any of the allegedly tortious conduct. Stevens, as chief executive officer and chief financial officer, was responsible for the overall profitability of JBC Holdings, not day-to-day operations, including policies and procedures. While he had knowledge of some of the safety and security policies, there is no evidence in the record that Stevens was personally responsible for creating or implementing the policies.[24] Stevens testified that "[i]n a

---

distributed to the owners of JBC Holdings. The trial court declined Stevens's late attempt to join in the motions of Gemini and Gameworks.

[21] Grange Ins. Ass'n v. State, 110 Wn.2d 752, 757, 757 P.2d 933 (1988).

[22] MBM Fisheries, 60 Wn. App. at 425.

[23] Huebner, 38 Wn. App. at 72.

[24] Rather, chief operations officer Tyler Warfield was responsible for safety and security policies. Indeed, Mika's own safety expert focused on the actions of Warfield,

broad context, the quote, 'policy and procedures,' it's my expectation that Tyler [Warfield] is managing those, and overseeing, and making sure that we're adhering to those."[25]

At oral argument, Mika emphasized that Stevens had testified in his deposition that security at Jillian's was not necessary, suggesting Stevens admitted having a role in setting the security policy and thus constituting a basis for long-arm jurisdiction based on tortious conduct. Even if we were to consider this argument, which is not argued in Mika's response brief, the record on appeal does not include the portion of the deposition in which Stevens initially made such a statement, so we are unable to examine the context of such a statement. The record before us reflects only that Stevens testified he did not believe video surveillance was necessary. Stevens's counsel asked Stevens at the end of the deposition to clarify whether he thought other security measures were necessary, and Stevens responded that the overall safety of the patrons at Jillian's was important. Given Stevens's unrebutted testimony that he had no responsibility for creating or implementing any of the safety policies or procedures, Stevens's comments on the security policies do not create a genuine issue of material fact that he committed tortious conduct, thus subjecting himself to personal jurisdiction under the long-arm statute.

---

of JBC Entertainment in general, and of Michael Knudsen, the manager on duty at Jillian's at the time of the shooting.

[25] Clerk's Papers at 131. This testimony is consistent with Warfield's, who testified that as president and chief operations officer, he "[o]versee[s] essentially, all operations, and that would encompass operations and marketing, purchasing, everything that kind of helps the clubs run." Clerk's Papers at 140. With regard to the safety policies at JBC Seattle, Warfield testified he was familiar with them.

b. Transaction of Business Within Washington

Mika also alleges that Stevens's participation in the sale of JBC of Seattle to Gameworks satisfies RCW 4.28.185(1)(a). While Stevens participated in the sale of an asset located in Washington, RCW 4.28.185(1) and (3) require the plaintiff's claim to arise from the act that subjects a defendant to litigation in the state.

Mika's tort claims would necessarily arise from Stevens's alleged failure to provide adequate security at Jillian's and not from the subsequent sale of JBC of Seattle. The only causes of action alleged against Stevens individually are negligent hiring, negligent supervision, ordinary negligence, and negligent infliction of emotional distress.[26] All of these claims arise out of the theory that in his capacity as chief executive officer and chief financial officer of JBC Holdings, Stevens failed to provide adequate security at Jillian's. The new evidence about Stevens's status as an owner of JBC Holdings does not change Mika's theories of tort liability against Stevens, which relate only to Stevens's role as chief executive officer and chief financial officer. Mika's tort claims do not arise out of Stevens's involvement in the sale of JBC of Seattle.

c. Due Process

The assertion of long-arm jurisdiction against Stevens would also offend due process standards. As with the long-arm statute, due process considerations require the defendant's contacts to actually give rise to the cause of action.[27] If a plaintiff cannot show a purposeful act or consummation of some transaction in the forum state,

---

[26] As discussed above in footnote 20, Mika did not allege a claim of fraudulent transfer against Stevens.

[27] CTVC of Hawaii, 82 Wn. App. at 709.

as well as a connection between the act or transaction and the cause of action, due process prevents the exercise of personal jurisdiction over the defendant.[28]

Mika again relies on one act, the sale of JBC of Seattle to Gameworks, to support his argument that Stevens purposefully did some act or consummated some transaction within the forum state. While Mika recognizes that execution of a contract with a Washington resident alone is not sufficient to fulfill the purposeful act requirement,[29] Mika does not point to any evidence in the record to suggest that the sale was anything more than execution of a bona fide contract between Gameworks, a foreign corporation, and JBC Holdings, a foreign corporation, for the sale of JBC of Seattle, a Washington business entity with assets in Washington.[30]

A court must examine the nature of the contractual relationship, including prior negotiations and contemplated future consequences, along with the actual course of dealing and specific terms of the contract, to determine whether that contract can be the basis for exercise of personal jurisdiction.[31] While the evidence establishes that Stevens took the lead in negotiating and executing the sale of JBC of Seattle, there is

---

[28] If the plaintiff does satisfy both elements of the due process test, the burden shifts to the defendant to present a compelling argument as to why the exercise of jurisdiction would be unreasonable. Burger King Corp., 471 U.S. at 476-77.

[29] Precision Laboratory Plastics, Inc. v. Micro Test, Inc., 96 Wn. App. 721, 727, 981 P.2d 454 (1999).

[30] Mika also contends that subjecting Stevens to the jurisdiction of a Washington court would not offend traditional notions of fair play because Stevens gave misleading testimony about his ownership interest in JBC Holdings. While Stevens's deposition testimony that JBC Holdings was Gemini's investment was arguably incomplete, he also testified that others needed his approval for a sale. This testimony does not amount to fraud, either upon Mika or upon the court.

[31] Precision Laboratory, 96 Wn. App. at 726-27 (discussing the "purposeful transaction" element of the due process analysis where a contract is at issue).

no indication that his individual activity took place in Washington or created any ongoing relationships and obligations to Washington citizens.[32]

Mika argues that "[i]t is axiomatic that the asset Stevens conveyed 'post-tort' to Gameworks is the situs of the negligence and consequent injury to the Plaintiff."[33] But Mika provides no persuasive argument or evidence to establish that his negligence claims arise from, or bear relationship to, the sale of JBC of Seattle to Gameworks.

Mika does not set forth prima facie evidence of an act or transaction by Stevens within Washington state out of which Mika's tort claims arise. Mika does not make any showing that Stevens was responsible for the safety policy at Jillian's, nor that his involvement in the post-tort sale had any relationship to Mika's tort claims. There is no genuine issue of material fact.

We reverse the trial court order denying Stevens's motion for summary judgment based on lack of personal jurisdiction, and remand with direction to dismiss Stevens from the lawsuit.

Stevens requests attorney fees under RCW 4.28.185(5). An award of attorney fees under the long-arm statute is discretionary.[34] "Where the defendant obtains a ruling that personal jurisdiction under the long-arm statute does not lie, the court may award up

---

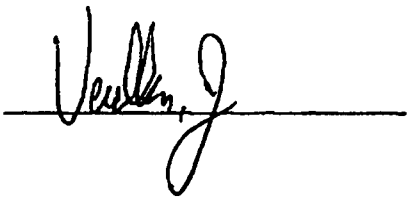
[32] See Huebner, 38 Wn. App. at 70-73 (personal jurisdiction existed over employees of corporation where those employees had personally negotiated rental agreements with Washington residents and had personally engaged in the offer and sale of unregistered franchises within Washington); Precision Laboratory, 96 Wn. App. at 726-27 (personal jurisdiction based on a contract satisfied due process where contract contemplated future consequences between Washington corporation and foreign corporation and created ongoing obligations between the two entities).

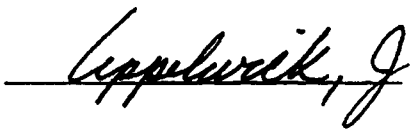
[33] Respondent's Br. at 11.

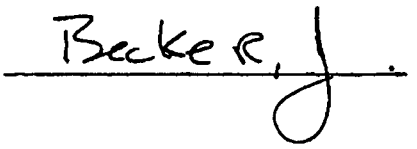
[34] RCW 4.28.185(5); Payne v. Saberhagen Holdings, Inc., 147 Wn. App. 17, 36, 190 P.3d 102 (2008).

to the amount of attorney fees that defendant would have incurred had the jurisdictional defense been presented as soon as the grounds for it became available."[35] We remand to the trial court to determine appropriate attorney fees under RCW 4.28.185(5) both in the trial court and on appeal.[36]

WE CONCUR:







[35] Hewitt v. Hewitt, 78 Wn. App. at 447, 456-57, 896 P.2d 1312 (1995).

[36] Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 149, 859 P.2d 1210 (1993) (remanding to the trial court to determine an appropriate award of fees and to determine "'what, if any, award [defendant] is entitled to for its appellate efforts'" (quoting Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 124-25, 786 P.2d 265 (1990)).

Appendix B

FREDERICK BEAU GOULD and JULIE P. GOULD, husband and wife, Respondents.

v.

HONG BIN IM and NANETTE MARIE IM, aka YOUNG B. IM, husband and wife, Appellants.

No. 42098-8-II

Court of Appeals of Washington, Division 2

March 5, 2013

UNPUBLISHED OPINION

WORSWICK, C.J.

After summary judgment on liability and a bench trial on damages, Hong Bong Im appeals a final judgment to Frederick Gould for breaching a well maintenance agreement. Im argues that the trial court erred by (1) considering supporting affidavits containing inadmissible evidence, (2) reforming the agreement on summary judgment because there was a genuine issue of material fact, and (3) awarding consequential damages that were unforeseeable and speculative. *We* hold that the trial court did not err when it reformed the contract, that the damages award was not speculative, and that Im failed to preserve his other arguments for appellate review. We affirm.

FACTS[1]

In August 2007, Gould was remodeling and landscaping his real property with the intention to sell it later that year. In September 2007, Im disconnected Gould's property from the well that was its only source of water. Gould's property had a right to water from a well on Im's property under a well maintenance agreement executed before either of them acquired their properties. But instead of identifying the parcel with the well, the agreement identified a different, vacant parcel that Im also owned. As a result of Im's refusal to allow reconnection to the well for approximately two years, Gould was unable to sell his property before real estate prices plummeted in 2008.

A. *The Well Maintenance Agreement*

M.C. Daviscourt and his wife owned a property that included three houses, a well, and a creek. All three houses drew water from the well.

In 1991, Daviscourt divided the property into three parcels: The first parcel (Im Parcel 1) contained two houses and the well; the second parcel (Im Parcel 2) was vacant land adjacent to Im Parcel 1 and was the site of the creek; and the third parcel (the Gould Property) was on the other side of a road and had a house on it.

The same year, Daviscourt made a well maintenance agreement to "provide for future use, maintenance and repair of the well." Clerk's Papers (CP) at 259. In part, the agreement stated: (1) "[T]he owners will have the right to draw water from said well," (2) "[n]either part [sic] shall interfere with the use of the well by the other," and (3) "[f]he owners agree to pay a monthly charge ... to share in electrical cost for the operation of the well pump." CP at 260. The agreement stated that it runs with the land and binds the Daviscourts' successors in interest. Daviscourt recorded two copies of the well maintenance agreement with the Mason County auditor.

The well maintenance agreement identifies the Gould Property and assigns it the right to use the well. However, the legal description in this agreement describes Im Parcel 2 as the parcel on which the well is located. In fact, Im Parcel 1 is the site of the well actually connected to the Gould Property.

After making the well maintenance agreement, Daviscourt sold the Gould Property to Nathan Cox in 1991. Daviscourt showed Cox that the Gould Property drew water from the well on Im Parcel 1. Cox paid Daviscourt a share of the monthly electric bill for the well pump. Daviscourt and his wife are now deceased.

B. *The Well Dispute*

In 2006, Cox sold the property to Gould. Im purchased both Im parcels in May 2007. In the summer of 2007, Gould was extensively remodeling and landscaping his property, preparing to sell it. While Gould owned the property, he did not pay for any part of the well's electricity bills.

After receiving electricity bills despite being away from the property, Im discovered that his well serviced the Gould Property. Based on his research of Mason County records, Im concluded that the well was a private well lacking permits for shared use and that he alone had a right to use it.

In August 2007, Im approached Gould's contractor, objecting to Gould's connection to the well. On August 14, Im sent Gould a letter that stated, "If I don't hear from you by the end of August, I will shut off the connection to your home." CP at 289.

Im received no reply, and Gould's contractor discovered the well was disconnected on September 10. The contractor reconnected the well, but Im disconnected it a second time. On September 17, the contractor found a note on Gould's door stating:

Well across the street is private. See county records. Do

not trespass on our property to access well house. Mason County Sheriff has been informed. Hong 253-532-xxxx. I am taking legal action against the general contractor.

CP at 294. The contractor called Im and faxed him a copy of the well maintenance agreement the following day. Im admitted that he had disconnected the Gould Property from the well and refused to allow reconnection. The well remained disconnected until after August 24, 2009.

C. *Summary Judgment and Trial*

Gould commenced an action seeking quiet title in rights to use the well and damages for breach of the well maintenance agreement. Gould moved for partial summary judgment on liability and sought reformation of any mistake in the agreement. He presented a total of 12 supporting affidavits and declarations.

Im asserted that the well maintenance agreement was intended to give the Gould Property's owner the right to draw water from the creek on Im Parcel 2. In support of this assertion, Im presented the affidavit of a licensed surveyor who called the creek a "surface water well." CP at 227.

However, Im's predecessor averred that when he (the predecessor) owned the property "[t]he creek wasn't a well" and the only well on either parcel was the well on Im Parcel 1. CP at 248. Likewise, Gould's predecessor averred that the two Im Parcels contained only one well between 1991 and 2006. According to the declaration of Daviscourt's son, "In 1991 there was only one well on the properties." CP at 258. A longtime neighbor's declaration added, "If there is a second well on Im's property, it is not the well that has continuously served Gould's house since at least 1985." CP at 255.

In his response brief, Im asserted that Gould's motion "relie[d] heavily on unsubstantiated hearsay and other inadmissible evidence," but Im did not specify which statements were inadmissible or cite legal authority in support of this assertion. CP at 244. Otherwise, Im asserted that there was a genuine issue of material fact because Daviscourt's intent was unclear.

In August 2009, the trial court granted Gould's motion, reformed the well maintenance agreement, and scheduled a trial to determine the amount of damages. Gould then reconnected the well, and the Gould Property sold for $ 1,100,000 in February 2010.

At the October 2010 trial, the trial court allowed both sides to present evidence,on whether Im had caused damages willfully. But the trial court's order in limine confined the evidence to the issue of damages and excluded testimony Im planned to offer to show his understanding of his rights in the well.

Gould presented testimony to establish damages. Gould's real estate agent testified that he was prepared to list the Gould Property for $1,600,000 in 2007, but that the disconnection from the well made the Gould Property unmarketable. An expert real estate broker testified that million-dollar properties listed by Gould's agent in 2007 sold on average for 97 percent of their list price. The broker further opined that $ 1,600,000 was a reasonably certain estimate of the Gould Property's market value in 2007, but that its market value declined to $1,100,000 in 2010, when it was the only million-dollar property sold in the area.

The trial court found that Im breached the agreement in bad faith. The court's damage award included $455,000 in consequential damages, representing profits lost when Gould sold the property in 2010" instead of 2007 as planned.

ANALYSIS

I. Evidentiary Objections to Supporting Affidavits

Im argues that the trial court erred by considering supporting affidavits that contained hearsay and conclusory statements not based on personal knowledge. Gould responds that Im failed to preserve this argument for appeal. We agree with Gould.

CR 56(e) provides that "[supporting and opposing affidavits shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence." To preserve a claim that statements in a supporting affidavit are not admissible as evidence, a party must object to the specific deficiency or must move the trial court to strike the affidavit before entry of summary judgment. *Parkin v. Colocousis*, 53 Wn.App. 649, 652, 769 P.2d 326 (1989). Failure to object to an affidavit before the entry of summary judgment waives the objection. *Bonneville v. Pierce County*, 148 Wn.App. 500, 509, 202 P.3d 309 (2008).

Im argues that he preserved this objection by raising it below in his brief opposing summary judgment. That brief states only, "[Gould's] summary judgment motion relies heavily on unsubstantiated hearsay and other inadmissible evidence." CP at 244. But Im did not specify, either to the trial court or to us, which portions of Gould's 12 supporting affidavits were, in his view, inadmissible. Im failed to adequately specify the evidence's deficiency to the trial court, and thus he did not preserve this claim for appeal.

II. Reformation

Im argues that reformation was unwarranted on summary judgment because a genuine issue of fact exists as to whether the well maintenance agreement's language differs from Daviscourt's intent. We disagree., We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Schmitt v. Langenour*, 162 Wn.App. 397, 404, 256 P.3d 1235 (2011). Summary judgment is appropriate when there is

no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). In ascertaining whether a genuine issue exists, "[t]he court must consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoying party. The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). "The burden is on the moving party to establish its right to judgment as a matter of law, but the opposing party may not rely on mere speculation or unsupported assertions." *Molsness v. City of Walla Walla*, 84 Wn.App. 393, 397, 928 P.2d 1108 (1996).

In general, a court may not reform an inadequate legal description of a property; however, a court may reform an inadequate legal description resulting from a scrivener's error or mutual mistake. *Geoghegan v. Dever*, 30Wn.2d 877, 889, 194 P.2d 397 (1948); *Snyder v. Peterson*, 62 Wn.App. 522, 525-26, 814 P.2d 1204 (1991). The party seeking reformation must establish that reformation is warranted by clear, cogent, and convincing evidence; however, "the mere denial that a mistake was made will not defeat an action for reformation." *Akers v. Sinclair*, 37 Wn.2d 693, 703-04, 226 P.2d 225 (1950).

"A scrivener's error occurs when the intention of the parties is identical at the time of the transaction but the written agreement errs in expressing that intention." *Reynolds v. Farmers Ins. Co. of Wash*, 90 Wn.App. 880, 885, 960 P.2d 432 (1998). The intentions of the parties to a contract is generally a question of fact. *Paradise Orchards Gen. P 'ship v. Fearing*, 122 Wn.App. 507, 517, 94 P.3d 372 (2004). A court ascertains the parties' intent "'by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'" *Berg v. Hudesman*, 115 Wn.2d 657,667, 801 P.2d 222 (1990) 1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Here, the facts establish that Daviscourt intended the well maintenance agreement to give the Gould Property owner the right to use water from the well on Im Parcel 1. Daviscourt made and recorded the well maintenance agreement in 1991, when he owned the Gould Property and the two Im parcels. The purpose of the agreement was to "provide for future use, maintenance and repair of the well" for the benefit of the owners of the Gould Property. CPat259. At the time of the agreement, pipes connected the Gould Property to the well on Im Parcel 1. Further, Daviscourt knew that the well on Im Parcel 1 served the Gould Property, and later that same year he showed Cox the source of the Gould Property's water. Nothing in the record suggests that Daviscourt, or his successors in interest other than Im, ever considered the possibility that the Gould Property would obtain its future water from a different, nonexistent connection to a well on Im Parcel 2.

Further, Daviscourt's conduct in performing the agreement after he sold the Gould Property to Cox suggests his understanding of the agreement's meaning. The agreement required the parties to share the well's maintenance and electricity costs. When Cox owned the Gould property, Daviscourt collected from Cox a share of the electric bill for drawing water from the well on Im Parcel 1. Considering the text of the well maintenance agreement and Daviscourt's performance, it is clear that Daviscourt intended the agreement to refer to Im Parcel 1, not Im Parcel 2 as written.

Im contends that in weighing the motion for summary judgment, the court must infer that Daviscourt intended the Gould Property to obtain water from Im Parcel 2. However, that inference is unreasonable. The only water source on Im Parcel 2 is a creek. In 1991, pipes connected the Gould Property to the well on Im Parcel 1; at no time has the Gould property been connected to the creek. Nothing in the record suggests that Daviscourt intended the Gould Property to draw water from a creek or from some other well that did not exist in 1991. Further, Im's inference would render the agreement's provisions regarding the pump and electricity costs ineffective, frustrating the agreement's cost-sharing objective. The only water pump on either Im parcel is the electric pump serving the well on Im Parcel 1, and without this pump there can be no costs to share.

Im's assertion that Daviscourt intended the well maintenance agreement to refer to Im Parcel 2 receives no support from any reasonable inference. Daviscourt's intention is shown by the existence of only one well on the two Im parcels, the other provisions of the well maintenance agreement, the course of conduct between Daviscourt and Cox, and the absence of any other plausible explanation of Daviscourt's intent. *See Berg*, 115 Wn.2d at 667. Considering the facts submitted and all *reasonable* inferences from those facts in the light most favorable to Im, reasonable persons could conclude only that Daviscourt intended the well maintenance agreement to refer to Im Parcel 1 instead of Im Parcel 2. *See Clements*, 121 Wn.2d at 249; *Molsness*, 84 Wn.App. at 397.

Accordingly, the well maintenance agreement's reference to Im Parcel 2 is the product of a scrivener's error. *See Reynolds*, 90 Wn.App. at 885. The trial court appropriately reformed the scrivener's error in the agreement to match Daviscourt's intention. See Snyder, 62 Wn.App. At 525 -26.

III. Consequential Damages

Im argues that the trial court erred in awarding consequential damages because (1) the amount of the award was speculative and (2) the damages were not reasonably foreseeable.[2] We hold that the damage award is not speculative and that Im failed to preserve his foreseeability argument for appeal.

In a breach of contract action, an award of consequential damages may include lost profits "when (1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of defendant's breach, and (3) they are proven with reasonable certainty." *Larsen v. Walton Plywood, Co.*, 65 Wn.2d 1,15, 390 P.2d 677 (1964).

A. *Speculation*

Im argues that the trial court based its determination of Gould's lost profits on speculation. We disagree.

In a breach of contract action, a plaintiff may recover damages for lost profits that "are proven with reasonable certainty." *Larsen*, 65 Wn.2d at 15. "[C]onversely, damages which are remote and speculative cannot be recovered." *Larsen*, 65 Wn.2d at 16. A greater degree of certainty is required to prove the *fact* of damages than the *amount* of damages: once it is reasonably certain that the breach caused damages, the fact-finder may determine the amount of the damage award by drawing reasonable inferences from reasonably convincing evidence. *Gaasland Co., Inc. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 713-14, 257 P.2d 784 (1953). Further, when a breach is willful or when the breach itself creates a difficulty in proving damages, the court may relax the plaintiffs burden to establish damages by reasonable certainty. *Larsen*, 65 Wn.2d at 17; RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a (1981).

To prove lost profits, the plaintiff may present a profit history or a reasonable estimate based on an analysis of market conditions and the experience of similar businesses operating in the vicinity and under substantially the same conditions. *Farm Crop Energy, Inc. v. Old Nat'l Bank of Wash.*, 109 Wn.2d 923, 928, 750 P.2d 231 (1988). An award of lost profits can be based on expert testimony alone. *Larsen*, 65 Wn.2d at 17. When a trial court has heard testimony on the amount of lost profits, an appellate court decides only whether the testimony had "a substantial and sufficient factual basis." *Larsen*, 65 Wn.2d at 19.

Here, Gould presented evidence from real estate professionals about sales of million-dollar homes in the Hood Canal area of Mason County. Gould's real estate agent testified that he was prepared to list the Gould Property for $1,600,000 in 2007. An expert real estate broker agreed that the property would have sold in 2007 for "something close to a million six" and reported that the agent's properties sold on average for 97 percent of list price. Verbatim Report of Proceedings (VRP) at 175. Im did not present conflicting testimony on the Gould Property's value. The trial court weighed this testimony and found that the house would have sold in 2007 for 97 percent of its list price, or $1,555,000, if the well disconnection had not made the property unmarketable for approximately two years. Instead, the Gould Property actually sold for $1,100,000, and the expert broker testified that he believed the sale price to represent the property's fair market value in 2010, given that it was the only sale of a million-dollar property in that area during the whole year. The trial court then determined that Gould's consequential damages equal the 2007 market value less the 2010 market value, or $455,000.

Im argues that the basis of this finding is speculative because high real estate prices in 2007 were an "anomaly" and because the testimony did not prove that Gould would have found a buyer in 2007. But the evidence, including expert testimony, showed that the house could have sold for its market value in the fall of 2007, if it had water. An analysis of market conditions is not speculative when supported with substantial and sufficient facts, whether or not market conditions are anomalous. *See Farm Crop Energy*, 109 Wn.2d at 928. Moreover, any difficulty in proving the precise amount of the Gould Property's 2007 market-value was directly caused by ". Im's breach, which prevented the house from being listed in 2007. *See Larsen*, 65 Wn.2d at 17.

In addition, Im argues in the alternative that (1) in awarding damages, the trial court improperly considered the willfulness of Im's breach and (2) the trial court's order in limine erroneously prevented Im from presenting evidence that his breach was not willful. We disagree with both arguments.

The first argument fails because the willfulness of Im's breach is a proper matter for the trial court to consider. Im's willfulness is a basis to relax Gould's burden of proving reasonably certain damages. *See* Restatement (Second) of Contracts § 352 cmt. a.

The second argument fails because the trial court's order in limine did not prevent Im from introducing evidence of whether he acted willfully. The order restricted the evidence to items relevant to the issue of damages. The trial court specifically stated, "I'm not shutting the door as to something that may have a bearing on willfulness." VRP at 58. The trial court reserved rulings on the admissibility of particular pieces of evidence, per its "standard practice in any trial." VRP at 58.

Im's arguments fail. The damages the trial court awarded were reasonably certain and not speculative.

B. *Foreseeability Issue Waived*

Im argues that the consequential damages award was improper because the damages were not reasonably

foreseeable to Daviscourt at the time of the contract. Gould contends that Im never asserted that the trial court should consider foreseeability from the Daviscourts' standpoint at the time the agreement was made, and that Im is not entitled to make this argument for the first time on appeal. Gould is correct.

We will generally not consider an issue or theory raised for the first time on appeal. RAP 2.5(a); *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn.App. 334, 338, 160 P.3d 1089 (2007). "The reason for this rule is to afford the trial court an opportunity to correct any error, thereby avoiding unnecessary appeals and retrials." *Smith v. Shannon*, 100 Wn.2d 26, 37, *666* P.2d 351 (1983). If a party becomes aware of an alleged error only after the trial has ended, he should bring it to the trial court's attention in a motion for a new trial. *Smith*, 100 Wn.2d at 37.

Im argues that he raised the issue at trial under the standards of *Osborn v. Public Hospital District 1*, 80 Wn.2d 201, 492 P.2d 1025 (1972), and East *Gig Harbor Improvement Association v. Pierce County*, 106 Wn.2d 707, 724 P.2d 1009 (1986). But neither case supports Im's argument. *Osborn* permits a party to invoke a statute for the first time on appeal if it pertains to an issue that was squarely before the trial court. 80 Wn.2d at 206. But Im's foreseeability argument does not mention any statute. In *East Gig Harbor*, the parties preserved an issue by arguing it and discussing relevant precedent in their trial briefs, even though they did not clearly frame the issue before the trial court. 106 Wn.2d at 709-10 n. 1. Here, Im's trial brief and motion for a new trial never mentioned foreseeability at the formation of the contract.

Im did not raise this issue below.[3] Im is not entitled to make this argument for the first time on appeal, and we decline to exercise our discretion to let Im do so here. Affirmed.[4]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I concur: Hunt, J.

Quinn-Brintnall, J. (concurring in part, dissenting in part)

While I concur with my colleagues in that portion of the majority opinion holding that Hong Bin Im failed to preserve his challenge to Frederick Beau Gould's supporting affidavits and that reformation of the well maintenance agreement was appropriate on summary judgment, I believe the trial court clearly misapplied the law in calculating its damage award. Because consequential damages are only appropriate when the special circumstances occasioning lost profits are known by the party breaching a contract-and the record here reflects that Gould presented *no evidence* that Im had knowledge of Gould's intent to improve and then immediately sell the home-I dissent. Knowledge of Special Circumstances

The common law has long recognized that consequential damages are appropriate in certain circumstances. Baron Alderson explained the rationale behind such an award over 150 years ago:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the *special circumstances* under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were *wholly unknown to the party breaking the contract*, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) (emphasis added).[5]

In arriving at the damage award in this case, the trial court incorrectly *assumed* that Im was aware of the "special circumstances" involved here, that Gould was attempting to sell his home. *See, e.g.*, 4 Report of Proceedings (RP) at 308 ("In this particular case, the Plaintiff- the facts are clear that the Plaintiff was remodeling a house to sell.").[6] And because of this assumption, the trial court awarded Gould the difference between what his home could have sold for at the height of the real estate boom (although Gould never had an offer) and what it did sell for after the market dramatically fell.[7]

In calculating the damage award, the record shows that the trial court discussed an alternative remedy: awarding the estimated amount the Goulds could have received in rent (roughly $140,000) while the property was uninhabitable. But the court summarily dismissed that amount stating, "The testimony in this case wasn't that this house really was going to be rented." 4 RP at 317. This damages analysis is legally incorrect.

Under *Hadley* and its progeny, Gould is entitled to

lost rents (or, alternatively, to recoupment of expenses accrued while finding alternative housing) because it was foreseeable that Im's actions would render the Gould home uninhabitable. But because the record does not reflect that Im knew of the "special circumstances" related to the Gould property-that the Goulds intended to improve and then immediately sell the home-damages related to the home sale are inappropriate.

Put another way, if a party deprives her neighbor's home of water, it is foreseeable in the "usual course of things" that the neighbor will not be able to live there for a time. Thus, the aggrieved neighbor is entitled to the lost rental value of the property while the water is blocked (or the recoupment expenses accrued while finding alternative housing). But there is no reason for the at-fault neighbor to assume that her aggrieved neighbor intended on improving and immediately selling the home. Without knowledge of such special circumstances, the at-fault neighbor should not be liable for these special damages.

Washington courts have not had occasion to visit this precise issue. However, in *Thompson v. Hanson*, 6 Wn.App. 1, 491 P.2d 1065 (1971), Division Three of this court did consider whether a contractor's contract breach could serve as the basis for a real estate developer's lost profits. In *Thompson*, a real estate developer, Alpine, hired D.S. McHenry to build a sewage plant to service Alpine's properties. 6 Wn.App. at 2. McHenry took an unreasonable amount of time to complete the plant and, in result, Alpine was unable to sell vacant lots on its property as quickly as it had hoped. *Thompson*, 6 Wn.App. at 2-4. Alpine sued McHenry for breach and the trial court found that

Alpine suffered additional loss of profit due to McHenry's breach inasmuch as there was a substantial increase in the interest rate on construction loans and other economic developments from December 1967 to November 1969 which made it difficult for purchasers to obtain construction financing thereby requiring Alpine to reduce the sales price of vacant lots 25 per cent.

Thompson, 6 Wn.App. at 4.

On appeal, Division Three remanded the case for reconsideration of the damage award, concluding that

[t]he evidence does not sustain a conclusion that the wide swing in interest rates was within the contemplation of the parties at the time the contract was signed; nor was it reasonably foreseeable at that time. Further, there is no specific showing by Alpine that McHenry had special knowledge of the risk created by the unusual increase in interest rates.

Thompson, 6 Wn.App. at 5.

Here, the situation is substantially the same. Not only did Gould fail to show that Im had special knowledge of the risk created by the housing market's unforeseen collapse, Gould failed to present any evidence showing that Im knew Gould wanted to sell the home.[8]

Although this case concerns a contract breach, the *Restatement (Second) of Torts* (1979) provides a useful analog in thinking through the damages award. Section 931, "Detention or Preventing Use of Land or Chattels," states,

If one is entitled to a judgment for the detention of, or for preventing the use of, land or chattels, the damages include compensation for

(a) the value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute, and

(b) harm to the subject matter or other harm of which the detention is the legal cause.

In illustrating clause (a), the *Restatement* describes a scenario where one party takes possession of another party's land for six months. Although the aggrieved party was not renting the land and had no plans to rent the land, the *Restatement* states that reasonable rental value is the appropriate damage award.

A damage award accounting for the lost rental value of the Gould's property would appear to be the appropriate calculation to apply in the circumstances here. It was foreseeable to Im, in the usual course of things, that shutting off water to the Gould property would make it uninhabitable. And although the Goulds do not appear to have treated the home as a rental property, the appropriate measure of damages is the reasonable rental value of the home as that value most closely approximates the damages foreseeable to Im.

Waiver

On appeal, Im focuses much of his argument on whether Gould's damages would have been foreseeable to M.C. and Florence Daviscourt (the previous property owners). Im failed to argue this theory of the case below and, as the majority opinion indicates, that argument is waived. However, the motion for a new trial established that Gould never told *Im* that he wanted to sell his property and, accordingly, Im was unaware of the special circumstances attendant on his breach of the well maintenance agreement:

After serving his complaint in October 2007, Plaintiff failed to file the complaint, or otherwise prosecute his claim, until April 2009. Moreover, between September, 2007, when Defendant disconnected Plaintiffs access to the well, and January 2008, when Plaintiff claims he would have needed to sell his property for maximum value, Plaintiff never informed Defendant that he intended to sell the property, or that Defendant's actions were precluding him from selling the property. Defendant was never informed of the basis for the lion's share of Plaintiff s damages claim, until a couple weeks before

trial, in October 2010.

Clerk's Papers at 84. The trial court denied Im's new trial motion.

Because Im fails to reraise this argument in his appellant's brief, the majority considers this issue waived. But because the trial court clearly misapplied the law in this case, I would invoke this court's inherent authority to consider issues briefed and presented to the trial court and to decide the appeal on that issue.[9] *State v. Aho*, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999); *State v. Carter*, 138 Wn.App. 350, 368, 157 P.3d 420 (2007); RAP 12.1(b). Here, the record clearly reflects that Gould presented no evidence that Im knew the Goulds were real estate speculators and intended to improve and immediately sell the house. The record further reflects that the trial court was presented with, and summarily rejected, the correct amount-lost rental value-of damages Gould should have received for Im's breach. In my view, the trial court simply misapplied Washington law regarding the proper method of calculating damages and awarded Gould an unwarranted windfall. Neither the common law, including 150 years worth of decisions affirming *Hadley*, nor Washington law, as seen in *Thompson*, support such an award. In these circumstances, I do not believe this court must turn a blind eye to the law and refuse to correct an obvious error. The measure of damages is a question of law which we should review and correct when our review of the record reveals error. *See, e.g., Farmer v. Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011). Accordingly, I would affirm the reformation of the well maintenance .agreement but I .would remand to the trial court for recalculation of damages under the proper lost rental value formula.

Notes:

[1] The facts are undisputed, except as noted.

[2] Im also assigns error to the trial court's determination that Gould did not fail to mitigate damages. But Im's brief does not contain an argument on this assignment of error, as RAP 10.3(a)(6) requires. Therefore, we deem this assignment of error waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

[3] Im cites two portions of the trial transcripts about "the issue of foreseeability." Reply Br. of Im at 18 & n.4 (citing VRP at 141-45, 283-85). Neither portion articulates Im's new argument. In the first portion, Im's counsel cross-examined the expert real estate broker on whether the national economic downturn affected real estate prices in the Hood Canal area. In the second portion, Im's counsel agreed "for the sake of argument" that lost profits were "predictable" while making an argument on the mitigation of damages. VRP at 284.

[4] The concurrence/dissent arrives at a different result after (1) finding that Im did not know that Gould wished to sell his house and (2) deciding that the proper measure of Gould's consequential damages is a reasonable rental. We do not consider these issues because Im neither raised these issues in the trial court, nor asked us to consider them on appeal. *See* RAP 10.3(a)(4), (6). Im never argued lost rental as the measure of damages. Although we may affirm the decision below on any grounds supported by the record, RAP 2.5(a), we do not *reverse* the decision below *on grounds that the parties have never mentioned. See* RAP 12.1. It is not the function of an appellate court "to comb the record with a view toward constructing arguments for counsel." *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998); *see also* RAP 10.3(a)(6).

[5] The United States Supreme Court has cited the *Hadley* decision for this proposition numerous times, first approving of the decision in *Western Union Telegraph Co. v. Hall*, 124 U.S. 444, 8 S.Ct. 577, 31 L. Ed. 479 (1888). Our own Supreme Court has repeated the *Hadley* holding multiple times with approval. *See, e.g., Gaglidari v. Denny's Rests., Inc.*, 117 Wn.2d 426, 445-46, 815 P.2d 1362 (1991). Section 330 of the *Restatement (First) of the Law - Contracts* (1932) also adopts the language from *Hadley:*

In awarding damages, compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made. If the injury is one that follows the breach in the usual course of events, there is sufficient reason for the defendant to foresee it; otherwise, it must be shown specifically that the defendant had reason to know the facts and to foresee the injury.

[6] The trial court references the fact that Im knew the house was being remodeled multiple times. But the trial court fails to explain why remodeling a house inevitably leads to knowledge of an impending sale.

[7] Although the majority opinion's analysis of why this figure was proven with reasonable certainty is sound, whether proven or not, absent proof of Im's knowledge of Gould's intent to sell the property, this award was inappropriately granted.

[8] Last year, the Indiana Court of Appeals had reason to consider a claim even more closely resembling the one at issue here. In *Estate of Collins v. McKinney*, 936 N.E.2d 252 (Ind.Ct.App. 2010), the Indiana court addressed a situation where the at-fault party (the Estate of Collins) caused delay such that the aggrieved party (McKinney) could not purchase and resell real estate at the height of the real estate boom. The *McKinney* court reversed an award of lost profit damages, concluding that

[t]he award of expectancy-style damages seems inappropriate here for two reasons. First, there is no evidence in the record that McKinney communicated to

or that Ray Collins otherwise knew that McKinney planned to sell the real estate almost immediately upon closing the sale.

Second, there is no evidence from which the trial court could conclude that McKinney's sale was foreseeable in the 'usual course of things'....

Because the evidence and inferences therefrom do not support equitable compensation for lost profits on McKinney's sale of the real estate in 2009 instead of 2007, we reverse the trial court as to the value of the 'damages' awarded and the accompanying award of pre-judgment interest."

936 N.E.2d at 262-63.

[9] I note also that Im's appellate briefing argues that the damage award was impermissibly speculative and that the collapse of the housing market was unforeseeable by the parties. Although these arguments are not well formulated or conceived-*e.g.*, Im focuses on whether damages would have been foreseeable to the Daviscourts-they are at least cogent enough to alert this court to potential error in the damage award.
