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Washington State Supreme Court

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No. 928967

Court of Appeals No. 46434-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES F. SMITH AND BARBARA DUSZYNSKA

Petitioners

v.

LLOYD ROOSEVELT REICH AND JOYCE REICH,

Respondents

FILED
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WASHINGTON STATE
SUPREME COURT

RESPONDENTS' ANSWER

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I. INTRODUCTION

Lloyd Reich and Joyce Reich, respondents herein, by and through their attorney of record, David H. Schultz, respectfully request the Court deny review, and affirm the ruling by the Court of Appeals, Division II. The Court of Appeals held that the trial court did not abuse its discretion when it denied Petitioners' motion for a continuance because Petitioners ignored the requirements of CR 56(f) and because the trial court did not have to consider hypothetical facts before ruling on a motion for summary judgment. The Court of Appeals, Division II, ruling was filed on December 8, 2015, in Cause Number 46434-9-II, and was attached to the Petition for Review (Appendix A-1 to A-6).

II. RESPONSE TO RELIEF SOUGHT

The petitioner seeks discretionary review of a Court of Appeals ruling affirming the Skamania County Superior Court's denial of a motion for an oral continuance. The ruling does not present an issue of "substantial public interest," and is not in conflict with Washington State Supreme Court Decisions. Lloyd and Joyce Reich respectfully request this Court deny review, and affirm the decision by the Court of Appeal, Division II.

III. STATEMENT OF CASE

1. On February 1, 2012, Charles Smith and Barbara Duszynska,

petitioners, filed a “Complaint, Breach of Contract, Encroachment” action. CP 1-8. On February 24, 2012, Lloyd and Joyce Reich, respondents, filed an “Answer and Affirmative Defense and Counterclaim. CP. 13-74. On March 19, 2012, the petitioners filed an “Answer to Counterclaim.” CP. 75-77.

2. On January 30, 2014, the respondents filed the “Motion for Summary Judgment” (CP. 93), “Memorandum in Support of Motion for Summary Judgment” (CP. 94-112), “Affidavit of Lloyd and Joyce Reich” (CP. 113-133), “Affidavit Supporting Summary Judgment by Vicky Cline (CP. 134-138), “Affidavit Supporting Summary Judgment by Ken Hoffman” (CP. 139-141), and “Affidavit Supporting Summary Judgment by Attorney” (CP. 142-194). The petitioners were served copies of these documents on January 31, 2014, along with a Citation setting a hearing on the motion for summary judgment and motion to dismiss on March 13, 2014.

3. The affidavit of counsel attached documents which were attached to the Answer, and included Exhibit “A”: Water System Easement and Agreement; Exhibit “B”: The original survey of the short plat regarding the real property in question, completed by Olson Engineering, filed and recorded as Parcel No. 6 of Jack Spring Survey Recorded in Book 1, page 139 of Surveys, Skamania County Auditor’s Records; Exhibit “C”: Small Claims Cause S03-08; Small Claims Cause S04-02; Small Claims Cause S07-21; Small Claims Cause S09-25; and Small Claims S10-06 (each attachment

included the claim filed, and the judgment therein); and Exhibit “D”: Petition and Affidavit for Order to Show Cause Why Claim of Lien Should Not Be Stricken and Other Relief Granted, Order to Show Cause Why Claim of Lien Should Not be Stricken and Other Relief Granted, and Order on Show Cause RE Claim of Lien/Judgment. CP. 142-194.

4. The petitioners did not file any responsive pleadings, motions, or affidavits to contest the motion for summary judgment. RP. 3. The petitioners did not file a CR 56(f) motion for a continuance. The petitioners did not file a CR 56(f) affidavit stating good reason for delay in obtaining the desired evidence, did not state what evidence would be established through the additional discovery, and did not demonstrate how the desired evidence would raise a genuine issue of material fact. RP. 1-13. The respondents’ motion for summary judgment was filed 729 days after the petitioners initially filed their complaint.

5. Prior to the hearing, the trial court had reviewed all the pleadings, responses, motions, memorandum, and affidavits in the court file. RP. 11-13. The trial court had also fully reviewed the petitioners’ motion for leave to amend their complaint. The trial court verified with the petitioners that it was basically the same complaint but added case law. RP. 2-3. The trial court discussed the summary judgment procedures with the petitioners. RP. 3-4. The trial court verified the petitioners were aware of the rules, and directly

asked the petitioners why they did not comply with Court Rule 56. RP. 4.

7. The trial court conducted the hearing on the motion for summary judgment and motion to dismiss on March 13, 2014. RP 1-13. The court gave both parties an opportunity to present argument. Towards the end of the hearing on summary judgment the petitioner stated: “may I ask for a continuance.” RP 10. This was done only after it was clear that the hearing was not going in the petitioners’ favor. The respondents did not agree to the continuance. The petitioners did not state good reason for delay in obtaining the desired evidence, did not state what evidence would be established through the additional discovery, and did not demonstrate how the desired evidence would raise a genuine issue of material fact. RP. 1-13.

8. The petitioners only argued that their Court Rule 15 motion would overcome the motion for summary judgment and motion to dismiss. The Reiches responded to the motion for leave to amend at the hearing, and cited case law on point. RP 5-6. Further, the petitioners acknowledge that the amended complaint only added case law, and did not change the facts alleged. Clearly the trial court had compared the two complaints. RP. 6. The motion for leave was considered by the court, despite being untimely. RP 6.

9. At this point in the hearing, the trial court stated “Mr. Smith I’m going to let you respond again because I want to make sure that you understand what’s going on. There are certain rules regarding motions for

summary judgment which have to be followed in every case. I cannot make an exception for you out of all the other citizens that appear in this court.” RP. 6. “And one of those is that Summary Judgment is a way for court to preclude issues that should not go to trial. Sometimes that’s the entire case. Sometimes it’s just a portion of the case.” RP. 6-7. “But what you have to do is cite into the record judicially cognizable facts and the only way you can do that is by submitting a Memorandum of Law and adding to that affidavits and exhibits. And that’s the way it’s done.” RP. 7. “So in response to [respondents] motion which is quite long with exhibits you should have prior to eleven days from – in the past – from now at least submitted your own Memorandum of Law as to why Summary Judgment is not the appropriate response today for the court and supported that with affidavits to show that there is some remaining issue of fact that needs to be adjudicated by a fact finder – either a Judge or jury. And you did none of those things.” RP. 7. The court further discussed the motion to amend the complaint and how that was not a response to summary judgment.

The court then stated “I’ll let you respond before I make a ruling.” RP. 7. In response, the petitioners stated that the respondents were “guilty of fraud” and cited to Court Rule 60. RP. 8. The petitioners did not provide a basis for the CR 56(f) continuance. On appeal, the petitioners did not challenge the denial of the motion for leave to amend, nor did the petitioners

challenge the finding that the gravamen of the amended complaint was the same as the original complaint.

10. The trial court confirmed with the petitioners that both the breach of contract issue, and the encroachment issue were previously litigated in small claims court. RP. 10.

11. The trial court then entered findings of fact based upon the undisputed factual record. CP. 289-294. Based upon these findings of fact, the trial court granted the motion for summary judgment, and dismissed the petitioners' complaint. CP 289-294.

12. The petitioners sought reconsideration based upon CR 59. CP 295-382. The respondents filed a Response to Motion for New Trial and Reconsideration. CP. 386-388. An order striking the improper portions of the petitioners' affidavits was entered. CP. 394. The court heard argument for the motion on May 15, 2014. RP. 20-35. The petitioners did not argue that the court should have granted a CR 56(f) motion to continue. Rather, the petitioners argued that "substantial justice" was not done, and admitted that it was a mistake to not file affidavits in response. RP. 20-23, 30-34. The court entered an order denying the motion for reconsideration. CP. 400.

13. The petitioners asserted one assignment of error to the Court of Appeals: "[t]he Trial Court abused its discretion by failing to grant Petitioners a Continuance pursuant to CR 56(f)." The trial court's unchallenged findings

of fact set forth in the order granting the motion for summary judgment are verities on appeal. The Court of Appeals affirmed the trial court in the opinion attached as Appendix A (A1-A6) to the Petition for Review.

IV. ARGUMENT

This Court Should Deny Review and Affirm the Ruling of the Court of Appeals Upholding the Trial Court's Denial of Petitioners' Oral Motion for a Continuance.

RAP 13.4(b) provides the considerations governing acceptance of review. The ruling of the Court of Appeals, Division II, that the trial court did not abuse its discretion when it denied Petitioners' motion for a continuance should be affirmed. The Respondents respectfully submit that the basis for acceptance of review has not met in this case, and the offer the following argument in support of denying review, and affirmed the ruling of the Court of Appeals, Division II.

The standard of review of a trial court's denial of a Court Rule 56(f) motion is for abuse of discretion. *Pitzer v. Union Bank of California*, 141 Wn.2d 539, 556, 9 P.3d 805 (2000). A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010)(quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

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(i) The Petitioners Waived Their Right to Challenge the Issue Relating to a CR 56(f) Continuance By Failing to Raise the Issue to the Trial Court.

The Llyod Reich and Joyce Reich, respondents herein, submit that Charles Smith and Barbara Duszynska, petitioners herein, failed to preserve the issue relating to a CR 56(f) continuance for appeal. As such, the court need not consider the merits of the petitioners' argument.

As a general rule, courts will not consider issues raised for the first time on appeal. RAP 2.5(a). A party may raise "the following claimed errors for the first time in the appellate court: (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). These errors are not presented in this case.

It is a fundamental principle of appellate litigation that a party may not assert on appeal a claim that was not first raised at trial. *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule is grounded in notions of fundamental fairness and judicial economy. See 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A trial court should be given the opportunity to respond to and correct mistakes at the time they are made to avoid unnecessary retrials and appeals. *Smith v. Shannon*, 100 Wn.2d

at 37.

The rule that appellate courts will generally limit review to claims argued before the trial court is especially true for summary judgment proceedings. *Nguyen v. Sacred Heart Medical Center*, 97 Wn.App. 728, 987 P.2d 634 (1999); RAP 9.12. The appellate court will only consider the evidence and issues called to the attention of the trial court when considering an appeal of an order for summary judgment. RAP 9.12. Issues not raised to the trial court on summary judgment may not be advanced on appeal. *Nelson v. McGoldrick*, 127 Wn.2d 124, 140, 896 P.2d 1258 (1995); *Hodge v. Raab*, 151 Wn.2d 351, 88 P.3d 959 (2004).

Court Rules further define the means by which an error must be preserved at the trial court. See CR 7, CR 43, CR 46, CR 51, and CR 56. The rules require parties to inform a trial court of the rules of law they wish the court to apply, and the facts for them to consider. While a party has the right to assume that the trial court knows and will properly apply the law, this does not excuse failure to seek correction of an error once the complaining party becomes aware of it. *Balandzich v. Demeroto*, 10 Wash.App. 718, 726, 519 P.2d 994 (1974); see also CR 46 (a party must make known action which he or she desires court to take), CR 7(b)(describing how a party shall make motions for an order), CR 56(c)(describing the summary judgment proceedings), and CR 56(e)(describing the required form of the affidavits, and specifically

noting “[i]f he does not so responds, summary judgment, if appropriate, shall be entered against him). Objections based on a theory not presented to the trial court cannot be raised for the first time on appeal. *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961).

In the context of this case, on January 30, 2014, Lloyd and Joyce Reich, respondents, filed a Motion for Summary Judgment which was based upon the Affidavit of Ken Hoffman, the Affidavit of Vicki Cline, the Affidavit of Lloyd and Joyce Reich, the Affidavit of Defense Counsel, Memorandum of Law, the records and files therein, including the exhibits attached to the defendant’s Answer, which include the Water System Easement and Agreement, all judgments relating to said matter, and the original survey of the short plat completed by Olson Engineering in 1978. The petitioners were personally served a copy of the citation for motion for summary judgment, the motion, supporting affidavits, and documents on January 31, 2014.

The petitioners did not file a responsive memorandum, or any affidavits in response. RP. 1-13. The petitioners did not file a motion pursuant to Court Rule 56(f) outlining the reasons why he could not present by affidavit the facts essential to justify opposition, or why he needed additional time to file affidavits. The petitioners did not file an affidavit outlining the reason justifying a continuance. RP. 1-13.

The petitioners’ only action of record was to file a motion for leave to

amend their complaint pursuant to Court Rule 15. The motion was filed on March 7, 2014. The court specifically addressed the CR 15 motion with the petitioners. RP. 4. The respondent cited case law during the hearing that provided the court with the basis to deny the motion for leave to amend. “The trial court did not abuse it’s discretion in denying a request for leave to amend made on the day summary judgment motions were argued.” RP. 5-6; *Bank of America NT v. David W. Herbert*, 153 Wn.2d 102, 122-123, 101 P.3d 409 (2004). The only other theory offered by the petitioners for not filing affidavits in response was that the respondents were “guilty of fraud” and Court Rule 60. RP. 8.

Prior to the March 13, 2014, hearing on summary judgment, the trial court reviewed the pleadings, motions, memorandum, documents, exhibits, and affidavits filed and properly before the court. The trial court considered the pleadings and argument of the parties during the summary judgment hearing March 13, 2014. RP. 1-13. The trial court specifically asked the petitioners “what is the difference from the first complaint?” To which the petitioners provided: “There is no case law cited. I have cited case law. I – in one of the pleadings I have removed with respect to asking for Contempt of Court.” RP. 2.

As addressed in the trial courts order granting summary judgment, “the only action of record taken by the defendant was to file an untimely motion to

amend the complaint on the day of the motion for summary judgment hearing, which was denied by the court.” CP. 289-294. Further, as agreed by the plaintiffs on the record, the motion to amend the complaint did not change the gravamen of the complaint, as it continued to raise the same issues. The plaintiffs did not demonstrate a question of fact existed. The facts set forth in the defendant’s affidavits are uncontroverted. CP. 290.

Towards the end of the hearing on summary judgment the petitioners stated: “may I ask for a continuance.” RP 10. This was done only after it was clear that the hearing was not going in the petitioners’ favor. The respondents did not agree to the continuance. The petitioners did not present the reasons for the continuance in the form of a timely CR 56(f) motion, and supporting affidavit for such a continuance. Rather, as a last ditch effort, the petitioners asked for a continuance. From the record, it does not “appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition.” CR 56(f). The opposing party did not file an affidavit. CP. 378-388. If such a record was established, “the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” CR 56(f).

If a party opposing a summary judgment is for some reason unable to present evidence justifying his opposition, the party should submit a CR 56(f)

affidavit stating the reasons preventing him or her from presenting by affidavit facts essential to justify opposition. *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 553 P.2d 107 (1976). The petitioners did not file such an affidavit. The petitioners did not file a written motion for a continuance. The petitioners did not provide opposing counsel with any notice they intended to request a continuance. The petitioners did not orally offer good reason for the delay, did not orally state what essential evidence would be established through additional discovery, and did not orally demonstrate how the desired evidence would raise a genuine issue of material fact. RP. 1-13. The petitioners also did not argue this issue as a basis to the court in their motion for reconsideration. RP 20-23, CP. 387-388, CP. 400.

The petitioners' only assignment of error on appeal was that the trial court abused its discretion by failing to grant petitioners a continuance pursuant to CR 56(f). As this argument and the necessary supporting facts were not called to the attention of the trial court, this Court should not consider it for the first time on appeal. As simply stated by the Court of Appeals, "Smith ignored the requirements of CR 56(f)." Therefore, this Court should deny review.

(ii) The Trial Court Properly Denied Petitioners' Oral Request for a Continuance, and Acted Within Its Discretion.

Whether a motion for a continuance should be granted or denied is a

matter discretionary with the trial court, reviewable on appeal only for manifest abuse of discretion. *Jankelson v. Cisel*, 3 Wn.App. 139, 473 P.2d 202 (1970). The abuse of discretion standard recognizes that deference is owed to the trial court because it is "better positioned than the appellate court to decide the issue in question." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)(quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S.Ct. 2447, 2459 L.Ed.2d 359 (1990)).

Further, a party who moves for a continuance must have exercised good faith and due diligence to prevent the need for delay. *Odom v. Williams*, 74 Wn.2d 714, 717-18, 446 P.2d 335 (1968). In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

The Petitioners failed to exercise good faith and diligence to prevent the need for delay. They were aware of the court rules and elected not to file affidavits in response. They also did not file or serve a timely written motion or affidavit showing the materiality of the evidence expected to be obtained

and the due diligence used to procure such evidence. See *Odom*, 74 Wn.2d at 717 (finding that the defendant did not comply with procedural requirements because he failed to file or serve any timely written motion or affidavit supporting his motion for continuance); *Makoviney v. Svinth*, 21 Wn.App. 16, 29, 584 P.2d 948 (1978), review denied, 91 Wn.2d 1010 (1979)(stating the plaintiff failed to comply with procedural requirements of CR 40(e) when he made an oral offer of proof but did not supply the required affidavit).

More specifically, a trial court does not abuse its discretion in denying a CR 56(f) request for a continuance if the requesting party “(1) does not offer a good reason for the delay in obtaining the desired evidence; (2)...does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.”

Manteufel v. Safeco Insurance Co., 117 Wn.App. 168, 175, 68 P.3d 1093 (2003); *Tellevik v. Real Prop.*, 120 Wn.2d 68, 90, 838 P.2d 111 (1992). A denial of a motion for a continuance can sufficiently be predicated on just one of these grounds. *Gross v. Sunding*, 139 Wn.App. 54, 68, 161 P.3d 380 (2007), CP. 386-388, CP 400.

The Petitioners’ reliance upon *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 582 P.2d 775 (1997), as a basis to grant review, is misplaced. In *Junker*, a law professor and two of his students conducting a class research project in 1969, were permitted by a superior court order to examine randomly

selected mental illness files. The prosecuting attorney and others challenged this order as a breach of confidentiality, citing former RCW 71.02.250, relating to mental illness cases. In *Junker*, the Court considered this back history in the exercise of discretion. In our case, there is no clear showing of abuse of discretion that was manifestly unreasonable. Rather, the petitioner failed to follow the procedural requirements of CR 56(f), and failed to act with due diligence. The trial court, and appellate court rulings where in line with the cases cited *supra* regarding the denial of a motion for a CR 56(f) continuance based upon the record.

It should be noted that “pro se litigants are expected to comply with the rules.” *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn.App. 299, 310, 57 P.3d 300 (2002). The trial court was under no obligation to grant special favors to pro se litigants. “The law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.” *In re Marriage of Wherley*, 34 Wn.App. 344, 349, 661 P.2d 155 (1983).

Even assuming *arguendo* the petitioners’ procedural deficiencies were excusable, the trial court nevertheless acted within the proper limits of its discretion. The trial court denied the petitioners’ continuance after they failed to provide an oral basis for a continuance, and properly interpreted it essentially as a last ditch effort after unsuccessfully making their argument to

the trial court. It should be noted that 729 days elapsed from the time that the petitioners filed the action to the day that the respondents filed for summary judgment. This was a fact that the trial court was clearly aware. The trial court also had the ability to observe the parties, including their age and health, and factor that into their consideration. The trial court was properly positioned to implicitly exercise its discretion and deny the motion.

In the end, the petitioner was aware of the court rules, and made the choice not to follow the court rules. He was capable of working on the matter and filed motions, he simply made the conscious choice not to file affidavits in response. As he later admitted, that was a mistake. RP. 23. As addressed to the trial court, the mistake was not a basis for reconsideration. RP. 26.

In this case, the petitioners did not file a written motion or affidavit for a continuance. The petitioners failed to exercise due diligence. Further, the petitioners did not offer a good reason for delay in obtaining the desired evidence, did not state what evidence would be established through the additional discovery, and did not demonstrate how the desired evidence would raise a genuine issue of material fact. The only information provided to the trial court, was the petitioners asking the judge if he could ask for a continuance, and the respondents not agreeing to a continuance. RP. 1-13. The trial court, having reviewed the full record, and having satisfying himself through questioning the petitioners and observing the parties, properly denied

the oral motion lacking a sufficient factual basis for a continuance.

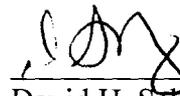
As stated by the Court of Appeals, “[the petitioner] failed to offer one good reason for the requested delay considering that the summary judgment motion was filed nearly two years after Smith filed the complaint.” “Because Smith did not satisfy CR 56(f) and because the superior court did not have to consider hypothetical facts before ruling on a motion for summary judgment,” the Court of Appeals properly held “the superior court’s decision not to grant a continuance was not manifestly unreasonable or based on untenable grounds or reasons.” Therefore, the trial court properly exercised its discretion, and this Court should deny review.

V. CONCLUSION

The petitioner’s argument fails to set forth a basis for this Court to accept review, as such, the respondents respectfully requests the petition be denied.

DATED this 4th day of February, 2016.

Respectfully submitted,



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