

72160-7

72160-7

No. 72160-7-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ABRAHAM CHAR,

Appellant,

vs.

AMERICAN SEAFOODS INC.,

Respondent.

BRIEF OF RESPONDENT AMERICAN SEAFOODS

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COURT OF APPEALS
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ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

II. INTRODUCTION..... 1

III. STATEMENT OF THE CASE..... 2

A. Background/Char’s Accidents..... 2

B. Char’s Complaint..... 3

C. Withdrawal of Char’s Counsel.....4

D. Discovery of Char’s Claim..... 5

E. ASC’s Motion for Summary Judgment..... 5

F. Oral Argument of the Summary Judgment Motion..... 10

G. The Trial Court’s Ruling..... 11

H. Char’s Appeal 13

IV. ARGUMENT..... 13

A. This Court Should Affirm the Trial Court Because Plaintiff Has Not Listed Any Assignment of Error in His Appellate Brief Nor Has He Otherwise Identified How the Trial Court’s Summary Judgment Decision Was Erroneous..... 13

B. The Trial Court’s Summary Judgment Decision Should Be Affirmed Because (1) Char Failed to Submit Any Evidence Opposing the Motion and Therefore Did Not Meet a Plaintiff’s Burden of Production to Show an Issue of Material Fact on the Essential Elements of His Claims, and (2) The Evidence Before the Trial Court Does Not Give Rise to a Genuine Issue of Material Fact Exists and the Law Shows ASC Is Entitled to Judgment..... 16

1. Standard of Review..... 16

2.	Standard for Granting Summary Judgment.....	16
3.	Summary Judgment Was Proper Because Char Did Not Present Evidence To Support the Essential Elements of His Claims.....	18
4.	Summary Judgment Was Properly Granted Because The Evidence Before the Trial Court Gives Rise To No Issue of Material Fact and ASC Is Entitled to Judgment as a Matter of Law On All Three of Char's Claims.....	23
5.	Char's Arguments on Appeal Do Not Raise Issues of Material Fact Because They Are Not Supported by Any Evidence Offered Below, Particularly Where Such Evidence Existed at the Time of the Summary Judgment Motion, and He Failed To Submit It to the Trial Court.....	33
V/	CONCLUSION.....	37

TABLE OF AUTHORITIES

CASES

Bale v. Allison, 173 Wn. App. 435, 451 (Wash. Ct. App. 2013)..... 20

Breese v. AWI, 823 F.2d 100 (5th Cir. 1987)..... 31

Burton v. Twin Commander Aircraft, LLC, 171 Wn.2d 204
(Wash. 2011)..... 18, 21, 22

Calmar S.S. Corp v. Taylor, 303 U.S. 525 (1938)..... 31

Celotex Corp. v. Catrett, 477 U.S. 317 (1986)..... 18, 21

Chandris v. Latsis, 515 U.S. 347 (1995)..... 30

Clausen v. Icicle Seafoods, 174 Wn.2d 70 (2012)..... 25, 31

Colon v. Trinidad Corp., 188 F.Supp. 97 (S.D.N.Y. 1960) 29

Dean v. Fishing Co. of Alaska, Inc., 177 Wn.2d 399 (2013)..... 31, 32

Detweiler v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99 (1988)..... 17

Farrell v. U.S., 336 U.S. 511 (1949)..... 31

Funderburk v. Maintenance Asso., Inc., 640 F.Supp. 813 (E.D. La.
1986).....30

Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997)..... 26

Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267 (1997)..... 24

Green v. A.P.C., 136 Wn.2d 87 (1998)..... 20

Guile v. Ballard Cmty. Hosp., 70 Wn.App. 18 (Wash. Ct. App. 1993)... 18

Havens v. F/T POLAR MIST, 996 F.2d 215 (9th Cir. 1993)..... 26

<u>Hedges v. Foss Maritime</u> , 2015 U.S. Dist. LEXIS 69940 (W.D. Wash. 2015).....	31
<u>Hollis v. Garwall, Inc.</u> , 88 Wn.App. 10 (Wn. App. Ct. 1997)	36, 37
<u>Huber v. American President Lines</u> , 240 F.2d 778 (2d Cir. 1957).....	28
<u>Huff v. Budbill</u> , 141 Wn.2d 1 (2000).....	16, 17
<u>Hyde v. Chevron, USA, Inc.</u> , 697 F.2d 614 (5 th Cir. 1983).....	30
<u>In re Hechinger</u> , 890 F. 2d 202 (9th Cir. 1989).....	25, 26, 27, 29
<u>In re Recall of Feetham</u> , 149 Wn.2d 860 (2003).....	35, 36
<u>Int'l Ultimate v. St. Paul Fire & Marine</u> , 122 Wn. App. 736 (Wash. Ct. App. 2004).....	20
<u>Lee v. Pacific Far East Line</u> , 566 F. 2d 65 (9th Cir. 1977).....	27
<u>Miller v. Arctic Alaska Fisheries</u> , 133 Wn.2d 255 (Wash. 1997)	27
<u>Mission Ins. Co. v. Guaranty Ins. Co.</u> , 37 Wn.App. 695 (Wn. App. Ct. 1984).....	36
<u>Mitchell v. Trawler Racer, Inc.</u> , 362 U.S. 539 (1960).....	27
<u>Morris v. McNicol</u> , 83 Wn.2d 491 (1974).....	17
<u>O'Donnell v. Great Lakes Dredge & Dock Co.</u> , 318 U.S. 36 (1943).....	31
<u>Pelotto v. L&N Towing Co.</u> , 604 F.2d 396 (5 th Cir. 1979).....	31
<u>Penberthy Electromelt Int'l v. United States Gypsum Co.</u> , 38 Wn. App. 514 (Wash. Ct. App. 1984).....	15
<u>Radacz v. F/T REBECCA IRENE</u> , Slip Op. C95-2137Z (W.D. Wash. 3/6/97).....	27
<u>Repsholdt v. United States</u> , 205 F.2d 852 (7 th Cir. 1953).....	28, 29

<u>Ribitzki v. Canmar Reading & Bates, Ltd. Partnership</u> , 111 F. 3d 658 (9th Cir. 1997).....	25, 26
<u>Sears v. Grange Ins. Ass'n</u> , 111 Wn.2d 636 (Wash. 1988).....	35, 36
<u>Seven Gables Corp. v. Mgm/Ua Co.</u> , 106 Wn.2d 1 (Wash. 1986)....	17, 32
<u>Sherrell v. Selfors</u> , 73 Wn. App. 596 (Wash. Ct. App. 1994).....	15
<u>Sloan v. U.S.</u> , 603 F.Supp.2d 798 (E.D. Pa. 2009).....	29
<u>Snow v. Whitney Fidalgo Seafoods, Inc.</u> , 38 Wn.App. 220 (1984).....	26
<u>Something Sweet, LLC v. Nick-N-Willy's Franchise Co.</u> , 156 Wn.App. 817 (Wash. Ct. App. 2010).....	22
<u>Spokane Airports v. RMA, Inc.</u> , 149 Wn. App. 930 (Wash. Ct. App. 2009).....	35
<u>Thomas v. French</u> , 99 Wn.2d 95 (Wash. 1983).....	14
<u>Wilburn v. Maritrans GP, Inc.</u> , 139 F.3d 350 (3 rd Cir. 1998).....	29, 30
<u>Young v. Key Pharm., Inc.</u> , 112 Wn.2d 216 (1989).....	17, 18, 19, 21

OTHER AUTHORITIES

RAP 9.11(a)..... 35, 36

RAP 9.11(a)(4)..... 36

RAP 9.12..... 34

RAP 10.3(a)(4).....13

RAP 10.4(c)..... 14, 15, 16

CR 56..... 20

CR 56(c).....17

CR 60(b)..... 36

Schoenbaum, Admiralty and Maritime Law (4th Ed. 2007) 30, 31

I. ASSIGNMENTS OF ERROR

Appellant Abraham Char presents no assignment of error.

II. INTRODUCTION

Appellant Abraham Char appeals from an Order granting summary judgment to Respondent American Seafoods Company LLC¹ (hereinafter, “ASC”), dismissing all of Char’s claims in this action relating to four separate accidents aboard ASC’s vessels. Char initially was represented by counsel, but after exchange of discovery the lawyer withdrew. Char has not found another attorney willing to represent him.

At the conclusion of discovery, ASC filed a motion for summary judgment. Char did not submit any brief or evidence opposing ASC’s motion. However, Char appeared and was heard at the summary judgment hearing. Although the trial judge explained to Char his burden on responding to a summary judgment motion, Char failed to point to any reason or evidence showing why summary judgment should not be granted. The trial court found ASC’s evidence sufficient to meet its initial burden that no genuine issue of material fact existed regarding the validity of Char’s claims and that Char submitted no evidence that gave rise to a

¹ There is no company named American Seafoods, Inc.; the correct name is American Seafoods Company LLC.

fact issue on any of his claims. The Court entered summary judgment in favor of ASC.

After more than a year trying to perfect his appeal, Char filed two handwritten letters with this Court entitled “Appellant Brife.” The first brief filed in August 2015 is dated “8-18-2015” dated in the upper right hand corner, and the second brief filed in September 2015 is dated “6-21-2015” in the same location. ASC understands both submissions comprise Char’s opening appellate brief. These documents, respectively, are referred to herein as “Brief I” and “Brief II,” respectively.

In his briefs Char points to no error made by the trial court nor explains while summary judgment should not have been granted. No error or other ground for reversal exists. This Court should affirm the Superior Court’s Order granting summary judgment in favor of ASC dismissing Char’s claims with prejudice.

III. STATEMENT OF THE CASE

A. Background/Char’s Accidents

Respondent ASC is a fishing company located in Seattle. CP 42. ASC employed the Appellant Abraham Char from time to time as a processor aboard its fishing vessels between June 2008 and September 2011. CP 41.

Char allegedly sustained injuries in four different accidents aboard various ASC vessels in 2010 and 2011, as follows:

- 1) a neck contusion aboard the F/T OCEAN ROVER on March 12, 2010, while helping an independent contractor's employees move their scaffolding;
- 2) a back strain aboard the F/T AMERICAN DYNASTY on September 16, 2010, when performing the normal work of a processor moving boxes during an offload;
- 3) a knee injury aboard the F/T AMERICAN DYNASTY on October 10, 2010, when he fell due to an unexpected roll of the vessel; and
- 4) a back sprain aboard the F/T NORTHERN JAEGER on September 29, 2011, when performing the normal work of a processor offloading fishmeal bags.

CP 42-45, 47, 49.

ASC paid maintenance & cure benefits to Char in connection with each of his four injuries until his treating physicians determined that he reached maximum medical improvement. CP 48.

B. Char's Complaint

On 3/5/13, Char, through his attorney John Merriam, filed an unverified Complaint in King County Superior Court against ASC,

asserting claims for negligence, unseaworthiness, and maintenance & cure in connection with the four accidents. Complaint, ¶ 7 (CP 2).

Therein, Char claimed entitlement to maintenance & cure because he had not reached maximum medical cure (although not specifying from what injury). Id., ¶ 10 (CP 3). He also claimed that ASC was liable for the four accidents under theories of negligence and unseaworthiness because “[p]aintiff was forced to work hours too long, and at a pace of production too fast, for safety; plaintiff was forced to work in weather too rough for safety; for the March 12, 2010 injury, plaintiff was injured by an object that was unsecured and during an operation that was shorthanded.” Id.

On 4/26/13, ASC filed its Answer to the Complaint and also a Third Party Complaint against Union Bay Fabrication in connection with Char’s claims relating to Char’s 3/12/10 neck contusion aboard the OCEAN ROVER. Union Bay Fabrication did not appear in the case.

C. Withdrawal of Char’s Counsel

After early exchange of discovery, Char’s lawyer John Merriam filed a Notice of Intent to Withdraw on 8/1/13. CP 27-28. After counsel withdrew, Char did not retain another lawyer to represent him, claiming he could find no lawyer who would represent him. Brief I at p. 3. Char has prosecuted the case on a *pro se* basis since August 2013.

D. Discovery of Char's Claim

ASC deposed Char on 11/14/13 and 11/27/13 (the interpreter who appeared at the summary judgment hearing, John Nhial, also interpreted at Char's deposition). *See* CP 81. On 4/26/14, ASC deposed two of its crewmembers, Dave Franca and John Quandt. Char attended these depositions and was told that he had the opportunity to ask questions.

E. ASC's Motion for Summary Judgment

On 5/2/14, ASC moved for summary judgment, seeking to dismiss with prejudice Char's claims for negligence, unseaworthiness, and maintenance & cure. CP 41-64. ASC submitted evidence in support of its motion through the declarations of David Franca (CP 67-75), Anthony J. Gaspich (CP 76-156), and Robert M. Lang (CP 157-229).

The following is a summary of the evidence submitted by ASC to the trial court in support of its motion.

Robert Lang is an in house claims adjuster employed by ASC who handled all four of Char's injury claims and, in particular, was responsible for determining when he reached maximum medical cure. CP 157-58. His declaration includes numerous medical, vessel, and personnel records relating to Char and which details the history of medical treatment for his injuries.

Relevant to ASC's motion for summary judgment on the maintenance & cure claim, Mr. Lang explained Char's medical treatment and ASC's payment of maintenance & cure to Char for each injury: (1) the 3/12/10 neck contusion. Lang Decl., ¶¶ 8, 9, 12 (CP 158-60); (2) the 9/16/10 back sprain. Id., ¶¶ 16-18, 25, 26 - CP 161-62); (3) the 9/29/11 back sprain. Id., ¶¶ 28-31, 32 (CP 163-64); and (4) the 10/15/10 knee injury. Id., ¶¶ 36-41, 42 (CP 164-166). He explains how ASC terminated paid maintenance & cure payments when Char was found at the point of maximum medical improvement by his treating physicians. CP 160, 162, 164, and 166.

Dave Franca was Chief Engineer aboard the F/T OCEAN ROVER and was Char's supervisor at the time of his 3/12/10 neck contusion. Franca Decl., ¶¶ 2, 4 (CP 67, 68). Franca explains in his declaration that ASC hired an independent contractor, Union Bay Fabrication, to convert sea water tanks aboard the vessel into fish oil tanks and that Union Bay was responsible for performing all related work except for fire watch during hot work, which ASC provided. Id., ¶ 3 (CP 68). He states Char was assigned to work as fire watch during the conversion work and was not trained, assigned, or instructed to assist the Union Bay workers in any way, particularly in moving their scaffolding. Id., ¶¶ 5, 6 (CP 68-69). Franca said Union Bay was responsible for moving its scaffolding, ASC

had no responsibility for doing so, and he did not instruct Char to help them with this task. Id., ¶8 (CP 69). Franca said Char informed him after the fact that he injured his neck helping the Union Bay workers move its scaffolding, that Char did so as a volunteer, and that ASC had no prior notice that Char intended to do so. Id., ¶9 (CP 69).

The Declaration of Anthony J. Gaspich attached deposition testimony of Char regarding his four accidents and from John Quandt, the Mate/Medical Officer aboard the F/T AMERICAN DYNASTY regarding Char's 10/10/15 knee injury.

Quandt identified as a deposition exhibit the vessel's bridge log, which recorded based on his observations the height of the seas during the period in question ranged between 4 and 6 feet high. CP 139-49. Quandt described these conditions as "moderate" according to the Beaufort Scale, a recognized authority used by mariners to characterize wind and sea conditions. Quandt Dep. at 25-26 (CP 133-34). Based on his 20 years working aboard the AMERICAN DYNASTY as a processor, deckhand, Mate, and relief Captain, Quandt testified these seas would have "very little effect or no effect at all" on the AMERICAN DYNASTY, a 297 foot vessel. Id. at 26, 27 (CP 134-35). Quandt testified that such sea conditions do not give rise to an unreasonable risk of falling for a seaman. Id. at 28 (CP 136).

Char's deposition testimony showed the following facts relevant to his claims. Although Char speaks English, an interpreter attended his deposition and assisted him as needed in his native language Dinka. Char Dep. at 7 (CP 82).

Regarding the 3/12/10 neck contusion, Char testified that Chief Engineer Dave Franca was his supervisor (CP 83), Char worked as fire watch (CP 84), his job responsibilities as fire watch included attending hot work to watch for fire and cleaning (e.g. "I mean, broom, you know to clean up the dust on the floor") (CP 85), he was not required to lift or carry as a fire watch ("For the fire watch, you know, I did not take any kind of, you know, kind of lifting.") (CP 85), "Union" employees performed the work in a tank (CP 84), Char was asked by the Union employees to help them move their scaffolding (CP 85, 89-90), Char was injured when lifting the scaffolding (CP 90), and the Union employees were in charge of moving the scaffolding (CP 92-93).

Regarding the 9/16/10 back injury, Char testified he was picking up boxes in the freezer hold during an offload and placing them on a conveyor (CP 96-97), his injury occurred when bending over to pick up a box (CP 97), offloading boxes from the boat was part of his "normal work that we do all the time" (CP 97), and he received instruction from ASC on proper lifting technique (CP 100).

Regarding the 10/10/10 knee injury, Char testified that he was walking into the factory to go on shift and fell when “the boat move up and down” (CP 102), the movement of the boat was unexpected (CP 105), and his fall was not caused by a slippery deck or any other abnormal condition (CP 108). Char stated at his deposition that ASC was at fault for this accident because he thought the weather was “very bad” and the crew should not have been working, but he does not know and cannot say what the actual weather or sea conditions were beyond his lay opinion (CP 106). Char states prior to this accident he worked in the factory in similar weather conditions (CP 107). He also says would ASC would stop work in the factory “when the weather was very rough” (CP 108). Work in the factory continued after his fall, and Char is not aware of anyone else on board who thought weather conditions warranted stopping work (CP 109).

Regarding his 9/29/11 back injury, Char testified that his injury occurred when lifting a fishmeal bag during an offload (CP 113-14), and this was normal work he performed during his four years with ASC (CP 115). Similar to the other injuries, Char was asked at his deposition why ASC was at fault for the accident, but Char could not say:

Q: ... What did American Seafoods do wrong that you say caused your back to hurt?

A: You have the medical record. You have my medical record. And when I do this, this work, this injury is what happened. And they send me to the clinic.

Q: But the fact that you have an injury doesn't mean that you get to recover anything, Mr. Char. You know, you have to show – you have to show that American Seafoods did something wrong, that they acted negligently. So I'm asking you what do you think they did wrong that caused this back injury on September 29th, 2011? What are you critical about? What do you believe that somebody did to you, or that something didn't work right? What is it that you're claiming, if anything?

A: I was injured. And I reported it to them. And they sent me to the clinic. And you want me to say something that I would blame them. I was injured and they sent me to the clinic, and that's what happened.

CP 114-15.

Plaintiff was served with ASC's motion, but filed no written opposition. He filed no affidavit, document, or other evidence with the Court opposing the motion. CP 51, 263. VRP 5.

F. Oral Argument of the Summary Judgment Motion

Oral argument on ASC's motion for summary judgment took place in King County Superior Court on 6/6/15 before Judge Douglass North.²

Id. Char attended the hearing, but produced no evidence showing why

² The hearing was originally set for 5/30/14. When Char appeared without arranging an interpreter, Judge North set the hearing over for a week and arranged for an interpreter to attend the hearing.

ASC was negligent, its vessel was unseaworthy, or he was owed additional maintenance & cure for any of the four accidents. VRP 8, 10.

G. The Trial Court's Ruling

The trial court ruled that the evidence submitted on summary judgment established that neither ASC nor its crew were negligent, ASC's vessels were not unseaworthy. CP 265-66. VRP 9-11. The trial court also found that Char had reached maximum medical improvement with respect to his four injuries and was paid all maintenance & cure to which he was entitled. CP 267.

The court explained that, "American Seafood has presented information here that indicates that they're not responsible. And you [Mr. Char] haven't presented any information to me." VRP 13. The court also told Char that "summary judgment is decided on the basis of facts that are placed before me by means of either an affidavit, . . . or a deposition, [and] all I have at this proceeding is information from American Seafood." VRP 8.

Char told the trial court that his medical records was the only evidence he had. VRP 5, 9. Char later told the court that "[m]y injuries records [sic] are my evidence 100%." CP 259, 269-71. However, as the court explained, Char needed to show more than that he was injured. VRP 6. Plaintiff needed to show that ASC did something wrong. VRP 5-6.

Char did not offer any evidence that ASC did something wrong. He failed to place any facts before the court by means of an affidavit or deposition. VRP 10, CP 265-68. Therefore, he did not raise a genuine issue of material fact. *Id.* Accordingly, the Court granted ASC's motion for summary judgment, dismissing all of plaintiff's claims on June 6, 2014. CP 265. The court specifically found that the uncontroverted evidence showed:

1. Plaintiff's alleged neck injury occurred when he volunteered to assist independent contractors aboard the F/T OCEAN ROVER. ASC did not instruct or expect Mr. Char to assist the independent contractors. The task fell outside the scope of Mr. Char's regular job duties as a fire watch aboard the vessel. ASC had no legal responsibility for the injury or the independent contractor's actions.
2. Plaintiff's alleged back injury occurred on September 16, 2010 while performing his regular work lifting boxes during an offload aboard F/T AMERICAN DYNASTY. Neither ASC nor its crew was negligent, and the vessel was not unseaworthy.
3. Plaintiff's alleged back injury occurred on September 16, 2011 while performing his regular work lifting a fishmeal bag during offload aboard F/T NORTHERN JAEGER. Neither ASC nor their crews were negligent and the vessel was not unseaworthy.
4. Plaintiff's alleged knee injuries occurred on or about October 15, 2010 when he lost his balance due to an unanticipated motion by the F/T AMERICAN DYNASTY. The vessel was operating in normal sea conditions and expectable weather and was not unseaworthy. Neither ASC nor their crews were negligent.
5. The undisputed evidence shows that Mr. Char reached maximum medical cure regarding his alleged back, neck, and knee injuries

and that ASC paid all maintenance and cure to which Mr. Char was entitled.

CP 265-68.

H. Char's Appeal

On July 3, 2014, Plaintiff filed a timely Notice of Appeal with the Superior Court of Washington for King County. CP 275-79; RAP 5.2(a).

IV. ARGUMENT

A. This Court Should Affirm the Trial Court Because Plaintiff Has Not Listed Any Assignment of Error in His Appellate Brief Nor Has He Otherwise Identified How the Trial Court's Summary Judgment Decision Was Erroneous.

Plaintiff's opening appellate "briefs" do not identify any assignment of error or otherwise describe the basis for his appeal. Apart from disagreeing with dismissal of his case, he points to no legal error made by the trial court in granting ASC's motion for summary judgment. His failure to identify the grounds of his appeal constitutes an independent basis for affirming the trial court's Order.

An appellant is required to set forth in its brief a "separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4).

This Court can only review issues that are identified as an assignment of error in the appellant's brief. RAP 10.4(c). Thomas v. French, 99 Wn.2d 95, 99-100, 659 P.2d 1097 (Wash. 1983).

The purpose of 13 is to expedite the determination of appeals by placing responsibility for identifying alleged errors of the trial court on the appellant. Id. at 99-100. An appellate court's administrative burden is increased substantially if it is required to scour the record below in search of possible mistakes. Id. at 100. This rule is intended to reduce that burden by limiting this Court's responsibility to evaluating only the merits of any error raised by the appellant. Id. Specifying what issues must be reviewed is the responsibility of the appellant. In short, the appellate court is not required to perform review the entire record below to determine if an error may exist.

If an appellant fails in his duty to identify alleged errors in the ruling on appeal, the appellate court shall not consider that argument. "To assure the rule accomplishes its intended purpose of improving and expediting appellate procedure, we must enforce it by requiring full compliance with its clear requirements." Thomas, 99 Wn.2d at 100 (this requirement is "one of command, not merely of suggestion").

Although the appellate rules require a specific assignment of error, it has been deemed sufficient if a party identifies an alleged error

somewhere in its brief. Sherrell v. Selfors, 73 Wn. App. 596, 598-99, 871 P.2d 168, 1994 Wash. App. LEXIS 139 (Wash. Ct. App. 1994) (the Court may consider a claimed error if it “is included in an assignment of error or is clearly disclosed in the associated issues pertaining thereto.”).

Char filed two handwritten briefs on appeal. His briefs do not identify any error or issue, apart from his generalized dissatisfaction with the result below. His briefs do not challenge the trial court’s findings of fact. An appellant’s failure to challenge any of the trial court’s findings of fact verbatim in his brief, as required by RAP 10.4(c), precludes review of the findings. Penberthy Electromelt Int’l v. United States Gypsum Co., 38 Wn. App. 514, 519-20, 686 P.2d 1138 (Wash. Ct. App. 1984). Nor does Char point to any evidence submitted to the trial court which would have created an issue of material fact or explain how the trial court misapplied the law.

Despite vague unsupported allegations raised for the first time on appeal, Char does not state or indicate how this Court may find error with the trial court’s decision. He does not assert any allegations that were brought to the attention of the trial court – either in his argument or in the evidence submitted. Nor does he assert that the trial court failed to

consider relevant evidence. Char simply fails to explain how the trial court erred apart from ruling against him.

Therefore, Plaintiff has failed to comply with this Court's rules requiring an appellant to by failing to identify what errors the trial court allegedly made and the part of the record that the Court need review evaluate those errors. Because this Court can only review issues and errors designated by appellant in his brief, as well as the part of the record relevant to such assignment, Char's failure to make such designations warrants dismissal of his appeal. RAP 10.4(c).

B. The Trial Court's Summary Judgment Decision Should Be Affirmed Because (1) Char Failed to Submit Any Evidence Opposing the Motion and Therefore Did Not Meet a Plaintiff's Burden of Production to Show an Issue of Material Fact on the Essential Elements of His Claims, and (2) The Evidence Before the Trial Court Does Not Give Rise to a Genuine Issue of Material Fact Exists and the Law Shows ASC Is Entitled to Judgment.

1. Standard of Review.

Summary judgment rulings are reviewed *de novo*. Huff v. Budbill, 141 Wn.2d 1, 7-8, 1 P.3d 1138 (2000). The appellate court engages in the same inquiry as the trial court. Id.

2. Standard for Granting Summary Judgment.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c). “All facts and reasonable inferences must be reviewed in the light most favorable to the nonmoving party” Huff, 141 Wn.2d at 7. “[T]he motion should be granted only if reasonable people could reach but one conclusion.” Id. Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

When a defendant moves for summary judgment, it, as the moving party, bears the initial burden of demonstrating the absence of any issue of material fact. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1 (Wash. 1989); Detweiler v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99, 108, 751 P.2d 282 (1988) (“The burden of showing that there is no issue of material fact falls upon the party moving for summary judgment.”).

Once the moving party meets its initial burden, the nonmoving party must set forth specific facts that rebut the moving party’s contentions and create an issue of material fact. Seven Gables Corp. v. Mgm/Ua Entm't Co., 106 Wn.2d 1, 21, 721 P.2d 1 (Wash. 1986) (after the moving party submits adequate affidavits to meet its burden, “the adverse party must set forth specific facts showing there is a genuine issue for trial”). If the nonmoving party fails to do so, summary judgment may be granted. Id.

3. Summary Judgment Was Proper Because Char Did Not Present Evidence To Support the Essential Elements of His Claims.

One way a defendant may obtain summary judgment is by showing that the plaintiff lacks evidence to establish an essential element of its case on which it bears the burden of proof at trial.³ Young, 112 Wn.2d at 225 n.1; Burton v. Twin Commander Aircraft, LLC, 171 Wn.2d 204, 222 (Wash. 2011) (“The moving defendant may meet its initial burden by “pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case.”). “In such a situation there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Id., *citing* Celotex Corp v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct 2548 (1986).

This standard supports the purpose behind the summary judgment motion, which is "to examine the sufficiency of the evidence behind the plaintiff's formal allegations in the hope of avoiding unnecessary trials." Young, 112 Wn.2d at 226 (affirming summary judgment in favor of defendant hospital and physicians because the plaintiff did not present

³In this situation the defendant is not required to set forth specific facts supporting its motion. Celotex, 477 U.S. at 323; Young, 112 Wn.2d at 226; Guile v. Ballard Cmty. Hosp., 70 Wn.App. 18, 23-24 (Wash. Ct. App. 1993) (holding that defendant was not required to support its summary judgment motion with affidavits because it moved for summary judgment based on plaintiff’s lack of competent evidence).

competent evidence to make out a prima facie case of medical malpractice).

The burden then shifts to the plaintiff to present sufficient evidence to support his claims. “In order to avoid summary judgment, the plaintiff must make out a prima facie case concerning the essential elements of its claim.” Young, 112 Wn.2d at 225.

Char did not submit any evidence to the trial court, but merely referred to his medical records as the sole evidence supporting his claim. VRP 5. Although relevant to some aspects of his claims (e.g. damages on the negligence and unseaworthiness claims and his some parts of his maintenance & cure claim), his medical records do not establish all essential elements. VRP 5, 10-13. The records merely showed that Plaintiff had been injured, not that ASC was liable for such injuries. VRP 10-11, 13. As the trial court explained, “I understand that you were injured, Mr. Char, but in order to win . . . you have to prove one of two theories [negligence or unseaworthiness].”⁴ VRP 5, 6, 9.

Char’s arguments at the summary judgment hearing comprise unsupported and conclusory statements. For example, Plaintiff argued that “I was injured because they didn’t do something here.” VRP 10.

⁴ A negligence claim requires a showing of duty, breach, causation, and damages. An unseaworthiness claim requires a showing of a condition aboard a vessel that is not reasonably fit for its intended purpose, causation, and damages.

Arguments, without evidence to support them, are insufficient to avoid summary judgment if that party bears the burden of proof on the claim that is the subject of the motion. “When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts.” CR 56. Int’l Ultimate v. St. Paul Fire & Marine, 122 Wn.App. 736 (Wash. Ct. App. 2004) (affirming summary judgment when plaintiff corporation failed to present any evidence that its insurers acted negligently or in bad faith when it denied plaintiff’s claim). A party cannot merely rely its own critique of or disagreement with the opposing party’s evidence because “argument of counsel does not constitute evidence.” Green v. APC, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

Here, Plaintiff rested upon mere allegations that he made to the court. He did not respond by affidavits, nor did he set forth specific facts. VRP 5-10, 12-13. Plaintiff gave no reasoned arguments as to the elements of negligence or unseaworthiness, or facts to support his claims. *Id.* Consideration by the trial court was, therefore, unmerited. “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” Bale v. Allison, 173 Wn. App. 435, 451 (Wash. Ct. App. 2013).

“If . . . the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . then the trial court should grant the motion [for summary judgment].” Celotex Corp. v. Catrett, 477 U.S. 317, 319, 322 (U.S. 1986); *see also* Burton v. Twin Commander Aircraft, LLC, 171 Wn.2d 204, 222-23, 254 P.3d 778 (2011). Young, 112 Wn.2d at 225 (quoting Celotex, 477 U.S. at 322). Thus, summary judgment in favor of ASC was the only proper judgment the trial court could have made.

For example, the Washington Supreme Court reversed the Court of Appeals and reinstated a trial court’s grant of summary judgment when the plaintiff did not aver sufficient facts to establish an essential element of its claim. Burton, 171 Wn.2d 204, 208. The defendant was sued for a plane crash that occurred more than 18 years after delivery of the aircraft to the first purchaser. Id. At issue was whether the suit was barred by an 18 year statute of repose. Id. The plaintiff argued that the “fraud exception” to the statute applied, basing his argument on the opinions of two experts about e-mails written by the defendant.⁵ Id. The trial court found these facts did not satisfy an essential element of the fraud exception. Id. at 209 (“It is

⁵The emails described prior incidents but did not reveal material, relevant facts that supported plaintiff’s argument. 171 Wn.2d at 227-228.

highly significant that these e-mails are essentially the only evidence that [plaintiff] relies on.”).

Similarly, the defendant in *Something Sweet, LLC v. Nick-N-Willy's Franchise Co.* was sued for allegedly violating a franchise agreement for an outlet store. Something Sweet, LLC v. Nick-N-Willy's Franchise Co., 156 Wn.App. 817, 823-824, 237 P.3d 923 (Wash. Ct. App. 2010). The plaintiff alleged that a material omission at the time it purchased the franchise from defendant entitled plaintiff to damages. Id. at 822. The alleged omission involved a discontinuation of defendant's outlet stores. Id. Defendant moved for summary judgment and presented affidavits from its chief executive officer showing it had not discontinued its outlet stores. Id. at 821-24. When the plaintiff offered no evidence to support its allegations, the superior court granted summary judgment and the appellate court affirmed. Id. at 820-24.

like the defendant in Something Sweet, who offered an affidavit from its chief executive officer in support of its motion for summary judgment, ASC offered various affidavits in support of its motion. CP 51. And like the plaintiffs in Something Sweet, who failed to offer any evidence beyond mere allegations that the defendant had made a material omission to its franchise agreement, or the plaintiff in Burton who presented some evidence, but not facts relevant to the essential elements of

his claim, Char failed to offer any evidence beyond mere allegations that ASC was negligent, its vessels were unseaworthy, and it owed more maintenance and cure to him. VRP 10. Char's failure to support his conclusory statements with evidence warrants entry of summary judgment.

ASC's motion referred to evidence showing that it was not negligent, its vessels were not unseaworthy, and Char received all maintenance & cure to which he was entitled. Char then needed to submit some evidence to create a fact issue on the essential elements of his claims. But he submitted no law or facts to dispute ASC's showing. CP 265-68. As the trial court pointed out, "[ASC presented] the only statements that are made under penalty of perjury, putting facts before me." VRP 10, 13. Accordingly, ASC was entitled to summary judgment as a matter of law.

4. Summary Judgment Was Properly Granted Because The Evidence Before the Trial Court Gives Rise To No Issue of Material Fact and ASC Is Entitled to Judgment as a Matter of Law On All Three of Char's Claims.

The more traditional way for a defendant to obtain summary judgment is by demonstrating based on all evidence before the court that no genuine issue of material fact exists. Where, as here, the plaintiff produces no evidence whatsoever, no material facts should be in dispute.

“A material fact is one upon which the outcome of the litigation depends.” Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). Here, Char asserted claims for negligence, unseaworthiness, and maintenance and cure. VRP 9. The material facts upon which Char needed to submit evidence involved ASC’s alleged failure to exercise reasonable care, the alleged unfitness of its vessels and their appurtenances for their intended purpose, and the medical evidence showing Char had not reached maximum medical improvement.

The evidence placed before the trial court showed:

- 1) Char sustained a neck contusion on board the F/T OCEAN ROVER on 3/12/10 when volunteering to help the employees of an independent contractor Union Bay Fabrication move their scaffolding, he was neither directed by ASC to help the contractor’s employees nor was this part of his job description as a fire watch;
- 2) Char sustained a back strain aboard the F/T AMERICAN DYNASTY on 9/16/10, when bending over to pick up a box, which was the normal work of a processor during an offload;
- 3) Char sustained a knee injury aboard the F/T AMERICAN DYNASTY on 10/10/10, when he fell in moderate sea

conditions due to an unexpected roll of the vessel, which is a normal risk of working at sea;

- 4) Char sustained a back sprain aboard the F/T NORTHERN JAEGER on 9/29/11, when performing the normal work of a processor lifting a fishmeal bag;
- 5) ASC paid Char all maintenance & cure related to his treatment for each of these injuries through the date his doctors found him at maximum medical improvement (MMI).

Char claims that each of his four alleged injuries occurred while he was working as a member of the crew aboard various fishing vessels, so as a seaman, his claims are governed by the general maritime law. Clausen v. Icicle Seafoods, 174 Wn.2d 70, 76, 272 P.3d (2012).

To prevail on his negligence claim under the Jones Act, plaintiff has the burden of proving, by a preponderance of the evidence, that defendant was negligent, and that such negligence was the cause of plaintiff's injury. In re Hechinger, 890 F. 2d 202, 208 (9th Cir. 1989); *cert. denied*, 498 U.S. 848 (1990); Ribitzki v. Canmar Reading & Bates, Ltd. Partnership, 111 F. 3d 658, 662 (9th Cir. 1997). Negligence is the failure to act reasonably under the circumstances. This is the same standard as under a common law negligence action, except that the

causation standard is broader to encompass any cause, however slight.

Havens v. F/T POLAR MIST, 996 F.2d 215, 218 (9th Cir. 1993).

However, the mere occurrence of an injury is alone not sufficient to create liability. Char must offer evidence showing that the employer's conduct fell below the required standard of care. Gautreaux v. Scurlock Marine, Inc., 107 F. 3d 331, 335 (5th Cir. 1997) (*en banc*).

To prevail on his claim of unseaworthiness, Char bears the burden of proving by a preponderance of the evidence that the vessel on which he worked was unseaworthy, and that the unseaworthy condition was a substantial cause of plaintiff's injury. In re Hechinger, 890 F. 2d at 208. Miller v. Arctic Alaska Fisheries, 133 Wn.2d 250, 263, 944 P.2d 1005 (1997). A vessel is unseaworthy if the vessel and its parts, equipment, and crew are not reasonably fit for their intended purpose. Ribitzki, 111 F. 3d at 664. Snow v. Whitney Fidalgo Seafoods, Inc., 38 Wn.App. 220, 686 P.2d 1090, *rev. denied*, 103 Wn.2d 1007 (1984). In other words, a seaman cannot recover unless he was injured by a piece of the ship's equipment that was not reasonably fit for its intended purpose. Miller, 133 Wn.2d at 263.

A vessel owner has no duty to provide an accident-free ship and is not required to have the best parts and equipment, nor the finest of crews;

it is only required to have what is reasonably suitable for the vessel's intended use. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550, 80 S.Ct. 926 (1960); Lee v. Pacific Far East Line, 566 F. 2d 65, 67 (9th Cir. 1977).

Char appears to have abandoned the claim regarding his back injury for lifting the box as he makes no mention of it in his briefs. Similarly, the evidence before the trial court regarding his back injury from lifting the fishmeal bag does not support a finding that any negligence or unseaworthiness caused this injury, but only that Char was injured performing his normal work of lifting during an offload.

The law specific to the alleged fault giving rise to Char's knee injury, i.e., heavy weather, shows ASC is entitled to judgment as a matter of law. A vessel owner is not liable for injuries caused by a roll of its boat. *See, e.g., In re Hechinger, supra* at 209 (affirming trial court's finding that cause of injury, i.e., rolling, constituted a peril of the sea for which the owner was not liable, and did not give rise to negligence or unseaworthiness); Repsholdt v. United States, 205 F.2d 852 (7th Cir.), *cert. denied*, 346 U.S. 901 (1953) (same); Radacz v. F/T REBECCA IRENE (Slip Op. C95-2137Z, 3/6/97) (Zilly, J.), *aff'd*, 187 F.3d 648 (9th Cir. 1999) (summary judgment in shipowner's favor appropriate where seaman injured when he lost his balance and fell because the vessel rolled

unexpectedly in rough weather). See Huber v. American President Lines, 240 F.2d 778 (2d Cir. 1957) (no liability where plaintiff fell on wire rigged across catwalk because seamen “are trained to handle themselves and keep their footing in fairly precarious places.”).

Char’s description of the weather as “bad” does not give rise to liability because the only evidence before the trial court regarding the size of the seas shows they were only 4 to 6 feet. Char admits he cannot say what the actual sea conditions were. The fact that the vessel may have been rolling does not, alone give rise to liability as this is a normal risk of going to sea. The Repsholdt case is instructive. A storm arose, and the seaman slipped after walking through water that accumulated in his quarters because the portholes were not closed in a storm. The seaman argued the shipowner was liable because the crew failed to warn him of an approaching storm. The court rejected this contention stating:

There is no duty on the part of officers of a vessel to inform an experienced seaman that the weather is rough or that there is a storm, such conditions being self evident to all personnel aboard the ship.

...

When it appears, as it does here, that involved are only ‘the obvious and well known risks of the business’ then there is an absence of negligence in law. Storms and heavy seas are ‘obvious and well known risks of the business’ of all seamen.

205 F.2d at 855, 856. See Colon v. Trinidad Corp., 188 F. Supp. 97, 100 (S.D.N.Y. 1960) (“It seems only fair that men who make their livelihood on the water can be expected to cope with some of the hazardous conditions that must prevail even on a seaworthy vessel. Any stricter rule would require the intervention of traveling companions to guide and protect sailors in going about the vessel to perform their duties.”).

More significantly, the Ninth Circuit in Hechinger affirmed a determination of no liability on an injury claim where a small boat was suddenly surrounded by 25 foot seas that tore a hole in its hull. 890 F.2d. 202, 206 (9th Cir. 1990). A seaman was injured when one of the waves caused him to lose his balance and fall to the deck. Id. The Court found no liability as a matter of law due to the vessel rolling in a much larger sea than the one that existed at the time of Char’s accident.

Similarly, the law addressing a vessel owner’s liability with respect to the actions of an independent contractor shows ASC is entitled to judgment on Char’s claim as a matter of law.

“Under the Jones Act, an employer is liable for injury suffered by a seaman through the negligence of the employer or a fellow employee.” Sloan v. U.S., 603 F.Supp.2d 798, 805 (E.D. Pa. 2009), *citing* Wilburn v.

Maritrans GP, Inc., 139 F.3d 350, 357 (3rd Cir. 1998). Although a seaman's employer also can be held liable for negligence of its agent, "the negligence of an independent contractor is not chargeable to the employer." Schoenbaum, Admiralty & Maritime Law, §6-211, p. 463 (5th Ed. 2011) (citing cases). Funderburk v. Maintenance Asso., Inc., 640 F.Supp. 813, 814 (E.D. La. 1986). In Funderburk, the court granted summary judgment against a seaman where the vessel owner hired an independent contractor to perform maintenance on an offshore drill rig and did not exercise control over the nature or manner of the work:

It is elementary that a principal who does not exercise operational control over the manner of an independent contractor's performance may not be held liable for the negligent acts committed by that contractor in the course of its duties. And the principal has no duty to insure, through instructions or supervision, that the independent contractor will perform its obligations in a reasonably safe manner.

Funderburk, 640 F.Supp. at 814. Accord Hyde v. Chevron, USA, Inc., 697 F.2d 614, 630 (5th Cir. 1983).

Finally, the law applicable to Char's maintenance & cure claims does not support his claim of additional entitlement to such benefits under the facts of this case. A seaman is entitled to maintenance & cure from his employer if he becomes ill or injured while in the service of the employer's vessel. Chandris v. Latsis, 515 U.S. 347, 354 (1995);

O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 41-42 (1943).

Clausen, 174 Wn.2d at 76.

Maintenance & cure is no longer owed when a seaman reaches maximum medical recovery (“MMI”). Dean v. Fishing Co. of Alaska, Inc., 177 Wn.2d 399, 406 (2013).

Maximum cure is achieved when it appears probable that the seaman’s condition is cured or is recognized as incurable, that is, further treatment will result in no betterment of the seaman’s condition and is simply for pain relief.

Hedges v. Foss Maritime, 2015 U.S. Dist. LEXIS 69940, at 11 (W.D. Wash. 2015). Farrell v. U.S., 336 U.S. 511, 69 S.Ct. 707 (1949) (maintenance & cure is due for a reasonable time after the voyage so as to effect such improvement in the seaman’s condition as reasonably may be expected from medical treatment until he is so far cured as possible); Calmar S.S. Corp v. Taylor, 303 U.S. 525, 530 (1938) (owed until point of stability); Pelotto v. L&N Towing Co., 604 F.2d 396, 400 (5th Cir. 1979) (“Thus, where it appears that ... future treatment will merely relieve pain and suffering by not otherwise improve the seaman’s physical condition, it is proper to declare that the point of maximum cure has been achieved.”). Schoenbaum, Admiralty & Maritime Law, §6-30, p. 526 (5th Ed. 2011).

Determination of MMI involves a medical decision, i.e., is based on medical evidence. Breese v. AWI, 823 F.2d 100, 104-05 (5th Cir. 1987).

A vessel owner bears the burden of showing a legitimate reason to terminate payment of maintenance & cure. Dean, 177 Wn.2d at 402.

The evidence placed before the trial court by ASC showed the absence of negligence or unseaworthiness with respect to Char's injuries and that Char reached MMI with respect thereto. Char failed to submit any evidence to the trial court that raised an issue of material fact or contracted the law cited by ASC on any of his claims. Entry of summary judgment against Char was appropriate. See Seven Gables Corp. v. Mgm/Ua Entm't Co., 106 Wn.2d 1, 12, 712 P.2d 1 (Wash. 1986).

In Seven Gables Corp., the plaintiff successfully moved for summary judgment and defendant appealed, alleging a statute under which the plaintiff had sued violated the Constitution of the United States. Defendant was obliged to provide admissions, affidavits, declarations, or other sworn testimony presenting specific facts which, if believed, would justify a court in holding that the statute was unconstitutional. Id. at 13-14. While the defendant did present sworn statements of its executives, the court found no specific facts in the sworn statements that raised an issue of material facts. Id. It noted that "defendant mentions, only once, two issues involving the Washington Constitution and then fails to discuss these issues any further in its brief." Id. Accordingly, the defendant's sworn statements did not command consideration. Id. at 14.

Herein, the only evidence before the trial court was presented by ASC. Summary judgment was proper here because ASC's evidence was uncontroverted. CP 265-68. Nothing therein gives rise to an issue of material fact on Char's claims. Char only offered arguments below, relying on the fact that he was hurt. Although this entitles him to maintenance & cure for his injuries, which has been paid, it does not entitle him to any further recovery. ASC was entitled to summary judgment as a matter of law, and this Court should affirm the judgment.

5. Char's Arguments on Appeal Do Not Raise Issues of Material Fact Because They Are Not Supported by Any Evidence Offered Below, Particularly Where Such Evidence Existed at the Time of the Summary Judgment Motion, and He Failed To Submit It to the Trial Court.

Char appears to raise arguments for the first time on appeal why ASC should be liable under a negligence or unseaworthiness theory: (1) Char injured his back because the machine was operated with high speed and conveyor belt moved in a different direction; (2) Char injured his knee because the crew should not have been working at the time in bad weather; and (3) Char injured his neck because his supervisor instructed him to help the welders move the scaffolding. Brief I at 2-3; Brief II at 3.⁶

⁶ Char also asserts in his brief that ASC did not pay money promised to him on 10/24/11, fired him before his contract ended, discriminated against him based on his race, and owes him wages for the past four years based on his contract. Notwithstanding these knotty issues, this Court need not consider them because Char neither asserted such

Char fails to explain how the trial court could have erred in considering these arguments when he did not raise them below. His late unsworn assertions do not constitute evidence and cannot be considered on appeal. Even assuming, *arguendo*, the validity of these assertions (which ASC denies),⁷ it is simply too late for Char to try to raise them now. The time to have done so would have been in discovery or before the trial court on summary judgment.

“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. For the reasons mentioned above, Char’s appeal should be denied because he did not submit any evidence to the trial court, either when opposing summary judgment or afterward that supported essential elements of his liability case.

His attempt to do so now on appeal should not be permitted. Although the appellate rules contemplate situations where a party will be allowed to introduce new evidence on appeal, Such relief is rarely granted

claims in his Complaint nor raised such issues on the summary judgment motion. *See* CP 1-5.

⁷ Moreover, an unsworn statement cannot be submitted on summary judgment to refute a plaintiff’s sworn deposition testimony. For instance, Char was asked at his deposition why ASC was at fault or responsible for his back injury when lifting fish meal bags. CP 113-115. Char did not testify that the conveyor was running too fast or backwards or abnormally, but instead said he performed this job over four years and did not blame ASC for this accident. *Id.*

and only in unusual situations. A party must meet all six of the conditions set out in RAP 9.11(a), as follows: 1) additional proof of facts is needed to fairly resolve the issues on review; 2) the additional evidence would probably change the decision being reviewed; 3) it is equitable to excuse the party's failure to present the evidence to the trial court; 4) the remedy available to the party through postjudgment motions in the trial court is inadequate or unnecessarily expensive; 5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive; and 6) it would be inequitable to decide the case solely on the evidence already taken in the trial court. Spokane Airports v. RMA, Inc., 149 Wn.App. 930, 937, 206 P.3d 364 (Wash. Ct. App. 2009); Sears v. Grange Ins. Ass'n, 111 Wn.2d 636, 640, 762 P.2d 1141 (Wash. 1988).

Char has not requested this Court to treat his new arguments on appeal as new evidence. Therefore, they can be dismissed outright because they were neither raised nor supported below. But even if the Court should consider whether to allow Char to submit new evidence, such relief is not warranted because Char cannot meet 9.11(a)'s six part test.

First, the assertions made in his current arguments could have been raised with the trial court at the time of the summary judgment motion, and therefore equity does not mediate toward excusing such failure. In re

Recall of Feetham, 149 Wn.2d 860, 872-73, 72 P. 3d 741 (2003) (motion to submit additional evidence denied where because available evidence was not placed before the trial court and it is not equitable to excuse its failure to do so). *See* Sears, 111 Wn.2d at 640 (same). Here it would be similarly inequitable to excuse Char's failure to raise these points at summary judgment as his Complaint was filed 14 months before, his deposition inquiring about ASC's alleged fault was taken six months before, Char attended depositions of two witnesses discussing these issues a month before, and the trial court advised Char to consult an attorney to understand the issues raised on summary judgment.

Second, RAP 9.11(a)(4) provides that a party must show that "the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive." The trial court informed Char at the summary judgment hearing that he could move for reconsideration of the decision and that he needed to do so in a limited period of time. VRP 10, 13. Char could also have sought relief from the trial court by filing a motion under CR 60(b) relief below within the one year period allowed by the rule on grounds of mistake, inadvertence, or excusable neglect. Accordingly, he cannot meet the six conditions under RAP 9.11(a). Mission Ins. Co. v. Guaranty Ins. Co., 37 Wn.App. 695, 702, 683 P.2d 215 (Wn. App. Ct. 1984). *See* Hollis v. Garwall, Inc., 88

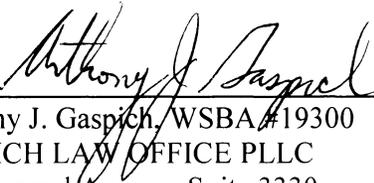
Wn.App. 10, 17-18, 945 P. 2d 717 (Wn. App. Ct. 1997); (motion to supplement the record on appeal is denied where party did not meet all six factors, the court noting that allowing a party to supplement the record on appeal undermines the principles of finality and invades the province of the trial court).

VI. CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's summary judgment order in favor of Respondent American Seafoods Company LLC.

Respectfully submitted this 14th day of October, 2014.

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CERTIFICATE OF SERVICE

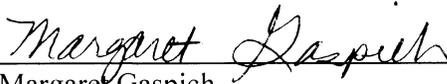
I, Margaret Gaspich, under penalty of perjury of the laws of the State of Washington, hereby certify as follows:

1. I am an employee of the law firm of Gaspich Law Office PLLC, 1000 Second Ave., Suite 3330, Seattle, WA 98104, counsel for Respondent American Seafoods Company LLC.

2. On October 14, 2015, I caused a true and correct copy of Respondent's Reply Brief to be served on the following in the manner indicated below:

Abraham Char	<input checked="" type="checkbox"/>	By Mail
P.O. Box 3133	<input type="checkbox"/>	By Hand Delivery
Kent, WA 98089	<input type="checkbox"/>	By E-Mail
Seattle, WA 98104	<input type="checkbox"/>	By Facsimile

DATED this 14th day of October, 2015.


Margaret Gaspich