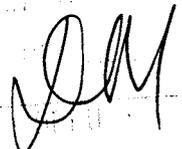


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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JEFFREY STEPHENS,

v.

WILLIAM HOLLANDSWORTH, ET. AL.

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson
Pierce County Superior Court Cause No. 04-2-14764-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO:

1. Did the trial court err when it granted the plaintiff's motion for summary judgment where the plaintiff failed to meet his burden to show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law?

2. Did the trial court err when it denied the defendant's motion for reconsideration of the order granting summary judgment?

B. STATEMENT OF THE CASE.

1. Facts:

Jeffrey Stephens, hereinafter "appellant", owned property at 19113 – 59th Street East, Lake Tapps, in Pierce County on which the defendant's company Four C Utility Construction, pursuant to a contract with Qwest, installed a telecommunications cable. (CP 3-7; CP 114-201).

The telecommunications cable installation occurred on two dates: November 11, 2004 and December 26, 2004. Id. On November 11, 2004, the defendants placed an above-the-ground telecommunications cable on the property. (CP 279-545). That cable was laid down 13 feet east of the hole that was made on December 26, 2004. Id. Plaintiff became concerned that the above-the-ground cable posed potential safety problems and he placed orange surveyor's tape next to that hole. Id.

On December 26, 2004, and without notice to plaintiff, the defendants entered his property to bury the telecommunications cable. (CP 114-201). Plaintiff had informed Qwest that he wanted to be present during the installation of the telecommunications cable. Id., deposition of Stephens, pages 98-99.

In order to bury the telecommunications cable, Four C dug a trench with a machine. (CP 3-7). While digging the trench, the defendants created a hole approximately the size of plaintiff's foot. (CP 114-201). The defendants left this hold open without any warning to plaintiff that this hazard existed. (CP 3-7).

On December 27, 2004, plaintiff stepped into that hole and sustained injuries. Id. and page 4. After plaintiff fell in the hole and injured himself, he put a safety barrier around the hole. Deposition of Stephens, page 106.

Plaintiff stepped into the hole when he went to check on a trailer that had been moved. Id., at 109-110. He was concerned that his shop truck had been broken into and, while checking the windows he stepped into the unmarked hole. Id., at 110.

Plaintiff observed that the hole was one of several uncompacted areas along the trench which the defendants dug to install the cable. Id., at 130.

2. Procedure:

On December 22, 2004, the appellant initiated a lawsuit alleging that, inter alia, the defendant Four C Utility Construction Corporation dug a hole on his property on or about December 26, 2001, for purposes of installing a telecommunication cable

on his property. The appellant alleged that the hole was a hazard, into which he fell on December 27, 2001, and sustained personal injuries. (CP 3-7). As the result of those injuries, the appellant lost his ability to earn a living and also sustained on-going medical expenses. (CP 3-7).

During the litigation in this case, plaintiff retained an attorney, Robert Hayes. SCP (Notice of Appearance, filed 8/21/06). During the course of preparing plaintiff's declaration, Mr. Hayes misread an email from plaintiff and made an assumption that in one sentence, plaintiff referred to the hole in the trench line, when in fact plaintiff referenced the above-the-ground telecommunications line around which he had placed orange surveyor's tape. (CP 279-545).

On April 6, 2007, the court heard argument on defendants' motion for summary judgment. RP 4/6/07 1.

Defendant argued that plaintiff's cause of action should be dismissed because the basis of the complaint was "speculation and conjecture." RP 4/6/07 2-3. Because Mr. Hayes had incorrectly set forth the email facts he received from the plaintiff, the defendants argued and the court found that plaintiff had knowledge of the hole before he sustained his injuries because he had placed orange surveyor's tape around it. RP 4/6/07 6-7. Based on the error of Mr. Hayes, the defendants were able to argue that they did not create the hole because plaintiff asserted that it was apparent on/after November 14, 2004, when he placed the surveyor's tape on the

ground. RP 4/6/07 4. Defendants argued that no hole had been dug on November 14, 2007. Id.

Mr. Hayes failed to grasp when plaintiff had taken action regarding the above-the-ground cable and also that plaintiff had placed the surveyor's tape more than 13 feet from the hole that was dug in late December. Passim.

Based on this critical error by plaintiff's counsel, the court focused on the 8/31/06 declaration of plaintiff, wherein plaintiff erroneously affirmed, "The temporary phone line was placed on top of the ground. I placed orange surveyor's tape next to this hole to prevent anybody from tripping on it." (CP 68-69).

Plaintiff argued that the hole had been not been created until December 27th. RP 4/6/07 18. Mr. Hayes also incorrectly argued that the above-the-ground cable was laid down on December 19, 2007. RP 4/06/07 19.

Mr. Hayes later grasped that the sentence in issue referred to the placement of orange surveyor's tape occurred when the temporary phone line was laid down, but incorrectly argued that the hole had been created at that time. RP 4/6/07 20.

Prior to the court's ruling, Mr. Hayes acknowledged his error. RP 4/6/07 24.

The court granted the motion, holding that there were no genuine issues of material fact in this case. RP 4/6/07 27.

Plaintiff then timely filed a motion for reconsideration. (CP 269-279) That motion was heard on May 4, 2007. At that time, plaintiff noted that the defendant's

never denied that the work crew caused the hole in his yard. RP 5/4/07 30. Plaintiff noted that the defendant's motion for summary judgment and the court's ruling depended on that one sentence that incorrectly related that plaintiff had placed the orange surveyor's tape around the hole, as opposed to the around the above-the-ground telecommunications cable. RP 31. Plaintiff's argued that this statement was purely error. RP 34.

The court asked plaintiff to articulate those facts, which established that the defendants were responsible for the hole. RP 36.

Plaintiff responded that his amended declaration averred that the work crew had not finished the job of burying the cable in December 2004. RP 36-37. He noted that the yard had been left "a mess" and that they had failed to notify him that the area was potentially hazardous. RP 37. Plaintiff also argued that the hole had been created during the trenching in December because it was located in the middle of the trench line, which defendants made when they buried the cable on December 27, 2004. (CP 37-38). RP 37-38; Exhibit 14F. Defendant argued that there was a reasonable inference that the hole had been created at that time because it was in the middle of the trench line which defendants acknowledged making. RP 39.

Further, plaintiff went out to retrieve his mail only four hours after the defendants left his property on December 27, 2004, and he fell into the hole at that time. RP 41. Because plaintiff regularly walked out to retrieve his mail, plaintiff's

failure to notice the hole earlier created a reasonable inference that no hole existed at that time. Passim.

In response, the defendants contended that the plaintiff was not allowed to correct errors in a declaration as part of a motion for reconsideration of summary judgment. RP 48-51. Further, the defendant argued that the trial court's ruling should be affirmed on reconsideration even if the court considered the amended declaration. RP 51.

Plaintiff also argued that his deposition could not be used against him pursuant to CR 30(b)(2)¹ because it was taken when, the deponent was not represented by counsel, and after he had made diligent efforts to retain counsel. RP 51-53.

On May 10, 2007, the court denied the motion for reconsideration. The court held that plaintiff had not established that there existed evidence that would persuade reasonable minds to conclude that the accident happened as a result of the defendant's negligence. RP 67-68.

The court did not rule that the amended declaration was improperly considered. Nor did the trial court rule that the defendants could rely on plaintiff's deposition taken without counsel after the plaintiff made diligent efforts to obtain counsel. Passim.

¹ See Appendix A

Plaintiff thereafter timely filed this appeal. (CP 595-599).

C. LAW AND ARGUMENT.

1. The trial court erred when it granted the plaintiff's motion for summary judgment where the plaintiff failed to meet his burden to show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court. Degel v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 48, 914 P.2d 728 (1996). The appropriate standard for this court to apply, then, is de novo review. International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction, 142 Wn.2d 431, 434-35, 13 P.3d 622 (2000) cert. denied, 532 L.Ed.2d 652, 121 S. Ct. 1672 (2001).

That is, summary judgment is appropriate “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 a judgment as a matter of law.” CR 56(c)².

The party seeking summary judgment bears “the initial burden of showing the absence of an issue of materials fact.” Green v. A.P.C., 136 Wn.2d 87, 100, 960 P.2d 912 (1998). When determining whether the moving party has met this burden, the court must consider all facts submitted and reasonable

² See Appendix B

inferences from them in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A question of fact may be determined as a matter of law when reasonably minds could reach but one conclusion from the evidence presented. Cent. Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 353, 779 P.2d 697 (1989). If the moving party meets his initial burden of showing the absence of an issue of materials fact, the burden shifts to the nonmoving party to make a showing sufficient to establish the existence of an element essential to the party's case. Young v. Key Pharms., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989).

Once that burden has been met, the “adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in {CrR 56} must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e).

In the instant case, the appellant initiated a lawsuit alleging that, inter alia, the defendant Four C Utility Construction Corporation dug a hole on his property on or about December 26, 2001, for purposes of installing a telecommunication cable on his property. The appellant alleged that the hole was a hazard, into which he fell on December 27, 2001, and sustained personal injuries. As the result of those injuries, the appellant lost his ability to earn a living and also sustained on-going medical expenses. (CP 3-7).

There was no question but that the defendants made the hole that caused plaintiff's injury. The issue then was whether or not the plaintiff had knowledge of the hole prior to stepping into it and sustaining his injuries. Viewing the evidence in the light most favorable to the nonmoving party, this court should conclude that plaintiff in fact has established that he sustained that he sustained injury as the result of the defendants' negligence and that the hole that caused his injury was not dug prior to December 27, 2004. In his declaration in response to the defendants' motion for summary judgment, plaintiff clearly connected his placement of the orange surveyor's tape to the placement of the temporary phone line on top of the ground. (CP 242-246). Although the declaration erroneously stated that a hole was created at that time, plaintiff, upon discovering that misstatement, immediately provided an amended (corrected) declaration to the court. (CP 242-246). There is no question that the defendants buried the cable many weeks after the cable was placed atop the ground. The uncontroverted evidence that the hole that caused plaintiff's injury was in the middle of the trench line that was dug on December 27, 2004, affirms that the hole was made at that time. Commonsense dictates that any previously existing hole would have been destroyed/disrupted by the trencher. Thus, plaintiff established the material fact that the hole was created by the defendants.

On these facts, plaintiff established actionable negligence because he demonstrated the existence of a duty, a breach thereof, a resulting injury, and

proximate causation between the breach and the resulting injury. Shooley v. Pinch's Deli Market, 134 Wn.2d 468 (1998); Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Given that the defendant's created a hole in the middle of trench line, which they dug on December 27, 2994, the defendants created a hazardous condition. Further, the defendants failed to finish the job of compacting the soil over the trench line and also failed to notify plaintiff that they had not finished the job. As a direct result of their actions, plaintiff walked into the hole in the middle of the trench line and sustained serious physical injury. These facts created material issues sufficient to put before the jury.

2. The trial court erred when it denied the defendant's motion for reconsideration of the order granting summary judgment.

CR 59³ permits a motion for reconsideration on numerous grounds, including accident or surprise which ordinary prudence could not have guarded against. In this case, during the course of litigation and in response to the motion for summary judgment, plaintiff filed an erroneous declaration which had been prepared by his counsel while counsel misunderstood the plaintiff's statements. Even the most prudent practitioner and litigant sometimes make errors in their pleadings. The discovery of an error (in this case, an error mistakenly asserting that there was a hole

³ Appendix C

after the cable was placed on *top* of the ground) was an accident that a reasonable practitioner could have made in the course of preparing a pleading.

Defendant below argued that the new declaration should not be permitted under the rule of Adams v. Western Host, Inc., 55 Wn. App. 601, 779 P.2d 281 (1989). However, that case is easily distinguished. That case did not involve the filing of an amended/corrected declaration but rather a declaration setting forth entirely new facts on an issue unaddressed in the first declaration. The court held that such a declaration, which broached completely new subject matter which would have been available to the declarant at the time he made the first declaration, did not constitute newly discovered evidence.

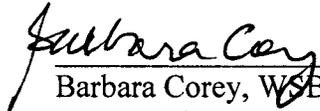
Further, although the plaintiff's amended declaration did clarify the facts, the trial court should have denied the summary judgment motion based on the original declaration and the other evidence before it at the summary judgment motion. This is so because it was uncontroverted that the defendants did not in any way disturb the ground when they laid the cable on top of it. Further, they acknowledged that they made a trench line in the ground in which to bury the cable. They did not compact the disruption created by the trench line. Further, the hole was in the middle of the trench line. In addition, the defendants failed to notify the plaintiff that they had either made a trench line and/or failed to compact the soil. Ignorant of the

defendants' actions and the existence of the hole, the plaintiff inserted his foot into the hole and sustained serious damage.

D. CONCLUSION.

For the foregoing reasons, the appellant respectfully asks this court to reverse the trial court order granting summary judgment as well as the order denying the appellant's motion for reconsideration. The appellant asks this court to direct the superior court to remand this case for trial on the merits.

DATED this 4th day of January, 2008.



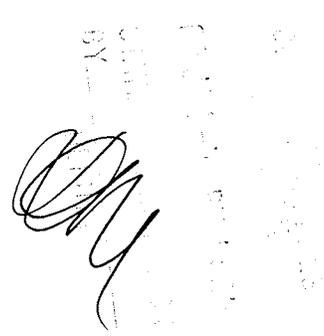
Barbara Corey, WSB # 11778
Attorney for Appellant

CERTIFICATE OF SERVICE:

The undersigned certifies that on this day she delivered by U.S. Mail to John Francis Kennedy, Attorney for Respondents, 3419 Harborview Drive, Gig Harbor, WA 98332-2148 a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1-4-08
Date


Signature



APPENDIX "A"

justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the superior court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

[Amended effective September 1, 2005.]

RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(-) **Within the State.** Depositions within the state may be taken before the following officers:

(1) *Court Commissioners.* [Reserved. See RCW 2.24.040(9) and (10).]

(2) *Superior Courts.* [Reserved. See RCW 2.28.010(7).]

(3) *Judicial Officers.* [Reserved. See RCW 2.28.060.]

(4) *Judges of Supreme and Superior Courts.* [Reserved. See RCW 2.28.080(3).]

(5) *Inferior Judicial Officers.* [Reserved. See RCW 2.28.090.]

(6) *Notaries Public.* [Reserved. See RCW 5.28.010 and 42.44.010.]

(7) *Special Commissions.* [Reserved. See RCW 11.20.030.]

(a) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under rule 29.

(b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and the person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory or a letter of request, or (4) pursuant to the means and terms of any applicable treaty or convention. A commission, a letter rogatory, or a letter of request shall be issued on application and notice, and on terms that are just and appropriate. It is not requisite to the issuance of a commission, a letter rogatory, or a letter of request that the taking of the deposition in any other manner is impracticable or

inconvenient; and a commission, a letter rogatory, and a letter of request may all be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or by descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." A letter of request or any other device permitted by any applicable treaty or convention shall be styled in the form prescribed by that treaty or convention. Evidence obtained in response to a letter rogatory or a letter of request need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) Equal Terms Required. Any arrangement concerning court reporting services or fees in a case shall be offered to all parties on equal terms. This rule applies to any arrangement or agreement between the person before whom a deposition is taken or a court reporting firm, consortium or other organization providing a court reporter, and any party or any person arranging or paying for court reporting services in the case, including any attorney, law firm, person or entity with a financial interest in the outcome of the litigation, or person or entity paying for court reporting services in the case. [Amended effective September 1, 1985; September 1, 1993; September 1, 2001; September 1, 2005.]

RULE 29. STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.

[Amended effective July 1, 1972.]

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May Be Taken. After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is

given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Video Tape Recording.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing of not less than 5 days (exclusive of the day of service, Saturdays, Sundays and court holidays) to every other party to the action and to the deponent, if not a party or a managing agent of a party. Notice to a deponent who is not a party or a managing agent of a party may be given by mail or by any means reasonably likely to provide actual notice. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party seeking to compel the attendance of a deponent who is not a party or a managing agent of a party must serve a subpoena on that deponent in accordance with rule 45. Failure to give 5 days' notice to a deponent who is not a party or a managing agent of a party may be grounds for the imposition of sanctions in favor of the deponent, but shall not constitute grounds for quashing the subpoena.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or the order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded

testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under section (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in section (e), and the certification of the officer required by section (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of rule 34 shall apply to the request, including the time established by rule 34(b) for the party to respond to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to the matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or by other electronic means. For the purposes of this rule and rules 28(a), 37(a)(1), 37(b)(1), and 45(d), a deposition taken by telephone or by other electronic means is taken at the place where the deponent is to answer questions propounded to him.

(8) Videotaping of Depositions.

(A) Any party may videotape the deposition of any party or witness without leave of court provided that written notice is served on all parties not less than 20 days before the deposition date, and specifically states that the deposition will be recorded on videotape. Failure to so state shall preclude the use of videotape equipment at the deposition, absent agreement of the parties or court order.

(B) No party may videotape a deposition within 120 days of the later of the date of filing or service of the lawsuit, absent agreement of the parties or court order.

(C) On motion of a party made prior to the deposition, the court shall order that a videotape deposition be postponed or begun subject to being continued, on such terms as are just, if the court finds that the deposition is to be taken before the moving party has had an adequate opportunity to prepare, by

discovery deposition of the deponent or other means, for cross examination of the deponent.

(D) Unless otherwise stipulated to by the parties, the expense of videotaping shall be borne by the noting party and shall not be taxed as costs. Any party, at that party's expense, may obtain a copy of the videotape.

(E) A stenographic record of the deposition shall be made simultaneously with the videotape at the expense of the noting party.

(F) The area to be used for videotaping testimony shall be suitable in size, have adequate lighting and be reasonably quiet. The physical arrangements shall be fair to all parties. The deposition shall begin by a statement on the record of: (a) the operator's name, address and telephone number, (b) the name and address of the operator's employer, (c) the date, time and place of the deposition, (d) the caption of the case, (e) the name of the deponent, and (f) the name of the party giving notice of the deposition. The officer before whom the deposition is taken shall be identified and swear the deponent on camera. At the conclusion of the deposition, it shall be stated on the record that the deposition is concluded. When more than one tape is used, the operator shall announce on camera the end of each tape and the beginning of the next tape.

(G) Absent agreement of the parties or court order, if all or any part of the videotape will be offered at trial, the party offering it must order the stenographic record to be fully transcribed at that party's expense. A party intending to offer a videotaped recording of a deposition in evidence shall notify all parties in writing of that intent and the parts of the deposition to be offered within sufficient time for a stenographic transcript to be prepared, and for objections to be made and ruled on before the trial or hearing. Objections to all or part of the deposition shall be made in writing within sufficient time to allow for rulings on them and for editing of the tape. The court shall permit further designations of testimony and objections as fairness may require. In excluding objectionable testimony or comments or objections of counsel, the court may order that an edited copy of the videotape be made, or that the person playing the tape at trial suppress the objectionable portions of the tape. In no event, however, shall the original videotape be affected by any editing process.

(H) After the deposition has been taken, the operator of the videotape equipment shall attach to the videotape a certificate that the recording is a correct and complete record of the testimony by the deponent. Unless otherwise agreed by the parties on the record, the operator shall retain custody of the original videotape. The custodian shall store it under conditions that will protect it against loss or destruction or tampering, and shall preserve as far as practicable the quality of the tape and the technical integrity of the testimony and images it contains. The custodian of the original videotape shall retain

custody of it until 6 months after final disposition of the action, unless the court, on motion of any party and for good cause shown, orders that the tape be preserved for a longer period.

(I) The use of videotaped depositions shall be subject to rule 32.

(c) Examination and Cross Examination; Record of Examination; Oath; Objections. Examination and cross examination of witnesses may proceed as permitted at the trial under the provisions of the Washington Rules of Evidence (ER). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. A judge of the superior court, or a special master if one is appointed pursuant to rule 53.3, may make telephone rulings on objections made during depositions. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the

APPENDIX "B"

(4) *Costs and Proof of Service.* Costs shall not be awarded and default judgment shall not be rendered unless proof of service is on file with the court.

(c) **Setting Aside Default.**

(1) *Generally.* For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

(2) *When Venue Is Improper.* A default judgment entered in a county of improper venue is valid but will on motion be vacated for irregularity pursuant to rule 60(b)(1). A party who procures the entry of the judgment shall, in the vacation proceedings, be required to pay to the party seeking vacation the costs and reasonable attorney fees incurred by the party in seeking vacation if the party procuring the judgment could have determined the county of proper venue with reasonable diligence. This subsection does not apply if either (a) the parties stipulate in writing to venue after commencement of the action, or (b) the defendant has appeared, has been given written notice of the motion for an order of default, and does not object to venue before the entry of the default order.

(d) **Plaintiffs, Counterclaimants, Cross Claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of rule 54(c).

(e) **Judgment Against State.** [Reserved.]

(f) **How Made After Elapse of Year.**

(1) *Notice.* When more than 1 year has elapsed after service of summons with no appearance being made, the court shall not sign an order of default or enter a judgment until a notice of the time and place of the application for the order or judgment is served on the party in default, not less than 10 days prior to the entry. Proof by affidavit of the service of the notice shall be filed before entry of the judgment.

(2) *Service.* Service of notice of the time and place on the application for the order of default or default judgment shall be made as follows:

(A) by service upon the attorney of record;

(B) if there is no attorney of record, then by service upon the defendant by certified mail with return receipt of said service to be attached to the affidavit in support of the application; or

(C) by a personal service upon the defendant in the same manner provided for service of process.

(D) If service of notice cannot be made under subsections (A) and (C), the notice may be given by publication in a newspaper of general circulation in the county in which the action is pending for one publication, and by mailing a copy to the last known

address of each defendant. Both the publication and mailing shall be done 10 days prior to the hearing. [Amended effective July 1, 1977; September 1, 1978; January 1, 1981.]

RULE 56. SUMMARY JUDGMENT

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings.** The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits Are Unavailable.** Should it 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, 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.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) **Form of Order.** The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

[Amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993.]

RULE 57. DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, RCW 7.24, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

RULE 58. ENTRY OF JUDGMENT

(a) **When.** Unless the court otherwise directs and subject to the provisions of rule 54(b), all judgments

shall be entered immediately after they are signed by the judge.

(b) **Effective Time.** Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge enters a judgment to be filed with him as authorized by rule 5(e).

(c) **Notice of Entry.** [Reserved. See rule 54(f).]

(d) [Reserved.]

(e) **Judgment by Confession.** [Reserved. See rule 4.60.]

(f) **Assignment of Judgment.** [Reserved. See rule 4.56.090.]

(g) **Interest on Judgment.** [Reserved. See rule 4.56.110.]

(h) **Satisfaction of Judgment.** [Reserved. See RCW 4.56.100.]

(i) **Lien of Judgment.** [Reserved. See rule 4.56.190.]

(j) **Commencement of Lien on Real Estate.** [Reserved. See RCW 4.56.200.]

(k) **Cessation of Lien—Extension Prohibited.** [Reserved. See RCW 4.56.210.]

(l) **Revival of Judgments.** [Reserved.]

RULE 59. NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) **Grounds for New Trial or Reconsideration.** The motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues, if such issues are clearly and fairly separable and distinct from any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; whenever any one or more of the jurors shall have induced to assent to any general or special verdict a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the making of the application, which he could not with reasonable diligence have discovered and produced at the

APPENDIX "C"

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

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(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

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(a) **Grounds for New Trial or Reconsideration.** On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on its own initiative may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, the judge by whom it is to be heard may on the judge's own motion or on application determine:

(1) *Time of Hearing.* Whether the motion shall be heard before the entry of judgment;

(2) *Consolidation of Hearings.* Whether the motion shall be heard before or at the same time as the presentation of the findings and conclusions and/or judgment, and the hearing on any other pending motion; and/or

(3) *Nature of Hearing.* Whether the motion or motions and presentation shall be heard on oral argument or submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be served and filed.

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and for a new trial may be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law, is made and heard before the entry of the judgment, no further motion may be made, without leave of the court first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), and (i) of this rule, or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);