

FILED
COURT OF APPEALS

10/11/13 PM 1:17

CLERK OF COURT

BY *JW*

No. 40301-3-II

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

JAMES and DEBRA PRUITT
Appellants,

v.

PIERCE COUNTY,
Respondent.

APPELLANTS PRUITTS' OPENING BRIEF
REVISED

Carolyn A. Lake WSBA #13980
Goodstein Law Group PLLC
501 South G Street
Tacoma WA 98405
Attorneys for Appellants Pruitt

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. APPELLANTS’ ASSIGNMENT OF ERRORS1

Issues Related to Assignment of Errors1

II. STATEMENT OF THE CASE2

III. ARGUMENT7

A. **ISSUE 1: DID THE COURT ERR WHEN IT GRANTED DEFENDANT’S “SUMMARY JUDGEMENT” MOTION OVER PLAINTIFF’S OBJECTION WHERE MOTION WAS FILED TEN DAYS PRIOR TO HEARING, RELIED ON DEPOSITION TRANSCRIPTS WHICH WERE NOT FILED UNTIL TWO DAYS PRIOR TO HEARING, AND WHERE CIVIL RULE 56 REQUIRES 28 DAYS NOTICE?**7

B. **ISSUE 2: DID THE COURT ERR BY REFORMING CONTRACT UPON A FINDING OF FRAUD WHERE NO DUTY TO DISCLOSE EXISTS & PARTIES NEGOTIATED AT ARMS LENGTH?**.....13

C. **ISSUE 3: DID THE COURT ERR BY REFORMING CONTRACT UPON A FINDING OF FRAUD WHERE PARTIES HAD NO PRIOR AGREEMENT INCONSISTENT WITH SIGNED SETTLEMENT AGREEMENT**.....22

D. **ISSUE 4: DID THE COURT ERR BY REFORMING CONTRACT WHERE REFORMATION IS BARRED DUE TO DEFENDANT’S NEGLIGENCE?**.....25

E. **ISSUE 5: DID THE COURT ERR BY GRANTING DEFENDANT’S SUMMARY JUDGEMENT WHERE DISPUTED FACTS EXIST?**.....26

F. **ISSUE 6: DID THE COURT ERR BY DENYING**

PLAINTIFF’S SUMMARY JUDGEMENT TO DISMISS
DEFENDANT’S COUNTERCLAIMS WHERE
PLAINTIFFS ENTITLED TO RELIEF AS A MATTER OF
LAW?33

G. **ISSUE 7: DID THE COURT ERR WHEN IT DENIED
APPELLANTS’ MOTION TO CONTINUE THE TRIAL TO
OBTAIN NEW COUNSEL AFTER COURT WAS AWARE
THAT CURRENT LEGAL COUNSEL HAD ETHICAL
CONFLICT IN CONTINUED REPRESENTATION?.....36**

IV. CONCLUSION AND RELIEF.....43

TABLE OF AUTHORITIES

Cases

Alexander v. Housewright, 667 F.2d 556, 558 (8th Cir.1981)..... 41

Alpha Inv. Co. v. City of Tacoma, 13 Wash.App. 532, 536 P.2d 674,
Wash.App., 1975..... 39

Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co. (2006)
158 Wash.2d 603, 146 P.3d 914 8

Bell v. Byerson, 11 Iowa, 233, 77 Am. Dec. 142..... 20

Braegelmann v. Snohomish County, 53 Wn.App. 381, 383, 766 P.2d 1137,
review denied, 112 Wn.2d 1020 (1989)..... 34

Bravo v. Dolsen Cos., 125 Wash.2d 745, 750, 888 P.2d 147 (1995) 7

Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir.1974)..... 42

Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wash.2d 726, 732,
853 P.2d 913 (1993)..... 16

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). 40

Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc. (2004)
123 Wash.App. 863, 99 P.3d 1256 7

Fidelity & Casualty Co. of New York v. Nichols, 124 Wash. 403, 214 P. 820
..... 22

Gammel v. Diethelm, 59 Wash.2d 504, 507, 368 P.2d 718 (1962)..... 14

Golle v. State Bank of Wilson Creek, 52 Wash. 437, 100 P. 984..... 21

Griffith v. Strand, 19 Wash. 686, 54 P. 613..... 20, 32

Grimsby v. Samson (1975) 85 Wash.2d 52, 530 P.2d 291..... 7

Grimwood v. Univ. of Puget Sound Inc., 110 Wn.2d 355 (1988)..... 12

<i>Halvorsen v. Halvorsen</i> , 3 Wash App. 827, 479 P.2d. 161, 1970 ...	37, 39, 42
<i>Harris v. Harris</i> , 60 Wn.App. 389, 392, 804 P.2d 1277, review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991).....	34
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)	40
<i>Hubenthal v. Spokane & Inland R. Co.</i> , 43 Wash. 677, 86 P. 955, 958	18, 32
<i>Hulet v. Achey</i> , 39 Wash. 91, 80 P. 1105.....	20, 32
<i>Hull v. Celanese Corp.</i> , 2 Cir., 513 F.2d 568 (1975).....	38
<i>In re McMurray</i> , 99 Wash.2d 920, 665 P.2d 1352 (1983)	42
<i>In re Richardson</i> , 100 Wash.2d at 677, 675 P.2d 209	40
<i>Johnston v. Spokane & Inland Empire R. Co.</i> , 104 Wash. 562, 177 P. 810, 812.....	22, 33
<i>Kaufmann v. Woodard</i> , 24 Wash.2d 264, 163 P.2d 606 (1945)	22
<i>Kelley v. Von Herberg</i> , 184 Wash. 165, 174, 50 P.2d 23 (1935)....	14, 15, 16, 18
<i>Lake v. Churchill</i> , 39 Wash. 318, 81 P. 849	20, 32
<i>Landberg v. Carlson</i> (2001) 108 Wash.App. 749, 33 P.3d 406, review denied 146 Wash.2d 1008, 51 P.3d 86.....	8
<i>Leland v. Frogge</i> , 71 Wn.2d 197 (1967)	13
<i>Maltman v. Sauer</i> , 84 Wn.2d 975, 530 P.2d 254 (1975)	34
<i>Matter of Richardson</i> , 100 Wash.2d 669, 675 P.2d 209. Wash.,1983.....	43
<i>McCormack v. Molburg</i> , 43 Iowa, 561,	20
<i>Mickensv, Taylor</i> , 535 U.S. 162, at 172 n. 5, 122 S.Ct. 1237; 2002.....	39
<i>Morin v. Harrell</i> (2007) 161 Wash.2d 226, 164 P.3d 495.....	8

<i>National Bank of Wash. v. Equity Investors</i> , 81 Wash.2d 886, 506 P.2d 20 (1973).....	25
<i>Nebeker v. Cutsinger</i> , 48 Ind. 436	21
<i>Oates v. Taylor</i> , 31 Wash.2d 898, 904, 199 P.2d 924 (1948).....	15
<i>Ranger Ins. Co. v. Pierce County</i> (2008) 164 Wash.2d 545, 192 P.3d 886 ..	8
<i>Rogers v. Place</i> , 29 Ind. 577	21
<i>Samson v. Beale</i> , 27 Wash. 557, 68 P. 180.....	20, 32
<i>San Juan County v. No New Gas Tax</i> 160 Wash.2d 141, 157 P.3d 831, Wash.,2007	7
<i>Sherman v. Sweeny</i> , 29 Wash. 321, 69 P. 1117	20, 32
<i>Skagit State Bank v. Rasmussen</i> , 109 Wash.2d 377, 745 P.2d 37 (1987)....	25
<i>State v. Dhaliwal</i> , 150 Wash.2d 559, 571, 79 P.3d 432 (2003).....	39
<i>Stephens v. United States</i> , 595 F.2d 1066, 1070 (5th Cir.1979).....	41
<i>Stiley v. Block</i> , 130 Wash.2d 486, 502, 925 P.2d 194 (1996).....	37, 39
<i>Stone v. Moody</i> , 41 Wash. 680, 84 P. 617, 85 P. 346, 5 L. R. A. (N. S.) 799.	15
<i>Sullivan</i> , at 348, 349-50, 100 S.Ct. at 1719	41
<i>Tank v. State Farm Fire & Casualty Co.</i> (1986) 105 Wash.2d 381, 715 P.2d 1133.....	38
<i>Waite v. Salestrom</i> , 201 Neb. 224, 266 N.W.2d 908 (1978)	22, 23
<i>Walker v. Ebert</i> , 29 Wis. 194, 9 Am. Rep. 548	21
<i>Walsh v. Bushell</i> , 26 Wash. 576, 67 P. 216	20, 32
<i>Walsh v. Meyer</i> , 40 Wash. 650, 82 P. 938	20, 32
<i>Washington Central Imp. Co. v. Newlands</i> , 11 Wash. 212, 39 P. 366	19

<i>Washington Mut. Sav. Bank v. Hedreen</i> , 125 Wash.2d 521, 886 P.2d 1121, Wash.(1994).....	22
<i>West Seattle Land & Imp. Co. v. Herren</i> , 16 Wash. 665, 48 P. 341	20, 32
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220, 1097 (1981).....	40, 41
<i>Yakima Cy. (W. Vly.) Fire Protec. Dist. 12 v. Yakima</i> , 122 Wash.2d 371, 858 P.2d 245 (1993).....	25

Rules

CR 12 (b).....	7
CR 12(b)(6).....	7
CR 12(c).....	7
CR 56	passim
CR 56(e).....	12
ER 801(c).....	12

Treatises

Restatement (Second) of Contracts § 157 (1979).....	25, 26
Pomeroy, Equity Jurisprudence (4th Ed.) §§ 901, 902.....	15, 33

I. APPELLANTS' ASSIGNMENT OF ERROR

1. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S "SUMMARY JUDGEMENT" MOTION OVER PLAINTIFF'S OBJECTION WHERE MOTION NOT TIMELY FILED OR SUPPORTED BY ADMISSABLE EVIDENCE
2. THE TRIAL COURT ERRED BY REFORMING THE CONTRACT WHERE ELEMENTS OF REFORMATION NOT MET.
3. THE TRIAL COURT ERRED BY DENYING PLAINTIFFS' SUMMARY JUDGMENT MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS.
4. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANTS' MOTION TO CONTINUE THE TRIAL AFTER ETHICAL CONFLICT WAS MADE KNOWN TO THE COURT

Issues Related To Assignments Of Error.

ISSUE 1: DID THE COURT ERR WHEN IT GRANTED DEFENDANT'S "SUMMARY JUDGEMENT" MOTION OVER PLAINTIFF'S OBJECTION WHERE MOTION WAS FILED TEN DAYS PRIOR TO HEARING, RELIED ON DEPOSITION TRANSCRIPTS WHICH WERE NOT FILED UNTIL TWO DAYS PRIOR TO HEARING, AND WHERE CIVIL RULE 56 REQUIRES 28 DAYS NOTICE? **YES.**

ISSUE 2: DID THE COURT ERR BY REFORMING CONTRACT? YES UPON A FINDING OF FRAUD WHERE NO DUTY TO DISCLOSE EXISTS & PARTIES NEGOTIATED AT ARMS LENGTH? **YES.**

ISSUE 3: DID THE COURT ERR BY REFORMING CONTRACT UPON A FINDING OF FRAUD WHERE PARTIES HAD NO PRIOR AGREEMENT INCONSISTENT WITH SIGNED SETTLEMENT AGREEMENT? **YES**

ISSUE 4: DID THE COURT ERR BY REFORMING CONTRACT WHERE REFORMATION IS BARRED DUE TO DEFENDANT'S NEGLIGENCE? YES

ISSUE 5: DID THE COURT ERR BY GRANTING DEFENDANT'S SUMMARY JUDGEMENT WHERE DISPUTED FACTS EXIST? YES. (Assignment of Error No. 1)

ISSUE 6: DID THE COURT ERR BY DENYING PLAINTIFF'S SUMMARY JUDGEMENT TO DISMISS DEFENDANT'S COUNTERCLAIMS WHERE PLAINTIFFS ENTITLED TO RELIEF AS A MATTER OF LAW? YES

ISSUE 7: DID THE COURT ERR WHEN IT DENIED APPELLANTS' MOTION TO CONTINUE THE TRIAL TO OBTAIN NEW COUNSEL AFTER COURT WAS AWARE THAT CURRENT LEGAL COUNSEL HAD ETHICAL CONFLICT IN CONTINUED REPRESENTATION? YES.

II. STATEMENT OF THE CASE

Appellants filed suit in Pierce County Superior Court for damages in tort, breach and other causes against Pierce County after the County failed to produce and abide by a "Settlement Agreement" purportedly signed by the parties. See *Amended Complaint* on file. CP 1-12. The Settlement Agreement was entered into to resolve land use enforcement actions pursued by the County and successfully resisted by Appellants. The Settlement Agreement was intended to address and resolve land use entitlement issues for Appellants' property and uses. Appellants brought suit based on their

•
•

belief that the County had breached the Agreement by it re-newed land use enforcement action. Id.

Nearly a year after Appellants filed suit, the Respondent County subsequently brought counterclaims against the Appellants, or more particularly, as part of those counterclaims, alleged fraud against Appellants' then-legal counsel in an effort to achieve reformation of the purported Settlement Agreement, to the detriment of Appellants' interests. CP 13-22.

In October 2009, Appellants filed a CR 12(b)6 Motion to Dismiss Respondent County's counterclaims. CP 188-202. The County objected that the Motion relied on matters outside the pleadings. The Court agreed, and Appellants re-filed the dispositive Motion as one for Summary Judgment, set a hearing date of and provided the 28 days' advance notice as required by CR 56. CP 209-223. Respondent County responded to the Summary Judgment by pleading filed November 30, 2009. CP 350-361. Embedded within the County's responsive documents was a purported "cross motion" for Summary Judgment, also to be heard on the 11 December 2009 hearing date. Id. The County's Summary Judgment motion was purportedly supported by repeated references to Disposition excerpts; however the Deposition was not filed and all citations referencing the deposition page

numbers were blank. Id and see attached copy **Appendix 1**. Appellants objected to the “cross motion” for Summary Judgment, and its lack of authenticated support. CP 376-391 and CP 444-447. Two days before the Summary Judgment hearing was held, the Respondent County filed an “Amended” pleading which for the first time added the previously missing deposition and citation to page numbers. CP 419-430. At the hearing two days later on December 11, and over Appellants’ objection, the Court ruled to grant the County’s “cross motion” Summary Judgment Motion and to deny Appellants’. 12/11/09 TR at 21:4-7.

On the issue of timeliness, the Court ruled:

Certainly affidavits can be considered as a 12(b)(6) which makes it like a summary judgment, but that doesn't change the time frame, which appears to be the issue in question. Can still be heard on a six day Motion to Dismiss or as a 28 day Motion to Dismiss.

12/11/09 TR at 20:23 – 21:4.

The Court’s ruling on Summary Judgment also included a verbal finding that Plaintiffs’ former counsel committed fraud, 12/11/09 TR at 19:20-21, and as a result, the Court ruled that the County was entitled to Summary Judgment and the relief of reformation of contract. 12/11/09 TR at 20:15-18. (Transcript attached as **Appendix 2**). The Court “reformed” the parties’ land use Settlement Agreement by inserting a mutual release

clause into the contract. 12/11/09 TR at 21:4-7. That act eliminated

Appellants' following causes for relief sought in the civil suit:

- 3.2 Abuse of Process
- 3.4 Discrimination
- 3.5 Interference with Business Relationship
- 3.6 Tortious Interference
- 3.7 Intentional Infliction of Emotional Distress
- 3.8 Malicious Prosecution

Id. Appellants were left with two remaining claims: 3.3 Injunctive relief and 3.1 Breach of contract.

In addition, the effect of Court's verbal ruling finding Appellants' counsel committed fraud placed the interests of Appellants' then- counsel directly at odds with that of Appellants, creating a conflict pursuant to RPC 1.7. 1/11/10 TR at 26:19-27:16. Appellants believed that the ethical conflict of interest prevented Appellants then counsel from further representing Plaintiffs Id. As a result of the Court's finding, resulting in the conflict of interest, and after conferring with their existing counsel, Appellants obtained new counsel. Id.

On January 11, 2010, the date set for trial, both Appellants original trial counsel and new counsel appeared in court Id and CP 510-511 Clerk's Minute Entry, **Appendix 3**. Appellants' original trial counsel together with Respondent County's counsel sought to present (1) an Order

memorializing the Courts' verbal December 11, 2009 ruling granting Respondent's Summary Judgment, and (2) an Order Dismissing with prejudice Appellants' two remaining claims. Id. Appellants' original trial counsel signed the two Orders, neither Appellants nor their new counsel signed the Orders, instead objecting to their entry. Id.

As an alternative to the Orders, Appellants' new counsel presented the Court with (1) a Notice of Substitution of Counsel¹, and (2) a Motion to Continue the Trial date. 1/11/10 TR at 26:19-27:16. CP² In presenting the pleadings and via the written Motion to Continue, Appellants' new counsel brought the conflict of interest to the Court's attention on the record CP The Court however, declined to continue the trial and instead signed both Orders, terminating Appellants' case. Id and CP 491-509, CP 512-513.

Days later, original trial counsel withdrew. CP New counsel filed an unconditional Notice of Appearance. CP 514. Appellants timely thereafter appealed the Court's rulings.

¹ The substitution of counsel was contingent upon the granting of a continuance. Absent a continuance, new counsel could not effectively represent Appellants in this matter as the current trial date was imminent. Effective representation of Appellants demanded that the current trial date be continued so that new counsel may adequately prepare for trial and defense Absent a continuance, the Court would simply be trading one ethical challenge (conflict of interest) with another (ineffective assistance due to lack of adequate time to prepare). 1/11/10 TR at 26:19-27:16. Further, the trial continuance would not have prejudiced Respondent County, the trial in this matter would have been "bumped" due to a conflicting criminal trial which re-commenced in this Courtroom on 11 January 2011. Id.

² The original signed pleadings were submitted in open Court on 11 January 2010, however, they do not appear on the Court Docket. These pleadings will be provided via Supplemental Clerks papers or appropriate Motion to Supplement.

III. ARGUMENT

- A. **ISSUE 1: THE COURT ERR WHEN IT GRANTED DEFENDANT’S “SUMMARY JUDGEMENT” MOTION OVER PLAINTIFF’S OBJECTION WHERE MOTION WAS FILED TEN DAYS PRIOR TO HEARING, RELIED ON DEPOSITION TRANSCRIPTS WHICH WERE NOT FILED UNTIL TWO DAYS PRIOR TO HEARING, AND WHERE CIVIL RULE 56 REQUIRES 28 DAYS NOTICE.**

1. Standard of Review of Appeal.

The trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law that the Court of Appeals reviews de novo. *Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.* (2004) 123 Wash.App. 863, 99 P.3d 1256. A court should dismiss under this rule when it appears beyond a reasonable doubt that no facts justifying recovery exist. *San Juan County v. No New Gas Tax* 160 Wash.2d 141, 157 P.3d 831, Wash.,2007. *Bravo v. Dolsen Cos.*, 125 Wash.2d 745, 750, 888 P.2d 147 (1995). Courts presume the allegations of the complaint to be true for the purpose of such a motion. *Grimsby v. Samson* (1975) 85 Wash.2d 52, 530 P.2d 291.

If materials outside the pleadings are considered, the CR 12(b)(6) motion is treated as a summary judgment motion under CR 56. CR 12(c). The Court may affirm an order granting summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Ranger Ins. Co. v. Pierce County* (2008) 164 Wash.2d

545, 192 P.3d 886. *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.* (2006) 158 Wash.2d 603, 146 P.3d 914. All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Landberg v. Carlson* (2001) 108 Wash.App. 749, 33 P.3d 406, *review denied* 146 Wash.2d 1008, 51 P.3d 86. When reviewing an order of summary judgment, the Supreme Court engages in the same inquiry as the trial court. *Morin v. Harrell* (2007) 161 Wash.2d 226, 164 P.3d 495.

2. Grant of Dismissal to Defendant was Error Where Summary Judgment Motion Was Filed Ten Days Prior To Hearing, Relied On Deposition Transcripts Which Were Not Provided or Identified Until One Day Prior To Hearing, And Where Civil Rule 56 Requires 28 Days Notice.

a. Facts in support. Appellants originally filed their Motion to Dismiss pursuant to 12(b)6 on October 22, 2009, CP 188-202, and re-filed the Motion as a Summary Judgment on November 30, 2009. CP 209-223. On November 30, 2009, Respondent County filed its Response to Summary Judgment and “Cross Claim,” which was also noted for December 11, 2009. CP 350-361. Embedded throughout the Motion were references to a Deposition (Guernsey). Yet, the deposition was not attached or filed, and all citations to deposition page numbers were blank. *Id.* Appellants objected to the late filing and lack of notice as required under CR 56. CP 3760391 and CP 444-447. By relying on matters outside their pleadings, Respondent

County's motion is therefore a motion for summary judgment, and, under CR 56 (c), was required to be noted for hearing no less than 28 days from the date of filing and service. The County's motion filed eleven days prior to the hearing was not timely, and should have been stricken or denied.

b. Applicable Civil Rules .

CR 12 (b) provides, in pertinent part, as follows:

...If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 56 (c) provides, in pertinent part, as follows:

...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 Court erred in not applying the foregoing rules to Respondent's

“cross” summary judgment motion to dismiss.

c. Summary Judgment Motion Was Untimely

Because Respondent's motion to dismiss is based not only upon the amended complaint, but also matters contained in the disposition of Guernsey, under CR 12 (b), Respondent's motion was required to be treated as one for summary judgment and disposed of as provided in rule 56. CR 12 (b), *supra*; *Lombardo v. Pierson*, 121 Wn. 2d 577, 581 n. 2, 852 P. 2d 308 (1993); *Gain v. Carroll Mill Co., Inc.*, 114 Wn. 2d 254, 256 n. 1, 787 P. 2d 553 (1990); *St. Yves v. Mid State Bank*, 111 Wn. 2d 374, 377, 757 P. 2d 1384 (1988), *overruled on other grounds*, *Berg v. Hudesman*, 115 Wn. 2d 657, 669, 801 P. 2d 222 (1990); *Mueller v. Miller*, 82 Wn. App. 236, 246, 246, 793 P. 2d 604 (1996); *Suliman v. Lasher*, 48 Wn. App. 373, 375, 739 P. 2d 712 (1987); *Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc.*, 9 Wn. App. 284, 289, 513 P. 2d 102 (1973).

Respondent County had a procedural motivation for shortcutting the rules, which was a dilemma of their own making. If the Respondent County had properly noted their cross motion as required under CR 56 (c), they would have had to provide not less than 28 days notice. Defendants' motion was received by plaintiffs' counsel on December 2, 2009.³ Thus, the earliest date for hearing of defendants' motion is December 30, 2009. Unfortunately for defendants, the Court's case schedule deadline for hearing

³ Declaration of J. McMahon ¶CP 410-418.

dispositive motions was December 14, 2009.⁴ Thus, there was insufficient time left under the case schedule to hear Respondent's Summary Judgment, which forced them to improperly by-pass the rules. Appellants' however were substantially prejudiced by the Court's allowing the timely motion to be heard on such abbreviated notice. Respondent's motion to dismiss should have been stricken and or be denied.

d. Summary Judgment Motion Lacked Supporting

Authentication

Respondent County's Summary Judgment motion suffered a second fatal defect which should have required it to be stricken on a wholly independent second ground. The Motion cites to the deposition of Ms. Guernsey, but Respondent failed to submit the relevant portions of the deposition or any portion of her deposition. Additionally, the Defendants failed to provide a declaration from Ms. Guernsey in support of her alleged comments. Consequently, the three sections of the Defendants Memorandum that discuss Ms. Guernsey's opinions without proper documentation are hearsay and these three portions of the Defendant's Memorandum should be stricken. See *Tortes v. King County*, 119 Wn.App. 1 (2003).

⁴ Declaration of J. McMahon EX 1.CP 410-418.

CR 56(e) is explicit in its requirements for a summary judgment motion. Affidavits must (1) be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of his pleading. Further, affidavits submitted in support of a motion for summary judgment must set forth facts that would be admissible in evidence. If he does not so respond, summary judgment, if appropriate, shall be entered against him. CR 56. Here, despite the repeated references to a ‘deposition’, the deposition was not filed with the “cross motion”. Lacking the supporting deposition under oath, all the purported “factual references” are nothing more than unauthenticated hearsay, which is not admissible.

ER 801(c) defines hearsay as follows:

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

And, unless an affidavit set forth facts, evidentiary in nature, that is, information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion, the affidavit does not raise a genuine issue for trial. *Grimwood v. Univ. of Puget Sound Inc.*, 110 Wn.2d 355 (1988). A party may not rest on formal pleadings on motion for

summary judgment but must affirmatively present admissible factual evidence upon which he relies. *Leland v. Frogge*, 71 Wn.2d 197 (1967). With respect to those passages cited above, the Respondent failed to provide factual evidence in support of their suppositions and/or opinions, and did nothing more than attempt to “rest on formal pleadings.” The Court erred in considering the flawed and unauthenticated pleadings.

Washington Courts have generally determined that adherence to CR 56 and the requirements contained therein are essential to successfully winning or defending a summary judgment motion. The sole “evidence” relied on by the Respondent are excerpts from a deposition of Ms. Guernsey that have not been annotated nor had the deposition been filed with the Court. Under CR 56 and *Grimwood*, the Defendants failed in their burden and the unsupported sections of their Summary Judgment should have been stricken.

B. ISSUE 2: THE COURT ERRED BY REFORMING CONTRACT UPON A FINDING OF FRAUD WHERE NO DUTY TO DISCLOSE EXISTS & PARTIES NEGOTIATED AT ARMS LENGTH.

The Court erred as a matter of law by not granting Appellants’ Summary Judgment Motion to dismiss the reformation claim sought by Respondents of the parties’ Settlement Agreement. Reformation is a unique

remedy available under limited circumstances. *Kelley v. Von Herberg*, 184 Wash. 165, 174, 50 P.2d 23 (1935), which does not apply here. A party to a contract is entitled to reformation of a contract if either (1) there has been a **mutual** mistake or (2) **one** party is mistaken **and the other** party engaged in fraud or inequitable conduct. *Gammel v. Diethelm*, 59 Wash.2d 504, 507, 368 P.2d 718 (1962); *Kelley v. Von Herberg*, 184 Wash. 165, 174, 50 P.2d 23 (1935).

In the present case, it is undisputed that the County's attorneys and staff reviewed and executed the Settlement Agreement that did not contain a provision for mutual release of claims. That may have been **one** party's mistake. But reformation then requires a showing that the other party engaged in fraud or inequitable conduct. Respondents did not establish that criteria as a matter of law.

1. County Failed to Establish by Undisputed Facts or as a Matter of Law that Fraud Occurred.

Fraud consists of positive representations, artifice, or concealment. A party has engaged in fraud or inequitable conduct if it conceals a material fact from the other party, where a duty to disclose exists. Concealment only constitutes fraud or inequitable conduct when the party possessing the knowledge has a duty to disclose that knowledge to the other party. *Oates v.*

Taylor, 31 Wash.2d 898, 904, 199 P.2d 924 (1948); *Kelley*, 184 Wash. at 174-75, 50 P.2d 23.

To prevail the County should have been held to affirmatively meet a two step inquiry:

(1) whether deletion of the mutual release was in fact occasioned by positive representations, artifice, or concealment?

(2) And, if positive representations, artifice, or concealment (non disclosure) occurred, then whether any duty in fact existed on the part of plaintiff to disclose to the County the fact that the Agreement did not contain a provision for mutual release.

2. No Special Relationship or Duty to Disclose Existed

Even assuming for argument that concealment occurred, Appellants were entitled to Summary Judgment as a matter of law because **the County did not and cannot show that there existed a trust or fiduciary relationship between the parties, such that a duty to speak existed.** Ordinarily, a duty to speak arises only out of a trust or fiduciary relationship between the parties. 2 *Pomeroy, Equity Jurisprudence* (4th Ed.) §§ 901, 902.

Concealment of a material fact, by one having knowledge of it from one who is in ignorance of it, may constitute fraud-**but only when there is a duty, on the part of the one having knowledge, to speak.** 26 C. J. 1073. It is said: ‘Whether a duty to speak exists in a given case is a question depending upon the peculiar facts involved, such as the nature of the

transaction, the mutual relation of the parties, and their respective knowledge and means of knowledge.’ Id. In general, “[s]ome type of **special relationship must exist before the duty [to inform] will arise.**” *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wash.2d 726, 732, 853 P.2d 913 (1993).

In those cases where a court has found a duty to disclose, the **circumstances surrounding the transaction have created a relationship of trust and confidence upon which the injured party was entitled to rely.** *Kelley*, 184 Wash. at 175, 50 P.2d 23. *Stone v. Moody*, 41 Wash. 680, 84 P. 617, 85 P. 346, 5 L. R. A. (N. S.) 799.

The present case is analogous to *Kelley*. In *Kelley*, a lessee leased a plot of land from a lessor with the intention of constructing a building on it. The lease contained a provision allowing the lessee to assign the lease after completion if he was not in default, but did not contain any provision regarding his liability upon assignment.

Similar to this case, in *Kelley*, prior to signing the lease, the parties had engaged in extensive negotiations regarding its terms. Throughout the negotiations the lessor assured the lessee that he would not be held liable on the lease upon assignment. The lessor prepared the lease. However, he did not include a provision that reflected his verbal assurances. After

construction was complete the lessee assigned the lease. He subsequently defaulted on the lease payments. The lessor brought an action to recover past due rent. In response, the lessee requested that the court reform the lease to conform with the lessors initial oral assurances. The lessee argued that the lessor was obligated to inform the lessee before execution that the lease did not contain a provision releasing the lessee from liability upon assignment. **The court concluded that the lessor did not have such an affirmative duty because the parties dealt at arm's length and had access to the same means of acquiring information. Specifically, both parties had the opportunity to read the lease before signing it.**

In the present case, the decision of the *Kelly* case is controlling. The parties (Pruitt and the County) dealt at arm's length throughout the entire negotiation process and had access to the same means of acquiring the necessary information. Specifically, both parties had the opportunity to read the document and both parties made their respective desired changes before signing it.

The Court erred when it apparently accepted Respondent County's argument that the facts and circumstances surrounding the negotiations and dealings between themselves and Pruitt created such a situation of trust and confidence as required Pruitt's counsel to speak. The Court erred as the

County provides no undisputed or authenticated evidence that such special circumstances creating a relationship of trust and confidence upon which the injured party is entitled to rely existed. Instead, here, the parties were clearly dealing at arm's length, were embroiled in a longstanding (and on-going) feud, and both had the same means of acquiring knowledge. **Silence on the part of the one having knowledge is not actionable.** *Kelly v. Von Herberg*, 134 Wash 165, 50 P.2d 23 (1935).

3. No Duty to Disclose Where Parties Negotiate at Arms Length

The Washington Supreme Court re-affirmed that as between parties dealing at arms length, **even positive representations as to the contents of a written instrument will not serve as the basis of an action for equitable relief.** *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 P. 955, 958. *Hubenthal* is so directly analogous to the present case. Hubenthal executed a deed to the railway company for a right of way. The deed contained certain specific covenants and agreements to be performed by the grantee. Hubenthal brought the action, setting up certain additional covenants and agreements to be performed by the grantee, which he alleged had been promised by the agents of the railway company during the negotiations leading up to the execution of the deed. One such agreement alleged to have been made was requiring that the railway company would

not make any fills on the right of way, but would instead require the construction of trestles over depressions where fills would otherwise be required. Hubenthal sought injunctive relief to prevent the railway company from making fills they had undertaken. Had the relief sought been granted, it would have transformed the deed from a grant in fee simple to an easement.

Judge Rudkin, speaking for the court, said:

‘The only question arising on the first cause of action is this: Does the allegation ‘that at the time said agreement for the right of way was entered into between plaintiffs and defendant corporation, the said defendant corporation proposed to plaintiffs that they would reduce the said agreement to writing and would prepare the necessary instrument for the purpose of carrying out said contract, and thereafter said defendant corporation did present to plaintiffs a certain agreement in writing, which said defendant corporation said embraced the agreement so made for the said right of way, and requested plaintiffs to sign the same, and plaintiffs, believing that the said instrument so presented contained the agreements for said right of way as above alleged, thereupon executed such agreement, and the said defendant corporation took possession of the said instrument, and at all times since has retained the same. *That plaintiffs have no knowledge as to the exact contents of said agreement so signed, but signed and executed the same on the understanding and representations that it contained the agreements of the parties as above alleged;*’ entitle the appellants to equitable relief on the ground of fraud or mistake, simply because the agreement does not embody all the prior stipulations of the parties? ***We are of the opinion that it does not.*** In *Washington Central Imp. Co. v. Newlands*, 11 Wash. 212, 39 P. 366, this court said: ‘Conceding that these representations were false, and conceding that the purchaser relied upon them, there is not yet enough shown, it seems to us, in this answer to give the defendant relief. There is no fiduciary relation between the seller and the buyer alleged. It is not alleged that the buyer was in such a position that he was unable to make an investigation concerning the truth or falsity of these alleged

representations. So far as the allegations of the answer are concerned, there is nothing to show that the land was not at hand when this contract was made, and that it could not, by the use of ordinary prudence, have been investigated by the purchaser; and in cases of this kind, it seems to us that parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and that they cannot call upon the law to stand in loco parentis to them in the ordinary transactions of business, and their ordinary dealings with their fellow-men. * * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other **29 people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.'

'The rule above announced has been reiterated in many subsequent cases. *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 P. 341; *Griffith v. Strand*, 19 Wash. 686, 54 P. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 P. 216; *Samson v. Beale*, 27 Wash. 557, 68 P. 180; *Sherman v. Sweeny*, 29 Wash. 321, 69 P. 1117; *Hulet v. Achey*, 39 Wash. 91, 80 P. 1105; *Lake v. Churchill*, 39 Wash. 318, 81 P. 849; *Walsh v. Meyer*, 40 Wash. 650, 82 P. 938.

True, in nearly all of these cases the false representations related to the quality, quantity, or condition of property embraced in a contract of sale or deed; but if a party cannot rely upon the representations of others as to such matters when the means of investigation are at hand, should not the rule apply with even greater strictness where an attempt is made to avoid the effect of a written contract which a party has signed, relying solely upon the representations of another as to its contents.

In *McCormack v. Molburg*, 43 Iowa, 561, the plea of fraud or mistake was even stronger than in this case. A demurrer was sustained to the plea, and, in affirming the judgment, the court said:

"In *Bell v. Byerson*, 11 Iowa, 233, 77 Am. Dec. 142, it is said if the means of knowledge of the alleged fraud were equally open to both parties the law will not interfere to protect the negligent; and in

Rogers v. Place, 29 Ind. 577, it is said if no device is used to put him off his guard, a party who, having capacity to read an instrument, signs it without reading, places himself beyond legal relief. 'If the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless.' 2 Parsons on Contract, 772; Kerr on Fraud & Mistake, 77. To the same effect is the late case of *Nebeker v. Cutsinger*, 48 Ind. 436. The defendant does not state that plaintiffs used any artifice to prevent him from reading the contract, nor does he state that he was unacquainted with the English language, or that he could not read. In fact no excuse whatever is given, except that he signed the contract relying on the representation of plaintiff as to its contents. This is inexcusable neglect, and the defendant must suffer the consequences of his own folly. The effect of such a rule as that claimed by appellant would be to render written contracts of but little practical value over those existing in parol only. The authorities cited by counsel for the appellant are not in point. In *Walker v. Ebert*, 29 Wis. 194, 9 Am. Rep. 548, the defendant was a German by birth and education, and unable to read the English language. With scarcely an exception, where the rule has apparently been recognized different from that herein established, some such exception*179 will be found to exist, or some artifice used to obtain the signature of the party or to prevent him from reading the contract. None such exist in this case, and the judgment of circuit court must be affirmed.'

Without reviewing all the cases cited, it will be found that in nearly all of them appears some fact or circumstance tending to show fraud or mistake aside from the mere reliance on the representation of the other party to the contract as to its contents, such as inability to read or understand the language of the contract, a relation of trust or confidence between the parties, or some artifice used to obtain the signature of the party or prevent him from reading the contract.'

The *Hubenthal* case has repeatedly been cited as authority for this log-standing principal. *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 P. 984; *Fidelity & Casualty Co. of New York v. Nichols*, 124 Wash. 403,

214 P. 820; *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 P. 810, 812. In the last-cited case, Judge Holcomb, speaking for the court, said: **‘We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.’**

This Court should similarly find that the doctrine set out in *Hubenthal* is sound. This doctrine must be adhered to by the parties in every contract if the integrity of written instruments is to be maintained. The Court erred in

C. ISSUE 3: THE COURT ERRED BY REFORMING CONTRACT UPON A FINDING OF FRAUD WHERE PARTIES HAD NO PRIOR AGREEMENT INCONSISTENT WITH SIGNED SETTLEMENT AGREEMENT

The other instance where Washington law establishes a duty to disclose may be where parties have a *prior established* agreement, and which one party in a subsequent agreement acts in disregard’: *Kaufmann v. Woodard*, 24 Wash.2d 264, 163 P.2d 606 (1945); *Waite v. Salestrom*, 201 Neb. 224, 266 N.W.2d 908 (1978) (cited by the Court in *Washington Mut. Sav. Bank v. Hedreen*, 125 Wash.2d 521, 886 P.2d 1121, Wash.(1994). The County did not establish that circumstance exists here.

In *Kaufmann*, a seller contracted to sell two plots of land to a buyer. One of the plots was encumbered by a mortgage. Subsequently, the mortgagee of that plot and the seller negotiated *a preliminary agreement* which indicated that the mortgagee would release the seller from his obligations on the mortgage in exchange for assignment of the contract of sale into which the seller had entered with the buyer. Both parties understood that the assignment was to include the entire contract of sale, which encompassed both of the plots. The seller prepared the documents effecting the assignment. In doing so, he only included one of the two plots that were the subject of the sale contract. **Because the mortgagee and the seller had previously transacted business, the mortgagee did not review the assignment documents before he signed them.** The mortgagee subsequently sued to have those documents reformed to include both plots. This court affirmed the trial court's reformation of the documents, concluding that the seller had a duty to inform the mortgagee that the documents he had prepared only covered one plot.

In *Waite v. Salestrom, supra*, *a seller and a buyer entered a written option agreement* which gave the buyer the right to purchase the seller's land for a specified sum. A provision of the agreement stated that the seller agreed to subordinate his lien on the land to that of any party lending funds

to the buyer to purchase the property. The buyer exercised the option. The final documents were prepared by attorneys representing all parties. *The terms of those documents did not conform to the subordination provision of the option.* Instead, the documents provided for a series of deeds of trust and notes to be executed. However, all parties apparently agreed to this alternative structure of the transaction. After being drafted, the deeds of trust and notes were presented to the buyer for signature. He did not inform the seller of the change, but expected him to object if it was not satisfactory. Prior to signing them, the buyer added the phrase “without recourse” to the note in order to relieve him of any personal liability. The seller executed the documents without noticing the change. Subsequently, the seller sued to reform the note to exclude the phrase “without recourse”. The trial court granted the reformation and the Nebraska Supreme Court concluded that the buyer had a duty to inform the seller that he had altered the note. The court based its conclusion on the *existence of a prior agreement between the parties, as evidenced by the option contract*, which held the buyer personally liable.

The Waite and Kaufmann cases clearly are distinguishable from this case. In *Kaufmann* and *Waite*, the parties had **entered into a preliminary agreement**, followed by a *subsequent, inconsistent* agreement. Here, no

such preliminary agreement exists. The parties were engaged in active, ongoing negotiations as the Settlement Agreement was being drafted. Only one agreement was controlling – the one that the County and its attorneys apparently failed to read with any ordinary standard of care.

D. ISSUE 4: THE COURT ERRED BY REFORMING CONTRACT WHERE REFORMATION IS BARRED DUE TO DEFENDANT’S NEGLIGENCE

It is undisputed that the County’s Deputy Prosecuting Attorney had the lead in producing the last four versions of the Agreement during negotiations prior to it being finalized and signed. CP 226.

The Restatement of Contracts states:

A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation under the rules stated in this Chapter, **unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.**

Restatement (Second) of Contracts § 157 (1979).

The Washington Courts have issued numerous consistent rulings, including *Yakima Cy. (W. Vly.) Fire Protec. Dist. 12 v. Yakima*, 122 Wash.2d 371, 858 P.2d 245 (1993); *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 745 P.2d 37 (1987); and *National Bank of Wash. v. Equity Investors*, 81 Wash.2d 886, 506 P.2d 20 (1973), standing for the proposition that **“a party to a contract which he has voluntarily signed will not be**

heard to declare that he did not read it, or was ignorant of its contents.”

Skagit State Bank, 109 Wash.2d at 381, 745 P.2d 37 (quoting *Equity Investors*, 81 Wash.2d at 912, 506 P.2d 20).

Comment *b* to § 157 of the Restatement explains the limited circumstances under which where negligence is overlooked, in favor of reformation:

The exceptional rule stated in the present Section with regard to (allowing) reformation **has no application to the common case in which the term in question was not the subject of prior negotiations. It only affects cases that come within the scope of § 155, under which there must have been an agreement that preceded the writing.** In such a case, a party's negligence in failing to read the writing does not preclude reformation if the writing does not correctly express the prior agreement....

Comment *b*, *Restatement (Second) of Contracts § 157*

E. ISSUE 5: THE COURT ERRED BY GRANTING DEFENDANT’S SUMMARY JUDGEMENT WHERE DISPUTED FACTS EXIST

The Court erred in granting Summary Judgment because the County failed to prove fraudulent misrepresentation by material facts that are undisputed. To do so, the County should have been required to establish each the following nine elements by clear, cogent, and convincing and undisputed evidence, which they did not:

- (1) Appellants’ counsel made a representation of an existing fact;
- (2) the factual representation was material;
- (3) it was false;

- (4) Appellants' counsel knew it was false;
- (5) Appellants' counsel intended that the County act on the false representation;
- (6) The County was ignorant of the falsity of the representation;
- (7) The County relied on the false representation;
- (8) The County had a right to rely on this representation; and
- (9) The County suffered damages due to its reliance on the false representation.

Stiley v. Block, 130 Wn.2d 486, 504-505, 925 P.2d 194 (1996); *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992). Failure to establish just **one** of the nine elements of fraud renders summary judgment inappropriate. *Id.* The County established none of the elements sufficient to prevail against Summary Judgment standards. A few criteria in particular bear discussion.

(1) Appellants' counsel made a representation of an existing fact;

The County failed to establish that Appellant's counsel made a "representation of an existing fact". At most Appellants' counsel offered an opinion during the negotiations on the status of then-current draft version. As a matter of law, opinions are not "factual representations unless:

- (1) the defendant made the representation intending to induce the plaintiff to act;
 - (2) the relevant information was not readily available to the plaintiff;
- and
- (3) the circumstances otherwise indicated that the plaintiff was entitled to rely on the representations as fact

Restatement (Second) of Torts sec. 538A (1977).

At the very least, the facts are disputed on this point. On March 4, 2009 Appellant's counsel sent Respondent's counsel a "Second draft of the Drat Settlement Agreement. The email cover to that document called out that "a number of provisions not relevant" had been deleted. CP 224- 299, CP 230. That version of the Agreement contained a unilateral release whereby only the County released the Pruitt's; the release as of March 4, 2009 was not mutual. Respondent's counsel admitted she did not read that version. See CP CP 224-299; CP 228.

Thereafter on March 13, 2009, the parties held an extended negotiation session to finalize the Agreement. Id The negotiations took place at the County offices. Four generations of the draft Agreement were successfully worked on. Handwritten revisions were made. **None of the four drafts worked on by the parties on March 13, 2009 included a mutual release.** Id. The County's attorney imputed the changes to each successive document. Clearly, the "relevant information" regarding the status of the release language was readily available to the both parties. Id.

Under these circumstances, it was error for the Court to find that no disputed facts exist as to the following critical criteria necessary to support Summary Judgment:

- (2) the "factual" representation was material;
- (3) it was false;

- (4) Appellants' counsel knew it was false;
- (6) The County was ignorant of the falsity of the representation;
- (7) The County relied on the false representation;

(5) Appellants' counsel intended that the County act on the false representation;

Respondent's counsel, as the typist and co-drafter of the four progressive versions of the settlement agreement on March 13th, should have known that the unilateral release language had been removed. The four versions of the proposed settlement agreements were read and revised by all parties attending the March 13th meeting. Respondent's counsel knew that the unilateral release had been placed into the document by Appellate' Counsel on March 12th because she is presumed to have read the document (Paragraph 17 of the Settlement Agreement) and she agreed to it on the 13th by her acceptance of the language which *she did not change despite having the opportunity to so do.*

Section 17 of the Settlement Agreement includes a paragraph entitled "Opportunity for Legal Advice" which reads as follows:

"Each party acknowledges that the execution of this Agreement is done after an opportunity to consult with friends, attorneys, or other advisors, and with the full understanding and appreciation of those acts and ramifications and that the signing of this document is free from any coercion. Jacqueline McMahon of the Law Offices of J. McMahon on behalf of the Pruitts has drafted this Agreement. Pierce County (PALS) was represented by Deputy Prosecuting Attorney, Jill Guernsey."

The County failed to show that there was falsity on the part of the Appellant's attorney; and the signed Settlement Agreement confirms that each party had an opportunity to consult with others and that the signing was free from coercion.

(8) The County had a right to rely on this representation;

According to the Restatement, parties with the same experience are not entitled to rely on one another's opinions: The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker:

- (a) purports to have special knowledge of the matter that the recipient does not have, or
- b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
- (c) has successfully endeavored to secure the confidence of the recipient, or
- d) has some other special reason to expect that the recipient will rely on his opinion.

Restatement (Second) of Torts sec. 542 (emphasis added). Reliance is not justified if both parties have approximately equal competence to form a reliable opinion on the subject matter. *Restatement (Second) of Torts* sec.542, Comment d. The representee is deemed to be competent to form an independent opinion regarding a transaction if the transaction relates to

something of common experience and to an ordinary commodity.

Restatement (Second) of Torts sec. 542 cmt. d. *Stiley v. Block*, 130 Wn.2d 486, 504-505, 925 P.2d 194 (1996).

In the *Kelley* case, which is controlling in this matter, the lessee argued that the lessor was obligated to inform the lessee before execution, that the lease did not contain a provision releasing the lessee from liability upon assignment. **The court concluded that the lessor did not have such an affirmative duty because the parties dealt at arm's length and had access to the same means of acquiring information. Specifically, both parties had the opportunity to read the lease before signing it.**

Similar to *Kelley* the parties in this case dealt at arm's length throughout the entire negotiation process, had access to the same means of acquiring the necessary information, had the opportunity to read the document and both parties made their respective desired changes before signing the final document.

In sum, Respondents were required to prove **each of the 9 elements** of fraud and **each element must be satisfied with evidence that is clear, cogent and convincing**. Instead Respondents failed to provide any evidence to support at least three of the elements (i.e. materiality, ignorance of falsity or reliance). Consequently, the Court erred in granting Summary

Judgment to Respondents where they failed to satisfy their burden or the requirements of CR 56.

Hubenthal v. Spokane & Inland R. Co., 43 Wash. 677, 86 P. 955, 958. is controlling in this case. It is worth repeating the relevant portions of this decision as presented by Judge Rudkin which bear directly on the issue at hand:

* * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other **29 people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.'

'Again, the rule above announced has been reiterated in many subsequent cases. *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 P. 341; *Griffith v. Strand*, 19 Wash. 686, 54 P. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 P. 216; *Samson v. Beale*, 27 Wash. 557, 68 P. 180; *Sherman v. Sweeny*, 29 Wash. 321, 69 P. 1117; *Hulet v. Achey*, 39 Wash. 91, 80 P. 1105; *Lake v. Churchill*, 39 Wash. 318, 81 P. 849; *Walsh v. Meyer*, 40 Wash. 650, 82 P. 938.

Throughout the negotiation process the County had the ability to modify the settlement agreement. Instead, the Respondent County argued and the Court accepted that based on conversational language between attorneys, somehow the County's duty to read the document was negated,

and that fraud was committed because Appellants' Counsel should have known that the Respondents would not read the document. Respondent's absurd argument should have been rejected by the Court. As held in *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash.562, 177 P.810, 812, "We have always held that a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein."

Moreover, the County fails in its claim of inequitable dealing because **the County has not and cannot show that there existed a trust or fiduciary relationship between the parties, such that a duty to speak existed.** 2 Pomeroy, Equity Jurisprudence (4th Ed.) §§ 901, 902.

F. ISSUE 6: THE COURT ERRED BY DENYING PLAINTIFF'S SUMMARY JUDGMENT TO DISMISS DEFENDANT'S COUNTERCLAIMS WHERE PLAINTIFFS ENTITLED TO RELIEF AS A MATTER OF LAW.

1. Dismissal is Appropriate Pursuant to CR 56:

The rule of Civil Procedure 56(c) provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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.

The present Motion for Summary Judgment pursuant to CR 56(c) is therefore proper if the pleading if the pleadings, affidavits and depositions before the court show that there is no material issue of fact. A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn.App. 381, 383, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn. 2d 768, 774, 698 P.2d 77 (1985).

“The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law.” Cons...719 P.2d 98 (1986)). “[T]he nonmoving party may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain.” Id.

Issues of law are properly resolved on summary judgment. See *Harris v. Harris*, 60 Wn.App. 389, 392, 804 P.2d 1277, review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975).

2. Appellants Entitled To Judgment As A Matter Of Law.

The pleadings reveal the following material facts are not in dispute:

- Plaintiffs and Pierce County Planning and Land Services (PALS) entered into a “Settlement Agreement and Mutual Release,” which

was signed by Debra and James Pruitt, Plaintiffs; Jacqueline McMahon, Plaintiffs' attorney; Charles Kleeberg, Director of PALS; and Jill Guernsey, Deputy Prosecuting Attorney. CP 224-299.

- **On March 4th 2008**, Appellants' Counsel Ms. McMahon provided the County's Prosecuting Attorney version No.2 of the Plaintiffs proposed Settlement Agreement which served as the basis for the final document. (See Decl. of McMahon, **Exhibit "A"**). CP 224-299. CP 229. Respondent's counsel, working from the March 4th document provided her at 2:56 p.m., prepared an email thanking McMahon's legal assistant for providing her the document because she did not have it when attempting to make changes to the document at home. (**Exhibit "B"** to McMahon declaration in support of Summary Judgment). CR 224-299. CP 236. The March 4th document sent to the County at 2:56 p.m. contained the unilateral release, and not a mutual release. Id.
- **On March 13th, 2008** prior to signing what would be the Settlement Agreement, Jill Guernsey made changes to McMahon's March 12th document emailed to her the night previous. In fact, the parties at the March 13th meeting, created four additional proposed Settlement Agreements that day before agreeing on what would be the final Settlement Agreement. (Suppl. Decl of McMahon, **Exhibit "I"**, CP 392-399)
- Ms. Guernsey had complete dominion and control over the last four versions of the Settlement Agreement. She personally made changes to the last four versions of the Settlement Agreement using a computer located at the Pierce County Annex. (Suppl. Decl. of McMahon, **Exhibit "J"**, CP 392-399.)
- No fiduciary relationship existed between the Appellants and Respondents prior to or at the time the Settlement Agreement was signed. (CP 224-299. Decl. of McMahon, **Exhibit "F"**).
- No party (Appellant or Respondent) asserts that the parties had any agreement prior to the March 13th Settlement Agreement being signed.

- The Settlement Agreement contains a section discussing each parties opportunity for legal advice and also contains an integration section. (See CP 224-299.Decl. of McMahon, **Exhibit “E”**)

As a matter of law, no fraud or inequitable conduct occurred on the part of Appellants’ counsel. The Court erred in granting Respondent’s Summary Judgment and denying Appellants’.

G. ISSUE 7: THE COURT ERRED WHEN IT DENIED APPELLANTS’ MOTION TO CONTINUE THE TRIAL TO OBTAIN NEW COUNSEL AFTER COURT WAS AWARE THAT CURRENT LEGAL COUNSEL HAD ETHICAL CONFLICT IN CONTINUED REPRESENTATION

1. Facts Relevant to this Issue on Appeal

Late in these proceedings (December 11, 2009) and very shortly before the scheduled trial date, the Court made a verbal finding that Plaintiffs’ counsel committed fraud, and as a result, the Court verbally ruled that the County’s sought relief of reformation of contract will be granted. No written Order has yet entered to memorialize the Court’s ruling.

While Plaintiffs’ strenuously dispute the Court’s decision, the Court’s verbal ruling places the interests of Plaintiffs’ counsel directly at odds with that of Plaintiffs. Plaintiffs’ counsel is ethically constrained from continued representation of Plaintiffs, and Plaintiffs have obtained new counsel. New counsel’s substitution is contingent upon the granting of a continuance.

Absent a continuance, new counsel cannot effectively represent

Plaintiffs in this matter as the current trial date is imminent. Effective representation of Plaintiffs demands that the current trial date be continued so that new counsel may adequately prepare for trial and defense.

The trial continuance will not prejudice Defendant County, as it was likely this trial would not be heard on the scheduled date due to a conflicting criminal trial scheduled to re-commence 11 January 2011, for this Courtroom, which Plaintiffs' counsel has confirmed will be heard on that date and time.

2. Trial Court Erred in Failing to Make Inquiry Once Issue of Conflict Was Raised

Prior to the Court's signing the Orders, Plaintiffs raised the issue of a conflict of interest with their former counsel. The Court had a duty to inquire further, but did not. When the facts underlying the alleged attorney-client relationship are disputed, the fact-finder makes the determination after weighing the evidence and the credibility of the witnesses. *Stiley v. Block*, 130 Wash.2d 486, 502, 925 P.2d 194 (1996).

When an attorney client conflict of interest is challenged in court, the matter is a fact question to be determined by looking to the reasonableness of the activity, under the whole circumstances of the case. *Halvorsen v. Halvorsen*, 3 Wash App. 827, 479 P.2d. 161, 1970. Here, the Court should

reconsider the entry of the Orders, in order to undertake the appropriate inquiry.

3. Rules of Professional Conduct Prohibit Conflicts of Interest between Attorney & Client

Under Washington's Rule of Professional Conduct (*RPC*) 1.7(b), “[a] lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests” unless the lawyer reasonably believes the representation will not be adversely affected and the client consents in writing after consultation and full disclosure of the material facts. *Id.*

The dictates of RPC 1.7, which address conflicts of interest, must be strictly followed. *Tank v. State Farm Fire & Casualty Co.* (1986) 105 Wash.2d 381, 715 P.2d 1133.

In the first place the Preliminary Statement to the Code of Professional Responsibility provides: ‘The Disciplinary Rules state the Minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.’ (Italics ours.) In our opinion, the argument that the Minimum level of conduct sets the standard for disqualification of any attorney in a potential conflict of interest case overlooks the spirit of Canons 4 and 9 of the Code of Professional Responsibility. It seems to us that if the objectives of the Code as a whole are to be achieved it is the Spirit of those canons, rather than the minimum behavior proscribed by the disciplinary rules which must be observed. See *Hull v. Celanese Corp.*, 2 Cir., 513 F.2d 568 (1975).

The objectives of the Code are to improve the administration of justice so that the public will develop and maintain a respect for and confidence in our legal and judicial system.

Alpha Inv. Co. v. City of Tacoma, 13 Wash.App. 532, 536 P.2d 674, Wash.App., 1975.

4. Court Has a Duty to Inquire When Conflict Issue is Raised.

Whether an attorney can in good conscience represent a party is preeminently a question of his own conscience and whether there is an apparent conflict of interest. *If his decision is challenged in court*, the matter is a fact question to be determined by looking to the reasonableness of the activity, under the whole circumstances of the case. *Halvorsen v. Halvorsen*, 3 Wash.App. 827, 479 P.2d 161, Wash.App. 1970.

When the facts underlying the alleged attorney-client relationship are disputed, the fact-finder makes the determination after weighing the evidence and the credibility of the witnesses. *Stiley v. Block*, 130 Wash.2d 486, 502, 925 P.2d 194 (1996).

No actual prejudice need be shown. An analysis of “actual conflict as something separate and apart from adverse effect” is not required. *Mickensv. Taylor*, 535 U.S. 162, at 172 n. 5, 122 S.Ct. 1237; 2002; *State v. Dhaliwal*, 150 Wash.2d 559, 571, 79 P.3d 432 (2003).

5. Failure to Inquire Is Reversible Error.

A trial court commits reversible error if it knows or reasonably should know of a particular conflict of interest into which it fails to inquire. *In re Richardson*, 100 Wash.2d at 677, 675 P.2d 209.

Reversal is necessary when the defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown. *In re Richardson*, 100 Wash.2d at 677, 675 P.2d 209.

In *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the U.S. Supreme Court held that a trial court's failure, in the face of defense counsel's warning that he had a possible conflict of interest, to either ascertain that the risk of conflict was remote or appoint different counsel per se deprived the defendant of effective assistance of counsel. *Holloway*, at 484, 98 S.Ct. at 1178. Moreover, the U.S. Supreme Court held, error of this nature can *never* be harmless-prejudice is to be presumed.

While *Holloway* involved a situation in which defense counsel had expressly informed the court of the possibility of a conflict, its reasoning was extended in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220, 1097 (1981).

In *Sullivan*, the Court noted that *Holloway* imposed no general duty to inquire about the possibility of conflict but held nevertheless that a defendant who shows that “an actual conflict of interest adversely affected his lawyer's performance” was entitled to relief even absent a showing of prejudice. *Sullivan*, at 348, 349-50, 100 S.Ct. at 1719. In *Wood*, the Court further clarified the duty to inquire by noting that “*Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it ‘knows or reasonably should know that a particular conflict exists.’ ” *Wood*, at 272 n. 18, 101 S.Ct. at 1104, n. 18, (quoting *Sullivan* at 347, 100 S.Ct. at 171).

The Courts have ruled that that application of these rules is not limited to joint representation of codefendants, or criminal defense matters. While most of the cases have involved that fact situation, the rules apply to any situation where counsel represents conflicting interests. *See, e.g., Wood*, at 266, 101 S.Ct. at 1100 (counsel paid by defendant's employer); *Sullivan*, at 337-38, 100 S.Ct. at 1712 (representation of codefendants in separate trials); *Alexander v. Housewright*, 667 F.2d 556, 558 (8th Cir.1981) (previous representation of prosecution witness in action against defendant); *Stephens v. United States*, 595 F.2d 1066, 1070 (5th Cir.1979) (simultaneous representation of prosecution witness and defendant); *Castillo*

•
•

v. Estelle, 504 F.2d 1243, 1245 (5th Cir.1974) (simultaneous representation of defendant in criminal trial and prosecution witness in unrelated civil litigation), and *Halvorsen v. Halvorsen*, 3 Wash App. 827, 479 P.2d. 161, 1970 (domestic, civil litigation). Simultaneous representation of a defendant and a witness with opposing interests is “self-evident” conflict of interest. See *In re McMurray*, 99 Wash.2d 920, 665 P.2d 1352 (1983) (violation of DR 5-105 to represent defendant after prior representation of prosecution witness in unrelated civil proceeding).

In the present case, the trial court had a duty to inquire into the possibility of conflict. In presenting the pleadings, Plaintiff’s new counsel brought the conflict of interest to the Court’s attention on the record and via the written Motion to Continue. The written Motion set out that “while Plaintiffs’ strenuously dispute the Court’s [December 11, 2009] decision, the effect of Court’s verbal ruling places the interests of Plaintiffs’ counsel directly at odds with that of Plaintiffs”, creating a conflict. See **Exhibit 6**.

Pursuant to RPC 1.7, the ethical conflict of interest prevented Plaintiffs’ counsel from further representing Plaintiffs, including the authority for former Counsel to sign Orders Dismissing Plaintiffs’ causes of action. The conflict is founded in the Court’s December 11, 2009 ruling granted Defendant’s Motion for Summary Judgment, which was based upon

Defendant's claim that Plaintiffs' counsel committed fraud. By its ruling, the Court granted the Defendant's requested relief of reforming the Settlement Agreement between Plaintiffs and Defendant County to add a paragraph by which Plaintiffs released Defendant County from any damages claim. The reformation and release eliminates Plaintiffs' multi-million dollar claim against the Defendant County pursued under this case. Nonetheless, Plaintiffs still retained two cause of action, upon which to proceed to trial. See CP **Exhibit 4**, Order of Dismissal with Prejudice, "dismissing with prejudice the two remaining causes of action herein". Appellants objected to entry of the Order, and asserted that a conflict existed because the Court's finding of fraud by Appellants' former counsel lead to former counsel to prematurely dismiss Appellants' two remaining causes to achieve closure.

The Court made no further inquiry into this apparent conflict despite the disclosure of the conflict. The Court erred by this omission to undertake the appropriate fact-finding on the issue of the conflict of interest. *Matter of Richardson*, 100 Wash.2d 669, 675 P.2d 209. Wash.,1983.

IV. CONCLUSION AND RELIEF

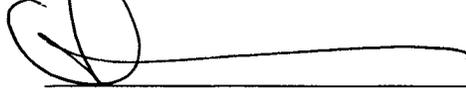
This appeal should be granted. The grant of Summary Judgment to Respondent should be reversed because the motion was untimely brought,

was unsupported by authenticated material until the two days before Summary Judgment hearing, and because material facts are disputed.

Summary Judgment should be granted to Appellant as a matter of law. The Court's January 11, 2010 verbal Order denying Appellants' Motion to Continue as to the remaining two causes of action should be reversed, and on remand the Court should be directed to undertake the proper fact finding inquiry to address Appellants' concern of a conflict of interest.

DATED: August 3, 2010.

GOODSTEIN LAW GROUP PLLC

A handwritten signature in black ink, appearing to be 'Carolyn A. Lake', written over a horizontal line.

Carolyn A. Lake WSBA #13980
Attorneys for Appellants Pruitt

APPENDIX 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

JAMES and DEBRA PRUITT,

Plaintiff,

vs.

PIERCE COUNTY, a municipal corporation
operating in the State of Washington;
PLANNING AND LAND SERVICES, a
division of Pierce County; DAVID
RISVOLD, individually and on behalf of the
marital community comprised thereof,

Defendants.

NO. 08-2-11821-1

DEFENDANT PIERCE COUNTY'S
RESPONSE TO PLAINTIFF'S
SUMMARY JUDGMENT MOTION TO
DISMISS COUNTERCLAIM & CROSS-
MOTION

December 11, 2009, at 900 AM

I. INTRODUCTION

COMES NOW, Defendants Pierce County and David Risvold, by and through their attorneys of record, Mark Lindquist, Prosecuting Attorney and P. GRACE KINGMAN, Deputy Prosecuting Attorney, and hereby oppose Plaintiffs' Summary Judgment to Dismiss Defendant's Counterclaim and requests that this Court grant Summary Judgment in favor of Defendants, thus dismissing Plaintiffs' causes of action 3.2 through 3.8.

*

Appendix 1

COPIES

1
2 **II. FACTS**

3 Please see facts set forth in Defendants' Motion to Disqualify filed on November 10,
4 2009. Also see Deposition of Jacqueline McMahon (Decl. McMahon, Exhibit "I") filed on
5 November 18, 2009.
6

7 **II. ISSUES**

8 1. Should this Court deny Plaintiffs' motion to dismiss Defendants' counterclaim
9 for reformation of contract based on fraud, when the evidence proves the nine elements of
10 fraud by clear, cogent and convincing evidence.

11 2. Should this Court grant summary judgment in favor of Defendants where the
12 uncontroverted evidence shows (1) Plaintiffs intentionally made a false representation of fact;
13 (2) Defendants relied upon such fact; and (3) Defendants are damaged by the
14 misrepresentation.
15

16 **III. ARGUMENT**

17 A. THIS COURT SHOULD GRANT SUMMARY JUDGMENT IN
18 FAVOR OF DEFENDANTS FOR THE EQUITABLE REMEDY OF
19 REFORMATION OF THE 'SETTLEMENT AGREEMENT AND
20 MUTUAL RELEASE' BECAUSE PLAINTIFFS ENGAGED IN
21 FRAUD AND DEFENDANTS WERE MISTAKEN AS TO THE
22 CONTENTS OF THE AGREEMENT.

23 Summary judgment should be granted where "there is no genuine issue as to any
24 material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56(c).
25 An appellate court reviews a trial court's ruling on summary judgment de novo. *York v.*
Wahkiakum School District, 163 Wn.2d 297, 302; 178 P.3d 995 (2008) (citing *Telepage, Inc.*
v. City of Tacoma, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)). The court must construe the
facts, and the inferences from the facts, in a light most favorable to the nonmoving party. *Id.*

1 (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

2 1. Fraud.

3 To prove fraud, Defendants must establish nine elements by clear, cogent, and
4 convincing evidence. *Westby v. Gorsuch*, 112 Wn.App. 558, 570, 50 Wn.App.3d 284 (2002); *North*
5 *Pacific Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn.App. 228, 230 and 232, 628 P.2d
6 482 (1981). The nine elements are:

7
8 (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the
9 speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it
10 should be acted on by the person to whom it is made; (6) ignorance of its
11 falsity on the part of the person to whom it is made; (7) the latter's reliance on
12 the truth of the representation; (8) his right to rely upon it; (9) his consequent
13 damage.

14 *North Pacific Plywood* at 232-33 (citing *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920,
15 425 P.2d 891 (1967); *Martin v. Miller*, 24 Wn.App. 306, 308, 600 P.2d 698 (1979)); *Westby*
16 at 570. There is no issue of fact regarding these elements allowing this Court to find for
17 Defendants on the issue of fraud.

18 The first element is met because Ms. McMahon's false statement to Ms. Guernsey that
19 she made no changes of substance to the Settlement Agreement and Mutual Release
20 (Agreement) pertained to an existing fact, to wit: the contents of the Agreement. McMahon
21 Dep., Ex #5.

22 The second element, materiality is also met. The statement is material because it
23 pertains to an essential portion the Agreement, which is the mutual release. That the release
24 went from mutual to unilateral, was quite significant. The County would not have signed the
25 agreement had it known there was no mutual release. Guernsey Dep. at _____.

The third element, falsity is also proven. Ms. McMahon e-mailed Ms. Guernsey:

Jill: I have made some modifications to your proposed Settlement

1 Agreement. I hope there is no issue with my modifications; *I don't think*
2 *they change the substance of the document...*

3 McMahan Dep., Ex. #5 (emphasis added). Substance is defined as: "1a: essential nature... b:
4 a fundamental or characteristic part or quality..." Webster's New Collegiate Dictionary,
5 1976. Since the document had the words "mutual release" in its title and footer and the
6 mutual release was contained in the first two versions of the document, that type of release
7 was a fundamental part of the agreement. When Ms. McMahan asserted that the removal of
8 the mutual release language was not a change of substance, she made a false representation.

9 Ms. McMahan knew that this statement was false, thus satisfying the fourth element.
10 She admits that she intentionally removed the mutual release on the night of March 12, 2008,
11 on her computer at her residence. McMahan Dep. at 56-57:6-4. She also knew that this
12 modification was substantial. She admitted in her deposition that a multi-million dollar
13 lawsuit – one that would have been clearly foreclosed by an unambiguous mutual release – is
14 of substance. McMahan Dep. 58:8-14. Therefore, Ms. McMahan's knowledge of the false
15 nature of the statement is proven by clear, cogent and convincing evidence.
16

17 The fifth element, McMahan's intent that the statement should be acted upon by Ms.
18 Guernsey, is also proven. This is shown by (a) the fact that McMahan made the false
19 representation, (b) she removed the mutual release from the body of the document, but did not
20 make corresponding changes to the remainder document, i.e. did not change the title which
21 continued to reflect a mutual release, changed the footer to *include* "mutual release" in the
22 document name, (c) the fact that she had previously removed the language from the third draft
23 as well as the fifth draft and did not mention the change either time. McMahan Dep. 38:19-
24 24; Ex. #3, (d) Plaintiffs instructed McMahan to remove the language; (e) the document as
25 altered was much more favorable to Plaintiffs; and (f) there was no other reason for the false

1 statement.

2 Sixth, Ms. Guernsey was not aware that Ms. McMahon's statement was false.
3 Guernsey Dep. _____. She was not aware the mutual release language contained in the
4 draft sent to her by McMahon had been converted to a unilateral release, to the County's
5 detriment. Guernsey Dep. _____. If she had been so aware, she never would have signed the
6 agreement. *Id.* at _____. Ms. Guernsey assumed that if Ms. McMahon had made any
7 material changes to the agreement, she would have mentioned them, as attorneys usually do.
8 *Id.* at _____.¹

9
10 The seventh element, reliance, is also met because Ms. Guernsey assumed that Ms.
11 McMahon was truthful in her affirmative statement that no changes of substance had been
12 made to the Agreement. Guernsey Dep. _____. Further, identical mutual release language had
13 been included in the first two drafts of the agreement prepared by Ms. McMahon, one of
14 which Ms. Guernsey used to create her own version. McMahon Dep. Ex. #1; #2; Guernsey
15 Dep. _____. Ms. Guernsey thus relied on Ms. McMahon's false statement.

16
17 The eighth element which is proven is Ms. Guernsey's right to rely on Ms.
18 McMahon's statement. Ms. Guernsey had the right to expect that Ms. McMahon would not
19 make a false statement to her. A lawyer "generally has no affirmative duty to inform an
20 opposing party of relevant facts."² However, "[i]n the course of representing a client a lawyer
21 shall not knowingly make a false statement to a third person..." Rules of Professional
22 Conduct 4.1(a); *In re Disciplinary Proceeding Against Kuvava*, 149 Wn.2d 237, 244, 66 P.3d

23
24 ¹ Ms. McMahon testified that Ms. Guernsey *knew* of the changes to the release section because they made
25 several other changes to the document that day, re-reading it each time. McMahon Dep. 66:2-18. What Ms.
Guernsey knew is speculation on the part of McMahon and not admissible evidence. Therefore, it cannot be
considered in a summary judgment motion. CR 56(e).

² *Comment [1]* to RPC 4.1.

1 1057 (2003). It is professional misconduct for an attorney to engage in conduct involving
2 dishonesty, fraud, deceit, or misrepresentation. RPC 8.4(c). *In re Disciplinary Proceeding*
3 *Against Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002).

4 The purpose of these rules is to prevent attorneys from actively engaging in
5 misleading conduct. The plain language of RPC 4.1(a) incorporates three elements: (1) an
6 affirmative act; (2) regarding a material fact; (3) knowingly made. Regarding RPC 8.4(c), the
7 courts have made clear the importance of this provision. "Simply put, the question is whether
8 the attorney lied. No ethical duty could be plainer." *In re Disciplinary Proceeding Against*
9 *Boelter*, 139 Wash.2d 81, 99, 985 P.2d 328 (1999) (quoting *In re Disciplinary Proceeding*
10 *Against Dann*, 136 Wash.2d 67, 77, 960 P.2d 416 (1998)).

12 In fraud cases not involving attorneys, the courts have still found a party has a right to
13 rely on a statement, known by the speaker to be false, even where further investigation into
14 public records would have revealed the truth. *North Pacific Plywood*, 29 Wn.App. at 233
15 (citing *Boonstra v. Stevens Norton, Inc.*, 64 Wn.2d 621, 626, 393 P.2d 287 (1964)).

16 Finally, the ninth element, resulting damage to Defendants is also met. A lawsuit by
17 the Plaintiffs against Pierce County and its employees would have been foreclosed by the
18 mutual release. However, because Ms. Guernsey relied on Ms. McMahon's false statement,
19 Pierce County must now defend itself and Mr. Risvold in this litigation.

21 As discussed above, Defendants have proven each of the nine elements of fraud by
22 clear, cogent and convincing evidence. Defendants now seek equitable relief from this Court.

23 2. Reformation of Contract.

24 A trial court has equitable power to reform an instrument if there is clear, cogent and
25 convincing evidence of a unilateral mistake coupled with inequitable conduct. *Kaufmann v.*

1 Woodard, 24 Wash.2d 264, 270, 163 P.2d 606 (1945). Sitting in equity, a court “may fashion
2 broad remedies to do substantial justice to the parties and put an end to litigation.” *Hough v.*
3 *Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003) (citing *Carpenter v. Folkerts*, 29
4 Wn.App. 73, 78, 627 P.2d 559 (1981) (citing *Esmieu v. Hsieh*, 92 Wn.2d 530, 535, 598 P.2d
5 1369 (1979)).

6 “Reformation will be granted when there is a mistake on the part of one of the parties
7 as to the content of a document and there is fraud or inequitable conduct on the part of the
8 other party. It is not determinative that the mistaken party could have noticed the discrepancy
9 between his understanding and the written agreement by reading the documents.” *Mitchell*
10 *Int'l Enters., Inc. v. Daly*, 33 Wn.App. 562, 565, 656 P.2d 1113 (1983) (citations omitted). It
11 is not essential, therefore, that one seeking reformation of contract show that he is wholly free
12 from fault. *Meyer v. Young*, 23 Wn.2d 109, 113, 159 P.2d 908 (1945) (quoting 45 Am.Jur.
13 Reformation of Instruments § 78, at 632 (1943)). Mere negligence not rising to the dignity of
14 a violation of a positive legal duty, as negligence that is a mere inadvertence, does not
15 preclude relief. Nor will relief be denied where, in the circumstances, the negligence of the
16 party seeking relief is excusable. *Id.*

17 Plaintiffs contend that Defendants are not entitled to reformation of the Agreement
18 because Ms. Guernsey was negligent in not carefully reading the Agreement to discover the
19 fraud before signing it. However, the courts of Washington, as well as those of other
20 jurisdictions, are in agreement that negligence is not a bar to reformation of a contract when
21 the reformation claim is based upon mutual or unilateral mistake. *See, e.g., Meyer v. Young*,
22 23 Wn.2d 109, 113, 159 P.2d 908 (1945); *Carlson v. Druse*, 79 Wash. 542, 548-49, 140 P.
23 570 (1914); *Home Stake Prod. Co. v. Trustees of Iowa College*, 331 F.2d 919, 921 (10th
24 25

1 Cir.1964). Additionally, in *Waite v. Salestrom*, 201 Neb. 224, 231, 266 N.W.2d 908 (1978),
2 the court noted that “[m]ere carelessness, however, is not necessarily a defense to an action
3 for reformation.” The case law is in accord with the Restatement of Contracts, which states:

4 A mistaken party's fault in failing to know or discover the facts before making
5 the contract does not bar him from avoidance or reformation under the rules
6 stated in this Chapter, unless his fault amounts to a failure to act in good faith
and in accordance with reasonable standards of fair dealing.

7 Restatement (Second) of Contracts § 157 (1979).

8 If negligence were a defense to a reformation claim, then reformation would almost
9 never be available as a remedy because mistake is most frequently a basis for reformation,
10 and negligence generally results from mistake. *Hedreen* at 531 (citing *Carlson v. Druse*, 79
11 Wash. 542, 548, 140 P. 570 (1914)).

12 There are two theories of reformation that apply in this case. One is where there exists
13 an affirmative misrepresentation. The other is where there is inequitable conduct which
14 involves concealing a material fact from the other party.
15

16 Under the first theory:

17 If a party's manifestation of assent is induced by the other party's fraudulent
18 misrepresentation as to the contents or effect of a writing evidencing or
19 embodying in whole or in part an agreement, the court at the request of the
recipient **may reform the writing to express the terms of the agreement as
asserted**, ... if the recipient was justified in relying on the misrepresentation.

20 ...

21 Restatement (Second) of Contracts Section 166 [emphasis added]. There appears to be no
22 Washington authority involving the mistake by one party and an affirmative misrepresentation
23 by another party. The Washington cases all involve failure to disclose rather than a fraudulent
24 statement.

25 However, the case of *Hand v. Dayton-Hudson*, 775 F.2d 757 (6th Cir.1985) is very

1 similar to the facts in the present case. Defendant employer fired Plaintiff Hand and offered
2 to pay him a sum of money in exchange for a release. *Id.* at 758. The release was given to
3 Hand for consideration. *Id.* Hand at a later date returned stating he would sign the release.
4 *Id.* He brought an altered release with him that was different than the original, but appeared
5 “superficially identical.” *Id.* at 758-59. Hand had limited the terms of the release. *Id.* He
6 then sued Defendant employer. *Id.* at 759. The court granted summary judgment on the issue
7 of fraud, reformed the release, and held that summary judgment was appropriate since Hand’s
8 claims were precluded by the reformed release. *Id.*

10 The Sixth Circuit affirmed the trial court, holding that when one party fraudulently
11 alters a contract and induces the other party to sign it, the contract can be reformed to reflect
12 the defrauded party’s understanding. *Hand* at 760.

13 The facts of the present case are analogous to *Hand*. As discussed above, all nine
14 elements of fraud are proven by clear, cogent, and convincing evidence. Additionally,
15 comparison of the fourth version of the agreement proposed by Ms. Guernsey and the fifth
16 version which was fraudulently altered by Ms. McMahon reveal they very similar in
17 appearance – the title and footer both containing the words “mutual release.” McMahon Dep.
18 – Ex #4 and Ex #5.

20 Defendants are also entitled to the same relief under the second theory of inequitable
21 conduct, which involves concealing a material fact from the other party. The relief is the
22 same.

23 In *Washington Mutual Savings Bank v. Hedreen*, 125 Wn.2d 521, the Supreme Court
24 upheld the trial court’s reformation of a master lease between the parties. The *Hedreen* court
25 reasoned:

1 [T]he parties in the instant case entered into a preliminary agreement, had
2 equal access to information, and negotiated at arm's length. Washington
3 Mutual and Hedreen executed a commitment letter which both parties
4 understood to require Hedreen to enter a Master Lease with Hedreen Company
5 covering all of the unleased office space in Jefferson Square. The commitment
6 letter was negotiated by Washington Mutual and Hedreen, both of whom are
7 sophisticated parties. Hedreen is a real estate developer, and Washington
8 Mutual is a bank in the business of making loans. Moreover, both parties had
9 an opportunity to review the final loan documents before they signed them.

Therefore, Hedreen had a duty to inform Washington Mutual about the
discrepancy between the Master Lease and the commitment letter. He failed to
do so. Thus, he has engaged in inequitable conduct. Accordingly, Washington
Mutual is entitled to have the Master Lease reformed to accord with the
commitment letter.

10 *Hedreen* at 529.

11 In their motion for summary judgment, Plaintiffs argue that there was no special
12 relationship between Ms. Guernsey and Ms. McMahon that would create a duty to disclose.
13 However, as discussed above, Ms. McMahon as an attorney licensed to practice law in the
14 State of Washington is barred from knowingly making false statement. RPC 4.1(a). This
15 imposes a duty on Ms. McMahon to be honest in her dealings with opposing counsel. Thus,
16 no duty to disclose need be proven. Plaintiffs argue repeatedly that Ms. McMahon had no
17 duty to disclose. However, that is not the issue. In the instant case, she did not merely fail to
18 disclose; she made an affirmative misrepresentation which she is expressly forbidden from
19 doing and which goes beyond a mere failure to disclose. Plaintiffs' argument is without
20 merit.
21

22 Plaintiffs also argue there is no prior inconsistent agreement in the present case which
23 bars reformation. However, that factor, as discussed in *Hedreen* pertains to the issue of the
24 special relationship between the parties which imposes a duty to disclose. *See Hedreen* at
25 526. Here, the question is not one of a 'duty to disclose,' but rather a prohibition of making

1 false statements embodied in the RPC's. Therefore, the special relationship/trust and
2 confidence issue is not a factor in the present case. RPC 4.1(a). This argument also fails.

3 Plaintiffs further argue that negligence is a bar to reformation when no prior
4 agreement exists. However, as noted above, the prior agreement pertains to the creation of
5 the duty to disclose. In the present case, the duty requirement is satisfied by Ms. McMahon's
6 ethical duties previously discussed. Further, Ms. McMahon lead Ms. Guernsey to believe
7 there was an agreement when she sent Ms. Guernsey's version back to her indicating no
8 changes of substance; meaning Ms. Guernsey believed they were in agreement at that point.
9 When one party is fraudulently induced to sign a contract by the other party, there will never
10 be an agreement, because the guilty party knows that the contract does not reflect the
11 innocent party's intent. *See Hand v. Dayton-Hudson*, 775 F.2d at 761. Plaintiffs' argument is
12 misapplied and therefore also fails.
13

14 Lastly, Plaintiffs argue there is no duty to disclose when the parties negotiate at arms
15 length. Again, this line of analysis is not applicable to the facts of the present case.
16 Defendants do not have to prove a duty to disclose because Ms. McMahon bears the
17 affirmative duty to be truthful in her statements to opposing counsel.
18

19 20 **IV. CONCLUSION**

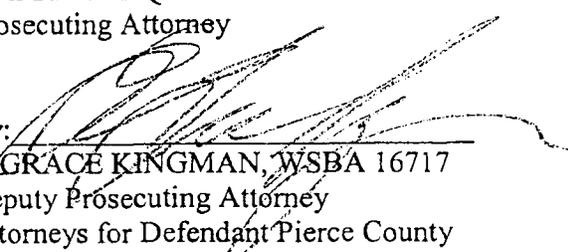
21 All of Plaintiffs' arguments having failed, they are not entitled to summary judgment
22 dismissal of Defendants counterclaims.

23 Conversely, this Court should grant Defendants' cross-motion for summary judgment
24 on the issue of fraud and reform the release portion of the Agreement to reflect the mutual
25 release language that was fraudulently removed. This Court should then grant summary

1 judgment for Defendants and dismiss Causes of Action 3.2, 3.4, 3.5, 3.6, 3.7, and 3.8 of the
2 Amended Complaint because these claims are precluded by the reformed release.

3 DATED this 25th day of November, 2009.

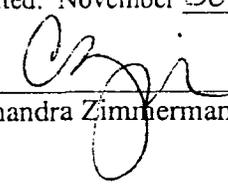
4 MARK LINDQUIST
5 Prosecuting Attorney

6
7 By: 
8 P. GRACE KINGMAN, WSBA 16717
9 Deputy Prosecuting Attorney
10 Attorneys for Defendant Pierce County

11 **DECLARATION OF MAILING**

12 I declare that a true copy of the foregoing document
13 was delivered this 30th day of Nov. 2009 to ABC legal msg.
14 w/ appropriate instruction to forward the same to:

15 Dated: November 30th, 2009, at Tacoma Washington.

16 
17 Chandra Zimmerman

18 Jacqueline McMahon
19 102 Bridge St. South
20 Orting, WA 98360

APPENDIX 2

1 IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF PIERCE

2 STATE OF WASHINGTON

3

4 JAMES and DEBRA PRUITT,)
5)
6 Plaintiffs,) VERBATIM REPORT OF PROCEEDINGS
7)
8 vs) Superior Court No. 08-1-11821-1
9) Court of Appeals No. 40301-3-II
10 PIERCE COUNTY, a)
11 municipal corporation)
12 operating in the state of)
13 Washington; PLANNING AND)
14 LAND SERVICES, a division)
15 of Pierce County; DAVID)
16 RISVOLD, individually and)
17 on behalf of the marital)
18 community comprised)
19 thereof,)
20)
21 Defendants.)

Volume 1 of 1
Pages 1-30

22 APPEARANCES

23 MS. JACQUELYN McMAHON, Attorney at Law, appeared on
24 behalf of the Plaintiffs.

25 PIERCE COUNTY PROSECUTING ATTORNEY, by MS. GRACE
KINGMAN, Deputy Prosecuting Attorney, appeared on behalf of
the Defendants.

BE IT REMEMBERED that on the 11th day of December
2009 and the 11th day of January, 2010, the above-captioned
cause came on duly for hearing before the HONORABLE JAMES R.
ORLANDO, Judge of the Superior Court in and for the County
of Pierce, State of Washington; the following proceedings
were had, to-wit:

COA # 82104

Randy Kay York, CCR, RDR Official Court Reporter
930 Tacoma Avenue South Dept. 1, Superior Court
Tacoma, Washington 98402 (253) 798-7482

I N D E X

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PAGE

DECEMBER 11, 2009

Argument by Ms. McMahon	3
Argument by Ms. Kingman	12
Argument by Ms. McMahon	18
Court's oral ruling	19

JANUARY 11, 2010

Presentation of agreed order to dismiss	26
Attempt of Counsel Lake to substitute in	26
Court signs agreed settlement order	28

1 DECEMBER 11, 2009

2 MORNING SESSION

3 **MS. McMAHON:** Jackie McMahon on behalf of the
4 plaintiffs, Jim and Debra Pruitt, 08-2-11821-1. Before
5 we get started, last night when I was reviewing counsel's
6 memorandum to her Motion to Dismiss plaintiffs' tort
7 claims, she made a comment in her memorandum that I
8 thought was odd. When I looked at my memorandum that had
9 gotten filed, the incorrect one had been filed, because I
10 had not cited authority and she had cited that. So what
11 Ms. Kingman and I have decided today is that I am going
12 to hand up what was omitted from my original copy, which
13 is the last paragraph which does cite case law and that
14 includes Rosen vs Ascentry Technologies, which I think is
15 controlling in this case and dispositive. I am going to
16 hand those up to you.

17 So because of her kindness in allowing me that, I am
18 going to strike my motions to have her late filed
19 pleadings eliminated so that all issues can be resolved
20 here on the merits -- if that's okay with the court.

21 **THE COURT:** Well, I haven't read the case that you are
22 citing, so just be aware of that.

23 **MS. McMAHON:** Okay.

24 **MS. KINGMAN:** What she has indicated, Your Honor, is
25 what we agreed to, and she provided me a copy of her

December 11, 2010

1 amended memorandum this morning citing the cases and a
2 copy of the Rosen case as well.

3 **MS. McMAHON:** So I am just going to get started, then,
4 Your Honor. I will hand up this bench copy and the case.
5 I will hand it here to your JA; when she gets a chance,
6 she can pass it up to you.

7 The court is acutely aware of the facts in this case,
8 and I do not want to belabor them except to say there are
9 few that are really important that are undisputed.
10 Undisputed facts are that the plaintiffs and Pierce
11 County entered into an agreement in 2008. Anyway that
12 agreement settled all claims that were under cause number
13 AA2-05.

14 On March 4, I provided the county two versions of a
15 proposed settlement agreement, one sent to Ms. Guernsey
16 at 2:56, was responded to her six minutes later, and she
17 had indicated, "Thank for you the document. I didn't
18 have it this weekend and I am glad to have it."

19 March 4, 2:56 document had a unilateral release in it.
20 The deputy prosecuting attorney, Ms. Guernsey, then
21 prepared another draft settlement agreement that included
22 a mutual release and that information was not told to me.

23 On March 12, I then prepared another document trying
24 to incorporate some of her changes from the March 6 or 7
25 document she had provided me. And on March 13, we had

1 the meeting at PALS and four more versions of that
2 document were -- of the settlement agreement were
3 created. Each one of those were typed by Ms. Guernsey.
4 She had complete dominion and control over each one of
5 those documents.

6 My deposition was taken on October 16 of this year and
7 no questions regarding fraud were raised during that
8 deposition. No fiduciary relationship existed between
9 the deputy prosecuting attorney and myself at the time of
10 the settlement agreement was signed or thereafter. The
11 parties had no prior agreement prior to the March 13
12 settlement agreement being signed. And defendants cannot
13 prove fraud or inequitable conduct.

14 So let's talk about their fraud. They have correctly
15 stated in their responsive memo that nine elements of
16 fraud are needed to be proven. Each one by clear, cogent
17 and convincing evidence. They have failed in this
18 burden.

19 Even allowing the defendants the admission of the
20 amended summary judgment response, they have still
21 omitted any evidence as to the second element of fraud,
22 which is material. They have eliminated that, no
23 evidence, and so that element cannot be proven by clear,
24 cogent and convincing evidence.

25 As to number one representation of existing facts,

1 defendants rely on the statements made that I do not
2 believe there were any substantial changes made to the
3 document on March 12th before a meeting that was to be
4 held on March 13th. This statement was merely an
5 expression of personal opinion, not a representation of
6 existing fact. And so this March 12 statement was an
7 affirmation, did not become fact upon which the county is
8 entitled to rely.

9 In terms of materiality, CR 56 (e) states, "an adverse
10 party may not rest upon mere allegations or denials in
11 their pleading." They have done this here by failing to
12 provide any evidence, whether in their original document
13 or in their amended document.

14 Falsity, the third element. I revised the proposed
15 settlement agreement to include some of the suggestions
16 from Ms. Guernsey, advised her we would discuss the
17 documents on the March 13th meeting date. There was no
18 falsity.

19 Additionally, in section 17 of the settlement
20 agreement, which I have blown up here, it says that there
21 is an opportunity for legal advice which states each
22 party acknowledges that the execution of this agreement
23 is done after an opportunity to consult with friends,
24 attorneys, or other advisors and with a full
25 understanding of appreciation of those acts and

1 ramifications and the signing of this document is free
2 from any coercion thereof.

3 There is no falsity on the plaintiffs' attorney and a
4 signed settlement agreement confirms each party had an
5 opportunity to consult with others and signing was free
6 from coercion.

7 Moreover, on this document, we have the signature of
8 Charles Kleeberg, who is also a licensed attorney and is
9 presumed he read the document.

10 Number 4, knowledge of falsity. Again the defendants
11 fail in this essential allegation of fraud. Because that
12 release language that had been included was reinserted by
13 Ms. Guernsey without notice to me.

14 Ms. Guernsey, even more important, was a typer (sic)
15 and co-drafter of the various versions of that settlement
16 agreement on March 13th. Four different versions. She
17 cannot claim that she did not have knowledge that the
18 unilateral release was included in that document.

19 Also the portions of the deposition transcript that
20 the county is attempting to rely on do not state what
21 they are saying that they state. If there were
22 questions, there was an opportunity to discuss them on
23 the 13th, I was not asked nor demanding that the county
24 sign the proposed documents sent on the 12th, rather I
25 knew that changes would be made to the document prior to

1 it being signed on March 13th and that's exactly what
2 happened.

3 In response to the next three elements of fraud, which
4 are intent that it should be acted upon by the person to
5 whom the comment is made; six, ignorance of falsity by
6 the person to whom it is made; and seven, reliance. I
7 can group these altogether, say that the deposition
8 sections that the county relies on do not prove again
9 what they are asserting.

10 The deposition portion relied upon by the county was
11 from an e-mail that was sent on the 4th of March.
12 There were six more versions of the settlement agreement
13 that were created after that date, five of which were
14 created by Ms. Guernsey. They cannot prove any of these
15 three elements.

16 And as to element number 18, they have no right to
17 rely on a statement. The defendants are blurring the
18 duties between an ethical duty and a legal duty. And
19 trying to say that they exist; they do not.

20 Number 18 of the settlement agreement has an
21 integration clause, and it says that this is the entire
22 understanding between the parties and it supersedes any
23 prior understandings and agreements between them with
24 respect to the subject matter herein. There was no prior
25 agreement. This was the only agreement.

1 And so, even though they cite Westby V Gorsuch, that
2 case is easily distinguished because it involved the
3 purchase of valuable Titanic memorabilia from an antique
4 dealer with one party who had no knowledge of their
5 value. Here that's not the case. The
6 Restatement (Second) tort says reliance is not justified
7 if both parties are approximately equally competent to
8 form reliable opinion as of the subject matter.

9 And indeed were those cases where the court has found
10 a duty to disclose the circumstances surrounding the
11 transactions have created a relationship of trust and
12 confidence upon which the other party was entitled to
13 rely. But we don't have that here, because the Kelley
14 case, which we cited in our brief, is controlling. And
15 Kelley states that where because the party lessor, in
16 that case, dealt at arm's length, they did not have --
17 they had the same means of acquiring the information and
18 failed to do so. But there was no special duty created.

19 And this case is similar to Kelley. In this case, we
20 dealt at arm's length transaction throughout the entire
21 negotiation process. We both had access to the same
22 means of acquiring the necessary information, we had
23 opportunity to read the document, and both parties made
24 the respective desired changes before signing the
25 document on March 13th.

1 Obviously they can't prove damages, either.

2 So we believe that each of the nine elements, although
3 cited, have not been proven, and clearly number two, has
4 not even been proven because they haven't provided any
5 case law to support that or evidence.

6 Hubenthal V Spokane & Inland Railroad Company is
7 controlling and it is worth repeating what the judge in
8 that case said real quickly, "If people having eyes
9 refuse to open them and look, and have an understanding
10 refuse to exercise it, they must not complain when they
11 accept an act upon the representations of other people."

12 Here Ms. Guernsey admits in her deposition at pages 44
13 and 45, which I have attached to our materials, that she
14 typed the last four versions of that document. The
15 defendants are somehow asserting that, based on some
16 conversational language, that a duty arose from that, and
17 it's just not there.

18 Regarding reformation. Reformation is also not
19 appropriate in this case.

20 The court held in Kelley that reformation is a unique
21 remedy available under only limited circumstances and
22 that doesn't apply here. The court in Oates V Taylor
23 held, "A concealment only constitutes fraud or equitable
24 conduct when the party possessing the knowledge has a
25 duty to disclose that knowledge to the other party."

1 We don't have that here. There was no such duty
2 because there was no special relationship and no duty to
3 disclose existed. The county cannot show that there
4 existed a duty of trust or fiduciary relationship between
5 the parties, because citing again to Kelley, the parties
6 here dealt at an arm's length transactions.

7 Number two, the plaintiffs had no duty to disclose, as
8 the parties had no prior agreement. The only agreement
9 the parties had here was this final agreement signed by
10 the parties on March 13th. The only -- that was the
11 only one that was controlling and that was the only one
12 finalized, and it was the only one that was typed four
13 times by Ms. Guernsey prior to being signed.

14 Also negligence is a bar to reformation where no prior
15 agreement exists. Comment B section 157 explains why
16 negligence is overlooked. But that exceptional rule has
17 no application to the common sense in which the term in
18 question was not the subject of prior negotiation. So
19 even under negligence, it requires a prior agreement and
20 prior negotiations, which we don't have here.

21 And again, there's no duty to disclose where the
22 parties deal at arm's length. That is clearly what
23 happened here, when we are both in a hotly contested case
24 and trying to resolve it.

25 So for the reasons I have cited, I am respectfully

December 11, 2010

1 requesting that the defendants' counterclaim for fraud
2 and equitable conduct be dismissed, summary judgment
3 granted.

4 **THE COURT:** Thank you.

5 Ms. Kingman?

6 **MS. KINGMAN:** Thank you, Your Honor. I know you are
7 well versed in the facts on this case already. I want to
8 make you aware of the cases with regard to the law and
9 with regard to the cases that plaintiffs' relying on --
10 plaintiffs' rely on the Kelley case, which is a 1935
11 case, it has got a big red flag in Westlaw. It has been
12 overruled by Hadreen in 1994 and Hadreen specifically did
13 not follow -- and Hadreen is our state supreme court --
14 did specifically not follow the Kelley opinion because it
15 was a plurality opinion and the justices didn't agree
16 with regard to the duty to disclose.

17 And it also conflicts with the Kaufmann case,
18 K-a-u-f-m-a-n-n, but we both cited or at least plaintiffs
19 have cited, at 24 Wn. 2d 264. So the reliance on the
20 Kelley case is misplaced.

21 So with regard to the other case that counsel cited
22 to, Hubenthal I believe it is that case, Your Honor, is
23 from 1906. And you will notice that the date in the
24 citation is interestingly omitted from plaintiffs' brief.
25 That's a 1906 case, before the Restatement and before

1 Restatement (Second). That case has been -- it hasn't
2 even been specifically overruled, but it is such an old
3 case it is not valid anymore.

4 When the court looks at the ruling in Hadreen, which
5 is the 1994 Washington state supreme court case, where
6 they decline to follow Kelley, the court is looking at a
7 situation where there's a duty to disclose and all of
8 counsel's briefing and argument is based on a duty to
9 disclose and whether a failure to disclose then creates
10 the inequitable conduct.

11 None of these cases from Washington have to do with an
12 actual fraud. And I submit to you, Your Honor, that the
13 cases look to the prior agreement and they look to that
14 prior understanding as the basis for forming the duty to
15 disclose.

16 In other words, we agree A, B and C so you have an
17 agreement, everybody's on the same page. And then one
18 person submits a document that's different and doesn't
19 say that it's different.

20 We don't have that here. We have a worse case
21 scenario, we have actual fraud. All of the nine elements
22 of fraud.

23 And so we don't need the duty, this is it's not a duty
24 to speak or a duty to disclose, it's a duty to if you do
25 speak, you must be honest.

1 So one of the cases even comes right out and says, you
2 know, did this person lie? And in effect that's what we
3 have here with the false statement.

4 So all of their -- if we are looking at the silence
5 versus lying analysis, everything that plaintiff relies
6 on is the silence, but here there wasn't silence. There
7 was affirmative misrepresentation with regard to that
8 document. And, yes, there were more changes to the
9 document. They were made by Ms. Guernsey. But even in
10 Ms. McMahon's deposition we have cited and filed
11 previously, she agrees that the release section was never
12 touched upon again on that day. Yes, it was in the
13 document, but it was not something that the parties
14 talked about or negotiated or made any changes to that
15 section. And everyone agrees on that.

16 So it's the defendants' position that this is not a
17 case about a duty to speak, it's not the case about a
18 duty to disclose. It's a case about what happens when
19 someone affirmatively misrepresents something? And
20 that's what happened here. So the lack of the prior
21 agreement doesn't really even come into play here.

22 Now, in our brief, defendant cited the Hand case,
23 unfortunately isn't a Washington case because, as I have
24 indicated, I was unable to find any authority in
25 Washington with where we have affirmative

1 misrepresentation like this. And the Hand case -- well,
2 first of all, I should note for the court that plaintiffs
3 have indicated that in the Hand case there was a prior
4 agreement, and there wasn't. Mr. Hand was fired by his
5 employer, and they talked about certain things. And then
6 the employer provided to Mr. Hand a release. And
7 Mr. Hand said they didn't agree to it, he said, "I will
8 think about it."

9 He took the release and left with it, came back on a
10 different day with a release and he made it look
11 identical to the one he was handed but he had made
12 changes to the release. This is just exactly what we
13 have here. And then without seeing the changes had been
14 made, the employer signed off on the release. And the
15 court held that that fraud amounted to -- that that fraud
16 gave the court the ability to provide the equitable
17 remedy of reformation.

18 Now, I know that the sixth circuit case is not
19 controlling on this court. It's federal, we are not in
20 the sixth circuit, but still very persuasive authority in
21 terms of the reasoning, especially since we lack anything
22 like that here in Washington. And if you look at the
23 cases that counsel cited, some of these older cases, they
24 are stricter with regard to the duty to read every word
25 and those types of things. And as we progress through

1 and look at Kauffmann and Hadreen, we can see that the
2 Washington state supreme court has actually begun to make
3 things more lenient, and they are including this
4 inequitable conduct if you have a prior contact. So we
5 don't have a prior contract, but we have affirmative
6 misrepresentation.

7 Your Honor, and I have cited authority in my brief for
8 the proposition that the court has broad discretion with
9 regard to equitable remedy, and we are seeking an
10 equitable remedy here. That's the only thing can make it
11 right for the county. Because obviously, from looking at
12 the fact that the county was cheated here, we didn't get
13 much out of the agreement at all, and part of the
14 consideration was the release which was taken out.

15 And in a document that's entitled Settlement Agreement
16 and Mutual Release that we have, that's a very essential
17 component of the document for the county. Ms. Guernsey
18 testified she would in never have entered into this
19 without a mutual release, she didn't ever know it was a
20 problem. Even if she did know it was a problem, even if
21 you believe all the facts as plaintiff has presented them
22 to you, the affirmative misrepresentation brings us right
23 into the fraud category. If you find that those nine
24 elements have been met, and I submit to you that they
25 have, then the county is entitled to reformation.

1 We don't have a legal remedy because we have already
2 given the land use permits. The changes have been made
3 to the land, and there's no way to put the county back to
4 where we were with money or with anything else except to
5 give us the release we were promised and deprived of, why
6 we are asking for the reformation and you have broad
7 discretion to do that; equity is about fairness.
8 Your Honor has seen what has happened here.

9 With regard to the amended response of the plaintiffs,
10 I do note that we missed to put in a cite to the
11 deposition on page 3 and counsel's referred to that a
12 couple of times. But I will note the same proposition
13 appears on the next page with the citation that the
14 county would not have signed at agreement, had they known
15 there was no mutual release, and that's page 54 to 55,
16 and we do cite those two pages and we have provided them
17 to counsel and to the court.

18 So, Your Honor, we are asking that you grant summary
19 judgment on behalf of the defendants as a matter of law
20 and that once the -- what you will hopefully do today,
21 once the mutual release language is back into the
22 contract, that the tort claims be dismissed because they
23 are barred by the affirmative defense of release as a
24 matter of law.

25 **THE COURT:** Ms. McMahon?

1 **MS. McMAHON:** First of all, the county's not entitled
2 to summary judgment relief. The way I read CR 56, they
3 have not filed a memorandum, so they cannot be entitled
4 to it. They talk about Hadreen here before Your Honor,
5 but that case also involved a prior agreement that the
6 parties had entered into that was changed. That provided
7 the basis for that claim.

8 In our brief, we have cited case law where a party
9 subsequent to an agreement has acted in disregard of the
10 parties' prior established agreement and that was come
11 Kaufmann V Woodard and Waite. But we have also cited the
12 cases that have numerous consistent rulings with what we
13 are stating that there is no fraud here and those are
14 Yakima Valley Fire Protection, Skagit State, National
15 Bank V Equity Investors. All of those stand for a
16 proposition that a party to a contract who has
17 voluntarily signed it will not be heard to declare he did
18 not read it.

19 We have a situation here where Ms. Guernsey admits she
20 typed the last four versions. We read the document front
21 to back at least four different times. Everyone in the
22 room did. We have a declaration from my client stating
23 that is what happened. The release section wasn't
24 changed, but that's because there was agreement with it.

25 My clients have provided consideration for this

1 agreement in the form of the limitations that they have
2 been willing to accept on their property.

3 So they were never promised a mutual release. In
4 fact, they never were promised any release, and we
5 believe that summary judgment is appropriate.

6 **THE COURT:** Thank you.

7 Well, the body of the actual written document contains
8 the footer referencing a mutual release. That was the
9 language that was in the document when it had been
10 modified. There were no changes made by Ms. Guernsey to
11 the release language. There was never a discussion of a
12 unilateral release, meaning a release by the county only
13 and no release by the Pruitts.

14 Obviously, as Ms. Guernsey stated, they would have
15 never entered into an agreement that continues the county
16 to be bound for ongoing claims and ongoing litigation
17 when they are giving up something, basically providing
18 the permits, allowing the Pruitts to move forward with
19 their development.

20 If this case doesn't meet the elements of fraud, it's
21 hard to imagine any case meeting the elements of fraud.
22 There was an ongoing discussion, there was direct
23 modification of the release language, and there was
24 affirmative representation that there were no significant
25 changes made to the document when, in fact, that is a key

1 change to the document. That was never the subject of
2 discussions.

3 Unfortunately in the days of word processing, it's
4 easy to cut and paste and make significant modifications
5 that often are overlooked because people, I think, rely
6 on prior versions when they read these things.

7 I don't think this is a case where the county is going
8 to be held to the standard that they didn't read every
9 word in the document prior to signing it. I think they
10 had a right to rely upon the representations there were
11 no other significant changes made. There was ongoing
12 negotiation as to other matters that were included in the
13 final document, but the county never negotiated away the
14 mutual release.

15 So I think reformation is an appropriate legal remedy
16 here. I think the agreement should be reformed to
17 provide for mutual release. I think mutual release takes
18 away the ongoing tort claims of the Pruitts.

19 I don't think that the Motion to Dismiss needs to rise
20 to the level of the summary judgment motion in light of
21 the fact that there was a release, which was an
22 affirmative defense that was pled. It's no different
23 than moving under a 12(b)(6). Certainly affidavits can
24 be considered as a 12(b)(6) which makes it like a summary
25 judgment, but that doesn't change the time frame, which

1 appears to be the issue in question. Can still be heard
2 on a six day Motion to Dismiss or as a 28 day Motion to
3 Dismiss.

4 So I am granting the reformation, finding the document
5 to have been intended to create a mutual release finding
6 that the Pruitts' tort claims are barred and dismissing
7 the matter.

8 **MS. McMAHON:** Your Honor, I would point out in Rosen
9 vs. Ascentry Technology, they state where a settlement
10 agreement has been provided and there's been no --
11 there's been a breach of that settlement agreement, which
12 we have here, the county breached the settlement
13 agreement on May 8th when David Risvold filed
14 additional conditions on the county, and that was
15 confirmed by the hearing examiner. Under Rosen V
16 Ascentry, it states that the cases -- that the elements
17 and the claims that were pled can go back before the
18 settlement agreement, that they aren't barred by the
19 settlement agreement.

20 We think that case is controlling here, because when
21 that breach occurred by the county of the settlement
22 agreement, it revived the Pruitts' claims, the claims
23 which were -- claims which were preserved in the
24 administrative hearing that was heard April 13, 2005
25 before Stephen Causseaux. Those claims are preserved

1 because of the county's breach of the settlement
2 agreement. And because of that breach, we also don't
3 have a statute of limitations issue, because they were
4 preserved under that cause number. And that cause
5 number, which is the administrative cause number, is also
6 cited in the settlement agreement at page 2.

7 So because of that, those claims do survive, we
8 believe, on defendants' Motion to Dismiss them based on
9 Rosen vs Ascentry Technologies.

10 **MS. KINGMAN:** Well, Your Honor, do you need to me to
11 respond to that?

12 **THE COURT:** Yes.

13 **MS. KINGMAN:** That Rosen case is not on point. In
14 Rosen, what happened was there was tort litigation
15 ongoing. And to resolve the tort litigation, the parties
16 entered into a settlement agreement, and then Ascentry,
17 the defendant, breached the contract. In other words,
18 they had a contract they were going to, you know, offer a
19 payment to make court claims go away. They did not make
20 the payment, and so Rosen sued. And the question became
21 could he sue only for his payment, because Ascentry was
22 saying, well, you are right, we breached, we owe you the
23 money, take a judgment against us in the amount of the
24 settlement. But Rosen thought he should be able to go
25 back and reopen the tort claims because Ascentry had, in

1 essence, repudiated the contract by breaching it. And
2 the court agreed with Rosen saying, yes, he can sue on
3 the -- on the underlying torts, and Ascentry cannot
4 enforce a contract that they materially breached.

5 We don't have that here at all.

6 What was handled out at planning and land services
7 were land use issues, and in the land use contract there
8 was a release of claims.

9 It's not the same situation at all. And there was no
10 breach of the contract. That hasn't been litigated, we
11 don't agree that there was.

12 **MS. McMAHON:** Briefly, Your Honor, we do have the same
13 claims here. I mean, there couldn't be a case more on
14 point. We have the county violating the settlement
15 agreement. They never denied they violated it. We have
16 the hearing examiner agreeing with us that there was a
17 violation of the settlement agreement.

18 **MS. KINGMAN:** We --

19 **MS. McMAHON:** And in Rosen, because there was a
20 violation of their CR 2(a) agreement, Rosen was able to
21 go back and revive his claims he had pled previously. He
22 was not limited to the agreement he had executed in the
23 settlement agreement because Washington state courts view
24 settlement agreements as an executory accord. They are
25 not a substituted contract, they are an executory accord.

1 Because of that, the Pruitts here are able to go back and
2 revive those claims, those tort claims, that they
3 preserved at the August 13th hearing.

4 And we provided that information to Your Honor in our
5 briefing with Mr. Pruitt's declarations and Mr. and
6 Mrs. Pruitts' testimony that occurred during that
7 April 13th hearing. At that hearing they talked about
8 their damages, that they couldn't plant crops, they
9 couldn't do animal husbandry they wanted to do, they lost
10 thousands and thousands of dollars.

11 Those claims then are revived with the county's breach
12 of this agreement, and there is not a statute of
13 limitation issue, then, that's at issue because of the
14 Rosen case.

15 **MS. KINGMAN:** Your Honor, the hearings examiner hears
16 land uses issues, he doesn't hear tort claims.

17 **THE COURT:** I don't think the hearing examiner would
18 have any ability to rule or even reserve a ruling on
19 whether or not there was a valid tort claim. That's not
20 something that is within their purview. So I will deny
21 the request to find that the tort claim survived the
22 mutual release.

23 **MS. KINGMAN:** Your Honor, if I may, I would like to
24 prepare an order and send it to counsel for signature, if
25 we can agree. And, if not, set it for presentation. Is

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

that acceptable?

THE COURT: That's fine.

MS. KINGMAN: Thank you Your Honor.

THE COURT: Thank you.

(Recess taken.)

1 JANUARY 11, 2010

2 MORNING SESSION

3 **THE COURT:** This is the Pruitt and Pierce County
4 matter, 08-2-11821-1.

5 **MS. KINGMAN:** Grace Kingman, for the record, on behalf
6 of Pierce County and David Risvold. We were scheduled
7 for trial this morning. On Friday afternoon, plaintiffs'
8 counsel, Ms. McMahon, and I signed the order granting
9 defendants' summary judgment motion regarding the
10 reformation of contract and also an order of dismissal
11 with prejudice for the other two remaining counts. I
12 will hand those forward at this time, Your Honor.

13 We do have an attorney trying to intervene this
14 Omorning; I am not sure what the basis for that is or
15 what's going on there, but as far as I knew, until
16 nine o'clock this morning, this case was resolved. I
17 never received a phone call or any communication or any
18 other communication from counsel.

19 **MS. LAKE:** Thank you, Your Honor. Carolyn Lake,
20 Goodsteen Law Group. I have provided the court notice of
21 substitution, notice of withdrawal and substitution of
22 counsel. We're seeking to substitute in on behalf of the
23 plaintiffs, Jim and Debra Pruitt. As Your Honor knows,
24 this case has kind of had a tortured history. This
25 originally began with a claim by plaintiffs against the

Attempt of Counsel Lake to substitute in

1 county based upon contract breach and tort and other
2 causes.

3 Along the way the county filed counterclaims that
4 alleges fraud against plaintiffs' counsel with a goal of
5 achieving reformation of a settlement agreement.
6 Your Honor recently found that fraud had been committed
7 and as a result, you verbally indicated your intention to
8 reform the contract.

9 Mr. Pruitt and Mrs. Pruitt contacted me. We believe
10 that the current posture of the case places current
11 plaintiffs' counsel in a very constrained and ethically
12 challenged position as potentially her interests and her
13 clients' interests are at odds. We don't believe that
14 continued effective representation can continue; we are
15 asking to substitute in. We understand there's a
16 criminal trial that was set to bump this case; we don't
17 believe there's any prejudice to the county. We believe
18 that our clients are entitled to adequate representation,
19 one that is free from any constraints. We are asking the
20 court to grant the substitution.

21 **MS. McMAHON:** Jackie McMahon, former attorney for the
22 Pruitts. I would like to put on the record that on
23 Friday I had verbal authorization from my client to enter
24 into the two orders that were signed, the summary
25 judgment order as well as the order of dismissal. And I

Attempt of Counsel Lake to substitute in

1 had no idea that Ms. Lake was going to be substituting in
2 until I arrived at the court this morning.

3 I would also like to clarify that in Your Honor's oral
4 ruling you found that fraud had been committed but you
5 did not name by who, and I would like to put that before
6 the court.

7 Thank you.

8 **MS. KINGMAN:** Your Honor --

9 **MS. LAKE:** And, Your Honor --

10 **MS. KINGMAN:** Counsel --

11 **MS. LAKE:** I would also add I did e-mail both counsel
12 this morning. The decision by Mr. Pruitt was made with
13 finality this weekend. I e-mailed them very early with a
14 copy of the motion for substitution and also motion to
15 continue the trial date.

16 **THE COURT:** Case is done. It's settled, I am signing
17 it.

18 **MS. KINGMAN:** Thank you, Your Honor.

19 **THE COURT:** You know, Ms. McMahon is correct. The
20 Pruitts were participating in the drafting of the various
21 release documents along with her; they were well aware of
22 what the substitution of language was intended to do, and
23 I don't think that they can come in with unclean hands
24 and ask for the kind of relief you are now requesting.

25 So I am signing the order of dismissal and the order

Court signs agreed settlement order

1 granting summary judgment motion.

2 **MS. KINGMAN:** Thank you, Your Honor. I would also
3 like to add that the plaintiffs' declarations that they
4 filed personally throughout the litigation of the
5 defendants' counterclaim they indicated vehemently they
6 wished Ms. McMahon to continue as their attorney, so
7 they're renegeing over the weekend. Appreciate the court
8 taking that for what it is, and thank you for signing the
9 orders this morning.

10 **MS. LAKE:** Your Honor, we will be filing an
11 unconditional notice of appearance for purposes of the
12 appeal.

13 **THE COURT:** Okay. Thank you.

14 (Matter concluded.)

C E R T I F I C A T E

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WASHINGTON)
)
COUNTY OF PIERCE)

I, Randy Kay York, Official Shorthand Reporter in
and for the County of Pierce, State of Washington, do hereby
certify that the foregoing proceedings were reported by me
on December 11, 2009 and January 11, 2010 and reduced to
typewritten form.

I further certify that the foregoing transcript of
proceedings is a full, true and correct transcript of my
machine shorthand notes of the aforementioned matter.

Dated this 12th day of April, 2010.

Randy Kay York, CCR, RDR
CCR # 2477

APPENDIX 3



08-2-11821-1 33552553 CME 01-12-10



IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

JAMES PRUITT

Plaintiff(s)

vs.

PIERCE COUNTY

Defendant(s)

Cause Number:08-2-11821-1

MEMORANDUM OF JOURNAL ENTRY

Page 1 of 2

Judge/Commissioner: JAMES ORLANDO

Court Reporter: RANDY YORK

Judicial Assistant/Clerk: JANET L COSTANTI

PRUITT, JAMES	JACQUELINE A. MCMAHON	Attorney for Plaintiff/Petitioner
PRUITT, DEBRA	JACQUELINE A. MCMAHON	Attorney for Plaintiff/Petitioner
PIERCE COUNTY	P. GRACE KINGMAN	Attorney for Defendant
PLANNING AND LAND SERVICES	P. GRACE KINGMAN	Attorney for Defendant
RISVOLD, DAVID	P. GRACE KINGMAN	Attorney for Defendant
PIERCE COUNTY	P. GRACE KINGMAN	Attorney for Counter Claimant
PLANNING AND LAND SERVICES	P. GRACE KINGMAN	Attorney for Counter Claimant
PRUITT, JAMES	JACQUELINE A. MCMAHON	Attorney for Counter Defendant
PRUITT, DEBRA	JACQUELINE A. MCMAHON	Attorney for Counter Defendant

Proceeding Set: Trial

Proceeding Outcome: Dismissed

Resolution: Dismissal Without Trial

Outcome Date: 01/11/2010 9:30

<p>Clerk's Scomis Code:DSMHRG</p> <p>Proceeding Outcome code:DISM</p> <p>Resolution Outcome code:DSM</p> <p>Amended Resolution code:</p>

Appendix 3

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

JAMES PRUITT

vs.

PIERCE COUNTY

Cause Number: 08-2-11821-1

**MEMORANDUM OF
JOURNAL ENTRY**

Page: 2 of 2

Judge/Commissioner:
JAMES ORLANDO

MINUTES OF PROCEEDING

Judicial Assistant/Clerk: JANET COSTANTI

Court Reporter: RANDY YORK

Start Date/Time: 01/11/10 9:13 AM

January 11, 2010 09:13 AM Present in courtroom is Atty Grace Kingman, Atty McMahon and Atty Carolyn Lake. Atty Kingman states that until 9:00 AM this morning she was of the understand this matter was resolved. Atty Lake makes motion for substitution of counsel. Court denies motion for substitution of counsel, signing Order on Summary Judgment and Order of Dismissal.

Atty Lake to be filing notice of appearance for appeal.

End Date/Time: 01/11/10 9:20 AM

FILED
COURT OF APPEALS

10 AUG -3 PM 1:17

STATE OF WASHINGTON

BY _____
CITY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES and DEBRA PRUITT, Appellants, v. PIERCE COUNTY a municipal corporation operating in the State of Washington, PLANNING LAND SERVICES, a division of Pierce County; DAVID RISVOLD, individually and on behalf of the marital community composed thereof Respondents.	NO. 40301-3-II DECLARATION OF SERVICE
--	--

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused the following documents:

APPELLANTS PRUITTS' OPENING BRIEF -REVISED

to be served on July 16, 2010, on the following parties and in the manner indicated below:

Grace Kingman Deputy Prosecuting Attorney
Pierce County Prosecutors Off. Civil
955 Tacoma Ave. S., Ste 301
Tacoma, WA 98402-2160

- by United States First Class Mail
- by Legal Messenger
- by Facsimile
- by Federal Express/Express Mail
- by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of August 2010 at Tacoma, Washington



Carolyn A. Lake