

FILED  
COURT OF APPEALS

NO. 40301-3-II

10 MAY 25 AM 11:31

STATE OF WASHINGTON

BY *sw*

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

JAMES & DEBRA PRUITT, Appellants

v.

PIERCE COUNTY, et al., Respondents

---

**BRIEF OF RESPONDENTS**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
Attorneys for Respondents

955 Tacoma Avenue South  
Suite 301  
Tacoma, WA 98402  
PH: (253) 798-6721

## Table of Contents

	<u>Page</u>
<b>A. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR. ....</b>	<b>1</b>
<b>B. STATEMENT OF THE CASE .....</b>	<b>2</b>
1. Procedure .....	2
2. Facts.....	7
<b>C. ARGUMENT .....</b>	<b>12</b>
1. BECAUSE THE APPELLANTS WITHDREW THEIR MOTIONS TO STRIKE, THE TRIAL COURT PROPERLY PROCEEDED TO THE MERITS OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT. ....	12
2. THE TRIAL COURT PROPERLY FOUND THAT THE EQUITABLE REMEDY OF REFORMATION OF CONTRACT WAS AVAILABLE TO RESPONDENTS AS A MATTER OF LAW.....	15
a. Standard of Review. ....	15
b. Fraud.....	16
c. Reformation of Contract.....	22
(i) Respondents’ negligence, if any, is <i>not</i> a bar to reformation. ....	23
(ii) Appellants’ arguments regarding ‘duty to disclose’ are not applicable to this case.....	25

	(iii)	Appellants reliance on <i>Hubenthal</i> and similar cases from the early 1900's is misplaced, as is their reliance on <i>Kelley</i> , which is no longer the current law.....	27
	(iv)	The trial court properly denied Appellants' motion for summary judgment dismissal of Respondents' counter-claim. ....	29
3.		THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION BY FINDING THAT ALL TORT CLAIMS WERE BARRED BY THE MUTUAL RELEASE.....	30
4.		THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AT THE SUMMARY JUDGMENT HEARING...	31
5.		THE TRIAL COURT PROPERLY DENIED APPELLANTS' POST-RESOLUTION MOTION FOR CONTINUANCE. ....	32
	a.	Appellants' oral motion for a continuance was not properly before the court. ....	32
	b.	There is no affirmative duty in a civil case to inquire into attorney-client conflicts.....	34
<b>D.</b>		<b>CONCLUSION .....</b>	<b>38</b>

## Table of Authorities

### Page

#### Cases

<i>Alexander v. Housewright</i> , 667 F.2d 556 (8th Cir. 1981).....	34
<i>Boonstra v. Stevens Norton, Inc.</i> , 64 Wn.2d 621, 626, 393 P.2d 287 (1964).....	21
<i>Carlson v. Druse</i> , 79 Wash. 542, 548-49, 140 P. 570 (1914).....	23, 24
<i>Carpenter v. Folkerts</i> , 29 Wn. App. 73, 78, 627 P.2d 559 (1981) .....	22
<i>Castillo v. Estelle</i> , 504 F.2d 1243 (5th Cir. 1974) .....	34
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 809, 828 P.2d 549 (1992) .....	31
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 100 S.Ct. 1708, 64 L. Ed. 2d 333 (1980) .....	34
<i>Esmieu v. Hsieh</i> , 92 Wn.2d 530, 535, 598 P.2d 1369 (1979) .....	22
<i>Halvorson v. Halvorson</i> , 3 Wn. App. 827, 479 P.2d 161 (1971) .....	35, 36
<i>Hand v. Dayton-Hudson</i> , 775 F.2d 757 (6th Cir. 1985).....	24, 25, 27
<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 538, 954 P.2d 290 (1998) .....	31
<i>Hollis v. Garwall, Inc.</i> , 137 Wash.2d 683, 689 n. 4, 974 P.2d 836 (1999) .....	31
<i>Holloway v. Arkansas</i> , 435 U.S. 475, 98 S.Ct. 1173, 55 L. Ed. 2d 426 (1978).....	34
<i>Home Stake Prod. Co. v. Trustees of Iowa College</i> , 331 F.2d 919, 921 (10th Cir.1964) .....	23

<i>Hough v. Stockbridge</i> , 150 Wn.2d 234, 236, 76 P.3d 216 (2003).....	22
<i>Hubenthal v. Spokane &amp; Inland R. Co.</i> , 43 Wash. 677, 86 P. 955 (1906) .....	28
<i>In re Disciplinary Proceeding Against Boelter</i> , 139 Wash.2d 81, 99, 985 P.2d 328 (1999) .....	21
<i>In re Disciplinary Proceeding Against Carmick</i> , 146 Wn.2d 582, 48 P.3d 311 (2002).....	20
<i>In re Disciplinary Proceeding Against Dann</i> , 136 Wash.2d 67, 77, 960 P.2d 416 (1998) .....	21
<i>In re Disciplinary Proceeding Against Kuvara</i> , 149 Wn.2d 237, 244, 66 P.3d 1057 (2003) .....	20
<i>In re Pers. Restraint of Breedlove</i> , 138 Wn.2d 298, 312, 979 P.2d 417 (1999).....	15
<i>In re Richardson</i> , 100 Wn.2d 669, 675 P.2d 209 (1983) .....	34
<i>Kaufmann v. Woodard</i> , 24 Wash.2d 264, 270, 163 P.2d 606 (1945).22, 28	
<i>Kelley v. Von Herberg</i> , 184 Wash. 165, 50 P.2d 23 (1935).....	28
<i>Martin v. Miller</i> , 24 Wn. App. 306, 308, 600 P.2d 698 (1979) .....	17
<i>Meyer v. Young</i> , 23 Wn.2d 109, 113, 159 P.2d 908 (1945) .....	22, 23, 27
<i>Mitchell Int'l Enters., Inc. v. Daly</i> , 33 Wn. App. 562, 565, 656 P.2d 1113 (1983).....	16, 22
<i>Niemann v. Vaughn Community Church</i> , 154 Wn.2d 365, 374, 113 P.3d 463 (2005).....	15, 16, 30
<i>Nolan v. Snohomish County</i> , 59 Wn. App. 876, 882, 802 P.2d 792 (1990) .....	3
<i>North Pacific Plywood, Inc. v. Access Road Builders, Inc.</i> , 29 Wn. App. 228, 230, 232, 628 P.2d 482 (1981) .....	17, 21
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 201, 961 P.2d 333 (1998).....	16

<i>SAC Downtown Ltd P'ship v. Kahn</i> , 123 Wn.2d 197, 204, 867 P.2d 605 (1994).....	30
<i>Sigman v. Stevens-Norton, Inc.</i> , 70 Wn.2d 915, 920, 425 P.2d 891 (1967) .....	17
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)...	32
<i>State v. Downing</i> , 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) .....	32
<i>State v. Johnson</i> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) .....	31
<i>Stephens v. United States</i> , 595 F.2d 1066 (5th Cir. 1979).....	34
<i>Telepage, Inc. v. City of Tacoma</i> , 140 Wn.2d 599, 607, 998 P.2d 884 (2000).....	16
<i>Waite v. Salestrom</i> , 201 Neb. 224, 231, 266 N.W.2d 908 (1978) .....	23
<i>Washington Mutual Savings Bank v. Hedreen</i> , 125 Wn.2d 521, 528-30, 886 P.2d 1121 (1994) .....	23, 26, 28
<i>Westby v. Gorsuch</i> , 112 Wn. App. 558, 570, 50 P.3d 284 (2002).....	16, 17
<i>Wood v. Georgia</i> , 450 U.S. 261, 101 S.Ct. 1097, 67 L .Ed. 2d 220 (1981) .....	34
<i>York v. Wahkiakum School District</i> , 163 Wn.2d 297, 302; 178 P.3d 995 (2008).....	16
<b>Other Authorities</b>	
<b>Am.Jur. Reformation of Instruments</b> .....	22
<b>Restatement (Second) of Contracts</b> .....	23, 24
<b>Webster's New Collegiate Dictionary</b> , 1976 .....	18

**Rules**

*PCLR*.....33

*Rules of Prof'l Conduct*.....passim

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly proceed on the merits on cross-motions for summary judgment, where Appellants withdrew their motions to strike Respondents' allegedly untimely pleadings because both parties desired to proceed on the merits without further delay?

[Pertains to Appellants' Assignment of Error #1.]

2. Did the trial court properly grant Respondents' summary judgment motion for reformation of contract, thus reinstating a fraudulently removed mutual release, when the undisputed material facts proved both elements required for this equitable remedy: (1) fraud by Appellants and (2) mistaken belief on the part of Respondents?

[Pertains to Appellants' Assignment of Error #2 and #3.]

3. Did the trial court, sitting in equity, abuse its discretion when it used the remedy of reformation of contract to do substantial justice to the parties and put an end to litigation when it dismissed Appellants' tort claims as barred by the mutual release?

[Pertains to Appellants' Assignment of Error #2 and 3.]

4. Did the trial court properly deny Appellants' day-of-trial motion for substitution of counsel and continuance of the trial date when (1) all of the issues in the case were resolved prior to the day of trial; (2)

Appellants' motion was not properly before the court, and (3) Appellants had "unclean hands"?

[Pertains to Appellants' Assignment of Error #4.]

B. STATEMENT OF THE CASE

1. Procedure

On January 9, 2009, Appellants James and Debra Pruitt filed their Amended Complaint against Pierce County, Pierce County Planning and Land Services (PALS), and David Risvold, Environmental Biologist at PALS. CP 1-12. Appellants alleged numerous causes of action arising from land use issues pertaining to their property located in Pierce County, to wit: breach of contract, abuse of process, injunctive relief, discrimination, intentional interference with business relations and expectancy, tortious/negligent interference with business relationships and expectancy, intentional infliction of emotional distress and malicious prosecution. CP 9-11.

Respondents Pierce County and David Risvold filed their individual Answers to the Amended Complaint on January 29, 2009, and on March 26, 2009, respectively. CP 13-22, 28-36. "Defendant PALS"

did not file a separate Answer.<sup>1</sup> Respondents denied any liability and plead the affirmative defense of release and a counterclaim of fraud, seeking the equitable remedy of reformation of contract and dismissal of the action. CP 18-22, 33-36.

Respondents alleged that Appellants' attorney, Jacquelyn McMahon, acting on behalf of Appellants, fraudulently converted the **mutual release** in the 'Settlement Agreement and Mutual Release' to a **unilateral release** in favor of Appellants only. CP 21. Respondents further alleged that the mutual release would have been a bar to Appellants' action. CP 20. In late September 2009, Respondents personally served McMahon with a Notice of Deposition and Subpoena Duces Tecum. CP 65-68. Appellants moved to quash the subpoena and sought a protective order barring the taking of McMahon's deposition. CP 57-58. The trial court denied Appellants' motion, finding that McMahon "may be a fact witness herein." CP 186-87.

Respondents' attorney took McMahon's deposition on October 16, 2009. CP 651. Based on her testimony, Respondents moved to have McMahon disqualified as Appellants' counsel. CP 519-84. Respondents

---

<sup>1</sup> PALS is an agency within Pierce County and is not an entity that can be sued. *Nolan v. Snohomish County*, 59 Wn. App. 876, 882, 802 P.2d 792 (1990) ("[I]n a legal action involving a county, the county itself is the only legal entity capable of suing and being sued.")

also moved to continue the trial date. *Id.* Appellants vehemently objected to both a continuance and to disqualification of McMahon. CP 107-10. The trial court denied both motions. CP 348-49.

On October 29, 2009, Appellants filed their motion for summary judgment dismissal of Respondents' counterclaim of fraud. CP 209-23.<sup>2</sup> Their attorney took the deposition of Jill Guernsey on November 23, 2009, nearly a month *after* they filed their summary judgment motion.<sup>3</sup> CP 433. One week later, Respondents filed their response to Appellants' summary judgment motion and cross-moved for summary judgment. CP 350. In part, Respondents relied on facts from the Guernsey deposition. CP 350-61. In their reply brief and also by separate motion, Appellants moved to strike Respondents' cross-motion for lack of timeliness. CP 376-91; 444-47. In the same document where Appellants objected to Respondents' use of the Guernsey deposition, Appellants cite to it and rely on it in support of their argument on the merits. CP 386; 389; 445.

On December 11, 2009, the day of the hearing, however,

---

<sup>2</sup> Appellants originally filed a CR 12(b)(6) motion to dismiss Defendants' counterclaim, which they later converted to a summary judgment motion. CP 188-02; 203-05; 209-23.

<sup>3</sup> Jill Guernsey is a Deputy Prosecuting Attorney and the legal advisor to Planning and Land Services (PALS). She and McMahon were the attorneys who negotiated the Settlement Agreement and Mutual Release on behalf of their respective clients. CP 534-35.

Appellants admitted to timeliness issues regarding their own briefing and the parties reached an agreement on these issues. Appellants' attorney put the resolution on the record:

**Ms. McMahon:** ... When I looked at my memorandum that had gotten filed, the incorrect one had been filed, because I had not cited authority... So what Ms. Kingman and I have decided today is that I am going to hand up what was omitted from my original copy, which is the last paragraph which does cite case law and that includes *Rosen vs. Ascentry Technologies*, which I think is controlling in this case and dispositive. ...

So because of her kindness in allowing me that, **I am going to strike my motions to have her [Ms. Kingman's] late filed pleadings eliminated** so that all issues can be resolved here on the merits – if that's okay with the court.

RP 3 (emphasis added); CP 454-59.

After hearing oral argument, the trial court granted Respondents' motion for summary judgment, reformed the Settlement Agreement and Mutual Release to reflect the *mutual* release and dismissed the tort claims that were barred by the release. CP 491-509; RP 19-21; 24. Accordingly, the trial court denied Appellants' motion for summary judgment dismissal of Respondents' counterclaim. *Id.* In its oral ruling, the trial court stated:

[T]he body of the actual written document contains the footer referencing a mutual release. That was the language that was in the document when it had been modified. There were no changes made by Ms. Guernsey to the release language. There was never a discussion of a unilateral release, meaning a release by the county only and no release by the Pruitt's.

Obviously, as Ms. Guernsey stated, [Respondents] would have never entered into an agreement that continues the county to be bound for ongoing claims and ongoing litigation when they are giving up something, basically providing the permits, allowing the Pruitt's to move forward with their development.

**If this case doesn't meet the elements of fraud, it's hard to imagine any case meeting the elements of fraud.**

There was ongoing discussion, there was direct modification of the release language, and there was [an] affirmative representation that there were no significant changes made to the document when, in fact, that is a key change to the document. That was never the subject of discussions. ...

I think [Respondents] had a right to rely upon the representations there were no other significant changes made. There was ongoing negotiation as to other matters that were included in the final document, but the county never negotiated away the mutual release. ...

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

RP 19-21 (emphasis added).

On the day of trial, January 11, 2010, the parties appeared before the court to present the written order on summary judgment, which both parties had approved for entry. CP 491-94; RP 26. The parties also presented an agreed order of dismissal for the remaining two counts. CP 512-13; RP 26. Appellants gave their consent to the entry of this order to McMahon on the preceding Friday, the 8<sup>th</sup> of January 2010. RP 27. These

orders resolved all causes of action in the case.

However, attorney Carolyn Lake appeared before the trial court and attempted to “substitute in” on behalf of the Appellants. RP 26. She was also requesting a continuance of the trial date, despite the fact that all issues in the case had been resolved. RP 28. Prior to their arrival in court that morning, neither Appellants’ counsel nor Respondents’ counsel were aware of Lake’s intention. RP 26-27. Lake stated that “potentially [McMahon’s] interests and her clients’ interests are at odds.” RP 27. She requested that the trial court “grant the substitution.” *Id.* Lake did not file a motion to continue, affidavit in support thereof, nor a motion for order shortening time. The trial court denied the motion, stating:

The Pruitts were participating in the drafting of the various release documents along with [McMahon]; they were well aware of what the substitution of language was intended to do, and I don’t think that they can come in with **unclean hands** and ask for the kind of relief you are now requesting.

RP 28-29 (emphasis added); *c.f.* CP 587.

This timely appeal follows.

## 2. Facts

On March 13, 2008, Pierce County Planning and Land Services (PALS) and Appellants entered into a “Settlement Agreement and Mutual Release.” CP 637-49. During the process of drafting the Agreement,

McMahon removed language wherein the Appellants agree to release Pierce County, converting the mutual release into a unilateral release in favor of Appellants only. CP 640; CP 437. McMahon returned the Agreement to Guernsey stating that she had made no changes of substance. CP 581.

“The Pruitt’s were participants in the drafts and changes to the Settlement Agreement. The Pruitt’s have personal knowledge of **each** of the variations of what would become the final Settlement Agreement.” CP 587 (emphasis in original).

There were several drafts of the Agreement:

a. First version (McMahon).

McMahon, Appellants’ attorney, drafted the first version of the Agreement, which she sent as an e-mail attachment to Respondents’ attorney, Jill Guernsey, on February 12, 2008. CP 537; 559-63. In saving the Agreement in Word, McMahon named the document “*Pruitt.MutualRelease.2.12.08.doc.*” CP 559 (emphasis added). The title at the top of the Agreement itself and footer on the Agreement read: “Settlement Agreement and **Mutual** Release.” CP 538-39; 560 (emphasis added). There was a paragraph in this original version created by McMahon that read:

Whereas Pruitt and Pierce County desire to resolve all

pending claims and **avoid litigation** by entering into this Settlement Agreement.

CP 561(emphasis added). This first version also contained the following:

Upon the execution of this Agreement, **Pruitt** agrees to release and forever discharge Pierce County from **any and all claims and/or causes of action** in which it has, had, or which could be made against Pierce County, or which could be discovered to exist by extensive research and investigation through the date of the execution of this Agreement... .

CP 562 (emphasis added).

b. Second version (McMahon).

On March 3, 2008, McMahon e-mailed Guernsey another draft, because the first one had “some blank spots in it.” CP 543; 564-68. The title and footer remained “Settlement Agreement and Mutual Release.” The mutual release language, and the “avoid litigation” language, as quoted above, also remained the same. CP 566; 567.

The change to this second version amounted to filling in some language in the second paragraph on page one, which appeared as a single blank line on the first version. *Compare* CP 560 and CP 565.

c. Third version (McMahon).

The next day, March 4, 2008, McMahon, through her secretary, Rhonda, sent Guernsey the third version, again as an attachment to an e-mail. CP 569-73. The e-mail to Guernsey advises that “there were a

number of provisions that were not relevant so they have been omitted.”

CP 569. The title, footer, and “avoid litigation” language remain unchanged from the first and second versions. However, McMahon surreptitiously deleted the entire paragraph wherein Appellants release the County. *Compare* CP 567 with CP 572. McMahon also changed the third paragraph of the release section from:

Upon the execution of this Agreement, *the parties* shall file a stipulation and order dismissing their claims with prejudice. [First and second versions.]

To:

Upon the execution of this Agreement, *the County* shall file a stipulation and order dismissing their claims *against the Pruitt’s* with prejudice. [Third version.]

*Id.*

d. Fourth version (Guernsey).

In the meantime, Guernsey took a hard copy of McMahon’s *first version* to her home to work on it over the weekend. CP 435. This version contained a mutual release. (*See* CP 561-62.) Guernsey found McMahon’s first version confusing and wanted to separate out the substantive land use issues so that they would not overlap. CP 434; 590. Guernsey did not receive the version McMahon’s secretary sent until after she had completed a draft of her own over the weekend, and as such, Guernsey did not read the third version. CP 434-35; 574; 590. Guernsey

e-mailed her draft to McMahon on March 6, 2008. CP 574. This fourth version drafted by Guernsey contains a mutual release identical to the one contained in McMahon's first and second versions. CP 578; *see also* CP 561-62 and 567.

e. Fifth version (McMahon).

On March 12, 2008, McMahon attached the fifth version of the Agreement to an e-mail and set it to Guernsey. In the e-mail, McMahon stated:

Jill: I have made some modifications to your proposed Settlement Agreement. I hope there is not issue with my modifications; **I don't think they change the substance of the document...**

CP 581 (emphasis added). Contrary to her representation in the e-mail, McMahon had again made the mutual release unilateral by deleting the paragraph on page 4, section 16, wherein the Pruitt's agree to release Pierce County. *See* CP 640; 711; 714.<sup>4</sup>

f. Final Settlement Agreement and Mutual Release signed by all parties.

On March 13, 2008, the parties met at PALS to finalize the

---

<sup>4</sup> The last two pages of the fifth version. *See* CP 582-84. However, McMahon and Guernsey agree that no changes were made to the release language between the fifth version and the final version. CP 711; 714. CP 437, 438. Therefore, the release provisions in the fifth version can be seen at CP 640-41, the final version.

Agreement. CP 553. In her deposition testimony, McMahon acknowledges that while some changes were made to other sections of the Agreement on March 13, no changes were made to the release provisions. CP 713-14. Respondents would never have entered into a settlement agreement without a release in their favor. In her deposition, Ms.

Guernsey testified:

I relied on the mutual release language that [McMahon] had in [her] first draft and that I had in the draft I sent [her] on the 6<sup>th</sup>. If I had not relied on it, we would not have - - if I had known what [she] had done, we would not have entered into a settlement agreement. There is no way that I would have had a settlement agreement if both sides weren't prepared and ready to enter into a mutual release.

CP 439.

On March 13, 2008, all parties signed the Settlement Agreement and Mutual Release. CP 713-14. The Agreement does not contain a mutual release, but a unilateral release in favor of Appellants only. CP 636-49.

In August 2008, Appellants filed suit against Pierce County/PALS for \$2,000,000.00.

#### C. ARGUMENT

1. BECAUSE THE APPELLANTS WITHDREW THEIR MOTIONS TO STRIKE, THE TRIAL COURT PROPERLY PROCEEDED TO THE MERITS OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT.

Appellants assign error to the trial court granting Respondents'

cross-motion for summary judgment based on the alleged lack of timeliness of Respondents' pleadings regarding the motion. Brief of Appellant 1; 7-13. Appellants devote seven pages of their brief to this issue. *Id.* However, at the hearing, Appellants withdrew their motions to strike. RP 3. This issue, as framed by Appellant, is not supported by the record below. The facts are:

On October 29, 2009, Appellants moved for summary judgment dismissal of Respondents' counterclaim of fraud. CP 209-23. Their attorney took the deposition of Jill Guernsey on November 23, 2009, which as *after* they filed their summary judgment motion. CP 433. One week later, Respondents filed their response to Appellants' summary judgment motion and cross-moved for summary judgment. CP 350. In part, Respondents relied on facts from the Guernsey deposition. CP 350-61. In their reply brief and also by separate motion, Appellants moved to strike Respondents' cross-motion and citations to the Guernsey deposition for lack of timeliness. CP 376-91; 444-47. On December 11, 2009, the day of the hearing, however, Appellants admitted to timeliness issues regarding their own briefing and the parties reached an agreement on these issues. Appellants' attorney explained to the court on the record:

**Ms. McMahon:** ... When I looked at my memorandum that had gotten filed, the incorrect one had been filed, because I had not cited authority... So what Ms. Kingman

and I have decided today is that I am going to hand up what was omitted from my original copy, which is the last paragraph which does cite case law and that includes *Rosen vs. Ascentry Technologies*, which I think is controlling in this case and dispositive. ...

So because of her kindness in allowing me that, **I am going to strike my motions to have her [Ms. Kingman's] late filed pleadings eliminated** so that all issues can be resolved here on the merits – if that's okay with the court.

RP 3 (emphasis added); CP 454-59.

McMahon's statements demonstrate that it was Appellants' desire to have the court conduct the hearing. Appellants' acquiescence to what they felt were late filed documents by Respondents was reasonable under the circumstances. First, it allowed Appellants to have their omitted briefing and case law considered by the trial court, and second, it avoided the need for a continuance. Third, the evidence relied upon by both parties consisted of the various drafts of the Settlement Agreement and Mutual Release, the McMahon deposition, and to a lesser degree, the Guernsey deposition. McMahon was well versed in all the evidence. She was not only present for both depositions, but was also present at all of the underlying events. She did not need additional time to assimilate any of the facts that were allegedly produced in an untimely fashion. Appellants' desire to proceed on the merits was logical; they needed a ruling on summary judgment in order to prepare for trial, which was just one month

away.

Appellants waived this issue when they withdrew their motions to strike. They cannot now claim an “error” on the part of the trial court when the hearing proceeded as they requested. The doctrine of invited error “prohibits a party from setting up an error at trial and then complaining of it on appeal.” *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999) (*internal quotations omitted*).

Because the parties resolved the timeliness issues amongst themselves, Appellants never asked the court to rule on their motions to strike. They actually withdrew their motions. The trial court made no ruling and thus no error. Appellants’ argument must fail.

2. THE TRIAL COURT PROPERLY FOUND THAT THE  
EQUITABLE REMEDY OF REFORMATION OF  
CONTRACT WAS AVAILABLE TO RESPONDENTS  
AS A MATTER OF LAW.

a. **Standard of Review.**

“[T]he question of whether equitable relief is appropriate is a question of law.” *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (citations omitted). However, trial courts have broad discretionary power in fashioning equitable remedies. *Id.* Therefore, the trial court’s granting summary judgment for reformation should be reviewed by this Court de novo. The application of that remedy

is reviewed for an abuse of discretion. *Niemann*, 154 Wn.2d at 374, 386 (equitable remedy upheld where there was no evidence trial court abused its discretion nor evidence that trial court acted in an arbitrary and capricious manner).

Summary judgment should be granted where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56(c). 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.* (citing *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)).

The trial court properly granted reformation in the present case because the undisputed facts prove the required elements of Appellants' fraud and Respondents' mistake. See *Mitchell Int'l Enters., Inc. v. Daly*, 33 Wn. App. 562, 565, 656 P.2d 1113 (1983) (citations omitted).

**b. Fraud.**

To prove fraud, Respondents must establish nine elements by clear, cogent, and convincing evidence. *Westby v. Gorsuch*, 112 Wn. App. 558, 570, 50 P.3d 284 (2002); see also *North Pacific Plywood, Inc.*

*v. Access Road Builders, Inc.*, 29 Wn. App. 228, 230, 232, 628 P.2d 482 (1981). The nine elements are:

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

*North Pacific Plywood*, 29 Wn. App. at 232-33 (citing *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967); *Martin v. Miller*, 24 Wn. App. 306, 308, 600 P.2d 698 (1979)); *Westby*, 112 Wn. App. at 570. There is no genuine issue of material fact regarding these elements, which prove Appellants engaged in fraud.

The first element, a representation of an existing fact, is met because McMahon represented that the changes that she made to the Agreement were not of substance. CP 581. Appellants attempt to characterize this representation as an 'opinion' to defeat the first element of fraud. *See* Br. of Appellants at 27. However, as the trial court noted, this was "in fact" a "key change to the document." RP 19-20.

The second element, materiality, is also met. McMahon's statement is material because it pertains to an essential portion of the Agreement, the mutual release. The change in the release language from mutual to unilateral was significant because the County would not have

signed the agreement had it known there was no mutual release. CP 437.

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

Jill: I have made some modifications to your proposed Settlement Agreement. I hope there is no issue with my modifications; **I don't think they change the substance of the document...**

CP 581 (emphasis added). "Substance" is defined as: "1a: essential nature... b: a fundamental or characteristic part or quality..." *Webster's New Collegiate Dictionary*, 1976. Because the document had the words "mutual release" in its title and footer and the mutual release was contained in the body of the first two versions of the document, that release was a fundamental part of the agreement. When McMahon asserted that the removal of the mutual release language was not a change of substance, she made a false representation.

McMahon knew that this statement was false, thus satisfying the fourth element. She admits that she intentionally removed the mutual release on the night of March 12, 2008, on her computer at her residence. CP 553. She also knew that this modification was substantial. She admitted in her deposition that a multi-million dollar lawsuit – one that would have been clearly foreclosed by an unambiguous mutual release – is of substance. CP 554. Therefore, McMahon's knowledge of the false

nature of the statement is proven by clear, cogent and convincing evidence.

The fifth element, McMahon's intent that the statement should be acted upon by Guernsey, is also proven. This is shown by (a) the fact that McMahon made the false representation, (b) she removed the mutual release from the body of the document, but did not make corresponding changes to the title, which continued to reflect a mutual release; (c) she removed the release language from the third draft, as well as the fifth draft, and did not mention the change either time, CP 569, 581; (d) Appellants instructed McMahon to remove the language, CP 546; (e) a unilateral release in favor of Appellants was much more favorable to Appellants than a mutual release; and (f) there was no other explanation for the false statement.

Sixth, Guernsey did not know that McMahon's statement was false. CP 436; 441. She did not know that the mutual release language contained in the draft sent to her by McMahon had been converted to a unilateral release, until it was brought to her attention after the Agreement had been finalized. CP 437-38; 441. If she had been so aware, she never would have signed the agreement. CP 439; 440. Guernsey assumed that if McMahon had made any material changes to the agreement, she would have mentioned them, as attorneys usually do, instead of affirmatively

representing there were no substantive changes. CP 436.

The seventh element, reliance, is also met because Guernsey assumed that McMahon was truthful in her affirmative statement that no changes of substance had been made to the Agreement. CP 436; 438-39. Further, identical mutual release language had been included in the first two drafts of the agreement prepared by McMahon, one of which Guernsey used to create her own version. CP 561-62; 567; CP 343-35. Guernsey thus relied on McMahon's false statement.

The eighth element, which is proven, is Guernsey's right to rely on McMahon's statement. Guernsey had the right to expect that McMahon would not make a false statement to her. A lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." However, "[i]n the course of representing a client a lawyer shall not knowingly make a false statement to a third person..." *Rules of Prof'l Conduct* 4.1(a); *In re Disciplinary Proceeding Against Kuvara*, 149 Wn.2d 237, 244, 66 P.3d 1057 (2003). It is misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. *RPC* 8.4(c). *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 48 P.3d 311 (2002).

The purpose of these rules is to prevent attorneys from actively engaging in misleading conduct. The plain language of *RPC* 4.1(a)

incorporates three elements: (1) an affirmative act; (2) regarding a material fact; (3) knowingly made. Regarding *RPC* 8.4(c), the courts have made clear the importance of this provision. “Simply put, the question is whether the attorney lied. No ethical duty could be plainer.” *In re Disciplinary Proceeding Against Boelter*, 139 Wash.2d 81, 99, 985 P.2d 328 (1999) (quoting *In re Disciplinary Proceeding Against Dann*, 136 Wash.2d 67, 77, 960 P.2d 416 (1998)).

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

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

Respondents have proven each of the nine elements of fraud by clear, cogent, and convincing evidence. The trial court properly found that equitable relief was appropriate.

**c. Reformation of Contract.**

A trial court has equitable power to reform an instrument if there is clear, cogent, and convincing evidence of a unilateral mistake coupled with inequitable conduct. *Kaufmann v. Woodard*, 24 Wash.2d 264, 270, 163 P.2d 606 (1945). Sitting in equity, a court “may fashion broad remedies to do substantial justice to the parties and put an end to litigation.” *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003) (citing *Carpenter v. Folkerts*, 29 Wn. App. 73, 78, 627 P.2d 559 (1981) (citing *Esmieu v. Hsieh*, 92 Wn.2d 530, 535, 598 P.2d 1369 (1979))).

“Reformation will be granted when there is a mistake on the part of one of the parties as to the content of a document and there is fraud or inequitable conduct on the part of the other party. It is not determinative that the mistaken party could have noticed the discrepancy between his understanding and the written agreement by reading the documents.” *Mitchell Int'l Enters., Inc. v. Daly*, 33 Wn. App. 562, 565, 656 P.2d 1113 (1983) (citations omitted). It is not essential, therefore, that one seeking reformation of contract show that he is wholly free from fault. *Meyer v. Young*, 23 Wn.2d 109, 113, 159 P.2d 908 (1945) (quoting **45 Am.Jur. Reformation of Instruments** § 78, at 632 (1943)). Mere negligence not rising to the dignity of a violation of a positive legal duty, as negligence

that is a mere inadvertence, does not preclude relief. Nor will relief be denied where, in the circumstances, the negligence of the party seeking relief is excusable. *Id.*

- (i) Respondents' negligence, if any, is not a bar to reformation.

The courts of Washington, as well as those of other jurisdictions, are in agreement that negligence is not a bar to reformation of a contract when the reformation claim is based upon mutual or unilateral mistake. *See, e.g., Meyer v. Young*, 23 Wn.2d 109, 113, 159 P.2d 908 (1945); *Carlson v. Druse*, 79 Wash. 542, 548-49, 140 P. 570 (1914); *Home Stake Prod. Co. v. Trustees of Iowa College*, 331 F.2d 919, 921 (10th Cir.1964). Additionally, in *Waite v. Salestrom*, 201 Neb. 224, 231, 266 N.W.2d 908 (1978), the court noted that “[m]ere carelessness, however, is not necessarily a defense to an action for reformation.”<sup>5</sup> The case law is in accord with the Restatement of Contracts, which 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.

---

<sup>5</sup> Our Supreme Court relied on *Waite* in its analysis and holding in *Washington Mutual Savings Bank v. Hedreen*, 125 Wn.2d 521, 528-30, 886 P.2d 1121 (1994).

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

If negligence were a defense to a reformation claim, then reformation would almost never be available as a remedy because mistake is most frequently the basis for reformation, and negligence generally results from mistake. **Hedreen** 125 Wn.2d at 531 (citing **Carlson v. Druse**, 79 Wash. 542, 548, 140 P. 570 (1914)).

Reformation of contract is available when there has been an affirmative misrepresentation.

If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or 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. ...

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

However, the case of **Hand v. Dayton-Hudson**, 775 F.2d 757 (6th Cir. 1985) is analogous to the present case. Defendant employer fired Plaintiff Hand and offered to pay him a sum of money in exchange for a release. **Id.** at 758. The release was given to Hand for consideration. Hand at a later date returned stating he would sign the release. **Id.** He

brought an altered release with him that was different than the original, but appeared “superficially identical.” *Id.* at 758-59. Hand had limited the terms of the release. He then sued Defendant employer. *Id.* at 759. The court granted summary judgment on the issue of fraud, reformed the release, and held that summary judgment was appropriate because Hand’s claims were precluded by the reformed release. *Id.*

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

The facts of the present case are analogous to *Hand*. Here, all nine elements of fraud are proven by clear, cogent, and convincing evidence. Additionally, comparison of the fourth version of the agreement proposed by Guernsey and the fifth version which was fraudulently altered by McMahon reveal that the agreements are very similar in appearance – the title and footer both containing the words “mutual release.” CP 575-80 and 637-42.

- (ii) Appellants’ arguments regarding ‘duty to disclose’ are not applicable to this case.

In their motion for summary judgment, Appellants argue that there was no special relationship between Guernsey and McMahon that would

create a duty to disclose. However, as discussed above, McMahon, an attorney licensed to practice law in the State of Washington, is barred from knowingly making false statement. **RPC 4.1(a)**. This imposes a duty on McMahon to be honest in her dealings with opposing counsel. Appellants argue repeatedly that McMahon had no duty to disclose. However, that is not the issue. In the instant case, she did not merely fail to disclose; she made an affirmative misrepresentation, which she is expressly forbidden from doing, and which goes beyond a mere failure to disclose. Appellants' argument that McMahon had no duty to disclose is not applicable to this case where McMahon's conduct went beyond mere failure to disclose and made an affirmative misrepresentation.

Appellants also argue there is no prior inconsistent agreement in the present case which bars reformation. However, that factor, as discussed in *Hedreen*, pertains to the issue of the special relationship between the parties which imposes a duty to disclose. *See Hedreen* 125 Wn.2d at 526. Here, Respondents are not required to prove 'duty to disclose' because Appellants committed fraud. Therefore, the special relationship/trust and confidence issue is similarly inapplicable to the present case. *See RPC 4.1(a)*.

Appellants further argue that negligence is a bar to reformation when no prior agreement exists. However, as noted above, the prior

agreement pertains to the creation of the duty to disclose. *See, e.g., Meyer v. Young*, 23 Wn.2d at 113. In the present case, the duty requirement is satisfied by McMahon's ethical duties previously discussed. McMahon lead Guernsey to believe there was an agreement when she sent Guernsey's version back to her indicating no changes of substance; meaning Guernsey believed they were in agreement at that point. When one party is fraudulently induced to sign a contract by the other party, there will never be an agreement, because the guilty party knows that the contract does not reflect the innocent party's intent. *Hand v. Dayton-Hudson*, 775 F.2d at 761. Appellants' argument is misapplied and therefore fails.

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

- (iii) Appellants reliance on *Hubenthal* and similar cases from the early 1900's is misplaced, as is their reliance on *Kelley*, which is no longer the current law.

In support of their position regarding reformation of contract, Appellants rely solely on cases regarding the *duty to disclose*. Br. of

Appellants at 13-25 (Issues 2 and 3). Without ever including the year the case was decided, Appellants place great weight on *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 P. 955 (1906). Br. of Appellants at 18-21; 32. This case was decided in 1906, over 100 years ago, before the Restatement of Contracts. It is in direct conflict with current Washington Supreme Court cases. See *Hedreen*, 125 Wn.2d 521 (1994) (a party to a contract is entitled to reformation if either there has been a mutual mistake or one party is mistaken and the other party engaged in fraud or inequitable conduct); *Woodard*, 24 Wn.2d 264 (1945) (a trial court has equitable power to reform an instrument if there is clear, cogent, and convincing evidence of a unilateral mistake coupled with inequitable conduct).

Appellants' reliance on *Kelley v. Von Herberg*, 184 Wash. 165, 50 P.2d 23 (1935) is similarly unreliable. See Br. of Appellants at 13, 14, 16, 18. In 1994, the Washington Supreme Court in *Hedreen* declined to follow *Kelley*, which effectually overruled that 75-year-old decision. *Hedreen*, 125 Wn.2d at 527. The *Hedreen* court gave two reasons for this: First, *Kelley* is a plurality opinion. Second and more importantly, the *Kelley* decision is directly in conflict with *Woodard*, 24 Wn.2d 264 (1945), which was decided ten years after *Kelley*. *Hedreen*, 125 Wn.2d at 527. Therefore, Appellants' arguments against reformation of contract are

without supporting authority.

Applicable state law, as discussed above, conclusively shows that the trial court properly found that Respondents were entitled to the equitable remedy of reformation of contract as a matter of law.

- (iv) The trial court properly denied Appellants' motion for summary judgment dismissal of Respondents' counter-claim.

In support of their arguments, Appellants cite only a portion of the undisputed facts in the case, and then summarily conclude they were entitled to summary judgment in their favor. Br. of Appellants 33-36. In their brief, Appellants specifically omit the key undisputed facts:

First: That McMahon made an affirmative misrepresentation to Guernsey, when she returned Guernsey's draft of the agreement stating she made no substantive changes, but she had in fact converted the mutual release to a unilateral release benefiting only Appellants (CP 581); Second: That on the day the parties signed the final version of the Agreement, they made four other drafts prior to executing the Agreement. However, no changes were made to the Release provisions that day (CP 714); Third: That Respondents would never have entered into a settlement with Appellants without securing a release from them (CP 439); Fourth: That Guernsey had no idea the mutual release had been modified by McMahon (CP 439); Fifth: That the first two drafts provided by

McMahon had a mutual release (CP 561-62 and 567); and Sixth: That the first three drafts provided by McMahon had a ‘whereas’ provision stating each party’s desire to avoid litigation, the title and footer read “Settlement Agreement and Mutual Release” (CP 560-61; 565-66; 570-71).

Given all the undisputed facts and the law applicable to Reformation of Contract, as discussed above, Appellants are not entitled to summary judgment in their favor.

3. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION BY FINDING THAT ALL TORT CLAIMS WERE BARRED BY THE MUTUAL RELEASE.

Trial courts have broad discretionary power in fashioning equitable remedies, which is reviewed for an abuse of discretion. *Niemann v. Vaughn Community Church*, 154 Wn.2d at 374, 385 (citing *SAC Downtown Ltd P’ship v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994)).

Appellants do not assign error to the trial court’s fashioning of the remedy once it found that Reformation of Contract was appropriate as a matter of law. Br. of Appellants at 1; *see* CP 493. Nor do Appellants assign error to the trial court’s dismissal all tort claims as being precluded by the mutual release. *See id.*

An appellant must assign error to each ruling it claims was improperly made. RAP 10.3(a)(4). An appellate court will review only a

claimed error that is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). Further, failure to provide argument and citation to authority in support of assignments of error, as required under RAP 10.3, generally precludes appellate consideration of an alleged error. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 689 n. 4, 974 P.2d 836 (1999); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992). See also *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

Therefore, this Court should decline to review the trial court’s fashioning of the remedy.

4. THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AT THE SUMMARY JUDGMENT HEARING.

Appellants argue that the trial court erred by granting Respondents’ summary judgment because “disputed facts exist.” Br. of Appellant at ii (Issue 5); 26-33. This entire section of Appellants’ brief discusses purely legal issues and law inapplicable to the present case. *Id.* Appellants’ argument does not point out *any* genuine issue of material fact that would support their position that Respondents were not entitled to

summary judgment. *See* CR 56(c). Therefore, the trial court's summary judgment order must be affirmed.

5. THE TRIAL COURT PROPERLY DENIED APPELLANTS' POST-RESOLUTION MOTION FOR CONTINUANCE.

A trial court's grant or denial of a motion for continuance is reviewed for an abuse of discretion.

a. **Appellants' oral motion for a continuance was not properly before the court.**

"The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). An appellate court reviews a trial court's decision to grant or deny such a motion for abuse of discretion. *Id.* at 272. An appellate court will not disturb a trial court's decision unless the appellant shows that the decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Id.* at 272 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Under the Pierce County Local Rules, a request to change a trial date must be made by motion and supported by a showing of good cause. **PCLR** 40(g)(2)(B). If the date to adjust trial date has passed, "the motion will not be granted except under extraordinary circumstances where there is no alternative means of preventing a substantial injustice." *Id.* Such a

• • •

motion will not be considered by the trial court absent the clients' signatures on the motion, or a certification by the clients indicating they are in agreement with the motion. *Id.* In the present case, Appellants met none of these requirements. Additionally, they did not file a written motion or proof of timely notice to Respondents. *See PCLR 7(a)(4)*. Therefore, the trial court did not err in denying the motion for a continuance.

In the present case, Appellants moved for a continuance on the day of trial when all of the issues in the case had been resolved by oral ruling of the court and agreement of the parties. *See* RP 26. All that remained to be done on the day of trial was to get the Court's approval of the written orders. The trial court's denial of the continuance was within its discretion to deny the Appellants' belated request for a continuance because there was no proper written motion and all issues had been resolved. Appellants cannot show an of abuse of discretion.

Further, the issue of a continuance is moot. Appellants did not assign error to the agreed Order of Dismissal with Prejudice, which dismissed the only two claims that survived the summary judgment ruling. CP 512-13; Br. of Appellant at 1. Therefore, at the time Appellants moved for a continuance of the trial date, there were no remaining claims or issues to be resolved at trial.

**b. There is no affirmative duty in a civil case to inquire into attorney-client conflicts.**

The court does not have an affirmative duty to inquire further in a civil case. The authorities cited by appellant are criminal cases, which necessarily implicate the Sixth Amendment right to effective assistance of counsel. The appellant offers: *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L. Ed. 2d 220 (1981) (vacating criminal judgment and remanding for determination of whether attorney conflict violated defendant's due process rights); *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L. Ed. 2d 333 (1980) (petitioning for federal writ of habeas corpus after criminal conviction); *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L. Ed. 2d 426 (1978) (appealing criminal convictions for robbery with use of a firearm and rape); *Alexander v. Housewright*, 667 F.2d 556 (8th Cir. 1981) (petitioning for federal writ of habeas corpus after criminal conviction); *Stephens v. United States*, 595 F.2d 1066 (5th Cir. 1979) (moving to vacate criminal sentence); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974) (petitioning for federal writ of habeas corpus after criminal conviction); *In re Richardson*, 100 Wn.2d 669, 675 P.2d 209 (1983) (bringing personal restraint petition on grounds of ineffective assistance of counsel in criminal trial). No such right to effective assistance of counsel exists in the civil context where there is no liberty interest at stake and

Appellants have elected to file a suit and appear in court. Noticeably, appellants have not included any authority to the contrary.

Appellants offer only one authority from a civil case, *Halvorson v. Halvorson*, 3 Wn. App. 827, 479 P.2d 161 (1971), which does not support the proposition that the trial court has a duty to inquire into conflicts or that failure to do so is reversible error. In *Halvorson*, the appellant's counsel raised the conflict issue with the appellant before an initial default divorce judgment, yet she chose to continue to have counsel represent her and her husband jointly. *See id.* at 829, 831. The appellant did not challenge the joint representation until some two and a half years later, when she brought an action in 'equity' to set aside the property judgment on the basis of fraud and mental incompetence. *Id.* at 829. Only then did a new trial court engage in a factual inquiry into the joint representation by counsel, and, ultimately, determined the representation was adequate. *Id.* at 830. There is no indication that the trial court in the initial divorce proceeding made any inquiry into the conflict of joint representation or that the court was required to do so. *Id.* at 829. Therefore, the Appellant here has failed to offer any support to extend the criminal conflict rules to the civil context and impose a new requirement on trial courts investigate potential attorney conflicts.

Indeed, there is no statutory or case law authority to support the

proposition that the court has a duty to inquire into attorney conflicts in civil cases. Rather, conflicts in civil matters are governed by the rules of professional responsibility. For example, in *Halverson*, the court recognized that issues of attorney conflicts are between the attorney and the client.

Whether an attorney can in good conscience represent both parties to an agreement 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 circumstances of the case.

*Id.* at 831. Significantly, the fact question as posed in *Halvorson* was a determination made by different trial court than the one at which the attorney represented the client in the first place, and the appellate court did not discuss what inquiry, if any, the initial trial court made into the apparent conflict. *Id.* at 830-31. Thus, the ‘fact question’ was totally confined to collateral attack. Consequently, the initial decision of whether an attorney may represent a client in a civil matter is still a choice for the attorney and the client.

The rules of professional conduct are the proper governance for attorney client conflicts. The Washington rules of professional conduct define conflict and guide a lawyer’s decisions about which clients to represent. *See* **RPC** 1.7(a). Furthermore, the rules provide that a lawyer

with a conflict may continue to represent the client under certain circumstances. *See generally* RPC 1.7(b). The Washington rules allow the lawyer to make the determination about whether the conflict is waivable, and the client to decide whether to actually waive the conflict. *Id.* If the client initially chooses to waive the conflict, consent may still be revoked to terminate the representation at any time. *Id.* at cmt. 21. If appellants perceived a conflict with trial counsel, their remedy was to terminate the relationship with counsel. They chose not to pursue this option, and therefore, cannot later challenge the adverse orders of the trial court by re-writing the trial court's responsibilities with regard to attorney client conflicts.

Further, the undisputed evidence in this case shows that McMahon was acting on Appellants' behalf, with their full knowledge, and under their instructions. "The Pruitt's were participants in the drafts and changes to the Settlement Agreement. The Pruitt's have personal knowledge of **each** of the variations of what would become the final Settlement Agreement." CP 587 (emphasis in original).

The trial court denied the motion, stating to Lake:  
The Pruitts were participating in the drafting of the various release documents along with [McMahon]; they were well aware of what the substitution of language was intended to do, and I don't think that they can come in with **unclean hands** and ask for the kind of relief you are now requesting.

RP 28-29 (emphasis added); *c.f.* CP 587.

D. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the trial court's Order Granting Defendants' Summary Judgment Motion, Reforming Contract, and Denying Plaintiffs' Summary Judgment Motion.

DATED: August 24, 2010

MARK LINDQUIST  
Prosecuting Attorney

By 

P. GRACE KINGMAN  
Deputy Prosecuting Attorney  
Attorneys for Respondents  
Ph: (253)798-6721 / WSB # 16717

FILED  
COURT OF APPEALS  
16 AUG 25 AM 11:31  
STATE OF WASHINGTON  
BY \_\_\_\_\_

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

JAMES and DEBRA PRUITT,  
  
Appellants,  
  
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,  
  
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 this Declaration and the following documents:

- 1. Brief of Respondents

to be served on the following parties and in the manner indicated below:

CAROLYN LAKE  
501 SOUTH G STREET  
TACOMA WA 98405

- by United States First Class Mail, with proper postage affixed thereto
- by Legal Messenger
- by Facsimile

- by Federal Express/Express Mail
- by Personal Delivery

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

DATED this 24th day of August, 2010.

  
\_\_\_\_\_  
CHANDRA ZIMMERMAN

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