

No. 42098-8-II

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

11 DEC 1
STATE OF WASHINGTON
BY _____ DEPUTY

FREDERICK BEAU GOULD and JULIE P. GOULD, husband and wife,

Respondents,

v.

HONG BIN IM and NANETTE MARIE IM a/k/a YOUNG B. IM,

husband and wife,

Appellants.

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STATE OF WASHINGTON
BY [Signature] DEPUTY
COURT OF APPEALS
DIVISION II

RESPONSE BRIEF

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II. STATEMENT OF THE CASE

Three times between September and October 2007, Defendant Hong Im (Im) intentionally disconnected plaintiff Beau and Julie Gould's (Gould) sole source of water to Gould's home on Hood Canal. Clerk's Papers (CP) at 95, 96, 99, 216, 284, 294–295, 324; VRP at 207, 212–13. Since the property was first sold by a common grantor to separate owners, the well on Im's property has served as the sole source of water for both Im's and Gould's homes. CP at 250–51, 254–55, 258, 282–284, 293–94. As a result of Im's intentional actions, the Goulds' incurred over \$400,000.00 in damages. CP at 88–90, 99. During the course of this litigation, all Im had to do to prevent the ongoing damages was to turn the spigot and restore water to the Gould home. Verbatim Report of Proceedings (VRP) at 320. Im steadfastly refused to do so.

The Gould home's right to water from the Im property's well arises out of a Well Maintenance Agreement recorded against the property by common grantors M.C. and Florence J. Davisourt (Davisourt) in 1991. CP at 260–61, 290–91. Every deed conveying the property from Davisourt through to Gould and from Davisourt through to Im explicitly restricted the conveyance based on the Well Maintenance Agreement. CP at 298, ¶ 12. The one exception is the deed from Frank Burke to Im, which instead references "covenants, conditions, restrictions and

easements, if any, affecting title, which may appear in the public record.” *Id.* at 232–34, 298. The Well Maintenance Agreement itself was recorded twice on the public record to at least one of the parcels granted to Im in his deed. CP at 227, 232–33, 298.

Im intentionally disconnected the sole source of water to the Gould home three times between September and October 2007. Prior to shutting off Gould’s water, Im had record notice of the Well Maintenance Agreement. CP at 227, 232–33, 298. Prior to shutting off Gould’s water, Im searched the same public records where the Well Maintenance Agreement was recorded. CP at 230. It was common knowledge in the neighborhood that the well on Im’s property was the sole source of the Gould home’s water. CP at 248–49. Im had the parties’ legal rights explained to him by several of Gould’s agents both before and after he shut off the water. CP at 293–95; Ex. 9. Im consistently made it difficult for Gould’s agents to communicate with him. VRP at 206–07. Im steadfastly refused to turn the water back on. VRP at 209, 211–214. Gould had to obtain a court order following summary judgment to restore water to his home.¹ CP at 99.

¹ A case is commenced the earlier of when it is filed or served. CR 3(a). In his Opening Brief, Im erroneously states that Gould did not commence his case until 2009. Opening Brief, at 1. A review of the record will show that Im was served October 23, 2007. CP at 332. Im appears to be aware of this. Opening Brief, at 11, 24.

When Im shut off Gould's water, Gould was preparing the property for sale by doing renovations and landscaping. CP at 130–33, 185. Im's intentional malfeasance caused much of that landscaping to be destroyed. CP at 97–100, 105–107; Ex. 4. Im's intentional malfeasance prevented the sale of Gould's house for two years. VRP at 126. Im's intentional malfeasance caused Gould to lose out on the fast-paced environment and high real estate prices in 2007, forcing him to sell only after the real estate crash. VRP at 126. Im's intentional malfeasance robbed Gould of almost one-third of the value of his home. Ex. 6; CP at 99.

Gould brought suit for Im's intentional breach of the Well Maintenance Agreement. CP at 322–32. Before the superior court, Im did not dispute the facts showing his acts were intentional. CP at 242–47. In response to Gould's motion for summary judgment on liability, Im's offered defense was that he thought the Well Maintenance Agreement referenced a creek on his property. *Id.* He further argued that, as it had been used for over twenty-five years, the well was in violation of the Mason County Code. *Id.* The court held that there was no material dispute of fact, that Im breached the Well Maintenance Agreement, and that the Well Maintenance Agreement contained a mutual mistake of fact regarding the legal description of Im's property. CP at 215–17. The only

aspect of the court's summary judgment order Im appeals is the court's conclusion that Davis court intended the Well Maintenance Agreement to refer to the well on what is now Im's property. Opening Brief, at 33–44. Only the issue of damages was reserved for trial. CP at 216.

In the trial for damages, Gould presented evidence of four types of damages: (1) lost landscaping, (2) expenses for reconnecting the well; (3) lost profits from the sale of the home; and (4) lost rents while the home was untenable due to the lack of water. The trial court did not award damages for lost rental value, but did award damages for a portion of the other amounts claimed. CP at 91–104. The only damages Im appeals are those awarded for lost value when Gould's home was sold. Opening Brief, at 9.

At trial, Im admitted that he shut off the water three times. VRP at 59, 75–76. Gould's general contractor and real estate manager, Eric Muller, testified that the Gould home was ready for sale when Im shut off the water. VRP at 93. Gould's real estate agent, Butch Boad, testified that he was about to list the Gould home for \$1.6 million when Im shut off the water. VRP at 125–32. Both Boad and another expert, Jef Conklin, testified that \$1.6 million was an appropriate listing price and that over the past five years, Boad's listings for over \$1 million were selling for an average of 97% of list price. *Id.*, 165–70; Ex. 6. Boad testified that it is

impossible to sell a home without a reliable source of potable water. VRP at 126. Both Mueller and Im's expert, Arlene Hyatt, testified that there are no alternative sources of water for Gould. VRP at 68–69, 178–82, 232–36. Im did not offer any testimony to refute any of that testimony, nor did he successfully impeach or competently dispute any of the testimony on cross-examination.

The court did not find any of Im's counterclaims or affirmative defenses credible and denied both relief and set-off for them. Im assigns error to the court's conclusion that Gould did not mitigate his damages because he did not immediately seek injunctive relief. Opening Brief, at 10–11. However, Im does not make any argument in support of that assignment of error in his opening brief.

The court found the lost value at sale was reasonably foreseeable, stating in the oral decision that "one doesn't need an expert to tell you you can't sell a residence that doesn't have a source of water." VRP at 308; *accord* CP at 101. The court further held, based on the testimony of the two of Gould's expert witnesses, that Gould would have been able to sell his house for 97% of the intended list price of \$1.6 million or \$1,555,000.00 had Im not shut off the water. CP at 99. Gould's house actually sold for \$1.1 million after the court ordered Im to turn the water back on following summary judgment. Ex. 6; CP at 99. Based on that

evidence, the trial court awarded \$455,000.00 in consequential damages for the lost sale value to Gould's home. CP at 103.

III. ARGUMENT

A. Unchallenged Issues of Fact and Law Are Verities on Appeal and Issues Identified but Not Discussed in the Opening Brief are Waived

On appeal, any unchallenged orders, findings of fact, or conclusions of law are considered conclusively established. This doctrine is waiver when applied in reference to the trial court's orders and conclusions. See RAP 10.3 The appellant must designate "a separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4); *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960). The appellant must then discuss each alleged error in the argument section of his brief. RAP 10.3(a)(6); RAP 12.1(a); *Burback*, 56 Wn.2d at 877. Any issue not both identified in the statement of error and discussed, with citation to the record and supporting authority is waived and will not be considered by the appellate court. *Weyerhaeuser Co. v. Comm. Union Ins. Co.*, 142 Wn.2d 654, 692-93, 15 P.3d 115 (2000). In a related doctrine, unappealed facts become verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

On appeal, the defendant's arguments break down into two general categories: challenges to the trial court's order granting partial summary judgment and challenges to the trial court's award of damages. The defendant does not raise any arguments regarding his motion to remove plaintiff's counsel in his brief and the trial court's ruling on that issue is now conclusively established.

The only issue Im discusses in his opening brief relevant to summary judgment is whether Davis court intended that the Well Maintenance Agreement referenced the well he connected to Gould's property. Opening Brief, *passim*. That issue is discussed *infra* in section B. By failing to make any argument or reference any supporting facts or authority, Im has waived any argument disputing (1) that the Well Maintenance Agreement runs with the land; (2) that the Well Maintenance Agreement created an irrevocable easement; and (3) that Im acted intentionally to shut off Gould's water supply. *See* RAP 10.3 (a)(6); *Burback*, 56 Wn.2d at 877.

Im's brief discusses two issues with regard to the trial court's award of damages for lost profits from the sale of the Gould home. Those issues are discussed *infra* in section C. By failing to make any argument or reference any supporting facts or authority, Im has waived any

argument against the trial court's other award of damages. *See* RAP 10.3(a)(6); *Burback*, 56 Wn.2d at 877.

Im also assigns error to the court's conclusions denying Im's affirmative defense of failure to mitigate damages. Opening Brief, at 10-11. However, no section of Im's argument is devoted to this issue and no legal authority is cited. Opening Brief, *passim*. By failing to make any argument or reference any supporting facts or authority, this issue is not properly before the appellate court and is waived. *See* RAP 10.3(a)(6); *Burback*, 56 Wn.2d at 877.

B. Summary Judgment Was Appropriate: There Were No Disputed Material Facts and Im Is Liable for Intentionally Shutting Off Gould's Water Supply

When reviewing a motion for summary judgment, the appellate court is limited to the arguments and evidence called to the attention of the trial court. RAP 9.12. The purpose of summary judgment is to avoid the unnecessary time and expense of trial when the material facts are not in dispute. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980); *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 93, 969 P.2d 1078 (1998). A "material fact" is one on which the outcome

of the litigation depends. *Owen v. Burlington N. Santa Fe RR Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

When a motion for summary judgment is supported by affidavits or discovery responses, the responding party “must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” CR 56(e).

When reasonable minds could reach only one conclusion, then summary judgment is appropriate. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003); *Christiano*, 93 Wn. App. at 93. The party opposing summary judgment may not merely rely on speculation or unsupported assertions and inferences. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 397, 928 P.2d 1108 (1996).

In *Molsness v. City of Walla Walla*, a former employee sued his employer for wrongful termination. 84 Wn. App. at 395. The employee had resigned after receiving a memo from his supervisor recommending that he resign or face a hearing to determine whether he should be terminated for cause. *Id.* at 396–97. Under caselaw, an employee voluntarily resigns, thus defeating a claim of wrongful termination, if his resignation is a result of duress or is brought on by government action. *Id.* at 398–99. The city moved for summary judgment, arguing voluntarily

resignation. *Id.* at 397, 399. The employee alleged the reasons given for the threatened disciplinary action were pretextual, but also did not dispute them. *Id.* at 399. Similarly here, as set out in the following sub-sections, Im does not dispute the vast majority of the facts supporting the trial court's order granting summary judgment. Rather, he implores the court to adopt unreasonable inferences based on his mere speculation that are not supported by any offered facts.

1. *Im Did Not Show Any Material Dispute of Fact and Instead Seeks to Rely on Unreasonable Inferences Not Supported by the Evidence*

The court's primary task when interpreting a contract is to determine the drafters' intent. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). The reviewing court must give words in a covenant their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 115 P.3d 262 (2005). In order to be ambiguous, a covenant must be uncertain or two or more reasonable and fair interpretations must be possible. *White v. Wilhelm*, 34 Wn. App. 763, 771, 665 P.2d 407 (1983). But ambiguity is not a prerequisite for a court

to examine the context surrounding the execution of a contract. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990).

On summary judgment, the court considers all the material facts and all reasonable inferences derived from those facts. The undisputed facts were that:

- Daviscourt drafted the Well Maintenance Agreement in 1991 and recorded it twice in the public records of Mason County, CP at 227, 232–33, 257–61, 298;
- The Well Maintenance Agreement burdened at least one of the parcels owned by Im and benefited the Gould parcel, CP at 227, 259, 299;
- The Well Maintenance Agreement was specifically identified in every deed in the chain of title from Daviscourt to Gould, CP at 298 ¶ 12;
- The Well Maintenance Agreement was specifically identified in every deed in the chain of title from Daviscourt to Im, except the deed to Im, that identified “covenants, conditions, restrictions and easements, if any, affecting title, which may appear in the public record,” CP at 298 ¶ 12;

- It was common knowledge in the neighborhood that the Gould home's source of water was a well on Im's property, CP at 248–49, 250–51; and
- The Gould home had received water exclusively from the well on Im's property since before Davis court signed the Well Maintenance Agreement until Im shut off the water, CP at 95, 96, 99, 216, 250–51, 255, 284, 294–295, 324.

From these undisputed facts, the court concluded Davis court's intent was to bind the well on the Im property to serve the Gould property and granted reformation. CP at 215–17. Put another way, the court made the reasonable conclusion that the only error in the Well Maintenance Agreement was in the legal description.

Im's defense to these undisputed facts was to offer evidence that the Im property Davis court described in the Well Maintenance Agreement contained a creek (that Im erroneously called a well); that, as operated for over twenty-five years, the well may be in violation of the Mason County Code; and that he was confused by his seller's disclosures regarding the shared well. CP at 226–42.

Davis court must have intended to bind either the well or the creek when he wrote the Well Maintenance Agreement. There are no other

possibilities. If Im is allowed to unilaterally shut off the former Gould home's sole historic source of water for at least the past twenty-five years, that house will be left with no viable source of water. CP at 99; Ex. 6 (Gould home was sold); VPR at 68–69, 178–82, 232–36.

All the available evidence supports the conclusion that Daviscourt intended the well to be bound by the Well Maintenance Agreement. Im expects the court to disregard all these facts and to infer that Daviscourt meant to identify the creek and not the well when he wrote the Well Maintenance Agreement. For the reasons set out below, this expectation is manifestly *unreasonable*. This amounts to the same level of speculation the court refused to engage in *Molsness*. 84 Wn. App. at 399.

a. A creek is not a well

Washington defines a “Water Well” as “any *excavation* that is constructed when the intended use of the well is for the location, diversion, artificial recharge, observation, monitoring, dewatering or withdrawal of *groundwater*. Water wells include ground source heat pump borings and grounding wells.” WAC 173-160-111(53) (emphasis added); *see* CP 219.²

² The Hyatt declaration incorrectly references paragraph 52. The declarant clearly intended to refer to paragraph 53. A copy of WAC 173-160-111(52)–(53) is included as an appendix to this brief.

Im's surveyor, Daniel Johnson, characterized a creek on the Im property as a "surface water well." CP at 227 ¶ 4, 250–51. There is no such thing as a "surface water well."³ See WAC 173-160-111; CP at 219. Im's mischaracterization of a creek as a water well is an attempt to create an issue of fact where none existed. There was and is only one water well on the Im property. CP at 250–51, 258, 284–85. This one and only well is the only well that Daviscourt could have intended to subject to the Well Maintenance Agreement.

- b. Daviscourt connected the well to Gould's property when he owned all three parcels, long before drafting the Well Maintenance Agreement

The undisputed evidence was that Daviscourt set up the well to provide water to all his properties, three parcels sharing a single owner, sometime long before he drafted the Well Maintenance Agreement in 1991. CP at 258. As pointed out by Im, this use would not be a violation of the Mason County Code. CP at 245.

³ Im cites to WAC 173-160-111 for the proposition that surface water can meet the definition of a water well. However, that section only refers to "water well[s]" and "GWI[s]." A GWI is "groundwater under the direct influence of surface water" and is defined as "any water beneath the surface of the ground. . ." WAC 246-291-010. Copies of WAC 246-291-010 and WAC 173-160-111 are included in the appendix to this brief.

Im did not offer any evidence disputing that Daviscourt connected the Gould and Im properties to the well; rather, he offered his seller's Form 17 disclosures that made conflicting statements regarding the use of the shared well. CP at 229, 236–40. The disclosures stated the existence of a shared well in several places. CP 236–40 (questions 1(E), 2(A)(1), and 6(D)). Im cited to the question where the seller checked two boxes for “Private or publically owned water system” and for “Private well serving only the subject property” and ignored the fact that the seller separately hand-wrote that there was a “well” and a “shared well” on the property. CP at 236–40. This evidence is hardly relevant to show Daviscourt's intent some twenty-years earlier—the only issue related to summary judgment that is discussed on appeal. Rather, this evidence demonstrates that Im was on notice of the existence of the shared well, supporting the trial court's ruling granting summary judgment on knowing breach.

- c. Im's proposed inference regarding Daviscourt's intent is unreasonable

From the available facts, Im asks the court to make the unreasonable inference that Daviscourt intended the Well Maintenance Agreement to bind the creek on Im's property to serve both the Im and Gould properties rather than the well. CP at 244–47; Opening Brief 41–

43. To make this inference, the court must also infer that DavisCourt used the correct legal description, but made the following errors: (1) there was no well on the described parcel; (2) he had hooked up a well on the other Im parcel to both the Im and Gould properties; (3) he identified a pump for the well in the Well Maintenance Agreement but there is no pump on the creek; (4) he allowed for allocation of electricity costs for the well, but the creek does not use electricity; (5) he was using a surface water creek to supply water knowing that this was unsafe and illegal; (6) he identified an easement in the Well Maintenance Agreement but there was no utility easement on the described parcel; and many other errors.

Im did not offer any evidence that the Gould house was ever connected to the creek. Im did not offer any evidence to show the Im house was ever connected to the creek. It would be unreasonable to assume DavisCourt wrote a *Well* Maintenance Agreement for a source of water that is not a well, was never shared, and was never used as a source of potable water.

Instead, the court made the more reasonable inference that DavisCourt got all those facts correct and that his only error was in which of two legal descriptions identified the property with DavisCourt's one and only well. DavisCourt correctly described one of the two parcels he sold together and on the same deed, but it was the wrong one. CP at 260–61.

The evidence was also undisputed that the well Im disconnected was in fact the one that Davis court connected to the two properties. CP at 255, 257–58. It would be exceptionally odd for Davis court to connect his well to one of his properties and then write a document called a *Well Maintenance Agreement* giving the property rights to water from a creek—not a well—from which it was not, and had never, received water. Yet, this is what Im asks the court to infer without any supporting evidence.

2. *Gould Proved the Existence of the Mutual Mistake Made when Writing the Legal Description for the Well Maintenance Agreement*

Reformation following mutual mistake is a legal theory where the court changes the written word in a contract to reflect what was always the intent of the parties, not that the court is changing a written contract. *Tenco, Inc. v. Manning*, 59 Wn.2d 479, 483, 386 P.2d 372 (1962); *Meyer v. Young*, 23 Wn.2d 109, 114, 159 P.2d 908 (1945); *John Hancock Mut. Life Ins. Co. v. Agnew*, 1 Wn.2d 165, 176, 95 P.2d 386 (1939). When a document does not reflect the mutual intent of the parties, it will be reformed to show their true intent. *Tenco, Inc.*, 59 Wn.2d at 483, 485. When mutual mistake is alleged, parole evidence is always admissible to

establish the mistake, and parole evidence must be admitted to prevent an injustice. *John Hancock Mut. Life Ins. Co.*, 1 Wn.2d at 176–77.

One of the more frequent applications of reformation is to correct erroneously-written legal descriptions. *See, e.g., Tenco, Inc.*, 59 Wn.2d at 480–81; *Martin v. Momany*, 26 Wn.2d 379, 380, 384, 174 P.2d 305 (1946); *Meyer*, 23 Wn.2d at 114; *Dennis v. N. Pac.Ry Co.*, 20 Wash. 320, 321, 336, 55 P. 210 (1898).

In *Tenco, Inc. v. Manning*, the court corrected a legal description based on mutual mistake. 59 Wn.2d at 486. Ms. Manning sought to sell her twenty acres of real property within the Admiralty Heights tract in Island County, Washington. *Id.* at 480–81. Working with a real estate agent, she listed the property for sale and entered into an earnest-money agreement with Tenco. *Id.* at 481. The legal description incorrectly identified the property being sold as the entire Admiralty Heights tract, a fifty acre parcel. *Id.* at 480–81. The purchase price was a reasonable value for the twenty acres Manning sought to sell. *Id.* at 482. Tenco moved for summary judgment to determine the correct legal description; the parties learned of the mistaken legal description for the first time at summary judgment. *Id.* at 483. The trial court granted reformation, changing the legal description to identify only the twenty acres the parties sought to exchange. *Id.* at 486.

Similarly, in *Meyer v. Young*, the court reformed a legal description based on unilateral mistake and the appearance of fraud. 23 Wn.2d at 114. There, Meyer sought to purchase a property containing a house enclosed by a hedge and fence. *Id.* at 110. The physical appearance suggested that the property could have been subdivided into two or three plots at most; in fact, it had been subdivided into six plots. *Id.* The seller's earnest money agreement gave the property's street address and noted a more detailed legal description would be included with the closing documents. *Id.* at 112. The final legal description identified only two of the six plots Meyer thought he was buying. *Id.* at 113. The court found this to be fraud and, after determining that neither party would receive a windfall, reformed the contract to include all six plots. *Id.* at 114–15.

As in *Tenco, Inc.*, no one here was aware that the Well Maintenance Agreement contained an incorrect legal description until after Im shut off the water. *Id.* at 483. For over twenty-five years, successive owners of both properties had used the well to supply their homes with water. As in *Tenco, Inc.*, any mistake in drafting the Well Maintenance Agreement was mutual because Davis court was both grantor and grantee. CP 257–61. In *Tenco, Inc.*, the evidence showed that both parties intended to identify only the twenty acres owned by Manning. 59 Wn.2d at 483. In *Meyer*, the evidence showed that any observer would

have understood that the entire enclosed property was being sold. 23 Wn.2d at 110–112, 114. Here, Davis court all Davis court’s successors in interest for over twenty-five years, and that all outside observers understood was the well from which Gould’s property received water. CP at 95, 96, 99, 216, 250–51, 284, 294–295, 298, 324.

Im seeks to rely on the erroneous legal description as evidence that the legal description is correct. Opening Brief, 38–42. If this proposition was accepted, no court would ever grant reformation. The only evidence Im offers to support his proposed inference that the legal description is correct is that there is a creek on the described parcel. Opening Brief, at 41; CP at 227. Otherwise, he asks the court to make unreasonable inferences; inferences the trial court rejected. CP at 215–17. As in *Tenco, Inc.*, the court properly granted reformation not to change the intent of the parties, but to correct the written record of their agreement to reflect what had always been the mutual intent of the drafting parties and their successors.

3. *Im Waived Any Objection to Gould’s Supporting Affidavits Because He Did Not Properly Raise an Objection Before the Trial Court*

A motion for summary judgment may be supported by affidavits or declarations made on personal knowledge that set forth facts that would be admissible in evidence. CR 56(e). Failure to make a timely objection before the trial court that states the specific grounds of the objection waives the objection on appeal. ER 103(a); ER 402; RAP 2.5(a); *DeHaven v. Gant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986). A party who objects to affidavits supporting summary judgment must either (1) identify the deficiencies with specificity in his responsive brief or (2) move to strike the offending statements before entry of summary judgment. *Parkin v. Colocousis*, 53 Wn. App. 649, 652, 769 P.2d 326 (1989). Failure to make a timely objection or move to strike waives the objection. *Bonneville v. Pierce County*, 148 Wn. App. 500, 508–09, 202 P.3d 309 (2008); *Turner v. Kohler*, 54 Wn. App. 688, 692 n.1, 775 P.2d 474 (1989). The court will not consider issues in a summary judgment motion that are raised for the first time on appeal. RAP 2.5(a); *E. Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 709 n.1, 724 P.2d 1009 (1986); *Ashcraft v. Wallingford*, 17 Wn. App. 853, 860, 565 P.2d 1224 (1977).

In his response to summary judgment, Im alleged that Gould's motion "relies heavily on unsubstantiated hearsay and other inadmissible evidence." CP at 244. At no point did Im identify any particular

offending affidavit or statement that was objectionable. *See* CP at 243–47. Absent specific objections, Im’s arguments about admissible evidence are waived on appeal. *Parkin*, 53 Wn. App. at 652.

On appeal, Im attempts to recharacterize his arguments about inadmissible hearsay as lack of personal knowledge and, therefore, avoid his waiver. Opening Brief, at 38–40. Im argues that the affidavits “are riddled with hearsay and conclusory statements that are without foundation,” *Id.* at 40, and that Davis court’s affidavit was not did not show sufficient personal knowledge, *id.* at 39–40. These objections go to the weight of the evidence and, as set out above, the statements’ admissibility went *undisputed* before the trial court. Taken as a whole, there was sufficient evidence to prove Im’s liability and Im did not present any material facts which disputed that liability. Summary judgment on liability was appropriate.

C. The Judgment Following Trial Must Be Affirmed

On appeal following a bench trial, the appellate court’s review is limited to determining whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *Standing Rock Homeowners Ass’n v. Misich*, 106 Wn. App. 231, 242–43, 23 P.3d 520 (2001). Substantial evidence is the “quantum of evidence sufficient to

persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The appellate court must make all reasonable inferences in the light most favorable to the judgment. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). There is a presumption in favor of the judgment and the party alleging error has the burden of showing a finding of fact is not supported by substantial evidence. *Fisher Props. V. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Though the trier of fact is free to believe or disbelieve any evidence presented at trial, "[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). Unchallenged findings are verities on appeal. *Hill*, 123 Wn.2d at 644.

1. *Only Gould's Lost Profits from the Sale of the Home are Appealed. Im Does not Appeal the Award for Lost Landscaping and Other Damages of \$16,526.00 plus Prejudgment Interest and Retrial on Those Issues is Unnecessary.*

Unchallenged legal conclusions are waived. Im does not appeal Finding of Fact 24, CP at 98, identifying the lost landscaping caused by Im shutting off Gould’s water supply. This finding is a verity on appeal and retrial on this aspect of damages is inappropriate regardless of this court’s ruling on the issues that are appealed.

Likewise, the findings and conclusions that Im intentionally breached the Well Maintenance Agreement with respect to the trial on damages are not appealed and are verities or are waived.⁴ In unchallenged findings of fact and conclusions of law following trial, the court found that Im acted intentionally both when he disconnected Gould’s source of water and when he refused to reconnect it or allow Gould to reconnect it. CP at 96, 101–02 (Findings of Fact 16 and 17; Conclusions of Law 6–9). This renders retrial on the intentional nature of Im’s conduct inappropriate, regardless of this court’s ruling on the issues that are appealed.

*2. The Measure of Foreseeability is Raised for the First
Time on Appeal and the Lost Sale Value Was
Foreseeable and was Caused by Im’s Breach*

⁴ Findings of Fact 16, 17; Conclusion of Law 6–9. CP at 96, 101–02. The findings and conclusions are also supported by substantial evidence. Im testified that he shut off the water intentionally. VRP at 59, 75–76, 262–63. Gould’s contractor, Eric Mueller, testified that the damages to the well could not have been an accident—he used the word “sabotage.” VRP at 60, 72–76.

Im raises two arguments with respect to the trial on damages. First, that the damages related to lost value at sale were not reasonably foreseeable. Opening Brief, at 46–48. Second, that there was not sufficient evidence of the nature and extent of Gould’s damages, i.e. that they were “improperly based on speculation.” Opening Brief, at 46; *accord id.* at 48–50.

Damages are recoverable if they are foreseeable. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 6, 390 P.2d 677 (1964); Restatement (2d) of Contracts § 351 (1981). Damages are foreseeable if they occur in the ordinary course of events. *Larsen*, 65 Wn.2d at 7; Restatement (2d) of Contracts § 351 (1981). If the injury happens as a result of the ordinary course of events following the breach, that is reason enough for the defendant to foresee it. *Larsen*, 65 Wn.2d at 10. “It does not require that the defendant should have had the resulting injury actually in contemplation.” *Id.* at 7.

The Court will not consider an argument raised for the first time on appeal. RAP 2.5(a); *E. Gig Harbor Improvement Ass’n*, 106 Wn.2d at 709 n.1; *Shelton v. Powers*, 111 Wash. 302, 303, 190 Pac. 900 (1920); *Ashcraft*, 17 Wn. App. at 860. Preserving an issue does not mean merely raising it in some passing manner, but with sufficient detail to allow the

trial court to know the issues and legal precedent before deciding the issue. *E. Gig Harbor Improvement Ass'n*, 106 Wn.2d at 709 n.1.

At trial, Im disputed whether Gould's damages were foreseeable to Im. VRP at 141–45. Following trial on damages, entry of findings of fact and conclusions of law, and entry of final judgment, Im filed two post-judgment briefs seeking reconsideration of the court's decision.⁵ CP 53–57, 73–87. Im raised issues of illegality, CP at 74–76, unclean hands, CP at 76–78, irregularity at trial, CP at 78–83, excessive damages, CP at 83–85, statutory notice, CP at 86, and the court's authority to amend the judgment under the civil rules, CP at 53–57. Im argued that the damages were not foreseeable to Im and did not claim that foreseeability should be measured from anyone other than Im. *See* CP at 83–85. On appeal, Im argues for the first time that foreseeability should be measured against Davis court. Any argument that the court considered the wrong measure of foreseeability is waived.

Even if Im's foreseeability issue is properly before this court, Im is seeking the wrong remedy. Appellate courts do not find facts or make conclusions. *Quinn*, 153 Wn. App. at 717. Appellate courts examine whether the findings support the conclusions made. *Id.* The proper remedy if the appellate court holds that the trial court's findings of fact do

⁵ The defendant also made an unsuccessful motion to recue counsel for the plaintiff; however, that motion is not part of the record on appeal. *See* VRP at 257–59.

not support its conclusions of law is to remand for the trial court to determine whether it should enter new findings based on the evidence that was before it at trial, whether it should hear additional testimony and evidence, or whether it should order a new trial. *See Preview Props., Inc. v. Landis*, 161 Wn.2d 383, 389, 165 P.3d 1 (2007).

If Im's new issue of foreseeability is properly before the appellate court, Gould was not required to show that the magnitude of his damages was foreseeable, only that it was foreseeable that he would not be able to sell the house if it was deprived of a source of water. *See Larsen*, 65 Wn.2d at 6–10; *Pettaway v. Commercial Automotive Svcs., Inc.*, 49 Wn.2d 650, 655, 306 P.2d 219 (1957); *Alpine Inds. v. Gohl*, 30 Wn. App. 750, 754, 637 P.2d 998 (1981), *amended at* 645 P.2d 737 (1982); 6A *Washington Practice: Washington Pattern Jury Instructions: Civil* 303.03, .04 (5th ed. 2011); Restatement (2d) of Contracts § 351 (1981).

Both the Gould's expert Boad and Im's expert Hyatt testified that without potable water, a home cannot be sold. VRP at 126, 178–82. Boad further testified that even if there was a source of water, but that continued access was disputed, the home would be unsellable. VRP at 126. In its oral ruling, the court announced that “one doesn't need an expert to tell you you can't sell a residence that doesn't have a source of water.” VRP at 308. The lost sale value naturally flows from this foreseeable inability

to sell the home. *See Larsen*, 65 Wn.2d at 10. Even if foreseeability is properly raised at this late date, substantial evidence supports the trial court's findings and conclusions.

3. *The Damage Award is Within the Trial Court's Discretion*

Once it is shown that a particular type of damages is foreseeable, damages will only be awarded if they are reasonably certain to the finder of fact. *Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 711, 257 P.2d 784 (1953); *Shields v. Garrison*, 91 Wn. App. 381, 388, 957 P.2d 805 (1998), *amended at* 967 P.2d 1266; Restatement (2d) of Contracts § 350, comment a. Reasonable certainty means the evidence “is sufficient to afford a reasonable basis for estimating [the plaintiff's] loss, he is not to be denied recovery because the amount of the damages is incapable of exact ascertainment.” *Larsen*, 65 Wn.2d at 16. The degree of certainty required is reduced when the breaching party intentionally breached the contract. Restatement (2d) of Contracts § 380, comment a. This is so because the law will not allow a party intending to act wrongfully to then benefit from the uncertainty created by his own intentionally malicious act. 25 David K. DeWolf and Keller W. Allen, *Washington Practice: Contracts Law and Practice* § 14:9 (2007). Any

doubts about reasonable certainty are resolved against the party who breached the contract. Restatement (2d) of Contracts § 352.

The rule of reasonable certainty only applies to the fact of damage, usually acting as a bar to recovery for lost profits when a business is so new that their profits are mere speculation. *Gaasland Co.*, 42 Wn.2d at 712. Once the existence of the damages is proven with reasonable certainty, the trial court is not bound by the limit of reasonable certainty and is free to make reasonable inferences as to approximate amounts. *Gaasland Co.*, 42 Wn.2d at 713; *see Larsen*, 65 Wn.2d at 18–21. The appellate court will reverse the amount of the damage award only if the amount actually awarded is outside the range of substantial evidence, shocks the conscience, or appears to be the result of passion or prejudice. *Federal Signal Corp. v. Safety Factors*, 125 Wn.2d 413, 439, 886 P.2d 172 (1994); *see King County v. Sheehan*, 114 Wn. App. 325, 335, 57 P.3d 307 (2002) (abuse of discretion standard); 25 *Wash. Prac.: Contracts Law and Practice* § 14:9 (abuse of discretion standard).

Regardless of whether Im's intentional conduct affected the court's decision on summary judgment, the court reserved determination of all issues related to damages from its summary judgment ruling. CP at 216; VPR at 58. The parties properly raised the intentional aspect of Im's acts in the damages trial. It was relevant to damages because of the affect on

the degree of certainty required to prove damages. *See* Restatement (2d) of Contracts § 380, comment a. Im testified that he intentionally turned off Gould's water multiple times. VRP at 59, 75–76, 262–63. In response to Im's pretrial motion in limine to exclude evidence of Im's intentional conduct, the court ruled that it was only considering the intentionality of Im's conduct at trial for the purposes of determining damages. VRP at 58. As noted above, it is uncontested on appeal that Im intentionally breached the Well Maintenance Agreement. The intentional nature of these acts reduces the degree of certainty required for Gould to show damages.

At trial, Gould's expert witness, Butch Boad, testified that he would have listed the Gould home for \$1.6 million if it had water in 2007 and gave lengthy testimony as to how he had reached that price. VRP at 125–32. Both Boad and Jef Conklin testified how that number was reached, that it was an accurate number, and that Boad's historic sales in that market were at over 97% of the listed price. *Id.* at 125–32, 165–70; Ex. 6. Boad and Conklin also testified that there were still ready, willing, and able buyers for homes on Hood Canal over \$1 million until well after Im breached the Well Maintenance Agreement. VRP at 136–37, 174–75. It is undisputed that after Boad decided on a list price, Im disconnected Gould's water. Boad also testified that a home is unsellable without a source of potable water or if there is an ongoing dispute over that source.

VRP at 126. Im's expert Arlene Hyatt testified that it would be nearly impossible to connect the Gould home to the South Shore Water System—the only alternative source of water—and that, even if it could be done, that it would probably cost tens of thousands of dollars and ten to fifteen years. VRP at 178–82 (no alternate sources), 232–36 (infeasible to connect to South Shore system). Taken together, Boad's and Hyatt's testimony establishes that the lost sale was caused by Im's breach of the Well Maintenance Agreement. Boad's and Conklin's testimony establishes the probable sale price would have met or exceeded \$1,555,000.00.

Because this is not an actual sale, there is an inherent degree of uncertainty. However, the accuracy of Boad's and Conklin's testimony was not seriously challenged on cross-examination and Im did not put on any experts with conflicting opinions. Any uncertainty must be viewed in the light that this uncertainty was created by Im's intentional breach of the Well Maintenance Agreement. Taken in the light most favorable to the prevailing party, the damages are supported by substantial evidence and must be affirmed.

IV. CONCLUSION

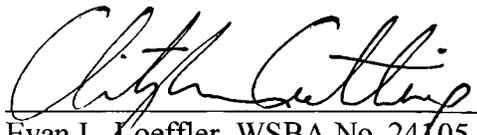
Ultimately, this appeal is about two narrow issues. First, did the trial court properly grant summary judgment on liability when no evidence

supported the defendant's arguments and they could only be true if the court made unreasonable inferences in the defendant's favor? The evidence presented to the trial court, much of which was uncontested before the trial court and is undisputed on appeal, showed that the trial court acted properly. Any trial would have been a needless waste of scarce judicial resources.

Second, were the damages the trial court awarded for lost sale value reasonably foreseeable, based on reasonably certain evidence that damages existed, and reasonable estimates that did not shock the conscience? To the extent the issue is properly raised, the trial court stated in its oral decision that it did not even need expert testimony to show the damages were foreseeable. Any uncertainty is the result of Im's malfeasance and the exact award was within the range of the trial court's discretion. The trial court should be affirmed in all respects.

Respectfully submitted this 14th day of December, 2011.

LAW OFFICE OF EVAN L. LOEFFLER PLLC



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Certificate of Service

I hereby certify that on December 14, 2011, I caused to be served the foregoing on the following parties by delivering to the following address:

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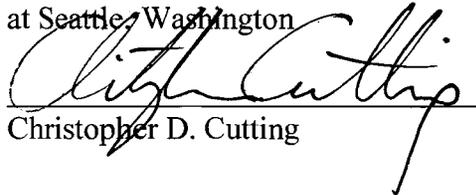
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DATED December 14, 2011, at Seattle, Washington


Christopher D. Cutting

Appendix of Washington Administrative Code

WAC 173-160-111 What are the definitions of specific words as used in this chapter?

...

(52) "Unconsolidated formation" means any naturally occurring, loosely cemented, or poorly consolidated earth material including such materials as uncompacted gravel, sand, silt and clay.

Alluvium, soil, and overburden are terms frequently used to describe such formations.

(53) "Water well" means any excavation that is constructed when the intended use of the well is for the location, diversion, artificial recharge, observation, monitoring, dewatering or withdrawal of groundwater. Water wells include ground source heat pump borings and grounding wells.

WAC 246-291-010 Definitions.

Abbreviations:

...

GW I - groundwater under the direct influence of surface water;

...

"Groundwater under the direct influence of surface water (GW I)" means any water beneath the surface of the ground, which the department determines has the following characteristics:

Significant occurrence of insects or other macroorganisms, algae, or large-diameter pathogens such as *Giardia lamblia*; or

Significant and relatively rapid shifts in water characteristics such as turbidity, temperature, conductivity, or pH closely correlating to climatological or surface water conditions.

...

"Surface water" means a body of water open to the atmosphere and subject to surface runoff.

WAC 246-291-110 Surface water and GWI source approval and protection.

(1) The owner shall ensure that drinking water is obtained from the highest quality source feasible. Existing sources shall conform to the primary water quality standards established in this chapter. Proposed sources shall conform to the primary and secondary water quality standards established in this chapter. The owner shall be responsible for submitting evidence required by the department to determine whether a proposed groundwater source is a GWI.

(2) No new source, previously unapproved source, or modification of an existing source shall be used as a drinking water supply without department approval. As of the effective date of these rules, the department shall no longer approve new or expanding surface water or GWI sources unless the department determines they meet the following conditions:

(a) The system is under the ownership and operation of a department of health approved satellite management agency; and

(b) Continuous effective treatment, including filtration, disinfection and any other measures required under chapter 246-290 WAC are provided.

(3) An owner seeking source approval shall provide the department:

(a) A copy of the water right permit, if required, obtained from the department of ecology for the source, quantity, type, and place of use;

(b) A copy of the source site inspection approval made by the department or local health jurisdiction representative;

(c) Upgradient water uses affecting either water quality or quantity;

(d) A map showing the project location and vicinity;

(e) A map depicting topography, distances to the surface water intake or GWI source from existing property lines, buildings, potential sources of contamination, ditches, drainage patterns, and any other natural or man-made features affecting the quality or quantity of water;

(f) For GWI sources:

(i) A map depicting topography, distances to well or spring from existing property lines, buildings, potential sources of contamination within the six hundred foot radius around the well, and any other natural or man-made features affecting the quality or quantity of water;

(ii) Copies of the recorded legal documents for the sanitary control area;

(iii) A copy of the water well report if applicable;

(iv) A general description of the recharge area affecting the quantity or quality of flow. Seasonal variation shall also be included;

(v) Well development data establishing source capacity. Data shall include static water level, yield, amount of drawdown, recovery rate and duration of pumping. The source shall be pump tested to determine whether the well and aquifer are capable of supplying water at the rate desired and to provide information necessary to determine proper pump settings. A department guideline titled Group B Water System Approval is available to assist owners.

Existing and proposed sources shall conform to the well construction standards established under chapter 173-160 WAC if applicable.

(g) Documentation of totalizing source meter installation;

(h) An initial analysis result of raw water quality from a certified lab, including as a minimum, a bacteriological, and complete inorganic chemical and physical analysis of the source water quality;

(i) In areas where the department determines that other contamination may be present, or at the discretion of the department, sample results for these contaminants may also be required;

(j) If water quality information from (h) and (i) of this subsection shows a contaminant level of concern, the department may require further action by the owner; and

(k) If water quality results taken from the proposed source confirm a primary MCL violation, the owner shall ensure that appropriate treatment is provided which shall eliminate the public health risk to consumers served by the system.

(4) Watershed control program.

(a) Owners of new or expanding surface water or GWI sources shall ensure the development and submittal of a watershed control program to the department for review and approval. Once approved, the owner shall implement the program.

(b) This program shall be part of the water system plan required in WAC 246-291-140.

(c) The owner's watershed control program shall contain, at a minimum, the following elements:

(i) Watershed description and inventory, including location, hydrology, land ownership and activities which may adversely affect water quality;

(ii) Watershed control measures, including documentation of ownership and relevant written agreements, monitoring procedures and water quality;

(iii) System operation, including emergency provisions; and

(iv) Documentation of water quality trends.

Sections in the department guideline titled Planning Handbook and in the DOH SWTR Guidance Manual address watershed control and are available to owners.

(d) The owner shall ensure submittal of the watershed control program to the department for review and approval. Following department approval, the owner shall ensure implementation as approved.

(e) The owner shall update the watershed control program at least every six years, or more frequently if required by the department.