

DEC 11 2012

NO. 307956

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION III

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KEVIN GRUDZINSKI,

Appellant.

v.

RANDY GRUDZINSKI, et ux.

Respondents.

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AMENDED OPENING BRIEF OF RESPONDENTS

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Nancy Grudzinski

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## I. ISSUES PRESENTED FOR REVIEW

### *Assignments of Error*

Respondents Randy and Nancy Grudzinski assign no error to the trial court's summary judgment dismissal of Appellant Kevin Grudzinski's claims.

### *Issues Pertaining to Assignments of Error*

Respondents disagree with the Appellant's statement of issues. Respondents believe the issues on appeal are more properly stated as follows:

1. Was it proper for the trial court to dismiss the MTCA claim when there is no evidence Randy Grudzinski transported a "hazardous substance" to the property or any other evidence to support a private cause of action for contribution under MTCA?
2. Assuming Elsie Grudzinski had a negligence claim against Randy Grudzinski based on dumping construction debris on the property, did the negligence claim pass to Kevin through the estate where Elsie's personal representative knew about the construction debris and the potential cleanup costs and took them into consideration when he decided how to distribute the assets of the estate?
3. Is Kevin Grudzinski entitled to equitable relief with regard to construction debris Randy Grudzinski dumped on the property when he

already received \$25,000.00 from the estate specifically for the estimated cleanup costs and he has unclean hands?

4. In light of the facts of this case, is there a basis for a quiet title action?

5. Did the trial court abuse its discretion when it granted defendant's motion for leave to have his motion for summary judgment heard 11 days before trial when plaintiff had notice of the hearing 45 days before trial and plaintiff failed to establish how he would be unfairly prejudiced by having the hearing 11 days before trial?

## **II. STATEMENT OF THE CASE**

This underlying lawsuit arises out of a dispute between two brothers: Kevin and Randy Grudzinski. CP 2. The dispute is related to several parcels of land totaling 57.04 acres, which are located along Bearsville Lane, Electric Avenue, Myra Road, South Gose Street, and Hatch Street in Walla Walla, Washington (collectively referred to as "the property"). CP 2. The property was previously owned by the parties' deceased mother, Elsie Grudzinski. CP 2.

At all times material hereto, Randy Grudzinski owned an excavation company called Randy Grudzinski, Inc. CP 52. In 2007, Apollo, Inc. hired Randy's excavation company as a subcontractor on a construction project. CP 52. During the construction project, Randy's

company dumped construction debris on one of the parcels that make up the property. CP 52. The debris consisted of asphalt, concrete, vegetation, tree stumps, and pit-run gravel. CP 52. This debris was dumped with the knowledge and consent of Elsie Grudzinski. CP 52. At the time that Randy's company had a subcontract with Apollo, Inc., Elsie Grudzinski also had a contract with Apollo, Inc., which authorized Apollo, Inc. to dump fill dirt (dirt and vegetation) on one of the parcels that make up the property. CP 52.

Elsie Grudzinski died on May 13, 2009. CP 50. Article II of her Last Will and Testament provides as follows:

I am concerned that my children will argue over the disposition and management of my estate after my death. It is my intention by naming a non-family member to act as Personal Representative of my estate to avoid conflict between my children. **Therefore, should either of my children contest the terms of my Will or the manner in which my Personal Representative is handling the resolution of my estate, said child shall receive the sum of ONE DOLLAR (\$1.00) and otherwise receive nothing under this Will, said share to pass to my other child.** Additionally, anyone contesting the terms of this Will or the management of my estate by my designated Personal Representative shall be responsible for the attorney fees and costs incurred by my Personal Representative in defending the Will and the actions of the Personal Representative.

Neither of my children shall have any involvement in the management nor disposition of my estate unless assistance is specifically requested by my Personal Representative. **In furtherance of my effort to avoid controversy, I suggest**

**to my Personal Representative that all of my assets be sold at market value with any property that is unable to be sold to be donated.** CP 50-51, CP 31-32 (emphasis added).

In her will, Elsie made a few specific bequests of personal property, but she wanted the rest of her estate, including all of her real estate, to pass 60% to Kevin and 40% to Randy. CP 38, CP 31-35. Neither Randy nor Kevin wanted the court-appointed personal representative, Thomas Sawatzki, to sell the real estate. CP 38-39, CP 43. Therefore, Mr. Sawatzki, worked hard to develop a plan for dividing the real estate between the brothers. CP 38-39. In a declaration Mr. Sawatzki submitted in the probate, he states the following:

While I had the choice of selling all of the property, both real and personal, after meeting with Kevin and Randy individually, it was obvious that each was emotionally attached to both the land and many items of personal property. Accordingly, I established a plan to allow each to acquire some of the personal property and some of the land.

Dealing with the land was time consuming as well because of the **appraisal issues, environmental issues, clean up issues, and the need to divide the land so that Kevin and Randy would not be sharing boundaries.** CP 43 (emphasis added).

Mr. Sawatzki knew about the construction debris when he decided how to distribute the property. CP 39. He hired a real estate appraiser to value the property. CP 39. Mr. Sawatzki also obtained estimates for the cost of removing the construction debris from the property. CP 39, CP

131. Based on the estimates he obtained, Mr. Sawatzki gave Kevin an additional \$25,000.00 from the estate specifically for the estimated clean up costs. CP 39, CP 131, CP 133.

On September 16, 2010, Kevin accepted the allocation of the property and signed a release waiving all claims against Mr. Sawatzki related to serving as personal representative of the estate. CP 39. At the same time, Kevin was in the process of filing a lawsuit against Randy for money damages and equitable relief related to the property. CP 51. In fact, on September 15, 2010, the day before Kevin accepted Mr. Sawatzki's allocation of the property and signed the release, Kevin filed this lawsuit against Randy and his wife Nancy seeking \$365,000.00 in damages related to the construction debris on the property, as well as equitable relief related to the real property he received from the estate. CP 51. In particular, the Complaint states five causes of action: (1) Violation of Washington's Model Toxics Control Act ("MTCA"), (2) Negligence, (3) Equity, (4) Quiet Title, and (5) Implied Easement for Water Rights. CP 1-10. Kevin's claims against Nancy arise solely out of the alleged acts and omissions of Randy. CP 1-10.

On February 9, 2012, Randy's attorney contacted the court to get a hearing date for a motion for summary judgment of dismissal. CP 67. Judge Lohrmann's judicial assistant set the hearing for March 15, 2012,

which was 11 days before the trial was scheduled to start. CP 67. On February 9, 2012, the same day the hearing was set and 45 days before trial, Randy's attorney served Kevin's attorney with a Note for Motion for the March 15, 2012 hearing date. CP 67. On February 16, 2012, defense counsel filed and served Defendants' Motion for Summary Judgment. CP 15-27. Kevin's attorney filed a motion to strike the summary judgment on the basis that the hearing was less than 14 days from the trial date. CP 56. In response to the motion to strike, Randy's attorney filed a motion for leave of court to have the summary judgment motion heard less than 14 days before trial. CP 63-66.

At the hearing on March 15, 2012, the trial court denied Kevin's motion to strike. CP 196-197, CP 200. Moreover, the trial court granted Randy's motion for summary judgment and entered an order dismissing all of Kevin's causes of action against Randy and Nancy, except the cause of action for an implied easement. CP 203-204. The implied easement claim was dismissed pursuant to a stipulation of the parties on April 18, 2012. CP 211-212.

### **III. SUMMARY OF ARGUMENT**

The trial court properly granted summary judgment of dismissal because (1) there is no evidence Randy Grudzinski dumped a "hazardous substance" on the property; (2) there is no evidence to support a private

cause of action for contribution under MTCA; (3) Elise Grudzinski's alleged negligence action against Randy Grudzinski did not pass through her estate to Kevin Grudzinski; (4) there is no cloud on the title; (5) the underlying facts do not support Kevin Grudzinski's request for equitable relief; and (6) the trial court did not abuse its discretion by allowing the hearing to take place 11 days before the trial.

#### **IV. ARGUMENT**

##### **A. The Trial Court Properly Granted Summary Judgment of Dismissal.**

###### **1. The standard of review is de novo.**

This court reviews an order granting summary judgment de novo. *Green v. A.P.C. (Am. Pharmaceutical Co.)*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). A defendant is entitled to a summary judgment of dismissal where a plaintiff lacks competent evidence to make a prima facie case. *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989), (quoting *Celotex v. Catrett*, 477 U.S. 317, 322 (1986)). A moving defendant may meet this burden by showing that the plaintiff lacks the requisite evidence to support his case. *Young* at 225. Once the initial burden is met, the burden shifts to the plaintiff to rebut the defendant's proof. *Id.* Summary judgment is appropriate when the plaintiff is unable to demonstrate the existence of an element essential to the case on which

he bears the burden of proof. In *Celotex*, the United States Supreme Court explained:

In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other facts immaterial.

*Celotex*, 477 U.S. at 322-23.

A plaintiff may not rely on the bare allegations in his pleadings to defeat summary judgment, but must set forth specific facts showing that there is a genuine issue for trial. *Baldwin v. Sisters of Providence, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Additionally, a plaintiff cannot use speculation or conjecture to defeat a motion for summary judgment. *See, Mathis v. H.S. Kress Co.*, 38 Wn.2d 845, 847, 232 P.2d 921 (1951).

**B. Kevin Grudzinski Failed to Satisfy the Elements of a MTCA Claim.**

Washington's Hazardous Waste Cleanup-Model Toxics Control Act ("MTCA") is codified in RCW 70.105D. Under MTCA, a person may bring a private cause of action, including a claim of contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs.<sup>1</sup> Recovery of remedial action costs are limited to those remedial actions that, when

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<sup>1</sup> RCW 70.105D.080

evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action.<sup>2</sup> The term “remedial action” is defined as “any action or expenditure consistent with the purpose of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment...”<sup>3</sup> The term “hazardous substance” is specifically defined in RCW 70.105D.020(10).<sup>4</sup>

**1. There is no evidence Randy Grudzinski transported a “hazardous substance” to the property.**

RCW 70.105D.040(d) provides, in pertinent part, that “any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required,...; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is

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<sup>2</sup> RCW 70.105D.080

<sup>3</sup> RCW 70.105D.020(26)

<sup>4</sup> “Hazardous substance” means:

(a) Any dangerous or extremely hazardous waste as defined in RCW 70.105.010 (1) and (7), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter 70.105 RCW;

(b) Any hazardous substance as defined in RCW 70.105.010(10) or any hazardous substance as defined by rule pursuant to chapter 70.105 RCW;

(c) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

not operated in accordance with chapter 70.105 RCW” is liable for remedial action costs.

There is no evidence Randy Grudzinski transported a “hazardous substance” to the property, including hazardous substances from the Stubblefield site. Kevin Grudzinski was deposed on February 28, 2012.

At his deposition, Kevin testified as follows:

Q: Right, right. But again, it would have been Apollo or somebody that Apollo contracted with to dump the Stubblefield material on your mother’s property?

A: Uh-huh.

Q: Is that yes?

A: Yes. Sorry.

Q: And again, just so the record’s clear, you can’t say whether that included Randy or an employee of Randy’s company?

A: Not specifically.

...

Q: To your knowledge, did Randy dump any toxic materials on the property you inherited from your mother?

A: I have not – I don’t know.

CP 179, page 58, lines 14-23; CP 180, page 95, lines 8-11.

Kevin claims he saw Randy’s trucks leaving the Stubblefield site and headed towards his mother’s property, but he did not actually witness

Randy or any of his employees dumping material from the Stubblefield site on his mother's property. CP 118, lines 11-15; CP 179, pages 57-58. Kevin's suspicion that Randy or his employees dumped material from the Stubblefield site on his mother's property is pure speculation and conjecture.

Moreover, Randy Grudzinski did not dump, or caused to be dumped, any material from the Stubblefield site on his mother's property. CP 188, page 91, lines 8-11. Apollo, Inc. was the general contractor of the Myra Road Extension Project, which cut through the middle of the Stubblefield site. CP 186, pages 66-68. Apollo did the excavation work on the Stubblefield site. CP 186, pages 66-68. All the dirt and other material from the excavation work on the Stubblefield site was dumped by Apollo or one of Apollo's subcontractors on another section of the Stubblefield site. CP 186, pages 66-68. In 2009, after the project was completed, the EPA tested the portion of the Stubblefield site Apollo used as the dumpsite and concluded there were no environmental concerns. CP 187, pages 69-70. Accordingly, Kevin's assumption that the entire Stubblefield site was contaminated is erroneous. Furthermore, there is no evidence any of the dirt and other material Randy allegedly transported from the Stubblefield site contained hazardous substances.

In his Complaint, Kevin alleges Randy dumped, or caused to be dumped, substantial amounts of “logs, stumps, concrete, asphalt and materials of as yet unknown content” on the property. CP 2, lines 23-26. However, Randy only dumped hardened asphalt, concrete, vegetation, tree stumps, and pit-run gravel on the property. CP 52, lines 2-5. Randy did not dump any “hazardous substances” on the property. Although hardened asphalt is a petroleum-based product, it does not pose a threat or potential threat to human health or the environment. *City of Seattle v. Washington State Dept. of Transp.*, 98 Wn. App. 165, 176-77, 989 P.2d 1164 (1999). In *City of Seattle v. Washington State Dept. of Transp.*, not only did the court conclude that hardened asphalt was not a “hazardous substance,” the parties agreed it was not a “hazardous substance.” *Id.* at 177.

**2. There is no evidence to support a private cause of action for contribution under MTCA.**

A party seeking contribution under MTCA bears the burden of establishing he is entitled to contribution. *City of Seattle v. Washington State Dept. of Transp.*, 98 Wn. App. 165, 176, 989 P.2d 1164 (1999). Before a court may allocate remedial action costs in a contribution action under MTCA, a party seeking contribution must

demonstrate that the defendant's hazardous substance contributed to a threat or potential threat to human health or the environment. *Id.*

As stated above, there is no evidence Randy Grudzinski transported a "hazardous substance" to the property. Moreover, there is no evidence the property Kevin Grudzinski inherited is contaminated with a "hazardous substance." That is, Kevin Grudzinski did not have the property tested for hazardous substances. CP 179, page 60, lines 8-10. Kevin's suspicion that Randy dumped a "hazardous substance" on the property is pure speculation and conjecture.

Kevin Grudzinski is seeking money damages for remedial action costs. CP 4-5. However, he has not incurred any cleanup or other remedial action costs. CP 180, page 95, lines 12-15. Additionally, he did not obtain a remedial action report or any proposals or estimates for remedial action costs. In short, there is no factual basis for calculating damages for remedial action costs related to the cleanup of the alleged "hazardous substance".

Appellant cites two cases – *Dash Point Village Associates v. Exxon Corp.*, 86 Wn. App. 596, 613, 937 P.2d 1148 (1996) and *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 144 P.3d 1185 (2006) – to support his argument that "[n]othing in the statute precludes a finding of liability for future remediation costs." The cases appellant cited differ from the

present case in three significant ways. First, the claimants in both cases presented evidence to establish the property was contaminated with a “hazardous substance.” *Dash Point*, 86 Wn. App. at 598-600; *Taliesen Corp.*, 135 Wn. App. at 112-116. Second, the claimants in both cases presented evidence to establish the defendants were responsible for contaminating the property with a “hazardous substance.” *Id.* Finally, the claimants in both cases retained environmental consultants who prepared remedial action reports, which could be evaluated to determine if the remedial action satisfied the “substantial equivalent” requirement. *Dash Point*, 86 Wn. App. at 600; *Taliesen Corp.*, 135 Wn. App. at 115-116.

The Department of Ecology considers a party’s independent remedial action to be the substantial equivalent of a “department-conducted or department-supervised remedial action” if the following elements are satisfied: (1) the party reports the action to the department, (2) the department does not object to the action being conducted, (3) the party takes reasonable steps to provide advance public notice of the action, (4) the remedial actions substantially comply with the department’s technical standards and evaluation criteria, and (5) the party documents that the hazardous substances are disposed of lawfully.<sup>5</sup>

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<sup>5</sup> WAC 173-340-545(2)(c).

Although these elements are not absolute requirements, the court must have some basis for determining the “overall effectiveness” of the independent remedial action. *Taliesen Corp.*, 135 Wn. App. at 119-120. In the present case, Kevin Grudzinski failed to present any evidence he complied with the “substantial equivalent” requirement necessary to maintain a private cause of action under MTCA.

**C. Kevin Grudzinski Failed to Satisfy the Elements of a Negligence Claim.**

In order to avoid a summary judgment dismissal of his claims, plaintiff must establish a prima facie case of negligence. *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 779 P.2d 181 (1989). To meet this burden of proof, plaintiff must establish each of the following elements: (1) the existence of a duty owed; (2) a breach of that duty; (3) a resulting injury; and (4) proximate causation. *Hansen v. Friend*, 118 Wn.2d 476, 479 (1992) (citing *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 667 P.2d 166 (1984)); *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1990). Although issues regarding breach of a duty and proximate cause are generally factual questions, the issue of whether a duty exists is a question of law reserved solely for the court. *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 874 P.2d 861 (1994); *Ford v. Red Lion Inn*, 67 Wn. App. 766, 840 P.2d 198 (1992); *Swanson v. McKain*, 59 Wn. App. 303, 796

P.2d 1291 (1990). When no duty exists, a defendant cannot be negligent as a matter of law. *Lauritzen*, 74 Wn. App. at 438 (citations omitted).

**1. There is no evidence Randy Grudzinski breached a duty he owed to Kevin Grudzinski.**

All of the alleged dumping occurred when Elsie Grudzinski was alive and while she owned the property. CP 180, page 95, lines 16-19. At the time of the alleged dumping, Kevin did not own or have any legal interests in the subject property. CP 180, page 95, lines 16-19. Accordingly, if Randy's alleged dumping constitutes a breach of duty, it was a duty he owed to his mother.

**2. Elsie Grudzinski's alleged negligence claim against Randy Grudzinski did not pass through her estate to Kevin Grudzinski.**

In her Will, Elsie Grudzinski made it clear she was concerned about Kevin and Randy arguing over the disposition of her estate and management of her estate after her death. Article II of the Will provides as follows:

It is my intention by naming a non-family member to act as Personal Representative of my estate to avoid conflict between my children. Therefore, should either of my children contest the terms of my Will or the manner in which my Personal Representative is handling the resolution of my estate, said child shall receive the sum of ONE DOLLAR (\$1.00) and otherwise receive nothing under this Will, said share to pass to my other child. Additionally, anyone contesting the terms of this Will or the management of my estate by my designated Personal Representative shall be responsible for the attorney fees

and costs incurred by my Personal Representative in defending the Will and the actions of the Personal Representative.

Neither of my children shall have any involvement in the management nor disposition of my estate unless assistance is specifically requested by my Personal Representative. In furtherance of my effort to avoid controversy, I suggest to my Personal Representative that all of my assets be sold at market value with any property that is unable to be sold to be donated. CP 31-32.

In addition, Article IV of her Will provides that “[a]ny loans, gifts, or other benefits I have provided to either KEVIN GRUDZINSKI or RANDY GRUDZINSKI shall be forgiven at the time of my death and not part of the formula for distribution.” CP 34.

As personal representative of Elsie’s estate, Tom Sawatzki was solely responsible for deciding what Elsie Grudzinski would have done about the construction debris Randy dumped on her property. CP 31-32, CP 38-44. Elsie knew about the construction debris on her property for at least two years, but she did not take any legal action against Randy. CP 116-117. Likewise, Mr. Sawatzki, as the personal representative of Elsie’s estate, did not take any legal action against Randy, even though he knew about the construction debris long before the estate was closed. CP 38-39. Instead, Mr. Sawatzki decided to give Kevin a credit of \$25,000 for the cleanup costs. CP 39, CP 131, CP 133. In the Final Allocation of Assets prepared by Mr. Sawatzki, there is no reference to any tort claims being

assigned to Kevin. CP 133. Mr. Sawatzki could have liquidated all of Elsie's property, real and personal, and distributed the cash proceeds to Kevin and Randy. CP 31-32, CP 38-44. If Mr. Sawatzki had sold all of the real estate, Kevin would not have been able to ignore the last wishes of his mother, as well as the severe penalty for contesting the Will, by filing this vexatious lawsuit.

**D. Kevin Grudzinski's Equity Claim Should Be Dismissed Because He Has Already Been Compensated For The Cleanup Costs and Because He Has Unclean Hands.**

- 1. It would be unfair and unjust to compel Randy to clean up the construction debris because Kevin has already been compensated for the cleanup costs.**

In the process of deciding how to divide Elsie Grudzinski's estate, Tom Sawatzki factored in the cost of cleaning up the construction debris. CP 38-39, CP 133. In a June 30, 2010 letter Mr. Sawatzki wrote to Larry Siegel, the attorney assisting him with the probate, he explains his decision-making process in great detail. The letter provides in pertinent part as follows:

Although clearly not required by the Will, I have asked for and received input from each of Kevin Grudzinski and Randy Grudzinski throughout my process. I have heard from each of them that they would like the real property from the Estate distributed to them rather than my selling it and distributing cash to them.

...

I have also considered allocating to each of them their inheritance as an undivided interest in all of the real property. That is, I considered allocating undivided ownership of all of the real property at 60% to Kevin and 40% to Randy. However, given the historical disagreements between the two of them, that seems unlikely to be a reasonable solution. In fact, I assume it would likely result in one or both of them subsequently petitioning the court to partition the property with the result being an expensive process very similar to what I have just completed.

I carefully examined several alternatives for allocating the real property parcels between Kevin and Randy. Unfortunately, each of the alternatives to my final selected approach had at least one or two very serious flaws. One important element is that Kevin and Randy have had a very contentious relationship for a number of years. Therefore, I viewed critically any alternatives that resulted in the two of them sharing a lengthy fence line. Also, several of the alternatives would have required legal documentation of shared water rights and shared access to pumps, pipes and wells, or easements across the property of the other heir to allow physical access. Some alternatives would likely have required that both water rights documents be negotiated AND easements be worked out. Ultimately, I have rejected all of those alternatives as unworkable because they all require future cooperation between the heirs.

In the course of my process, I was asked to follow up with some specific questions as to the accuracy of the appraisals of the real property. I was ultimately satisfied with the answers I received to those questions. **Included in that process was the suggestion by one heir that certain properties had been overvalued while other properties had been undervalued. In response, I suggested to the heir the possibility to essentially switch the properties he was to receive with his brother. However, when it came down to it, he rejected that approach indicating he preferred to be allocated the property adjacent to his home rather than have his brother have the property adjacent to his home.**

A final issue related to the properties was the question of “cleaning up” certain piles of asphalt, concrete, trees and tree stumps. The appraiser indicated to me that in his process he did not reduce the value of the property for anticipated cleanup costs. **I received quotes for what I considered a reasonable removal effort ranging from \$15,000 up to \$43,700. I have provided a general cleanup allowance of \$25,000. This is ten thousand dollars (\$10,000) higher than the lowest of what I believe to be the two relevant quotes.** I acknowledged that some much higher quotes were received but I have concluded that they related to a level of clean up of the property that was far beyond a reasonable expectation. CP 130-132 (emphasis added).

In light of the declaration Mr. Sawatzki submitted in support of Defendants’ Motion for Summary Judgment (CP 38-49), as well as his June 30, 2010 letter to Larry Siegel, it is clear Kevin has been compensated for the cleanup costs.

**2. Kevin Grudzinski has unclean hands.**

Equity requires that those seeking its protection shall have acted fairly and without fraud or deceit as to the controversy in issue; in other words, they must have clean hands. *Campagnolo S.R.L. v. Full Speed Ahead, Inc.*, 258 F.R.D. 663 (W.D. Wash. 2009).

Kevin was fully aware of the construction debris on the subject property before his mother died. CP 116-118. Kevin could have told Mr. Sawatzki he did not want the subject property. He also could have told Mr. Sawatzki to give the subject property to Randy. Moreover, he could have requested that Mr. Sawatzki sell or donate the

subject property. Instead, Kevin told Mr. Sawatzki he wanted the subject property. CP 43, CP 130-133. Kevin then turns around and sues Randy because there is construction debris on the property. CP 1-10. Not only that, Kevin was prepared to sue Randy even before the estate closed, as he filed his lawsuit the day after the court signed the Order Approving Final Accounting, Fees and Costs. CP 171-172. Kevin knew he could not contest the will directly or challenge Mr. Sawatzki's handling of the estate, so he did it through the backdoor by filing this lawsuit.

Moreover, Kevin understood he was being compensated for the cleanup costs before he filed this lawsuit. At his deposition, Kevin testified as follows:

Q: Was it your understanding, though, that Mr. Sawatzki was giving you a cash credit of some amount to account for the cleanup costs?

A: I understood he was trying to appease, and it was his opinion of how the – how it should be divided, and it was his opinion on how much it took to clean it up. After talking to experts, he took it upon his own to just pick out a number that don't even correlate to the problem here.

CP 181, page 97, lines 17-25.

Under the circumstances, Kevin has unclean hands and is not entitled to equitable relief.

**E. Kevin Grudzinski's Quiet Title Claim Should Be Dismissed Because Randy Grudzinski is Not Legally Responsible for the Cloud on the Title.**

The alleged cloud on the Title was taken into consideration when Thomas Sawatzki decided how to divide the property of the estate. Again, Mr. Sawatzki retained a real estate appraiser to value the property, including the property with the construction debris on it. CP 39. He also obtained estimates for the cost of removing the construction debris. CP 39, CP 130-133. Mr. Sawatzki took the appraiser's report and the estimates into consideration when he decided how to divide the property, as well as his decision to give Kevin an additional \$25,000.00 for the cost of cleaning up the construction debris. CP 38-39, CP 130-133. Accordingly, there is absolutely no legal or equitable basis for Kevin's request that Randy remove the alleged cloud on the title.

**F. There Is No Evidence the Trial Court Abused Its Discretion By Allowing the Hearing 11 Days Before Trial.**

Civil Rule 56(c) provides that "summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise." It is within the discretion of the trial court to grant a motion seeking leave of court to have a summary judgment motion heard within 14 days of trial. *See* CR 56(c); *State ex rel.*

*Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 88 P.3d 375 (2004). An appellate court will overturn a trial court's discretionary ruling only if there was a manifest abuse of discretion. *Id.* at 236 (citations omitted). In the absence of prejudice to the nonmoving party, there is no manifest abuse of discretion. *Id.* (citing *Zimny v. Lovric*, 59 Wn. App. 737, 740, 801 P.2d 259 (1990)); *see also*, *Cole v. Red Lion*, 92 Wn. App. 743,749, 969 P.2d 481 (1998). To establish prejudice, the nonmoving party must show a lack of actual notice of the motion, a lack of time to prepare for the motion, and no opportunity to submit case authority or prepare for oral argument. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d at 236-237.

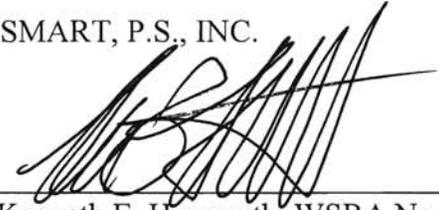
In the present case, Kevin Grudzinski failed to present any evidence or make any arguments he was prejudiced by having the summary judgment hearing 11 days before trial. The fact is he suffered no prejudice. Kevin had notice of the hearing 45 days before trial and he received the motion for summary judgment 28 days before the hearing. Moreover, Kevin waited 12 days after he received notice of the hearing to object to the hearing being less than 14 days before trial.

**V. CONCLUSION**

The trial court did not commit any errors in granting Respondents' motion for summary judgment of dismissal. Accordingly, this court should affirm the trial court's ruling.

Respectfully submitted this 10<sup>th</sup> day of December, 2012.

LEE SMART, P.S., INC.

By: 

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Attorney for Respondents Randy and  
Nancy Grudzinski

**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on December 10, 2012 (for delivery on December 11, 2012), I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA FED EX – OVERNIGHT**

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