

**FILED**

**FEB 19 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 311490-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

RUSSELL H. BENSCH and CELLIE D. BENSCH, husband and wife,

Respondents

v.

DON C. DIXON and PATRICIA E. BRITZA,

Appellants.

---

APPELLANTS' REPLY BRIEF

---

Chris A. Montgomery, WSBA #12377  
Attorney for Appellants  
Don C. Dixon and Patricia E. Britza  
Montgomery Law Firm  
344 East Birch Avenue  
PO Box 269  
Colville, Washington 99114  
(509) 684-2519  
FAX (509) 684-2188

## TABLE OF CONTENTS

A.	TABLE OF AUTHORITIES.....	ii
B.	ARGUMENT.....	1
C.	CONCLUSION.....	5

**TABLE OF AUTHORITIES**

**Table of Cases**

*Charbonneau v. Wilbur Ellis Co.*,  
9 Wn. App. 474, 512 P.2d 1126 (1973).....3

*Ferris v. Blumhardt*,  
48 Wn.2d 395, 402, 293 P.2d 935 (1956).....4

*Gingrich v. Unigard Sec. Ins. Co.*,  
57 Wn. App. 424, 788 P.2d 1096 (1990).....2

*Mostrom v. Pettibon*,  
25 Wn. App. 158, 607 P.2d 864 (1980).....1

*Partridge v. City of Seattle*,  
49 Wn. App. 211, 215, n.2, 741 P.2d 1039 (1987).....3

**Statutes and Rules**

CR 56.....1

## ARGUMENT

The fundamental question in this case is whether the Trial Court Judge abused his discretion in granting Summary Judgment to Respondents Bensch in their action for Replevin. While Respondents set forth the proper criteria for an award of Summary Judgment under CR 56 in their Respondents' Brief, they proceed to present the facts, *not in light most favorable to the non-moving party*, but in a light favoring themselves. This framework is exactly the framework applied by the Trial Court, and is the reason the decision granting Summary Judgment in favor of the Respondents must be reversed. The Trial Court must deny a Motion for Summary Judgment if the record shows any reasonable hypothesis which entitles the nonmoving party to relief. *Mostrom v. Pettibon*, 25 Wn. App. 158, 607 P.2d 864 (1980).

Quite simply, there were numerous facts in dispute below, numerous facts relating to objective and subjective evidence of knowledge and an intent to abandon, many of which depended on the credibility of the witnesses, particularly the Bensches. Summary Judgment should not be granted when the credibility of a material witness is at issue; Summary Judgment also may not be appropriate when material facts are particularly within the knowledge

of the moving party. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990).

The basic facts, viewed in a light most favorable to the non-moving party, are that 1) The Benschers lost all of their real property to foreclosure and received actual notice of the foreclosure sale pertaining to their land; 2) the Benschers received actual notice to remove their personal property from the land; 3) the Benschers in fact removed the personal property they wished to keep, and intentionally left other personal property behind; 4) they provided no evidence that they sought permission to store property on the bank's land after foreclosure, 5) nor did they change their minds or make any attempt to claim title until *after* the Appellants Dixon/Britza bought the land, more than fourteen (14) months after the foreclosure. (CP 1-6). At the time they first viewed the property Appellants Dixon/Britza observed abandoned vehicles and equipment, a large garbage pile, old tires, 55 gallon oil barrels, and piles of metal strewn around the property. They believed the metal and junk vehicles could be sold to help offset some of the cost of clean-up of the property and the building materials could be used on the property. Those factors influenced their decision to purchase the property (*Declaration of*

*Patricia E. Britza*, CP 65-83, and *Supplemental Declaration of Patricia E. Britza*, CP 101-108).

Much of the “evidence” supplied by the Benschers consisted of their personal interpretations of oral third party statements, for example regarding the appraisal or amount of property to be foreclosed and sold (*see, e.g.* Respondent’s Brief at 3-4; & CP 17; CP 19). Hearsay evidence contained within an affidavit either in support of or opposition to a Motion for Summary Judgment does not meet the requirements of this rule and is not competent. *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973). Moreover, since knowledge is generally a question of fact, Summary Judgment is improper where, even though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent or knowledge. *Partridge v. City of Seattle*, 49 Wn. App. 211, 215, n.2, 741 P.2d 1039 (1987). And, Benschers represent to this Court that they “‘produced testimony’ that they never intended to abandon their personal property and substantial circumstantial evidence is in the record supporting Plaintiffs (sic.) claim of ownership.” (Respondent’s Brief at 11.) No testimony was taken, no opportunity for cross examination was given, and circumstantial evidence was provided that the Benschers knew exactly what

they were doing when they moved most of their personal property and left junk behind.

The Benschers failed to show, *as a matter of law*, that one whose property is foreclosed, who removed most of the personal property from the land, left other property behind for more than fourteen (14) months, never attempting to get permission to store it on the foreclosed land nor making any attempt to remove it, has not abandoned the property. Abandonment is the voluntary relinquishment by an owner intending to terminate ownership. *Ferris v. Blumhardt*, 48 Wn.2d 395, 402, 293 P.2d 935 (1956). The objective evidence, viewed in a light most favorable to the Appellants, supports the conclusion that the left-behind personal property had been abandoned.

There were presented genuine issues of material facts, and, most importantly, reasonable persons could reach different conclusions as to whether, *when they left select personal property behind*, the Benschers intended to abandon it. The Trial Court, in the Summary Judgment hearing, made factual determinations and credibility assessments without a Trial. That decision was an improper application of the principles of Summary Judgment and should be reversed.

## CONCLUSION

In view of the foregoing facts and authorities, Appellants Dixon/Britza respectfully request that the Trial Court decision granting Summary Judgment to the Benschers be reversed and the case remanded for Trial on the factual questions presented.

**DATED** this 15<sup>th</sup> day of February, 2013.

Respectfully submitted,



Chris A. Montgomery  
WSBA #12377  
Attorney for Appellants  
Don C. Dixon and Patricia E. Britza