

COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO.: 67771-3-I

DIVISION ONE OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

TAE HO CHUNG AND JANE DOE CHUNG AND
THE MARITAL COMMUNITY COMPOSED
THEREOF, APPELLANTS

v.

NEW GRACE INVESTMENT, INC.,
RESPONDENT

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Four general rebuttals are raised in regard to respondents' Reply

Brief:

- (a) form should not rule over content;
- (b) technicalities should not be applied inconsistently;
- (c) procedural review must precede substantive review; and
- (d) extreme sanctions are disfavored.

DISCUSSION

A. Substantial Justice Is Based on Content, Not Form

The first rebuttal is pithily expressed in the quotation "[S]ubstance trumps formality." The context was the technical use of the Civil Rules to try to excuse a necessary party from a suit. Quality Rock Products, Inc. v. Thurston County, 126 Wn.App. 250, 265, 108 P.3d 805 (Div. 2 2005). That court decided that the emphasis of the CRs was to construe them to do substantial justice. Numerous other Washington cases hold that substance should control over form in applying the CRs. See, e.g., Colorado Nat'l Bank v. Merlino, 35 Wn.App. 610, 614, 668 P.2d 1304 (1983) (sufficiency of a motion is determined not by its technical format or language but by its contents; citing 2A J. Moore, *Federal Practice*, 2d ed. 1983, p.7.05); Neal v. Wallace, 15 Wn.App. 506, 550 P.2d 539 (1976);

Teitzel v. Teitzel, 71 Wn.2d 715, 430 P.2d 594 (1967); Brower v. Wells, 103 Wn.2d 96, 690 P.2d 1144 (1984).

B. Fairness Should Work Both Ways

Second, if you're going to be technical, it cuts both ways.

Appellant quoted Black's in his brief to the effect that an affidavit is "A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths...." BLACK'S LAW DICTIONARY, 2d Pocket Ed. 2001, p.22; Brief of Appellant (BA) at 7. No one denies that Mr. Chung wrote down the declaration. No one denies that he swore to it before an officer authorized to administer oaths. That officer was the judge, when the judge asked him under oath if what he wrote was true. Technically, CR 56(e) does not say that the swearing must be in writing.

In fact, if Mr. Chung's statements were lies, he could be charged with perjury regardless of whether he swore in writing. A 1938 Supreme Court case dealt with the question "When is an affidavit complete for purposes of prosecution for perjury?" The defendant had made a totally fabricated statement under oath before a notary, but did not sign it. His defense was that the act would not be complete until he signed the transcript. Section 104 of the then Rem.Rev.Stat. § 2356 read as follows:

'The making of a deposition, certificate or affidavit shall be deemed to be complete when it is subscribed and sworn to or affirmed by the defendant with intent that it be uttered or published as true.'

The defendant got the charge dropped, not because his oath was never written down, but because there lacked proof that he had the "intent that it would be uttered or published as true." State v. Ledford, 195 Wash. 581, 587, 81 P.2d 830 (Wash. 1938).

How does this apply to Mr. Chung? He affirmed his statement, and clearly intended that it be accepted as true. Under Ledford, he can be charged with perjury if he lied. But if he told the truth (per respondent's argument), it cannot be accepted or even considered as true. How can one have it both ways?

C. Prejudging Is Prejudicial

Speaking of having it both ways, the court below essentially said to Mr. Chung "Your statements will not be considered--but by the way, we consider them inadequate." BA at 4. As stated in Appellant's Brief, it appears the court granted the Motion to Strike based on its opinion of the evidence, thus putting the cart before the horse. *Id.*

Prejudging suggests a failure to properly consider all the arguments. For example, Mr. Chung asserts that he never actually took

possession of the premises, never accepted them because they were never in "as is" condition, and that he notified New Grace that he had not done so. This is crucial to his defense because it was taking possession and/or accepting the premises that would have triggered the obligation to pay rent, and if he did not have the obligation, then (he argues) withholding rent was not a breach of the lease. This issue is never addressed in the court's findings of fact. Nor are the other issues specifically addressed that appear in Brief of Appellant.

If some of Mr. Chung's proffered statements were conclusory, argumentative, or hearsay, however, many others were accounts of specific events made from his own personal knowledge. They constituted (to quote respondent) "information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion." Where they differed from New Grace's account of the same events, they raised material issues. CP 36-52; also see BA at 14-35.

D. Less-than-Extreme Provocations Do Not Deserve Extreme Sanctions

Appellant has made the point that exclusion of testimony is an extreme sanction and Washington courts favor extreme sanctions only where the procedural violation was "willful and deliberate" and substantially prejudiced the other party. BA at 12. Respondent has not

cited any case where the extreme sanction of being thrown out of court has been applied where there was not a "willful or deliberate" violation. In State v. Fritz, 21 Wn.App. 354, 585 P.2d 173 (1978) (Brief of Respondent (BR) at 8), defendant Fritz made an untimely request to act *pro se*. The court denied permission because it was merely the next step in a series of tactics he used to try to delay trial. *Id.* at 364-66. In Bonney Lake v. Delaney, defendant's argument that she was "not versed in the legal consequences of perfecting an appeal" failed to work for her, but no other extenuating circumstances were mentioned. *Id.*, 22 Wn.App. 193, 196, 588 P.2d 1203 (1978).

Respondent has never shown that it would be substantially prejudiced by consideration of Mr. Chung's issues.

CONCLUSION

Appellants respectfully request vacation of the summary judgment and a rehearing on the motion for summary judgment.

Respectfully submitted this 18th day of May, 2012.



Gregory E. Gladnick, Attorney for Appellants

NO: 10-2-10613-6

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PROOF OF SERVICE OF APPELLANT'S REPLY BRIEF

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On May 18, 2012, I had sent out for service or mailed a true and correct copy of the Appellant's Brief to Respondent's counsel Michael P. Jacobs.

I hereby declare under penalty of perjury under the laws of the State of Washington that the above statement, to the best of my knowledge, is true and correct.

DATED May 18, 2012.



Gregory E. Gladnick, Seattle WA