SUPREME COURT OF THE STATE OF WASHINGTON

NO. 99521-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NO. 53461-4-II

ERNEST EDSEL,

PEITIONER,

v.

PATRICK GILL, BARBARA BOWMAN, DEREK LAMOUREUX, AMBERLEE D'APPOLLONIO, AND JOHN DOES (1-10),

RESPONDENTS.

RESPONDENTS PATRICK GILL AND BARBARA BOWMAN'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Patrick Gill and Barbara Bowman were defendants in the trial court and respondents in both the Court of Appeals (Division II) and before this Court.

II. INTRODUCTION

This case involves numerous claims for nuisance and trespass by petitioner Ernest Edsel1 against respondents Gill and Bowman, and respondents Derek Lamoureux and Amberlee D'Appollonio. Gill and Bowman own a duplex next to where Edsel lives. Lamoureux and D'Appollonio rent one of the units at the duplex.

The issues in Edsel's appeal do not conflict with any Supreme Court case, and they do not meet any of the other limited circumstances under which this Court grants review. Instead, in an unpublished decision, the Court of Appeals (Division II) properly affirmed the trial court and correctly held the following: (1) counsel for Gill and Bowman did not make a judicial admission during oral argument; (2) Gill and Bowman are not liable for an alleged nuisance created by their tenants that arose only after the tenancy commenced; (3) Gill and Bowman were not required to obtain and then produce documents not in their control, but in the possession and control of a non-party; and (4) a declaration that does not comply with the statutory requires of RCW 9A.72.085(1) is inadmissible.

[1] The lawsuit named Ernest Edsel and his wife Judy Lamb as plaintiffs. CP 1. However, in exchange for Amazon stock, Mr. Edsel purchased Ms. Lamb's claims either as her husband or her counsel and then proceeded to litigate the matter on his own behalf. CP 898.

Edsel filed a motion for reconsideration with the Court of Appeals, which was denied. Edsel did not move to have the Court of Appeals' decision published. He now seeks review by this Court.

III. COUNTERSTATEMENT OF ISSUES PRESENTED

The issues raised by Edsel in his petition for review do not meet the criteria set forth under RAP 13.4 and do not properly identify the legal issues addressed by the Court of Appeals. Properly stated, the issues before this Court are as follows:

Did the Court of Appeals correctly hold that a party does not make a judicial admission when accepting another party's factual allegations as true only for purposes of a summary judgment motion?

Did the Court of Appeals correctly hold that landlords are not liable for an alleged nuisance created by their tenants when the claimed nuisance arose only after the tenant took possession of the premises?

Did the Court of Appeals correctly hold that Gill and Bowman were not required to obtain and then produce documents not in their control, but in the possession and control of a non-party?

Did the Court of Appeals correctly hold that a declaration is inadmissible when it does not state that it is certified or declared under the laws of Washington, as required by RCW 9A.72.085(1)?

IV. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

Since June 2016, Ernest Edsel, a licensed attorney, and his wife Judy Lamb have lived in a house located at 307 East 30th Street in Bremerton,

Washington. CP at 153 (¶1), 154 (¶2), CP at 156 (¶¶ 11-12). The property is owned by Sandhurst Corp., a Texas corporate entity that is part of a trust of which Edsel and his wife are beneficiaries. CP at 990-91.

The property on which Edsel lives abuts a duplex owned by Gill and Bowman own and that Lamoureux and D'Appollonio leased. See CP at 137; see also CP at 57. Edsel's residence is surrounded by properties rented out to tenants by landlords that he has referred to in court filings as "slumlords," including a neighbor he said rented out an "illegal basement" where all manner of activities occurred. CP at 97, 337; see CP 455 (describing the reference to his neighbors being "slumlords" as possibly an accident or a Freudian slip).

According to Edsel, his residence is across the street from an actual drug house—a home he refers to as the "Hong Drug House." CP at 995, 1012; see CP at 12 (¶¶ 40-41). His residence is also near a small private road (one that does not service his property) but that is used for access and parking for his neighbors—a private road that he complains had too many parked vehicles, fell into disrepair, did not properly channel water, and was a haven for drug dealers and drug users because it was "out of sight from police and neighbors." CP at 12 (¶ 40), 70-71, 998-99, 1002, 1004-09; see CP at 819. Since moving in, Edsel has endeavored on a one-man mission to change the neighborhood and clean it up, often resorting to self-help and calls to the fire department, law enforcement, and city officials. See, e.g., CP at 453-54, 457, 810, 813-815, 818-20, 1000-03.

After living at the property for only a year and a half, Edsel filed this lawsuit against Respondents Gill and Bowman and their tenants, Respondents Lamoureux and D'Appollonio. CP at 1. Edsel asserted claims premised on nuisance, trespass, and breach of contract. CP at 11-25 (¶¶ 39-87).

B. Relevant Procedural Background

On January 10, 2018, Edsel filed the Complaint alleging various property-related claims and a claim for breach of contract. CP at 1. He named the respondents as defendants. CP at 1.

On April 27, 2018, Gill and Bowman brought a motion for partial summary judgment to dismiss Edsel's claims for noise trespass, common area nuisance, and breach of contract. CP at 130. Lamoureux and D'Appollonio joined in the motion. See CP at 306.

On May 16, Edsel filed a motion to compel production of documents Edsel provided to Gill and Bowman's insurer. CP at 216-21. In his motion, Edsel contended, among other things, that he was entitled to every document in anyway related to the following: the Gill-Bowman property; Gill and Bowman's tenants; and anything in possession of Gill and Bowman's insurer. See CP at 228-29. Gill and Bowman opposed the Motion to Compel. See CP at 304.

On May 23, 2018, Edsel filed an untimely response to Gill and Bowman's motion for partial summary judgment, but argued his response was timely because a motion for partial summary judgment is not subject to the filing requirements of CR 56(c). CP at 259. Lamoureux and

D'Appollonio moved to strike Edsel's untimely response. CP at 293, 295-97.

On May 25, 2018, the trial court struck Edsel's response to the motion for partial summary judgment as untimely and granted the Gill and Bowman's motion for partial summary judgment and dismissed Edsel's claims for noise trespass, common area nuisance, and breach of the common area maintenance agreement. CP at 302-03, 307. The trial court also denied Edsel's motion to compel because it found that his motion was "not well-grounded in fact or law." CP at 305.

On February 15, 2019, Lamourex and D'Appollonio, and Gill and Bowman filed a second motion for summary judgment to dismiss Edsel's remaining claims. CP at 778, 825. Four days later, Edsel sought to delay the hearing on the motions on various grounds, none of which complied with CR 56(f). CP at 851, 853-55; see also CP at 860-65. The trial court denied Edsel's motion. CP at 877, 881-82.

On March 5, Edsel responded to the motions for summary judgment. CP at 883, 1062.

On March 15, the hearing on the motions for summary judgment occurred. CP at 1354-90. At the hearing, counsel for Gill and Bowman stated the following: "You know, of course, my clients deny everything. But for the purposes of this motion, we're accepting as true Mr. Edsel's allegations." CP at 1293, 1350, 1382, 1420. Counsel took the position that Edsel's factual allegations were true for purposes of summary judgment, with the implication that Edsel had to support those allegations with

competent evidence at summary judgment, which he didn't do: "[Edsel] has [the] burden to come forward with evidence to show his claims. He doesn't have any evidence. He has his suppositions and his opinion." *Id*.

Following the hearing, Edsel filed a motion to strike the summary judgment motions, premised on the theory that counsel for Gill and Ms. Bowman made a judicial admission that required the summary judgment motions be struck. CP at 1266-67; see CP at 1382.

By order dated March 21 2019, the trial court granted summary judgment and dismissed all of Edsel's remaining claims against all defendants. CP at 1279-83. Edsel then moved to amend or alter that order and for reconsideration again arguing that there was a purported judicial admission. CP at 1296. The trial court denied Edsel's motions for reconsideration and to amend or alter. CP at 1424. The trial subsequently ruled that there had been no judicial admission:

> Plaintiffs, in their Motion for Reconsideration, blatantly misrepresented the statements of counsel when they submitted documents claiming Landlords' counsel made a judicial admission during oral argument for summary judgment. This same misrepresentation was made regarding the same statements from the Landlord's counsel in three additional separate instances.

CP at 1534 (footnotes omitted).

Edsel timely filed a notice of appeal. CP at 1521, 1538.

On December 15, 2020, the Court of Appeals, Division II, in an unpublished opinion, affirmed the trial court's grant of Gill and Bowman's

2019 motion for summary judgment dismissal of Edsel's claims.2 Opinion at 19.

On January 22, 2021, Edsel filed a motion for reconsideration, which was denied by the Court of Appeals. Petition at App. 21.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

C. This Case Does Not Fall Within the Narrow Criteria Required for this Court to Accept Review.

Under RAP 13.4(b), the Supreme Court may accept a petition for review in limited circumstances. These include:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1)-(4).

Edsel seeks review under the first three criteria, arguing the decision by the Court of Appeals "is directly contrary to decision of the Supreme Court and Courts of Appeal," and also "contrary to the 'full faith and credit'

[2] The Court of Appeals reversed the trial court on the issue of nuisance as to Lamourex and D'Appollonio related to burning of material. Opinion at 19. Because the Court of Appeals reversed on that issue, it also reversed and remanded the trial court's grant of attorney fees under RCW 4.84.185. *Id*.

and 'comity' clauses" of the United States Constitution. Petition at 1. Even a cursory reading of the cases cited by Edsel demonstrates there is no conflict between the courts with respect to the issues raised in his Petition and there is no significant question of law under the U.S. Constitution.

D. The Court of Appeals' Decision Does Not Conflict with Any Decision of this Court or Any Other Court.

1. The Court of Appeals' correctly held counsel for Gill and Bowman did not make a judicial admission.

Edsel continues to argue that counsel for Gill and Bowman made a judicial admission when he stated during oral argument on Gill and Bowman's second motion for summary judgment: "You know, of course, my clients deny everything. But for purposes of this motion, we're accepting as true Mr. Edsel's allegations." *See* Petition at 9 (continuing to cite only a portion of the quoted text); CP at 1382. In support of his argument, Edsel cites *Oscanyan v. Arms Co.*, 103 U.S. 261, 264, 26 L. Ed. 539 (1880) and *State v. Goodin*, 67 Wn. App. 623, 838 P.2d 135 (1992). Neither support his position.

In *Oscanyan*, during opening statement in a case involving a contract dispute an attorney for the plaintiff made statements and representations about the facts plaintiff intended to establish during the trial. 103 U.S. at 262. The facts which the plaintiff proposed to prove, however, "showed that the contract was void as being corrupt in itself and prohibited by morality and public policy, upon which no recovery could be had . . . ." *Id*. The defendant moved for directed verdict, which the court granted. *Id*.

Plaintiff appealed arguing, in part, that his attorney was new to the case and that representations made during opening statement should not the basis for a directed verdict. *Id*. at 263-66. On appeal, the Supreme Court stated the following:

> Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit.

Id. at 264 (underlining added). However, in the case of *Oscanyan*, the Supreme Court concluded that the evidence showed the attorney was fully apprised of the facts of the case, went into detail about the facts, and "dwelt upon and reiterated the statement of fact which constituted the ground for the court's" directed verdict. *Id*. Contrary to Edsel's position, *Oscanyan* does not stand for the proposition that every statement made by counsel constitutes a judicial admission.

In *Goodin*, the defendant's attorney entered into a formal stipulation as a trial tactic to constitutionally challenge a statute, which the defendant later waived against advice of counsel, and the defendant then argued that his attorney's stipulation demonstrated ineffective assistance of counsel. 676 Wn. App. at 632-34. *Goodin* does not deal with a judicial admission and has no bearing on this case.

Here, the Court of Appeals decision does not conflict with any prior decision of this Court. The Court of Appeals correctly held Gill and Bowman did not make a judicial admission.

2. The Court of Appeals correctly held that Gill and Bowman are not liable for a nuisance created by their tenants after the tenancy commenced.

Edsel argues that the Court of Appeals decision affirming the trial court's dismissal of Edsel's nuisance claim against Gill and Bowman for their tenants' alleged conduct "conflicts with five Supreme Court decisions." Petition at 14. Edsel then purports to summarizes each case. Id. at 14-16. Upon review of each case cited by Edsel, it is clear that Edsel blatantly misstates and misrepresents the facts and holdings of each case. For example, in *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956), the plaintiff owned an apartment complex next to a tire capping plant and brought an action to enjoin his neighbor from operating the plant. *Id*. at 277. The plaintiff alleged the plant created a nuisance and endangered the health and wellbeing of his tenants. *Id*. After a bench trial, the trial court entered judgment in favor of the defendants. *Id*. at 278. This Court affirmed the trial court, holding the operation of the plant did not create a nuisance. Edsel misstates this Court's holding in *Morin*.

Shew v. Hartnett, 121 Wash. 1, 208 P. 60 (1922), is a premises liability case in which a 17-year-old employee of the defendant tenant was injured when an elevator on the leased premises malfunctioned. *Id*. at 2. The employee's mother brought suit against the employer and the landlord alleging the elevator the elevator was a public nuisance. *Id*. at 2-4. A jury returned a verdict in favor of the plaintiff against the landlord but not the employer-tenant. *Id*. at 3. On plaintiff's motion, the trial court then entered

judgment notwithstanding the verdict against the employer-tenant. *Id*. This Court reversed judgment as to the landlord and employer-tenant, finding the landlord did not owe the employee a duty of care under premises liability and that the defective elevator did not constitute a nuisance. *Id*. Edsel misstates this Court's holding. See Petition at 15.

Similarly, in *Ward v Hinkleman*, 37 Wash. 375, 79 P. 956 (1905), another premises liability case, the plaintiff, a visitor to a house where her daughter rented a room, brought an action against the owners of the property for damages she sustained when she fell through boards between the sidewalk and the porch of the house. *Id*. at 375-76. This Court reversed the jury's verdict in favor of the plaintiff, holding the landlords "were not responsible for the defective condition of the demised premises at the time of the injury complained." *Id*. at 381. Contrary to Edsel's representation, this Court did not hold the landlord was liable for any nuisance created the tenant.

And finally, in both *Powell v. Superior Portland Cement*, 15 Wn.2d 14, 21, 129 P.2d 536 (1942), and *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013), this Court held that in each case, neither defendant was liable for the alleged nuisance.

Here, the Court of Appeals correctly held Gill and Bowman are not liable for any alleged burning nuisance created by their tenants and the decision does not conflict with any decision of this Court or another appellate court.

3. The Court of Appeals correctly held that Gill and Bowman were not required to produce documents in the possession and control of a non-party insurer.

Edsel argues the Court the Appeals' holding that Gill and Bowman were not required to produce documents not in their control but were in the possession and control of their insurer, a non-party to this lawsuit, is contrary to this Court's holdings in *Heidibrink v. Moriwari*, 104 Wn.2d 392, 706 P.2d 212 (1985), and *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004). Edsel's ignores the Court of Appeals' analysis and basis for its decision on this issue.

In this case, Edsel propounded overbroad discovery on Gill and Bowman requesting, among other things, communications and materials in the possession and control of Gill and Bowman's insurer. *See* CP at 227-29; *see also* CP at 221-23. Gill and Bowman objected to the discovery on several grounds. Edsel moved to compel responses, and the trial court denied the motion.

On appeal, the Court of Appeals correctly held there was "no evidence" Gill and Bowman had sufficient control over the documents to invoke the requirement that Gill and Bowman obtain documents in the possession and control of a non-party and then produce them. Opinion at 8. The Court of Appeals concluded that the documents Edsel sought were in the possession and control of a non-party, meaning Edsel could have tried to obtain them through non-party discovery under CR 34(c) and CR 45(a)(1)(C). *Id*. Edsel chose not to. *Id*. The Court of Appeals' decision is

not contrary to *Heidibrink* or *Harris*, and does not even implicate those cases. Edsel's argument to the contrary is unfounded.

E. The Court of Appeals Decision Affirming the Striking of an Inadmissible Out-of-State Declaration Does Not Raise a Constitutional Issue.

Edsel argues that the Court of Appeals' decision affirming the striking of a declaration that does not comport with RCW 9A.72.085(1) presents this Court with a constitutional issue. Petition at 18-20. It does not.

In response to Gill and Bowman's second motion for summary judgment, Edsel submitted a declaration that did not comport with the requirements of RCW 9A.72.085(1), specifically, the witness failed to declare or certified that he was bound by the laws of the state of Washington. *See* CP at 915-19. Both RCW 9A.72.085(1) and GR 13 require that declarations state that they are "declared under the laws of the state of Washington." Absent compliance with Washington's statute and GR 13, Herzog's statements could have been contained in a sworn affidavit—Edsel did not choose this alternative option and statutory compliance was required if he wanted to submit the less formal declaration. Such a failure to refer to Washington law does not substantially comply with the requirements of RCW 9A.72.085. *See Bunch v. Lee*, No. 45810-1-II, 2015 WL 3541225, *5 (Wash. Ct. App. June 4, 2015) (unpublished).[3]

Edsel cites *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014), contending that all a declaration needs to include is that it is made

[3] Pursuant to GR 14.1, this decision is being cited as nonbinding authority.

on personal knowledge, is supported by admissible evidence, and it shows the witness is competent. Petition at 19. *SentinelC3* does not address the requirements of RCW 9A.72.085 and simply restates what is contained in CR 56(e). *See* 181 Wn.2d at 141. Although Rule 56(e) discusses affidavits on summary judgment, affidavits were originally required to be sworn under oath before a person, usually a notary public, who could take sworn statements. *See State v. Howard*, 91 Wash. 481, 486-87, 158 P. 104 (1916). That is no longer the case, and a party or witness may submit a declaration that comports with the statutory requirements of RCW 9A.72.085. See CR 56(c); GR 13.

Moreover, contrary to Edsel's argument, simply stating that a declaration is being made under penalty of perjury has no force or effect unless the party makes the declaration under the laws of the State of Washington. *Id*. A declaration, even if it subjects the witness to federal perjury law (noncompliance with which would be adjudicated in a federal court), does not vest a state court with power enforce its laws against an out-of-state individual. *See* GR 13.

Finally, the full faith and credit clause is not implicated here. The full faith and credit clause of the United States Constitution requires states to "recognize judgments of sister states." O*neWest Bank, FSB v. Erickson*, 185 Wn.2d 43, 55, 367 P.3d 1063 (2016) (underlining added) (citation omitted). It does not apply to affidavits that do not comport with state law.

VI. CONCLUSION

As set forth above, this case does not conflict with any decision of this Court, any other court, or raise important issue of constitutional law. For these reasons, Gill and Bowman respectfully request that this Court decline review of the Court of Appeals decision.

RESPECTFULLY submitted this 24th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I (1) cause to be filed with this Court this document; and (2) to be delivered via Washington State Appellate Courts' Portal E-Service to below parties:

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

DATED: March 24, 2021.

/s/ Leili Moore
Leili Moore, Legal Secretary

HELSELL FETTERMAN LLP

March 24, 2021 - 4:07 PM

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