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STATE OF WASHINGTON

No. 37728-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASTE CONTROL RECYCLING, INC., a Washington Corporation,

Appellant,

vs.

EMS MULTI MATERIAL MANAGEMENT & MARKETING, a division
of EAST BAY RESOURCES, INC.,

Respondent.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in ruling that there was no genuine issue of fact with regard to the identity of the product that Appellant was contractually bound to deliver to Respondent.

Issues pertaining to the Assignment of Error

1. Is extrinsic evidence regarding the contracting parties course of negotiations, the parties prior course of dealings, and the usage of particular terms of art within the industry relevant in defining the terms of a contract?
2. Once the contracting parties agree on the sale of a particular product, can the buyer unilaterally change the requisite quality of that product by inaccurately memorializing the agreement?
3. Is extrinsic evidence showing that a key term of the contract was surreptitiously and unilaterally changed as part of a scheme to defraud third parties relevant in determining how to interpret the disputed term?

B. STATEMENT OF THE CASE

The Appellant Waste Control Recycling, Inc., is a processor, seller and broker of recyclable materials, including recyclable paper, located in Longview, Washington.

The Respondent EMS Multi Material Management & Marketing is a recyclable material broker doing business in Washington.

The case at hand involves Appellant's sale of a sub-grade recyclable paper mix known as "shaker mix" or "KB mix" to the Respondent.

The three key personalities in this case are (1) Rick Campbell, a paper broker and employee of Appellant, (2) Ken Simkins, a paper broker and employee of Respondent, and (3) Fritz Sparks, an employee and principal of Respondent.

Appellant and Respondent entered into two contracts wherein the Appellant sold recyclable paper to Respondent. A dispute arose when the second shipment of recyclable paper was rejected by a paper mill in China. Respondent filed suit alleging that under the terms of the contract, Appellant was required to deliver highly valuable "mixed paper" as defined by the 2006 ISRI guidelines. Appellant denied Respondent's claim, alleging that Respondent had agreed to purchase a sub-grade product and that

Respondent's damages were the result of Respondent's semi-fraudulent attempt to re-sell this product as "mixed paper." Respondent moved for summary judgment against the Appellant and the trial court granted the motion.

C. STATEMENT OF THE FACTS

In June of 2005, Campbell started working with Simkins to locate recycled paper that Simkins, on behalf of Respondent EMS, could then sell to customers of EMS. CP26, page 2, para 4. Later that month, Campbell and Simkins toured a facility in Portland, Oregon, known as "KB Recycling." CP26 page 2, para 5. KB Recycling receives and resells recyclable materials collected "curbside" from residential customers. CP26, page 2, para 5. The KB facility produces only three grades of material: (1) #7 ONP, which is newspaper, (2) #11 OCC, with is old corrugated cardboard, and (3) "shaker mix" which is a mixture of paper, plastic and metal. CP26, page 2, para 5. Simkins and Campbell where shown how the facility worked and were given an opportunity to inspect the three types of recyclable material produced therein. CP26, page 2, para 5. Sometime after the tour, Campbell offered to broker the sale of shaker mix to Simkins.

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Shaker mix, or “KB mix” as it was referred to by Campbell, Simkins and Sparks, is a sub-grade material of questionable, if not dubious, value due to its high content of “non-fibrous materials” or “out-throws.” CP26, page 3, para 8. “Non-fibrous materials” or “out-throws” are non-paper materials such as plastic bottles, steel or aluminum cans, glass, or plastic. Shaker mix was not a well known product and did not fit into any of the paper mix definitions provided by the ISRI guidelines.¹ CP26, page 2, para 5.

After touring the KB Recycling facility, Simkins reported back to his employer, Fritz Sparks, that the paper mix produced by the KB facility was “pretty tough, pretty dirty. It could be problematical.” CP25, page 26, L24 through page 27, L11. Simkins also stated that the KB mix was “not good enough,” “marginal,” and “would be difficult to sell.” CP25, page 28, L21 through page 29, L5.

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“ISRI” stands for the “Institute of Scrap Recycling, Inc.,” a company which produces guidelines for classifying recyclable mixed paper products. FS, Exhibit B.

The limited value of the shaker mix was not the only hurdle to selling products from the KB Recycling plant. In 2005 and 2006, China was the primary destination for most recyclable paper exports from the United States. Campbell and Simkins discussed via e-mail and otherwise that the KB plant had a bad reputation with the Chinese mills and the Chinese inspectors. CP26, page 2, para 6. Campbell warned Simkins that the CCIC (a Chinese company located in the U.S. that conducts all pre-shipping inspections) would probably reject the KB mix. CP26, page 32, L23 through page 33, L7. Nonetheless, Simkins was determined to broker a transaction involving the KB mix. CP25, page 2, para 6. Simkins and Sparks hoped to purchase the KB mix at a discount rate and pass it off as "mixed paper." Mixed paper is a highly valuable recyclable paper product containing very little non-fibrous materials and few out-throws. The result of this ploy, as demonstrated in the record, would be profits of up to five times the industry norm.

As Campbell had warned, Simkins ran into trouble marketing the product from the very beginning. Based on the record, Simkins' first attempt to sell the KB mix was to a paper exporter named "Welton." In an e-mail dated June 23, 2005, to Eric Kuo, a Welton employee, Simkins wrote:

I have also been offered 500 M/T (or less) of single stream mixed paper from Portland. I am not sure if I asked about this

already. Price would be something like 93.00 per metric (at least not more than this) ton Tacoma. A guy has been buying it for China he is based in Vancouver, BC. I have known the people who are selling it for a long time. We are trying to put something together on a transloading facility so there starting to offer me some tonnages. Let me know what you think. I did see . . . but not that much . . . Plastic bottles, can lids and clear poly bags. But it looks great when they dress the bales. It is all very dry and relatively clean.

CP25, Dep.Ex. 5, page 1. (Without correction.)

Mr. Kuo rejected the offer out of hand and issued a stern warning against sending such materials to China:

We will not touch any single stream mixed, pls do not touch it. There is a big chance to get rejected by Chinese Customs/CCIC.

CP25, Dep.Ex. 5, page 1. (Without correction.)

A second attempt to sell the product on July 2, 2005, to a different company was similarly rebuffed. In an e-mail to "SK Verma," of Sneh International, dated July 2, 2005, Simkins again offered to sell the KB mix. CP25, Dep.Ex. 5, page 2. This offer of sale evidently failed and, shortly thereafter, he sent an e-mail to Sparks asking "Did you hear our Waste Control mix was rejected?" CP25, Dep.Ex. 5, page 4.

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By the end of August 2005, the Respondent still had not found a buyer for the KB mix and both Simkins and Sparks were getting nervous about the deal. CP25, Dep.Ex. 5, page 7. On August 29, 2005, Sparks sent an e-mail to Simkins regarding a third potential buyer's concerns and questioning whether Respondent should even bother with KB mix:

Fagelson's reply. Truthfully, until he mentioned these specific photos, I didn't see them. I did see some small remnants of plastic. *Should we move forward on this?*

CP25, Dep.Ex. 5, page 7. (Emphasis added.)

Simkins responded the same day by e-mail:

The plastic and cans will always be in there to some extent (the stuff reminds me quite a bit of Rabanco's mix/6 news). Everything was fine until he said "If I know that we can get material that doesn't have that in there we are probably fine." I am sure Jim does not remember me but he is a very nice guy and I would hate to screw our relationship with him up because I know we would not be able to go back to Waste.

I could be a frightened Nelly (what ever the hell a Nelly is, maybe its an SFO term) and maybe what we should do is buy five and see how it goes?

Sorry your ball

CP25, Dep.Ex.5, page 7.

Although the e-mail from Jim Fagelson is not part of the record, one can see from Simkins' quote above that Mr. Fagelson was concerned about the

amount of metal and plastic that was in the KB mix. Simkins also made it known that he was getting nervous about this whole transaction and suggested, in order to limit the risk, that they should only buy five containers of KB mix and "See how it goes." Most importantly, however, is Simkins comparison of the KB mix to "Rabanco's mix/6 news." Simkins described this product later in an October 7, 2005, e-mail to Sparks as follows:

The only other supplier that produces mix that is even similar is Rabanco and frankly speaking theirs is just horrible. I have not purchased tonnage from them in over 7 years.

CP25, Dep.Ex. 5, page 17.

By September of 2005, Simkins had finally found a buyer for the KB mix. Kin Xun Recyclable Environment, Inc., dba "Sun Paper," had agreed to purchase ten containers of the paper subject CCIC inspection and approval. Unfortunately, when Sun Paper contacted CCIC to perform the inspection at the KB facility in Portland, Oregon, CCIC refused to even bother with the inspection. CP25, page 33, L20 through L24. Another employee of the Respondent EMS sent Simkins and Sparks an e-mail on September 8, 2005, breaking the bad news:

Ken,
Per the *msg below*, ccic has rejected the Waste Control mix without sending out an inspector because of past experience at KB Recycling. Please let Rick know.

Fritz,
Is there another supplier who can fill this 10 load order?

CP25, Dep.Ex. 5, page 9. (Without correction and emphasis added.)

The "msg below" was from Vickie Lu at Kin Xun Environment Recycle Ltd.,
dba, Sun Paper, and it stated:

Dear Steve:

We were informed by CCIC officer that this supplier's materials has been rejected few times in the past, and CCIC will not send anyone to this site currently. We will go ahead and cancel this inspection schedule because of that. If you have mixed paer from other suppliers that are ready for inspection, please contact me. Thank you!

CP25, Dep.Ex. 5, page 9. (Without correction.)

On September 8, 2005, Sparks also received an e-mail from Joe C. Wen, another potential purchaser of the KB mix. In this e-mail, Mr. Wen rejected the KB mix and politely admonished Sparks to not offer any more sub-grade products:

I just received a call from CCIC informing me about one of your packing plant in Tacoma-KB Recycling. They said that that particular plant had many rejections on the Mixed, and as such, they suggest me to cancel the inspection as they don't want to waste my money in case it fails again. As you know, we have a very good relationship with CCIC so they usually pre-select the new suppliers base on their records. Anyway, as we discussed previously, quality is very important to us as we are a direct mill buyer, not a broker. So the material we are buying must be consistent and reliable both in tern of

quality and quantity. I am relying on you on the selection of suppliers and in return we will commit to the tonnages month in month out so we can create a win win situation for both parties. Please kindly give me your thoughts on this. For now, KB inspection has been cancelled and we will not load from this plant. Please kindly ensure good quality from your other plants. Thanks.

CP25, Dep.Ex. 5, page 10. (Without correction.)

Simkins took another run at Sneh International in September of 2005.

On September 21, 2005, Simkins wrote to "S.K.," describing the product as "The pack will only have paper metal (steel cans a small amount of aluminum cans) and plastic in it (the tests showed 2% to 4% metals and plastics.)"

CP25, Dep.Ex. 5, pages 14 and 15.

Simkins followed up again with S.K. in an e-mail dated October 5, 2005:

I forgot to ask you about the mixed paper I have mentioned. Is there anyway that we can sell two containers to show the mill it is reasonable quality? I can sell these two loads approximately 40 /M/T at D150 Cochin/Nava including D3.50 for prompt shipment. What do you think?

I have actually attached some of the worst photos so you can see what might be there. They are saying the out throws percentage is about 4%.

CP25, Dep.Ex. 5, page 16.

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The record contains no other communications with S.K. or Sneh International and, therefore, it appears that Sneh International rejected the KB mix.

In an e-mail to Emea Igay, dated October 5, 2005, Simkins pitched the product to Aspinall Marketing:

I was going through my suppliers notes and I have on that produces a curbside mix. It has been sorted but it still contains about 3-4% of out throws and prohibitives (steel and aluminum cans, HDPE and PET bottles, can lids no glass).

CP25, Dep.Ex. 5, page 18.

Giving up on his original plan to sell ten containers, Mr. Simkins went on to offer Aspinall a trial shipment of only two containers:

I was wondering if you could sell two trial containers to a board mill as it will have a lot of new magazines and Occ in it. I can offer these two containers at 125.00 including D4 CNF Manila. I would offer more but I think it best to do trial first.

CP25, Dep.Ex. 5, page 18.

The court record contains no response from Aspinall.

Unable to move the KB mix due to its bad reputation in the industry, Simkins and Sparks came up with a plan to trick CCIC into approving the product. The plan was to ship it from the KB facility in Portland, Oregon, to the Appellant's facilities in Longview, Washington. Simkins and Sparks would then request CCIC inspection in Longview, Washington, and thereby

hide the product's source from CCIC. The plan also included showing the CCIC the Appellant's own high-quality mixed paper and foisting the KB mix off as a product of the Appellant. The plan even included placing three bales of high quality mixed paper immediately behind the door to the train car so that when the CCIC inspectors opened the door they would assume that the entire load was high quality mixed paper. In an undated e-mail, Simkins writes to Sparks:

I think I could have the bales be loaded from Waste Control, when the inspector comes he is shown Waste's regular mix then lastly have three bales of Waste's mix put on the butt end?

CP25, Dep.Ex. 5, page 19. (Without correction.)

One would assume that Sparks would have immediately reprimanded Simkins for even suggesting such a dishonest ploy. However, it appears that Sparks liked the idea and attempted to implement it. This plan was discussed by Sparks in his deposition:

Q. And then in the middle Ken says I think I could have the bales be loaded at Waste Control. When the inspector comes he is shown Waste Control's regular mix. Lastly, have three barrels [sic] of waste mix put on the butt end.

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A. Yeah. Yeah.

Q. What does that mean?

A. That means from what Ken had seen from what he and Rick Campbell had both agreed is that Waste Control made a very good mix and that what they could do - - if CCIC still, you know, demanded to come see it, then what they could do is could bring in the bales from Portland, rework them, dress them, whatever you want to call them.

Q. Okay.

A. So they put those in. And just to make sure everything looked great to the - - because the inspector still has to see some on the ground. But at least to show a container that they would like to show them loaded - -

Q. They open up the back door, and they look at it, it looks wonderful, and they close it back up?

A. Yes. But typically if they a five container order for us to ship, CCIC demands that at least half of the material has to be on site. And they don't want it all in containers ready to go. They'll let you have a container loaded. If it's a ten container load, they might let you have two or three loaded, but they still want to see paper on the ground.

CP25, page 65, L15 through page 66, L19. (Without correction.)

Alas, CCIC learned of the ploy and it failed. In an October 28, 2005, e-mail,

Sparks writes to Simkins explaining how their plan was foiled:

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The problem we had with Waste Control was that as soon as we gave CCIC the address, they contacted our buyer and informed them that the mix from this location was a very poor quality. They never went to see it, but our buyers asked us not to ship.

CP25, Dep.Ex. 5, page 19.

Simkins wrote back that same day, explaining that the reason for the rejection was that CCIC noticed that Respondent had changed the location on the same shipment:

Actually, it was KB that they refused and when we switched to Waste Control they caught wind of it . . . at least I think that this is what happened. I was not thinking of anyone state side but you two contacts in China.

CP25, Dep.Ex.5, page 19. (Without correction.)

Sparks wrote back on October 28, 2005, explaining to Simkins that it was Sun Paper, a company to whom they had previously attempted to sell the KB mix, that turned them into CCIC:

The other group, Sun Paper, was the one that was alerted by CCIC of the poor reputation for our supplier ex Tacoma. *I think they may smell a rat, but I will give them a call and see how they may react to a booking in Tacoma.*

CP25, Dep.Ex. 5, page 20. (Emphasis added.)

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The bolded portion of the above message is the first place in the record that mentions the scheme that Sparks and Simkins eventually employed to get the KB mix past CCIC and into China. Under this new plan, Sparks and Simkins would sell the KB mix to a large volume paper exporter and make an end run around the CCIC inspectors. CP25, page 35, L22 through page 36, L2. High-volume recyclable paper exporters can be licensed to "self inspect" by China and, thereby, avoid the delays associated with waiting for CCIC inspections. CP25, page 41, L4 through L9. The Respondent located a company called "Newport International" in Tacoma, Washington, that they could use as a consignee of the KB mix. CP25, page 37, L13 through L16. At some point, Respondent's scheme changed and Respondent actually sold the KB mix to Newport International and Newport then sold the mix to a mill in China. CP25, page 39, L23 through page 40, L4.

Having found a way into China, the Respondent agreed to purchase ten train cars of KB mix from Appellant. Simkins and Campbell agreed that the price for ten containers of KB mix would be \$76.00 per ton. CP25, page 79, L3-L4. The Respondent then sent two purchase orders, each for five containers, to the Appellant on December 9, 2005. Both purchase orders

listed the “grade” of the product as “mixed paper” and included the memo “unless otherwise specified, grade is in accordance with PS Standards.” CP25, Dep.Ex. 3 and Ex. 4.

Respondent made ten containers of KB mix available to the Respondent and sent invoices for each container describing the product as “shaker mix.”² CP25, Dep.Ex. 3 and Ex. 4. Respondent bought the ten containers of KB mix from Appellant for \$76.00 per ton (CP25, page 77, L2 through L5) and then sold it to Newport International for \$91.00 per ton. CP25, page 79, L3 through L4. Newport International sent the KB mix to China without it being inspected by CCIC. CP25, page 39, L17 through L22.

Respondent’s profit margin on this shipment was \$15.00 per ton. The typical profit margin for a paper broker is between \$3.00 and \$5.00 per ton. CP25, page 79, L8 through L10. Sparks admitted in his deposition that Appellant intentionally sold the KB mix at a low rate because of concerns regarding its acceptance by the Chinese and, for that reason, Appellant did

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Although the Respondent invoiced the December 2005, shipment as “shaker mix,” the Respondent denied seeing the invoices until after litigation had begun. CP25, page 38, L11 through page 39, L7. Mr. Sparks does not deny that these invoices were sent to his office by the Appellant, *id.*, nor does he deny that his company received the invoices. CP25, page 42, L7 through L17.

not care about Respondent's huge profit margin. CP25, page 80, L3. CP25, page 81, L9 through page 82, L9. After selling the KB mix to Newport International, Sparks waited nervously to find out how the product would be received in China. Sparks admitted in his deposition that he was "anxious" about the shipment (CP25, page 70, L19 through L23) and that he had been concerned about sending the KB mix to China since at least October 28, 2005. CP25, page 66, L23 through page 67, L3.

Fortunately for Respondent, the December shipment was accepted by the Chinese. In an e-mail to Campbell on February 14, 2006, Sparks describes his relief that the Chinese inspectors did not look very carefully at the shipment:

FYI, they have finished going through the first five containers. Non fiber materials edged up slightly higher than the first container indicated, but still the percentage of 4.4%, plus or minus, was not bad. They got a little nervous with a few bales that seemed to have quite a few cans inside the bales, but they commented that the outside of the bales was very good, and *customs didn't even look further than the second row in any container. This was very good.*

CP25, Dep.Ex.7, page 3. (Emphasis added.)

Having made a profit of three to five times more than normal, Sparks and Simkins were ready to buy and sell more KB mix. Sparks contacted Campbell and negotiated for the sale of ten more containers for shipment in

March of 2006. CP25, page 68, L25 through page 69, L2. Sparks and Campbell reached an agreement which Sparks allegedly memorialized with a February 15, 2006, purchase order. This third purchase order contained the same reference to "mixed paper" and the "PS Standards" as the first two purchase orders. On this second transaction, Respondent paid the Appellant \$79.00 per ton (CP25, page 77, L6 through L16) and sold the KB mix to Newport International for \$89.00 per ton. CP25, page 78, L15 through L17. Although the profit margin was slimmer than the first shipment, Respondent still made a profit of \$10.00 per ton which is two to three times more than normal.

Newport International shipped the March 2006 shipment to China without inspection by CCIC. CP25, page 40, L14 through page 41, L3. This shipment was allegedly rejected by the Chinese mill because it contained too much non-fibrous material.

The Respondent filed suit against the Appellant claiming that the contract between the parties required Appellant to deliver "mixed paper" grade recyclable paper as that term is defined by the 2006 ISRI Guidelines. Appellant denied Respondent's claim, alleging that the contract was for the delivery of KB mix, a product that everyone knew was of marginal value.

The Respondent moved the trial court for summary judgment and the trial court granted Respondent's motion.

D. ARGUMENT

1. Standard of Review

The Court of Appeals reviews an order granting summary judgment *de novo*. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992).

2. Standard on Summary Judgment

Summary judgment is proper where the pleadings, depositions, affidavits and admissions on file show that no genuine issue of material fact exists as a matter of law. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). In considering a motion for summary judgment, the court must view all evidence and all inferences from the evidence in the light most favorable to the nonmoving party. *Roger Crane & Assocs. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Summary judgment is inappropriate "if the record shows any reasonable hypothesis which entitles the nonmoving party to relief." *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980). Any doubts as to the existence of a dispute of material fact must be resolved in favor of the nonmoving party. *Ely v. Hall's Motor Transit Co.*, 590 F.2d

62 (3d Cir.1978). Summary judgment is inappropriate “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.”

Mostrom v. Pettibon, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

3. A contract already existed between the parties at the time Respondent sent its February 15, 2006, “purchase order” to Appellant and, therefore, RCW 62A.2-206(1)(b) does not apply.

RCW 62A.2-206 governs the formation of contracts, not the interpretation of the terms of a contract. The statute provides, in pertinent part:

62A.2-206. Offer and acceptance in formation of contract

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation.

(Emphasis added.)

RCW 62A.2-206 governs the manner in which contracts can be formed.

Subsection (a) provides the general rule that an offer to make a contract impliedly invites any reasonable manner and medium of acceptance.

Subsection (b) provides that a unilateral order or offer to buy goods for prompt service impliedly invites acceptance via the shipment of those goods. In the case at hand, the record establishes that Appellant and Respondent already had a contract to buy and sell ten containers of KB mix prior to the February 15, 2006, "purchase order."

The *Declaration of Rick Campbell* provides the following testimony:

The December 2005, shipment was apparently received in China and accepted so shortly thereafter in January or February, Fritz Sparks made contact with me to purchase more of the product that was being produced by KB Recycling. Ultimately, agreement between Fritz Sparks and myself was for EMS to purchase 10 additional containers. This time at a price of \$78.00 per ton.

CP26, page 3, para 12.

The testimony of Campbell establishes that the agreement to purchase ten additional containers of KB mix was made between "Fritz Sparks and myself." The *Declaration of Fritz Sparks* also states in his declaration that the contract was negotiated and entered into between Sparks and Campbell well before the February 15, 2006, purchase order:

On February 15, 2006 and in reliance on the Waste Control "mixed paper" scrap paper samples examined by me in late 2005 and the 10 containers of "mixed paper" grade scrap paper supplied by Waste Control in late 2005, I (on behalf of EMS) entered into a second contract for the purchase of an additional 10 containers of "mixed paper" grade scrap

paper. This second contract was memorialized with a Purchase Order dated February 15, 2006 that specified the "mixed paper" grade and incorporated the industry standard Paper Stock Standards for the "mixed paper" grade of scrap paper into the Purchase Order.

CP20, page 2, line12 through line 19. (Emphasis added.)

Campbell and Sparks agree that they personally negotiated and entered into a contract prior to the February 15, 2006, work order. Sparks admitted that the "purchase order" in question was a memorialization of an existing contract and not an offer to enter into a new contract. A verbal "offer and acceptance" had already occurred and, therefore, RCW 62A.2-206(1)(b) has no application in this case.

At the very least, there is a question of fact as to whether an enforceable contract existed prior to the February 15, 2006, purchase order. Also, as discussed later herein, the evidence in the record presents a genuine issue of fact as to the terms of that contract.

4. **The factual evidence in the record creates a genuine issue of fact as to whether the February 15, 2006, "purchase order" accurately memorialized the prior verbal agreement between the parties.**

The *Declaration of Rick Campbell* establishes that the specific product that he negotiated to sell Simkins and Sparks did not meet the definition of "mixed paper" as that term is used in the industry. CP26.

Campbell's testimony further establishes that he negotiated the sale of a particular product that was generated by a particular facility, not the sale of "mixed paper" as determined by any outside standard. Campbell met with Simkins at the KB facility, showed him KB mix, and offered to sell it to him. Sparks and Simkins agreed to buy KB mix generated at the KB facility at a price of \$79.00 per ton. Appellant delivered KB mix that was generated at the KB facility and Respondent paid \$79.00 per ton. Sparks did not pick up the phone and say "Hey Rick, send me 10 containers of mixed paper at \$79.00 per ton." Campbell negotiated for the sale of a sub-grade product and the record establishes that Simkins and Sparks knew that it was a *particular* sub-grade product. To the contrary is Sparks testimony that the agreement which was memorialized by, not created by, the purchase order was for "mixed paper" as defined by the 2006 ISRI guidelines. With this evidence in the record, there is a genuine issue of fact as to whether the February 15, 2006, purchase order accurately memorialized the prior agreement. Summary judgment was improper.

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Delving further into the record only sharpens the contrast between the factual evidence placed in the record by the Appellant and Respondent:

(I) Simkins and Sparks discussed between themselves and with their potential customers the percentage of out throws one could expect from KB mix.

The February 15, 2006, purchase order refers to the grade of paper as “mixed paper” and provides “Unless otherwise specified, grade is in accordance with PS Standards.” CP20, Ex. A. At the time of the transaction, there were no “PS Standards” that were in effect. The “PS Standards” were never admitted into the record. In their place, the Respondent provided the court with a copy of the “2006 Scrap Specifications Circular” that was produced by the Institute of Scrap Recycling Industries, Inc., or “ISRI.” In an attempt to cover up this problem, counsel for Respondent cited the trial court to the ISRI standard and generated a false citation, to the “Paper Stock Standards for Export Transaction at 32.” CP21, page 2. The false citation included underlined text that gives the impression that “Paper Stock Standards for Export Transaction” is the title of a document. No document bearing this title was ever placed into the record and, to the knowledge of counsel for Appellant, no such document even exists.

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The fact that the “PS Standards” did not even exist in 2005 and 2006 was not the only problem facing counsel for the Respondent. The ISRI definition of “mixed paper” that counsel incorrectly characterized as the “PS Standards” definition, defines “soft mixed paper” and “mixed paper” as:

(1) Soft Mixed Paper

Consists of a mixture of various qualities of paper not limited as to type of baling or fiber content.

Prohibitive Materials may not exceed 2%

Total Outthrows may not exceed 10%

(2) Mixed Paper

Consists of a clean, sorted mixture of various qualities of paper containing less than 10% of groundwood content.

Prohibitive Materials may not exceed ½ of 1%

Total Outthrows may not exceed 3%

CP20, Ex. B, page 32.

The Court should note that the ISRI definition for “mixed paper” has a maximum out-throws of 3.0 percent. This creates a huge problem for Respondent’s attempt to boot-strap the ISRI definition of “mixed paper” into this case. As summarized in the statement of facts, the record contains numerous e-mails between Sparks and Simkins and between Simkins and

Respondent's potential customers describing the KB mix as having between 2.0 and 4.0 percent out-throws. Furthermore, the December 2005 shipment of KB mix contained 4.4 percent out-throws. Not only did Respondent fail to object or complain about this shipment not meeting the ISRI definition of "mixed paper," but it decided to purchase ten more containers. This created an obvious problem for Respondent's counsel. How can Respondent convince the trial court that it contracted for "mixed paper" with no more than 3.0 percent out-throws when (a) Simkins and Sparks expected up to four percent out-throws, (b) Simkins told several potential buyers to expect up to four percent out-throws, and (c) the first ten containers of "mixed paper" contained 4.4 percent out-throws? The answer was to hybridize the ISRI definitions of "soft mixed paper" and "mixed paper." At page 2 of *Plaintiff's Motion for Summary Judgment*, counsel for Plaintiff writes:

The Paper Stock Standards define "mixed paper" as "[c]onsist[ing] of a clean, sorted mixture of various qualities of paper containing less than 10% of groundwood content. Prohibitive Materials may not exceed ½ of 1%. **Total outthrows may not exceed 10%.**"

CP21, page 2. (Emphasis added.)

Counsel for Respondent surreptitiously changed the ISRI definition of "mixed paper" by increasing the total allowable out-throws from three

percent to ten percent and presented it to the court as the “PS Standard.” The length to which counsel for the Respondent went to hide this issue from the trial court demonstrates the deadly impact of Simkins’ and Sparks’ knowledge that the KB mix would have out-throws of up to 4.0 percent.

(ii) Simkins’ attempts to openly sell KB mix in China were repeatedly rebuffed without exception.

Simkins tried for five months to sell the KB mix on the open market. The record contains communications with six different potential buyers. All of these invitations to negotiate were either ignored, declined, or rebuffed. At least two potential transactions were killed by CCIC’s refusal to even look at the product. This evidence creates a genuine issue of fact as to whether the purchase order, which refers to highly valuable “mixed paper,” accurately memorializes the agreement between Appellant and Respondent. Had Simkins been offering to sell highly valuable “mixed paper,” he would have had no trouble selling it on the open market.

(iii) Simkins and Sparks employed a ruse to get the KB mix into China.

Had Simkins and Sparks believed that Respondent was purchasing “mixed paper,” they would not have attempted to foist it off on CCIC as a mix that was produced by Appellant Waste Control. If Simkins and Sparks

were expecting highly valuable “mixed paper,” why would they develop two schemes, the second of which succeeded, to sneak this product into China? The fact that Simkins and Sparks employed these ruses creates an inference that they did not classify the KB mix as “mixed paper” because they expected Appellant to deliver “mixed paper” as defined by ISRI. It is just as likely, if not more likely, that the classification of the KB mix as “mixed paper” on the purchase order/memorialization was part of the ruse. By calling the product “mixed paper” and showing Newport International that the product came from Waste Control, Sparks and Simkins effectively “laundered” the KB mix and hid its true origin. This is a reasonable inference from the evidence that must be given to the Appellant as the nonmoving party.

(iv) Respondent bought the KB mix at a cut-rate and sold it at a premium rate.

If Simkins and Sparks were expecting “mixed paper,” why did they negotiate a purchase price that gave them a profit margin three to five times higher than normal? The *Declaration of Rick Campbell* accentuates this point:

Sometime in April or May 2006, after EMS made a claim for the March order, Fritz Sparks told me that EMS had sold the product to Newport for sale to China. This was the first time that I knew Newport was involved as I thought EMS was sending the product to a sorting facility. If I had been advised

that Newport was involved in the transaction, I would have told Fritz Sparks that Newport would not take any product from KB Recycling. *The price EMS got indicates that EMS, Fritz Sparks, was marketing the product to Newport as regular "mixed paper." If the paper mix could have qualified as "(2) Mixed Paper," under ISRI standards, Waste Control would have been selling the product at the price EMS was receiving. EMS was buying a sub-standard product at a discount price and then selling it at a higher-grade price.*

CP26, page 4, L9 through L17. (Emphasis added.)

Appellant is in the business of buying and selling recyclable paper products. If the KB mix met the "mixed paper" standard, Appellant would have sold it on the open market and made the obscene profits enjoyed by Respondent on the December 2005 shipment.

(v) Simkins and Sparks were openly anxious about how the KB mix would be received in China.

If Simkins and Sparks were expecting to receive highly valuable mixed paper from Appellant, why were they nervous about how the product would be received by Chinese inspectors?

(vi) Simkins and Sparks did not object when the first shipment of KB mix contained over four percent out-throws, but rather, Sparks ordered more.

If Simkins and Sparks were expecting "mixed paper" with no more than 3.0 percent out-throws, they would have objected or complained to Appellant when the December 2005 shipment contained 4.4 percent

out-throws. What is more, if the 2005 shipment was “nonconforming goods,” why did Sparks then decide to purchase ten more containers of the same product? This evidence of the prior course of performance between the parties is relevant in interpreting the term “mixed paper.”

RCW 62A.2-208(1) provides, in pertinent part:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Official Comments 1 and 2 elaborate on the above rule:

1. *The parties themselves know best what they have meant by their words of agreement and their action under that agreement is that best indication of what that meaning was.* This section thus rounds out the set of factors which determines the meaning of the “agreement” and therefore also of the “unless otherwise agreed” qualification to various provisions of this Article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of the course of performance elsewhere in this article carries no contrary implication when there is a failure to refer to it in other sections.

(Emphasis added.)

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In the case at hand, the December 2005 purchase orders used the term “mixed paper” to memorialize the parties’ prior verbal agreement. The Appellant delivered, per the verbal agreement, the sub-grade KB mix. The Respondent was aware that the KB mix contained out-throws of 4.4 percent. Not only did the Respondent fail to object or otherwise complain, the Respondent purchased more of the KB mix. This course of performance establishes that, or at the very least creates a question of fact as to whether, the parties never intended to buy and sell “mixed paper” as defined by ISRI guidelines.

(vii) Conclusion.

The factual evidence placed in the record by the Appellant created a genuine issue of fact as to whether the February 15, 2006, purchase order correctly memorialized the parties’ agreement. The evidence in the record, when construed in the light most favorable to the Appellant, and with all inferences therefrom resolved in favor of the Appellant, shows that the Respondent got exactly that for which it had bargained. Respondent knowingly bought sub-grade KB mix and attempted to sell it in China as a highly-valuable “mixed paper.”

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5. **Even if the terms of the February 15, 2006, “purchase order” constituted an offer that was accepted by shipment, the evidence in the record is contradictory as to the objective intent expressed by the parties’ use of the term “mixed paper.”**

In *Berg v. Hudesman*, 115 Wn.2d 657, 807 P.2d 222 (1990), the Washington Supreme Court adopted the “Context Rule” for interpreting contracts. In doing so, the court quoted a prior case of its own to summarize the Context Rule and how it should be applied:

May we say here that we are mindful of the general rule that parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. But, as stated in *Olsen v. Nichols*, 86 Wn. 185, 149, P. 668 (1915), parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing. Such evidence, however, is admitted not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. If the evidence goes no further than to show the situation of the parties and the circumstances under which the instrument was executed, then it is admissible.

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Id. at 669, 801 P.2d 222 (citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

Nine years later, in *Hollis v. Garwell*, 137 Wn.2d 683, 695, 974 P.2d 836 (1999), the Washington Supreme Court reiterated that the purpose of the Context Rule is to make extrinsic evidence admissible “where the evidence gives meaning to words used in the contract.”

The trial court failed to apply the “Context Rule” as required by *Berg* and *Hollis*. The trial court took purchase order/memorialization which says “mixed paper,” added with the Appellant’s admission that KB mix was not “mixed paper” as that term is used in the industry, and called it a day. From reviewing the verbatim transcript of proceedings, no weight or consideration was given to the extrinsic evidence in the record which, at the very least, creates a question of fact as to the meaning of “mixed paper.” The record also raised the question of whether the insertion of the term “mixed paper” into the purchase order/memorialization was part of a fraudulent scheme that the Respondent was using to sneak the KB mix into China.

All of this analysis, of course, assumes that the purchase order/memorialization was *the* contract between the parties. The evidence placed in the record by both Appellant and Respondent shows that the parties had reached an agreement before the February 15, 2006, purchase order was

even delivered to Appellant. The parties now disagree about the terms of pre-existing verbal contract. The February 15, 2006, purchase order/memorialization is evidence of the terms of the contract but it is not the actual contract. As such, the court should be applying *Berg* and *Hollis* to the purchase order/memorialization, but rather it should be applying the Context Rule to the pre-existing verbal agreement between Campbell and Sparks.

6. **Even if the 2006 ISRI definition of “mixed paper” applies, there is a question of fact as to whether the parties modified the term “mixed paper” as expressly provided for in the ISRI guidelines and Respondent’s purchase order.**

Definitions and standards within the paper recycling industry are fluid and subject to sudden change. Sparks admitted this in his deposition:

Q. This is what your counsel sent to me. Are these the ISRI standards?

A. Yes. I mean you have to understand that standardization in our industry is very dynamic, and overtime they’re basically changing as we go along.

Q. Well, I talked to one person in the trade – I don’t even remember who told me. He said basically his understanding is that there is no specific standard in the trade; there are different standards at time.

A. There are because again the standards literally can change because of the fiber content that paper manufacturers learn how to alter or change. They can change because certain items literally disappear from the industry. They can change because of the uses

that consuming mills learn how to sort or fine tune an existing grade, and with some tweaking they can make it into almost a new grade.

CP25, page 13, L10 through page 14, L1.

Sparks further testified that the standard can vary widely from transaction to transaction and agreements where certain buyers employed outdated standards from the 1990's because certain mills preferred it. CP25, page 14, L6 through L15. Sparks further testified that the parties will often alter the standards applicable to a transaction to suit their particular needs. CP25, page 14, L25 through page 15, L12.

As previously discussed, the reference to "PS Standards" by the purchase order creates a problem for the Respondent's argument. There was no such thing as "PS Standards" in 2005 and 2006. Sparks admitted in his deposition that he was unaware that the name of the guidelines had changed at the time of the 2005 and 2006 transactions with Appellant. CP25, page 18, L24 through page 19, L6. The "PS Standards" referred to in the purchase order were not only out of use in 2005 and 2006, they most likely would have been impossible to even find in 2005 and 2006. CP25, page 19, L7 through L11.

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There was also evidence in the record which showed that the ISRI guidelines were not definitive in the industry. Sparks admitted that the term “mixed paper” can have different meanings in the industry:

Yeah, but in our industry the use of mixed paper and - - if you know its coming from a curb side program, you are selling it as a soft mix. If it's coming from a waste paper plant that has no curb-side programs, you sell it as hard mix.

CP25, page 20, L21 through L25.

According to Sparks, any “mixed paper” that comes from a curbside program is “soft mix. In his e-mail of October 5, 2005, Simkins describes the KB mix as a curbside mix: “I was going through my supplier notes and I have one that produces a curbside mix.” CP25, Dep Ex. 5, page 18. The 2006 ISRI guidelines distinguish between “soft mixed paper” and “mixed paper” without regard to whether the product was part of a curbside program. As such, Sparks admitted (a) the ISRI guidelines are not definitive in the industry and (b) the product that he was purchasing from Appellant was properly classified as “soft mixed paper” as opposed to “mixed paper.”

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Even if the court makes the jump from “PS Standards” to “ISRI Guidelines,” Respondent is still unable to put away several nagging questions of fact in the record. Sparks admits that standards in the industry are anything but “standard” and can vary from transaction to transaction. The ISRI guidelines confirm and seem to embrace this need for flexibility:

VI Grade Definitions

The definitions which follow describe grades as they should be sorted and packed. CONSIDERATION SHOULD BE GIVEN TO THE FACT THAT PAPER STOCK AS SUCH IS A SECONDARY MATERIAL PRODUCED MANUALLY AND MAY NOT BE TECHNICALLY PERFECT. **Definitions may not specifically address all types of processes used in the manufacture or recycling of paper products. Specific requirement should be discussed between Buyer and Seller during negotiations.**

CP20, Ex.B.

The ISRI standards, if applicable, leave the door open for the parties to negotiate their own particular definitions. The evidence in the record shows that Respondent and Appellant did so in this case.

Furthermore, Respondent’s own purchase order states: “Unless otherwise specified, grade is in accordance with PS Standards.” Again, we see the flexibility discussed by Mr. Sparks. The evidence in the record

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downright shows that, let alone creates a question of fact as to whether, the parties "otherwise specified" the grade of paper.

E. CONCLUSION

There was a genuine issue of fact as to the identity of the product that Appellant contracted to sell to Respondent. The trial court erred in granting summary judgment in favor of Respondent and should be reversed.

DATED: July 28, 2008.

Respectfully submitted,


MATTHEW J. ANDERSEN
Of Attorneys for Appellant

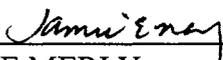
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CERTIFICATE

I certify that on this day I caused a copy of the foregoing Brief of Appellant to be mailed, postage prepaid, and faxed to Respondent's attorney, to the address and fax number as follows:

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DATED this 28 day of July, 2008, at Longview,
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JAMIE MERLY