

FILED
Court of Appeals
Division II
State of Washington
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IN THE WASHINGTON STATE
COURT OF APPEALS

MUHAMMAD AHSAN and)	
FAIZA AHSAN)	
Appellants,)	Case Number: 512611-1-II
)	
vs.)	
)	Superior Court Case No.: 16-2-01347-7
)	
SLOANS ENTERPRISE)	
OF AMBOY, LLC)	
)	
Respondent.)	
_____)	

APPELLANT'S BRIEF

RESPECTFULLY SUBMITTED,

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I.

TABLE OF AUTHORITIES

Cases

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*Weyerhaeuser Company v. Commercial Union
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II.

INTRODUCTION

This is an appeal by homeowners, husband and wife, against respondent, an excavating company, from an adverse verdict in the matter below, where the appellants alleged negligence in the removal of mud after a mudslide.

For the purposes of this appeal, the appellant believes that the parties may, likely, stipulate to the facts of the mudslide activity, as well as to the fact that the respondent removed some mud from in and around the appellant's home.

This matter was tried before a jury, where there was extensive testimony by experts¹ for both sides.

In this appeal, however, the appellants argue that the trial judge did not exercise his 'gatekeeper' role, when admitting the testimony of the expert for the defendant, Mr. Zipper.

III.

ASSIGNMENT OF ERROR

A.

ERROR: ADMISSION OF TESTIMONY BY DEFENDANT'S EXPERT, WHICH INVADED THE PROVINCE OF THE JURY

¹ Some effort was made by defense counsel to portray appellant, husband, as an expert in this matter. While it is true that said appellant is, coincidentally, a professional engineer, he was not asked any expert witness questions, and testified, instead, as a party to this matter.

B.

ISSUE

**WHETHER THE TRIAL JUDGE
ABUSED HIS DISCRETION IN
ALLOWING DEFENSE EXPERT,
MR. ZIPPER, TO TESTIFY AS
TO THE 'REASONABLENESS' OF
THE ACTIONS OF THE
DEFENDANT/RESPONDENT?**

IV.

STATEMENT OF THE CASE

The following exchange took place during defense counsel's direct examination of defendant's expert witness, Mr. Zipper:

"Q: (by defense counsel) And was there anything unreasonable then about Mr. Sloan going ahead and performing the work that Mr. Ahsan asked him to do?

"A: (by Mr. Zipper) No.

See, Appellant's Appendix filed in this matter.

The parties in this matter may agree that this was a negligence action over a mudslide that allegedly caused damage to the home and personal belongings of the appellants. CP Exh #s 1-19. Both sides hired expert witnesses on mudslides. CP Exh # 35, *and* Appellant's Appendix, attached to this brief. The appellant's expert testified that the excavation by the respondent

was one of the factors that caused the mudslide, that caused the offending damage to the home and belongings of the appellants. (R. 462)

The parties may further, likely, stipulate, that as the trial judge indicated, a large number of documents, including photos, charts, drawings, invoices, estimates, satellite photos, and the like, were admitted without objection by both sides. CP Exh #s 1-67

Neither side challenged the expert credentials of the other side, and therefore, they were ‘expert witnesses’ for the purposes of the trial.

V.

ARGUMENT

A.

THE STANDARD OF REVIEW

This Court reviews the admissibility of expert testimony based upon the ‘abuse of discretion’ standard of review. *Johnson-Forbes v. Matsunaga*, 181 Wash.2d 346 (2014); *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wash.2d 654 (2001).

B.

ANALYSIS

Washington State Court Rule of Evidence 704, prohibits an expert witness from testifying on matters which are within the province of the jury, such as whether a party acted ‘reasonably’ or not. The rule states: “ RULE ER704 - OPINION ON ULTIMATE ISSUE - Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” ER 704.

In this matter, Mr. Zipper’s testimony, that the respondent’s actions were not ‘unreasonable’ was not ‘otherwise admissible’ under the rule. Only the jury can decide as to what is, or is not reasonable.

The court addressed the same issue in *Johnson-Forbes v. Matsunaga*, 181 Wash.2d 346 (2014). Unlike in this matter, however, in *Johnson, supra*, both defense counsel, and also the expert witness, took extreme precautionary measures to avoid invading the province of the jury. The court in *Johnson, supra*, noted:

Moreover, Matsunaga’s counsel assured the court that Tencer would not testify about any injuries Johnston–Forbes did or did not sustain as a result of the collision, and on cross-examination, Tencer repeatedly stated during his *355 testimony that he was not testifying about Johnston–Forbes’s injuries. Given his training and experience and the limits of his expertise, Tencer appropriately did not opine on the injuries Johnston–Forbes may have sustained and the trial court properly limited any testimony that would tie in Tencer’s observations about force of impact in relation to Johnston–Forbes’s injuries.⁵ Because the trial court performed its proper gatekeeping function, we affirm. *Id.* at 393.

In the instant matter, the trial judge did not perform the proper ‘gatekeeping’ function. Unlike in *Johnson, supra*, defense counsel in this matter never assured the trial judge that he would refrain from asking Mr. Zipper about ‘reasonableness.’ To the contrary, defense counsel, without warning, specifically asked Mr. Zipper the above-stated question during trial, that is in the sole province of the jury. Similarly, Mr. Zipper is an expert witness who spends more than fifty percent of his time as a forensic expert witness. He knew that this question was improper. He, nevertheless, went on to provide an answer.

Further, as the court discussed in *Johnson, supra*, the only proper question to Mr. Zipper should have been along the lines of, ‘based upon your education, training and experience in the field of mudslides in the State of Washington, do you have an opinion as to whether Sloan’s excavation on the day in question fell below the standard of care for excavation under the facts which you have been asked to assume?’

By contrast to the instant matter, in *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wash.2d 654 (2001), a hazardous waste case, the plaintiff’s expert testified that she was offering her opinion, “based upon evidence generally relied upon by experts in her field.” *Id.* at 684. *Weyerhaeuser, supra*, in fact, had almost exactly the same data evidence as that which existed in the instant matter. There was data on local rainfall, local and site-specific geology, observation of on-site equipment operators, reports by other consulting firms, and reports by state officials. Unlike in the instant matter, however, the expert in *Weyerhaeuser, supra*, never crossed the line with an opinion as to the elements of the ultimate issue, including as to ‘reasonableness.’

In the instant matter, only the jury could decide on the elements of negligence, which are: duty, foreseeability, breach, damages. Whether the respondent's actions were reasonable, goes solely to the jury on the element of foreseeability.

V.

CONCLUSION

The trial judge's admission of Mr. Zipper's testimony was not 'otherwise admissible' under ER 704.

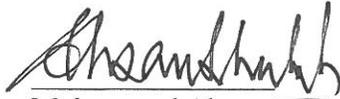
The admission of same was an abuse of discretion.

To the extent that the abuse of discretion went to an issue that was fundamental to the matter, appellants' right to have a jury decide the case, this court may find that such is reversible error.

The verdict and the judgment should be vacated, and the matter should be remanded for a new trial.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

WE HEREBY certify that on the 29th day of May, 2018, the original of this Appellant's Brief, was provided to the Clerk of the Court of Appeals, as a pdf. attachment by electronic mail to: coa2@courts.wa.gov, and that a copy of the email and of this Appellant's Appendix was provided by electronic mail to: Peter D. Motley, Esquire, WSBA #36070, Attorney for Respondent, to: Peter.Motley@LibertyMutual.com, and Kathryn R. Morton, Esquire, Attorney for Respondent, cassie.morton@libertymtual.com, and Amber L. Pearce, Esquire, Attorney for Respondent, APearce@floyd-ringer.com .


Muhammad Ahsan


Faiza Ahsan

APPENDIX

Page 577 of the trial transcript -
direct examination of defense expert - Zipper

1 attempt to clear soil from the side of his house that day?

2 A: Yes, yes. Because, you know, to his view, just trying to
3 sort of read his mind, you know, it wasn't guaranteed that
4 the slide was going to continue. A homeowner's got to do
5 what they can to try to protect their property, and it's a
6 very reasonable thing to do is to try to get the amount of
7 work done that, that can reasonably be done within a short
8 period of time, you know, on basically an emergency basis
9 to remove the mud that had already damaged these deck
10 posts.
11

12 Q: And was there anything unreasonable then about Mr. Sloan
13 going ahead and performing the work that Mr. Ahsan asked
14 him to do?
15

16 A: No.

17 Q: Okay.

18 I don't have any more questions for you, but I'm
19 sure Mr. Leatham does.
20

21 THE COURT: Thank you.

22 Cross examination, Mr. Leatham?

23 MR. LEATHAM: Thank you.
24

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MUHAMMAD AHSAN - FILING PRO SE

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