

FILED

APR 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

DONALD W. DOWNING, JR.,
an unmarried person,

Superior Court No. 08-00314-6

Plaintiff/Respondent,

COA No. 300153

v.

ROBERT WINKER and JANE DOE
WINKER, and REBECCA WINKER,
an unmarried person, and WADE W.
GOFORTH, an unmarried person,

Defendants/Appellants.

BRIEF OF RESPONDENT

SCOTT C. BROYLES
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Attorney for Plaintiff/Respondent

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I.

INTRODUCTION

I agree with the first paragraph of Mr. Winker's Brief.

However, during the trial there was evidence of damages incurred or to be incurred by the Plaintiff, introduced over objections by Defendant Winker and overruled by the Court, during the testimony of the Plaintiff by the defendant Winker as to the value of damages incurred in this case. The pertinent portion of that direct examination is set out in the Report of Proceedings, Page 31 through Page 41, attached as Exhibit "A" hereto for ease of reference.

The Court, based upon the testimony of Mr. Downing as illustrated by Exhibit 10, which was admitted as a good faith repair estimate, did award damages in the amount of \$13,054.00 and attorney fees of \$6,772.50 (CP #40).

II.

ASSIGNMENT OF ERROR

- A. Appellant's assignment of error was, "Did the Superior Court err in awarding damages to the Plaintiff based solely upon inadmissible hearsay evidence?"

- B. The more correct question that this Court has to answer is:
1. “Whether the plaintiff is capable of testifying as to the value of his property?”
 2. “Are estimates admissible?” and
 3. “Was Exhibit 10 admitted as correct and admissible?”

III.

STATEMENT OF THE CASE

I agree generally with Appellant’s Statement of the Case down to the last paragraph on Page 10. Appellant badly misunderstands Washington law and value of damages. The award was based upon Plaintiff’s testimony as to value and the estimate on Warren Watts, P.E. stationary.

IV.

ARGUMENT

- A. Washington case law is well settled, as far back as the early 1920's, about opinion evidence and value. *Worthington v. Worthington*, 73 Wn.2d 759 (1968). The Court said:

“An owner may testify as to the value of his property and the weight to be given to it is left to the trier of fact. *Ingersol v. Seattle-First Nat'l Bank*, 63 Wn.2d 354, 387 P.2d 538 (1963); *Cunningham V. Town of Tieton*, 60 Wn. 2d 434, 374 P.2d 375 (1962).”

This line of reasoning runs from at least the 1920's.

The owner of an article whether he is generally familiar with its value or not, is permitted to testify as to such values, the weight of said testimony being for the jury and our own finder of fact. *Wicklund v. Allraum*, 122 Wash. 546. The Washington Appeals Court in *Kammerer v. Western Gear Corp.*, 27 Wash. App. 512 (1980), said:

“If a witness has sufficient acquaintance with the property to form an opinion as to its value, it is for the jury to determine how much weight to attach to his testimony.”

In this particular trial Mr. Downing was put through the paces of how he acquired his opinion and what due diligence he did to acquire the overall valuation range of his property. The general reason for doing that was to indicate to the court his testimony was founded on some factual bases, rather than outright speculation or W.A.G.

B. Rules of Evidence 904(a)(3) reads as follows:

“A bill for, or an estimate of, property damage on a letterhead or billhead. In the case of an estimate, the party intending to offer the

estimate shall forward a copy to the adverse party with a statement indicating whether or not the property was repaired, and if it was, whether the estimated repairs were made in full or in part and attach a copy of the receipted bill showing the items of repair and amounts paid.”

Consequently, the objection to the total admission of Appendix 1, the letter from WW Engineering and its admissibility is resolved by the above quotation since it is from Warren S. Watts, P.E., on his letterhead.

V.

CONCLUSION

The Court had more than sufficient evidence in both the testimony of Don Downing and, via Rule 904(a)(3) the billing and/or estimate from WW Engineering, to enter its findings of fact. The *Worthington* Court said:

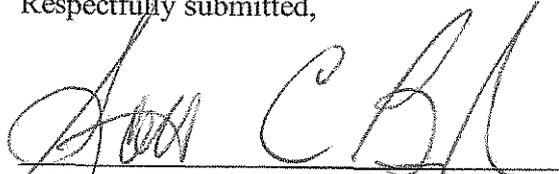
“We could agree with the court’s reasoning in this case if there was evidence to support it. The trial court’s findings are determinative of the factual issues involved only when there is evidence in the record to sustain them.”

In this case the findings of fact and the amount of damages are sustainable based upon the evidence in the record, including both the testimony of the owner, Don Downing, and of the estimate from Warren Watts.

This matter should be dismissed as it is without merit and attorney fees awarded to Plaintiff.

Dated this 30th day of April 30, 2012.

Respectfully submitted,



SCOTT C. BROYLES, WSBA #6070
Attorney for Plaintiff/Respondent.

EXHIBIT A

1 A. Well, (inaudible).

2 Q. Yes.

3 A. (Inaudible).

4 Q. Okay.

5 I would, ah, draw your attention to, ah, exhibit P-10.

6 THE JUDGE: (Inaudible).

7 MR. BROYLES: I'd move 10. No objection?

8 MR. CHAPMAN: No, I do have an objection.

9 MR. BROYLES: Okay.

10 THE JUDGE: P-10 is being (inaudible) Plaintiff's
11 Counsel. (Inaudible).

12 MR. CHAPMAN: Yes, Your Honor. Ah, I would object -- I
13 -- I think my first objection is based upon foundation.
14 There's, ah, figures, ah, contained therein, ah, without any
15 indication as to a source. And further, that if there is a
16 source those -- that source is beyond, ah, Mr. Downing. It
17 would be, ah, hearsay.

18 THE JUDGE: I don't know what the exhibit is other than
19 (inaudible), so I will allow you to (inaudible) foundation.

20 MR. BROYLES: I -- I'll back up and I'll work my way
21 through it.

22 THE JUDGE: (Inaudible).

23 MR. BROYLES: It's okay.

24 THE JUDGE: You may hand the exhibit back to the
25 witness. Did you get to see it, Mr. Goforth?

1 MR. GOFORTH: Yes, Your Honor.

2 MR. BROYLES: He did.

3 THE JUDGE: (Inaudible). You may continue your exam --

4 he hasn't offered it yet (inaudible) --

5 MR. BROYLES: -- I did --

6 MR. CHAPMAN: -- He did offer it --

7 THE JUDGE: -- Oh, you did offer it. Well, than the

8 objection is sustained at this time subject to a proper

9 foundation being (inaudible).

10 MR. BROYLES: Let me try and lay some foundation.

11 Q. I'll be digging all day in the stack of D exhibits and not

12 find it; huh?

13 Okay.

14 Mr. Downing, the, ah, exhibit D-10 is titled, ah, septic

15 system replacement costs?

16 A. That's correct.

17 Q. Okay.

18 How did you develop this, ah --

19 A. -- Well, I -- I determined that if I was going to try to

20 recover the costs of, ah, replacing the septic system,

21 (inaudible) costs were.

22 Q. Okay.

23 A. And so, I went first to the Asotin County Health Department

24 and -- and asked them what I needed to do, and they said

25 (inaudible) --

1 MR. CHAPMAN: -- Your Honor, again, I'm -- I'm going to
2 interpose an objection based upon hearsay as to this wit --
3 witness testifying to what was -- what --

4 THE JUDGE: -- It's not being offered to prove the
5 truth of the matter (inaudible). (Inaudible).

6 Q. Okay.

7 So, have you, ah -- did you receive an invoice and did you
8 pay an invoice for digging test holes?

9 A. Yes, I did. I, ah -- I paid for the test holes. I paid for
10 the evaluation --

11 Q. -- By the -- the --

12 A. -- by the Health Department. And I paid for (inaudible).

13 Q. And you paid for those, ah, by check?

14 A. Yes, I did.

15 Q. And, ah, copies of that -- the checks and the -- the invoices
16 have been furnished to Mr. Chapman in, ah, discovery as part
17 of our interrogatories?

18 THE JUDGE: Maybe you're talking a little Greek to your
19 client.

20 Q. I'm sorry. Remember when we did the -- the interrogatories
21 and we put copies of the -- the billings --

22 MR. CHAPMAN: -- Your Honor, I'll stipulate that I got
23 copies of those --

24 THE JUDGE: -- (Inaudible) --

25 MR. CHAPMAN: -- of those in -- in discovery responses.

1 THE JUDGE: Thank you.

2 MR. BROYLES: I'm sorry.

3 THE JUDGE: (Inaudible).

4 MR. BROYLES: Okay.

5 Q. Were you able to determine what other fees the county was --
6 was at the time charging, ah, for the on-site sewage liquid
7 waste program?

8 A. Yes, (inaudible). The application (inaudible) --

9 MR. CHAPMAN: -- Your Honor, I'm going to object as
10 being hearsay.

11 THE JUDGE: Ah, overruled, Counsel. (Inaudible).

12 Q. So, you did that; is that correct?

13 A. Those are the fees that, ah, will be required by the Asotin
14 County Health Department.

15 Q. You haven't incurred those?

16 A. I haven't paid those -- no. (Inaudible) disposal permit
17 (inaudible). (Inaudible).

18 Q. Did you pay that?

19 A. Ah, I don't know if I did or not. (Inaudible).

20 Q. And that's to WW Engineering?

21 A. That's correct.

22 Q. Okay.

23 A. (Inaudible) --

24 MR. CHAPMAN: -- Your Honor, again --

25 MR. BROYLES: -- Okay --

1 MR. CHAPMAN: -- I don't want to be a broken record,
2 but it's -- I'm interposing an objection based upon hearsay.
3 THE JUDGE: That's sustained. (Inaudible).
4 A. (Inaudible) --
5 Q. -- Do -- do --
6 A. -- (Inaudible) --
7 Q. -- Oh, no. Stick with me.
8 Okay?
9 A. Okay.
10 Q. Ah, did you do -- tell me whether or not you had, ah, some --
11 some bids on doing work?
12 A. Did I -- did I have bids taken on doing the work?
13 Q. Yes.
14 A. Yes, I did, and --
15 Q. -- Stop.
16 Okay.
17 Were you able to determine in your own mind what you believe
18 the minimum cost to construct the system is going to be?
19 A. I did.
20 Q. And what figure did you reach --
21 MR. CHAPMAN: -- Your Honor --
22 Q. -- as an understanding for the minimum?
23 MR. CHAPMAN: Your Honor, I'm going to object based
24 upon foundation and hearsay.
25 THE JUDGE: Ah, I'm going to overrule myself. I'm

1 going to allow him to testify who he got his bids from and
2 how much they were. So, if you want to follow that line of
3 questioning --

4 MR. BROYLES: -- Okay.

5 MR. CHAPMAN: Your Honor, can I have a continuing
6 objection to that, please?

7 THE JUDGE: It is noted for the record.

8 Q. Bids -- who did you get them from and how much?

9 A. (Inaudible).

10 Q. Okay.

11 Who else bid?

12 A. Ah --

13 Q. -- Do you recall?

14 A. I don't have that information (inaudible).

15 THE JUDGE: (Inaudible)?

16 A. (Inaudible).

17 THE JUDGE: Was one of the them from Delvin Rausch
18 (sic)?

19 A. I don't recall. I do know (inaudible).

20 Q. Okay.

21 And that -- that -- the Huwette (sic) one was the lowest?

22 A. That's correct.

23 THE JUDGE: May I, ah, speed things up just a little
24 bit (inaudible). (Inaudible). How many beds and baths?

25 MR. DOWNING: Two.

1 THE JUDGE: Of each? Two bedrooms, two baths?

2 MR. DOWNING: Oh, ah, two bedrooms, one bath.

3 THE JUDGE: Two bedrooms, one bath. And about how many
4 square feet?

5 MR. DOWNING: 1,300 square feet.

6 THE JUDGE: And, ah, do you remember how many feet of
7 drain line you were (inaudible) installed?

8 MR. DOWNING: I believe it was 200, but I'm not sure.

9 DIRECT EXAMINATION (continued)

10 BY MR. BROYLES:

11 Q. Okay.

12 Let's do this. Mr. Downing, I'm going to show you some
13 documents. See if it refreshes your memory.

14 THE JUDGE: Show them to Counsel (inaudible).

15 MR. BROYLES: I -- I --

16 THE JUDGE: -- If so, show them to Attorney Chapman.

17 If it's just to refresh memory, you don't have to.

18 MR. BROYLES: Yep, you got it.

19 MR. CHAPMAN: Yeah.

20 MR. BROYLES: Okay.

21 MR. CHAPMAN: Why -- why are you showing that to him
22 for? To get that --

23 MR. BROYLES: To get --

24 THE JUDGE: -- Is there a development in the criminal
25 case --

1 MR. BROYLES: -- To get those --

2 UNKNOWN: -- No, sir --

3 MR. CHAPMAN: To get those?

4 MR. BROYLES: Yeah, those are the bids.

5 MR. CHAPMAN: Okay.

6 MR. BROYLES: (Inaudible) and Harrison and (inaudible).

7 MR. CHAPMAN: Okay.

8 Ah, I don't have any problem stipulating (inaudible)
9 subject to hearsay objection. I don't have any problem.

10 MR. BROYLES: Okay.

11 MR. CHAPMAN: Your Honor, it's my understanding, ah,
12 subject to my hearsay objection, that, ah, there were four
13 estimates, ah, received, ah, for this project: ah, Huwette
14 Construction, Curry Inc., Harrison Excavation, and Lucky
15 Ahhi, and that's A-H-H-I.

16 MR. BROYLES: Spelled like the fish.

17 MR. CHAPMAN: Yeah.

18 THE JUDGE: Okay.

19 So, subject to your standing objection, ah, you have no
20 further objection to Attorney Broyles, ah, examining his
21 client about these, ah, four bids?

22 MR. CHAPMAN: Ah --

23 THE JUDGE: -- Sub -- subject to your standing hearsay
24 objection --

25 MR. CHAPMAN: -- And actually, yes, Your Honor, and --

1 and my objection even goes further because what this is
2 based on is a letter from WW Engineering to Mr. Downing,
3 which in and of itself, I believe, constitutes hearsay --

4 MR. BROYLES: -- It is hearsay, and I will --

5 MR. CHAPMAN: -- and the contents of that letter then
6 would be compounded, or hearsay within hearsay. That is, ah

7 --

8 MR. BROYLES: -- I'm not offering the letter. I'm
9 going to refresh his memory.

10 THE JUDGE: I'm going to allow the witness to, ah --
11 allow Counsel to inquire of this witness, his client, what
12 the -- what the estimates were. And -- and -- and, ah, I do
13 sustain your hearsay objection. It hadn't been offered yet,
14 so it's (inaudible). So far, he says he's just going to use
15 it to refresh his client's (inaudible).

16 **DIRECT EXAMINATION (continued)**

17 **BY MR. BROYLES:**

18 Q. All right.

19 What I'm showing you, Mr. Downing, is a document, and I want
20 you to look at it and tell me if it refreshes your memory.

21 Ah, and you can tell me (inaudible)?

22 A. Yes, it refreshes my memory. I thought there were three bids
23 -- there are four. Ah, two of the bids are for \$11,500, one
24 bid is at \$14,000, and one is at \$14,500.

25 Q. Okay.

1 (Inaudible) look at this document (inaudible)?

2 A. (Inaudible). I believe it's (inaudible) for 50 foot length.

3 THE JUDGE: And I apologize. I'm blown away.

4 (Inaudible).

5 MR. BROYLES: Okay.

6 You got the inverse doctor, lawyer, judge pricing.

7 THE JUDGE: (Inaudible).

8 MR. BROYLES: You won't get in trouble from me.

9 Q. Ah, the -- Mr. Downing, you are asking to be compensated in
10 order to, ah, put in the system?

11 A. That's correct.

12 Q. Okay.

13 MR. BROYLES: Again, Your Honor, I would move, ah,
14 P-10. We've covered its content. And Mr. Chapman has a
15 standing objection, I believe.

16 THE JUDGE: And as I understand P-10, this is a
17 document that was actually prepared by Mr. Downing?

18 MR. DOWNING: No.

19 THE JUDGE: Ah, wait -- okay.

20 What is P-10?

21 MR. BROYLES: P-10 is the document --

22 THE JUDGE: -- Oh, Mr. Chapman was shaking his head.

23 Okay.

24 I thought it was --

25 MR. BROYLES: -- No, I'm not doing war and watts. I

1 promised you I wouldn't. This is --

2 THE JUDGE: -- P-10 is the compilation of estimates and
3 expenses that he thinks he's -- the plaintiff thinks he's
4 going to have to incur to put a legal, ah, septic tank and
5 drain line system on his own property.

6 MR. CHAPMAN: I --

7 THE JUDGE: -- (Inaudible) --

8 MR. CHAPMAN: -- I apologize --

9 THE JUDGE: -- own notes.

10 MR. CHAPMAN: I apologize, Your Honor. It was my -- I
11 thought we were -- we had flipped to the letter from WW
12 Engineering. Ah, subject to my --

13 THE JUDGE: -- Standing objection --

14 MR. CHAPMAN: -- standing objection and foundation, ah
15 -- those are my objections.

16 THE JUDGE: Your hearsay objection (inaudible) allow
17 P-10 in over objections.

18 Oh, excuse me -- Mr. Goforth, do you have any objection
19 to P-10?

20 MR. GOFORTH: Ah, no, Your Honor.

21 THE JUDGE: Ah, so, ah, over Attorney Chapman's
22 objection, P-10 is admitted. As a, ah, good faith estimate
23 of what (inaudible).

24 **DIRECT EXAMINATION (continued)**

25 **BY MR. BROYLES:**

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COURT OF APPEALS, DIVISION III
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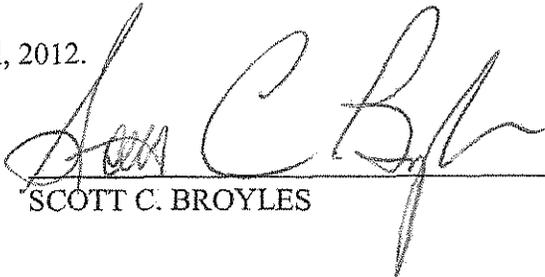
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WINKER, and REBECCA WINKER, an)
unmarried person and WADE W.)
GOFORTH, an unmarried person,)
)
Defendants/Appellants.)

Superior Court No. 08-00314-6
COA No. 300153
AFFIDAVIT OF MAILING

I, SCOTT C. BROYLES, hereby certify that on the 30th day of April, 2012, a copy of the foregoing BRIEF OF RESPONDENT and MOTION ON THE MERITS was served on Scott Chapman, attorney for Appellants, by mailing via the United States Postal Service, postage prepaid, at Clarkston, Washington, to:

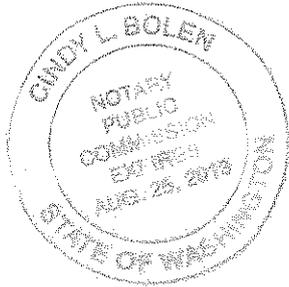
Scott Chapman
Chapman Law Offices, PLLC
P.O. Box 446
Lewiston, Idaho 83501

Dated this 30th day of April, 2012.



SCOTT C. BROYLES

SUBSCRIBED AND SWORN to before me this 30th day of April, 2012, by Scott C. Broyles.



Cindy L Bolen
NOTARY PUBLIC in and for the State of
Washington, residing at: LEWISTON, ID
My commission expires: 8/25/2013