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AUG 13 2014

No. 71036-2

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

LESLIE BLAKEY SPENCER and TAMMY S. BLAKEY,

Appellants,

v.

NANCY BLAKEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF GREG BLAKEY, Respondent,

and GLENDA BLAKEY,

Respondent/Cross-Appellant.

REPLY BRIEF OF CROSS APPELLANT GLENDA BLAKEY

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TABLE OF CONTENTS

1. Even though Tammy's admission addresses the merits of her claim, it is admissible 1

2. Tammy opened the door 3

3. The proper weight to give Tammy's admission is not a basis to deny its admission into evidence 4

4. The superior court's "initial" decision about the exculpatory clause has nothing to do with this appeal 4

5. Because Glenda timely appealed, this court has jurisdiction to decide the evidentiary issue. But if the court affirms summary judgment in favor of Glenda, the issue would be moot 5

TABLE OF AUTHORITIES

Cases

Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc., 172 Wn. App. 328, 339, 289 P.3d 735, 741 (2012) 4

Johnston-Forbes v. Matsunaga, 177 Wn. App. 402, 412, 311 P.3d 1260, 1265 (2013) 4

Stenger v. State of Washington, 104 Wn. App. 393, 407-08, 16 P.3d 644 (2001) 1

Rules

RAP 2.4(a) 5, 6

RAP 2.4(f) 6

Other Authority

K. Tegland, 2A Washington Practice: Rules Practice (7th ed. 2011) 5

Introduction

In opposing Glenda's cross appeal on an evidentiary issue, Tammy and Leslie make numerous arguments, each of which is addressed under the subject matter heading:

1. Even though Tammy's admission addresses the merits of her claim, it is admissible.

Citing *Stenger v. State of Washington*,[1] Tammy & Leslie argue that the superior court properly concluded that Tammy's admission is an impermissible legal conclusion. *Stenger* involved a declaration by an attorney who was offered as an expert witness. The attorney applied various federal statutes to the facts of the case and offered an opinion as to whether an individual's aunt had "legal authority to participate in the development" of an individualized education program (IEP). The court held the superior court properly exercised its discretion to strike the expert testimony, which it described as the expert's "legal opinions as to DSHS/DCFS's obligations to Jason under state and federal law." Here, by contrast, Tammy is a signatory to the Co-Tenancy Agreement and a party to the lawsuit. Tammy's concession that Glenda alleged refusal to lease did not violate the Co-Tenancy Agreement is dissimilar to the testimony in *Stenger*.

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[1] 104 Wn. App. 393, 407-08, 16 P.3d 644 (2001).

Rather, because Tammy admitted that Glenda was not the managing tenant, Tammy's answers illuminated the absence of Glenda's duties as one of four co-tenants. CP 1764. Tammy acknowledged the comprehensiveness of the Co-Tenancy Agreement. CP 1763. The examination then went through the Co-Tenancy Agreement to establish that each co-tenant owed virtually no duties to the other co-tenants. CP 1763-73. With this general backdrop, Tammy conceded that one co-tenant being unwilling to lease was not a violation of the Agreement. CP 1772. Part of that is because three co-tenants could out vote the fourth. Yet, Tammy also conceded that the co-tenancy agreement made deadlock possible, and deadlock ensued because the siblings could not get along:

> Q: I take it also, under the co-tenancy agreement, that you acknowledge that Glenda, because she only owned 25 percent of the co-tenancy, in fact could not prevent the other three co-tenants from leasing the building if they decided that's what they wanted to do?
>
> A: Right.
>
> Q: But the agreement, because it requires greater than 50 percent, does in fact require, if each person has 25 percent, at least three co-tenants to agree?
>
> A: That's true.
>
> Q: So I take it that the agreement drafted by your father's attorney, which you all agreed to, creates the possibility of a deadlock?
>
> A: Yes.

Q: And that when you signed the agreement, if you had read it and thought about it, you would have recognized that one risk that you were taking in entering into that agreement is that nobody controlled 51 percent and therefore there could be a deadlock on an issue such as whether or not to lease or sell the building?

A: True.

Q: And that is, in fact, the risk that came to pass was a risk of deadlock?

A: True.

Q: And the real reason for the deadlock has substantial amount to do with really the breakdown in the relationship between those four members of the same family?

A: True.

2. Tammy opened the door.

Even if Tammy's testimony, in context, was inadmissible, Tammy opened the door. Appellants concede that Tammy is a serial litigant and that in this lawsuit she submitted numerous statements about the legal merits and whether various parties had breached or not breached various duties. Respondent Glenda's brief at pp. 19-20. Tammy and Leslie don't cite authority or anything from the superior court record to refute this argument.[2] Tammy's concession was part of a line of questions that

[2] They simply assert that they did "not waive or invite this error."

explored Tammy's decision to name Glenda as a defendant. CP 1764 (dep. at p. 173).

3. The proper weight to give Tammy's admission is not a basis to deny its admission into evidence.[3]

Tammy & Leslie argue that Tammy's statement is "equivocal." Appellants' Reply Brief, p. 12. This argument goes to the weight, not the admissibility of Tammy's admission. *See, e.g.*, *Capitol Specialty Ins. Corp. v. JBC Entm't Holdings, Inc.*,[4] ("The testimony was expressly limited to Lawson's personal knowledge as vice president of claims. The limits of Lawson's personal knowledge go to the weight and not the admissibility of his declaration."); and *Johnston-Forbes v. Matsunaga.*[5]

4. The superior court's "initial" decision about the exculpatory clause has nothing to do with this appeal.

More than a year after being sued and after the court had entered several orders about the property sale, Greg and Glenda filed a summary judgment motion. That motion relied in part on paragraph 17 of the Co-Tenancy Agreement, the exculpatory clause. CP 1080. With respect to the exculpatory clause, the court held "deciding whether the facts override the

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[3] Appellants' Reply Brief, p. 12.
[4] 172 Wn. App. 328, 339, 289 P.3d 735, 741 (2012).
[5] 177 Wn. App. 402, 412, 311 P.3d 1260, 1265 (2013).

'no liability' standard in paragraph 17 cannot be done on summary judgment." CP 1522.

Tammy & Leslie now argue that Tammy's admission is consistent with the trial court's "initial" decision that issues of fact precluded summary judgment. This assertion misstates the record. Neither respondent relies upon the exculpatory clause to affirm the superior court. The exculpatory clause has nothing to do with this appeal, nor does the superior court's statement that issues of fact preclude reliance upon the exculpatory clause. The admissibility of Tammy's admission has nothing to do with the superior court's reasoning about the exculpatory clause.

5. Because Glenda timely appealed, this court has jurisdiction to decide the evidentiary issue. But if the court affirms summary judgment in favor of Glenda, the issue would be moot.

RAP 2.4(a) allows the court to review any act which "if repeated on remand would constitute error prejudicial to respondent." Tammy and Leslie's reply brief asserts that Glenda's cross appeal is improper because she does not seek affirmative relief." Tammy and Leslie cite *Tegland's* Washington Practice treatise at page 212 (7th ed. 2011). But in that portion of the treatise, Tegland is addressing respondents who did not file a cross appeal: "By contrast, the appellate court will generally not grant a respondent *affirmative* relief (normally meaning a change in the final

result at trial) unless the respondent timely files his or her own notice of appeal, commonly termed a notice of cross-appeal." K. Tegland, 2A Washington Practice: Rules Practice – RAP 2.4(a) at 212 (7th ed. 2011).

Glenda filed a timely notice of appeal. CP 2157-2161; RAP 2.4(a), (f).

While this court has jurisdiction to hear the cross appeal, it need not review the asserted evidentiary error in the event it affirms the superior court's determination that Glenda, one of four co-tenants, was entitled to summary judgment dismissing Tammy & Leslie's damage claims. In the event the court affirms the summary judgment in favor of Glenda, the court's ordering clause should dismiss Glenda's cross-appeal as moot.

Respectfully submitted this August 18, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 18, 2014, I caused to be served via email and first class mail a true and correct copy of the foregoing Reply Brief of Cross Appellant Glenda Blakey to:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED at Seattle, Washington on August 18, 2014.

Janet Petersen, Legal Assistant