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COURT OF APPEALS  
DISTRICT

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STATE OF WASHINGTON

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**NO. 33366-0**

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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DAVID DAVIES, et al.,

Appellants

vs.

BRYON WILLIAMS,

Respondent.

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**APPELLANTS' REPLY BRIEF**

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It is well-established in Washington law that, while presiding in a bench trial, a trial court may not gather extrinsic evidence for the purpose of either corroborating or discrediting a witness's testimony. *Christensen v. Gensman*, 53 Wn.2d 313, 333 P.2d 658 (1958). If the trial court does so, and its decision is based thereupon, it is reversible error. *Id.*

In this case, the trial court stated, at a hearing approximately two months after its Findings of Fact and Conclusions of Law were entered, that it based its finding that Respondent Williams was more credible than Appellant Davies in part on its review of the parties' deposition transcripts. *VRP (May 13, 2005) at 4:1-14*. The parties' deposition transcripts had not been admitted at trial as substantive evidence, although limited portions of the transcripts were used for impeachment purposes. The trial court did not advise the parties that it would be reviewing and/or relying on the transcripts or that it considered the transcripts to be admissible in their entirety as substantive evidence.

In his brief, Respondent Williams does not dispute this rule of law, but advances the theory that reversible error did not occur because the depositions were part of the court file (and, thus, not extrinsic evidence) and because no rule specifically prohibits a trial court from reviewing depositions

used at trial. William's theory is premised on a gross understatement of what actually occurred with the parties' depositions and is, in any event, incorrect. This matter must be remanded for a new trial before a different judge.

Initially, Williams contends that Davies waived any error related to the trial court's reliance on the parties' deposition transcripts because he did not object after learning the trial court reviewed the transcripts in their entirety to purportedly resolve their conflicting trial testimony. *Brief of Respondent at pages 10-15*. Williams relies on the rule that a party cannot appeal from an evidentiary ruling unless he objected thereto at trial. *Id. at page 11*. These contentions are incorrect for two reasons.

One, the trial court's consideration of, and reliance upon, the parties' deposition transcripts was not borne out of any evidentiary ruling of the trial court. The issue before this Court is not whether the deposition transcripts either could have or should have been admitted. Neither Williams nor Davies moved the trial court for an order admitting the parties' deposition transcripts into evidence. The trial court did not hear arguments for or against the wholesale admission of the deposition transcripts as substantive evidence, nor did it make any such ruling. Davies cannot be held to have waived an error related to an evidentiary ruling that was never made.

Two, any objection would have been futile. As Williams himself acknowledges, a prior objection ostensibly gives the trial court notice of an alleged error and the opportunity to cure that error. *Brief of Respondent at page 12 (and cases cited therein)*. However, even if Davies had objected at the May 2005 hearing once he learned the trial court's determination of credibility was based on evidence not admitted at trial, the trial court could not have "cured" its error. The Findings and Conclusions had been entered nearly two months prior. The trial court could not have re-opened its findings because, as soon as it revealed it sought out and relied upon extrinsic evidence to corroborate the parties' trial testimony, the only remedy to cure such an error was a new trial before a different judge. See *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995).

Nor could Williams have "cured" the error. Williams suggests that had Davies objected, he would have simply moved to admit Davies's deposition transcript into evidence. But a party's deposition is not admissible as substantive evidence as a matter of right, and Williams makes no attempt to justify the propriety of admitting a party's deposition testimony into evidence when the party is present and testified at trial. There is no court rule allowing a party to admit into evidence an adverse party's deposition

transcript as substantive evidence simply because limited portions of that transcript were used at trial for impeachment purposes. In any event, under no circumstances could Williams have offered his own deposition transcript as substantive evidence.

Indeed, Davies promptly objected when Williams attempted to use Davies's deposition testimony as substantive evidence during his examination, and the trial court sustained Davies's objections. Williams called Davies as an adverse witness in support of his case-in-chief. *VRP (October 13, 2004) 210:9-18*. Williams formally "published" Davies's deposition, ostensibly to be able to use portions thereof for impeachment. *Id.* ("... I'd move to publish the deposition transcript **in the event Mr. Davies and I have a difference of opinion.**") (emphasis added). However, when Williams attempted to use his deposition testimony as direct and substantive evidence, Davies promptly objected. *Id. at 212:2-10; 213:15 to 214:9; 215:1-18; 246:5 to 247:16*. Davies, through his counsel, explained to the trial court:

Your Honor, a discovery deposition, **the scope of the deposition is discovery, not admissible evidence**. I can't object in a deposition and, even if I don't, it comes in as evidence. That doesn't mean that all of a sudden he [Williams] can ask him this

question here [at trial].

*Id. at 247:8-13 (emphasis added).* The trial court sustained Davies's objections. *Id. at 212:2-10; 213:15 to 214:9; 215:1-18; 246:5 to 247:16.* Thus, both the trial court and Williams were on notice that Davies would have objected to any subsequent consideration of the parties' deposition transcripts by the trial court prior to entry of the Findings of Fact and Conclusions of Law.

Williams also suggests that Davies was advised the trial court had read the deposition transcripts prior to the hearing on the cost bill and prior to the entry of the Findings and Conclusions. *Brief of Respondent at page 11.* Those two brief references, though, gave Davies no indication that the trial court relied on the deposition transcripts as a whole and as substantive evidence — to the exclusion of the parties' trial testimony — in order to make its factual finding of credibility. Thus, any objection to the trial court's improper use of the deposition transcripts could not have been made at that time, because Davies had not been alerted that any error had occurred. It was **only** at the May 2005 hearing that the trial court revealed the extent of its consideration of and reliance upon the deposition transcripts.

At the time the Findings and Conclusions were entered, and at all

times prior to the trial court's comments made at the hearing on the cost bill, Davies had no reason to believe the trial court's determination of credibility had been based on anything but the trial testimony and the evidence admitted at trial. Because neither party made a motion to admit the parties' deposition transcripts, Davies could make no prior objection to the trial court's consideration thereof and/or reliance thereupon. Furthermore, once the error was revealed, neither the trial court nor the parties could have done anything to "cure" it. Davies did not waive any error and this matter must proceed on its merits.

With respect to the merits, Williams first argues this case is governed by an "abuse of discretion" standard of review. He relies, again, on case law referencing a trial court's decision whether to admit testimony; specifically, *Hendrickson v. King County*, 101 Wn. App. 258, 265, 2 P.3d 1006 (2000). *Hendrickson* was concerned with the admissibility of the discovery deposition of an opposing party's CR 26(b)(5) expert witness under CR 32(a)(5)(A). *Id.* The *Hendrickson* court did not consider the issue of whether a trial court may, on its own volition and without prior notice to the parties, rely on the parties' deposition testimony to determine which party was more credible when the parties gave conflicting trial testimony. And, as

noted above, neither party moved to admit the parties' deposition transcripts in their entirety into evidence and the trial court made no ruling on the wholesale admissibility thereof. This Court is not reviewing an evidentiary ruling and, thus, the abuse of discretion standard of review does not apply here.

The rule of law governing this appeal is stated plainly in *Christensen v. Gensman, supra*.<sup>1</sup> A trial court may not seek out extrinsic evidence to either corroborate or discredit a witness's testimony. *Id. at 318 (and cases cited therein)*. If the trial court does so, and its decision is based thereupon, it is reversible error. *Id.* This is, of course, precisely what occurred in this case. The trial court, without the knowledge of either party, read the parties' entire deposition transcripts for the purpose of making its determination as to the credibility of the parties. The deposition transcripts, although used at trial for the limited purpose of impeachment, were not admitted into evidence. The trial court's finding that Williams was more credible than Davies was based, at least in part, on its review of the transcripts. Reversible error, therefore, occurred and this matter must be remanded for a new trial

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<sup>1</sup>Williams devotes approximately four pages of his brief to his claim that the cases cited by Davies are "inapposite." *See Brief of Respondent at pages 17-20*. Interestingly, although Williams cites *Christensen*, he makes no attempt to distinguish it or address its holding.

before a different judge.

Williams, apparently conceding the merits of this analysis, argues that such a rule should not be applied in this case because the depositions were not extrinsic evidence. Therefore, Williams argues, the trial court did not abuse its discretion in relying on the deposition testimony instead of solely on the parties' trial testimony because no rule, statute, or case law prohibits it. *Brief of Respondent at pages 19-20*. Again, Williams is incorrect.

As Davies argued in his opening brief, it is axiomatic that a trial court presiding over a bench trial may only consider and base its decision upon evidence admitted during the trial. Williams does not dispute this, nor does Williams dispute Davies's contention that any evidence not admitted during the trial is, by its very nature, extrinsic evidence. *See Brief of Appellant at pages 8-9*. Instead, Williams takes the position that the parties' deposition transcripts were not extrinsic evidence because they were part of the court file. *Brief of Respondent at page 17*.

Williams's argument fails to appreciate the significant distinction between evidence **used** at trial versus evidence **admitted** at trial. This is not a distinction without a difference. Just because a portion of a party's deposition testimony may be used at trial for a limited purpose (*e.g.*,

impeachment) does not mean that the entire transcript is then admissible as substantive evidence, especially when the deponent testified at trial. *See Tegland, Civil Procedure, 14 Wa. Prac. § 16.33 at 472 (2003)*. In fact, **CR 32** clearly states that any use other than impeachment is permitted only so far as would be allowed by the Rules of Evidence. **CR 32(a)(1)**. But neither Williams nor Davies offered the other's entire deposition transcripts as substantive evidence and, therefore, neither had an opportunity to raise any evidentiary objections. *See CR 32(b)*. Nothing in **CR 32** allows a party's deposition to be admissible in its entirety as substantive evidence without objection or without regard to the Rules of Evidence.

It is unlikely Williams would credibly argue that a jury could, on its own and without regard to the evidence admitted at trial, review any pleading or document in the court file and base its decision thereupon simply because the pleading or document was in the court file. To be sure, the Civil Rules expressly prohibit a jury from reviewing a deposition transcript, even if the transcript had been formally admitted into evidence. *See CR 51(h)*. The reason for this rule is to prevent the jury from placing undue emphasis on written testimony to the exclusion of trial testimony. *See State v. Monroe, 107 Wn. App. 637, 27 P.3d 1249 (2001), rev. denied, 146 Wn.2d 1002 (2002)*.

There is no reason why this rule should not be applied with equal force when a trial court presides over a bench trial.

Despite Williams' claims, the trial court did not “simply review[] depositions used at trial.” *Brief of Respondent at page 20*. By understating the use made of the deposition transcripts by the trial court, Williams fails to appreciate the clear and important distinction between using limited portions of a deposition transcript for impeachment purposes and admitting an entire deposition transcript as substantive testimony. William’s arguments have merit only if the latter occurred. It did not.

As a consequence, the only remedy available is a remand of this matter for a new trial before a different judgment. *See Brief of Appellant at page 12; Sherman, supra, 128 Wn.2d at 205-06*. Interestingly, Williams does not dispute that this is the only available and proper remedy. Instead, Williams posits that Davies waived this particular remedy because he did not move for a mistrial. *Brief of Respondent at page 14*. Williams cites *In re the Marriage of Wallace, 111 Wn. App. 697, 45 P.3d 1131 (2002)*, in support of his argument.

In *Wallace*, this Court held that the doctrine of waiver applies to “bias and appearance of fairness claims.” *Id. at 705*. Davies is not relying on the

appearance of fairness doctrine as the basis for his appeal. Nor is Davies claiming the trial court was biased against him. Thus, Wallace does not apply, nor does it stand for the proposition that a party waives a particular remedy on appeal by failing to advise the trial court thereof. And, as set forth above, even if Davies had advised the trial court he would be asking for a new trial before a different judge on appeal, the error precipitating this remedy could not have been cured because the Findings and Conclusions had already been entered.

Williams also suggests that this matter need not be remanded for a new trial to a different judge because a trial court is presumed to disregard inadmissible evidence, citing State v. Read, 147 Wn.2d 238, 53 P.3d 26 (2002). The rule announced in Read, though, applies only where a trial court must necessarily review potentially inadmissible evidence in order to make a ruling whether to admit it. Id. at 245. In this case, neither party moved the trial court for an order admitting the parties' deposition transcripts. The trial court, on its own volition and without prior notice to either party, reviewed and relied on inadmissible evidence to make its determination as to the credibility of the parties. Read does not prevent this Court from following the holding of Sherman v. State, *supra*.

In sum, the trial court committed reversible error when it, without prior notice to either party, reviewed the parties' deposition transcripts (which had not been admitted into evidence) in their entirety and based, at least in part, its decision on credibility on that review. The only remedy for such an error is to remand this matter for a new trial before a different judge. Appellants Davies, *et. al*, ask that this Court so order.

Respectfully submitted this 18th day of August, 2006.

**BURGESS FITZER, P.S.**

A handwritten signature in cursive script, appearing to read "Melanie T. Stella", written over a horizontal line.

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**DECLARATION OF SERVICE**

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**Kathy Kardash**, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled pleading and competent to be a witness therein.

That on August 18, 2006, I deposited with ABC Legal Messengers, Inc. for delivery, and sent via facsimile, to the following:

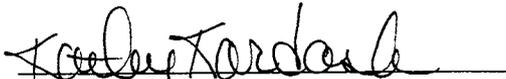
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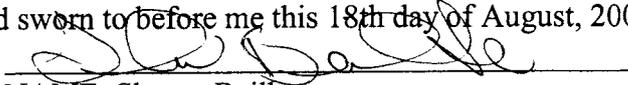
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a true and correct copy of this Declaration of Service and Appellants' Reply Brief.

  
KATHY KARDASH

Subscribed and sworn to before me this 18<sup>th</sup> day of August, 2006.

  
NAME: Sharon Beilke  
Notary Public in and for the State of Washington  
Residing at Kent, Washington.  
My Commission Expires: 4/29/09