

FILED  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY an

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' BRIEF**

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Robert W. Novasky, WSBA No. 21682  
Melanie T. Stella, WSBA No. 28736  
Attorneys for Appellants

**BURGESS FITZER, P.S.**  
1145 Broadway, Suite 400  
Tacoma, WA 98402  
(253) 572-5324

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## **A. ASSIGNMENTS OF ERROR**

**Assignment of Error No. 1:** The trial court erred in reviewing extrinsic, inadmissible evidence post-trial and then relying on such evidence for the purpose of making its determination as to the credibility of the parties.

**Assignment of Error No. 2:** The trial court erred in awarding plaintiff the full costs of the parties' depositions.

**Issue Related to Assignments of Error:** In a bench trial, may a trial court consider extrinsic evidence, including the parties' entire deposition transcripts, when (1) the entire transcripts had not been admitted as substantive evidence during the trial; (2) the trial court reviewed such evidence in order to resolve discrepancies in the parties' respective trial testimony and to determine the credibility of the parties' testimony; and (3) the trial court reviewed such evidence without notice or opportunity to object to either party?

## **B. STATEMENT OF THE CASE**

This case involves a claim for negligent infliction of emotional distress arising out of an incident involving Appellant David Davies, the defendant below, and Respondent Byron Williams, the plaintiff below. At times relevant to this appeal, Mr. Davies was the owner and operator of Hill Funeral Home in Puyallup, Washington. *CP 193*. Williams was a youth

pastor with Bethany Baptist Church in Puyallup, and a volunteer police chaplain. *CP 7, 187-88.*

On October 8, 1999, Kyle Barker, one of the young men Williams mentored at Bethany and with whom he had a personal relationship, committed suicide by shooting himself in the head. *VRP 611; CP 192-93.* Following the suicide, Barker's family requested that Williams and another pastor from Bethany assist them with his funeral arrangements. *CP 193.* In their discussions with Williams, Barker's family raised the issue of whether his body was viewable by other family members. *Id.*

On October 11, Williams visited Hill Funeral Home to discuss Barker's funeral arrangements with Mr. Davies. *Id.* Without speaking to Mr. Davies first, Williams apparently informed Barker's family that his body would be viewable based on discussions he had with the medical examiner's office. *CP 193, 194.* Mr. Davies did not agree and advised Williams that viewability was his decision, not Williams' or the medical examiner's. Mr. Davies also advised Williams that it was his duty, as the mortician, to discuss with the family the issue of viewability. *Id.*

Mr. Davies received Barker's body from the medical examiner's office on the evening of October 11. *CP 106.* After examining the body, Mr. Davies concluded it was, in fact, not viewable given the nature and extent of

the self-inflicted injuries. *Id.* Concerned that Williams had improperly informed the grieving Barker family that the body was viewable, Mr. Davies called Williams' office at Bethany and asked Williams to come to the funeral home. *CP 195.*

When Williams arrived, Mr. Davies took him into the preparation room where Barker's body was located. *Id.* Mr. Davies showed Williams Barker's body and told him it could not be made viewable. *CP 198.* Though he has no training or education in body preparation, Williams disagreed and questioned the basis for Mr. Davies' determination. *CP 197-98.* After further discussion on the issue of viewability, Williams thanked Mr. Davies and returned to Bethany. *CP 197.* The entire incident lasted only a few minutes. *CP 198.*

Based on that brief encounter, Williams filed suit against Mr. Davies for negligent and/or intentional infliction of emotional distress. *CP 8, line 15 to CP 9, line 25.* Williams sought general damages for emotional distress and special damages for medical expenses, wage loss, and loss of future earnings. *CP 11, lines 2-13.*

At trial, a factual dispute arose as to the condition of Barker's body when Williams was in the preparation room. Williams testified at trial that when he entered the prep room, Barker's body was completely naked and that

his internal organs were visible. *VRP 547*. Williams further claimed that Barker's rib cage had been removed from the body and was "lying on [ Barker's] side on the table." *Id.* He also alleged that Barker's head cavity was open and that Mr. Davies cut a portion of Barker's intestines during their discussion. *CP 197*.

Mr. Davies disputed Williams' version of events at trial and denied Williams' allegations regarding the condition of Kyle Barker's body. *Id.* To be sure, it was Mr. Davies' position that some of the alleged events Williams described could not have taken place (such as the alleged removal of the rib cage) given the limitations of a funeral home. *CP 107*.

The parties' credibility was not simply an isolated issue, but was significant to liability throughout the trial. Williams claimed at trial it was the alleged nakedness of Kyle Barker's body and the exposure to the internal organs that caused his damages. *VRP 578*. Notably, Williams had previously testified in his deposition that he would not have suffered any emotional damage if the events in the prep room unfolded as described by Mr. Davies. *Id.* When confronted with his prior testimony, however, Williams backpedaled and claimed that he "couldn't speculate" whether he would have suffered any injury if his version of events was not true. *VRP 577-78*.

The parties' credibility was also significant to Williams' damages

claims. A key component of Williams' damages claims centered on his allegation that he could no longer work at Bethany, or in the ministry, as a result of the incident in the preparation room. *CP 202, lines 5-9*. However, during trial it was revealed that Williams was having an affair with a church secretary prior to the preparation room incident. *CP 201, lines 22-25*. Indeed, Williams testified that his position at Bethany was "in potential danger" given the affair. *Id.* It was further revealed during trial that Williams and his wife were having other serious marital problems prior to the incident. *VRP 591:22-25*. Williams admitted on direct examination that a pastor's involvement in an extra-marital affair affects his credibility as a pastor and as a member of the congregation he serves. *VRP 568:6-15*. He also admitted that his marital issues adversely affected his position at Bethany and the performance of his duties. *VRP 518:11-18*. In fact, the trial court specifically found that "the affair and Williams' marital difficulties resulted in a conflict among the church peers as to whether Pastor Williams' employment would continue with Bethany Church and was had long range effects [*sic*]." *CP 206, lines 9-12*. Clearly, this finding was not related to the preparation room incident.

On March 24, 2005, the trial court entered its "Findings of Fact and Conclusions of Law." *CP 186-215*. In two separate findings, the trial court

found that “Williams’ accounting of the incidents is consistent and more credible than that given by Mr. Davies” and that “Davies’ testimony regarding his account of the meeting with Williams about viewability was not credible. CP 198; 199. The trial court awarded Williams \$333,531.00 in damages, including more than \$200,000.00 in economic damages alone. CP 212, lines 22-4.

In April 2005, Williams presented his cost bill to the trial court asking, in part, that he be awarded the entire cost of his and Davies’ depositions. CP 217, lines 9-13. Mr. Davies objected on the grounds that the depositions were not read into the record in their entirety as substantive evidence and, therefore, Williams should be awarded only a pro rata award of the deposition costs for those minimal portions of the transcripts used for impeachment purposes. CP 221, lines 1-15.

In May 2005, the parties appeared before the trial court to present argument regarding Williams’s proposed cost bill. At the start of that hearing, the trial court stated on the record:

I will tell you that I read both Mr. Davies['] and Mr. Williams['] deposition[s] *because there were various conflicts in the stories and testimony and I wanted to find out what their stories were closer in time, as close as I could by way of deposition versus what they were saying in trial*, and there were some discrepancies with regards to[,] purported discrepancy with regards to what was told to the investigator and so I did read them for that purpose. So I don’t find it –

*the Court found it very helpful to read them in their entirety rather than piecemeal so I can get a flavor. (emphasis added)*

*VRP (May 13, 2005) at 4:1-14.*

As a result of its apparently *sua sponte* decision to review the deposition transcripts in their entirety, the trial court ordered that Williams be allowed the entire costs of both his and Mr. Davies' depositions. *Id. at lines 17-21.*

While limited portions of the transcripts were used at trial for impeachment purposes, at no time during the trial were the transcripts offered or admitted in their entirety as substantive evidence. Furthermore, neither party was offered the opportunity to make any argument as to the admissibility of such testimony except as to the minimal excerpts used at trial.

The May 2005 hearing was not the only indication the trial court reviewed extrinsic evidence to make its final decision. For example, in an October 2004 hearing (months before the Findings of Fact and Conclusions of Law were presented), the trial judge indicated she had reviewed Mr. Davies' deposition testimony in an attempt to ascribe a motivation for Mr. Davies' actions in the preparation room, and tied that presumed motivation to her discussion regarding the credibility of the parties. *VRP (October 29, 2004) 7:4 to 9:3.* In that same hearing, the trial court also questioned the lack

of testimony from a particular witness and stated that she went back into an exhibit (which had not been admitted in its entirety) “looking for” the witness’s prior statement that, again, she believed was related to the parties’ credibility. *Id. at 16:13 to 17:13.*

It was improper for the trial court to have, on its own volition and without any notice to the parties, reviewed the parties' entire deposition transcripts, and it was improper for the trial court to have reviewed any other inadmissible evidence for the stated purpose of comparing deposition testimony and/or extrinsic evidence to trial testimony and/or evidence admitted at trial in order to resolve questions of credibility. Such a practice is expressly prohibited by Washington law. Consequently, this matter must be reversed and remanded for a new trial.

### **C. ARGUMENT**

Mr. Davies asks this Court to reverse the trial court’s judgment against him and to remand this matter for a new trial before a different judge because the trial court based its determination of the credibility of the parties—an issue crucial to liability and the extent of damages—on extrinsic evidence which was not admitted at trial.

Extrinsic evidence constitutes any information that is outside all the evidence admitted at trial, either by testimony or by exhibit. *Richards v.*

Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990).

Under Washington law, a trial court may gather extrinsic evidence only for the purpose of clarifying or harmonizing testimony. Christensen v. Gensman, 53 Wn.2d 313, 318, 333 P.2d 658 (1958).

Under no circumstances may a trial court review extrinsic evidence to corroborate or discredit the testimony of a witness. Id.; O'Sullivan v. Scott, 25 Wn. App. 430, 432, 607 P.2d 1246 (1980).

In this jurisdiction, the trial judge cannot view the premises [*i.e.*, review extrinsic evidence] for the purpose of proving some *res gestae* fact not in evidence, nor may he view the premises for the purpose of searching for extrinsic evidence to be applied in corroborating or discrediting the testimony of a witness. If he does so, and his judgment is based thereon, it is reversible error.

Christensen, 53 Wn.2d at 318 (citing Elston v. McGlaulin, 79 Wash. 355, 140 P. 396 (1914)); see also American Family Mut. Ins. Co. v. Shannon, 356 N.W.2d 175, 179 (Wis. 1984).

Here, the trial court stated unequivocally that it reviewed extrinsic and inadmissible evidence for the sole purpose of resolving discrepancies in the parties' trial testimony. In doing so, the trial court committed reversible error because, as is well established by Washington case law, a fact finder may not view extrinsic evidence in order to either corroborate or discredit a witness's testimony. Id.

This is particularly true when the extrinsic evidence would not otherwise be admissible. **Civil Rule 32(a)** allows portions of depositions to be *used* at trial only if those portions used are admissible in evidence. (It is important to note that **CR 32** does not provide for *admission* of a deposition, or any part of a deposition, into evidence.) This express limitation reflects the general principle that the scope of discovery is much broader than the scope of admissibility. *Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984). “A deposition is, by definition, an out-of-court statement and is thus objectionable as hearsay when offered to prove the truth of the matter asserted.” *Tegland and Ende*, 15A Wa. Prac. § 47.2 at 301 (2006 Ed.).

By considering the depositions in their entirety to resolve the discrepancies in the trial testimony of Williams and Mr. Davies, the trial court improperly turned the parties’ hearsay deposition testimony into substantive evidence. Nothing in **CR 32** provides that, if a portion of a party’s deposition transcript is used at trial, the entire deposition then becomes substantive admissible evidence for the fact finder to peruse at random and use to resolve credibility issues. By reviewing the transcripts in their entirety, the trial court deprived Mr. Davies of the opportunity to cross-examine, to object to the admissibility of the entire transcripts, and to rebut or explain deposition testimony. In this regard, it was harmful error for the

trial court to rely on an independent review of extrinsic evidence not admitted at trial to resolve issues of credibility based on conflicting trial testimony. *See, e.g., Knapp v. Hoerner*, 22 Wn. App. 925, 931, 591 P.2d 1276 (1979). The irreversible harm of this error cannot be determined by the weight given to the extrinsic evidence. A trial court's review of extrinsic evidence cannot sustain a finding of fact, nor may such a review serve as a vehicle by which the trial court "may go outside the record in search of some supportive fact contended for but not revealed or embraced within the documents or records upon which its attention must be primarily focused and to which its attention should be limited." *Carlson v. City of Bellevue*, 73 Wn.2d 41, 47, 435 P.2d 957 (1968). Thus, it is not necessary for this Court to make any determinations regarding the weight of the evidence presented at trial; this issue compels reversal of the case, regardless of the weight of the evidence. *See Elston, supra*, 79 Wash. at 357.

To be sure, the only proper remedy is reversal and a new trial before a different judge. *See Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995). Washington's Code of Judicial Conduct states that a judge should disqualify him- or herself in a proceeding "in which their impartiality might reasonably be questioned[.]" **CJC Canon 3(D)(1)** (2005). By going outside the record and reviewing inadmissible, extrinsic evidence in the form

of the parties' deposition transcripts, the trial court obtained information critical to a central issue on remand; namely, the credibility of the parties. This information could not be ignored or repressed by the trial judge if this matter were remanded to that same judge. Hence, a reasonable person might question the court's impartiality, its ability to fairly consider all admitted evidence on remand, and to make a determination of credibility based solely thereupon. See *Sherman*, 128 Wn.2d at 206. If the trier of fact in this case had been a jury, this Court would not remand for a new trial to the same jury that had been privy to extrinsic, inadmissible evidence. For the same reason, a new trial must be had before a different judge.

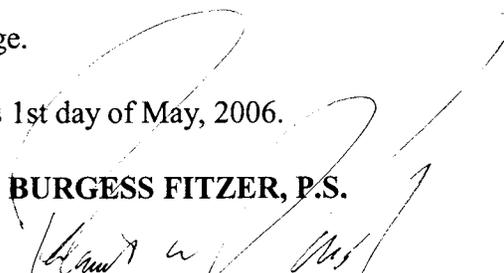
Finally, the trial court's decision to award Williams the entire cost of both his and Mr. Davies' deposition transcripts was in error. RCW 4.84.010(7) allows partial reimbursement of deposition costs on a pro rata basis "for those portions of the depositions introduced into evidence or used for purposes of impeachment." The trial court awarded the full costs because, on its own volition, it decided to review the transcripts in their entirety. Such a review, in addition to constituting reversible error from an evidentiary standpoint, does not provide justification for an award of deposition costs in contravention of RCW 4.84.010(7).

**D. CONCLUSION**

For the foregoing reasons, Mr. Davies respectfully requests that this Court reverse the judgment entered (including both the underlying judgment and the awarded costs) against him and remand this matter for a new trial before a different judge.

Submitted this 1st day of May, 2006.

**BURGESS FITZER, P.S.**



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ROBERT W. NOVASKY, WSB #21682



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MELANIE T. STELLA, WSB #28736

Attorneys for Appellants

