

Case No. 36895-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ROBERT BONNEVILLE, Appellant

vs.

PIERCE COUNTY, *et al.*, Respondents.

REPLY BRIEF OF APPELLANT BONNEVILLE

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A. Summary of Argument

The purpose of court rules is to ascertain the truth and ensure that legal proceedings are justly determined. ER 102. The rules governing the conduct of legal proceedings are to be construed to secure the just, speedy, and inexpensive determination of every action. CR 1. A trial judge is presumed to be able to disregard inadmissible evidence. *State v. Melton*, 63 Wn. App. 63, 68. 817 P.2d 413 (1991). Unless these statements are mere fig leaves covering the ugly truth of practical day-to-day legal practice in our courts, it is incumbent on this court to ensure that every litigant is afforded the opportunity present his case and have it disposed of on the merits, not on a technical violation of a rule, especially when a speedy, practical option was given to the court.

B. Argument

1. The Court Erred In Refusing to grant a continuance of the County's Motion for Summary Judgment.

This case was filed in Pierce County Superior Court on December 28, 2006. On January 24, 2007, Pierce County filed its Answer, and on July 23, 2007, the County filed its motion for summary judgment. At the Friday September 7, 2007 hearing, the Appellant Bonneville asked for, and received, one continuance due to the illness of his mother. The Trial Judge graciously gave him over the weekend and ordered him to file and serve his response not later than Monday, September 10, 2007. The day before the summary judgment hearing on September 21, 2007, Mr. Bonneville retained present counsel and asked him to appear at the hearing to request

a continuance so that the issues presented could be properly addressed. At that hearing, Mr. Bonneville's present counsel advised the judge he had not even seen the motion, exhibits, and accompanying declarations, and thus he was not prepared to argue the substantive issues at that time. The lower court denied this request for a continuance, and dismissed the complaint with prejudice, and only the complaint, leaving the counterclaim for trial.

The County asserts Mr. Bonneville had "plenty of time to hire an attorney." Brief of Respondents at 6, ¶3. How was he to find an attorney on a Friday afternoon willing to draft a response to a summary judgment motion that had to be filed and served not later than 4:30 p.m. the next Monday?

2. The County failed to establish a threshold *prima facie* case that no Genuine Issues of Material Fact existed that Preclude Summary Judgment.

Only after the moving party meets its burden of either producing factual evidence showing that it is entitled to judgment as a matter of law, does the burden shift to the nonmoving party. *Kennedy v. Sea-Land Service*, 62 Wn. App. 839, 816 P.2d 75 (1991).

The County states over and over in it's Responsive Brief that Mr. Bonneville did not object to the hearsay statements in the summary judgment motion and supporting affidavits. Of course not, since the respondents were successful in preventing Mr. Bonneville from obtaining a continuance to afford his attorney the opportunity to file opposition affidavits and object to the inadmissable evidence.

The summary judgment motion was based on the Staff Report, not declarations made upon personal knowledge. But now Pierce county states the Staff Report, as well as information contained in the Declaration of Officer Mark Luppino, was not offered to prove the truth

of the matter asserted, but only to show how the case originated. Brief of Respondents at p. 9, ¶1. If this is so, then in reviewing the lower court's order granting summary judgment, this court must exclude all statements contained therein and rely only upon the affidavits asserting facts known on personal knowledge. What then is left of the County's case? Excluding these two documents, there is no factual support for the summary judgment. Where can the County point to in the unexcluded supporting documents that there were too many employees? That there was too much space being used for business activities? That there were no permits issued?

It is almost humorous to read the disingenuous statement that Officer Luppino's statements were not hearsay because he attended the administrative hearing, subsequently read the transcript of that hearing, and therefore his statements about what he heard at that hearing are now made on personal knowledge. Brief of

Respondents at p. 10, ¶3. If the law supposes that, then the law is a ass, a idiot!

3. Mr. Bonneville is entitled to Constitutional Protection against warrantless, nonconsensual searches.

The Responsive Brief of Pierce County states Mr. Bonneville has no constitutional protections to illegally run a business. Brief of Respondents at p. 11, ¶1. But he does have constitutional rights against warrantless searches of his home.

Respondents state three times that the written consent to search the property was notarized by an attorney named Fred Hetter, whom is constantly referred to as Mr. Bonneville's attorney. Present counsel has discovered nothing in the record that confirms this assertion. "Plaintiff's own attorney attested ... that the agreement was signed freely and voluntarily." Brief of respondent at p. 18, ¶1. There is nothing in the record to

support this statement. Mr. Bonneville was *pro se* and unrepresented by legal counsel.

The Respondents request this court not consider that fact that by the terms of the Pierce County Code, PCC 18.60.060 -- Appendix A(B)(3), Pierce County needed the express consent of the property owner or residents prior to each search under a Right To Entry Agreement on the grounds this was not argued below. Again, this is part of the County's initial burden of showing there are no issues of material fact, and in any event, all issues are reviewed *de novo*. It is unnecessary to provide legal citations for the proposition that in reviewing orders granting summary judgment, all issues are reviewed *de novo*.

C.CONCLUSION

Simply put, there was no basis for the lower court's granting of Respondents' motion for summary judgment. The County now concedes the Staff Report was not used

to prove the facts of the matters asserted therein as well as the Lupinno declaration, and without those documents to support the motion, the County failed in its threshold burden. Therefore, Appellant requests this Court reverse and vacate the lower court's order granting summary judgment.

Respectfully submitted this 11th day of April, 2008.

A handwritten signature in cursive script, appearing to read "Joseph P. Tall", is written over a horizontal line.

Joseph P. Tall, WSBA #14821
Of Sorrel & Tall, Inc., PS
Attorney for Appellant Bonneville

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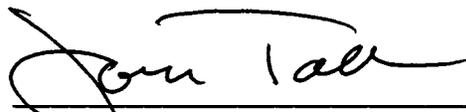
STATE OF WASHINGTON
BY _____
DEPUTY

DECLARATION OF SERVICE

1. The undersigned certifies, declares and affirms that on April 11, 2008, he mailed, postage prepaid, a true copy of the foregoing document to the Respondents' attorney Ronald Williams, Deputy Prosecuting Attorney, at the Pierce County Prosecuting Attorney's Office, 955 Tacoma Avenue South, Suite 301, Tacoma, WA 98402-2160.

I make the foregoing Declaration under penalty of perjury under the laws of the state of Washington.

DATED this 11th day of April, 2008 at Seattle, Washington.



Joseph P. Tall, WSBA # 14821
Of Sorrel & Tall, Inc., PS
Attorney for Appellant Bonneville