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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASTE CONTROL RECYCLING, INC., a Washington Corporation,

Appellant,

vs.

EMS MULTI MATERIAL MANAGEMENT & MARKETING, a division
of EAST BAY RESOURCES, INC.,

Respondent.

I. INTRODUCTION

The Appellant's brief provided the Court of Appeals with four arguments based on the evidence in the record, namely:

1. There was a genuine issue of fact as to whether the February 15, 2006, purchase order constituted an "offer" as that term is used in RCW 62A.2-206 or whether it was a

“memorialization” of a prior agreement as it was described by the Respondent’s primary witness.

2. There was a genuine issue of fact as to whether the February 15, 2006, purchase order accurately memorialized the verbal agreement that both Appellant and Respondent’s primary witness agreement pre-existed the February 15, 2006, purchase order.
3. Even if the February 15, 2006, purchase order constituted an “offer” as that term is used in RCW 62A.2-206, there was a genuine issue of fact as to the meaning of the term “mixed paper.”
4. Even if the February 15, 2006, purchase order constituted an “offer” as that term is used in RCW 62A.2-206, and if that “offer” adopted the 2006 ISRI guidelines’ definition of “mixed paper,” there was a genuine issue of fact as to whether the parties modified the term “mixed paper” as contemplated by the 2006 ISRI guidelines.

The Respondent’s brief utterly ignores arguments 1, 2, and 4, and focuses solely on argument 3 while advocating for the acceptance of

Respondent's explanation of the factual record. Unfortunately for Respondent, all the explaining in the world cannot wash away the factual dispute in the record. The Appellant is not arguing that Appellant should have prevailed on summary judgment against the Respondent. But, rather, it is Appellant's position that the factual controversy contained in the record precludes summary judgment in favor of anyone.

Respondent ends its brief with a proposed 10-count indictment against counsel for Appellant which ironically alleges, among other things, that counsel for Appellant of "personaliz[ing] the dispute in a manner that is demeaning to the opposing party" and acting like a "battle combatant."

II. ARGUMENT

1. **A contract already existed between the parties at the time Respondent sent its February 15, 2006, "purchase order" to Appellant and, therefore, RCW 62A.2-206(1)(b) does not apply.**

Counsel for Respondent simply dismisses this argument by stating: "Again, there is no competent evidence of a prior agreement contradicting the terms of the purchase order." *Brief of Respondent* at 17. What is missing from this statement, and for good reason, is a denial from Respondent that there was a pre-existing verbal agreement between the parties. Counsel for

Respondent drafted the *Declaration of Fritz Sparks* which states: "This second contract was memorialized with a Purchase Order dated February 15, 2006." CP 20, page 2, line 12 through 19.

The admission that there was a verbal contract in existence before the February 15, 2006, purchase order was even faxed makes RCW 62A.2-206 completely irrelevant to the court's analysis. RCW 62A.2-206 governs the formation of contracts, not the interpretation or memorialization of already-existing contracts. The Respondent's arguments, to both the trial court and to the Court of Appeals, rely solely on the application of RCW 62A.2-206 even though it is an undisputed fact that the contract already existed. Counsel for Respondent simply ignores this and bulls forward with its RCW 62A.2-206 analysis.

2. The factual evidence in the record creates a genuine issue of fact as to whether the February 15, 2006, "purchase order" accurately memorialized the prior verbal agreement between the parties.

With RCW 62A.2-206 out of the picture, the question for the court is "What were the terms of the verbal contract?" The Respondent produced evidence which, if accepted by the jury, would support a finding that the parties had a verbal agreement for the purchase and sale of highly valuable

“mixed paper.” This, however, is not the question that was before the trial court. One cannot obtain summary judgment solely on strength of his or her own evidence. It is only when the opposing party is unable to provide the court with *any* contradictory evidence that summary judgment is proper.

The great weight of the evidence in the record contradicts the testimony provided by the Respondent and, thereby, creates a genuine issue of fact precluding summary judgment. The record establishes:

- A. The parties negotiated for the purchase and sale of a specific product from a specific source, not “mixed paper” generally.
- B. Prior to purchasing the product, Simkins described it to his employer as “pretty rough, pretty dirty, It could be problematical,” “marginal,” “not good enough,” and “could be difficult to sell.” CP25 page 26, line 24 through page 27, line 11, and page 28, line 21 through page 29, line 5.
- C. Prior to purchasing anything from the Appellant, the Respondent repeatedly represented to its potential purchasers that the KB mix had out-throws which exceed the ISRI limit for “mixed paper.”

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- D. Prior to purchasing anything from the Appellant, the Respondent found it impossible to sell the product on the open market.
- E. Respondent unsuccessfully attempted to trick one of its potential purchasers into believing that the KB mix came from Appellant's facility. This ruse included packing the KB mix deeply into the train car and placing Appellant's high quality mixed paper right behind the door of the train car.
- F. Respondent was only able to get the KB Mix into China by avoiding CCIC inspectors and shipping the product from Appellant's facility to another facility in Tacoma, Washington, and then finally into China.
- G. Respondent bought the KB mix at a cut-rate and resold it at a premium price.
- H. Simkins and Sparks were openly anxious about how the KB mix would be received in China.
- I. When the first shipment of KB mix was verified by the mill in China as having 4.4 percent out-throws, Respondent did not object or otherwise complain to Appellant that the product

did not meet the ISRI guideline for “mix paper.” Instead, Respondent collected its ridiculously high profit margin and decided to buy even more.

There is ample evidence, both direct and circumstantial, as well as inferences to be drawn there from which would support a jury verdict finding that Respondent got exactly what it bargained for and that Appellant bears no fault for Respondent’s losses as a result of this risky endeavor.

3. The factual evidence in the record establishes that, let alone creates a question of fact as to whether, Appellant’s performance was consistent with the parties’ prior course of performance under RCW 62A.2-208(1).

The factual evidence in the record establishes Respondent, Appellant, and Respondent’s potential purchasers were the culmination of a nine month discussion regarding KB mix which included one prior purchase of the product. The purchase of KB mix in question was the second in a series of two purchases. RCW 62A.2-208(1) provides, in pertinent part:

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Official Comments 1 and 2 elaborate on the above rule:

1. ***The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was.*** This section thus rounds out the set of factors which determines the meaning of the “agreement” and therefore also of the “unless otherwise agreed” qualification to various provisions of this Article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of the course of performance elsewhere in this article carries no contrary implication when there is a failure to refer to it in other sections.

(Emphasis added.)

Respondent’s first response to this point is to deny that there was an ongoing course of performance, and characterize the February 15, 2006, purchase as a single, isolated event. Respondent’s Brief, page 19. While the Respondent is free to ignore the evidence and try this argument on the jury, such an argument must fail on summary judgment. The Appellant has placed in the record evidence which, if accepted by the jury, establishes a prior course of performance under RCW 62A.2-208(1). Appellant cannot make this evidence go away by simply restating over and over again that this was an isolated transaction. That is a question for the jury to decide.

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Respondent's second response is that the express terms of the contract control over the course of performance. Respondent once again skips right to the conclusion that the February 15, 2006, purchase order was an actual written contract as opposed to the one-sided memorialization of a verbal contract. Counsel for Respondent continues to beat this drum despite the fact that his own hand drafted the *Declaration of Fritz Sparks* wherein Mr. Sparks admits that purchase order was a memorialization of prior contract. CP 20, page 2, line 12 through line 19. The evidence offered by Appellant under RCW 62A.2-208(1) is not offered to contradict an existing written contract. But rather, this evidence is evidence of the terms of the verbal agreement that, all parties admit pre-existed the February 15, 2006, purchase order. It is also evidence that the February 15, 2006, inaccurately memorialized that agreement.

4. The extrinsic evidence provided by the Appellant is admissible under *Berg* to provide meaning to the term "mixed paper."

As previously cited by the Appellant, the Washington Supreme Court adopted the "Context Rule" for interpreting contracts in *Berg v. Hudesman*, 115 Wn.2d 657, 807 P.2d 222 (1990). Respondent does not dispute that extrinsic evidence is admissible under *Berg*, but rather, disputes what sorts

of extrinsic evidence are admissible. There is no question that a parties' subjective intent as to the meaning of a word is inadmissible. That is, a party to a contract cannot say "When I said the price was \$100.00, in my mind, the price was \$200.00." This information would be irrelevant. However, the *Berg* court expressly adopted the Restatement (Second) of Contracts §212 (1981), which provides for the admissible of objective evidence of the contracting parties' intent:

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) *A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.* Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Id. at 667-68, 801 P.2d 222 (Emphasis added.)

The *Berg* court went on to adopt comment b to this section of the Restatement:

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. *Any determination of*

a meaning or ambiguity should only be made in light of the relevant evidence of the situation and the relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the party.

Id. at 668, 801 P.2d 222 (Emphasis added.)

The *Berg* court also adopted Restatement (Second) of Contracts §214(c) and comment b thereto:

Agreements and negotiations prior to or contemporaneously with the adoption of a writing are admissible in evidence to establish

* * *

(c) the meaning of the writing, whether or not integrated.

Words, written or oral, cannot apply themselves to the subject matter. ***The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties.*** Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed.

Id. at 668, 801 P.2d 222 (Emphasis added.)

Under *Berg*, “evidence of the situation and the relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the party,”

Id. at 668, 801 P.2d 222, is admissible to prove the meaning of the term

“mixed paper.” The Appellant placed this exact evidence into the record and it was ignored by the trial court at the behest of Respondent. Based on the evidence in the record, the trier of fact is free to agree with the Respondent that the contract was for the sale of highly valuable ISRI “mixed paper.” However, the trier of fact is equally free to determine that Respondent’s contract was for the sale of a product of dubious value and that it suffered damages due to its failed attempt to foist the product off as something it was not. It is the trier of fact’s “choice among reasonable inferences to be drawn from the extrinsic” that makes summary judgment impossible in this case.

5. Even without *Berg*, extrinsic evidence would be admissible because the ISRI guidelines expressly provide for the customization of the term “mixed paper” on a case by case basis.

Fritz Sparks admitted that definitions and standards in the paper recycling industry are fluid and subject to change on a case by case basis. CP25, page 13, line 10 through page 14, line 1, page 14, line 6 through line 15, CP25, page 14, line 25 through page 15, line 12. Mr. Sparks even admitted that the KB mix was properly defined as “soft mixed paper” as opposed to “mixed paper” because it originated from a curbside collection facility. CP25, page 20, line 21 through line 25. Even the ISRI guideline that

Respondent hopes to boot-strap in as the “PS Standard” allows the parties to modify the definition of “mixed paper:”

VI Grade Definitions

The definitions which follow describe grades as they should be sorted and packed. CONSIDERATION SHOULD BE GIVEN TO THE FACT THAT PAPER STOCK AS SUCH IS A SECONDARY MATERIAL PRODUCED MANUALLY AND MAY NOT BE TECHNICALLY PERFECT. **Definitions may not specifically address all types of processes used in the manufacture or recycling of paper products. Specific requirement should be discussed between Buyer and Seller during negotiations.**

CP20, Ex. B (Emphasis added.)

There is ample evidence in the record which shows that, let alone creates a question of fact as to whether, parties modified the definition of “mixed paper” as provided by the ISRI guidelines. Again, the Respondent is free to waive the purchase order around in front of the jury and argue that his client contracted to purchase highly valuable mixed paper. However, Appellant should have the same opportunity to point out that Respondent knew the product was of dubious value, found it impossible to sell on the open market before on the purchasing the product, attempted and failed once to trick one of its buyers into accepting it, and finally succeeded in moving it into China by avoiding the CCIC inspectors altogether. Appellant should also have the opportunity point out the cut-rate that Respondent paid for the product, the

obscene profits they made on the first shipment, and their admission that they were “nervous” about how the product would be accepted in China.

III. REPLY CONCLUSION

This court should reverse the trial court’s order granting Plaintiff’s Motion for Summary Judgment and remand this matter for trial.

IV. RESPONSE TO RESPONDENT’S MOTION FOR SANCTIONS

Respondent’s motion for summary judgment faced two insurmountable hurdles. First, the only way for Respondent to prevail on summary judgment would be to convince the trial court to ignore the Context Rule from *Berg* and blindly apply the “PS Standards” to the February 15, 2006, transaction. As demonstrated herein, the extrinsic evidence, or “the rest of the story,” makes summary judgment impossible. The problem for Respondent was that there was no publication in use in 2006 that had the name “PS Standards.” Without such a document, the term “mixed paper” as used in the February 15, 2006, purchase order would be meaningless. This would leave the court with no choice but to review the extrinsic evidence and that would be the end of the Respondent’s case. To solve this problem, Counsel for Respondent took the 2006 ISRI Guidelines and created a false citation that gave the appearance that the name of this publication was the

“Paper Stock Standards for Export Transactions at page 32.” CP21, page 2.

The actual name of the publication was the “Scrap Specifications Circular 2006” which, of course, looks absolutely nothing like the “PS Standards” referenced by the February 15, 2006, purchase order. CP20, Ex.B.

The second hurdle standing in the way of summary judgment was the evidence that Respondent knew that the KB mix would have at least four percent out-throws. The ISRI definition of “mixed paper” in the “Scrap Specifications Circular 2006” (renamed as the Paper Stock Standards for Export Transactions) contained a maximum out-throw of three percent. How could Respondent claim that it expected “mixed paper” with less than three percent out-throws when it was telling all of its potential re-sale purchasers to expect out-throws of four percent? CP25, Dep. Ex.5, pages 16 and 18. And where was the Respondent’s objection when the first shipment was verified at 4.4 percent out-throws? The easiest way to deal with this hurdle was to simply hybridize the definitions of “soft mixed paper” and “mixed paper” so that the maximum out-throws were increased to ten percent.

Upon being caught by the Appellant and brought before the trial court for sanctions, the Respondent simply stated that both discrepancies were the result of a typographical error. CP36. Respondent offered no explanation as

to how these errors occurred or how it was that the errors just so happened to dispose of the two biggest impediments to Respondent's summary judgment motion. CP36. Respondent spent the balance of its response castigating Appellant for not giving it the opportunity to withdraw the fabrications prior to requesting Civil Rule 11 sanctions. CP 36.

The Respondent argued to the trial court that the "typographical errors" had no relevance to the outcome of the action. Anticipating the same argument would be made on appeal, Appellant pointed out what the Respondent had done at the trial court level. This was not done to smear or malign the counsel for Respondent. The effort that counsel for Respondent goes to avoid these two issues is an admission of how deadly these two issues are to Respondent's arguments. If the non-existence of any publication bearing a name that even remotely resembled the term 'PS Standards' was no big deal, counsel for Respondent would have no reason to change the name of the Scrap Specifications Circular 2006. Similarly, if Respondent's knowledge that the product it was purchasing would have out-throws of four percent was not a problem, counsel for Respondent would have had no reason to increase the allowable out-throws for "mixed paper" from three percent to ten percent.

Counsel's response to having its actions brought to the attention of the trial court was to claim it was all just an innocent mistake and to then go on the offensive against counsel for Appellant. It is no surprise that a similar tact is being used by counsel for Respondent at the Court of Appeals level. Counsel for Respondent has made ten allegations of sanctionable conduct, each of which is responded to specifically below:

1. "Waste Control's argument on appeal is precluded by well-established legal authority . . ." Counsel for Respondent trusts the court to review *Berg* and make its own determination as to whether Respondent should be sanctioned.
2. "Waste Control's argument lacks any support in the record . . ." Counsel for Respondent trusts the court to review the record and make its own determination as to whether Respondent should be sanctioned.
3. "Waste Control's brief is devoid of any judicial authority in support of its argument. It cites only *Berg* . . ." Counsel for Respondent is unaware of any rule that requires citation to more than one case, particularly when that one case is the

seminal ruling on the key issue before the court and that one case squarely answers all questions presented to the court.

4. “Waste Control’s argument is contrary to the statutory authority that express terms of the contract control over any prior oral agreements, course of dealing or performance.” Counsel for Respondent drafted the *Declaration of Fritz Sparks* wherein Mr. Sparks admits that the contract in question was a verbal contract which was unilaterally memorialized by the purchase order. There are no “express terms of the contract” in this case other than those that were expressed in the verbal agreement that pre-dates the purchase order.
5. “Waste Control argues fraud which is not pleaded as an affirmative defense . . .” Appellant does not argue fraud as an affirmative defense nor does it make a claim for fraud against the Respondent. Appellant has placed into the record evidence of the fraudulent measures employed by Respondent in their attempts to sell the sub-grade KB mix on the open market. The Respondent’s inability to sell the KB mix but for

an elaborate ruse which was devised *before* they purchased the product, is evidence that Respondent knew that it was buying a sub-grade product.

6. “Waste Control’s brief violates RAP 10.3(a)(5) which requires a “fair statement of the facts and procedures relevant to the issues presented for review, without argument” . . .” Counsel for Appellant drafted a statement of facts which contains factual statements that accurately reflect record. There is no rule against drafting a statement of facts that is persuasive. There is also no rule that would require counsel for Appellant to sugar-coat its description of Respondent’s wrongful conduct or that of Respondent’s counsel at the trial court level.
7. “Waste Control’s brief violates RAP 10.3(a)(5) which requires references to the record for each factual statement . . .” This general allegation fails to point out any such failures. The way in which exhibits were attached to the Clerk’s Papers, in particular the deposition exhibits, made citation difficult and undoubtedly makes reference to the

record more laborious than normal. Counsel for Appellant is unaware of any violations of RAP 10.3(a)(5) which warrant sanction and Respondent fails to point out any such violations.

8. “Waste Control’s brief violates RAP 10.3(a)(6). ‘[I]mplicit in the rule that citations to legal authority contained in the argument in support of a party’s position on appeal should [sic] relate to the issues presented for review and should support the proposition for which such authority is cited.’” This is just a repeat of Counts 3 and 5. Please see Appellant’s respective responses above.
9. “Waste Control’s brief violates RAP 10.4(c) because it does not attach the contract documents in the appendix.” There are no contract documents to be placed in the appendix. This case involves a verbal contract.
10. “Waste Control’s brief also personalizes the dispute in a manner that is demeaning to the opposing party and counsel without contributing to the resolution of the dispute on the merits.” The explanation as to why Respondent’s fraudulent

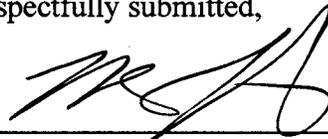
schemes to sell KB mix on the open market are relevant to the resolution of this dispute on the merits it spelled in Appellant's response to Count 5 above. The explanation as to why the conduct of Counsel for Respondent at the trial court level is relevant to the resolution of this dispute on the merits is described at length at the beginning of this Section IV herein.

V. MOTION FOR SANCTIONS CONCLUSION

The Court should deny Respondent's motion for sanctions.

DATED: October 17, 2008.

Respectfully submitted,



MATTHEW J. ANDERSEN
Of Attorneys for Appellant

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I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of October 2008, at Longview, Washington.

Cheryl L. Price
CHERYL L. PRICE, LEGAL ASST.