

FILED

JAN 10 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

DONALD W. DOWNING, JR.,
An unmarried person,

Appellant,

Superior Court No.

08-00314 6

v.

COA No. 300153

ROBERT WINKER and JANE
DOE WINKER, and REBECCA WINKER, an unmarried person,
and WADE W. GOFORTH, an
unmarried person,

APPELLANT'S BRIEF

Respondent.

APPELLANT'S BRIEF

Appeal from the Superior Court of the State of Washington
in and for the County of Asotin

Honorable William Acey, Presiding

Scott Chapman

Chapman Law Offices, PLLC

Post Office Box 446

Lewiston, Idaho 83501

Attorney for Defendants/Respondents

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I.

TABLE OF CASES AND AUTHORITIES

CASES:

Estate of Jones, 116 Wash. App. 353, 67 P. 3.d 1113 (2003) 16

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II.

INTRODUCTION

This Appeal involves a Judgment entered in favor of Plaintiff, herein (CP #28-29). Plaintiff Donald W. Downing, Jr., caused to be filed a Complaint against Defendant (for purposes herein) Robert Winker and Jane Doe Winker alleging that Donald Downing purchased property with improvements from Defendants Robert Winker and Goforth. The septic system on the property had been installed outside existing property lines and as a result thereof needed to be removed from adjoining neighbors property and replaced within the now Downing property lines (CP #1-16).

During the trial herein, evidence of the damages incurred by the Plaintiff was introduced over objections of Defendant Winker and overruled by the Court.

MR. CHAPMAN: Your honor, again, I'm (inaudible) upon hearsay and foundation.

THE JUDGE: Overruled. The witness may testify what his understanding is of what would be required to keep current (inaudible). Ah, obviously, he's done a fair amount of, ah, investigating into the situation to make sure that whatever he chooses (inaudible) legal. Ah – ah so he can testify as to what his understanding is as to

what would be required to put in a new septic tank system onsite.

MR. CHAPMAN: May I have a continuing objection to that, please?

THE JUDGE: So, noted for the record.

Q. Okay.

I would, ah, draw your attention to, ah, exhibit P-10.

THE JUDGE: (Inaudible).

MR. BROYLES: I'd move 10. No objection?

MR. CHAPMAN: No, I do have an objection.

MR. BROYLES: Okay.

THE JUDGE: P-10 is being (inaudible) Plaintiff's Counsel. (Inaudible).

MR. CHAPMAN: Yes, Your Honor. Ah, I would object – I – I think my first objection is based upon foundation.

There's, ah, figures, ah, contained therein, ah, without any indication as to a source. And further, that if there is a source those – that source is beyond, ah, Mr. Downing. It would be, ah, hearsay.

THE JUDGE: I don't know what the exhibit is other than (inaudible), so I will allow you to (inaudible) foundation.

MR. BROYLES: I – I'll back up and I'll work by way through it.

THE JUDGE: (Inaudible).

MR. BROYLES: It's okay.

THE JUDGE: You may hand the exhibit back to the witness. Did you get to see it, Mr. Goforth?

MR. GOFORTH: Yes, Your Honor.

MR. BROYLES: He did.

THE JUDGE: (Inaudible). You may continue your exam – he hasn't offered it yet (inaudible) –

MR. BROYLES: -- I DID --

MR. CHAPMAN: -- He did offer it --

THE JUDGE: -- Oh you did offer it. Well, than the objection is sustained at this time subject to a proper foundation being (inaudible). (RP, P. 52, L. 24 - P. 53 L. 10. See also, RP, P. 31 L. 4 - P. 32 L. 9; RP, P. 44 L. 5 - L. 11; and RP P. 45 L. 23 P. 36 L. 7).

The Court, based solely upon admission of the objected to documents, determined that the Defendant has been damaged by misplacement of the septic system and awarded damages in the amount of THIRTEEN THOUSAND AND FIFTY FOUR DOLLARS (\$13,054) (CP #28-29 and Appendix A)

III.

ASSIGNMENT OF ERROR

Did the Superior Court err in awarding damages to the Plaintiff based solely upon *inadmissible hearsay evidence*.

IV.

STATEMENT OF THE CASE

On December 11, 2008, the Plaintiff Donald W. Downing, Jr. filed a complaint against, among others, Robert and Jane Doe Winker, which alleged, in essence, that Robert Winker had been the owner of real property with improvements thereon, which had been

purchased by Plaintiff, Donald W. Downing, Jr. from Mr. Winker.
(CP #1-2)

The septic system existant on the property at the time of sale had allegedly been represented as being within the confines of the property owned by Mr. Winker. It was subsequently discovered the septic system had been in part placed on adjoining land owners property (CP #2).

The allegations were generally denied by Mr. Winker (CP #18). The matter was tried before the court on October 29, 2010. During the course of the trial, the following occurred regarding Mr. Downing's testimony as to the damages he sustained as a result of the alleged misplacement of the septic system:

Mr. Downing, ah, exhibit D-10 (sic) is titled, ah, septic system replacement costs?

A. That's correct.

Q. Okay.

How did you develop this, ah --.

A. --Well, I -- I determined that if I was going to try to recover the costs of, ah, replacing the septic system, (inaudible) costs were.

Q. Okay.

A. And so, I went first to the Asotin County Health Department and – and asked them what I needed to do, and they said (inaudible) --.

MR CHAPMAN: -- Your Honor, again, I'm – I'm going to interpose an objection based upon hearsay as to this wit – witness testifying to what was – what --.

THE JUDGE: -- It's not being offered to prove the truth of the matter (inaudible). (Inaudible).

Q. Okay. (RP Page 32 Line 14 thorough Page 33 Line 6). The testimony of Mr. Downing as to damages, as follows:

Q. Were you able to determine what other fees the county was – was at the time charging, ah, for the on-site sewage liquid waste program?

A. Yes, (inaudible). The application (inaudible) --

MR. CHAPMAN: -- You Honor, I'm going to object as being hearsay.

THE JUDGE: Ah, overruled, Counsel. (Inaudible).

Q. So, you did that; is that correct?

A. Those are the fees that, ah, will be required by the Asotin County Health Department.

Q. You haven't incurred those?

A. I haven't paid those – no. (Inaudible) disposal permit (inaudible). (Inaudible).

Q. Did you pay that?

A. Ah, I don't know if I did or not. (Inaudible).

Q. And that's to WW Engineering?

A. That's correct.

Q. Okay.

A. (Inaudible) --

MR. CHAPMAN: -- Your Honor, again --

MR. BROYLES: --okay--

MR. CHAPMAN: I don't want to be a broken record, but it's -- I'm interposing an objection based upon hearsay.

THE JUDGE: That's sustained. (Inaudible). (TRTR Page 34 Line 5 though Page 35 Line 3). Mr. Downing was questioned regarding various bids he received for replacement of the septic system.

Q. Ah, did you do -- tell me whether or not you had, ah, some -- some bids on doing work?

A. Did I -- did I have bids taken on doing the work?

Q. Yes.

A. Yes, I did, and --

Q. --Stop.

Okay.

Were you able to determine in your own mind what you believe the minimum cost to construct the system is going to be?

A. I did.

Q. And what figure did you reach --

MR. CHAPMAN: -- Your Honor --

Q. -- as an understanding for the minimum?

MR. CHAPMAN: Your Honor, I'm going to object based upon foundation and hearsay.

THE JUDGE: Ah, I'm going to overrule myself. I'm going to allow him to testify who he

got his bids from and how much they were. So, if you want to follow that line of questioning –

MR. BROYLES: -- okay.

MR. CHAPMAN: Your honor, can I have a continuing objection to that, please?

THE JUDGE: It is noted for the record.

(RP, P. 35 L. 10 - P. 36 L. 7) (Exhibit “D-10” referred to above is actually “P-10” and is attached hereto as Appendix A)

Ultimately Mr. Downing was allowed to testify that he had received bids in the range from ELVEN THOUSAND FIVE HUNDERED (\$11,500) through FOURTEEN THOUSAND FIVE HUNDRED (\$14,500) dollars wherein he states, over objection, as follows:

Q. All right.

What I am showing you, Mr. Downing, is a document, and I want you to look at it and tell me if it refreshes your memory. Ah, and you can tell me (inaudible)?

A. Yes, it refreshes my memory. I thought there were three bids – there are four. Ah, two of the bids are for \$11,500, one bid is at \$14,000, and one is at \$14,500.

(RP P. 39 LL. 18 through 24).

The sole exhibit as well as testimony offered upon which any determination of damages could be made was introduced and/or based on Plaintiff’s Ex. 10 (see Appendix A).

V.

ARGUMENT

The sole basis upon which the trial Court determined damages herein was based upon *hearsay testimony and/or documents(s)* and no appropriate exceptions to application of the hearsay rule applies herein. Absent substantial and competent evidence as to damages, the finding of the Superior Court of damages should be reversed and remanded with instructions from this reviewing Court the Plaintiff failed to prove damages and the hearsay evidence regarding said purported damages be stricken. No damages having been established the Plaintiff should take nothing thereby.

The law is straight forward and does not require any significant amount of briefing to establish that the evidence offered by Plaintiff as Plaintiff's Exhibit 10 (see Appendix A) and testimony based thereon is purely *hearsay evidence*.

Washington Rules of Evidence 801 provides and defines what hearsay is as follows:

The following definitions apply under this article:

(a) Statement.

A “statement” is (1) an oral or written assertion or (2) non-verbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A “declarant” is a person who makes a statement.

(c) Hearsay.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Obviously the bids offered by Plaintiff and his testimony based thereon, constitute a “statement” and further was a statement direct and or indirectly from others, not from Mr. Downing and offered for the truth of the matter asserted (Damages).

Rule 802 of the Washington Rules of Evidence provides that hearsay evidence is inadmissible, except as allowed by other rules or statutes, which are not applicable herein.

The Case of Estate of Jones, 116 Wash. App. 353, 368-369, 67 P. 3d 1113, ___ (2003), states as to hearsay as follows:

“Hearsay Objections. The court accepted Jeffrey and Peter's appraisal value of the house and rejected Russell's.

The court also did not believe Russell acted in good faith in assessing the value of the house. The court rejected Page 369 as inadmissible

hearsay a number of Russell's exhibits showing bids solicited and received from construction and repair companies. They were offered to establish, not the truth of the quoted repair estimates, but Russell's good faith basis for his valuation of the estate house.

If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of the matter asserted and the statement is not hearsay. FED. R. EVID. 801(c) advisory committee's note. The Washington rule is the same as the federal rule. ER 801 cmt.

The bids here may have been inadmissible to prove the truth of the matter asserted, i.e., that the quoted prices reflected the true cost of repairs. But, as offers on commercial business forms, the proposed exhibits were admissible to show that Russell did not simply invent the defects he claimed to have considered in reaching his assessed value. They were relevant to establish his good faith. Any objection went to weight, not admissibility. It was error to exclude them.”

Obviously the bid documents contained herein were offered solely for the purpose of the truth set forth therein (the amount of the bids and the cost to repair and/or replacement the septic system).

The Case of Patterson v. Kennewick Public Hospital, 57 Wash. App. 739,744, 790 P. 2d 195,___(1990) states as to hearsay:

“Whether the statement is hearsay depends upon the purpose for which it is offered. If it is offered to prove the truth of the matter asserted, the evidence is hearsay. If it is offered for some other purpose, it is not.” 5B K. Tegland, Wash. Prac., *Evidence* § 333, at 19 (1989). Out-of-court statements introduced to show the effect on the listener regardless of their truth are not hearsay. 5B K. Tegland, § 336, at 34. Here, Ms. Bolt's statement was offered to prove its effect on Mr. Patterson, *i.e.*, he and Mr. Telehala used this information in deciding whether to secure the panels locally or order them from Castle. It was *not* offered to show that delivery would in fact take 30 to 60 days. Mr. Patterson's testimony was admissible evidence, not hearsay.”

Evidence of the bids received by Mr. Downing were not offered for through any exceptions to the hearsay rule or purpose outside the hearsay rule (*i.e.* affect on listener or not offered for the truth etc.).

Judge Rosselini wrote in dissent in Jacqueline's v. Mercantile Stores, 80 Wash. 2d 784, 793-794, 498 P.2d 870, ___ (1972) regarding a situation extremely akin to the one herein as follows:

The accountant was not present at the trial for cross-examination upon his method of computing the loss which is stated therein or the source of his figures, but I think we may safely assume that

he obtained from the plaintiff the figures which he used. We have no way of knowing what measure of damages he used, so that even if we thought that his statement is competent evidence of the fact of loss, it is not shown to be relevant on the question of the difference in market value of the merchandise before and after the smoke damage.

I have examined this statement. Not only is it hearsay, but without explanation by the person who prepared it, it is unintelligible. At best, it shows the basis upon which the proof of loss submitted by the plaintiff to some insurer was prepared. It was offered only for this purpose, I assume, and the proof of loss was offered only to show a prior inconsistent claim on the part of the plaintiff. That was all it was good for. Under no stretch of the law could that self-serving declaration be used as substantive evidence of the amount of loss sustained by the plaintiff. Yet the majority blandly states that not only was it acceptable evidence, but it was all the evidence the trial court needed to support an award in the full amount of the claim!

The documentation (Plaintiff's Exhibit 10) and testimony based thereon should have been excluded by the trial Court nor used by the court to determine damages. (RP p. 74 LL 12-13)

VI.

CONCLUSION

Based upon the foregoing, the evidence regarding bids received etc., as set forth P-10 should be excluded and if excluded, Mr. Downing failed to prove damages in their entirety or at a minimum the amounts are significantly reduced. Therefore based upon foregoing Mr. Winker respectfully requests this reviewing Court to order the matter remanded with instructions the proof of the bids and documentation set forth in Plaintiff's Ex. 10 be stricken and further based upon the failure of the proof of any other damages in the Plaintiff's case dismissed and nothing be taken thereby.

DATED this 9th day of January, 2012.

CHAPMAN LAW OFFICES, PLLC



Scott Chapman, WSBA 34648
Chapman Law Offices, PLLC
1106 Idaho Street
Post Office Box 446
Lewiston, ID 83501

I HEREBY CERTIFY that
a true and correct copy
of the foregoing was on
this 9th day of January, 2012,

Mailed
 Hand Delivered
 Faxed
 Messenger

to the following:

Scott Broyles
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Post Office Box 208
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Appendix A

W W Engineering
3435 Clemans Road
Clarkston, Washington 99403

Warren Watts
Consulting Engineer

Phone: (509) 243-4003
Fax: (509) 243-4004

October 27, 2008

Don Downing
5000 Mill Road
P.O. Box 213
Anatone, Wa 99401

RE: On-Site Sewage System

Dear Mr. Downing:

Enclosed are the plans for your proposed on-site sewage system (OSS).

I had four contractors from the Lewiston/Clarkston valley area review the plans and estimate a lump sum cost. Their estimate are based on the following summary of work.

1. Pump and abandon the existing septic tank.
2. Furnish and install a 3 compartment 1500 gal septic tank/pump chamber.
3. Furnish and install effluent pump complete with control panel and floats.
4. Furnish and install 2 inch supply line from pump chamber to distribution box.
5. Furnish and install distribution box complete with piping and flow controls.
6. Furnish and install standard gravity drainfield, consisting of 4 each 50 L.F. of pipe and gravel complete with washed gravel , 4 inch perforated pipe, filter fabric and observation ports.
7. Extend risers to grade for 1500 gal. septic tank, distribution box, cleanouts and observation ports.

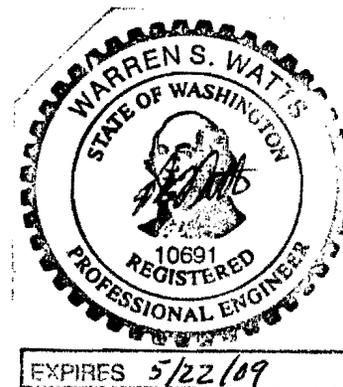
The four contractors estimates varied from \$11,500.00 to \$14,500.00 and are listed below:

Hewitt Construction.....	\$11,500.00
Curry Inc.....	\$11,500.00
Harrison Excavation.....	\$14,000.00
Lucky Ahhi.....	\$14,500.00

The total Engineering costs for design, drafting, inspections, as built drawings and O & M manual is \$810.00.

Respectfully,


Warren S. Watts, P.E.



P10