

63128-4

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No. 63128-4

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MYKHAYLO and HANNA STEFANKIV

Appellants,

vs.

BERN and SAVOUTH KEO,
Respondents.

REPLY BRIEF

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INTRODUCTION

Respondents Keo fail to cite any authority for the broad proposition that a judge may consider incompetent evidence in ruling on a motion for summary judgment so long as the evidence was produced in discovery by the other party. Similarity, Respondents Keo do not dispute that the trial judge decided questions of fact as indicated by the comments he made in ruling on the motion for summary judgment dismissing the Stefankivs' lawsuit.

ARGUMENT

- A. Notwithstanding the fact that certain evidence is obtained from another party in discovery a trial judge can not consider incompetent evidence in deciding a motion for summary judgment.**

The Keos do not cite any authority in support of their apparent contention that a trial judge can consider incompetent evidence in deciding a summary judgment motion. The Keos, and the trial court at the suggestion of the Keos, have equated the concept of the authentication of evidence with the

admissibility of evidence. This is an inaccurate and incorrect conclusion which is particularly troublesome in the summary judgment context. It is well-established law that, "A court may not consider inadmissible evidence when ruling on a motion for summary judgment." *King County Fire Protection Dist. No.16 v. Housing Authority*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Burmeister v. State Farm Ins. Co.*, 92 Wn.App. 359, 365, 966 P.2d 921 (1998). In fact, the very case upon which the Keos' rely for their wide-ranging notion of admissibility, *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App 736, 87 P.3d 774 (2004), instructs,

" Although a 'ruling on a motion to strike is discretionary with the trial court,' a 'court may not consider inadmissible evidence when ruling on a motion for summary judgment.'"

Int'l Ultimate at 743. Thus it is clear that the fact that evidence is obtained in discovery from the other side does not trump any evidentiary objection except that of authentication. Keos and

the court characterized the ruling in *Int'l Ultimate* in a much more sweeping manner. In general the plaintiffs' objections were based upon hearsay, lack of foundation, lack of relevance, failure to disclose experts and opinion testimony. Keos asserted and the court accepted the notion that because some of the documents were received in discovery or qualified under a theory of "public records"¹ no other objections should be considered.

In considering the Keos' motion for summary judgment in this case the trial judge specifically considered the following incompetent evidence:

-Exhibit B

This is a non-certified, unsworn and unrecorded document which contains a simple line drawing, the notation "6132 188th St. S.W." and the words "Inspected by Allon O'Neal on April 29, 1963". There is no other information or writing on the exhibit and there is no way to determine what the document means.

¹ It should be noted that the provisions of ER 901(7) have not been adopted in the State of Washington. RCW 5.44.040 controls.

(C.P. 107-110 Exhibit B.)

The Stefankivs objected to the admission of this exhibit on the basis that it lacked relevance, (ER 402), that it was hearsay (ER 802) and that there was no foundation for the exhibit. The exhibit is not capable of demonstrating a connection between itself and the fact to be established (relevance) without explanation (foundation) and whatever (if anything) is conveyed by the document is offered for the truth of the matter asserted therein (hearsay). Even if there were some way to determine the meaning of the document it does not comply with the requirements of RCW 5.44.040² (the law relating to the admissibility of public records in the State of Washington) and without compliance it is not admissible. Considering the admonition of *Int'l Ultimate* that "inadmissible evidence not be

² RCW 5.44.040 provides, "Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state. (Emphasis added).

considered in ruling on a motion for summary judgment", it is not reasonable to believe that receiving documents in discovery is sufficient to override the clear requirements of the statute.

-Exhibit D

This is a non-certified, unsworn and unrecorded document dated July 31, 1989 which bears the caption "City of Lynnwood Public Works" "Application for Side Sewer Permit" relating to 6134 188th St. S.W.. The exhibit is not self-explanatory and from the information or writing on the exhibit and there is no way to determine what it means. (C.P. 107-110 Exhibit D.)

The Stefankivs objected to the admission of this exhibit on the basis of hearsay (ER 802) and lack of foundation. As was the case with the 1963 document this exhibit is not capable of demonstrating a connection between itself and the fact to be established (relevance) without explanation (foundation) and whatever is sought to be conveyed by the document is offered for the truth

of the matter asserted therein (hearsay). Even if there were some way to determine the meaning of the document without resort to foundation it does not comply with the requirements of RCW 5.44.040³ because it is not under seal.

Under the Keos' theory of the case Exhibit D apparently depicts the original owner's intent to provide for dual use of the Stefankiv (6132 188th St. S.W.) side sewer to service what is now the Keo property (6134 188th St. S.W.) with the same pipe. Although the authority was not raised in the trial court such a use would be subject to the requirements of Lynnwood Municipal Code Section (LMC) 14.16.032⁴. The Stefankivs do not by this reference seek to advance a new claim but rather to bring previously uncited legal authority to the attention

³ RCW 5.44.040 is a codification of the common law public records hearsay exception. *State v. Monson*, 113 Wn.2d 833 at 837, 784 P.2d 485 (1989).

⁴ LMC 14.16.032 provides in pertinent part, **Upon approval of the director, two or more adjoining property owners may agree to service their respective lands through one side sewer. In such event there shall be a permit fee as shown in Chapter 3.104 LMC.** A joint easement of the property owners sharing a common line side sewer shall be filed with the Snohomish County auditor's office, and proof of the recorded easement shall be presented to the city prior to issuance of a permit for connection to the POTW. (Ord. 2656 §§§§ 1, 2, 2006; Ord. 1706, 1989)

of the appellate court. In *Walla Walla County Fire Protection Dist.No.5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987), the court considered the fire district's request for prejudgment interest. Respondents objected to the fire district's citation to cases not brought to the attention of the trial court. Respondents' objection was rejected by the appellate court because no rule prevented the fire district from relying upon additional legal authority on appeal. A similar result obtained in the case of *Bennett v. Hardy*, 113 Wn.2d 912, at 918, 784 P.2d 1258 (1990), wherein the court ruled that if there was a question as to whether it was entitled to consider a statute not cited to the trial court, it would exercise its discretion to do so because "(an) appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision." This court should exercise its discretion to consider the law necessary to make a proper decision in this case

which implicates a substantial restriction on the use of the Stefankiv property if the Keos' position is affirmed.

-Exhibit F

This is a non-certified, unsworn and unrecorded document dated November 15, 1993 which bears the caption "City of Lynnwood Public Works" "Application for Side Sewer Permit" relating to 6134 188th St. S.W. The exhibit is not self-explanatory from the information or writing on the exhibit and there is no way to determine what it means. (C.P. 107-110, Exhibit F.)

It is very troubling to compare Exhibits D and F. While both documents purport to relate to 6431 188th St. S.W., each appears to depict the location of the side sewer to be in a different place. The drawing contained on Exhibit D (the 1989 document) appears to show the side sewer crossing the 6132 188th St. S.W. property in a north-south direction along the east side of the 6132 property. Although it is impossible to determine on a more likely than not basis, the line drawing on Exhibit F (the 1993

document) seems to place the side sewer for 6134 188th St. S.W. in the panhandle road which serves the location. The apparent depictions on Exhibits D and F are in marked contrast to the recorded Declaration of Short Subdivision and of Covenants which does not depict any side sewer location but does contain the following language,

"(4) That any private road will be subject to the further right of the grantor or his successor and of any telephone, electric, gas, water, or sewer company, public or private, to lay or cause to be laid and the right of ingress or egress for the purpose of maintaining telephone, electric, gas, water or sewer pipes, mains, or conduits across a described portion of such road."

And,

"(8) That additional covenants, easements, and restrictions (if any apply to these lands) are attached hereto as exhibits None and incorporated by reference as though fully set out herein."

(CP 107-110, Exhibits A and N.)

Notwithstanding the obvious disparity in Exhibits

A, D, F, and N and the absolute failure to comply with LMC 14.16.032, the Keos argument, accepted by the trial court, was that the documents evidence an intention by the original owner to burden the Stefankiv property with an easement for the Keo property side sewer. The trial court's error was not limited to an incorrect ruling on the admissibility of Exhibits A, D, F, and N but also the apparent failure to recognize the internal inconsistencies with respect to the location of the side sewer as called out in each of the exhibits. Exhibits A, D, F, and N were submitted by the Keos' in support of their argument that the original owner intended to create an easement for the side sewer. When a three different locations are specified in three different exhibits it is most difficult to comprehend how a question of fact as to the intention and or the location could not exist.

-Exhibit P

This is an unsigned, unsworn,
non-certified and unrecorded
document captioned "Proposal"
"Roto-Rooter Plumbing and Drain

Service" dated 5/5/2008.
By the terms of this exhibit
Roto-Rooter proposes to connect
the Keo house to the sewer main
by means of installing a side
sewer in a trench on Keos'
property upon agreement to an entire
page of terms and conditions
and payment of a sum ranging
from \$20,525.00 to \$30,650.00.⁵
(CP 107-110, Exhibit O)

The Keos submitted Exhibit P to the trial court to establish one of the elements of their implied easement claim, reasonable necessity. *Berlin v. Robbins*, 180 Wash. 176, 179-180, 38 P.2d 1047 (1934). The Keos **did not** obtain Exhibit P from the Stefankivs in discovery. The proposal relates to the estimated cost to complete certain sewer construction work. Of necessity the proposal requires the formulation of an opinion which implicates a knowledge of construction practices, building code requirements, selection of materials, cost of materials, type and cost of necessary equipment and cost of labor. All of this knowledge

⁵ The price variation apparently being dependant upon the number and location of manholes which may be required by the City of Lynnwood.

requires special skill, experience knowledge or education. The Stefankivs' objections to Exhibit P are that no foundation is established with respect to the author of Exhibit P's qualifications⁶, that the exhibit sets forth opinion testimony and that the exhibit contains hearsay which was offered for the truth of the matter asserted therein. The trial judge simply (and for unknown reasons) rejected the fact that the information contained in Exhibit P was opinion testimony or that expert testimony was required to establish the cost to relocate the Keos' side sewer.

While it is true that in the trial setting, the qualifications of an expert are considered by the trial court and that determination will not be overturned absent an abuse of discretion, where the qualifications and opinions are part of a summary judgment proceeding, review is instead *de novo*.

Seybold v. Neu, 105 Wn. App. 666, 678, XXX P.2d XXX

⁶ An expert witness interrogatory was served on the Keos on May 30, 2008. No expert witness was ever identified by the Keos who continue to deny that Exhibit P represents an expert's opinion.

(2001), *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The determination that the contents of an exhibit was not such that expert testimony was required should be treated in the same manner. The detailed information set forth in Exhibit P is not the subject of common knowledge. It is rather information which requires a basis of special skill, experience, knowledge or education to formulate. In a like manner the information is not a statement of fact but is rather an expression of opinion that a project can be done for a certain price under certain conditions, an opinion which is admissible evidence only if it is properly expressed by a qualified expert witness. It may be that the author of Exhibit P has special skill, experience, knowledge or experience such as would qualify him to testify as to the opinions set forth in the exhibit. Without a statement of those qualifications it is impossible to know just as it was impossible for the trial court to know.

The Keos have suggested that Exhibit P was

admissible as a business record. That suggestion ignores the clear requirements of RCW 5.45.020,

Business records as evidence.

"A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

The obvious way for the Keos to satisfy the requirements of the statute (and the requirements of CR 56(e)) was to obtain an affidavit from the author attesting to facts meeting the requirements, business record of the company, custodian, mode of preparation and timeliness. Instead the Keos assert without citation to authority that Mr. Keo can testify as to the satisfaction of the statutory requirements because he obtained the document from

another. This clearly is not what is contemplated by the statute. Exhibit P is hearsay and is inadmissible over objection. Because Exhibit P was the only evidence offered to prove the reasonable necessity element of the implied easement counterclaim the trial court erred in granting the Keos' requested relief.

The evidence rulings made by the trial court in considering the Keos' motion for summary judgment were incorrect and ignored the clear language of *Int'l Ultimate, Inc. v. St. Paul Fire and Marine Ins. Co.*, *Supra* at 743,

"A court may not consider inadmissible evidence when ruling on a motion for summary judgment."

In this case inadmissible evidence was considered and that consideration resulted in the erroneous dismissal of the Stefankivs' action.

B. The trial court impermissibly engaged in deciding questions of fact when it ruled on the Keos' motion for summary judgment.

The Stefankivs have set forth several comments

made by the trial judge when he announced his ruling granting the Keos' motion for summary judgment. These remarks are indicative of issues of fact being decided by the judge. In their Response Brief the Keos do not challenge the accuracy of the comments which have been attributed to the trial judge nor do they dispute that the trial court made determinations of fact. Rather, the Keos make a somewhat disingenuous argument that a *verbatim* report of proceedings should have been provided to the appellate court.⁷ It is presently, and has not been for at least the last 35 years, the practice to report motions hearings in the Superior Courts of the State of Washington. There is no requirement in the Washington Civil Rules for Superior Courts or in the Snohomish County Local Rules that motions proceedings be reported. The clear reason for this situation is that no testimony is taken in a motion hearing. A summary judgment hearing is conducted

⁷ The Keos, at Respondent's Brief Page 21, Note 6, appear to suggest some ulterior motive to the italicization of the word *verbatim* in the Statement of Arrangements filed in this action. The sole reason for the use of italics was to identify the non-English word.

entirely on the written record-no evidence is taken in court. Any party may request that a motion hearing be reported but no reporter is provided as a matter of practice. The cases cited by the Keos in support of their position that a *verbatim* report of proceedings should have been provided, *Dash Point Vill. Assocs. v. Exxon Corp.* 86 Wn. App. 596, 937 P.2d 1148 (1997) and *Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (2008), both involve trial situations and are not applicable in the summary judgment context.

The appellate review of a motion for summary judgment is *de novo* based upon the evidence which was before the trial court. The trial court's comments in ruling on the motion are not "findings" nor are they evidence and a *verbatim* record of the comments is not required to be part of the record on review. Such comments are however indicative of the fact that the trial court considered factual issues and decided them. Such was the case here. The trial judge, in the absence of any evidentiary

basis, announced what he thought was "reasonable" and ruled accordingly. In ruling on summary judgment a court can only determine facts where, "reasonable minds could reach but one conclusion". *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Jones v. State*, 140 Wn.App. 476, 481, 166 P.3d 12 19 (2007). The trial judge's conclusions regarding manholes, expired agreements not to protest Local Improvement Districts and boilerplate title insurance exception language are certainly not such that reasonable minds could reach but one conclusion.

**C. No basis exists to award attorney fees
In this case.**

The Keos have requested an award of attorney fees based upon their characterization that this is a frivolous appeal. Appeals which raise debatable issues are not frivolous. The Stefankivs' utilized their right to appeal to obtain a review of valid issues which substantially impact their property

rights. This is not a case wherein it can be said that there are no debatable issues upon which reasonable minds might differ and that it is totally lacking in merit in the eyes of a reasonable person. The request for an award of fees should be denied.

CONCLUSION

The trial court improperly considered inadmissible evidence and decided questions of fact in ruling on the Keos' motion for summary judgment seeking dismissal of the Stefankivs' action. Multiple questions of fact exist and the matter should be remanded for trial.

Respectfully Submitted this 22nd day of July, 2009.

THOMAS R. BUCHMEIER, P.S.

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that I personally delivered a true and correct copy of the Reply Brief to the office of Attorney A. Janay Ferguson, 1424 Fourth Avenue, Suite 311, Seattle, WA 98101, on July 22, 2009.

Signed at Seattle, Washington this 22 day of July, 2009.

Ther R. Beck

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