

No. 64258-8-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

PRINS AUTOGASSYSTEMEN B.V.; AND
AMERICAN ALTERNATIVE FUEL, LLC.

Appellants,

v.

CARL COOK

Respondent

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

As an initial matter, the Appellants object to the Respondent's general references to matters outside the scope of this Court's review, and in particular, his devotion of four pages of his brief dealing with matters in New York State. Despite the irrelevancy, Appellants are compelled to notify this Court that it had in fact posted the required bond as provided under New York law; and all of Respondent's motions filed in New York were denied. Further, the Respondent had notice of Honorable D.K. Lalor's Order dated on March 17, 2010 denying his motions well before submission of his first brief and amended brief. In that decision, Judge Lalor not only denied Respondent's requests for relief but also barred Respondent from filing any further applications in New York unless filed by a New York licensed attorney or certified by such an attorney as being "meritorious and in proper form."

Additionally, Appellants object to Respondent's "Statement of Facts" which again is replete with references to alleged facts outside the court record, including alleged comments made by the trial court judge after the hearing and off the record.

Finally, as a general matter, the Respondent also fails to cite any legal precedent to support any of the positions taken in his brief. As a more particular reply to the Respondent's brief, the Appellants state as follows:

A. Respondent Failed to Serve Appellants With “Attached” Documents

Even if this Court were to assume that Respondent provided Appellants with copies of the “repair invoices” and “estimates”, which he did not, the Respondent’s Motion for Summary Judgment makes no reference to these documents. If this Court were to accept the Respondent’s position that it is sufficient to merely include the documents in an envelope along with his Motion for Summary Judgment, which he did not, this Court would be adopting a rule that any document placed in an envelope, without any supporting reference in a motion or affidavit, would be admissible for any purpose without regard to relevancy, references, authentication, or other notice requirements and evidentiary laws.

Contrary to the Respondent’s assertions, neither the Appellants nor their New York or Washington counsel received any of the attachments to his Motion for Summary Judgment. This is further evidenced by the complete lack of reference to any “attached” invoices or estimates in the Respondent’s Motion for Summary Judgment, or any affidavit or declaration offered in support of that motion. In fact, the first time the Respondent referred to these documents was during the oral argument of his Motion for Summary Judgment. Furthermore, the first time Appellants reviewed the supposed “receipts” and “estimates” allegedly attached to Respondent’s

Motion for Summary Judgment was when Appellants received Respondent's Appellate Brief. This failure of the Respondent to produce said documents was specifically objected to by Appellants' counsel at the hearing. See VR 9:9-18; VR 10:4-6; and VR 19:13-17.

In preparing and filing a motion for summary judgment, the moving party must incorporate applicable law by citing cases and statutes; and incorporate relevant, admissible facts. See Hash by Hash v. Children's Orthopedic Hospital & Medical Center, 110 Wn.2d 912, 757 P.2d 507 (1988) (If moving party does not sustain its burden of showing there are no material issues of fact, summary judgment should not be granted, regardless of whether nonmoving party has submitted affidavits or other evidence in opposition to motion); See also CR 56(e) (a summary judgment motion must be supported by affidavits and set forth facts that would be admissible in evidence).

In the present case, Respondent's Motion for Summary Judgment lacked *any* admissible or credible evidence as to damages and did not reference any alleged exhibits or attachments in support of Respondent's claims. Therefore, the trial court should have denied Respondent's motion for summary judgment as to the unsupported request for damages.

**B. Appellants Preserved Their Objections to the Documents
Allegedly Attached to Respondent's Motion for Summary
Judgment**

Respondent's claims that Appellants waived any objections to the documents, apparently submitted ex parte to the court, are completely without merit. First, ER 904(b) provides, in relevant part, that the party offering the evidence under this rule must give the opposing party proper notice. ER 904(c) further requires that the opposing party object within 14 days. In this matter, the Respondent admits that he failed to give notice as contemplated under ER 904. See Respondent's Brief at pages 13-14. The Respondent also failed to provide even the barest of constructive notice by failing to: (1) reference attachments in his summary judgment motion; and (2) serve Appellants with such attachments. Therefore, Appellants were unable to object or respond to any additional "evidence" prior to the hearing, and thus have not waived their rights regarding such "evidence" presented at the summary judgment hearing.¹

In addition, the Verbatim Report shows numerous objections by Appellants' counsel to the documents submitted with Respondent's motion, including but not limited to: "it's incumbent on the plaintiff to bring those in

¹ Even if the attachments were included in the same envelope as the Appellants' copy of Respondent's Motion for Summary Judgment (which they were not), Respondent still failed to incorporate them in his motion and give proper notice of its relevancy and his intention to rely upon them in support of his request for summary judgment; without which a party cannot properly or effectively object.

with his motion. And also lay out what this admitted item is and then prove the other elements of the claim, as well” (VR 8:15-17); “So while there’s a declaration, the rule requires that you establish via declaration with evidence, not statements that, ‘I’m entitled to recover’” (VR 9:15-18); “the burden is on the plaintiff to prove his case with evidence to establish each of the elements. And it hasn’t even been explained, let alone supported by evidence” (VR 12:12-15); “I have the motion but I don’t have everything else attached” (VR 18:9-10); and “I did not have the attachment to his motion ... And I see invoices attached which I don’t know whether these have been paid or not.” (VR 19:13-17).

Respondent’s failure to follow procedure is not a mere “hyper-technicality” as he claims; rather, Appellants were completely prejudiced in their inability to understand or challenge Respondent’s evidence supporting his alleged damage claims. Therefore, Appellants have preserved their rights to appeal the consideration of “evidence” presented, including the alleged “attachments” to the Motion for Summary Judgment.

C. Respondent’s Alleged Attachments to his Motion for Summary Judgment Fails to Establish Damages

Notwithstanding the deficiencies presented above, even if the alleged attachments to Respondent’s Summary Judgment Motion could somehow be admitted, they still fail to prove any alleged damages.

CR 56(e) requires that affidavits submitted in support of or in opposition to a motion for summary judgment set forth *facts based upon personal knowledge admissible as evidence to which the affiant is competent to testify* (emphasis added).² As more fully discussed in its original brief, Appellants' objections include but are not limited to Respondent's: (1) personal testimony of his alleged amount of damages; (2) opinions of causation of damages because he is clearly not the creator of the alleged damage repair estimates, and he is not an expert in the automotive field or on propane conversion systems.

Moreover, there is a complete lack of foundation for these documents. Appellants' original brief asserted that the admissible evidence introduced by Respondent relates only to liability (specifically, the Requests for Admissions); a plain reading of Respondent's Motion for Summary Judgment makes no showing therein to admissible evidence regarding damages. Even assuming liability was established, Respondent nevertheless must prove his damages, which he has failed to do.

Appellants further point to several problems with Respondent's alleged attachments. First, the "receipts" for purchase of the propane kit are

² Admittedly, evidence may be presented in affidavits by reference to other sworn statements in the record such as depositions and other affidavits, but Respondent failed to do this. See, Mostrom v. Pettibon, 25 Wn.App. 158, 607 P.2d 864 (Div.2 1980).

not marked as paid in order to justify any reimbursement³; and these “receipts” also show that Respondent’s kit was purchased from a foreign nonparty to this case. The “installation invoice” is also not marked as paid. Respondent has failed to establish in any admissible way, such as by affidavit, that the installer, “Car Medics” properly installed the propane kit on Respondent’s vehicle or that his vehicle was in good repair at the time of installation. Moreover, the “estimates” merely state the estimated costs for replacing the entire engine and removing the propane kit, however, it fails to show that the repairs were necessary and related to the alleged damages to Respondent’s vehicle by the propane kit.⁴

As previously asserted in Appellants’ original brief, Respondent was required to submit affidavits of the makers of these documents detailing, among other things their expertise, the condition of the vehicle, the relationship between the alleged malfunctioning propane system and the needed repairs, and the reasonableness of the work quoted. The documents submitted by Respondent not only fail to establish damages, but its ex parte submission robbed the Appellants of a meaningful opportunity to object, cross-examine, and offer mitigating evidence of damages.

³ See objection to by Appellants’ counsel at VR 19:16-17.

⁴ The “estimates” also fail to address the reasonableness of the work quoted.

D. The Court May Only Consider Admissible Evidence

Finally, contrary to Respondent's assertions on page 16 of his brief, the court is not "free under its own discretion to consider what evidence is proper." Rather, the trial court is generally given broad discretion, but it is limited in considering only admissible evidence. Lynn v. Labor Ready, Inc., 136 Wn.App. 295, 306, 151 P.3d 201 (Div. 2, 2006) (holding that like the trial court, in deciding whether summary judgment was proper, the court considers only admissible evidence) (internal citations omitted). This Court reviews summary judgment orders de novo, as discussed previously in Appellant's original brief and admitted to in Respondent's Brief at page 12. See, York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 302, 178 P.3d 995 (2008).

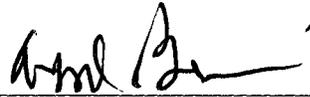
In the present case, the trial court erred in considering the "evidence" of damages presented ex parte to the court. The "evidence" submitted by the Respondent is inadmissible as it failed to comply with procedural requirements causing Appellants to be deprived of an opportunity to timely object; furthermore, the documents ultimately contain insufficient facts to prove damages.

II. CONCLUSION

For the reasons stated above, in addition to those set forth in Appellants' original brief in this matter, the trial court's decisions are unsupported by any admissible evidence and applicable law, and Appellants request that the Court of Appeals reverse and remand the September 4, 2009 Summary Judgment Order granting Respondent damages of \$12,541.00 plus interest. Appellants further request that Court award its attorney's fees on appeal.

Respectfully submitted this 12th day of July, 2010.

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