

No. 66619-3-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

RICHARD STABBERT, et al.,
Appellants

vs.

GLOBAL EXPLORER, LLC, et al.,
Respondents/Appellees

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY

APPELLANTS' OPENING BRIEF

Scott E. Stafne, WSBA # 6964
Attorney for Appellants

Stafne Law Firm
239 N. Olympic Avenue
Arlington, WA 98223
Phone: 360-403-8700
Fax: 360-386-4005

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 ORIGINAL

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I. INTRODUCTION

This appeal involves related contracts. The first contract is an oral brokerage agreement ("Oral Brokerage Agreement") between Richard Stabbert and his company, Global Marine Logistics, LLC, (hereafter collectively referred to as "Stabbert") and Global Explorer, LLC¹. The Oral Brokerage Agreement to broker the Deep Sea Vessel (DSV) GLOBAL EXPLORER was entered into by Stabbert and Frank Steuart, the managing member of GE. Mr. Steuart is a vice-president of defendant Steuart Investment Company (SIC), which owns the DSV GLOBAL EXPLORER. For purposes of this appeal GE, Steuart, and SIC shall be referred to as "Global defendants", which is how these defendants described themselves in their motion practice in Superior Court.

The second contract involved in this appeal is the April 3, 2006 Services Agreement between GE, Stabbert, and Deepwater Corrosion Services, (Deepwater). CP 634-638. Under this agreement Stabbert was to obtain "protected status" for Deepwater's corrosion technology in Pemex's² submarine pipeline and platform infrastructure within 200 miles of Mexican coasts. In return Deepwater agreed to give the DSV

¹ Global Enterprises LLC was a successor in interest to Global Explorer, LLC (both Global Explorer and Global Enterprises shall be hereafter referred to as "GE").

² Pemex is Mexico's national oil and gas company.

GLOBAL EXPORER a first right to install the technology, thus insuring long term charters of the vessel. Stabbert and Steuart agreed to share their profits 30% for Stabbert and the remaining 70% to GE.

Stabbert arranged a meeting with Deepwater and Pemex in August, 2006, which started the process for obtaining "protected status" for Deepwater's anti-corrosion technology. Stabbert also negotiated with Diavaz, a specialized PRMEX contractor, in the summer and fall of 2006 to charter the DSV GLOBAL EXPLORER on a long term basis. In the November, 2006 Steuart insisted Stabbert sign a new written brokerage agreement because the Oral Brokerage Agreement "had a potential to lead to [sic] and uncertainty regarding the parties' rights and duties". Clerk's Papers 483, paragraph 11. Stabbert refused to sign this agreement and was fired. Deepwater subsequently obtained "protected status". Diavaz began chartering the DSV GLOBAL EXPLORER in August, 2007 and those charters continue today.

Stabbert brought suit against Global defendants for breach of the Oral Brokerage Agreement and the April 3, 2006 Services Agreement. Stabbert brought suit against Deepwater for breach of the April 3, 2006 Service Agreement.

II. ASSIGNMENT OF ERRORS

1.) The Superior Court erred in determining there were no material fact issues regarding the terms and performance of the Oral Brokerage Agreement between Stabbert and GE;

2.) The Superior Court erred in determining there were no material fact issues as to whether Deepwater and/or GE repudiated the April 3, 2006 Services Agreement;

3.) The Superior Court erred in resolving the attorney-client privilege issues raised by Stabbert's motion for reconsideration;

4.) The Superior Court erred in failing to make evidentiary rulings and to identify that evidence which it considered related to Global defendants' and Deepwater's motions for summary judgment and Stabbert's motion for reconsideration; and

5.) The Superior Court erred in ruling it was precluded from deciding Stabbert's motion for sanctions.

III. ISSUES RELATED TO ASSIGNMENT OF ERRORS

ISSUE RELATED TO ASSIGNMENT OF ERROR #1:

Whether there are material factual issues regarding the terms and performance of the Oral Brokerage Contract so as to preclude summary judgment?

ISSUE RELATED TO ASSIGNMENT OF ERROR #2:

Whether there are material fact issues regarding the repudiation by Deepwater and/or GE of the April 3, 2006 Services Agreement which preclude the grant of summary judgment?

ISSUES RELATED TO ASSIGNMENT OF ERROR #3:

Whether the Superior Court erred in not addressing the Attorney-Client Privilege issues raised in Stabbert's motion for reconsideration?

ISSUES RELATED TO ASSIGNMENT OF ERROR #4:

Whether the Superior Court erred by not ruling on the evidentiary questions set forth in Stabbert's motion for reconsideration?

ISSUES RELATED TO ASSIGNMENT OF ERROR #5:

Whether the Superior Court erred by ruling that it was precluded from considering Stabbert's motion for sanctions?

IV. STATEMENT OF CASE

A. FACTS RELATING TO THE ORAL BROKERAGE AGREEMENT

Stabbert began working as a broker and Mexican manager for GE in 2002 or 2003³. From then until August 2007 Stabbert marketed the DSV GLOBAL EXPLORER to a very limited number of companies. CP

³ Frank Steuart, a defendant in this case, who was and is the managing member of Global Explorer, LLC, and Global Enterprises, LLC respectively testified Stabbert became employed pursuant to an oral contract in 2003. *See e.g.* CP 183:3-17. Stabbert testified in his declaration opposing summary judgment that that he was hired in 2002. CP 744 21:21-23.

66:5-10; 764:22-755:6. The target market was those few companies which contract with Pemex, Mexico's National Oil Company, to perform submarine pipeline and platform work in Mexico's territorial waters and exclusive economic zone (EEZ). CP 66:4-67:20; 161:3-162-:9; 185:3-186-7; 259:4-260:14. It is undisputed that under the applicable Oral Brokerage Agreement Stabbert received 5% of those charter monies actually paid by a Pemex contractor to GE for chartering the DSV GLOBAL EXPLORER to do Pemex contract work. CP 183:3-17; CP 744:21-23.⁴

Stabbert testified he worked as an exclusive brokerage agent while marketing the GLOBAL EXPLORER. CP 106:380:105-107:386:15. As an exclusive agent Stabbert was paid a commission for any charter of the vessel regardless of whether he was responsible for the ultimate negotiation of the charter. *Id.* See also Steuart testimony, CP 475:3-

⁴ Stabbert's testimony that GE paid him 5% of each charter payment made, is different than Global defendants' description of the charter arrangement in their opening motion for summary judgment. There Global defendants state:

"Under the Oral Contract, Global Explorer LLC , agreed to pay Stabbert a five percent commission on any charters of the GLOBAL EXPLORER procured as a direct result of Stabbert's efforts. Plaintiffs only would be paid if their efforts resulted in a charter, meaning that if no charter was signed, no commissions were paid to plaintiffs regardless of how much work they put into marketing the GLOBAL EXPLORER and in attempting to procure a charter." CP 62:20-25.

But even Steuart admitted at his deposition that this was not the way the Oral Brokerage Agreement worked. Stabbert could pay others to obtain the charter and then share the proceeds actually paid with others who had worked with him chartering the DSV GLOBAL EXPLORER. CP 475:3-477:3

477:3. Steuart and Stabbert contemplated Stabbert would produce long term charter agreements for which Stabbert would be paid a commission. Id; CP 103:346:15 -104:348:3; 746:12-14; cf. CP 489-490. (Pre-joint venture agreement between Stabbert and Steuart regarding marketing of GLOBAL EXPLORER for cathodic protection technology for long term charters of the vessel.)

For purposes of Global defendants' motion for summary judgment, Frank Steuart describes the Oral Brokerage Agreement in his declaration as follows:

2. Representation Agreement. In approximately 2003, Global Explorer, LLC and plaintiff Richard Stabbert (Stabbert) entered into an oral agreement to market the GLOBAL EXPLORER in Mexico (the "Oral Contract"). The terms of the Oral Contract were that Stabbert would be paid five per cent on any charters which came about as a direct result of Stabbert's effort to secure a charter. Stabbert worked in this capacity and through a company he owns, Global Marine Logistics, LLC ("GML"). Sometimes Stabbert would share his five per cent commission with another marketing agent, and at other times he would keep the entire commission for himself and GML. Plaintiffs would only be paid if their efforts resulted in a charter, meaning that if no charter was signed, no commission was paid to Plaintiffs regardless of how much work they put into marketing the GLOBAL EXPLORER. ...

CP 183:2-17. However, in a declaration dated April 22, 2009 submitted to the King County Superior Court in a related case Steuart testified that he wanted Stabbert to sign a written brokerage contract because "the parties

had operated under only a verbal agreement that had the potential to lead to uncertainty regarding parties' rights and duties". CP 483:11-13. During deposition testimony in that case Steuart contradicted any contention Stabbert had to bring the Global defendants a fully negotiated contract before Stabbert was entitled to a commission. CP 473:17-475:2 (Steuart testified that he took over contract negotiation after the "initial points" were formed.); *see also* CP 475:3-477:3.

In his deposition in this case, two days before the summary judgment hearing, Steuart testified:

Q Okay. Did the written -- did the written agreement change any of the terms and conditions of the oral agreement?

A Well, I didn't really have an oral agreement. I mean the agreement was, you go develop a con -- you know, find the business, bring me the contract, you get a commission, be pleasant, but there were no terms. There was nothing in our oral -- oral agreement.

CP 1329:17-22. Steuart claimed in the same deposition testimony that in order for Richard to earn his commission all Stabbert had to do was bring an interested party to the table, with a basic plan in mind, who ultimately chartered and paid to use the vessel. CP 1335:16-1338:2.

Stabbert asserted by deposition and in declarations introduced as evidence that he sufficiently put the deal together with Diavaz under the terms of the Oral Brokerage Agreement, as it had always been interpreted,

so as to be entitled to a 5% commission of all charter revenues paid to Global Enterprises for Diavaz' and its affiliates' continuing charter of the DSV GLOBAL EXPLORER. CP 91:290:18-291:92:13; 93:295:5-94:302:9; 108:396:5-110:404:3; 987; 749:15-755:5.

Global defendants claimed Stabbert was fired in February, 2007 for refusing to sign a new written employment agreement. CP 65:14-66:3; 184: 18-22; 483:1-18. Stabbert contended during his deposition that the written brokerage contract was being forced on him so as to allow GE to avoid paying his 5% commission from monies paid Diavaz to GE pursuant to the long term charter arrangement Stabbert put together. CP 103:344:2-16. Stabbert also testified he was concerned that a non-disclosure provision in the "take it-or-leave it" written contract could prevent his continuing to do the same work in Mexico, as well as compromise his defense in cases where he was being sued on account of Global defendants' actions. CP 102:340:11-105:352:19; *see also* 1331:19-1334:18.

Global defendants also argue the Diavaz charter was arranged exclusively by Frank Stuart. *See* CP 186:16-23; 261:5-12 Global defendants' state in their opening motion for summary judgment:

"Shortly before the Diavas/GE MTC was signed in August 2007, Stuart contacted Castro to inform him that the

GLOBAL EXPLORER was available for charter to determine whether Diavaz had need for the vessel".

CP 70:16-18.

In his declaration in support of Global defendants' motions for summary judgment, Steuart testified:

On August 2, 2007, Global Enterprises LLC entered into a Master Time Charter with Diavaz for the use of the GLOBAL EXPLORER (the "Diavaz/GE MTC"). I negotiated the Diavaz/GE MTC with Julio E. Castro Lluria (Castro) the Managing Director for Diavaz. *All of Castro's negotiations were with me exclusively.* Stabbert was not involved in negotiating the Diavaz/GE MTC in any way. ...

CP 186:16-21 [Emphasis Supplied]. Global defendants also submitted a declaration from Julio Castro supporting Steuart's testimony. Castro testified:

"I first became aware of the GLOBAL EXPLORER at some point prior to **late 2006**. I recall that my first contact from the GLOBAL EXPLORER was Frank Steuart, and he has been my primary contact with GLOBAL EXPLORER since then. I have known Richard Stabbert for years. **I do not recall ever negotiating any terms or charters with Richard Stabbert involving the GLOBAL EXPLORER. My negotiations involving any prospective charters of the GLOBAL EXPLORER have always involved Frank Steuart, and never involved Richard Stabbert.**"

CP 261:5-12 [Emphasis Supplied].

The above testimony by Steuart and Castro is directly contradicted by Stabbert. CP 93:295:11-13 ("I went ahead and negotiated the [Diavaz]

Supplytime draft MTC, which is the November 3, 2006, with Julio Castro..."); CP 93:298:5-9⁵; CP 94:301:25-302-4⁶; 754:22-755:5.

The evidence before the Superior Court included an email to Stabbert written by Castro on July 18, 2007. This email stated:

"Richard:

This is to confirm our interest in the Global Explorer for a six month contract with 2 one month extensions. Please confirm availability and rate.

Regards,

Julio Castro"

CP 987. No one disputes that Stabbert had been working with Diavaz in 2006 on a Master Time Charter (MTC) which had been approved by Pemex in November 2006 and had already been forwarded to GE's lawyers for review. *See Steuart deposition testimony CP 477:12-479:15; 1330:5-1331:5; 1334:19-1346:23; see also CP 91:290:18-94:302:9; 749:15752:4; 1564:4-1564:3; cf. CP 489-490, 1141-1146 (Stabbert letter*

⁵ "I went and negotiated with Julio Castro, I believe Rafael Lopez was peripherally involved, he was usually my contact person there at Diavaz, and I negotiated the terms of a charter party, which was contingent on a number of things." CP 93:298:5-9

⁶ "... -- and I negotiated terms with Julio Castro -- and that MTC agreement -- and if you want me to find it and read it to you, I will do so. contains a first right of refusal for long-term contracts.

The intent of the parties with respect to Diavaz prior to 2008, prior to 2007, and in 2006 was to contract the Global Explorer on a long-term basis, and that takes time. But the elements, contractual agreements, and intent were in place" CP 94:301:25-302-4;

to Steuart setting forth evidence how the proposed Services Agreement would produce long term charters for DSV GLOBAL EXPLORER.)

B. FACTS RELATED TO THE WRITTEN SERVICES AGREEMENT

This appeal also involves the Superior Court's grant of a summary judgment in favor of Global defendants and Deepwater for breach of a written contract. The April 3, 2006 Services Agreement (CP 634-638) incorporates an earlier July 10, 2005 Services Agreement (CP 639-641.) See CP 636, at paragraph 5.

The final Services Agreement is dated April 3, 2006. CP 634-638. By August, 2006 Stabbert had arranged for the chief of Pemex engineering to go to Deepwater's headquarters. The Chief of Technology wanted to obtain unique information about Deepwater's products so the products could obtain "protected status" for Deepwater's technology by being specifically required for performance in Pemex contracts. CP 625-627. A Deepwater employee explained the meeting with Sergio Dominquez, the engineering coordinator of Pemex and Stabbert on August 9, 2007 to James Britton, the president of Deepwater:

Dear Jim:

On August 9, 2006 Mr. Sergio Dominquez Engineering coordinator of Pemex, Joaguin Parrusquia, Rosa Maria Merlin, and Mr. Richard Stabbert from Global Marine Logistices, visit our office with the purpose of defining new strategies to introduce our product into the Pemex Technical Specifications.

* * *

Mr. Domiguez was expecting for us to justify technically why our products are better than the ones you could generally find in the market. His idea is to write in the specifications the character tics that make our products unique or describe only our product so the client will have to buy the products just from us to be in conformance with the spec."

CP 625-626⁷. There is no dispute that Deepwater has obtained "protected status" for Pemex technology related to work done on Pemex pipeline and platform infrastructure work in Mexico. CP 594:13-597:12. Britton testified he does not know how this status came about. CP 605:19-606:19.

The basis of Deepwater's summary judgment motion was that Stabbert and GE had failed to perform their obligations under the April 3, 2006 Services Agreement. CP 9-20. So Deepwater terminated that agreement by way of a letter dated June 4, 2009. CP 10:17-23; 57.

Stabbert made two responses to this argument. First, he argued that Britton and Steuart had terminated the agreement in late 2006 or early 2007, just months after he had brought Pemex's head engineer to Deepwater to obtain protected status for Deepwater technology. CP 448:19-465:22. Second, Stabbert argued there was sufficient evidence in

⁷ This particular email was provided by Global defendants, not Deepwater, in discovery. Deepwater claimed that it had long ago deleted all emails related to the Services Agreement from its records. CP 610:16-621:17. Jim Britton testified at his deposition about the email above, which was Exhibit 1 to his deposition.. CP 591:15-597:5.

place to create an issue of fact as to whether Deepwater had received over \$500,000 in sales. *Id.* See also CP 1202-1225.

Britton admitted that if Stabbert had obtained or started to obtain "protected status" for Deepwater in the summer of 2006 there would have been no ground upon which to terminate the Services Agreement.

Q Okay. Did he [Steuart] discuss with you at that that Stabbert had already obtained protect status for Deepwater products.

A No

Q Did he discuss with you at that time that Stabbert had already obtained a charter agreement to install Deepwater cathodic protection products?

A No.

Q Okay. If he had discussed those things with you, would it have made any difference.

A Yes.

Q Why?

A If he could have shown us the protected status verification at that time, we would have had no grounds to terminate.

CP 605:22-606:15. On January 29, 2007 Steuart wrote to Britton that "I have come to the same conclusion you have that things are not working out with regard to the cathodic protection program." CP 55. Britton admits at his deposition GE and Deepwater stopped all work pursuant to the Services Agreement and went about their business. CP 607:19-608:7.

During Britton's deposition, he testified that Deepwater had received information that Deepwater had not disclosed during discovery that Deepwater had obtained "protected status". CP 608:8-610:15. Upon

receipt of the documents which proved Deepwater had obtained "protected status" Stabbert was able to show that Deepwater technology was specified in a \$100,000,000 contract, which was ongoing in Mexico in 2009. CP 1202-1225. Stabbert produced a declaration which documented Deepwater's failure to timely disclose "protected status" pursuant to discovery, Deepwater's destruction of emails related to the Services Agreement, and "loss" of the first Services Agreement dated July 10, 2005. CP 602:4-623:16. Stabbert conducted this misconduct created credibility issues with regard to Britton's testimony and Deepwater's good faith production of evidence. Id. Jim Britton, was Deepwater's CR 30 (b) (6) designee and president. CP 610:16-623:19.

C. STATEMENT OF PROCEDURAL FACTS

Stabbert was represented in this case by Dennis Moran, Robert Windes, and Scott Stafne. Moran and Windes were at that time principals in a law firm held out to the public as Moran, Windes, and Wong. CP 1:1324. These attorneys (Moran, Windes, and Stafne) also represented EVYA and IECESA in a related suit against the same Steuart defendants as are involved in this case. EVYA, IECESA, and Stabbert had shared information while preparing their cases against the Steuart defendants. Stabbert had provided virtually all of his files to Moran and Windes for use in preparing his case and EVYA's case against the Steuart defendants.

On September 1, 2010 Windes filed a motion to continue the trial date. CP 1-3. Windes stated:

Plaintiffs' counsel Moran, Windes, and Wong has determined that a potential conflict of interest exists as to its current representation of plaintiffs in this case, such that it believes that its attorney ethical obligations could be compromised if it continues to represent plaintiffs...

CP 2:12-15. On that same day Windes filed a notice of withdrawal from Stabbert's case on behalf of Moran, Windes, and Wong and the Stafne Law Firm. CP 7:20-24.

On September 3, 2010 both Deepwater and the Steuart defendants filed motions for summary judgment against Stabbert. CP 9-21; 60-85. Windes also filed an amended notice of withdrawal. CP 58-59.

Deepwater's motion for summary judgment was based on the assertion that Deepwater properly terminated the Services Agreement in March, 2009 because Stabbert had failed to perform his end of the bargain. CP 9-20.

Global defendants' motion for summary judgment was based on, among other things, the assertion that Stabbert was not the "procuring cause" of the long term Diavaz charters as a matter of law. CP 73-78.

On September 7, 2010 Steuart defendants and Deepwater both filed oppositions to Stabbert's motion for a continuance. CP 361-366. Stafne filed a reply to defendants' responses to Stabbert's motion for a

continuance. CP 370-371. The reply indicated that Stafne did not believe there was any conflict of interest between Stabbert and the EVYA plaintiffs. CP 373:5-11. Stafne observed that "[i]f there is a true conflict of interest between current clients" then all existing counsel would have to withdraw from both the EVYA and Stabbert case. 370:18-21. Stafne requested an *in camera* hearing to resolve the conflict issue. *Id.* See also CP 374-376; 377-381. By way of a supplemental declaration Stafne advised the Court that if Moran and Windes withdrew he was not sure that he was medically capable of trying the case alone. CP 367-369.

Stabbert filed an objection to the withdrawal of counsel. CP 382-384. Stabbert noted that he and the EVYA defendants had worked together collecting evidence with regard to their related cases against the Steuart defendants. *Id.* Stabbert indicated that he had no problem signing a standard conflicts of waiver form such as that which was attached as an exhibit to his opposition. *Id.* "My problem has always been with regard to the wording of the 'conflict of interest waiver Mr. Moran insisted I sign." CP 383:9-10. Stabbert requested the Court hold "prompt "on the record" in camera hearing to determine whether there is a conflict of interest necessitating my attorneys withdrawal of representation in a case so close to trial". CP 383:12-14.

On September 17, 2010 the Court issued an Order denying motions to withdraw and to continue the trial date. CP 385. In this Order, the Court states:

Because Mr. Stabbert and Mr. Stafne have represented to the Court that resolution of this issue will involve considerations of communications between Mr., Stabbert and his attorneys which are covered by attorney-client privilege and have requested an "on the record" in camera regarding this issue, the Court hereby orders that on or before 9/20/10 plaintiff's counsel, Mr. Windes submit a declaration setting forth the detailed basis for the asserted conflict of interest shall be submitted to the court for in camera review. The declaration maybe ordered sealed pursuant to GR 15.

CP 386.

Stabbert believes that Moran and Windes have each filed two sealed declarations with the Court. *See* CP 325; 1325-6; 1358-1359. Stabbert has identified these sealed exhibits as part of the record on appeal. *See* Designation of Record. Although Stabbert asked to review these declarations, the Superior Court refused because of attorney-client privilege. Stabbert wants these declarations disclosed because he believes that they 1.) likely impugned his credibility while the instant motions for summary judgment were pending and 2.) are evidence that by the time the summary judgment motions were filed his attorney client relationship with his primary trial attorneys, Moran and Windes, had

deteriorated to such an extent that his ability to respond to the summary judgment motions and prepare for trial were prejudiced.

On September 20, 2010 Stabbert filed a "Consolidated Opposition" to all the defendants' motions for summary judgment (CP 444-473), Windes' declaration, which included "the translations which are otherwise dispersed as exhibits to the declaration of Richard Stabbert" (CP 473-443), Stafne's declaration in opposition to motions for summary judgment (CP 473-506), and Stabbert's declaration in opposition to motions for summary judgment⁸ (CP 743-1201).

Stafne's declaration included a copy of several Deepwater responses to discovery. CP 480:14-21; 500-503. Stafne stated:

As the Court can see Deepwater avoids providing any information about the technology that is being utilized in Mexico pursuant to the "protected status" that Stabbert obtained by performing his tasks under the Services Agreement based on the contention that no sales were made pursuant to that contract. Stabbert's point is that Deepwater and Global Defendants breached the contract by not letting him sell the technology through the bid process. Also the Court should note that Deepwater claims it will provide documents related to the Services Agreement, but its attorney has later stated that all these documents have been destroyed.

CP 480:14-21.

⁸ This declaration was timely filed, but under the EVYA case number. Each of the defendants was timely served. Stabbert's declaration was filed under the correct cause number on September 28, 2010. CP 743.

Deepwater filed its reply on September 27, 2010. CP 564-569. Deepwater argued Stabbert had produced no evidence Deepwater repudiated the Services Agreement. CP 566. Further, Deepwater argued "plaintiffs cannot avoid summary judgment by making false arguments that Deepwater has failed to produce evidence." CP 568. Deepwater made no objections to the evidentiary material Stabbert had submitted as his consolidated response to defendants' motions for summary judgment.

Deepwater's president declared Deepwater had produced documents showing all of its sales in Mexico since the agreement was signed. CP 570-571. Further, Britton swore Deepwater has not destroyed any documents during discovery. Id.

On September 27, 2010 the Global defendants submitted their summary judgment reply. CP 574-583. That brief stated:

The content of Stabbert's declaration, and the exhibits thereto, largely contain incompetent, inadmissible and irrelevant information, and do not establish any issue of fact requiring a trial on any of Plaintiffs' claims.

CP 575:9-13.

A. Stabbert's declaration should be Stricken in Large Part. Stabbert's Declaration contains multiple references to attached documents in Spanish to which Stabbert assigns implied and express meaning with no properly authenticated translation. The Court should strike and not consider such references.

CP 575:18-21.

On September 28, 2010 Stabbert's attorney Stafne filed a supplemental declaration containing excerpts from the deposition of Deepwater's president and 30(b)(6) designee which had been taken five days before on September 23. CP 584-624. *See also* CP 728-731. During Britton's deposition he provided a copy of a document which indicated that Pemex had given Deepwater protected status by including several parts of its technology as required parts in the performance of Pemex contracts. *See* Stabbert's supplemental September 28 declaration, CP 1202-1223.

On September 29, 2010 Deepwater filed a motion to strike plaintiffs' untimely and improper declarations. CP 1228-1229. On September 30, 2010 Stabbert told the Court that he recently "learned virtually no discovery had undertaken and little, if any, work had been done". CP 1317:22-23. Stabbert indicated that because he could not work with Mr. Moran and Mr. Windes had overwhelming personal issues, he terminated his attorney-client relationship with them. CP 1317-20. Stabbert's remaining attorney described the situation more fully. CP 1321-1324. On that same date, September 30, 2010 the Court issued an order sealing declarations filed by both Moran and Windes because of their attorney-client relationship with Stabbert. CP 1325-1326.

On October 1, 2010 Stabbert filed portions of Steuart's deposition testimony, which had been taken on September 28, 2010 and received in transcript form on September 29, 2010. CP 1327-1356. On that same day the Court heard oral arguments, but reserved judgment. CP 1357. During oral argument defense counsel made several additional evidentiary objections. The clerk's minutes state: "Defendants' motion to strike supplemental declarations will be ruled on at the time of summary judgment rulings." CP 1357.

On that same day, October 1, 2010, the Court sealed a second declaration of Robert's Windes and a one page attachment thereto. CP 1358-1359.

On October 4, 2010 Stabbert filed a motion for sanctions against Deepwater for failing to respond to interrogatories and requests for production of documents. CP 1360-1371. Deepwater opposed Stabbert's motion for sanctions. Mr. Zanzig filed a declaration which admitted he had "several general discussions about Deepwater's discovery responses, and each time I reiterated that Deepwater had disclosed all sales in Mexico from the signing of the services agreement in April, 2006 to the present." CP 1413:6-10. Stafne filed a reply declaration (CP 1457-1483), which stated in pertinent part:

Mr. Zanzig and I have had multiple discussions about Deepwater's inadequate discovery responses. ... So did Mr. Moran and Mr. Windes. I disagree with Mr. Zanzig that we have not conferred adequately regarding all aspects of the discovery inadequacies related to this instant motion for sanctions, including Mr. Britton's belated disclosure of the F-1 annex. ... It was Stabbert's position in his opening motion and remains his position here that he need not beg for discovery before seeking sanctions. *Magana v Hyundai Motor America*, 167 Wn2d 570, 583-4, 220 P.3d 1291 (2009). In any event it is my position I followed the local rule and sufficiently conferred with Mr. Zanzig.

CP 1459:1-9.

On October 11, 2010 the Superior Court granted the Global defendants' motion for summary judgment. The Court did not specifically rule on any of the Global defendants' evidentiary objections. CP 1545-1547. The Court also granted Deepwater's motion for summary judgment. CP 1548-1551. The Court wrote into the Order: "The Court finds that there are no issues of material fact and that Defendant Deepwater is entitled to judgment as a matter of law." CP 1550. The Court did not resolve any of Deepwater's evidentiary objections.

Stabbert moved for reconsideration on October 20, 2010. CP 1552-1562. In support of his motion Stabbert relied upon all the pleadings and evidence before the Court,

including the [sic] all pleadings and evidence (including sealed pleadings and declarations which at this time do not appear as part of the case record) related to Stabbert's counsels' notice to withdraw, Stabbert's response to

Defendants' motions to strike untimely evidence, and Stabberts' motions for sanctions against Deepwater, declarations in support thereof, Deepwater's response to the motion for sanctions in support of that response, and Stabbert's reply and the declaration Scott Zanzig in support of that response, and Stabberts' reply and the declarations in support of that reply.

CP 1553:18-1554:2.

Stabbert requested the Superior Court grant reconsideration pursuant to CR 59(a)(1), (7), (8), and (9). 1552:17-19. Among the issues raised in Stabbert's motion for reconsideration were: 1.) the Court's failure to precisely specify the documents it considered constituted an irregularity which prejudices plaintiffs because the record for review by an appellate Court has not been adequately specified so as to permit review?; and 2.) Did the Court's sealing of the declarations submitted by Moran and Windes, and failure to turn over Stabberts' litigation file to Stabbert, constitute and irregularity in the proceedings that substantially prejudiced Stabbert's rights? CP 1552:21-1553:7.

On October 28, 2010 the Superior Court ordered defendants to respond to Stabberts' Motion for Reconsideration. CP 1708.

In their response, Global defendants agreed "the record on appeal should be clarified". CP 1710:4-13. In its response Deepwater argued, among other things, that Stabbert's October 3, 2010 declaration should be stricken. CP 1724:10-21.

The Court denied Stabbert's motion to reconsider on January 4, 2011. The Court's order states:

The Court clarifies that it did not consider the sealed declarations of Mr. Windes and Moran or any materials not submitted in ruling on the subject motions for summary judgment. The Court further clarifies that it found no legal or factual basis to consider, for purposes of the summary judgment motions, the Declaration of Mr. Stafne dated 10/3/10.

CP 1753:20-24.

The Court denied Stabbert's motion for sanctions because it concluded Stabberts had not complied with CR 26(i), "which precludes this Court from 'entertaining any motion or objection with respect to Rules 26 through 37 unless counsel have conferred with respect to the motion or objection.'" CP 1755.

V. ARGUMENT

A.) There are material factual issues regarding to terms and performance of the Oral Brokerage Contract so as to preclude summary judgment.

The standard of appellate review for grants of summary judgment is de novo. *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 98-99, 249 P.3d 607 (2011); *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243, 178 P.3d 981 (2008). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, 319, 111 P.3d 866

(2005); *Green v. Am. Pharm. Co.*, 136 Wash.2d 87, 100, 960 P.2d 912 (1998). Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. at 319; *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005); *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. at 319.

The terms of the parties Oral Brokerage Agreement are material questions of fact. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. at 319; *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 354, 563 P.2d 211 (1977). Whether the Global defendants terminated Stabbert to avoid having to pay him a commission with regard to the Oral Brokerage Agreement and the April 2, 2007 Services Agreement is also a material question of fact. *Id.*

Oral contracts, by their nature, are generally not appropriate for summary judgment. *Duckworth v. Langland*, 95 Wn. App. 1, 7, 988 P.2d

967 (1998), *review denied*, 138 Wn.2d 1002 (1999). As the Court stated in *Duckworth*:

Oral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses. If a dispute exists with respect to the terms of the oral contract, then summary judgment is not appropriate. Instead, the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement.

Id.; see also *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 87 Wn. App. 495, 501, 962 P.2d 824 (1997) (disputes about oral agreements depend a great deal on the credibility of witnesses); *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 354, 563 P.2d 211 (1977) (question of fact existed as to the terms of an oral bonus agreement).

In this case, determining the terms of the Oral Brokerage Contract will turn on who the jury believes: Stabbert or Steuart? They were the parties who entered into the contract, performed the contract, and now years later have different recollections about its terms.

In their opening motion, Global defendants attempted to prove as a matter of law that Stabbert was not a "procuring cause" of the Diavaz contracts. CP 73:10-78:6. Global defendants did not show, based on the record before the Superior Court, that reasonable jurors must all agree Stabbert was not the procuring cause of the Diavaz charters.

Similarly, Global defendants have failed to demonstrate that no reasonable juror could believe Stabbert was not terminated in order to avoid paying him commissions. The law in Washington is that a right to a commission which has already been earned cannot be avoided by terminating the broker. *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 167 P.3d 1112 (2007); *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 748-759 (1988); *Harding v Rock*, 60 Wn.2d 292, 302 - 303, 373 P.2d 784 (1962).

In *Willis* the Supreme Court explained:

The procuring cause rule states that when a party is employed to procure a purchaser and does procure a purchaser to whom a sale is eventually made, he is entitled to a commission regardless of who makes the sale if he was the procuring cause of the sale. This rule is applied to allow agents' commissions on sales completed after a principal has terminated their employment if the sales resulted from the agent's efforts. This court has stated that if a principal attempts to revoke an agency or intervenes by taking the matter into his or her own hands, "such revocation or intervention, if made in bad faith, cannot defeat the right of the broker to a commission." If this were not so, the principal could easily escape paying the agent's commission while enjoying the fruits of the agent's labors.

109 Wn.2d 754-5. Whether a broker was the procuring cause for commissions occurring after a broker's termination is usually a question of fact precluding the grant of summary judgment where there is no written agreement stating how post-termination commissions should be

determined. See *Syputa v. Druck, Inc.*, 90 Wn. App. 638, 646-650, 954 P.2d 279 (1998).

The beauty of the April 3, 2010 Services Agreement was that it tied Stabbert and the Global defendants to long-term Pemex work that needed to be done by one of a limited number of Pemex contractors. CP 600:7-17; 601:21-602:2. To explain it more fully, if Deepwater products had to be used for Pemex contracts and GE and Stabbert had the first right to install such technology, then the DSV GLOBAL EXPLORER would have virtually unlimited work available, regardless of whether it actually involved cathodic protection or other sorts of work.

If the DSV GLOBAL EXPLORER could be tied to this long-term project it would create the long term charters that Stabbert and Steuart had originally contemplated. See e.g. CP 489-90 (Preliminary joint venture agreement between Global defendants and Stabbert); CP 1141-1146 (Stabbert's letter to Steuart dated January 15, 2006). Global defendants' offered to form a joint venture with Stabbert regarding the April 3, 2006 Services Agreement on March 8, 2006. CP 489-490.

Jim Britton, like Global defendants, also appreciated how Stabbert's obtaining "protected status" for "Deepwater technology" would benefit Deepwater. CP 585:1-586-16; 590:1-591:9.

B.) There are material fact issues as to whether Deepwater and/or GE repudiated the April 3, 2006 Services Agreement which preclude the grant of summary judgment.

A contract claim accrues when there is a breach of contract. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, 321, 111 P.3d 866 (2005). The question of anticipatory repudiation is one of fact, and can be decided on summary judgment only "if, taking all evidence in the light most favorable to the non-moving party, reasonable minds can reach only one conclusion." *Id.*, *Alaska P. Trading Co. v. Eagon Forest Products, Inc.*, 85 Wn.App. 354, 365, 933 P.2d 417 (1997). "An intent to repudiate may be expressly asserted or circumstantially manifested by conduct." *Id.* (quoting *CKP, Inc. v. GRS Constr. Co.*, 63 Wn.App. 601, 620, 821 P.2d 63 (1991)). A party's intent to repudiate cannot be inferred from "doubtful and indefinite statements that performance may or may not take place." *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, 321, 111 P.3d 866 (2005); *Alaska P. Trading Co.*, 85 Wn.App. at 365, 933 P.2d 417 (quoting *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994)).

The facts in this case leave no doubt about the parties' intention to repudiate the contract after Stabbert had begun to obtain "protected status" for Deepwater's technology and long term charters for DSV GLOBAL EXPLORER from Diavaz.

In October, 2007 Britton wrote Steuart:

October 19th 2006
Global Marine LLC, By-Email

Dear Frank:

We have informally agreed that our business agreement must be recast since the Mexican staff of GML and Global have been unable to communicate and coordinate effectively under the April 3, 2006 Services Agreement among GML, and Global under Section 4 (d).

In the hope of moving things forward, this is Deepwater's notice of default given under Section 6 of the Agreement. Please contact me promptly to discuss the necessary adjustments to our business arrangement. If we can make some progress, it will not be necessary for Deepwater to exercise its right to terminate the agreement after having given its ten day default notice.

Very truly yours,
Jim N. Britton.

CP 462:11-20; 724.

In January 23, 2007 Steuart wrote Britton:

Jim,

I have come to the same conclusion that you have that things aren't progressing with respect to the cathodic protection program. I know you had an interest in terminating the agreement. I actually think if we did so ... and knowing the product now ... that we can bring a proposal to you ... discuss a deal ... should one come up. ...

CP 55.

Britton testified he took this exchange of emails to mean the Services Agreement was terminated and Deepwater and GE went out about their own businesses. CP 607-608. These informal agreements constituted a repudiation of the agreement and did not constitute a termination of the agreement. The April 3, 2006 Services Agreement had a specific clause, paragraph 6, for terminating the agreement. CP 51. Britton admits, and the evidence shows, that that neither Britton nor Steuart followed the termination provisions of the Service Agreement before abandoning the performance. CP 607-608. Approximately a week later Steuart fired Stabbert in an attempt to deny him commissions from the long time charter arrangements he put in place with Diavaz, and any commissions and other monies which would be generated as a result of his retaining protected status for Deepwater technology. CP 314 (February 1, 2007 termination letter)

With regard to Deepwater's credibility it is worth noting that it claims to have erased all its internal files and emails related to its "protected status", except those which are helpful to its defense. CP 610:16-621:17. Deepwater also cannot explain why it did not have a copy of the July 12, 2005 Services Agreement, as should have been kept under Deepwater's documents policy. CP 621:18-623:16.

In Washington the question of repudiation is to be resolved by the trier of fact unless after interpreting the evidence and inferences therefrom a court can say that reasonable minds could not differ about this issue. *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn.App. 309, 321, 111 P.3d 866 (2005); *CKP, Inc. v. GRS Const. Co.*, 63 Wn.App. 601, 620, 821 P.2d 63 (1991). The Superior Court erred when it determined that under these facts a reasonable juror could not have found that Deepwater and the Steuart defendants purposefully repudiated the April 13, 2006 Services Agreement.

Unless justified, repudiation by one party will excuse performance by the injured party. *Turner v. Gunderson*, 60 Wn.App. 696, 704, 807 P.2d 370 (1991); *Hemisphere Loggers & Contractors, Inc. v. Everett Plywood Corp.*, 7 Wn.App. 232, 499 P.2d 85, review denied, 81 Wash.2d 1007 (1972). The injured party is also entitled to restitution or damages. *Turner v. Gunderson*, 60 Wn.App. at 704.

The record before the Superior Court had many facts before it from which a trier of fact could determine that Global defendants and/or Deepwater intended to repudiate the contract. Therefore, it was error to grant a summary judgment to both Deepwater and the Steuart defendants on this issue.

C.) The Superior Court erred in not addressing the Attorney-Client Privilege issues raised in Stabbert's motion for reconsideration.

A trial court's decision to seal records is reviewed for abuse of discretion. *Dreiling v. Jain*, 151 Wn.2d 900, 907, 3 P.3d 861 (2004); *King v. Olympic Pipe Line Co.*, 104 Wn.App. 338, 348, 16 P.3d 45 (2000). A discretionary ruling based on error of law is an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Questions of law are reviewed de novo. *Dreiling v. Jain*, 151 Wn.2d 908; *Rivett v. City of Tacoma*, 123 Wn.2d 573, 578, 870 P.2d 299 (1994).

As this Court will recall, the motions for summary judgment on appeal were filed two days after Stabbert's attorneys filed a notice to withdraw because of an alleged conflict of interest and sought a six month continuance of the trial of Stabberts' trial in this case. CP 1-8. Attorney Stafne, who was assigned to the task of writing a reply to the motion to continue, indicated that he did not believe there was a conflict of interest which required withdrawal. CP 370-381. Stafne also noted that if there was such a conflict Moran, Windes, and himself would need to withdraw from both cases in which they had conflicts. *Id.* Stafne requested the Superior Court to hold an in camera hearing to determine whether Moran, Windes, and himself would to have to withdraw from both the EVYA v

Global Explorer case (which is currently pending as an appeal in this Court as Cause # 66812-9) and this case. CP 376:1-5. The Superior Court instead ordered attorney Windes to write a declaration defining the conflict. CP 385-386. In compliance with the fiduciary duty owed Stabbert, Stafne directed Stabbert to attorney Robert Gould. CP 1317-1324. Stafne believed there was potential malpractice because virtually no work had been done on Stabbert's case. Id.

After being informed there would be no in camera hearing Stabbert terminated Moran and Windes from the case and directed they not communicate with the Court. Id. Stabbert notified the Court that Moran and Windes no longer represented him and his company. Id.

Stabbert was concerned that Moran and Windes may attempt to portray him to the Court in an unfavorable light and terminated them. The Superior Court had only ordered a response from Windes. CP 385. Moran disobeyed this order and filed declarations with the Court, which the Court sealed on the premise of attorney-client privilege. CP 385; 1325-6; 1358-9. Stabbert asked for disclosure of the declarations filed by Moran and Windes. CP 1317-1324. The Court refused to disclose the declarations, but stated that in its order denying reconsideration the Court did not rely upon any of his previous attorneys' declarations in ruling on any issue relating to the summary judgment motions. CP 1753:20-23

Const. art. I, § 10 provides: "[j]ustice in all cases shall be administered openly and without unnecessary delay". As our Supreme Court noted in *Doe*:

That justice which is to be administered openly is not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people's rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations. Indeed, the very first enactment of our state constitution is the declaration that governments are established to protect and maintain individual rights. Const. art. I, § 1. Const. art. I, §§ 1-31 catalog those fundamental rights of our citizens.

The drafters of our constitution placed such great importance upon rights that they provided: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Const. art. I, § 32.

It is important to note that our consideration here is of the right of access. We are not here considering the validity of a theory of recovery. We are not considering legislative or judicial creation or abolition of a cause of action. We are not considering the abrogation or diminishment of a common law right. These are all issues for other cases. See Wiggins, Harnetiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 *Gonz.L.Rev.* 193 (1986-1988).

Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 780 – 781, 819 P.2d 370 (1991).

In *Doe* the Supreme Court found a blood bank could not rely on privilege to protect it from disclosure of normally confidential blood

records. *Id.* This Court must use a similar analysis here to determine whether the Superior Court erred as a matter of law in protecting from disclosure the statements of adverse counsel who had been dismissed in the course of litigation. *Id.*

Washington's attorney-client privilege is set forth in RCW 5.60.060(2)(a). This provision states:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

It is black letter law that "[t]he attorney-client privilege can ordinarily be waived *only by the client, to whom the privilege belongs.*" *Dietz v. Doe*, 131 Wn.2d 835, 843-44, 935 P.2d 611 (1997). [Emphasis Supplied] The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz*, 131 Wn.2d at 842, 935 P.2d 611. Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and thus may be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. *Dietz*, 131 Wn.2d at 843, 935 P.2d 611; *see also Baldrige v. Shapiro*, 455 U.S. 345, 360, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982)

(Statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth.).

As Stabbert requested disclosures of communications his former counsel **made to the Court** as support for their own interest in withdrawing from the case pursuant to a disputed conflict of interest, it is difficult to understand how Stabbert's attorney-client privilege with Moran and Windes justifies non-disclosure. Stabbert wants to know what his former attorneys have said to the Court. Stabbert does not care if his adversaries see these disclosures. Stabbert wants to address any issues raised by the declarations up front and on the record as they relate to judicial decisions denying his continuance and his motion to reconsider. Stabbert is inclined to believe the declarations by these officers of the Court may have impacted the Court's summary judgment decisions, especially if they impugn his credibility in this complicated case.

Where former counsel are invited to defame their ex-client under a cloak of secrecy and without being subject to any examination, the judiciary appears less a temple of justice than a police station protecting its own officers. As the Supreme Court stated in *Dreiling*:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution

and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified.

Dreiling v. Jain, 151 Wn.2d 900, 904-905, 93 P.3d 861 (2004).

The Court originally ordered Windes to submit an application regarding the continuance and withdrawal of attorneys. CP 385. But the Court sealed four declarations. Any client ought to be able to obtain from the Court declarations by a former attorney against him where alleged conflicts are claimed, especially when they occur during a complex motions process going to a judgment on the merits of the case or when the merits should be heard. Such a rule is not only necessary for the benefit of clients, but for the judiciary to retain its bearings in the search for truth.

D.) The Superior Court erred by not ruling on the evidentiary questions set forth in Stabbert's motion for reconsideration.

1.) Stafne's October 1, 2010 Declaration.

It is this Court's task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court. *Wash. Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993); *Green v. Normandy Park Riviera Section Cmty. Club*, 137 Wn. App. 665, 678, 151 P.3d 1038 (2007). That record includes those documents designated in an order granting summary judgment and any supplemental order of the trial court. RAP 9.12.

Stabbert argued in his motion to reconsider:

This Court's orders granting summary judgment do not state whether it granted or denied any of the motions by defendants' to exclude untimely evidence. This failure to do so is problematic as the Court's orders indicate that it considered the Supplemental Declaration of Scott E. Stafne in Support of Stabbert's Opposition with regard to the deposition of James N. Britton, but does not even mention the supplemental declaration which described the September 28, 2010 deposition of Frank Steuart. (ECR, sub #136). The Court's orders failing to explain its reasoning as to why it considered one of these declarations and not the other does not provide a rationale for the disparate treatment of the same type of evidence. Stabbert will identify this evidence as part of the record on appeal. The appellate court and the parties should know whether this evidence was considered or rejected by this Court. If it was rejected Stabbert should be afforded the opportunity to argue the Court wrongly excluded the evidence. If the evidence was not rejected then Stabbert should be able to utilize Stabbert's deposition testimony in support of his appeal.

Equally troublesome is that the clerk's record does not reflect Stabbert's Declaration filed October 3, 2010 in opposition to the summary judgment motions. This was well before this Court's issuance of its summary judgment orders on October 11, 2010. These documents are important because, among other things, they contain verified declarations of the translations of several documents set forth in Stabbert's original declaration and his authentication of those documents. ECR documents make clear this pleading was filed, but Stabbert has no way of knowing whether this Court received this declaration and, if so, decided to consider his October 3, 2010 declaration." CP 1554:3-22

In the Clerk's minutes to the October 1, 2010 oral argument the Superior Court ruled: "Defendants' motions to strike will be ruled on at the same time of the summary judgment rulings." CP 1357. But the Court did

not include any such rulings in its Summary Judgment Orders. CP 1545-1551.

In response to Stabbert's motion to reconsider, Global defendants agreed the Superior Court needed to clarify the record it relied upon in ruling on the summary judgment motions. CP 1710:3-13.

The Court did not rule specifically in either of its summary judgment orders with regard to whether Stafne's October 1, 2010 declaration containing Steuart's September 28, 2010 testimony (CP 1327-1356) should be stricken. CP 1545-7. However, Global defendants' proposed order (which was submitted by Global Explorer to the Court before October 1, 2010) contained a catchall phrase indicating that the Court considered "the files and records herein" CP 1546:17-18.

On October 11, 2010, the date the proposed Global defendants' Order was signed by the Court, the files and records of the case included Stafne's October 1, 2011 declaration, as well as all the other records in the Court file, as part of the files and records in that case file. Accordingly, Stabbert believes this Court should also consider Stafne's October 1, 2010 declaration as part of the evidence considered by the trial court when ruling on whether there were issues of material facts precluding the grant of Global defendants' motion. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 756, 162 P.3d 1153 (2010).

If the Superior Court did strike Stafne's October 1, 2010 declaration containing Steuart's deposition testimony, Stabbert assigns error to this decision. In *Davis v. West One Automotive Group*, 140 Wn.App. 449, 166 P.3d 807, 813 (2007) the Washington Court of Appeals stated:

“This case serves to remind us of our Supreme Court's observation in *Balise* [v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963)]: "The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." *Balise*, 62 Wash.2d at 199.

Steuart's testimony in all the depositions and declarations has been inconsistent. These inconsistencies raise issues about this credibility.

Even if the Court did not consider Stafne's October 1, 2010 declaration in ruling on the summary judgment, it likely considered this evidence in reviewing Stabbert's motion for reconsideration. In *Applied Indus. Materials Corp. v. Melton*, 74 Wn.App. 73, 77, 872 P.2d 87 (1994) the Court observed:

"In the context of a summary judgment, unlike a trial, there is no prejudice to any findings if additional facts are considered. *Meridian Minerals Co. v. King Cy.*, 61 Wash.App. 195, 203, 810 P.2d 31, review denied, 117 Wash.2d 1017, 818 P.2d 1099 (1991). "Although not encouraged, a party may submit additional evidence after a decision on summary judgment has been rendered, but before a formal order has been entered." *Meridian Minerals*, 61 Wash.App. at 202-03, 810 P.2d 31."

The docket in this case shows that Stafne's declaration containing Steuart's deposition testimony was filed with the Court on October 1, 2010, three days after it was taken. No written objection was made to Stafne's declaration. An oral objection may have been made, but the objection was never specifically ruled upon. The Order denying summary judgment states that in addition to all the enumerated pleading the Court also considered "the files and records herein". CP 1456:17-18. In its January 4, 2011 ruling denying Stabbert's motion for reconsideration the Court's order indicates the Court considered "the pleadings submitted in support of and in opposition to said motion, and the record records and files herein. CP 1753:14-19. This language also indicates the Superior Court considered Stafne's October 1, 2010 declaration.

2.) Stafne's October 3, 2010 Declaration.

Deepwater argued in its response to Stabbert's Motion for Reconsideration that Stabbert's October 3, 2010 declaration should be stricken. CP 1714:8-17.

In the Court's ruling denying Stabbert's motion for reconsideration it only ruled Stafne's October 3, 2010 declaration was inadmissible. CP 1753. But there does not appear to be any declaration by Stafne dated October 3, 2010 in the record.

Deepwater's evasive discovery responses were before the Court as evidence relating to Stabbert's motion to reconsider. CP 1553:21-1554:2. But the Superior Court appears to have avoided considering the substantive issues raised by these responses by ruling the motion for sanctions was not properly brought. However, for purposes of the reconsideration motion Stabbert was using the discovery responses to show how Deepwater avoided responding to discovery by simply re-writing Stabberts' discovery requests. CP 1360-1371;1484-1489.

E.) The Superior Court erred by ruling that it was precluded from considering Stabbert's motion for sanctions.

The Superior Court held it was precluded from "entertaining any motion or objection with respect to Rules 26 through 37 unless counsel have conferred with respect to the motion or objection". This was error. Stabbert's motion for sanctions was based on *Magana v Hyundai Motor America*, 167 Wn.2d 570, 583-4, 220 P.2d 1291 (2009). In *Hyundai* the Supreme Court granted sanctions without requiring a certification. *Id.* Moreover, Stafne testified that he followed the local rule and conferred with Deepwater's counsel about Deepwater's failure to make discovery. CP 1459:1-6.

Moreover, this Court has already clearly ruled a trial court has authority to hear a motion to sanction in the absence of a CR 26(i)

certificate, or if the certificate is defective in some manner. *Amy v. Kmart of Wash., LLC*, 153 Wn.App. 846, 853. 223 P.2d 1247 (2009).

VI. CONCLUSION

This Court should reverse the summary judgment entered in favor of Global defendants because there are disputes with regard to material facts. This Court should reverse the summary judgment entered in favor of Deepwater because there are disputes with regard to material facts.

This Court should order the declarations of Stabberts' former counsel unsealed.

This Court should order the Superior Court to decide whether to consider Stabberts' motion for sanctions based upon the circumstances of this case.

Alternatively, this Court should reverse the denial of Stabberts' motion for reconsideration and order the Superior Court to 1.) set forth with particularity the evidence it considered in ruling on the summary judgment motions before it; and 2.) decide such motions based on that evidence.

Respectfully Submitted this 23rd day of May, 2011.



Scott E. Stafne
WSBA #6964

No. 66619-3-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

RICHARD STABBERT, et al.,
Appellants

vs.

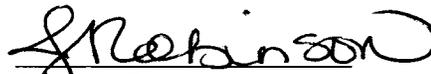
GLOBAL EXPLORER, LLC, et al.,
Respondents/Appellees

APPEAL FROM SUPERIOR COURT
FOR KING COUNTY

DECLARATION OF SERVICE

I, Jennifer Robinson, declare under the penalty of perjury that I served a copy of Appellants' Opening Brief on Appellees' attorneys, by depositing a copy of this document with the U.S. Postal Service addressed to: W. Scott Zanzig, 1200 Fifth Ave., Suite 1414, Seattle, WA 98101; and to Michael Gossler, 5500 Columbia Center, 701 Fifth Ave., Seattle, WA. 98104.

Dated: May 23, 2011, at Arlington, Washington.


Jennifer Robinson

 ORIGINAL