

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF SEATTLE, a first-class charter
city,

Plaintiff,

v.

PROFESSIONAL BASKETBALL CLUB,
LLC, an Oklahoma limited liability company,

Defendant.

No. C07-01620-MJP

THE CITY OF SEATTLE'S REPLY IN
SUPPORT OF ITS MOTION IN
LIMINE CONCERNING
STATEMENTS OF INDIVIDUAL
COUNCIL MEMBERS

Note on Motion Calendar:

June 6, 2008

I. SUMMARY OF REPLY

The Professional Basketball Club, LLC's ("PBC's") Opposition to the City of Seattle's Motion to Exclude Statements of Individual Seattle City Council Members (Dkt. No. 77) ("PBC's Opposition") ventures off on a tangent about the differences between Washington's Rule of Evidence 801(d)(2) and Federal Rule of Evidence ("F.R.E.") 801(d)(2)(D) in an effort to preserve its right to introduce out-of-court statements made by City Council members Nick Licata and Richard Conlin. PBC's approach is misguided. The City argued that the admission of prior statements or testimony from individual Council members must be predicated on the well-supported and self-evident caveat that such

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MEMBERS - 1

Case No. C07-01620-MJP

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1 statements do not constitute the binding admissions of the City. The City did not raise any
2 hearsay objections, making PBC's decision to dedicate nine pages of discussion to hearsay
3 superfluous.

4 II. ARGUMENT

5 PBC's Opposition misses the point by focusing on the differences between
6 Washington's Rule of Evidence 801(d)(2) and F.R.E. 801(d)(2)(D). The point of the City's
7 motion is not that the out-of-court statements by the council members are inadmissible, but
8 rather that those statements do not bind the City.

9 The City's motion merely requested that the Court "exclude evidence of statements
10 made by individual Seattle City Council members to the extent they are offered as admissions
11 purporting to bind the City. Such statements, if offered, may only be admitted as non-binding
12 opinion statements of individual legislators." The City of Seattle's Motion in Limine to
13 Exclude Statements of Individual Seattle City Council Members, to the Extent Offered as
14 Admissions Purporting to Bind the City (Dkt. No. 60), at 1. The Court considers Washington
15 state law only to explain the non-binding nature of any statements or testimony of individual
16 City Council members because the City Council members' relationship with the City is
17 defined by state law and the City Charter. The motion did not ask the Court to exclude the
18 statements completely.

19 F.R.E. 801(d)(2)(D) permits the admission of out-of-court statements as admissions of
20 a party-opponent even when the declarant's "employee" or "agent" relationship with the
21 party-opponent does not permit the declarant to bind the party-opponent. *See Big Apple*
22 *BMW, Inc. v. BMW of N. Amer., Inc.*, 974 F.2d 1358, 1372 (3d Cir. 1992) ("the vicarious
23 admission rule of Federal Rule of Evidence 801(d)(2)(D) does not require that a declarant
24 have authority to bind its employer"). The City also understands that some courts have
25 interpreted F.R.E. 801(d)(2)(D) to permit the admission of out-of-court statements
26

1 “concerning” an individual employee’s or agent’s “scope of employment” even when that
2 individual declarant does not have the sole or direct authority to make a binding decision on
3 the litigated issue. *See Maher v. City of Chicago*, 406 F. Supp. 2d 1006, 1020 (N.D. Ill. 2006)
4 (“[I]t is not necessary for a statement to be within the scope of the declarant’s agency or
5 employment that the declarant be a direct decision-maker. . . . if the declarant was an advisor
6 or other significant participant in the decision making process that is the subject matter of the
7 statement, the declarations by that person qualify as party admissions.”). These
8 interpretations of F.R.E. 801(d)(2)(D), however, simply underscore the entire thrust of the
9 City’s Motion—to the extent the City Council member’s individual statements are admitted,
10 they are non-binding based on the state laws and City Charter that establish the relationship
11 between the declarant and party-opponent in this case. The City reserves its right to object to
12 the admission of the statements depending on the purpose for which they are offered.

13 III. CONCLUSION

14 For the foregoing reasons, the City respectfully requests that this Court grant its
15 Motion in Limine that statements made by individual Seattle City Council members are not
16 binding admissions on behalf of the City, but rather non-binding statements of individual
17 legislators.

18 DATED this 4th day of June, 2008.

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26 THE CITY OF SEATTLE'S REPLY IN SUPPORT OF
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3 CERTIFICATE OF SERVICE
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5 I hereby certify that on June 4, 2008, I electronically filed the foregoing with the Clerk
6 of the Court using the CM/ECF system which will send notification of such filing to the
7 following:

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