IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DONALD W. DOWNING, JR., an unmarried person, Respondent, v. ROBERT WINKER and JANE DOE WINKER, Appellants, and REBECCA WINKER, an unmarried person, and WADE W. GOFORTH, an unmarried person, Defendants.	)	No. 30015-3-III UNPUBLISHED OPINION

Siddoway, J. — Donald Downing Jr., who purchased a home from the Robert Winker family, sued after discovering that the septic tank system was partially located on neighboring property (contrary to seller disclosure made by Mr. Winker) and would have to be replaced. Mr. Winker objects that Mr. Downing's evidence in support of the $13,054 in damages he recovered was inadmissible hearsay and we agree. Because Mr.

Downing proved the fact of damage but the trial court admitted evidence in error, we vacate the damage award and remand for a new trial solely on the issue of damages.

FACTS AND PROCEDURAL BACKGROUND

In May 2004, Donald Downing purchased real property on 5000 Mill Road in Anatone from Robert Winker, Rebecca Winker, and Wade Goforth. In connection with the sale, Robert Winker signed a seller disclosure statement that represented, among other matters, that the property was served by an onsite sewage system; that the onsite sewage system, including the drainfield, was located entirely within the boundaries of the property; that there were no encroachments; and that there were no existing material defects affecting the property that a prospective buyer should know about, other than were disclosed.

In August 2007, Mr. Downing discovered that the septic tank and drainfield were located on a neighbor's property. He wrote Mr. Winker asking that he correct the problem by moving the septic tank. When Mr. Winker failed to rectify the problem to his satisfaction, Mr. Downing sued, alleging breach of the warranties contained in the seller disclosure statement.

At the bench trial, Mr. Downing's lawyer questioned Mr. Downing about his anticipated cost of replacing the septic tank. Among documents Mr. Downing had brought to trial as potential exhibits were four estimates he had obtained from contractors

and his own compilation of the total cost based on those estimates. As Mr. Downing's lawyer attempted to offer the documents through Mr. Downing or question him concerning their contents, Mr. Winker raised continuing objections—and what was ultimately allowed to be a standing objection—that the bids, the compilation, and Mr. Downing's testimony concerning the estimates were all hearsay, or hearsay within hearsay.

Ultimately (it appears), the trial court allowed Mr. Downing to testify, as foundation for the compilation, to the estimates received from the several contractors. It allowed Mr. Downing's lawyer to use the estimates to refresh Mr. Downing's recollection. It eventually admitted the compilation, according to the record, as a "good faith estimate of what (inaudible)," later explaining that "he can testify as to what his understanding is as to what would be required to put in the new septic tank system onsite." Report of Proceedings (RP) at 41, 53. We qualify our conclusions as to what "appears" to have transpired because, unfortunately, two microphones were not enabled during the trial, and large segments of the report of proceedings are designated "inaudible." *See* RP at 6.

The trial court awarded Mr. Downing $13,054.00, plus interest, costs, and $6,772.50 in attorney fees. The evidence supporting the $13,054.00 damage appears to have been exhibit P-10, the compilation prepared from the four bids, and Mr. Downing's

hearsay testimony to the estimates supporting amounts included in that exhibit. Mr. Winker appeals.

ANALYSIS

Estimates of repair costs may be authenticated and admitted without the need to call the estimator at the time of trial, by complying with the requirements of ER 904. Requirements of that rule include providing the opposing party with notice 30 days prior to trial of the intent to rely on the rule and providing a copy of the estimate with the notice. The opposing party may object. Absent compliance with ER 904, or if the opposing party objects, there is no automatic authentication and admission. In that event, the estimate must be offered through the testimony of someone personally familiar with the preparation and validity of the estimate, who can be cross-examined.

Mr. Downing argues that the estimates to which he testified were admissible under ER 904(a)(3), but at trial he did not offer them under that rule and he did not establish the foundation required: namely, proof that he provided the required 30-day notice and received no objection. Moreover, the estimates themselves were not admitted into evidence. It is the estimates, not Mr. Downing's testimony or compilation, that could have been offered under ER 904.

Mr. Downing argues alternatively that an owner may testify to the value of real property, with the weight to be given left to the trier of fact. He is correct concerning

testimony of property value; both *Worthington v. Worthington*, 73 Wn.2d 759, 763, 440 P.2d 478 (1968) and *Kammerer v. Western Gear Corporation*, 27 Wn. App. 512, 526, 618 P.2d 1330 (1980), *aff'd*, 96 Wn.2d 416, 635 P.2d 708 (1981) support his argument. But those cases do not discuss and are not concerned with hearsay; rather, they concern whether an owner is qualified to testify to his or her opinion of the property's value. *Cf.* ER 701 (establishing limitations on opinion testimony by lay witnesses).

In *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004), our Supreme Court made clear that an owner's estimates of repair, offered to establish the cost of repair, are inadmissible hearsay even where cost of repair bears on property value. In *Jones*, the ultimate issue was the value of a home owned by a decedent's estate. The personal representative relied for his opinion of value on bids he received for repairs. This court had held that the bids "may have been inadmissible to prove the truth of the matter asserted, i.e., that the quoted prices reflected the true cost of repairs," but that they were admissible to show that the personal representative "did not simply invent the defects," and to show his good faith. *In re Estate of Jones*, 116 Wn. App. 353, 369, 67 P.3d 1113 (2003).

The Supreme Court reversed this court on that score, holding that the bids were not only inadmissible to prove the cost of repair but were inadmissible even to bear on the home's value, holding:

> [I]t seems more likely that the costs were offered to show a decrease in the value of the house. [The personal representative] could not offer the repair costs for this purpose, since the statements would then be offered for the truth of the matter asserted (e.g., bid for $80 is offered to show $80 repair is necessary, decreasing the house's value by $80). ER 801. . . . [T]he trial court correctly excluded these costs.

Jones, 152 Wn.2d at 13 n.6. In short, a property owner may express an opinion as to the value of his or her property, but expressing that view is not an opportunity or justification for offering hearsay information, such as third party repair estimates. The trial court erred in admitting evidence of the repair estimates in the form of Mr. Downing's compilation and testimony.

Mr. Downing presented substantial evidence of the fact of damage but the trial court erred in admitting hearsay on the basis that it was value evidence from an owner. We therefore vacate the damage award and remand the matter to the trial court for a new trial solely on damages. *See, e.g.*, *Fuller v. Rosinski*, 79 Wn.2d 719, 724, 488 P.2d 1061 (1971) (where there is substantial evidence of damages, but the evidence does not support a finding based on the proper measure of damages due to trial court error, we may remand the case and give the parties an opportunity to present further evidence), *overruled on other grounds by Eastlake Constr. Co. v. Hess*, 102 Wn.2d 30, 43-48, 686 P.2d 465 (1984).

Mr. Downing has requested an award of attorney fees on appeal but has not

identified a legal basis for an award and is not the prevailing party. His request for an award of fees is denied.

We vacate the award of damages and remand for proceedings consistent with this opinion.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Kulik, J.