BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. CENTURYLINK COMMUNICATIONS, LLC Respondent.	DOCKET UT-181051 PUBLIC COUNSEL'S MOTION TO STRIKE CERTAIN TESTIMONY AND EXHIBITS FILED BY CENTURYLINK COMMUNICATIONS, LLC

I. INTRODUCTION

1 Pursuant to WAC 480-07-375(1)(d), the Public Counsel Unit of the Washington Attorney General's Office (Public Counsel) moves to strike in its entirety Exhibit MDV-3C, Affidavit From Thomas McNealy, from the testimony of Martin D. Valence and portions of the testimonies of Valence, Stacy J. Hartman, and Steven E. Turner submitted by CenturyLink Communications, LLC (CenturyLink or Company) to the Washington Utilities and Transportation Commission (Commission) in Docket UT-181051. The Commission should strike this exhibit and related testimony without prejudice, because CenturyLink improperly presents McNealy's affidavit as testimony without presenting McNealy as a witness. In the alternative, the Commission should order CenturyLink to call McNealy as a witness and submit the affidavit as testimony.

II. STANDARD

2 Under WAC 480-07-495(1), all relevant testimony is admissible if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. When ruling on the admissibility of evidence, the presiding officer will consider,

ATTORNEY GENERAL OF WASHINGTON
Public Counsel Unit
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

but is not required to follow, the rules of evidence governing general civil proceedings in nonjury trials before Washington superior courts.

3 Under the Washington Administrative Procedure Act, RCW 34.05.452, evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.[1] The presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.[2] All testimony of parties and witnesses shall be made under oath or affirmation.[3]

4 Rule 703 of the Washington Rules of Evidence allows experts to rely on facts or data not admissible in evidence in forming their opinions or inferences.

III. DESCRIPTION OF TESTIMONY AND EXHIBITS AT ISSUE

5 CenturyLink submitted the response testimony of Martin D. Valence on March 31, 2022, and included the Affidavit of Thomas McNealy as an exhibit. Valence's testimony disagrees with Commission Staff witness James D. Webber, asserting that the packet storm experienced on CenturyLink's Red network in February 2018 was different from the December 2018 outage on the Company's Green network, and that the December outage was not foreseeable.[4] Valence states that Infinera's technical expert, Thomas McNealy, also disagrees with Webber, and submits the Affidavit of Thomas McNealy as an exhibit. Valence describes the affidavit as follows:

I attach as Exhibit MDV-3C an affidavit from Thomas McNealy, a Senior Director

[1] RCW 34.05.452(1).
[2] RCW 34.05.452(2).
[3] RCW 34.05.452(3).
[4] Response Testimony of Martin D. Valence, Exh. MDV-1TC at 10:17–11:3.

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(206) 464-7744

> at Infinera, who states that "To give context to why the Green Outage was not foreseeable or predictable I will briefly describe the Infinera equipment and how it operates." Mr. McNealy then spends eight pages describing how the Red and Green Outages were very different, and how the December 2018 outage was not foreseeable.[5]

6 Infinera, a California corporation, is not a party to this proceeding. Valence offers McNealy's affidavit as additional evidence regarding the circumstances of the two outages. McNealy's affidavit describes Infinera's network hardware and proprietary management channel, explains how the various components of Infinera hardware act together to send and receive network traffic across the country, describes the root causes of the outages in February and December 2018, and offers an opinion on why the December outage was unforeseeable.[6] Valence quotes multiple paragraphs from McNealy's affidavit[7] that include assertions of fact that Valence does not otherwise mention or expand upon. Valence does not address all factual assertions McNealy includes in his affidavit, nor explain whether or how he relied upon McNealy's affidavit to form his own opinion regarding the two outages.

7 CenturyLink witnesses Steven E. Turner similarly cites to McNealy's affidavit and quotes passages from the document as statements of fact.[8] CenturyLink witness, Stacy J. Hartman cites directly to McNealy's affidavit as a source and refers to the testimonies of Valence and Turner, which in turn cite to sections or quote directly from McNealy's affidavit.[9]

8 Public Counsel issued data requests to CenturyLink for an explanation of why McNealy

[5] Valence, Exh. MDV-1TC at 11:6–12.
[6] *See* Valence, Exh. MDV-3C.
[7] *See* Valence, Exh. MDV-1TC at 12:11–36, 13:1–13, 14:15–22, 15:1–2, 18:2–21, 18:26–28, 19:1–13, 19:21–33, and 20:1–4.
[8] *See infra* Table 1. Testimony and Exhibits Affected by this Motion.
[9] *Id.*

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(206) 464-7744

presents information through a declaration rather than through testimony.[10] CenturyLink stated, "The purpose of Mr. McNealy's affidavit is to document a technical explanation of the circumstances surrounding the third party service provider's network event and response. It was offered to correct Staff's testimony, which attempts to draw inferences based on Infinera's out-of-court statements (isolated communications between Lumen and Infinera)."[11]

9 Public Counsel also asked CenturyLink whether McNealy would testify at the evidentiary hearing as a witness and sought additional explanation as to why the affidavit was an exhibit to Valence's testimony.[12] CenturyLink responded,

> CLC does not presently intend to call Mr. McNealy as a witness. Mr. McNealy is an employee of Infinera, and CLC cannot direct him to testify. Should Public Counsel be interested in seeking information directly from Infinera, the Commission has mechanisms to formally request third party discovery.
>
> The purpose of Mr. McNealy's affidavit is described in CLC's response to data request PC-67. CLC's expert witnesses are entitled to rely on Mr. McNealy's affidavit in support of their testimony. *See e.g., In re Detention of Leck,* 180 Wash. App. 492, 513 (2014) ("ER 703 permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field." (citation omitted)).[13]

10 Commission Staff issued data requests regarding the facts asserted in McNealy's affidavit. CenturyLink responded to four of the requests by quoting from McNealy's affidavit with a line or two of summary information.[14] In three of the four responses, CenturyLink failed to identify any witness testifying on behalf of the Company who could respond to questions

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[10] See Exhibit A to the Declaration of Nina M. Suetake (CenturyLink Response to Public Counsel Data Request 67) filed herewith.
[11] *Id.*
[12] *See* Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).
[13] *Id.*
[14] *See* Suetake Decl. Exh. B at 1–10 (CenturyLink Responses to Commission Staff Data Requests 44C, 45C, 48C, and 49C).

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800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

concerning the data request response, as required by WAC 480-07-405(7)(a)(iii), and listed merely CenturyLink Legal as the respondent.[15] In the fourth instance, CenturyLink identified as respondents a principal network engineer, who also is not a testifying witness, in addition to CenturyLink Legal.[16]

11 Staff also requested all documents and communications in McNealy's possession, custody or control related to Docket UT-181051, including any such material supporting the affidavit.[17] In response, CenturyLink merely stated that it was unaware if McNealy had any such documents in his possession, and directed Staff to Infinera's outside counsel.[18]

IV. ARGUMENT

A. The protections of Evidentiary Rule 703 are not applicable to CenturyLink's use of McNealy's affidavit.

12 The Commission's rules generally allow all relevant evidence, including hearsay evidence, to be admitted into the record if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness.[19] The Administrative Procedure Act (APA) similarly regards such evidence admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.[20] Both the Commission's rules[21] and the APA[22] direct the presiding officer to consider

[15] *See* Suetake Decl. Exh. B at 1–10 (CenturyLink Responses to Commission Staff Data Requests 44C, 45C, 48C, and 49C).
[16] *See* Suetake Decl. Exh. B at 3–5 (CenturyLink Responses to Commission Staff Data Request 45C).
[17] Suetake Decl. Exh. B at 11–12 (CenturyLink Supplemental Response to Commission Staff Data Request 52).
[18] *Id.*
[19] WAC 480-07-495(1).
[20] RCW 34.05.452(1).
[21] *Id.*
[22] RCW 34.05.452(2).

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800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

the Washington State Court Rules of Evidence (ER) when ruling on the admissibility of evidence. As CenturyLink noted in response to Public Counsel's data request,[23] ER 703 "permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field."[24] Washington courts, however, have limited the admission of evidence under this rule, stating that "[t]he otherwise inadmissible facts or data underlying an expert's opinion is admissible for the limited purpose of explaining the basis for an expert's opinion, but is not substantive evidence."[25] The admission of those facts for that limited purpose is not proof of the facts themselves.[26]

13 CenturyLink asserts that its expert witnesses are entitled to rely on McNealy's affidavit in support of their testimony under ER 703.[27] At no point, however, does Valence explain how McNealy's affidavit forms the basis of Valence's opinion on the two outages that occurred on CenturyLink's Red and Green networks. Valence merely states that McNealy agrees with his assessment that the Green outage was not foreseeable but does not suggest that he relied upon McNealy's affidavit to form this opinion. Instead, Valence submits facts presented in McNealy's affidavit as substantive evidence about the Red network outage. Valence quotes five paragraphs directly from McNealy's affidavit describing the Red network outage, with no additional commentary or conclusions.[28]

14 Similarly, Turner cites to McNealy and quotes passages from the affidavit as if they are

[23] *See* Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).
[24] *See e.g., In re Det. of Leck,* 180 Wn. App. 492, 513 (2014) (citing *In re Det. of Marshall v. State*, 156 Wn.2d 150, 162, 125 P.3d 111 (2005)) (provided as Attachment A to this motion); *see also Allen v. Asbestos Corp*., 138 Wn. App. 579 (2007) (provided as Attachment B to this motion).
[25] *Allen v. Asbestos Corp.*, 138 Wn. App. 579 (2007).
[26] *Id.*
[27] *See* Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).
[28] Valence, Exh. MDV-1TC at 12:8–13:13.

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Public Counsel Unit
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
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statements of fact regarding the causes of the February and December 2018 outages. Hartman either cites directly to McNealy's affidavit as a source or appears to rely on passages from Valence's testimony that quote factual assertions made by McNealy.

15 CenturyLink inappropriately applies ER 703 protections to McNealy's affidavit in an attempt to offer the statement as substantive evidence regarding disputed facts without having to present McNealy as a witness. Valence does not appear to rely on McNealy's affidavit to form his opinion, but offers McNealy's statements as rebuttal testimony. Indeed, CenturyLink admits that it offered the affidavit as a technical explanation to correct Staff's assertions.[29]

16 As discussed previously, the courts have held that the otherwise inadmissible facts underlying an expert's opinion are not substantive evidence.[30] McNealy's affidavit statement itself is not admissible as evidence merely because Valence's opinion is admissible. Because the protections generally afforded to facts underlying an expert witness's testimony do not apply to CenturyLink's use of McNealy's affidavit, the Commission should strike it, along with the portions of Valence, Turner, and Hartman's testimonies that refer to and quote it.

B. CenturyLink's improper presentation of evidence through McNealy's affidavit is unduly prejudicial to parties and prevents a thorough examination of McNealy's assertions.

17 Under the Commission's rules, the presiding officer has broad discretion to admit all relevant testimony if the presiding officer believes it is the best evidence reasonably obtainable, considering its necessity, availability, and trustworthiness. In general, the best evidence rule is satisfied when a party presents a witness, and parties and the Commission have the opportunity

[29] *See* Suetake Decl. Exh. A at 1 (CenturyLink Response to Public Counsel Data Request 67).
[30] *Allen v. Asbestos Corp*., 138 Wn. App. 579 (2007).

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Public Counsel Unit
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

to cross-examine that witness regarding their assertions.

18 McNealy's affidavit contains substantive evidence regarding Infinera's network hardware and proprietary management channel, as well as information regarding the February and December 2018 outages. CenturyLink uses the facts in McNealy's affidavit as evidence, and uses the assertions it contains to challenge Staff's testimony. CenturyLink admits that it does not intend to call McNealy as a witness and directs queries to Infinera's counsel.[31]

19 Moreover, CenturyLink's discovery responses further illustrate its improper use of McNealy's affidavit. For example, when asked about McNealy's affidavit, CenturyLink fails to identify any testifying witness to sponsor data request responses.[32] Indeed, CenturyLink does not offer Valence as a witness to answer questions about the affidavit, despite the Company asserting that it intends the affidavit to be a basis for Valence's expert opinion.

20 Further, when asked for information underlying McNealy's affidavit, CenturyLink stated it was unaware of any documents in McNealy's possession and directed Staff to Infinera's counsel.[33] CenturyLink offers the facts in McNealy's affidavit in a manner that prevents parties and the Commission from examining the facts or questioning McNealy directly about his assertions. Additionally, it appears that Valence cannot be questioned directly about McNealy's assertions either.

21 The Commission's paramount interest in every case is to have the best possible record for its decision.[34] To develop such a record, the Commission should rely on the best available

[31] *See* Suetake Decl. Exh. A at 2 (CenturyLink Response to Public Counsel Data Request 68).
[32] *See supra* ¶ 9.
[33] *See* Suetake Decl. Exh. B at 11–12 (CenturyLink Supplemental Response to Staff Data Request 52).
[34] *In re the Joint Application of MidAmerican Energy Holdings Co. and PacifiCorp for an Order Authorizing Proposed Transaction*, Docket UE-051090, Order No. 5, ¶ 11 (Nov. 10, 2005).

evidence that is subject to full examination by the Commission and parties. In this instance, the best evidence of the facts regarding Infinera's network hardware and the two outages would be for CenturyLink to call McNealy as a witness and submit McNealy's affidavit as McNealy's own testimony. Because CenturyLink seeks to use McNealy's assertions as substantive evidence, CenturyLink must present McNealy as a witness.

22 CenturyLink's attempt to present substantive evidence under the pretense of supporting Valence's expert opinion through McNealy's affidavit is fundamentally unfair and unduly prejudicial to parties. CenturyLink's approach prevents a thorough examination of facts asserted and obstructs development of a full record. Parties cannot cross-examine McNealy regarding the assertions of fact in the affidavit despite the fact multiple CenturyLink witnesses cite to the affidavit as a source of asserted facts and quote the affidavit directly. Requiring parties to request third party discovery of McNealy is unreasonable and unduly burdensome, particularly since CenturyLink presents McNealy's statements as evidence while declining to call McNealy as a witness. Conversely, McNealy's testimony should be reasonably obtainable for CenturyLink given the Company has already submitted an affidavit written by McNealy.

23 CenturyLink's presentation of evidence in McNealy's affidavit is improper, and the Commission should strike from the record McNealy's affidavit and the portions of Valence, Turner, and Hartman's testimonies that refer to it. In the alternative, the Commission should order CenturyLink to call McNealy as a witness and submit the affidavit as testimony.

V. TESTIMONY AND EXHIBITS AFFECTED BY THIS MOTION

24 Table 1 contains a list of the portions of the response testimony and exhibits filed by CenturyLink affected by this motion.

ATTORNEY GENERAL OF WASHINGTON
Public Counsel Unit
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Table 1. Testimony and Exhibits Affected by this Motion

Exhibit	**Description**	**Items to be stricken (page: lines)**
Valence, Exhibit MDV-1TC	Response Testimony of Martin D. Valence	p. 11: 6–12, p. 12: 11–36, p. 13: 1–13, p. 14: 15–22, p. 15: 1–2, p. 18: 2–21 and 26–28, p. 19: 1–13 and 21–33 p. 20: 1–4
Valence, Exhibit MDV-3C	Exhibit of Martin D. Valence, Affidavit From Thomas McNealy	Entire exhibit
Hartman, Exhibit SJH-1TC	Response Testimony of Stacy J. Hartman	p. 39: 18–20 p. 40: 3–5 p. 42: 4–7 p. 55: 15-16
Turner, Exhibit SET-1TC	Response Testimony of Steven E. Turner	p. 51: 15 to 52: 8 p. 52: 12–18 p. 53: fn. 70 p. 55: 5–16 p. 55: 21–22 p. 56: 2–15 p. 56: 22–23

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Public Counsel Unit
800 5th Ave., Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

VI. CONCLUSION

25 For the reasons set forth above, Public Counsel respectfully requests that the Commission grant its Motion to Strike Certain Testimony and Exhibits Filed by CenturyLink Communications, LLC, and strike without prejudice the portions of the testimonies of Martin D. Valence, Stacy J. Hartman, and Steven E. Turner identified above, and the entirety of Exhibit MDV-3C. In the alternative, the Commission should order CenturyLink to call McNealy as a witness and file the affidavit as testimony.

DATED this 16th day of June 2022.

ROBERT W. FERGUSON
Attorney General

/s/
NINA M. SUETAKE, WSBA No. 53574
Assistant Attorney General
LISA W. GAFKEN, WSBA No. 31549
Assistant Attorney General, Unit Chief
JOHN NELSON, WSBA No. 45724
Assistant Attorney General

Attorneys for Public Counsel Unit

Public Counsel Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-2055
Nina.Suetake@ATG.WA.GOV
Lisa.Gafken@ATG.WA.GOV
John.Nelson@ATG.WA.GOV

BEFORE THE WASHINGTON
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WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. CENTURYLINK COMMUNICATIONS, LLC Respondent.	DOCKET UT-181051 PUBLIC COUNSEL'S MOTION TO STRIKE CERTAIN TESTIMONY AND EXHIBITS FILED BY CENTURYLINK COMMUNICATIONS, LLC

ATTACHMENT A

In re Detention of Leck

180 Wash.App. 492
Court of Appeals of Washington,
Division 2.

In re the DETENTION OF Jack LECK II, Petitioner.

No. 42573–4–II.
|
March 14, 2014.
|
Publication Ordered April 24, 2014.

Synopsis

Background: State filed petition seeking to commit sex offender as a sexually violent predator (SVP). The Superior Court, Kitsap County, Russell W. Hartman, J., granted petition. Offender appealed.

Holdings: The Court of Appeals, Penoyar, J.P.T., held that:

[1] SVP commitment statute applied retroactively;

[2] instruction informing jury that it could find sex offender to be an SVP based on uncharged "personality disorder" alternative was not a manifest error that violated offender's due process guaranty of fundamental fairness capable of being raised for the first time on appeal;

[3] offender was not entitled to personally appear at hearing to reconsider whether he was incarcerated for a recent overt act; and

[4] State's expert could give otherwise inadmissible hearsay testimony at SVP hearing.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (26)

[1] **Constitutional Law** Commitment and confinement

Mental Health Sex offenders

Mental Health Jurisdiction and proceedings in general

Amendment to sexually violent predator (SVP) commitment statute allowing petition to be filed in county in which the person committed recent overt act if the only sexually violent offense charge or conviction occurred in another State applied to all persons currently committed or awaiting commitment on, before, or after effective date of amendment and such retroactive application did not violate due process. U.S.C.A. Const.Amend. 14.

[2] **Constitutional Law** Commitment and confinement

Mental Health Petition and application

Mental Health Appeal

Instruction informing jury that it could find sex offender to be a sexually violent predator (SVP) based on uncharged "personality disorder" alternative was not a manifest error that violated offender's due process guaranty of fundamental fairness, and thus, the issue could not be raised for the first time on appeal; offender clearly received notice of State's intent to allege that he suffered from a mental abnormality or a personality disorder, and governmental interest, including costs and administrative burdens of additional procedures, limited the notice necessary to satisfy due process guaranties in the context of an SVP proceeding. U.S.C.A. Const.Amend. 14; West's RCWA 71.09.020(18); RAP 2.5(a)(3); CR 15(b).

[3] **Criminal Law** Instructions in general

Criminal Law Inapplicable to issue or evidence

The error of offering an uncharged means as a basis for a criminal conviction is presumed prejudicial and is harmless only if in subsequent instructions the crime charged was clearly and specifically defined to the jury.

[4] **Mental Health** Persons and offenses included

To commit a person as a sexually violent predator (SVP), the State must prove that he suffers from a mental abnormality or personality disorder. West's RCWA 71.09.020(18).

[5] **Mental Health** Persons and offenses included

Mental abnormality and personality disorder are two distinct means of establishing the mental illness element in sexually violent predator (SVP) commitment cases. West's RCWA 71.09.020(18).

[6] **Constitutional Law** Commitment and confinement

Mental Health Nature of proceeding

Mental Health Hearing

Sexually violent predator (SVP) commitment proceedings are civil and not criminal, and the right to fair trial afforded to criminal defendants under the state and federal constitutions do not attach to SVP petitioners; instead, SVP petitioners must rely on the guaranty of fundamental fairness provided by the due process clause. U.S.C.A. Const.Amends. 6, 14; West's RCWA Const. Art. 1, § 22.

4 Cases that cite this headnote

[7] **Constitutional Law** Factors considered; flexibility and balancing

Due process is a flexible concept, requiring such procedural protections as the particular situation demands. U.S.C.A. Const.Amend. 14.

[8] **Constitutional Law** Notice and Hearing

At the core of due process is the right to notice and the opportunity to be heard, but its minimum requirements depend on what is fair in a particular context. U.S.C.A. Const.Amend. 14.

[9] **Constitutional Law** Factors considered; flexibility and balancing

Constitutional Law Commitment and confinement

Mental Health Jurisdiction and proceedings in general

In determining what process is due in a given context, particularly where sexually violent predator (SVP) proceedings are concerned, courts employ the "*Mathews* test," which balances: (1) the private interest affected; (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional procedural safeguards; and (3) the governmental interest, including costs and administrative burdens of additional procedures. U.S.C.A. Const.Amend. 14.

[10] **Courts** Conduct of particular proceedings

Civil rules govern the procedure in the superior court in all suits of a civil nature, except where inconsistent with the rules or statutes applicable to special proceedings. CR 1, 81.

[11] **Appeal and Error** To conform to evidence or correspond with verdict or judgment

In determining whether the parties consented to the trial of an impleaded issue, the appellate court considers the record as a whole. CR 15.

[12] **Constitutional Law** Notice

Under the Due Process Clause, notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. U.S.C.A. Const.Amend. 14.

[13] **Mental Health** Hearing

Sex offender was not entitled to personally appear at hearing, at which purely legal issues

were considered, to reconsider whether offender was incarcerated for a recent overt act rendering him presently dangerous and thus eligible for sexually violent predator (SVP) commitment; offender, who appeared telephonically, had the opportunity to speak during the hearing and to offer additional evidence following argument, and although he consulted with his attorney during the hearing, he offered no additional materials.

[14] **Constitutional Law** Commitment and proceedings therefor

Due process requires that, before indefinitely committing a person to a secure facility, a jury must find beyond a reasonable doubt that he is both mentally ill and presently dangerous. U.S.C.A. Const.Amend. 14; West's RCWA 71.09.020(12).

[15] **Constitutional Law** Restraint, commitment, and detention

When a person is not incarcerated at the time the State files the commitment petition, due process requires the State to prove present dangerousness with evidence of a recent overt act. U.S.C.A. Const.Amend. 14; West's RCWA 71.09.020(12).

[16] **Constitutional Law** Commitment and confinement

The due process requirement of proving dangerousness in a sexually violent predator (SVP) commitment proceeding may be satisfied by the person's prior conviction when the petition is filed while the offender is incarcerated for a prior act that would itself qualify as a recent overt act. U.S.C.A. Const.Amend. 14; West's RCWA 71.09.020(12).

[17] **Mental Health** Hearing

Whether the act resulting in a conviction underlying the alleged sexually violent predator's (SVP) confinement is a recent overt act necessary for finding of present dangerousness for SVP commitment is a question of law for the trial court, not a question of fact to be decided by the jury. West's RCWA 71.09.020(12).

1 Cases that cite this headnote

[18] **Criminal Law** Presence of Accused

A defendant has the right to be present at proceedings where his presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge.

[19] **Criminal Law** Presence of Accused

A defendant does not have a right to be present during a discussion of purely legal matters, or where his presence would be useless.

[20] **Mental Health** Persons and offenses included

To determine a sex offender's eligibility for commitment as a sexually violent predator (SVP), the trial court must determine whether an individual is incarcerated for an act that qualifies as a recent overt act.

1 Cases that cite this headnote

[21] **Mental Health** Persons and offenses included

When the act resulting in a sex offender's confinement has not caused harm of a sexually violent nature, an adjudication of the recent overt act question, to determine present dangerousness necessary for sexually violent predator (SVP) commitment, requires both a factual and legal inquiry; the factual inquiry determines the circumstances of the alleged SVP's history and mental condition, and the legal inquiry determines whether an objective person knowing those factual circumstances would reasonably apprehend that the act resulting in his current confinement would cause harm of a sexually violent nature.

1 Cases that cite this headnote

[22] **Mental Health** Hearing

The original criminal proceeding provides a sex offender with an opportunity to contest the factual allegations supporting the conviction, and the subsequent inquiry in sexually violent predator (SVP) commitment proceedings as to whether the offender is incarcerated for an act that qualifies as a recent overt act making him presently dangerous is not meant to provide a second opportunity to litigate the facts supporting the underlying conviction.

1 Cases that cite this headnote

[23] **Mental Health** Experts

State's expert could give otherwise inadmissible hearsay testimony relaying out-of-court statements sex offender's sister had made about offender regarding his alleged penchant to discover sex offense victims at gyms, in sexually violent predator (SVP) commitment proceeding; testimony was admissible under evidence rules that permit an expert witness to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field and which govern disclosure of facts or data underlying expert opinion, trial court gave limiting instruction, and offender was able to argue that his sister was biased and had a motive to lie. ER 703, 705.

4 Cases that cite this headnote

[24] **Evidence** Hearsay

Evidence rule that permits an expert witness to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field applies to otherwise inadmissible hearsay. ER 703.

2 Cases that cite this headnote

[25] **Evidence** Competency of evidence or other information relied upon

Evidence Hearsay

Expert witness rule governing disclosure of facts or data underlying expert opinion grants the trial court discretion to allow the expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his expert opinion, subject to appropriate limiting instructions. ER 705.

1 Cases that cite this headnote

[26] **Mental Health** Experts

In sexually violent predator (SVP) commitment proceedings, experts may rely on psychological reports and the criminal history of an SVP detainee in testifying. ER 703, 705.

2 Cases that cite this headnote

Attorneys and Law Firms

****1112** Maureen Marie Cyr, Washington Appellate Project, Seattle, WA, for Appellant.

Tricia S. Boerger, Sarah Sappington, Office of the Attorney General, Seattle, WA, for Respondent.

Opinion

Penoyar, J.P.T. [1]

***497** ¶ 1 Jack Leck II appeals a jury verdict determining him to be a sexually violent predator (SVP). Leck contends that his right to due process was violated when (1) the jury was instructed on an alternative means of proving his SVP status that was not alleged in the petition, (2) he was not allowed to appear in person at a reconsideration hearing addressing the recent overt act requirement, and (3) the State's expert witness was allowed to refer to hearsay in expressing his opinion about Leck's SVP status. Leck also argues that the State had no authority to file an SVP petition against him in 2008 under the law. then in effect and that applying the 2009 law retroactively violated his right to due process. We hold that the State had authority to file the petition under both versions of the law, as explained in *In re Detention of Durbin,* 160 Wash.App. 414, 248 P.3d 124, *review denied,* 172 Wash.2d 1007, 259 P.3d 1108 (2011). We hold further that the jury instruction alleging that Leck suffered from a personality disorder did not constitute manifest constitutional error enabling Leck to raise this' issue for the first time on appeal, that the trial court did not err by refusing to continue

a reconsideration hearing addressing an issue of law, and that the State's expert appropriately referred to the evidence supporting his opinion. We affirm Leck's SVP commitment.

FACTS

I. Factual Background.

¶ 2 Leck was convicted in 1984 in Alaska of second degree sexual abuse of a minor and second degree attempted ***498** sexual abuse of a minor. For purposes of Washington's SVP laws at chapter 71.09 RCW, these two convictions amount to "sexually violent offenses."[2] Leck was released on parole for these offenses in July 1996. After being in and out of confinement for various parole violations, Leck was unconditionally released in September 2002.

¶ 3 In April 2003, Leck applied for a membership at the YMCA in Bremerton, Washington. A YMCA employee, aware that Leck ****1113** was a sex offender in Alaska, contacted Bremerton police. Having been informed by Leck's family[3] when Leck was released in 2002 that he might try to enter the Bremerton YMCA, the police contacted the address Leck had left there; the address was for a charitable organization at which Leck had begun volunteering a week earlier. The police searched the organization's computer to which Leck had had access during that week, discovering numerous images downloaded during that time of minors engaged in sexually explicit conduct. Leck was arrested and later convicted in Kitsap County Superior Court of 46 counts of possession of depictions of a minor engaged in sexually explicit conduct.

I. Procedural Background

¶ 4 In April 2007, shortly before Leck completed serving his sentence for the Kitsap County convictions, the State filed a petition in Thurston County alleging that Leck was an SVP.[4] Leck was transported first to the Thurston County jail and then, after a probable cause finding under RCW 71.09.040, to the Special Commitment Center on McNeil Island to await his commitment trial.

***499** ¶ 5 In May 2008, before Leck's trial, the Washington Supreme Court held that an SVP petition was improperly filed in Thurston County where the alleged SVP had committed sexually violent offenses outside Washington as well as offenses that were not sexually violent in Clark County, Washington. *In re Det. of Martin,* 163 Wash.2d 501, 504–05, 182 P.3d 951 (2008). In view of *Martin,* the State moved to dismiss the Thurston County petition against Leck and—at the request of the Kitsap County prosecutor—filed a petition against Leck in Kitsap County in July 2008.[5]

¶ 6 The Kitsap County petition was based on consulting psychologist Dale Arnold's 2006 evaluation of Leck in which Arnold diagnosed Leck with pedophilia.[6] As grounds for filing the petition, the State alleged that Leck had a mental abnormality—namely, pedophilia—but did not allege any personality disorder.

¶ 7 Leck moved to dismiss the petition in December 2008 for lack of jurisdiction and probable cause, arguing that he was unlawfully detained at the time the State filed the petition in Kitsap County. Relying on *In re Detention of Keeney,* 141 Wash.App. 318, 330, 169 P.3d 852 (2007), the trial court concluded that an unlawful detention under a criminal proceeding does not divest the court of its power to process an SVP petition, and so the court denied Leck's motion in May 2009.

¶ 8 Then, in October 2010, the State moved for a ruling that, as a matter of law, Leck's 2003 convictions for possession ***500** of depictions of minors engaged in sexually explicit conduct qualified as a recent overt act, which would relieve the State of its burden to prove a recent overt act at trial. Attached to the State's motion was an update to Arnold's evaluation based on his personal interview with Leck in September 2010. In the updated evaluation, Arnold diagnosed Leck with a personality disorder that predisposed him to commit criminal sexual acts. At no point, however, did the State amend the petition to ****1114** include this personality disorder as grounds for the petition.

¶ 9 Treating the State's recent-overt-act motion as one for partial summary judgment, the trial court denied the motion, pointing to conflicting expert opinion on Leck's mental condition. The State moved for reconsideration. At the reconsideration hearing, with Leck present telephonically, the trial court vacated its previous ruling and granted the State's motion, ruling that Leck's 2003 conviction qualified as a recent overt act.

¶ 10 After Leck's first trial ended in a mistrial, he was retried. At the end of that second trial, the court instructed the jury as follows:

To establish that Jack Leck, II is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That Jack Leck, II has been convicted of a crime of sexual violence, namely the Alaska offense of Sexual Abuse of a Minor in the Second Degree and/or Attempted Sexual Abuse of a Minor in the Second Degree;

(2) That Jack Leck, II suffers from a mental abnormality *or personality disorder* which causes serious difficulty in controlling his sexually violent behavior; and

(3) That this mental abnormality or personality disorder makes Jack Leck, II likely to engage in predatory acts of sexual violence if not confined to a secure facility.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that Jack Leck, II is a sexually violent predator.

***501** On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that Jack Leck, II is not a sexually violent predator.

Clerk's Papers (CP) at 1580 (emphasis added). Additional instructions defined both "mental abnormality"[7] and "personality disorder."[8] Leck did not object to any of these instructions.

¶ 11 After the jury returned a verdict finding that the State had proved beyond a reasonable doubt that Leck was an SVP, the court ordered him committed to the Special Commitment Center. Leck appeals.

ANALYSIS

I. Authority To File The Petition

[1] ¶ 12 Leck first argues that the State did not have authority to file a petition against him under the law in effect in 2008. Leck further argues that retroactively applying the law as amended in 2009—under which the State would have had authority to file the petition—would deny him due process. But in a recent case with analogous facts, we held that the State had authority under the 2008 law to file the SVP petition in question. *Durbin,* 160 Wash.App. at 429, 248 P.3d 124. We also held in *Durbin* that applying the 2009 law ***502** retroactively, which the legislature had clearly intended, did not violate due process. 160 Wash.App. at 431, 248 P.3d 124. Accordingly, the State was not precluded from filing the petition against Leck under either version of the law.

II. Instruction on Uncharged Alternative

[2] ¶ 13 Leck argues next that his statutory and due process right to notice was violated because the trial court instructed the jury on an alternative means (personality disorder) not mentioned in the petition alleging ****1115** that Leck was an SVP. The State responds that Leck waived this argument by not challenging instruction 4, the "to commit" instruction, at trial. Leck argues that he may raise this issue for the first time on appeal under *In re Personal Restraint of Brockie,* 178 Wash.2d 532, 309 P.3d 498, (2013).

[3] ¶ 14 In *Brockie,* the Supreme Court explained that failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation. 178 Wash.2d at 536, 309 P.3d 498 (citing U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Kjorsvik,* 117 Wash.2d 93, 97, 812 P.2d 86 (1991)). The *Brockie* court, explained further that when a defendant claims for the first time on appeal that the jury was instructed on an uncharged alternative means of committing a crime, the reviewing court should apply the line "of cases beginning" with *State v. Severns,* 13 Wash.2d 542, 125 P.2d 659 (1942). *Brockie,* 178 Wash.2d at 537, 309 P.3d 498. This case law stands for the proposition that it is error for a trial court to instruct the jury on an uncharged alternative means in a criminal case and that, on appeal, it is the State's burden to prove that the error was harmless. *Brockie,* 178 Wash.2d at 536, 309 P.3d 498 (citing *Severns,* 13 Wash.2d at 548, 125 P.2d 659; *State v. Bray,* 52 Wash.App. 30, 34–35, 756 P.2d 1332 (1988)). The error of offering an uncharged means as a basis for a criminal conviction is presumed prejudicial and is harmless only "if 'in subsequent instructions the crime charged was clearly and specifically defined to the jury.' " *Bray,* 52 Wash.App. at 34–35, 756 P.2d 1332 (quoting *Severns,* 13 Wash.2d at 549, 125 P.2d 659); *see also* ***503** *State v. Doogan,* 82 Wash.App. 185, 189, 917 P.2d 155 (1996) (error of offering uncharged means as a basis for conviction is prejudicial if the

jury might have convicted the defendant under the uncharged alternative).

[4] **[5]** ¶ 15 To commit a person as an SVP, the State must prove that he suffers from a mental abnormality or personality disorder. *In re Det. of Post,* 170 Wash.2d 302, 309–10, 241 P.3d 1234 (2010) (citing RCW 71.09.020(18)). " '[M]ental abnormality' and 'personality disorder' are two distinct means of establishing the mental illness element in SVP cases." *In re Det. of Halgren,* 156 Wash.2d 795, 811, 132 P.3d 714 (2006). Here, the State did not allege in the SVP petition that Leck suffered from a personality disorder, but instruction 4 informed the jury that it could find that Leck was an SVP if it found that he suffered from a mental abnormality or a personality disorder.

¶ 16 While tacitly conceding that error occurred, the State argues that neither *Brockie* nor the *Severns* line of cases applies here. As stated, those cases describe the rights of criminal defendants in criminal prosecutions. *Brockie* relied on the Sixth Amendment as well as article I, section 22 and the *Kjorsvik* decision in stating that failing to properly notify a defendant of the nature and cause of the accusation of a criminal charge is a constitutional violation. 178 Wash.2d at 536–37, 309 P.3d 498. The Sixth Amendment and article I, section 22, expressly refer to criminal prosecutions, and *Kjorsvik* stands for the proposition that all essential elements of a crime must be included in a charging document. 117 Wash.2d at 97, 812 P.2d 86.

[6] ¶ 17 Washington courts have repeatedly held that SVP proceedings are civil and not criminal, and they have added that the rights afforded to criminal defendants under the Sixth Amendment and article I, section 22 do not attach to SVP petitioners'. *In re Det. of Strand,* 167 Wash.2d 180, 191, 217 P.3d 1159 (2009); *In re Det. of Ticeson,* 159 Wash.App. 374, 377, 246 P.3d 550 (2011), *abrogated on other grounds, State v. Sublett,* 176 Wash.2d 58, 292 P.3d 715 (2012). ***504** Instead, SVP petitioners must rely on the guaranty of "fundamental fairness" provided by the due process clause. *Strand,* 167 Wash.2d at 191, 217 P.3d 1159.

¶ 18 Consequently, to raise his claim of instructional error for the first time on appeal, Leck must show that the error violated this due process guaranty of fundamental fairness and that he was prejudiced as a result. RAP 2.5(a)(3); *State v. Gordon,* 172 Wash.2d 671, 676, 260 P.3d 884 (2011).

[7] **[8]** **[9]** ¶ 19 Due process is a flexible concept, requiring " 'such procedural protections as the particular situation demands.' " *Sherman* ****1116** *v. State,* 128 Wash.2d 164, 184, 905 P.2d 355 (1995) (quoting *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). At its core is the right to notice and the opportunity to be heard, but its minimum requirements depend on what is fair in a particular context. *In re Det. of Stout,* 159 Wash.2d 357, 370, 150 P.3d 86 (2007); *Sherman,* 128 Wash.2d at 184, 905 P.2d 355. In determining what process is due in a given context, particularly where SVP proceedings are concerned, courts employ the *Mathews* test, which balances: (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures. *Mathews,* 424 U.S. at 335, 96 S.Ct. 893; *Stout,* 159 Wash.2d at 373, 150 P.3d 86.

¶ 20 As stated, Leck argues that the instruction informing the jury that it could find he was an SVP based on the uncharged "personality disorder" alternative violated his due process right to notice. In applying the *Mathews* test to this claim, we recognize that Leck has a significant interest in his physical liberty. As to the second factor, we do not see that trying Leck on the personality disorder alternative risked an erroneous deprivation of that liberty.

***505** ¶ 21 We are guided to this conclusion, in part, by CR 15(b), which provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The rule adds that the failure to formally amend the pleadings "does not affect the result of the trial of these issues." CR 15(b); *Green v. Hooper,* 149 Wash.App. 627, 636, 205 P.3d 134 (2009). Under CR 15(b), "[w]here evidence raising issues beyond the scope of the pleadings is admitted without objection, the pleadings will be deemed amended to conform to the proof." *Reichelt v. Johns–Manville Corp.,* 107 Wash.2d 761, 766–67, 733 P.2d 530 (1987).

[10] ¶ 22 The civil rules "govern the procedure in the superior court in all suits of a civil nature," with the exceptions set out in CR 81. CR 1; *In re Det. of Williams,* 147 Wash.2d

476, 488, 55 P.3d 597 (2002); *In re Det. of Cherry,* 166 Wash.App. 70, 74, 271 P.3d 259 (2011). CR 81(a) states that "[e]xcept where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings." Proceedings under chapter 71.09 RCW are special proceedings within the meaning of CR 81. *Cherry,* 166 Wash.App. at 74, 271 P.3d 259 (citing *In re Det. of Mathers,* 100 Wash.App. 336, 340, 998 P.2d 336 (2000)).

[11] ¶ 23 RCW 71.09.030 governs the information that must be contained in an SVP petition, but there is no statute in chapter 71.09 RCW that discusses the amendment of such petitions. Consequently, our review of whether Leck consented to and thereby had notice of his trial on an uncharged alternative is governed by CR 15. *See* *In re Det. of McLaughlin,* 100 Wash.2d 832, 849, 676 P.2d 444 (1984) (applying CR 15 to involuntary commitment proceeding). In determining whether the parties consented to the trial of an impleaded issue, we consider the record as a whole. *Mukilteo Ret. Apartments, LLC v. Mukilteo Investors L.P.,* 176 Wash.App. 244, 257, 310 P.3d 814 (2013).

¶ 24 During closing argument in Leck's first trial, the State informed the jury that it had to find that Leck ***506** suffered from a mental abnormality or a personality disorder to determine that he was an SVP. The State asserted that Leck suffered from a mental abnormality and added that "the other diagnosis that's not in dispute in this case is antisocial personality disorder." 2/28/11 Report of Proceedings (RP) (Feb. 28, 2011) at 1232. The defense conceded that the evidence showed that Leck "may have an antisocial personality disorder" and asserted that the "big issue" was whether Leck suffers from a mental abnormality or personality disorder. RP (Feb. 28, 2011) at 1253.

¶ 25 During Leck's second trial, the State sought to allow its expert:, Dale Arnold, to refer to information regarding Leck's molestation of his sister and her daughter to support the diagnosis of antisocial personality disorder and pedophilia. The defense responded that there was no disagreement ****1117** about the personality disorder diagnosis since both Arnold and Richard Wollert, the defense expert, agreed that Leck suffers from antisocial personality disorder. Defense counsel referred to the jury in adding that "[t]he diagnosis has been made.... They're going to learn that he has an antisocial personality disorder." RP (Aug. 1, 2011) at 161. After the trial court observed that both experts had clearly concluded that Leck has an antisocial personality disorder, it limited Arnold's testimony about his sister's allegations.

¶ 26 During his testimony, the State questioned Arnold about the "mental abnormalities and personality disorders" part of the SVP definition. RP (Aug. 8, 2011) at 221. Arnold responded that Leck suffers from the mental disorders of pedophilia and antisocial personality disorder, with both conditions supporting his commitment as an SVP. On cross examination, Leek's attorney asked about the personality disorder diagnosis, and Arnold replied, "[W]hen I say antisocial personality disorder and pedophilia, that's the mental abnormality and the personality disorder that drive the behavior." RP (Aug. 8, 2011) at 374. Defense counsel then asked whether a personality disorder would compel a person to commit a crime.

***507** ¶ 27 Wollert testified for the defense that the fact that Leck suffers from antisocial personality disorder does not mean that he has a mental abnormality.

¶ 28 During closing argument, the State asserted that the diagnosis that "everybody agrees with" is antisocial personality disorder. RP (Aug. 15, 2011) at 1097. Defense counsel responded that while Leck might have antisocial personality disorder, he was not incapable of making choices about whether to commit additional crimes. On rebuttal, the State again explained that the case was about whether Leck has a mental abnormality or personality disorder that causes him serious difficulty in controlling his sexually violent behavior.

¶ 29 There were no objections to the testimony or arguments cited above. Leck clearly received notice of the State's intent to allege that he suffered from a mental abnormality or a personality disorder; indeed, he conceded the latter allegation in an attempt to limit unfavorable testimony. As a result, the State's failure to formally amend its petition to include the personality disorder alternative did not risk an erroneous deprivation of Leck's liberty. The pleadings were deemed amended when Leck defended against the allegation that he suffers from a personality disorder without objection. There would be no value in retrying the case following a formal amendment of the petition. The second *Mathews* factor clearly weighs in the State's favor.

[12] ¶ 30 The third *Mathews* factor also favors the State, which has a substantial interest in protecting the community from sexual predators. It would be costly and burdensome,

as well as meaningless, to give Leck a third opportunity to raise the same defense he used in the prior two trials. Under the due process clause, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The purpose of notice having been ***508** served in this case, we see no due process violation. Accordingly, we decline to address Leck's claim of instructional error further. [9]

III. Recent Overt Act Reconsideration Hearing

[13] ¶ 31 Leck argues here that the trial court violated his due process right to be present when it denied his motion to continue the recent overt act reconsideration hearing so that he could attend the hearing in person.

[14] **[15]** ¶ 32 Due process requires that, before indefinitely committing a person to a secure facility, a jury must find beyond a reasonable doubt that he is both mentally ill and presently dangerous. *In re Det. of* *Marshall v. State,* 156 Wash.2d 150, 157, 125 P.3d 111 (2005). When a person is not incarcerated at the time the State files the commitment petition, due process requires the State to ****1118** prove present dangerousness with evidence of a recent overt act. *In re Det. of Lewis,* 163 Wash.2d 188, 193–94, 177 P.3d 708 (2008). A recent overt act is "any act, threat, or combination thereof that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." [10] RCW 71.09.020(12).

[16] **[17]** ¶ 33 The due process requirement of proving dangerousness may be satisfied by the person's prior conviction when the petition is filed while the offender is incarcerated for a prior act that would itself qualify as a recent overt act. *In re Det. of Henrickson v. State,* 140 Wash.2d 686, 695, 2 P.3d 473 (2000). Whether the act resulting in a conviction underlying the alleged SVP's confinement-is a recent overt act is a question of law for the trial court, not a question of fact to be decided by the jury. *Marshall,* 156 Wash.2d at 158, 125 P.3d 111.

***509** ¶ 34 The trial court initially denied the State's motion to treat Leck's 2003 convictions for possession of child pornography, for which he was confined when the SVP petition was filed, as a recent overt act as a matter of law. When the State moved for reconsideration, the court held a hearing at which Leck was present telephonically. Defense counsel moved for a continuance because Leck wanted to attend the hearing in person, but the trial court denied that motion after explaining that its decision would be based on the existing record and not additional testimony. The court added that if Leck wanted to submit further information, it would consider that request at the end of argument.

[18] **[19]** ¶ 35 The State argues that the trial court did not err by denying Leck's motion to continue a hearing at which purely legal issues were considered. *See* *State v. Eller,* 84 Wash.2d 90, 95, 524 P.2d 242 (1974) (whether to grant continuance is within trial court's discretion; denial is disturbed only if accused has been prejudiced and/or result likely would have differed had continuance been granted). A defendant has the right to be present at proceedings where his presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *In re Det. of Morgan,* 161 Wash.App. 66, 74, 253 P.3d 394 (2011), *review denied,* 177 Wash.2d 1001, 300 P.3d 415 (2013). A defendant does not have a right to be present during a discussion of purely legal matters, or where his presence would be useless. *Morgan,* 161 Wash.App. at 74, 253 P.3d 394.

[20] **[21]** **[22]** ¶ 36 The trial court must determine whether an individual is incarcerated for an act that qualifies as a recent overt act. *Marshall,* 156 Wash.2d at 158, 125 P.3d 111. When the act resulting in confinement has not caused harm of a sexually violent nature, an adjudication of the recent overt act question requires both a factual and legal inquiry. *Marshall,* 156 Wash.2d at 158, 125 P.3d 111; *State v. McNutt,* 124 Wash.App. 344, 350, 101 P.3d 422 (2004). The factual inquiry determines the circumstances of the alleged SVP's history and mental condition, and the legal inquiry determines whether an ***510** objective person knowing those factual circumstances would reasonably apprehend that the act resulting' in his current confinement would cause harm of a sexually violent nature. *Marshall,* 156 Wash.2d at 158, 125 P.3d 111. The court's role under the factual inquiry prong is not that of a fact finder; the court need only review facts already established, including those established in the record of the conviction resulting in incarceration. *In re Det. of*

Brown, 154 Wash.App. 116, 125, 225 P.3d 1028 (2010). The original criminal proceeding provides an individual with an opportunity to contest the factual allegations supporting the conviction, and the recent overt act inquiry is not meant to provide a second opportunity to litigate those facts. *Brown,* 154 Wash.App. at 125, 225 P.3d 1028.

¶ 37 The trial court noted here that a motion for reconsideration is generally decided on the basis of the motion submitted. The court requested argument, however, because it had questions about how to apply the **1119 two-part test outlined in *Marshall* to the record before it. Following argument, the court noted that it was relying only on uncontroverted facts in making its ruling. The trial court concluded that based on the record in the case and the material filed in support of the motion for reconsideration, the facts of Leck's 2003 conviction constituted an act or acts that could create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows of Leck's history and mental condition.

¶ 38 Leck now argues that the trial court relied on disputed facts in granting reconsideration of its recent overt act ruling, including the fact that he had a mental condition that predisposed him to commit acts of a sexually violent nature, that he was searching for pornography sites on a state-owned computer in 2001, and that he applied for membership at the Bremerton YMCA to meet children. Leck alleges further that when he made statements to the police at the time of his 2003 arrest to which the court's findings referred (i.e., that he "had a problem" and was *511 "trying so hard to stay away from this"), he did not mean he had a problem staying away from child pornography. CP at 767.

¶ 39 Assuming that the issues were as Leck now frames them, [11] he does not show that his presence was required at the hearing or that the trial court erred by denying his motion to continue that hearing. Leck had the opportunity to speak during the hearing and to offer additional evidence following argument at the hearing. Although he consulted with his attorney during the hearing, he offered no additional materials. The trial court did not err by denying the motion for a continuance and by holding the reconsideration hearing while Leck was present telephonically.

III. Basis for Expert Opinion

[23] ¶ 40 Finally, Leck claims that his due process right to cross examination was violated when Arnold relayed a prejudicial out-of-court statement from Leck's sister without Leck having the opportunity to cross examine her about her motive and bias.

¶ 41 During Arnold's testimony, and before he referred to facts from the record, the court orally instructed the jury as follows:

> Dr. Arnold is about to testify regarding information contained in file records he reviewed about Mr. Leck, which is part of the basis for his opinion. You may consider this testimony only in deciding what credibility and weight should be given to Dr. Arnold's opinion. You may not consider it as evidence that the information relied upon by the witness is true or that the events described actually occurred.

RP (Aug. 8, 2011) at 243.

¶ 42 Arnold then testified about Leck coming to Bremerton after his 2002 release and accessing child pornography on the Internet.

> *512 And after doing that for a couple days and saturating himself in the child pornography, he then went to get a membership at the YMCA. That's really important to me because that's how he found his last victim was at the YMCA in Anchorage.

RP (Aug. 8, 2011) at 263.

¶ 43 Leck testified during his direct and redirect testimony that he applied to the Bremerton YMCA so he could use its shower facilities. On rebuttal, Arnold answered as follows when asked about the significance of Leck's application to the Bremerton YMCA:

> I think it's quite significant for a couple of reasons.
>
> One reason is because it's very clear that he had obtained victims for child molestation in the past at the YMCA.

> And the other reason I think it's particularly important, is because that's how he was really caught in 2003 is because his sister knew that he had this pattern of contacting YMCAs, and she informed local law enforcement to watch out for him.

RP (Aug. 15, 2011) at 1043. Leck's attorney made a hearsay objection, and the trial court excused the jury so that it could hear argument ****1120** on the objection. The State argued that the court had given a limiting instruction about Arnold's testimony and that he was entitled to rely on facts in the record to support his opinion about the significance of Leck's YMCA application. Leck's attorney responded that the testimony was too prejudicial, but the court overruled the objection because the fact at issue was part of the basis for Arnold's expert opinion.

¶ 44 The trial court later gave the jury a written limiting instruction stating in part as follows:

> When Dr. Arnold/Dr. Wollert testified, I informed you that some information was admitted as part of the basis for his opinions, but may not be considered for other purposes. You must not consider this testimony as proof that the information relied upon by the witness is true. You may use this testimony only for the purpose of deciding what credibility or weight to give the witness's opinion.

CP at 1579.

[24] **[25]** ¶ 45 ***513** ER 703 permits an expert to base his opinion on facts that are not otherwise admissible if they are of a type reasonably relied on by experts in the particular field. *Marshall,* 156 Wash.2d at 162, 125 P.3d 111. "Thus, the rule allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence." *Marshall,* 156 Wash.2d at 162, 125 P.3d 111. In addition, ER 705 grants the trial court discretion to allow the expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his expert opinion, subject to appropriate limiting instructions. *Marshall,* 156 Wash.2d at 163, 125 P.3d 111; 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice §§ 705.4, 705.5 (5th ed.2007).

[26] ¶ 46 In an SVP trial, experts may rely on psychological reports and the criminal history of an SVP detainee in testifying. *In re Pers. Restraint of Young,* 122 Wash.2d 1, 58, 857 P.2d 989 (1993). In referring to Leck's sister's statement, Arnold was drawing from information in the 2003 Kitsap County presentence report to which he had referred in evaluating Leck in 2006.

¶ 47 Arnold testified appropriately, and the trial court gave a limiting instruction to which the defense did not object. We reject Leck's attempt to transform this evidentiary issue into one of constitutional magnitude. Furthermore, we observe that during the deposition played for the jury, Leck admitted to molesting his sister when she was a child, stated that she had wrongfully accused him of molesting her children, and added that she was jealous of his relationship with their father. This testimony provided ample basis for Leck to argue that his sister was biased and had a motive to lie. We see no error in the court's ruling regarding the scope of Arnold's testimony.

¶ 48 Affirmed.

We concur: WORSWICK, C.J., and BJORGEN, J.

All Citations

180 Wash.App. 492, 334 P.3d 1109

Footnotes

1 Judge Joel Penoyar is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

2 RCW 71.09.020(17) defines “sexually violent offense.”

3 Leck's family lived in the Bremerton area at this time.

4 “ ‘Sexually violent predator’ means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” RCW 71.09.020(18). This definition has remained unchanged since 1995. *See* Laws of 1995, ch. 216, § 1.

5 RCW 71.09.030 governs filing SVP petitions. The 1995 version of the statute was in effect when the State filed the petition against Leck in Thurston County. The legislature amended this version of the statute in 2008, but this amendment merely made one technical correction to the statute that is immaterial to our analysis here. *See* LAWS OF 1995, ch. 216, § 3; LAWS OF 2008, ch. 213, § 12. The 2008 version of the statute was in effect when the State refiled its petition against Leck in Kitsap County. The current version of the statute reflects the legislature's substantive amendments in 2009. *See* LAWS OF 2009, ch. 409, § 3.

6 Leck refused an interview with Arnold in 2005 for purposes of Arnold's initial evaluation of Leck; as a result, Arnold based his evaluation on a review of records alone.

7 Instruction 6 read:

> “Mental abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit criminal sexual acts to a degree that makes the person a menace to the health and safety of others.
>
> “Volitional capacity” means the power or capability to choose or decide.

CP at 1582.

8 Instruction 7 read:

> “Personality disorder” means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time and leads to distress or impairment.

CP at 1583.

9 Leck's claim that his statutory right to notice was violated is also waived under RAP 2.5(a).

10 The minor changes made to this definition after the State filed its petition against Leck do not affect our analysis here. *See* former RCW 71.09.020(10) (2006); *Durbin,* 160 Wash.App. at 426, 248 P.3d 124.

11 It does not appear that the trial court considered anything but the undisputed facts before it Leek's access to pornographic websites, his YMCA application, and his statements to the police at his arrest.

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. CENTURYLINK COMMUNICATIONS, LLC Respondent.	DOCKET UT-181051 PUBLIC COUNSEL'S MOTION TO STRIKE CERTAIN TESTIMONY AND EXHIBITS FILED BY CENTURYLINK COMMUNICATIONS, LLC

ATTACHMENT B

Allen v. Asbestos

KeyCite Yellow Flag - Negative Treatment
Distinguished by Wangen v. A.W. Chesterton Co., Wash.App. Div. 1, August 8, 2011

138 Wash.App. 564
Court of Appeals of Washington,
Division 1.

Gary D. ALLEN, Appellant,
v.
ASBESTOS CORP., LTD.; Crown Cork & Seal Company, Inc.; E.J. Bartells Settlement Trust; Garlock Sealing Technologies, LLC; Foster–Wheeler Energy Corporation; Metropolitan Life Insurance Company; Union Carbide Corp.; and Defendants, Uniroyal, Inc., Respondent.

No. 57723–9–I.
|
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|
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Synopsis

Background: Plaintiff who suffered from lung cancer brought personal injury action against company whose predecessor manufactured asbestos products, alleging that his lung cancer was caused by asbestos dust that his father brought home from work on his clothes. The Superior Court, King County, Linda Lau, J., granted defendant's motion for summary judgment. Plaintiff appealed.

[Holding:] The Court of Appeals, Coleman, J., held that plaintiff raised an issue of material fact as to whether his father was exposed to asbestos products manufactured by predecessor of defendant, thereby precluding summary judgment.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (16)

[1] **Appeal and Error** Review using standard applied below

When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court, and will affirm an order granting summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

1 Cases that cite this headnote

[2] **Appeal and Error** Summary Judgment
Judgment Weight and sufficiency
Judgment Personal knowledge or belief of affiant
Judgment Matters of fact or conclusions

In reviewing summary judgment orders, the appellate court considers supporting affidavits and other admissible evidence that is based on the affiant's personal knowledge; a party may not rely on mere allegations, denials, opinions, or conclusory statements, but, rather must set forth specifics indicating material facts for trial.

[3] **Appeal and Error** Evidence and Witnesses in General

When reviewing a summary judgment order, the trial court's evidentiary rulings are reviewed for manifest abuse of discretion.

3 Cases that cite this headnote

[4] **Judgment** Admissibility
Judgment Defects and objections

Although the trial court has discretion to rule on a motion to strike, a court may not consider inadmissible evidence when ruling on a motion for summary judgment.

3 Cases that cite this headnote

[5] **Judgment** Torts

Plaintiff who suffered from lung cancer raised an issue of material fact in personal injury action as to whether his father was exposed to asbestos products manufactured by predecessor of defendant, thereby precluding summary judgment against plaintiff; plaintiff presented expert testimony that if asbestos cloth was used anywhere at plaintiff's father's workplace, father would have been exposed to it because the asbestos dust would have drifted throughout the workplace, and sales records established that large quantities of asbestos were ordered by the shipyard where father worked over multiple years.

5 Cases that cite this headnote

[6] **Products Liability** Asbestos

Products Liability Weight and Sufficiency of Evidence

Asbestos plaintiffs in Washington may establish exposure to a defendant's product through circumstantial evidence.

12 Cases that cite this headnote

[7] **Evidence** Cause

Products Liability Proximate Cause

Products Liability Asbestos

Products Liability Weight and Sufficiency of Evidence

A court should consider the following factors to determine whether sufficient evidence of causation exists in an asbestos case: (1) plaintiff's proximity to the asbestos product when the exposure occurred; (2) the expanse of the work site where asbestos fibers were released; (3) the extent of time plaintiff was exposed to the product; (4) what types of asbestos products the plaintiff was exposed to; (5) how the plaintiff handled and used those products; (6) expert testimony on the effects of inhalation of asbestos on human health in general and the plaintiff in particular; and (7) evidence of any other substances that could have contributed to the plaintiff's disease, and expert testimony as to the combined effect of exposure to all possible sources of the disease.

8 Cases that cite this headnote

[8] **Evidence** Causation

Products Liability Asbestos

Products Liability Weight and Sufficiency of Evidence

In determining whether sufficient evidence of causation exists in an asbestos case, the proximity and time factors can be satisfied if there is evidence that the plaintiff worked at a job site where asbestos products were used, particularly where there is expert testimony that asbestos fibers have the ability to drift over an entire job site.

5 Cases that cite this headnote

[9] **Evidence** Sufficiency of authentication in general

Documents that were more than 20 years old, and which demonstrated that shipyard at which plaintiff's father had worked had used asbestos products, were properly authenticated and therefore admissible in personal injury action under ancient documents exception to hearsay rule; attorney stated in declaration that he found the documents either at shipyard or at national archives where older shipyard documents were stored, and defendant did not dispute that either of these locations was where authentic shipyard documents would likely be stored. ER 803(a)(16), 901(b)(8).

2 Cases that cite this headnote

[10] **Appeal and Error** Judgment

On appeal from summary judgment entered in favor of defendant company in asbestos case, the Court of Appeals did not need to consider plaintiff's argument that a certain deposition excluded by the trial court was admissible under the "predecessor in interest" hearsay exception, where plaintiff did not raise this exception before the trial court. ER 804(b)(1).

2 Cases that cite this headnote

[11] **Appeal and Error** Objections to evidence and witnesses

Error in the exclusion of testimony by a trial court generally cannot be urged under a theory presented for the first time on appeal.

3 Cases that cite this headnote

[12] **Evidence** Opportunity for cross-examination

Deposition by witness, who since died, was not admissible under "predecessor in interest" hearsay exception, in action brought against company to recover for injury allegedly caused by exposure to asbestos products manufactured by company's predecessor, where nothing in the record indicated that company's other predecessor in interest was present at the deposition or examined the witness. ER 804(b)(1).

2 Cases that cite this headnote

[13] **Judgment** Torts

Portions of expert's declaration concerning whether plaintiff's father was exposed to asbestos products manufactured by company's predecessor while working at shipyard were admissible for limited purpose of explaining basis of expert's opinion regarding medical effect that asbestos had on plaintiff, and not as substantive evidence of father's exposure, at the summary judgment stage in plaintiff's personal injury action against company alleging his lung cancer was caused by asbestos dust that his father brought home from work on his clothes; expert was qualified only to testify about the medical effect that asbestos had on plaintiff, assuming his father was exposed to asbestos products of company's predecessor at his workplace. ER 703.

9 Cases that cite this headnote

[14] **Evidence** Competency of evidence or other information relied upon

Evidence Disclosure or explanation of basis for opinion

The otherwise inadmissible facts or data underlying an expert's opinion is admissible for the limited purpose of explaining the basis for an expert's opinion, but is not substantive evidence. ER 703.

7 Cases that cite this headnote

[15] **Evidence** Hearsay

The trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of an expert's opinion; however, the admission of these facts is not proof of them. ER 703.

5 Cases that cite this headnote

[16] **Appeal and Error** Summary judgment

On appeal from summary judgment entered in favor of defendant company in asbestos case, plaintiff abandoned his assignment of error concerning trial court's exclusion of an exhibit, where plaintiff presented no argument in either his opening brief or his reply brief to support this assignment of error.

1 Cases that cite this headnote

Attorneys and Law Firms

****408** Janet L. Rice, William Joel Rutzick, Schroeter Goldmark & Bender, Seattle, WA, for Appellant.

Chris Robert Youtz, Sirianni Youtz Meier & Spoonemore Seattle, WA, for Respondents.

Opinion

COLEMAN, J.

***568** ¶ 1 Gary Allen sued Uniroyal, Inc., among others, claiming his exposure to asbestos dust from Uniroyal predecessor United States Rubber Company's asbestos-containing products caused his lung cancer. Uniroyal moved for summary judgment, alleging that Allen had insufficient evidence of causation, and the trial court granted the motion.

Allen claims that the trial court erred in granting summary judgment because he raised an issue of material fact and the trial court should have admitted certain pieces of evidence that would have precluded summary judgment. We agree that, drawing all reasonable inferences in his favor as the nonmoving party, Allen presented sufficient evidence to raise a genuine issue of material fact as to whether Allen's father was exposed to Uniroyal products. Summary judgment was erroneously granted, and we therefore reverse and remand for trial.

*569 *FACTS*

¶ 2 Allen sued Uniroyal, alleging that his lung cancer was caused by, inter alia, asbestos dust from a product manufactured by Uniroyal predecessor United States Rubber Company [1] that his father brought home from work on his clothes. Allen testified that his father worked at Puget Sound Naval Shipyard for 25 years as an insulator. Allen submitted sales records showing that the shipyard purchased Uniroyal products containing asbestos during the time that his father was employed there.

¶ 3 Uniroyal moved to strike many of Allen's exhibits, and the trial court granted the motion in part. Uniroyal also moved for summary judgment, arguing that Allen had not raised a genuine issue of material fact because he had not put forward sufficient evidence that his father had ever been exposed to Uniroyal products. The trial court granted summary judgment, and Allen now appeals both the summary judgment order and the order granting in part Uniroyal's motion to strike.

STANDARDS OF REVIEW

[1] **[2]** ¶ 4 When reviewing a summary judgment order, we engage in the same inquiry as the trial court.

> We will affirm an order granting summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In reviewing summary judgment orders, we consider supporting affidavits and other admissible evidence that is based on the affiant's personal knowledge. A party may not rely on mere allegations, ***570** denials, opinions, or conclusory statements but, rather must set forth specifics indicating material facts for trial.

Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wash.App. 736, 744, 87 P.3d 774 (2004) (footnotes omitted). The party moving for summary judgment has the initial burden of establishing the absence of an issue of material fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets this burden, in order to withstand summary judgment, the nonmoving party must set forth specific facts establishing a genuine issue for trial. *Young*, 112 Wash.2d at 225–26, 770 P.2d 182. "The evidence and all reasonable inferences therefrom must still be examined in the light most favorable to the nonmoving party to determine if there are genuine issues of material fact for trial." *Weatherbee v. Gustafson*, 64 Wash.App. 128, 132, 822 P.2d 1257 (1992).

[3] **[4]** ¶ 5 A trial court's evidentiary rulings, on the other hand, are reviewed for manifest abuse of discretion. ****409** *Int'l Ultimate*, 122 Wash.App. at 744, 87 P.3d 774. Although the trial court has discretion to rule on a motion to strike, a "court may not consider inadmissible evidence when ruling on a motion for summary judgment." *Int'l Ultimate*, 122 Wash.App. at 744, 87 P.3d 774.

ANALYSIS

Evidence of Allen's Father's Exposure to Uniroyal Products

[5] ¶ 6 Uniroyal moved for summary judgment on the grounds that Allen had offered insufficient evidence of his father's exposure to Uniroyal products. Allen argues that because he offered evidence showing that Uniroyal asbestos cloth was purchased by the shipyard, the trial court should have inferred that the cloth was thereby used at the shipyard. Allen considers this inference of exposure to be reasonable and argues that the trial court was required to ***571** resolve all reasonable inferences in his favor when considering Uniroyal's motion for summary judgment.

[6] **[7]** ¶ 7 Asbestos plaintiffs in Washington may establish exposure to a defendant's product through circumstantial evidence. *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 744 P.2d 605 (1987). *Lockwood* established factors that a court should consider to determine whether sufficient evidence of causation exists: (1) plaintiff's proximity to the asbestos product when the exposure occurred; (2) the expanse of the work site where asbestos fibers were released; (3) the extent of time plaintiff was exposed to the product; (4) what types of asbestos products the plaintiff was exposed to; (5) how the plaintiff handled and used those products; (6) expert testimony on the effects of inhalation of asbestos on human health in general and the plaintiff in particular; and (7) evidence of any other substances that could have contributed to the plaintiff's disease (and expert testimony as to the combined effect of exposure to all possible sources of the disease).

[8] ¶ 8 The proximity and time factors can be satisfied if there is evidence that the plaintiff worked at a job site where asbestos products were used, particularly where there is expert testimony that asbestos fibers have the ability to drift over an entire job site. *See, e.g., Berry v. Crown Cork & Seal Co.*, 103 Wash.App. 312, 324, 14 P.3d 789 (2000). In Berry, shipyard employees testified that they ordered the defendant's asbestos products for use at the shipyard, and the plaintiff's experts testified that asbestos fibers can drift over an entire shipyard such that anyone who worked anywhere at the shipyard is exposed if asbestos is used there. *Berry,* 103 Wash.App. at 324, 14 P.3d 789. Plaintiff's experts also opined that asbestos exposure led to plaintiff's death. *Berry,* 103 Wash.App. at 324, 14 P.3d 789. The defendant moved for summary judgment, and

> [t]he critical issue for purposes of summary judgment was whether the plaintiffs raised an issue of material fact as to whether Berry was exposed to *Brower products* while employed at PSNS [Puget Sound Naval Shipyard]. According to Lede's ***572** 1984 affidavit, Brower supplied some of the insulation products used at PSNS during both periods (1942 and 1945–50). Moreover, Downey's 1984 testimony that he saw Plant and Carey products "almost every day" during the seven years (1941–48) in which he worked at PSNS, in conjunction with Bradley's testimony that Brower was "a distributor" for Plant and Carey products, raises an issue of fact as to whether Berry was exposed to Brower-supplied products during the time frames in question.
>
> Saberhagen argues that Lede's affidavit leads to impermissible speculation because the plaintiffs do not provide evidence as to "how much or how often PSNS purchased products *from Brower,* as opposed to Bartells or others." Similarly, Saberhagen claims that Downey's and Bradley's testimony does not support an inference of exposure because "Downey did not say who supplied the Plant and Carey products to PSNS" and "Bradley said nothing to suggest that Brower had ever been the sole source for those products either in 1942 or any other time." We reject Saberhagen's argument. Lede's testimony was that local distributors such as Brower were the first source of supplies for small amounts or immediate needs. Plaintiff's evidence is sufficient to raise an inference ****410** that Brower products were used at PSNS during the time periods in question. The extent to which Brower supplied the products as compared with other distributors is irrelevant for purposes of summary judgment.

Berry, 103 Wash.App. at 324–25, 14 P.3d 789.

¶ 9 As in *Berry,* the central issue on summary judgment here is whether Allen raised an issue of material fact as to whether his father was exposed to Uniroyal products while working at the shipyard. Also like *Berry,* Allen presented expert testimony that if asbestos cloth was used anywhere at Allen's father's workplace, Allen's father would have been exposed to it because the asbestos dust would have drifted throughout the workplace.

¶ 10 As evidence of use, Allen put forward evidence of three sales orders of Asbeston (an asbestos cloth) in 1958, 1959, and 1960. Uniroyal admits that these orders were made, but claims that they do not give rise to an inference ***573** because there is no evidence that the Asbeston was ever used at the shipyard while Allen's father was there. Uniroyal argues that to infer that the Asbeston was used from the sales records alone amounts to impermissible speculation, and thus, there was no genuine issue of material fact as to whether Allen's father was exposed to Asbeston.

¶ 11 But the sales records establish that large quantities of Asbeston were ordered by the shipyard over multiple years. Uniroyal has not explained why the shipyard would order such large quantities of a product it did not use, especially when the orders were placed over a period of time. We

conclude that it would be reasonable from this record to infer that Asbeston was used at the shipyard. Because of Allen's expert testimony that if Asbeston was used, Allen's father would have been exposed, the inference that Asbeston was used at the shipyard leads directly to the inference that Allen's father was exposed to Uniroyal's product. In the trial court's consideration of Uniroyal's motion for summary judgment, Allen was entitled to have all reasonable inferences drawn in his favor. The inference of use and exposure is reasonable and is sufficient to raise an issue of material fact; thus, we conclude that the trial court erred in granting summary judgment.

¶ 12 We acknowledge that only one court has relied *solely* on sales records to infer exposure. *See Richoux v. Armstrong Cork Corp.,* 777 F.2d 296 (5th Cir.1985).[2] And it is true, as Uniroyal points out, that other courts have held that sales records alone are not enough to establish exposure under the facts presented in those cases. *See Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156 (4th Cir.1986); *Hansen* ***574** *v. New York City Housing Auth.,* 271 A.D. 986, 68 N.Y.S.2d 71, 73 (N.Y.App.Div.1947); *Booth v. Acands,* 854 So.2d 979 (La.App.2003). Those cases, however, do not establish a bright-line rule that sales records are not enough to support an inference of exposure. The courts there engaged in fact-specific inquiries to determine—in the context of all the evidence—whether sales records can support that inference. In *Lohrmann,* the court concluded that sales records from one manufacturer did not support the inference of exposure to that manufacturer's products where the plaintiff had testified that he was exposed to asbestos products made by other manufacturers. In *Hansen,* the court concluded that invoices of asbestos materials to various buildings did not support an inference that plaintiff was exposed because the plaintiff had not established when he worked at those buildings or that he would have been exposed if he had been working there when the materials were used. And in *Booth,* the court concluded that an invoice of asbestos tape to a job site in 1967 could not support an inference ****411** that the plaintiff was exposed to that product when he worked there in 1969. So while it is true that courts have concluded that sales record evidence was not enough to support an inference, each court examined the sales records in light of the totality of the evidence in the case to reach that conclusion. We apply that approach here.

¶ 13 Here, the timing and amounts of the sales permit the reasonable inference that Asbeston was used at the shipyard. The first shipment was a "trial" amount of 100 linear yards in 1958, while the second two shipments over the next two years were for amounts significantly larger (13,391 pounds in 1959 and 5,880 pounds in 1960). The repeated and increasing amount of orders suggests that the product was being used. Because it is reasonable to infer that Uniroyal's product was used at the shipyard and there is opinion testimony in the record that if the product was used Allen's father was exposed, the court erred in granting ***575** summary judgment because Allen established the existence of an issue of material fact.[3]

¶ 14 Due to our disposition of this case, we need not consider Allen's appeal of the trial court's evidentiary issues. We elect to do so, however, for clarity in the event that this evidence is proffered at trial.

Exhibit 9

[9] ¶ 15 Allen argues that the trial court erred in striking exhibit 9 as lacking authenticity because he put forward evidence of where the exhibit had been stored and when it was obtained. Exhibit 9 is a collection of documents with a cover sheet. Allen's attorney described this exhibit in a declaration as a "true and correct copy of Puget Sound Naval shipyard document pertaining to 'Asbeton [sic] or equal' on the IWO JIMA stating that the proposal was approved '18 Mar 1960.' " Allen offered this exhibit as evidence linking the Uniroyal product Asbeston with the shipyard at the time his father worked there, but Uniroyal moved to strike the exhibit as hearsay and for lack of proper authentication.

¶ 16 Allen claimed that the exhibit was admissible under the ancient documents exception to the hearsay rule (ER 803(a)(16)), but the trial court ruled that Allen had failed to authenticate the exhibit as an ancient document. The day before the summary judgment hearing, Allen submitted a declaration from an attorney, Kirk Mortensen, who was formerly associated with his counsel's law firm, stating that ***576** he received copies of the documents in exhibit 9 either directly from the shipyard or from the Sand Point facility in 1981 after reviewing the originals himself.

¶ 17 To properly authenticate an ancient document, a party must show that it: "(i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered." ER 901(b)(8). According to Uniroyal, Allen did not meet the second and third requirements because there was no evidence that the documents were found in a place where they would have been

if they were authentic, and there was also no independent evidence of the documents' age (other than the dates on the documents themselves). Uniroyal also presented evidence that the shipyard did not have any record of documents similar to the collection in exhibit 9.

¶ 18 Despite Uniroyal's argument to the contrary, the second requirement of ER 901(b)(8) does not require *a shipyard employee* to testify to where the documents were kept or found, but the rule only requires evidence sufficient to support a finding that the document is what its proponent ****412** claims it to be. *See, e.g.,* *Lockwood,* 109 Wash.2d at 250–51, 744 P.2d 605. Mortensen stated in a declaration that he found the documents either at the shipyard or at the national archives in Sand Point (where older shipyard documents were stored)—and Uniroyal did not dispute that either of these locations is where authentic shipyard documents would likely be stored. Uniroyal's argument that ER 901(b)(8) requires testimony from someone with personal knowledge regarding the creation of a document is misplaced—the case it cites to support this position is actually analyzing a different authentication evidence rule, ER 901(b)(1), which does require testimony of a witness with knowledge. ER 901(b)(8) sets out the criteria for determining the authenticity of ancient documents, and none of those factors requires testimony of a witness with knowledge about the document's creation.

***577** ¶ 19 As to the age of the evidence, the third requirement of ER 901(b)(8), Uniroyal did not present any evidence disputing that the dates on the documents themselves were inaccurate. Furthermore, Mortensen's declaration stated that he had collected these documents in 1981, which was more than 20 years before the time the exhibit was offered. Thus, Allen met all three authentication requirements for exhibit 9 by making a prima facie showing of all three criteria for authenticity of ancient documents, and the trial court erred in striking it.

¶ 20 While we have concluded that the inference of Asbeston use is reasonable based on the evidence that the trial court admitted, exhibit 9—which should have been admitted—further supports the inference. The proposal, approved in 1960 (after the shipyard had already placed orders of Uniroyal asbestos cloth Asbeston), recommends using Asbeston or an equal product. The cover letter to this proposal states that an unspecified asbestos cloth was then used extensively to insulate pipes, and the proposal recommends using the cloth also for ventilation ducts on a particular project. These documents support the inference that the shipyard used Asbeston, rather than just storing it, after it ordered the product in 1958. This relevant evidence should not have been excluded by the trial court because it was properly authenticated, and we therefore reverse this evidentiary ruling.

David Deposition

¶ 21 Allen argues that the trial court erroneously excluded Ralph David's deposition because the deposition is admissible under ER 804's "predecessor in interest" exception.

¶ 22 Certain types of testimony are considered exceptions to the general rule prohibiting hearsay evidence. ER 804(b). One such exception includes:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance ***578** with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, *a predecessor in interest,* had an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1) (emphasis added).

¶ 23 David's deposition was offered to demonstrate how a shipyard insulator during the relevant time would have used asbestos cloth. At the time of trial David was deceased, and the trial court struck the deposition because Uniroyal was not present at the deposition and had not had an opportunity to examine him.

[10] ¶ 24 At trial, Allen argued that the deposition should be admitted because it had been relied upon by one of his experts. Now on appeal, Allen argues that David's deposition was admissible because a Uniroyal predecessor in interest, Raymark, was present at the deposition, and thus, the deposition is former testimony admissible under ER 804(b)(1). Uniroyal contends that because Allen did not argue the application of this exception before, the predecessor-in-

interest exception should not be considered for the first time on appeal. [4]

****413** **[11]** ¶ 25 "Error in the exclusion of testimony by a trial court generally cannot be urged under a theory presented for the first time on appeal." *State v. Eaton,* 30 Wash.App. 288, 293 n. 7, 633 P.2d 921 (1981). *See also* RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court...."). Thus, because Allen did not raise the predecessor in interest exception before the trial court, we need not consider this argument on appeal.

[12] ¶ 26 Furthermore, even if we did consider this argument, it is not clear from the excerpts of David's deposition offered by Allen that Raymark, which Allen claims is Uniroyal's predecessor-in-interest, attended the ***579** deposition or examined David. The only attorney questioning David in the excerpted deposition is Allen's attorney, and thus, there is nothing in the record to indicate that Raymark was present or examined David. See Clerk's Papers at 182–87. Because the predecessor-in-interest exception requires the predecessor to have the opportunity to examine the witness and the deposition does not establish that this opportunity existed, the trial court did not err in not applying the exception.

Heyer Declaration

[13] ¶ 27 Allen argues that even though Dr. Nicholas Heyer relied on inadmissible documents and information to reach his expert opinion, such reliance is permitted under ER 703, and thus, his declaration should have been admitted. Uniroyal argues that the stricken portion of Heyer's declaration was inadmissible as substantive evidence because that portion was not based on Heyer's personal knowledge.

[14] **[15]** ¶ 28 ER 703 permits experts to base their opinion testimony on facts or data that is not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject[.]" The otherwise inadmissible facts or data underlying an expert's opinion is admissible for the limited purpose of explaining the basis for an expert's opinion, but is not substantive evidence. *See In re Det. of Marshall,* 122 Wash.App. 132, 146, 90 P.3d 1081 (2004), *aff'd,* 156 Wash.2d 150, 125 P.3d 111 (2005).

> The trial court may allow the admission of otherwise hearsay evidence and inadmissible facts for the purpose of showing the basis of the expert's opinion. *State v. Wineberg,* 74 Wash.2d 372, 384, 444 P.2d 787 (1968). The admission of these facts, however, is not proof of them.
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> [I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration: Wigmore on Evidence, 3rd ed. § 655. His explanation merely discloses the basis of his ***580** opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only.
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> *Wineberg,* at 382, 444 P.2d 787 (quoting *State Hwy. Comm'n v. Parker,* 225 Or. 143, 160, 357 P.2d 548 (1960)).

Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wash.2d 391, 399–400, 722 P.2d 787 (1986).

¶ 29 The trial court admitted paragraphs 7 through 9 of Heyer's declaration for the limited purpose of explaining Heyer's expert opinion only, but struck the paragraphs as substantive evidence of Allen's father's exposure to Uniroyal products because Heyer had no personal knowledge of that exposure. Heyer was qualified only to testify about the medical effect that asbestos had on Allen, *assuming* Allen's father was exposed to Uniroyal products at the shipyard. The court made it clear that those paragraphs were struck as substantive evidence of exposure and were admissible only for the limited purpose of explaining the bases of Heyer's expert opinion.

¶ 30 The stricken portion of Heyer's declaration reads:

> 7. Based on the above materials as well as my training experience and literature that I have read, it is my opinion that asbestos was a cause of Mr. Allen's lung cancer and that part of that asbestos exposure resulted from exposure to asbestos ****414** cloth manufactured by United States Rubber Company, including "Asbeston" cloth used at PSNS in the 1950's and 1960's. Dust from such cloth as well as from other sources of asbestos was widely distributed and was part of the asbestos to which workers such as Mr. Ernest Allen [were] exposed and which [was] brought home on his clothes.
>
> 8. Arriving at my opinions about the use at PSNS of asbestos cloth made by United States Rubber Company, I

> relied in part on the July 17, 1958, letter from the United States Rubber Company to PSNS. That letter describes its product, "asbeston," as a lightweight lagging cloth. I also relied in part on PSNS records dated in 1959 and 1960 regarding the use of "asbeston" or "asbeston or equal" at PSNS. I also considered Mr. D'Angleo's ***581** testimony about sales to PSNS of asbestos cloth from 1958 through 1960. I also relied on testimony from Mr. Tefft and Mr. Anderson, who referred to using lightweight asbestos cloth called asbeston or asbestone at PSNS for lagging pipes abroad [sic] ship in the years around 1960. John Northey, another PSNS insulator, also referred to using asbeston cloth at PSNS during the 1950s.
>
> 9. In my opinion, Gary Allen was substantially exposed to asbestos as a result of asbestos being brought home on his father's work clothes when his father was working as a lagger at PSNS in Bremerton, Washington. This exposure was more likely than not sufficient to cause Gary Allen's lung cancer. That exposure would have been in part from the asbestos being put into the air from the shipyard workers cutting and tearing the Asbeston cloth....

¶ 31 Although Allen correctly asserts that Heyer, as an expert, was entitled to rely on inadmissible evidence to form an opinion, that fact is unrelated to the reason that paragraphs 7 through 9 were stricken. The court, in striking those paragraphs, emphasized that the paragraphs were being struck as substantive evidence that Uniroyal products were used by Allen's father at the shipyard: "Heyer's testimony may not be offered to prove the presence of Uniroyal's product at PSNS." This limited admissibility is consistent with *Marshall,* 122 Wash.App. at 146, 90 P.3d 1081, and *Group Health,* 106 Wash.2d at 399–400, 722 P.2d 787. The trial court excluded the testimony of Hugh Tefft, Monty Anderson, and John Northey—the shipyard workers who testified about using Uniroyal products—and Heyer's reference to this excluded testimony cannot be considered substantive evidence establishing the use of Uniroyal products at the shipyard.

[16] ¶ 32 We conclude that the trial court did not err in striking a portion of Heyer's declaration because paragraphs 7 through 9 contain Heyer's opinion about factual matters outside his industrial hygiene and epidemiology expertise —namely, whether Uniroyal products were present or used at PSNS. The stricken portion is admissible only for the limited purpose of explaining the basis for Heyer's medical opinion. Thus, we conclude that the trial court ***582** properly excluded that portion of Heyer's opinion as substantive evidence. [5]

¶ 33 For the foregoing reasons, we reverse and remand for trial.

WE CONCUR: SCHINDLER, A.C.J., and BAKER, J.

All Citations

138 Wash.App. 564, 157 P.3d 406

Footnotes

1 Although the product at issue was manufactured by the United States Rubber Company, we refer to this product as a Uniroyal product or by its brand name, "Asbeston," in this opinion.

2 Allen cites other cases where sales records have supported an inference of exposure. In those cases, there was also additional evidence, usually in the form of testimony from the plaintiff or other co-workers identifying the asbestos product and describing its use at the workplace. *See* *Covalt v. Carey Canada, Inc.,* 950 F.2d 481 (7th Cir.1991); *Zielinski v. A.P. Green Indus.,* 263 Wis.2d 294, 661 N.W.2d 491 (2003); *Thacker v. UNR Indus., Inc.,* 213 Ill.App.3d 38, 572 N.E.2d 341, 157 Ill.Dec. 272 (1991); *Rocco v. Johns–Manville Corp.,* 754 F.2d 110 (3 Cir. 1985). Because such additional evidence was not present in this record, we do not consider these cases to be analogous here.

3 Uniroyal also argues that summary judgment was appropriate on the ground that Allen presented insufficient evidence that he inhaled asbestos dust from his father's clothes, particularly because there was insufficient evidence that any dust would have been from a Uniroyal product. But Allen testified in a deposition that he carried his father's work clothes home from the bus stop and stood nearby while his father shook dust off of them, and Allen's expert opined that this exposure was more likely than not a substantial factor causing Allen's cancer. Given that we conclude that the evidence supports a reasonable inference that Allen's father was exposed to Uniroyal products, Allen's deposition and expert testimony raise a genuine issue of material fact as to whether Uniroyal products were a substantial factor causing Allen's cancer. Therefore, this is not an appropriate ground for summary judgment.

4 Allen does not rebut this argument in his reply brief; in fact, his reply brief does not mention this deposition at all.

5 Allen also assigns error to the trial court's exclusion of exhibit 17, but presented no argument in either his opening brief or his reply brief to support the assignment of error. We consider this assignment of error abandoned because it is not developed in the briefs. *Bercier v. Kiga,* 127 Wash.App. 809, 824, 103 P.3d 232 (2004) (“[W]ithout argument or authority to support it, an appellant waives an assignment of error.”).

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