

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

RAY M. COLLINS and CAROL J.
COLLINS,

Plaintiffs,

vs.

DAVID W. HALL and MARGARET R.
HALL Trustees, and their successors in trust,
of the D & M Hall Community property
trust, dated March 14, 2005, and also all
other persons or parties unknown claiming a
right, title, estate, lien, or interest in the real
estate described in the complaint in this
action,

Defendants.

CASE NO. 1JU-14-00771 CI

**DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO
EXPERT WITNESS JOHN BENNETT**

Both parties agreed to use Mr. Bennett as a joint, neutral expert witness whose report would be provided to both parties and who could be called by either party (or both parties) as a witness at trial. Attorneys for both parties signed Mr. Bennett's engagement letter stating that his scope of work would be to "Provide a report stating our opinion regarding the location of the boundary between lots 14 & 15 that is best supported by the evidence."¹ The record on this, presented below, is clear.

Furthermore, the Collins's objection is untimely, and his vague concern that Mr. Bennett's testimony will not be helpful to the trial court is unfounded.

1. The Objection is Untimely

¹ Attachment 1, page 1.

According to the Pretrial Scheduling Order entered by this court on October 24, 2014, objections to the parties' final witness lists were due on April 5th. At the hearing on April 1, the parties and the court discussed the impact of the withdrawal of the Collins's attorney, Mr. Bruce. Counsel for the Halls informed the Court that the deadline for objecting to witness lists was coming up in a few days and the Halls intended to object to some of the witnesses on the Collins' final list. Therefore, the Halls attorney requested and was granted a 30-day extension *for the Halls* to file their objections. This was primarily for the Collins's benefit so that they would have time to find a new attorney, and they would not have to respond to the objections *pro se*. Neither Mr. Bruce nor Mr. Collins indicated that the Collinses intended to object to any of the Halls' witnesses, nor did they request a similar extension for the Collinses.

The court was very clear that no other deadlines would be extended as a result of Mr. Bruce's withdrawal. The Collins's late objection to Mr. Bennett is particularly inappropriate because Mr. Bruce already brought up this objection to the Hall's attorney before withdrawing, and the Hall's attorney responded to it at that time.² So Mr. Bruce was entirely aware of this potential objection and chose not to make it. Mr. Collins's deadline has passed and this late objection is unwarranted.

2. The Parties Agreed to Hire Mr. Bennett as a Joint Expert Who Could Testify For Either Party if the Case Failed to Settle.

The parties agreed to hire Mr. Bennett jointly to provide a neutral opinion about the case, and agreed that if they were unable to settle the case after receiving the neutral opinion, either party or both parties could call Mr. Bennett as a witness. The history of hiring Mr. Bennett is as described in this section, supported by the emails attached to this response as Attachment 2.

² See attached Affidavit of Counsel.

The deadline for filing expert witness lists in this case passed on March 15, 2015. The deadline for close of discovery was August 31, 2015. On August 18, Mr. Bruce informed the Hall's attorney that the Collins's wished to hire DOWL Engineering as a new expert witness.³ The Hall's attorney wrote to Mr. Bruce on October 9th, and stated that the Halls would object to the Collinses hiring DOWL Engineering as an expert witness for the plaintiffs, but would agree to both parties hiring DOWL Engineering as a joint expert witness. That email gave details on how such an arrangement would work, including that the report would be neutral and the costs split by the parties. It also stated: "In the end, either party could call the DOWL surveyor as an expert witness and use the report. If by some miracle DOWL comes up with something that cuts through the Gordian knot of this case, great. But they won't act as an arbitrator or anything, and neither side would be 'bound' by their recommendations."⁴

Sometime in early November, Mr. Bruce spoke to the Hall's attorney by phone and suggested hiring Mr. Bennett as a joint expert instead of DOWL Engineering.⁵ On November 19th, Mr. Bruce wrote an email to the Hall's attorney saying: "we should probably enter a formal agreement re Bennett's role and services. I think you had an email to me that was pretty comprehensive regarding the use of the Bennett opinion. Would you mind taking the first cut at such an agreement?"⁶ This email was obviously a reference to the October 9th email. Also on that same day, the Hall's attorney provided Mr. Bruce with a proposed agreement, as he requested, based on the October 9th email that stated: "If the parties fail to resolve their dispute based on the expert

³ Attachment 2, page 1.

⁴ Attachment 2, page 2.

⁵ See attached Affidavit of Counsel.

⁶ Attachment 2, page 4.

report, either party (or both parties) may call Mr. Bennett as an expert witness and use the report produced by Mr. Bennett at trial.”⁷

Also on that day, Mr. Bruce and the Hall’s attorney exchanged emails about Mr. Bruce’s phone conversation with R&M Consultants. Mr. Bruce wrote: “I have not spoken to Mr. Bennett only to Len Story. ... I said what we were really looking for was “the man” on surveying in Alaska to act as an independent expert on the surveying issues in the case. Both sides would see the report and I hope find it conclusive on those issues in the case. He said they would entertain doing the work on that basis.”⁸

Mr. Bruce never objected to anything in the Halls proposed agreement with regards to Mr. Bennett, and the Halls moved forward in reliance on the understanding that the parties were in agreement about the terms in it. As can be seen from the email history, it was never even suggested that Mr. Bennett’s report would be confidential or that he could not be called at trial. On November 24th, Mr. Bennett provided the parties with an engagement letter stating that his scope of work would be to “provide a report stating our opinion regarding the location of the boundary between lots 14 & 15 that is best supported by the evidence.” That agreement was signed by both Mr. Bruce and the Halls’ attorney.⁹

Mr. Bennett provided his first report to the parties on December 17th. It directly addressed the scope of work jointly agreed to by the parties in the engagement letter, concluding: “The best evidence to support the location of the Lot 14/15 boundaries are the monumented WCMC-1 of U.S. Survey No. 1755, the basis of bearing between WCMC-1 and USMS 1285 according to U.S.S. 1755 and the record bearings and

⁷ Attachment 2, pages 5 and 6.

⁸ Attachment 2, page 7.

⁹ See Attachment 1.

distances from WCMC-1 to the lots according to the Colt Island Subdivision plat (Plat 75-11). These elements are best represented in the “Hall” plat (2012-32).”¹⁰

Mr. Collins then requested that Mr. Bennett review the depositions of John Bean, the surveyor who prepared the survey on which the Collinses rely. Mr. Bruce signed an additional engagement letter sent by Mr. Bennett stating that “the purpose of this [deposition] review is to determine whether essential facts are missing and whether the testimony in the depositions would lead to an amendment of our report issued on December 17, 2015.”¹¹ Mr. Bennett then reviewed the two depositions of Mr. Bean (approximately 350 pages), and then issued a supplemental report stating: “I found nothing in Mr. Bean’s testimony that would lead me to change my conclusions.”¹² The report then discussed Mr. Bean’s testimony in detail, and was very helpful in clearly explaining some of the jargon used by Mr. Bean that the parties’ attorneys had struggled to understand in the depositions.

Mr. Collins’s affidavit indicates that he was unaware that this was the scope of work assigned to Mr. Bennett, and that he was unaware that Mr. Bennett could be called as a witness at trial. But that is irrelevant. Mr. Hall gave Mr. Bruce the authority to make decisions in this case on his behalf, and Mr. Bruce agreed to Mr. Bennett acting as a joint expert in this case who could be called by either party at trial.

3. Mr. Bennett’s Testimony Will Assist the Trial Court

The Collinses also object to Mr. Bennett’s testimony on the grounds that it “is more likely than not to generate confusion instead of credible testimony that will yield evidence necessary to resolve this case.” The Collinses do not point to any part of the report in support of this vague statement. The full reports provided by Mr. Bennett are

¹⁰ The report is attached as Attachment 3, and the quote comes from page 20.

¹¹ See Attachment 4.

¹² The report is attached as Attachment 5, and the quote comes from page 1.

attached for the court's review, as Attachments 3 and 5. As the court will see, they are helpful and informative, both in explaining the surveying principles and terminology at issue in this case and in explaining the specific surveys at issue. They contain definitions, a description in chronological order of all recorded surveys and plats of the island, narrative discussion, figures with notes, and conclusions. Those conclusions are clear and well-supported. Mr. Bennett reviewed all available public record documents about this case and the depositions of Mr. Bean in creating his reports. Mr. Bennett is a state-wide expert in surveying (as Mr. Bruce described him, "the man").¹³ And his testimony is all the more credible because he reached his conclusions independently. His testimony will be invaluable to the court in understanding the issues in this case.

Mr. Collins's affidavit expresses concern that Mr. Bennett did not visit Colt Island, but Mr. Bennett's reports clearly describe what information he used to reach his conclusions and account for the fact that he has not visited the island himself. Mr. Collins also expresses concern that Mr. Bennett never "interviewed" Mr. Bean, but Mr. Bennett did review 350 pages of deposition testimony given by Mr. Bean. The court is entirely capable of weighing the value of Mr. Bennett's opinion, given the level of his review. The fact that Mr. Bennett has not visited the island or "interviewed" Mr. Bean is not grounds to exclude his testimony.

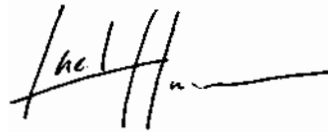
4. Conclusion

This court should deny the plaintiffs' objections to Mr. Bennett.

DATED this 28th day of April, 2016

FAULKNER BANFIELD, P.C.

¹³ Mr. Bennett's CV is included in his initial report, Attachment 3, pages 21 and 22.

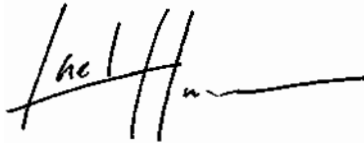


Lael Harrison
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David W. Hall and Margaret R. Hall,
Trustees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of April, 2016, the undersigned caused a copy of the foregoing to be sent by mail to:

Joe Geldhof
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