

NO. 41158-0-II

THE
COURT OF APPEALS
DIVISION II
11 JUN 17 AM 12:24
STATE OF WASHINGTON
BY _____
DEPUTY

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOHN ALTON BURNELL,

Appellant,

v.

THURSTON COUNTY, WASHINGTON,

Appellee.

**REPLY BRIEF OF APPELLANT
JOHN ALTON BURNELL**

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TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
I. Argument in Reply.....	1
II. Conclusion	3
Certificate of Service	1

TABLE OF AUTHORITIES

Cases

Brown v. Child, 3 Wn.App. 342, 474 P.2d 908 (1970)..... 2

Hill v. Sacred Heart Medical Center, 143 Wn.App. 438, 449, 177 P.3d
1152 (2008)..... 2

Mansfield v. Holcomb, 5 Wn.App. 881, 491 P.2d 672 (1971)..... 2

Orion Corp. v. State, 103 Wn.2d 441, 693 P.2d 1369 (1985) 1

I. ARGUMENT IN REPLY

The County's Brief fails to address the gravamen of this appeal; to wit, a government entity is not entitled to summary judgment in a case alleging civil rights violations when the only evidence relied upon in support of summary judgment is an affidavit from a government employee stating he believes that he and his colleagues and subordinates at the County acted lawfully at all times in their dealings with Plaintiff. To the extent that the County sought to establish that there are no genuine issues of material fact at play in this case, it relied and relies exclusively upon a Declaration from Thurston County Planning and Environmental Section Manager Mike Kain, executed August 5, 2004. CP 119-121.¹

Conclusions of law stated in an affidavit filed in a summary judgment proceeding are improper and should be disregarded. *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985). Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Brown v. Child*, 3 Wn.App. 342, 343, 474

¹ Clerk's Papers page numbers using Plaintiff's pagination for the sake of consistency.

P.2d 908 (1970); *Mansfield v. Holcomb*, 5 Wn.App. 881, 491 P.2d 672 (1971). All Mr. Kain's declaration contains are conclusions of law and conclusional statements. Accordingly that document is insufficient evidence to carry the burden placed upon the proponent of summary judgment, Thurston County.

Finally, with respect to the County's argument, at pages 7 – 8 of its Brief, that the Court should disregard materials in the Clerk's Papers which were referenced in, but not attached to, Burnell's response to the County's motion for summary judgment below, although the rule requires that affidavits submitted in support of, or in opposition to, motion for summary judgment set forth facts based upon personal knowledge admissible as evidence to which the affiant is competent to testify, evidence may be presented by reference to other sworn statements in the record such as depositions and other affidavits. *Hill v. Sacred Heart Medical Center*, 143 Wn.App. 438, 449, 177 P.3d 1152 (2008). As stated in Appellant's Opening Brief, Burnell did reference previously filed affidavits in his response to the County's Motion. They are therefore properly considered by this Court on review.

II. CONCLUSION

For the foregoing reasons and the reasons set forth in Appellant's opening Brief, the trial court erred in granting the County summary judgment because the Appellant has come forward with evidence setting forth facts showing that there is a genuine issue of material fact. Beyond this, the County is simply not entitled to judgment as a matter of law upon the record. Appellant requests the Court vacate the Order granting summary judgment to the County and remand this matter to the Superior Court for trial.

Respectfully submitted,



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COURT OF APPEALS
BY

CERTIFICATE OF SERVICE

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The undersigned certifies that on this 17^h day of June 2011 he

STATE OF WASHINGTON
BY

caused the foregoing **Appellant's Reply Brief** to be served on the below-

DEPUTY

identified parties by regular U.S. Mail, postage prepaid

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Dated: 17 June 2011.



Robert A. Beatley