

NO. 45298-7-II

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

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IRENE NGUGI,

Appellant/Cross-Respondent,

v.

STATE INSTITUTION FOR PUBLIC POLICY; and EVERGREEN  
STATE COLLEGE,

Respondents/Cross-Appellants.

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**REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS**

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## I. INTRODUCTION

The trial court in this case declined to grant Defendants Washington State Institute for Public Policy's and The Evergreen State College's (collectively, "Respondents") motion to strike because the court indicated it would have granted Respondents' summary judgment motion regardless of any ruling on the motion to strike. Nonetheless, the trial court recognized that "the materials that were being moved to strike had some problematic admissibility issues with them." RP at 58:14-16. Before the trial court, Ms. Ngugi even conceded that some of the challenged materials should have been stricken. CP at 619. Those materials were inadmissible and the trial court erred in not striking them.

This Court need not reach the issues raised in this cross-appeal and this brief, however, if this Court affirms the dismissal of Ms. Ngugi's claims after reviewing the entire record on appeal. In that case, this cross-appeal would become moot. But the appropriate handling of the evidentiary issues presented by this cross-appeal make the necessity of affirming the dismissal of Ms. Ngugi's claims all the more clear.

## II. ARGUMENT

### A. The Trial Court's Failure To Grant Respondents' Motion To Strike Is Reviewed De Novo

This Court reviews de novo decisions regarding motions to strike made in conjunction with a motion for summary judgment. *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) (“[W]hen a motion to strike is made in conjunction with a motion for summary judgment, we review de novo.” (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998))).

Ms. Ngugi's assertion that *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), stands for the proposition that a “trial court's decision to admit or refuse evidence proffered at summary judgment is reviewed for an abuse of discretion,” Brief of Cross-Respondent and Reply Brief of Appellant (“Appellant's Reply Br.”) at 20, is incorrect. *Stenson* concerned the admissibility of evidence *at trial*, not on summary judgment. 132 Wn.2d at 677 (“Stenson appeals his sentence of death and the underlying convictions for the murders of his wife and his business associate.”). Accordingly, the trial court's failure to grant Respondents' motion to strike in this case is reviewed de novo.

**B. The Testimony Of An Undisclosed Expert Witness Providing Legal Conclusions Was Inadmissible**

There are two, independent reasons why the trial court erred by not striking the Declaration of Bart Stroupe. The first is that Ms. Ngugi failed to timely disclose Mr. Stroupe's identity. Ms. Ngugi does not deny that she failed to disclose Mr. Stroupe in her required witness disclosures and discovery responses, or that she first mentioned Mr. Stroupe when she filed his declaration with her summary judgment opposition. Nor does she deny that declarations should be stricken in such circumstances. *Southwick*, 145 Wn. App. at 301-02 (affirming striking of expert declaration submitted in connection with summary judgment motion because expert had not been disclosed as required by case scheduling order and "CR 56(e) requires that a declaration be limited to matters that would be admissible in evidence").<sup>1</sup>

Ms. Ngugi's sole response regarding her failure to disclose Mr. Stroupe is her description of his testimony as "rebuttal testimony."

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<sup>1</sup> See also CR 26 & 37; see also *Sather v. Lindahl*, 43 Wn.2d 463, 464-65, 261 P.2d 682 (1953) ("One of the purposes of the Rules of Pleading, Practice, and Procedure pertaining to pretrial discovery, including depositions, 34A Wn.2d 84, ff., is to enable a litigant to know in advance the witnesses upon whom his adversary is relying and thus to avoid surprise. When, after denying knowledge of witnesses which he in fact had, a litigant produces those witnesses at the trial, the adverse party should object to their being permitted to testify and, if they are permitted to testify, should move that their testimony be stricken. The trial judge can sustain such an objection and refuse to permit the witness to testify or can order his testimony stricken[.]"); *Lampard v. Roth*, 38 Wn. App. 198, 201-02, 684 P.2d 1353 (1984) (holding that trial court abused its discretion by not excluding expert testimony when party failed to disclose expert).

Appellant's Reply Br. at 21. But she cites no authority supporting this argument,<sup>2</sup> and she does not even attempt to explain how styling such testimony as "rebuttal" permitted her to violate the trial court's case scheduling order and the discovery rules. In any event, the case scheduling order in this case also had a deadline for the disclosure of rebuttal witnesses, by which Ms. Ngugi failed to disclose Mr. Stroupe. CP at 556. Simply stated, Ms. Ngugi's failure to disclose Mr. Stroupe in her witness disclosures and discovery responses required the striking of his declaration, and the trial court erred by not doing so.

The second, independent reason why the trial court erred by not striking Mr. Stroupe's declaration is that his testimony was not proper expert testimony under ER 702. Ms. Ngugi does not deny that Mr. Stroupe lacks the personal knowledge to testify as a lay witness under ER 602. Instead, she contends that his testimony is appropriate expert testimony under ER 702. Appellant's Reply Br. at 21-22. But she does not deny that Mr. Stroupe's testimony consisted almost entirely of

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<sup>2</sup> Ms. Ngugi does cite *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), following a sentence in which she references "rebuttal testimony," Appellant's Reply Br. at 20, but that case does not reference rebuttal testimony and has nothing to do with summary judgment or failing to disclose a witness. Rather, Ms. Ngugi appears to have cited this case for its discussion regarding "opening the door," which is analyzed later in this brief.

inadmissible legal conclusions.<sup>3</sup> See, e.g., CP at 521 (“WSIPP became legally eligible to employ Ms. Ngugi”), 522 (“[T]hese were material changes of Ms. Ngugi’s working conditions that would have required a new I-129 Petition[.]”), 522 (“OSPI was qualified to sponsor Ms. Ngugi as an H-1B nonimmigrant[.]”). Nor does she deny that Mr. Stroupe lacked sufficient factual foundation to express any opinions because Mr. Stroupe’s opinion relies entirely upon Ms. Ngugi’s vague declaration, which does not provide sufficient information regarding the positions at the Office of the Superintendent of Public Instruction (“OSPI”) that is essential for Mr. Stroupe to offer the expert opinions he purports to give.<sup>4</sup> Further, Ms. Ngugi does not deny that Mr. Stroupe’s testimony would not have been helpful to the jury, because they could have simply been instructed on the applicable law.<sup>5</sup>

Ms. Ngugi’s sole response to these fundamental admissibility issues is the following argument:<sup>6</sup>

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<sup>3</sup> Brief of Respondents/Cross-Appellants (“Br. of Resp’ts”) at 48 (citing *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (“[E]xperts may not offer opinions of law in the guise of expert testimony.”)).

<sup>4</sup> Br. of Resp’ts at 48 (citing *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703 (1994) (holding that expert must have adequate factual foundation for testimony to be admissible)).

<sup>5</sup> Br. of Resp’ts at 48 (citing *Anderson v. Akzo Nodel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011) (holding that expert testimony must be helpful to be admissible)).

<sup>6</sup> She also argues that Mr. Stroupe is qualified to testify about the matters contained in his declaration, Appellant’s Reply Br. at 21-22, but Respondents did not challenge his declaration on that basis.

The Respondent clearly and repeatedly opened the door to . . . testimony concerning the visa waiver process at summary judgment, through otherwise inadmissible hearsay testimony offered by Lieb, who supposedly spent \$20,000 on lawyers' advice, admittedly had no experience with those laws on her own, had no clue how to interpret them, and repeatedly referred to various laws and the out-of-court oral interpretations of them attributed to unnamed and perhaps lesser-experienced lawyers than Mr. Stroupe.

Appellant's Reply Br. at 21. Ms. Ngugi's "opening the door" argument fails for two reasons. First, even when the "door is opened," ER 702's stringent requirements for the admissibility of expert testimony still apply. *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) ("Opening the door to ultimate issues did not open the door to all opinions. The focus in deciding whether an expert's opinion should be admitted is Rule 702's standard[.]" (citation and quotation marks omitted)).<sup>7</sup> Ms. Ngugi does not—and cannot—cite any authority for the proposition that once a party has introduced evidence regarding an issue, opposing expert testimony is admissible without regard to compliance with ER 702. ER 702 always governs the admissibility of expert testimony and, as indicated above, Mr. Stroupe's testimony is inadmissible under ER 702 and Ms. Ngugi has not even attempted to argue otherwise.

The second reason Ms. Ngugi's "opened the door" argument fails is that the "door is opened" to certain inadmissible evidence only if the

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<sup>7</sup> See *State v. Brush*, 32 Wn. App. 445, 450-51, 648 P.2d 897 (1982) (relying upon federal authority regarding scope of "open the door" theory).

evidence that “opened the door” was itself inadmissible. *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) (“A party’s introduction of evidence that would be *inadmissible* if offered by the opposing party ‘opens the door’ to explanation or contradiction of that evidence.” (emphasis added)). Here, Ms. Ngugi argues that Ms. Lieb’s testimony regarding immigration issues opened the door because it was hearsay. Appellant’s Reply Br. at 21. But it is well-established that an employer’s testimony regarding statements made by others offered to explain why the employer took a certain action is not “offered for the truth of the matter asserted,” and thus is not hearsay.<sup>8</sup> In this case, Respondents offered Ms. Lieb’s testimony regarding her interactions with attorneys not for the truth of the statements made by those attorneys but rather to explain why the contract with OSPI did not work—it was immigration issues rather than discrimination or retaliation. As a result, Ms. Lieb’s testimony was not inadmissible hearsay, and the “opening the door” theory does not apply. The trial court erred in not striking Mr. Stroupe’s declaration.

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<sup>8</sup> *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 78-80, 98 P.3d 1222 (2004) (“Walsh’s description of what she saw on the videotape is not hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted, and it is generally inadmissible absent an applicable exception. In this case, Walsh’s testimony was not offered for the truth of the matter asserted. Rather, it was offered to show Walsh’s motivation for the decision to reprimand and eventually terminate Domingo’s employment. See ER 803(a)(3) (An exception to the hearsay rule is a statement of the declarants then existing state of mind, such as motive.)” (footnote omitted)).

**C. Much Of Ms. Ngugi's Declaration Was Inadmissible As Hearsay Or For Lack Of Personal Knowledge**

**1. The Statements Of OSPI Personnel Were Pure, Inadmissible Hearsay**

Respondents moved to strike three types of inadmissible evidence from Ms. Ngugi's declaration. The first were statements attributed to employees or agents of OSPI that were inadmissible hearsay. This includes the following pages and lines of Ms. Ngugi's declaration:<sup>9</sup>

- Page 9:18-19: "Both [Priddy and Munoz-Colon] however expressed satisfaction with my work, and at no time expressed any dissatisfaction with my work products."
- Pages 11:22-12:2: "Buschel informed me that there was no contract in the works between OSPI and WSIPP, and that her department was at that time not aware of any such proposed contract."
- Page 12:4-10: "Priddy stated that my job at OSPI was initially meant to be 'temporary and then permanent.' It was not clear to me what this meant, and it was contrary to what Priddy had told me when I first went to OSPI on August 10, 2009. Then, Priddy had informed me that Lieb had informed Priddy that I had some projects at the Institute that I could set aside for a while so as to help OSPI with some urgent work. When I inquired about the interagency contract between ESIPP and OSPI, Priddy informed me that the contract between OSPI and WSIPP was 'still in the air', and that she was waiting to talk to the agency's lawyer about the contract."
- Page 13:10-11: "Priddy indicated that she was not aware of my termination nor was she aware I had been directed in the

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<sup>9</sup> Ms. Ngugi's declaration is in the record at CP at 481-519. The portions of the declaration Respondents have moved to strike are CP at 489:18-19, 491:22-492:2, 492:4-10, 493:10-11, 493:13-18, 494:1-13.

termination letter not to go to work at OSPI that morning.”

- Page 13:13-18: “Priddy stated that the reason I had been terminated from WSIPP was because the contract between OSPI and WSIPP had not worked out. Priddy continued to inform me that the position that I had previously been assigned to by WSIPP at OSPI was no longer available, and instead informed me to seek another position within OSPI. Priddy also requested me to provide her with completed work products that I had been working on for Priddy.”
- Page 14:1-13: “However, on December 29, 2009, Janetta Sheehan from the Attorney General’s office and Janet Cheetham from the law firm of Ryan, Swanson & Cleveland PLLC informed me that there were complications in trying to apply for a new H1-B work visa (to enable me to take up a new position at OSPI) because there were no more work visas available in that year’s H1-B visa quota. Janetta Sheehan and Janet Cheetham informed me that they would try to make the new position at OSPI eligible for an H1-B visa under the cap-exempt H1-B visas category. Given OSPI employer designation, I was not surprised when Sheehan and Cheetham informed me that they could not guarantee that the process would succeed, and therefore, I had only two options: (i) leave the country; or (ii) change to another immigration status in the next two days in order for me to maintain my legal status in the United States. Sheehan told me she would find out if WSIPP would agree to extend my termination date by a week in, but both Sheehan and Cheetham indicated that they could not guarantee that the extension would be approved or that the immigration process would be a success.”

Each of these statements constitutes inadmissible hearsay.

Ms. Ngugi does not deny that these statements are inadmissible hearsay. Instead, she argues “Respondents opened the door [to these inadmissible statements] through Lieb’s declaration, which also similarly recounts hearsay conversations with Priddy and other unnamed OSPI

employees about the Appellant.” Appellant’s Reply Br. at 22-23.<sup>10</sup> But, as explained above, evidence must be inadmissible to “open the door,” and Ms. Lieb’s testimony regarding her interactions with OSPI were not hearsay because it was offered to explain Ms. Lieb’s motivation for decisions regarding arrangements made with OSPI, and not for the truth of the matter asserted.<sup>11</sup> As a result, no “door was opened” to such inadmissible hearsay, and the trial court erred by not striking it.

**2. The E-mail Ms. Ngugi Neither Sent Nor Received Was Inadmissible Hearsay**

The second piece of inadmissible evidence is an exhibit to Ms. Ngugi’s declaration that is an e-mail that Ms. Ngugi neither sent nor received. CP at 498. Ms. Ngugi does not deny that she lacks the necessary personal knowledge to authenticate this document. ER 602, 901(b)(10). Nor does she deny that it constitutes hearsay. ER 801 & 802. Instead, Ms. Ngugi argues that, because the document has a Bates stamp indicating that it was provided in response to a public records request, it is admissible as a public record pursuant to RCW 5.44.040, ER 803, and

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<sup>10</sup> Ms. Ngugi also states, “Priddy’s testimony concerning her side of the conversation was included as well, which was properly before the trial court.” Appellant’s Reply Br. at 22. But Ms. Ngugi cites no authority and presents no argument for the relevance of this alleged fact. Further, none of Priddy’s testimony in her declaration referred to any conversation with Ms. Ngugi that is relevant to the hearsay testimony Respondents have moved to strike.

<sup>11</sup> *Domingo*, 124 Wn. App. at 78-80.

*State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989). Ms. Ngugi is incorrect.

RCW 5.44.040 states:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly *certified by the respective officers having by law the custody thereof, under their respective seals* where such officers have official seals, shall be admitted in evidence in the courts of this state.

(Emphasis added.) The Supreme Court also requires the following additional criteria be met before documents are to be admitted under this statute:

In order to be admissible, a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts which are of a public nature, it must be retained for the benefit of the public and there must be express statutory authority to compile the report.

*Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941) (cited with approval by *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 450-51, 191 P.3d 879 (2008)).

Ms. Ngugi can meet none of these requirements for Exhibit A, and it was her burden to prove compliance with them. *Spokane Research & Defense Fund v. Spokane County*, 139 Wn. App. 450, 462, 160 P.3d 1096 (2007) (“As the party offering the proposed determination for admission,

it has the burden to produce evidence to establish that it was a public record of sufficient reliability for admission under ER 803.”). Exhibit A is not accompanied by a statement from its custodian attesting to the authenticity of the document. It also necessarily follows that any such signed statement was not made under an official seal. *State v. Monson*, 53 Wn. App. 854, 858, 771 P.2d 359 (1989) (“In *State v. Hodge*, 11 Wn. App. 323, 523 P.2d 953 (1974), the court approved admission of certified copies of records from the Department of Motor Vehicles. The documents carried the *imprint of the official seal* of the department and were *signed by the acting supervisor of the DMV records section*.” (emphasis added)). Further, there is no evidence that Exhibit A “relate[s] to facts which are of a public nature,” was “retained for the benefit of the public,” and that there was “express statutory authority to compile the” document. *Steel*, 9 Wn.2d at 358 (“The exhibit in question meets none of these requirements except that of a statutory direction to prepare the report. Its content was the result of the exercise of judgment founded upon personal computations and opinions made by officials or employees of the department. The subject matter did not relate to facts of public interest. Moreover, the report was not retained for the public benefit, but was designed merely for the use of the department, its officials and the various boards of county

commissioners.”). In short, Exhibit A meets none of RCW 5.44.040’s requirements.

The single case Ms. Ngugi cites in support of her argument, *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989), does not apply here, as that case concerned a certified copy of a driver’s license, which plainly meets each of the requirements. Exhibit A, however, is an internal, informal e-mail sent between employees pertaining to the internal personnel issues at the Institute. It is not admissible under RCW 5.44.040 and the trial court erred in not striking it.

**3. Ms. Ngugi Lacked Personal Knowledge Regarding The Alleged Treatment Of, And Actions Of, Other Employees**

The third category of inadmissible testimony is Ms. Ngugi’s testimony regarding issues for which she lacks personal knowledge, mostly concerning the treatment of other employees. ER 602. Specifically, Respondents moved to strike the following testimony:<sup>12</sup>

- Page 2:18-19: “This is contrary to the treatment other newly recruited and even seasoned researchers at WSIPP received.”
- Page 4:10-12: “At the end of 2008, and after the end of the education project, and beginning in January 2009, I was singled out for miss-treatment when I requested assignment to new work assignments from AOS, who assigned work

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<sup>12</sup> Ms. Ngugi’s declaration is in the record at CP at 481-519. The portions of the declaration Respondents have moved to strike are CP at 482:18-19, 484:10-12, 484:12-15, 484:19-485:2, 485:3-4, 485:8-11, 486:6-8, 490:2-3, 490:17-19, 491:1-2, 491:3-8, 491:10-11.

projects at WSIPP.”

- Page 4:12-15: “These assignments would have introduced me to work in other areas, not just education, and would have provided me with opportunities to receive training and expertise in other skill areas that researchers developed on the job at WSIPP.”
- Pages 4:19-5:2: “All other research staffers were assigned and continued working on one or more major project(s). A research associate (Caucasian) with similar credentials who started work at the institute a few months after I received a major project assignment and continued working in collaboration with and receiving mentoring from a more senior research associate. Another research associate (Caucasian) who previously had focused on education policy research like me continued to receive other major project assignments.”
- Page 5:3-4: “Supervisors treated me differently in that I received fewer assignments than other research staff.”
- Page 5:8-11: “Although the lack of funding was prospective and concerned more staff than me, Lieb and Aos were not directing others who had worked on education projects to seek new employment.”
- Page 6:6-8: “After I returned from vacation on July 6, 2009, I saw that other researchers were attending research staff meetings (moderated by Aos) to which she [sic] was the only researcher not invited.”
- Page 10:2-3: “In October 2009 Lieb hired another research associate (Caucasian), who immediately started working on at least one major project at WSIPP.”
- Page 10:17-19: “Also on October 28, 2009, WSIPP created a Personnel Action Form (PAF) which confirmed my conversation with Lieb on the same day. In fact, the PAF was completed, signed, and dated by Lieb and mailed to the Evergreen College for Steve Trotter’s signature.”

- Page 11:1-2: “Schmidt contacted the Office of the President at TESC on the morning of October 29, 2009.”
- Page 11:3-8: “In direct retaliation for pursuing a formal complaint of racial/national origin discrimination, WSIPP breached its October 28, 2009 contract of employment with me and on October 30, 2009, secretly requested (via email sent by Janie Maki, office manager at WSIPP) that the Personnel Action Form (PAF) authorizing my employment until June 2010 be “shredded by an individual at the Evergreen college. WSIPP continued seeking the destruction of my PAF through several subsequent emails to TESC on November 2, 2009.”
- Page 11:10-11: “After the destruction of this original PAF, WSIPP created another similar, though not identical cover up document.”

It is a common tactic in employment cases for a plaintiff to attempt to testify about the treatment of other employees that the plaintiff has not established a foundation of personal knowledge regarding, as is required by ER 602. Courts should not and do not condone this tactic and routinely decline to consider such testimony. *See, e.g., Burns v. Interparking Inc.*, 24 Fed. Appx. 544, 548 (7th Cir. 2001) (declining to consider plaintiff’s testimony regarding treatment of other employees that was “not within [plaintiff’s] personal knowledge”); *Roop v. Lincoln College*, 803 F. Supp. 2d 926, 934 (C.D. Ill. 2011) (holding that plaintiff’s testimony regarding treatment of other employees was inadmissible because there was “no evidence” that the plaintiff had personal knowledge of that treatment); *Wojciechowski v. Nat’l Oilwell Varco, L.P.*, 763 F. Supp. 2d 832, 846

(S.D. Tex. 2011) (striking plaintiff's testimony regarding treatment of other employees because plaintiff had "not demonstrated she has personal knowledge" of that treatment); *White v. Connecticut Dep't of Children & Families*, 544 F. Supp. 2d 112, 116 (D. Conn. 2008) ("[P]laintiff did not have sufficient personal knowledge with respect to any of those individuals to support a conclusion that a person similarly situated to the plaintiff was treated differently."), *aff'd* 330 Fed. Appx. 7 (2d Cir. 2009); *Saltarella v. Town of Enfield*, 427 F. Supp. 2d 62, 71 (D. Conn. 2006) (striking plaintiff's testimony regarding treatment of other employees "because he has shown no basis for his personal knowledge about" that treatment), *aff'd* 227 Fed. Appx. 67 (2d Cir. 2007).<sup>13</sup>

The entirety of Ms. Ngugi's response to this issue is the following two sentences:

Finally, the Respondent complains about statements in the Appellant's own declaration about how she was treated in comparison to other employees. Those statements are based upon personal knowledge.

Appellant's Reply Brief at 22. Simply saying a witness has personal knowledge does not make it so. Ms. Ngugi has identified nothing in the record, and no legal authority, establishing that she had the personal

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<sup>13</sup> See *In re Detention of Pouncy*, 168 Wn.2d 382, 393 n.9, 229 P.3d 678 (2010) ("Where our evidence rules mirror their federal counterparts, we may look to federal case law interpreting the federal rules as persuasive authority in interpreting our own rules."). ER 602 and FED. R. EVID. 602 are substantially identical.

knowledge required by ER 602 to testify about these matters. Accordingly, the trial court erred in not striking this testimony.

**D. The Voluminous, Uncited Deposition Transcripts Were Inadmissible**

Ms. Ngugi does not deny that, in opposing summary judgment, she filed the entire transcripts of six depositions, totaling over 200 pages and 22 exhibits, and failed to provide even a single pin cite to these transcripts in her opposition brief. Nor does she deny that the substance of her brief only actually relied upon 14 pages and a single exhibit of those materials. In fact, Ms. Ngugi conceded that what she had done was inappropriate and the unreferenced portions of the transcripts should be stricken:

Plaintiff apologizes to the court for expansive submission in support of Ms. Ngugi's Opposition to Summary Judgment. It was not plaintiff's intent to burden the court. To that end, plaintiff agrees with defendants that the court should only consider its selection of testimony and exhibit(s) set out in their Motion to Strike.

CP at 619. On appeal, Ms. Ngugi admits that "filing entire depositions may be burdensome and contrary to procedural rules[.]" Appellant's Reply Br. at 20. These voluminous, unutilized deposition excerpts were irrelevant and should have been stricken under ER 401 and 403.<sup>14</sup> The

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<sup>14</sup> See also *Ngyuen v. Radiant Pharm. Corp.*, 946 F. Supp. 2d 1025, 1034 (C.D. Cal. 2013) (Courts "need not 'comb the record' looking for other evidence; it is only required to consider evidence set forth in the moving and opposing papers and the portions of the record cited therein." (citing *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001))).

trial court's decision to not strike the unreferenced materials given that it was granting the Institute's summary judgment motion, RP at 58:16-17, was error.

Ms. Ngugi's sole argument against striking these materials is that *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996), and *McClarty v. Totem Electric*, 119 Wn. App. 453, 81 P.3d 901 (2003), forbade the striking of those materials. Ms. Ngugi is incorrect. In both cases, the issue was whether deposition transcripts should be stricken from the record *on appeal* when the opposing party had *failed to move to strike them before the trial court*. In *Mithoug*, the Supreme Court held that the issue had been waived because the opposing party failed to object before the trial court. 128 Wn.2d at 463 (“[T]his requirement is waived, however, if not brought to the trial court’s attention through a motion to strike. There is nothing in the record suggesting that the defendants objected to the trial court’s consideration of the depositions. Thus, they were properly before the court and should have been considered in deciding the motion for summary judgment.” (citation omitted)). Similarly, in *McClarty*, the issue on appeal was not whether the trial court had properly denied a motion to strike—there is no indication that the defendant had so objected before the trial court—but whether the Court of Appeals could consider certain evidence. 119 Wn. App. at 462-63. Thus,

those cases concern a different issue than is being raised here—*Mithoug* and *McClarty* concern the proper record on appeal when a defendant has failed to object before the trial court, whereas this case concerns the admissibility of evidence before the trial court when the opposing party had properly moved to strike and appealed. Ms. Ngugi has cited no authority regarding the actual issue presented by this evidence, and the trial court erred in not striking it.

### III. CONCLUSION

For the reasons stated above, the trial court erred in not granting Respondents' motion to strike.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of August, 2014.

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**CERTIFICATE OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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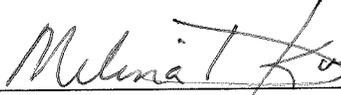
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of August, 2014, at Tumwater, Washington.

  
\_\_\_\_\_  
MELISSA KORNMANN, Legal Assistant

# WASHINGTON STATE ATTORNEY GENERAL

**August 15, 2014 - 3:58 PM**

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