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

M. GWYN MYLES, individually and as Personal Representative of the
Estate of WILLIAM LLOYD MYLES, deceased,

Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON, et al.,

Respondent/Cross-Appellants.

**REPLY BRIEF OF CROSS APPELLANT
CLARK COUNTY**

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I. INTRODUCTION

This brief provides reply argument relating to the cross-appeal of Respondent/Cross-Appellant Clark County (“the County”). While the County ultimately prevailed below and asks the Court to affirm summary judgment in its favor, to the extent the trial court considered inadmissible evidence submitted by Appellant/Cross Respondent Gwyn Myles (“Myles”), it erred. This Court should decline to consider such evidence when it conducts its *de novo* review of the record below.

II. REPLY ARGUMENT ON CROSS-APPEAL

Arguing the trial court’s decision on the County’s motion to strike should be reviewed only for an abuse of discretion, from the outset Myles misstates the proper standard of review. “The *de novo* standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). “[W]hen a motion to strike is made in conjunction with a motion for summary judgment, [the appellate court reviews] *de novo*.” *Southwick v. Seattle Police Officer John Doe #s 1-5*, 145 Wn. App. 292, 186 P.3d 1089 (2008); *see also Keck v. Collins*, 181 Wn. App. 67, 81, 325 P.3d 306 (2014); *Farrow v. Alfa Laval, Inc.*, 179 Wn. App. 652, 660, 319 P.3d 861 (2014). Therefore, the County’s motion to

strike inadmissible evidence submitted by Myles in opposition to its summary judgment motion is reviewed *de novo*.

As previously noted, affidavits or declarations opposing summary judgment must (1) be made on personal knowledge; (2) set forth facts as would be admissible in evidence; and (3) show that the affiant is competent to testify on the matters contained therein. CR 56(e); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). “A court may not consider inadmissible evidence when ruling on a motion for summary judgment.” *King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Thus, unauthenticated and hearsay documents relied upon by Myles below are insufficient to overcome the County’s motion for summary judgment. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 139, 331 P.3d 40 (2014).

A. The County Sufficiently Objected to the Admissibility of the Documents at Issue

The County objected to the documents offered by Myles in opposition to summary judgment at CP 537-663 and 778-83, because (1) they were not properly authenticated, either as naked attachments to her summary judgment opposition brief or as attachments to a declaration by Myles’ attorney and (2) they contained hearsay. Myles concedes the County objected to these documents both in its summary judgment briefing and

during the summary judgment oral argument. CP 1022-23; RP 1-3. This Court should reject Myles' contention that the County should have objected yet again when the court entered orders reflecting its summary judgment decision. The trial court did not announce its summary judgment ruling immediately following the parties' oral arguments on August 29, 2016, but instead scheduled a separate hearing, which it reserved exclusively for purposes of stating its decision. When the trial court announced its decision at this hearing approximately one month later, it did not give an express ruling regarding the admissibility of the disputed documents nor did it invite further argument by the parties. RP 40-76. By considering and failing to address the admissibility of the documents, the trial court implicitly denied the County's motion to strike. *See, e.g., Matthews v. Island Landmarks*, 193 Wn. App. 1014, 2016 WL 1306655, *3 (unpublished decision, *see* GR 14.1) (stating the trial court "implicitly denied" a motion to strike where it listed disputed documents in its order on summary judgment). This erroneous ruling, which is part and parcel of the summary judgment decision Myles has appealed, is properly before the Court.¹

¹ Arguably, the County was not even required to cross-appeal this issue in order to raise it with this Court. "The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to the respondent." RAP 2.4(a). "A successful litigant need not cross-appeal in order to urge any additional reasons in support of the judgment, even though rejected by the trial court, but no additional relief will be granted on appeal in the absence of a cross-appeal." *Peterson v. Hagan*, 56 Wn.2d 48, 52, 351 P.2d 127 (1960). "While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought

B. With the Exception of a Handful of Documents Considered By the Court Based on Appropriate Foundation Provided by the County Elsewhere in the Record, All Documents the County Objected to Were Inadmissible

Myles points out that a handful of the disputed documents were authenticated elsewhere in the record. The County acknowledges the following few documents were properly considered by the trial court based upon their authentication by other witnesses: the single active warrant for Villanueva-Villa that existed on December 23, 2005;² the WSP CAD log for December 23, 2005;³ and dockets relating to Villanueva-Villa's DUI charges based on his conduct on November 26, 2005 and December 23, 2005.⁴ However, the remaining documents the County objected to at CP 537-663 and 778-83 are inadmissible for lack of authentication and hearsay, and no foundation for their admissibility exists elsewhere in the record.

Myles' reliance on the "open the door" rule to argue for the court's consideration of what he characterizes as similar documents to those

by the respondent beyond affirmation of the lower court." *State v. Sims*, 171 Wn.2d 436, 442, 256 P.3d 285 (2011). Here, the County is not seeking any affirmative relief for purposes of RAP 2.4(a). Instead, it has raised the inadmissibility of evidence relied upon by Myles as an alternative ground for affirming summary judgment in the County's favor. The County has filed a cross-appeal despite RAP 2.4(a) out of an abundance of caution, because some Washington appellate courts have precluded any appellate review of a motion to strike evidence submitted on summary judgment without such a cross-appeal of the issue. *See, e.g., Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 87 n.5, 328 P.3d 962 (2014); *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 728, 309 P.3d 711 (2013).

² This warrant was properly authenticated by witness Kelly Roberson at CP1042-45.

³ The CAD log was properly authenticated by witness Carey Salzsieder at CP 27-36.

⁴ The court dockets for these charges, offered for purposes of establishing the amount of bail set by the Superior Court, were properly authenticated by witness Ric Bishop at CP 39-61.

submitted by the County is misplaced. The “open the door” rule is a discretionary rule of cross-examination that a court may apply during a jury trial where one party “opens the door” by introducing evidence that would otherwise be inadmissible.⁵ The “open the door” rule is not a method of avoiding the requirement that documents offered as evidence to oppose a motion for summary judgment have an appropriate foundation, including a showing that they are authentic and not hearsay. With the few exceptions acknowledged above, the documents the County objected to were inadmissible because Myles’ counsel had no personal knowledge of their contents nor any basis to authenticate them. To the extent the trial court considered and relied upon these documents in ruling on the motions for summary judgment, it erred.

C. The Documents the County Moved to Strike Were Not Authenticated

“Underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible.” *International Ultimate, Inc.*

⁵ See, e.g., *State v. Gefeller*, 76 Wn.2d 449, 458 P.2d 17 (1969) (“[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of examination in which the subject matter was first introduced.”); *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.”); *State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998) (“Otherwise inadmissible evidence is admissible on cross-examination if the witness ‘opens the door’ during direct examination and the evidence is relevant to some issue at trial.”).

v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004). A document cannot be authenticated by merely presenting a certification of an attorney with no personal knowledge about the authenticity of the documents or their contents. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014); *Burmeister v. State Farm, Ins.*, 92 Wn. App. 359, 368, 966 P.2d 921 (1998).

Myles contends many of the contested documents were properly authenticated by her counsel, because her counsel averred that he obtained them from public entities in response to requests made under the Public Record Act (“PRA”). This argument is without merit. Some Washington courts have held that where documents have been produced in discovery by the party challenging them, authentication is satisfied for purposes of summary judgment. *International Ultimate*, 122 Wn. App. at 748. However, there is no rule providing, as Myles suggests, that a document is self-authenticating merely because it is was obtained in response to a PRA request. For example, even though police reports are undoubtedly public records, they are not self-authenticating. *Burmeister*, 92 Wn. App. at 368.

ER 902 governs when public records are self-authenticating. None of the records at issue meet the requirements of the rule. For example, none of the records at issue bear a seal purporting to be that of a governmental entity with a signature purporting to be an attestation or execution. ER 902

(a). Likewise, none include the signature of a public official with a certification under seal that the signer has such official capacity and that the signature is genuine. ER 902 (b). Nor are any of the disputed documents certified copies of official records or reports. ER 902 (c). Here, Myles' attorney lacked any personal knowledge of the disputed documents that would enable him to authenticate them under ER 901, and they were not self-authenticating under ER 902. As a result, the trial court could not properly consider them on summary judgment.

D. The Documents the County Moved to Strike Contained Hearsay

Hearsay – an out-of-court statement offered to prove the truth of the matter asserted – is inadmissible. ER 801 (c); ER 802. Thus, hearsay may not be considered by a trial court when deciding a summary judgment motion. *SentinelC3*, 181 Wn.2d at 141; *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 308-09, 151 P.3d 201 (2006). The documents at 537-663 and 778-83, which include alleged statements by non-party witnesses, were also inadmissible because they were hearsay. The non-party witnesses whose hearsay statements were contained in these records included Villanueva-Villa's attorney (CP 546); Department of Corrections ("DOC") community corrections officers (CP 572-79, 584) and hearing officers (CP 595-97);

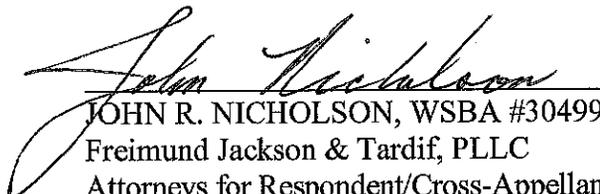
non-party troopers from the Washington State Patrol (CP 608-16);⁶ and City of Vancouver police officers (CP 617-18). Myles has never argued these documents, which also lack any authentication as explained in the preceding section above, were offered for any non-hearsay purpose, and this Court should refuse to consider them when it reviews the record *de novo*.

III. CONCLUSION

Much of the evidence Myles relied upon below was not properly authenticated and contained hearsay. The trial court erred to the extent it considered this evidence over the County's objections in deciding whether summary judgment was appropriate. On appeal, this Court should hold that the materials identified above offered by Myles were inadmissible and that the trial court erred to the extent it considered them.

RESPECTFULLY SUBMITTED this 12th day of November,
2019.

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⁶ Myles' contention raised for the first time in this appeal that a report by Trooper Petersen Stock, a non-party, is admissible as an admission by WSP as a party-opponent under ER 801(d)(2) is wrong. Where one of the parties is an organization, such as WSP, only statements by employees who are "speaking agents" will be deemed admissions of a party-opponent under this rule. *State v. Williams*, 79 Wn. App. 21, 28, 902 P.2d 1258 (1995). Myles has made no showing that Trooper Stock is a "speaking agent" for WSP.

CERTIFICATE OF SERVICE

On said day below, I electronically served a true and accurate copy via the Washington State Appellate Court's Portal the *Reply Brief of Cross-Appellant Clark County* to the following parties:

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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 12th day of November, 2019, at Olympia, Washington.



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