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NO. 49889-8-II

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

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

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

**REPLY BRIEF OF CROSS-APPELLANTS
STATE OF WASHINGTON AND ROBERT BRUSSEAU**

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I. INTRODUCTION

If this Court affirms summary judgment on any of the bases raised in State Respondents' Brief, it is unnecessary for the Court to address this argument on cross-appeal.

Should the Court reach this argument, the trial court erroneously considered irrelevant and inadmissible evidence submitted by Plaintiff, over the objection of the State Defendants, including uncertified Clark County Superior Court records pertaining to Carlos Villanueva-Villa's 2001 vehicle prowling charge and a related bail jump charge (CP 222-91), and to events occurring after his 2006 vehicular homicide charge (CP 320-36, 412-17), several weeks after the DUI arrest at issue in this case. These records are irrelevant, and therefore inadmissible, under ER 402. They are also not properly authenticated by any permissible method, including ER 901, 902, CR 44(a)(1), 56(e) or RCW 5.44. Finally, they are not subject to judicial notice under ER 201. The trial court therefore abused its discretion in considering them, and Plaintiff fails to offer any persuasive reason for holding otherwise. This Court should not consider the irrelevant and inadmissible evidence during its de novo review of the order granting summary judgment. Summary judgment should be affirmed.

II. ARGUMENT

A. The Trial Court's Consideration of Objectionable Evidence at Summary Judgment Is Properly Before This Court

A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment. *King Cty. Fire Prot. Dist. 16 v. Hous. Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). Here, the trial court's consideration of inadmissible evidence over State Defendants' specific objections, in ruling on State Defendants' motion for summary judgment, is properly before this Court. *See, e.g., Bonneville v. Pierce Cty.*, 148 Wn. App. 500, 508-09, 202 P.3d 309 (2008) ("object[ing] to an affidavit filed in support of a motion for summary judgment preserves the issue on appeal").

In its order denying State Defendants' motion for summary judgment (CP 1232-40), the trial court expressly stated its consideration of Exhibits 1-34 submitted by Plaintiff in opposition to summary judgment. CP 1234, ¶ 15. Exhibits 1-34 include the unauthenticated and uncertified Clark County Superior Court records pertaining to Villanueva-Villa's 2001 vehicle prowling charge and a related bail jump charge (CP 222-91) and to events occurring after his 2006 vehicular homicide charge (CP 320-36, 412-17). The trial court considered that evidence over State Defendants' objections to it. *See* CP 971-75, 993; VRP 1-3. Contrary to Plaintiff's argument, the trial court's order at summary judgment implicitly denied

State Defendants' objections. *See* Pl.'s Reply at 17, 46. Further, the trial court did not subsequently reverse its evidentiary ruling in its order granting State Defendants' motion for reconsideration. CP 1354-56. For the reasons explained below, this Court should determine that the trial court abused its discretion in considering the inadmissible evidence.

B. The Records at Issue Are Irrelevant and Inadmissible Under ER 402

"Evidence which is not relevant is not admissible." ER 402. The purported Clark County Superior Court records submitted by Plaintiff pertaining to Villanueva-Villa's 2001 vehicle prowling charge and a related bail jump charge, and to events occurring after his 2006 vehicular homicide charge, are irrelevant and inadmissible and should not have been considered by the trial court at summary judgment. *See* CP 222-91, 320-36, 412-17.

The records related to the 2001 charges are irrelevant because Trooper Brusseau was not privy to the charges purportedly evidenced by those records at the time of Villanueva-Villa's arrest. Furthermore, the only plausible purpose served by records related to the 2006 vehicular homicide charge is to prejudice State Defendants by inviting this Court, and the trial court before it, to improperly speculate as to cause-in-fact related to what a judge would have done, and what restrictions he or she might have imposed, had Villanueva-Villa been brought to and held at Clark County jail

overnight on December 23, 2005. *See Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004). This Court should decline that invitation.

There is no evidence—no allegation, in fact—that Villanueva-Villa's 2001 alleged charges were known, or knowable, to Trooper Brusseau when he arrested Villanueva-Villa for DUI on December 23, 2005. Nor is there any allegation or evidence that those 2001 charges related to Villanueva-Villa's alcohol use. Accordingly, those records are not relevant to any material issue of fact and are inadmissible under ER 402.

In addition, Plaintiff relies on records from after Villanueva-Villa's 2006 vehicular homicide charge in an attempt to show that Antabuse monitoring, urine testing and supervision would likely have been imposed on him in 2005, prior to his being charged in the death of Mr. Myles. Pl.'s Reply at 42-43; CP 412-17. However, Plaintiff does not show how one is probative of the other, and this evidence is therefore also inadmissible under ER 402 as irrelevant.

C. The Records at Issue Are Unauthenticated and Inadmissible Under CR 44(a)(1) and 56(e), ER 901 and 902, and RCW 5.44

In addition, the documents at issue are not properly authenticated and, thus, are not admissible. CR 56(e) provides that affidavits in support

of summary judgment be made “on personal knowledge” and that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Thus, in *Burmeister v. State Farm Ins. Co.*, the Court of Appeals held that an attorney’s declaration “certifying” that a police report was a “true and certified cop[y] of the original” was insufficient to authenticate the uncertified copy of the police report, because the attorney could not testify to the authenticity of the report based on his personal knowledge. 92 Wn. App. 359, 366-67, 966 P.2d 921 (1998). The court therefore reversed the trial court’s order denying the defendant’s motion to strike. This was in spite of the fact that the police report itself was signed and “certified” as “true and correct” by the police officer who prepared the report. *Id.* at 367. The signed report was nonetheless inadmissible because it was not offered under the seal of a public officer. *Id.* Similarly, the purported court records submitted by Plaintiff in opposition to State Defendants’ motion for summary judgment are not certified and Plaintiff’s counsel does not possess the personal knowledge necessary to authenticate them.

Further, the court in *Burmeister*, in ruling that the police report was *not* properly authenticated, considered the 10 illustrations provided in ER 901(b) of documents that *are* properly authenticated and did not find

that any applied. *Id.* at 365-66, n.4. Plaintiff in this case relies on ER 901(b)(4) to argue that the uncertified court records are nevertheless properly authenticated. Pl.’s Reply at 17. Plaintiff’s reliance on that provision is misplaced.

ER 901(b)(4) pertains to records that are self-authenticating as a result of their “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” Like the police report in *Burmeister*, the uncertified court records in this case do not possess any distinctive characteristics sufficient for authentication. Although Plaintiff notes that the some of the records bear a date stamp and the clerk’s sub-numbers, Plaintiff does not cite to any authority showing that these are the sorts of “distinctive” features contemplated by ER 901(b)(4). Moreover, were Plaintiff correct, there would be no need for the certification requirements for public records under CR 44(a)(1),¹ ER 902(d)² or RCW 5.44.³ *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (holding that the court “may not delete language from an

¹ CR 44(a)(1) pertains to proof of official state records by an official publication or by official attestation accompanied by certification of custody.

² ER 902(d) pertains to certification of official records, reports, and other publicly filed records. *See State Resp’t Br.*, App. at 12.

³ RCW 5.44.010 pertains to certification and admissibility of court records and proceedings. *See State Resp’t Br.*, App. at 13. RCW 5.44.040 similarly pertains to certification and admissibility of state agency records and documents. *See State Resp’t Br.*, App. at 14.

unambiguous statute: Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” (Internal quotation marks and citations omitted.).

Plaintiff cites to *Int’l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, for the holding that CR 56(e) does not “limit the type of evidence allowed to authenticate a document” and that “evidence which is sufficient to support a finding that the evidence in question is what the proponent claims it to be” will satisfy the authentication requirement of CR 56(e). Pl.’s Reply at 46-47, citing to 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004). In so holding, the court did not dispose of the requirement that certain records must be sworn or certified. Rather, it explained that ER 901 and 902 provide “alternative means of authenticating documents in addition to those found in chapter 5.44 RCW and CR 44.” *Id.* at 746. However, if the document has *not* been authenticated under ER 901 or 902, it still must be authenticated under either RCW 5.44 or CR 44. As previously noted, Plaintiff has failed to authenticate these records under either ER 901 or ER 902. Nor has Plaintiff certified them under RCW 5.44 or CR 44. Therefore, because they are not properly certified, the records may not be considered on summary judgment. *See* CR 56(e).

The court in *Int'l Ultimate* also held that “authentication may be satisfied when the party challenging the document originally provided it through discovery.” *Id.* at 748. Consistent with this, Plaintiff argues that Defendant Clark County opened the door to some of this evidence when it offered the County District Court Dockets as exhibits. Pl.’s Reply at 20, 24. But, whether or not Clark County may have opened the door to the use of the purported court dockets, State Defendants did not. Further, State Defendants do not object on appeal to the authenticity of any document they originally produced in discovery in this case.⁴ *See Int'l Ultimate, Inc.*, 122 Wn. App. at 748.

Plaintiff also attempts to justify her failure to obtain certified copies of the records at issue due to the associated cost of doing so. Pl.’s Reply at 47. However, Plaintiff offers no evidence to show what those costs would have been, nor does Plaintiff cite to any authority to demonstrate that the alleged financial burden that may be placed on one litigant supersedes the procedural guarantees afforded to another. Accordingly, the unauthenticated records should not be considered on the basis of any alleged additional cost to the Plaintiff.

⁴ Washington State Patrol inadvertently objected to the records found at CP 292-301, and withdraws its objection to those records.

D. The Records at Issue Are Not Subject to Judicial Notice Under ER 201

Plaintiff also maintains that the trial court is permitted to take judicial notice of these records under ER 201. Pl.'s Reply at 17, 24. That is incorrect. While it is true that the court may take judicial notice of the record in the cause before it, it may not similarly take judicial notice of the record of separate proceedings. The Washington Supreme Court has spoken quite clearly on this point:

[C]ourts of this state cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties. The record, though public, must be proved.

Swak v. Dep't of Labor & Indus., 40 Wn.2d 51, 54, 240 P.2d 560 (1952).

III. CONCLUSION

The trial court in this case specifically relied on inadmissible evidence in ruling on State Defendants' motion for summary judgment. That ruling is prejudicial to State Defendants to the extent this Court would otherwise reverse the trial court's entry of summary judgment in favor of the State Defendants. In that event, this Court should find that the documents identified above are inadmissible, that they should not be considered on summary judgment, and that summary judgment was appropriately granted.

RESPECTFULLY SUBMITTED this 12th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I caused service of the foregoing REPLY BRIEF OF CROSS-APPELLANTS STATE OF WASHINGTON AND ROBERT BRUSSEAU, that has been electronically filed with the Court of Appeals Division II, and electronically served on the following parties, according to the Court's protocols for electronic filing and service:

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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.

s/Debbie Thomas

Debbie Thomas

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