

Nº. 50156-2-II

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

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STATE OF WASHINGTON  
Respondent,

v.

NICHOLAS P. BAJARDI,  
Appellant.

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REPLY BRIEF OF APPELLANT

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Appeal from the Superior Court of Thurston County,  
Cause No. 16-1-01896-7  
The Honorable James J. Dixon, Presiding Judge

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A. ARGUMENT

**1. The State fails to cite any authority that recognizes the hearsay statements contained in a driver’s license as evidence admissible as a “business record” or “public record.”**

Mr. Bajardi challenges the admission of the hearsay statements contained on a driver’s license in Exhibit 1 under the “business records” or “public records” hearsay exceptions contained in ER 803(a)(6) and ER 803(a)(8).<sup>1</sup> Mr. Bajardi argues that the contents of the driver’s license were inadmissible as “business records” under RCW 5.45.020 because the State presented no records custodian or any other witness who testified as to the accuracy of the sources of information used to prepare driver’s license.<sup>2</sup> Mr. Bajardi argues that the contents of the driver’s license were inadmissible as “public records” under RCW 5.44.040 because the information contained on the driver’s license is not comprised of “statements by public officials or employees.” Rather, the information is information provided by a third party (the license applicant) at the time the driver’s license was applied for and issued.

In response, the State discusses *State v. Mares*, 160 Wn.App. 558, 248 P.3d 140 (2011), *State v. Ziegler*, 114 Wn.2d 533, 789 P.2d 79 (1990), and *State v. Monson* 113 Wn.2d 833, 784 P.2d 485 (1989).<sup>3</sup> However,

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<sup>1</sup> Appellant’s Opening Brief, p. 6-14.

<sup>2</sup> Appellant’s Opening Brief, p. 9-12.

<sup>3</sup> Respondent’s Brief, p. 4-7.

none of these cases address the issues raised by Mr. Bajardi, that the statements contained on a driver's license are hearsay that is not automatically admissible under the "business records" or "public records" exceptions.

A. *State v. Mares.*

*Mares* is the case that is factually closest to Mr. Bajardi's case, but the legal question at issue in *Mares* is very different from the questions presented here. The issue before the court in *Mares* was whether the defendant was entitled to confront the Department of Licensing records custodian who certified the authenticity of the victim's driver's license where the victim did not testify or appear at trial but the State introduced a certified copy of her driver's license by way of certified letter from the Department of Licensing (DOL) records custodian as evidence of the victim's identity.<sup>4</sup>

Mr. Bajardi is not challenging the authenticity of Exhibit 1, nor is he claiming his right to confront the witnesses against him was violated. Mr. Bajardi is challenging whether the contents of Exhibit 1 were admissible under the "business record" or "public record" hearsay exceptions. Neither of these issues were litigated in *Mares*. However, in reaching its decision the *Mares* court did write,

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<sup>4</sup> *Mares*, 160 Wn. App. at 560-561, 248 P.3d 140.

Business and public records are generally admissible absent confrontation because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial. The certification here attests only to the authenticity of a public record. It offers neither an interpretation of the record nor any assertions about its relevance, substance, or effect. The custodian did not attest that the license belonged to any particular “Brittany Knopff,” nor that the person pictured on the license was the victim of a crime. Other witnesses made those assertions, and Mares had a full opportunity to confront them.<sup>5</sup>

Unlike *Mares*, here the State *did* use the driver’s license in Exhibit 1 to attest that the license belonged to a particular Erin Roblin who was the victim of the crime charged in this case. Mares is factually and legally distinguishable from this case and does not support the State’s argument that the contents of Exhibit 1 were properly admitted. If anything, under *Mares* the State’s use of Exhibit 1 in this case was improper because the State attempted to use a purported “business record” or “public record” as a testimonial document to prove a fact at trial. The contents of the driver’s license depicted in Exhibit 1 is hearsay that is not admissible under the “business record” or “public record” hearsay exceptions.

2. *State v. Ziegler*.

In arguing that the contents of the driver’s license in Exhibit 1 were admissible under the business record exception, the State cites the

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<sup>5</sup> *Mares*, 160 Wn. App. at 564, 248 P.3d 140 (footnote omitted).

following passage from *Ziegler*: “The UBRA, RCW 5.45.020, makes evidence that would otherwise be hearsay competent testimony. The UBRA contemplates that business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify.”<sup>6</sup> However, the State fails to discuss the very next sentence of the *Ziegler* opinion that reads,

The UBRA contains five requirements for admissibility designed to ensure reliability. To be admissible in evidence a business record must (1) be in record form, (2) be of an act, condition or event, (3) be made in the regular course of business, (4) be made at or near the time of the act, condition or event, and (5) the court must be satisfied that the sources of information, method, and time of preparation justify the admittance of the evidence.<sup>7</sup>

The “business records” at issue in *Ziegler* were lab reports that were part of the medical records of two doctors who had treated a rape victim.<sup>8</sup> The *Ziegler* court found the trial court did not err in finding that the lab reports met the requirements for admissibility under the UBRA, noting that in *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 *review denied*, 103 Wn.2d 1036 (1985), the court held, “A practicing physician's records, made in the regular course of business, properly identified and otherwise relevant, constitute competent evidence of a condition therein

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<sup>6</sup> *Ziegler*, 114 Wn.2d at 537–38, 789 P.2d 79.

<sup>7</sup> *Ziegler*, 114 Wn.2d at 538, 789 P.2d 79, *citing State v. Kreck*, 86 Wn.2d 112, 118–19, 542 P.2d 782 (1975); *Tennant v. Roys*, 44 Wn.App. 305, 312, 722 P.2d 848 (1986).

<sup>8</sup> *Ziegler*, 114 Wn.2d at 537–38, 789 P.2d 79.

recorded.”<sup>9</sup>

In finding the medical records admissible, the *Ziegler* court cited with approval the following portion of the *Sellers* opinion:

We find no merit in Sellers' next contention, that a lab report showing Pamela's blood type was inadmissible because neither the technician who had done the tests nor his supervisor was called to authenticate it. *The report was part of her physician's file and was identified by him.* It was admitted as a business record under RCW 5.45.020. *The statute does not require that the record be made by the person performing the lab test, but only that it was made in the regular course of business under circumstances which the court finds makes it trustworthy. A practicing physician's records, made in the regular course of business, properly identified and otherwise relevant, constitute competent evidence of a condition therein recorded.* The blood tests were requested and used by Pamela's physician in his treatment of her for two pregnancies and other health matters during her 8 years as his patient. This is very convincing evidence of their trustworthiness. The report was properly admitted.<sup>10</sup>

The *Sellers* and *Ziegler* courts found that medical records were admissible as business records because the medical records in those cases satisfied the five-part test set out in RCW 5.45.020, including sufficient evidence to satisfy the court that “the sources of information, method, and time of preparation justify the admittance of the evidence.” This is in stark contrast to Exhibit 1 in this case about which the State presented **no** evidence of the sources of information used to create it, the method of its

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<sup>9</sup> *Ziegler*, 114 Wn.2d at 538–39, 789 P.2d 79.

<sup>10</sup> *Ziegler*, 114 Wn.2d at 538–39, 789 P.2d 79 (emphasis in original), citing *Sellers*, 39 Wn.App. at 806–07, 695 P.2d 1014.

creation, or the time of its preparation. In short, the factors that established the reliability of the medical records at issue in *Ziegler* and *Sellers* such that the records are glaringly absent from the record in this case.

*Ziegler* is factually distinguishable from this case and the State fails to acknowledge or address the five-part test for admissibility of a business record set out in RCW 5.45.020. The State presented no evidence at trial that addresses the reliability of the information contained in Exhibit 1 and makes no argument about it in its Response Brief. It was an abuse of the trial court's discretion for the trial court to admit Exhibit 1 as a "business record" with requiring evidence of its reliability.

C. *State v. Monson.*

*Monson* involved "the admissibility of a certified copy of a defendant's driving record to establish that the defendant's driver's license was suspended or revoked."<sup>11</sup> The State is correct that the *Monson* court held that "RCW 5.44.040 provides for admissibility of certified copies of public records as an exception to the hearsay rule"<sup>12</sup> and found that, despite a driving record being a hearsay statement,<sup>13</sup> the driving record

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<sup>11</sup> *State v. Monson*, 113 Wn.2d 833, 834, 784 P.2d 485 (1989).

<sup>12</sup> *Monson*, 113 Wn.2d at 839, 784 P.2d 485.

<sup>13</sup> *Monson*, 113 Wn.2d at 836, 784 P.2d 485.

was admissible under RCW 5.44.040 as a public record.<sup>14</sup>

In so ruling, the *Monson* court noted that RCW 5.44.040 has two functions: “the statute (1) describes the way in which a public record is authenticated, and (2) directs admission thereof into evidence despite its hearsay character.<sup>15</sup> Again, Mr. Bajardi does not dispute that Exhibit 1 was an authentic copy of a Washington driver’s license. Mr. Bajardi argues that the contents of the driver’s license are inadmissible under the public records hearsay exception because the *contents* of the driver’s license do not meet the definition of a “public record” under RCW 5.44.040.

The *Monson* court acknowledged that RCW 5.44.040 is treated “as a codification of the common law public records hearsay exception.”<sup>16</sup>

The *Monson* court explained,

When this court adopted the evidence rules it did not adopt as part of ER 803 a hearsay exception for public records and reports. Instead, ER 803(a)(8) states: “[Reserved. See RCW 5.44.040.]” The comment to ER 803(a)(8) explains: “Federal Rule 803(8) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by the statute and decisions already familiar to the bench and bar.” The reference to the statute in ER 803 and the comment show that the reason the federal public records hearsay exception was not adopted was because the statute already provided for the exception. Further, **because**

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<sup>14</sup> *Monson*, 113 Wn.2d at 837, 784 P.2d 485.

<sup>15</sup> *Monson*, 113 Wn.2d at 836, 784 P.2d 485.

<sup>16</sup> *Monson*, 113 Wn.2d at 837, 784 P.2d 485.

**existing decisional law was approved, cases in which the courts have treated the statute as codifying the common law hearsay exception continue in force.**<sup>17</sup>

The *Monson* court also made clear that just because a document can be categorized as a “public record” that document is not automatically admissible:

not every public record is automatically admissible under [RCW 5.44.040]. As this court held:

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.<sup>18</sup>

In addition to being prepared by a public official and containing facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion (such as a belief that the person pictured on a driver’s license is the person described in the body of the license), the common-law “public records” hearsay exception contained additional requirements for a document to be found to be admissible as a “public record”:

The usual public record sought to be introduced as an

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<sup>17</sup> *Monson*, 113 Wn.2d at 838–39, 784 P.2d 485 (emphasis added).

<sup>18</sup> *Monson*, 113 Wn.2d at 839, 784 P.2d 485, citing *Steel v. Johnson*, 9 Wash.2d 347, 358, 115 P.2d 145 (1941).

exception to the hearsay rule has been prepared by a public official who had a duty to make it. Its reliability is based upon that assumption. See McCormick, *Law of Evidence*, 2d ed. ch. 32 s 315 (1972). Where the official has neither prepared the document nor from first-hand knowledge can authenticate its preparer, a proper foundation for its admissibility has not been laid.”<sup>19</sup>

In other words, since common-law decisions regarding the “public records” continue to apply under RCW 5.44.040, for a document to be admissible under the “public record” hearsay exception, the proponent of the document must show: (1) it was prepared by a public official who had the duty to make it or the public official can, through first-hand knowledge, authenticate the contents of the document; and (2) it contains facts and not opinion or conclusions involving the exercise of judgment or discretion.

For example, in *Tire Towne, Inc.*, Tire Town obtained judgments against a logging company and, to enforce those judgments, caused the sheriff to seize a trackloader found in the possession of the debtor.<sup>20</sup> The following month, Farish & Gunther, Inc, who were not the judgment debtors, filed an affidavit and bond with the sheriff claiming ownership of the trackloader and demanding the sheriff return the trackloader.<sup>21</sup>

At trial, Tire Town attempted to establish title of the trackloader in

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<sup>19</sup> *Tire Towne, Inc. v. G & L Serv. Co.*, 10 Wn. App. 184, 190, 518 P.2d 240 (1973).

<sup>20</sup> *Tire Towne, Inc. v. G & L Serv. Co.*, 10 Wn. App. at 185, 518 P.2d 240.

<sup>21</sup> *Tire Towne, Inc. v. G & L Serv. Co.*, 10 Wn. App. at 185-186, 518 P.2d 240.

the debtor by calling a deputy Clallam County assessor who identified a document titled, “1970 Listing of Personal Property” that had been filed with the assessor and was purportedly made for tax purposes.<sup>22</sup> The filing described the trackloader and was accompanied by an affidavit that the filing was, under penalty of perjury, “a true, correct, and complete listing of all taxable personal property (including consigned merchandise and leased equipment)...owned, held, or controlled by” the debtor.<sup>23</sup> The affidavit was admitted over Farish’s objection that it was hearsay and no attempt had been made to authenticate the signature of the person who signed the affidavit.

The Court of Appeals held that the affidavit should not have been admitted because, inter alia,

the signature of the preparer was never authenticated. The deputy assessor was not able to testify from his personal or first-hand knowledge that the signature was in fact authentic. The usual public record sought to be introduced as an exception to the hearsay rule has been prepared by a public official who had a duty to make it. Its reliability is based upon that assumption. See McCormick, *Law of Evidence*, 2d ed. ch. 32 s 315 (1972). Where the official has neither prepared the document nor from first-hand knowledge can authenticate its preparer, a proper foundation for its admissibility has not been laid.

Furthermore, we agree with Farish, that the hearsay exclusionary rule is applicable to the document in question. The tax filing was offered not for the purpose of proving

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<sup>22</sup> *Tire Towne, Inc. v. G & L Serv. Co.*, 10 Wn. App. at 188, 518 P.2d 240.

<sup>23</sup> *Tire Towne, Inc. v. G & L Serv. Co.*, 10 Wn. App. at 188, 518 P.2d 240.

that a filing had been made with the assessor, but for the purpose of proving the alleged claim of ownership contained therein. The preparer was not subject to cross-examination as to the factual basis for this asserted conclusion and the filing should have been excluded.<sup>24</sup>

Thus, in *Tire Towne, Inc.*, while the affidavit could be described as a “public record” it should not have been admitted because it was offered to prove the facts claimed therein but was not prepared by a public official and the public official could not verify the contents of the affidavit. This is precisely the argument being made by Mr. Bajardi in this appeal. The State offered Exhibit 1 not to prove that a license existed for a particular person, but to establish the truth of the information asserted in the license—that the individual pictured on the license was accurately described by the information contained on the license. However, the statements contained on the driver’s license were not the statements of any public official and no public official was called who could verify the accuracy of the information contained in the driver’s license.

The State’s reliance on *Monson* is misplaced. Unlike an individual’s driving record, the statements contained in that same individual’s driver’s *license* are not statements made by a public official. The information on a driver’s license might originally be input into the Department of Licensing’s computer system by a public employee, but the

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<sup>24</sup> *Tire Towne, Inc. v. G & L Serv. Co.*, 10 Wn. App. at 190, 518 P.2d 240.

State presented no evidence that whatever employee initially took the information contained on the license could authenticate the accuracy of that information. The DOL employee who input the information into the DOL databade that ultimate was reproduced on the driver's license in Exhibit 1 is like the deputy-assessor in *Tire Town, Inc*- the State presented no evidence that the employee who made the statements on the driver's license could verify the accuracy of those statements, making it error for the trial court to admit evidence of the driver's license.

B. CONCLUSION

The State fails to cite authorities or make argument addressing the issues raised in Mr. Bajardi's Opening Brief. If anything, the authorities cited by the State support Mr. Bajardi's arguments.

For the reasons stated above and in Mr. Bajardi's Opening Brief, this court should either vacate Mr. Bajardi's conviction and dismiss the charge with prejudice, or, alternatively, remand his case for a new trial where Exhibit 1 is excluded as hearsay.

DATED this 28<sup>th</sup> day of August, 2017.

Respectfully submitted,



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Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 28<sup>th</sup> day of August, 2017, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Thurston County Prosecutor  
2000 Lakeridge Dr SW  
Olympia, WA 98502-6045

And to:

Mr. Nicholas Bajardi, DOC# 362762  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

Signed at Tacoma, Washington this 28<sup>th</sup> day of August, 2017.



Reed Speir, WSBA No. 36270

# LAW OFFICE OF REED SPEIR

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## Transmittal Information

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