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Division II
State of Washington
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No. 52843-6-II

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

ARTHUR WEST,
appellant,

Vs.

CLARK COUNTY,
respondent

Review of decisions entered by
the Honorable Judge Warning

APPELLANT'S
OPENING BRIEF

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III. SUMMARY OF ARGUMENT

This case involves the application of the scope of employment standard and the conduct of business rule developed in *Nissen*, *Vermillion* and *Door* to social media postings on Facebook by then Clark Council Member Dave Madore to determine if they are public records.

Because, unlike those of former Puyallup City Council member *Door*, the Facebook posts of Clark County Council member Madore demonstrate that Madore was acting in his official capacity to actively conduct back and forth discussions of "specific details of (his) work as a Council member and "regarding Council discussions, decisions, or other actions" Madore was "conducting business" and "creating and exchanging public records", the case and record-specific inquiry required under *Door* and *Nissen* should result in a finding that the Facebook posts in this case are public records and that the county violated the Public Records Act in failing to identify or produce them.

As the Supreme Court ruled in *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015).....

If the PRA did not capture records individual employees prepare, own, use, or retain in the course of their jobs, the public would be without information about much of the daily operation of government. Such a result would be an affront to the core policy underpinning the PRA — the public's right to a transparent government. That policy, itself embodied in the statutory text, guides our interpretation of the PRA. RCW 42.56.030; LAWS OF 1973, ch. 1, § 1(11); *Hearst Corp.*, 90 Wash.2d at 128, 580 P.2d 246. *Nissen*, at 53...

Yet the ability of public employees to use cell phones to conduct public business by creating and exchanging public records — text messages, e-mails, or anything else — is why the PRA must offer the public a way to obtain those records. Without one, the PRA cannot fulfill the people's mandate to have "full access to information concerning the conduct of government on every level." LAWS OF 1973, ch. 1, § 1(11). *Nissen*, at 56

In light of the clear precedent in *Nissen*, and the undeniable circumstance that the disputed posts concerned detailed back and forth discussions of specific council action and detailed discussions of the business of the county, conducted by an elected official within the broad scope of their duties, this case should be remanded back to the Trial Court with instructions to find that Clark County Council member Madore and Clark County violated the Public Records Act.

IV. ASSIGNMENTS OF ERROR

- 1. The Court erred in ruling that Clark County council member Madore’s Facebook posts were not public records when substantial evidence demonstrated that they fell withing the “scope of employment” standard and the more definite “conduct of public business” rule set forth in Nissen, Vermillion, and Door.....**12**

- 2. The Court erred in ruling that the disputed records were not public records when substantial evidence demonstrated that Clark County Council Member Madore’s posts: **a.** contained indications they were made in his official capacity, **b.** contained specific details of Madore's work as a City Council member, county business and council action, **c.** involved details of matters that would come before the council for a vote, and **d.** included back and forth discussions concerning specific details of council action and county business.....**17**

- 3. The Court erred in failing to grant a continuance or consider or take notice of evidence that met a reasonable standard of authentication under ER 901 and which was subject to judicial notice under ER 201.....**23**

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Did the Court err in ruling that Clark County council member Madore’s Facebook posts were not public records when substantial evidence demonstrated that they fell withing the “scope of employment” standard and the more definite “conduct of public business” rule set forth in Nissen, Vermillion, and Door? Yes.....

- 2. Did the Court err in ruling that the disputed records were not public records when substantial evidence demonstrated that Clark County Council Member Madore’s posts: **a.** contained indications they were made in his official capacity, **b.** contained specific details of Madore's work as a City Council member, county business and council action, **c.** involved details of matters that would come before the council for a vote, and **d.** included back and forth discussions concerning specific details of council action and county business? Yes.....

- 3. Did the Court err in failing to grant a continuance or consider or take notice of evidence that met a reasonable standard of authentication under ER 901 and which was subject to judicial notice under ER 201? Yes.....

V. STATEMENT OF THE CASE

This case concerns the issues of whether, or under what circumstances, the online social media postings of an elected quasi-municipal officer, in this case a Clark County Council Member, should be subject to disclosure under the Public Records Act. (CP at 3-5)

This case originates in a request under the Public Records Act to Clark County of July 25, 2016, for the following records...

"Any messages or communications concerning county business posted on, sent to or received at Councilor Dave Madore's Facebook page, or any facebook page used by Mr. Madore to conduct county business, 2013 to present" (CP at 9, line 4-8)

The County responded and provided an estimate the next day

On August 5, 2016th the County provided West with an affidavit from Madore stating that no public records were on his facebook site and closed his request. (CP at 9, line 14-16)

Significantly, a key portion of the declaration, that the records were not "related to the governance of Clark County" was crossed out by Mr. Madore prior to his signing it. (CP at 4, line 12-14)

Numerous postings on the site indicated that the posts were made in an official capacity, with one stating that "As a

representative of the citizen's of Clark County, let me say this..."
and another **including his oath of office under the heading of**
"Reporting for duty sir!" (CP at 32, 33, and 73)

Numerous postings on the site that the County declined to identify or produce also concerned specific detailed discussions of County Council action and county business. (See CP at 73-109, 32-68)

A number of the posts also involved detailed back and forth discussions of specific county and County Council matters between Mr. Madore and the public. (See CP at 73-109, 32-68)

Plaintiff filed Suit on August 24, 2016. (CP at page 3-5)

On March 7, 2018 the Complaint was Amended (CP at page 17-19)

On April 25, 2018 a hearing was held on defendant's Motion for Summary Judgment. (Transcript of April 25, 2018)

At the April 25, 2018 hearing, the Court denied West's Motion to continue under CR 56 and refused to take judicial notice of or admit evidence under ER 901. (Transcript of April 25, 2018)

On November 7, 2018, the Court entered an Order granting the defendant's Motion and dismissing the case. (CP 115-117)

On November 19, 2018, Plaintiff filed a Motion for Reconsideration (CP at 104-198)

On December 7, 2018, Plaintiff filed a timely Notice of appeal (CP at 138-140)

On April 1st, 2018, the Court entered an Order denying reconsideration (CP at 136-7)

On April 29, 2018, Plaintiff filed a timely Amended Notice of appeal (CP at 138-40)

STANDARD OF REVIEW

This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review all substantive issues de novo and the issues involving admission of evidence under the abuse of discretion standard.

ORDERS ON APPEAL

Appellant seeks review of the Order Granting Summary Judgment of November 7, 2016 (CP 115-117) Appellant also seeks review of the Court's April 1st, 2019 Order Denying Reconsideration (CP 136-7)

VI. ARGUMENT

1. The Court erred in ruling that Clark County council member Madore's Facebook posts were not public records when substantial evidence demonstrated that they fell within the "scope of employment" standard and the more definite "conduct of public business" rule set forth in *Nissen, Vermillion, and Door*.....**12**

The Court erred in entering the Order of November 7, 2018 (CP 115-117) and April 1st, 2019 (CP 136-137) in that it failed to follow the rule of law set forth by this Court in *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197, (2018), a case involving the facebook posts of Puyallup Council member Julie Door.

On February 21, 2018, this Court, Division II of the Court of Appeals, issued a Published Opinion concerning the Facebook posts of Puyallup City Council member, Julie Door.

In the *Door* case, this Court held:

posts on social media sites like Facebook potentially can constitute public records, just like any other written communication. The court in Nissen emphasized that the PRA must apply when public employees "use cell phones to conduct public business by creating and exchanging public records-text messages, e-mails or anything else." 183 Wash.2d at 884, 357 P.3d 45. The same rule necessarily applies to public officials using Facebook to "conduct public business." Therefore, a Facebook post can constitute a public record -but only if the statutory requirements are satisfied. *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197, (2018)

Citing to Nissen, this Court reiterated that:

The (Nissen) court held that "[a]n employee's communication is within the scope of employment' only when [1] the job requires it, [2] the employer directs it, or [3] it furthers the employer's interests." *Id.* at 878, 357 P.3d 45. In other words, the PRA applies only to "records related to the employee's public responsibilities." *Id.* At 879, 357 P. 3d 45. The court stated that "[t]his inquiry is always case-and record specific." *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197, (2018)

Based upon this case and record-specific inquiry, the Court of Appeals in Door concluded that the Facebook posts in that case were not public records, finding "no indication that Ms. Door was acting in her "official capacity" as a City Council member in preparing these posts".

In making this determination, this Court apparently identified several rule-like factors to guide the decision making process:

Door was not "conducting public business" on the Facebook page. The posts did not contain specific details of Door's work as a City Council member or regarding City Council discussions, decisions, or other actions. The posts merely provided general information about City activities and occasionally about Door's activities. *West v. City of Puyallup*, 2 Wn. App. 2d 586, 410 P.3d 1197, (2018)

Although the Facebook records in Door were not found to be public records, the application of the principles of Door and Nissen to the very different records in this case should lead to a very different conclusion as to the records of Council member Madore.

Complicating the Court's review in this case is that the case and record specific review are applied to both a somewhat amorphous Standard as to the scope of public employment and a more definite developing Rule regarding the conduct of public business.

As one commentator has observed "[a] legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation." while by contrast: "[a] legal directive is 'rule'-like when it

binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." See *Foreword: The Justices of Rules and Standards*, Kathleen M Sullivan 106 Harv. L. Rev. 22 (1992-1993), note 19, at 58. Cited in *Rules Against Rulification*, Michael Coenen, Yale Law Journal, Volume 124, Issue 3, (2014)

In this case the Court should clarify the developing rule as to the conduct of public business by holding that in the context of public quasi-municipal council members' communications on non-public devices, the amorphous scope of employment standard is satisfied under the conduct of business rule when such communications **a.** contain indications they were made in his official capacity, **b.** contain specific details of the official's work as an official, agency business and agency board action, **c.** involve details of matters that would come before the agency council for a vote, or **d.** include back and forth discussions concerning specific details of council action and agency business.

In addition, it might be appropriate for this Court to further refine the proto-rule-like guidelines it appears to have employed in Door to conduct its case and record specific analysis.

As one (former) Supreme Court Justice observed:

we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat-an acknowledgment that we have passed the point where "law," properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.

I stand with Aristotle, then-which is a pretty good place to stand-in the view that "personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement." See *The Rule of Law as a Law of Rules*, Antonin Scalia *The University of Chicago Law Review* Volume 56 Number 4, at page 1989, citing Ernest Barker, transl, *The Politics of Aristotle*, book III, ch xi, § 19 at 127 (Oxford, 1946).

By refining the conduct of business rule, and how it applies to the scope of employment standard, this court can not only resolve this existing case, but enhance the regularity and predictability of future rulings¹ .

¹ See, Rules Against Rulification Michael Coenen, Yale Law Journal, Volume 124, Issue 3, (2014): Frederick Schauer has also written about the rulification phenomenon, although his focus is less on the sort of "natural" rulification process that results from the accretion of judicial precedents, and more on conscious decisions to inject rule-like

2. The Court erred in ruling that the disputed records were not public records when substantial evidence demonstrated that Clark County Council member Madore’s posts: **a.** contained indications they were made in his official capacity, **b.** contained specific details of Madore's work as a City Council member, county business and council action, **c.** involved details of matters that would come before the council for a vote, and **d.** included back and forth discussions concerning specific details of council action and county business.....

The Court erred in entering the Orders of November 7, 2018 (CP 115-117) and April 1st, 2019 (CP 136-137) when an application of the case and record specific inquiry of Nissen to the facts and records of this case in under the scope of employment standard and the conduct of business rule in accord with the considerations identified in Door demonstrated that Madore’s posts were public records.

In Door, the analysis of the Court of Appeals was based upon the critical and peculiar circumstances involving Facebook postings of general information, which did not constitute "doing business"

language into the interstices that standards leave open. *See* Schauer, *supra* note 13, at 805-06 (2005) ("Whether it be by importing rules from elsewhere, or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three- and four-part tests, interpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree. ..." (footnote omitted)); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1904 (2008) (noting that "courts frequently engage in what Frederick Schauer has called the 'rulification' of standards, developing sub-principles that guide their application of standards"); Mark Tushnet, *The First Amendment and Political Risk*, 4J. LEGAL ANALYSIS 103, 106 (2012) (noting the "tendency over time for courts to replace doctrine articulated in the form of standards with doctrine articulated in the form of rules with exceptions")

and which did not meet the requirements of the text messages set forth in Nissen.

As the Vermillion Court explained:

Second, the Nissen court considered whether the specific records requested were public records. The court noted that the text messages were a writing, and considered whether the requested records "'relat[e] to the conduct of government or the performance of any governmental or proprietary function'" and were "'prepared, owned, used, or retained' by an agency." Nissen, 183 Wn.2d at 880-81 (alteration in original) (quoting RCW 42.56.010(3)). The court held that the content of the text messages requested were potentially public records subject to disclosure because the requester sufficiently alleged that the elected prosecutor put "'work related'" outgoing text messages "'into written form'" and "'used'" incoming text messages "while within the scope of employment, "thereby satisfying the three elements of a public record in RCW42.56.010 (3). Nissen, 183Wn.2d at 882-83. (Vermillion. Citing Nissen)

Similarly, this Court should conclude, in accord with the Rule set forth in Door, Vermillion, and Nissen, that Council member Madore put "'work related'" outgoing text messages "'into written form'" and "'used'" incoming text messages "while within the scope of employment," thereby satisfying the three elements of a public record in RCW 42.56.010(3).

In this present case, the Madore Facebook records are radically different in nature from those in the Door case. There *are* specific indications that Council member Madore was acting in his official capacity, the posts *did* contain specific details of Madore's work as a County Council member and detailed discussion regarding Council discussions, decisions, or other actions, and, perhaps most critically, Madore, in stark contrast to Door, *did* engage in extensive back and forth discussions of specific Council voting and business matters.

Thus, since Clark County Council member Madore, unlike Puyallup City Council member Julie Door, *was* conducting business and actively engaging in discussions of specific Council actions, the case and record-specific inquiry required under Nissen compels a different conclusion in regard to the very different Facebook records of Clark County Council member David Madore.

Of particular significance is the post of December 14, 2016, (See CP 32, CP 73) which is explicitly written in Madore's official capacity "As a Representative of the voters of Clark County"

Needless to say, this is an explicit recognition of the official capacity of the postings on the site and a message to any

reader that they are reading communications from an elected official acting in their formal capacity as "a representative of the citizens of Clark County"·.

Similarly appended is an August 15, 2016 screenshot that includes Madore's *Oath of Office* and a caption "*Reporting for duty, Sir!*" This, too, is, at the very least, an "indication" that Council member Madore was acting in his official capacity.

The numbered records appended in the plaintiffs ER 904 filing amply demonstrate records subject to disclosure under the PRA in the following regards:

1. The Facebook Post of November 14, 2016, (CP 32, 73) as noted above, expressly demonstrates an official capacity communication.

2. The Facebook Post of December 8, 2016 (CP 75) contains a specific discussion of Commission action on the County Budget and County Budget issues.

3. The Facebook Post of December 7, 2016, (CP 77-8) also contains a specific discussion of Commission action and County issues.

4. The Facebook Post of December 28, 2016 (CP 77-82) includes a discussion of a proposed adsorption of Skamania County,

and includes a claim by Madore that the county council majority misused the GMA. Madore responds to citizen comments at CP 82.

5. The Facebook Post of December 22, 2016 (CP 84-85) includes a discussion of the CRC LightRailTolling Project and the council majority voting thereon. Madore responds to citizen comments at CP 85.

6. The Facebook Post of December 12, 2016, (CP 87-89) contains a specific detailed discussion of a property tax vote and a reference to Council Minority Budget Amendments. Madore engages in extensive back and forth discussions at CP 88 and 89.

7. The Facebook Post of November 8, 2016 (CP 90-97) is actually that of December 6th., due to an inadvertent clerical error. This document contains a specific discussion of a Council vote on property taxes and an extensive discussion of County tax issues. Madore engages in extensive back and forth discussions at CP 94, CP 95, CP 96, and CP 97.

8. The Facebook Post of November 22, 2016 (CP 99-101) specifically discusses the actions of "a big-government-knows-best council majority that rubber stamps unchecked spending", and Council member Madore and Mielke's plan for a "right-side-up

budget instead." Madore engages in back and forth discussions at CP 101.

9. The Facebook Post of November 1, 2016 (CP 103) contains a specific discussion of County planning issues.

10. The Facebook Post of October 16, 2016 (CP 105-108) also contains a discussion of Clark County central planning "rubber stamped" by the Clark County Council. Madore engages in back and forth discussion at CP 108.

Thus, Unlike the very different case of Puyallup City Council Member Door, who only posted general information and did not engage in two-way discussions of specific county business, council actions or voting, Clark County Council member David Madore used his facebook page to engage in extensive back and forth discussion of specific and detailed county and council business and voting, including land use issues county tax increases, the County Budget, and county GMA planning issues.

As then plaintiff West argued at the hearing before the Honorable Judge Warning on April 25, 2019:

...(I)n the documents admitted under... ER 904, such as the September 7, 2017, communication, Madore talks about the Marc Boldt, Jeanne Stewart, Julie Olson rubber stamping the staff's budget...talks about the

banned council minority presentation, which he provides a link to.

...(T)he other clear and... apparent distinction between Madore and Julie Door's Facebook posts were that while Judge Door's Facebook posts were one way,... Madore's Facebook was designed to and was used for...extensive back-and-forth communications.

And there's a back-and-forth communication on the November 20th, 2016, communication about the GMA,... -- where people comment about it.... Madore responds back about the Clark County... GMA, -- that the County Council majority (allegedly) mis-used to strip rural citizens of their private property rights.

There's a communication of November 12th, 2016 -- actually, there's three comments...from Mr. Madore back to citizens on the November 12th communication on the issue of taxes. Certainly a public issue.

He's engaging in back- and-forth communication about specific issues that will come before the County for a vote. I can't see how this is not under Nissen the back and forth exchange of information....

I don't see how this can't be seen to be not conducting business of the County. These are specific issues that are being discussed, outside of a public forum, concerning details of official County business.

Again, November 6, 2016, he talks about the MPD fund, and the council majority would not allow the fund history or the computer model formula they used to be revealed.

Again, on November 16th, he makes another comment to Miss Stewart, I guess there's two more comments on this issue on the November 16th. So, this is an extensive discussion of public issues, specific public issues by a public figure, and this is what was entirely

missing in the Door case... Transcript of April 25, 2018, at Page 21-22

So, in stark contrast to the general one-way posts of Puyallup City Council member Julie Door, Clark Council member David Madore put "work related" outgoing text messages "into written form" and "used" incoming text messages "while within the scope of employment," thereby satisfying the "conducting public business" rule and the elements of a public record set forth in RCW 42.56.010(3).

Thus, a compelling case was presented as to the status of the Madore Facebook posts as public records under the PRA

In addition to the records submitted under ER 904, there were additional true and correct copies of screenshots of Madore's Facebook posts of July 29, 28, 25, 20, 18, and 9, 2016, all of which discuss specific County Council actions, issues, and voting.

These screen shots and text were accurately copied from the Facebook page of David Madore. These records were capable of ready confirmation and generally known, and as such should have been judicially noticed under ER 201.

These screenshots and texts of posts have sufficient indicia of reliability to justify their admission. Plaintiff formally moved for judicial notice of and admission of these adjudicative facts under ER 201² and was denied.

In association with many of both categories of these posts, as their accompanying text demonstrates, Council member Madore actively solicited and exchanged further messages about specific Council voting, business and activities. Most telling, and in direct contrast to the record in Door, the June 14, 2016 post of Clark County Council member Madore discusses specific details of pending land use actions.

Again, the post of May 25, 2016 involves a discussion of a CountyCode enforcement action and related specific Council actions.

The August 24, 2016 post further discusses the specifics of a Council vote and issues related to the County Animal Control program.

² ER 201 provides, in pertinent part: A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned...(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

In light of the content of the records described above, and the standard and rule set forth in established precedent, the county was not entitled to summary judgment as a matter of law and this case should be remanded back to the Trial Court for further proceedings.

3. The Court erred in failing to grant a continuance or consider or take notice of evidence that met a reasonable standard of authentication under ER 901 and which was subject to judicial notice under ER 201.....16

In entering the Orders of the Court erred and abused its discretion in failing to admit relevant evidence or grant a continuance under CR 56(f). See *Garret v. City of San Francisco*, 818 F.2d 1515, 1518-19 (9th Cir. 1987), cited in *Turner v. Kohler*, 54 Wn. App. 688, 775 P.2d 474, (1989).

The Court further erred and abused its discretion in failing to admit or consider relevant evidence under ER 901 and ER 201, and in refusing to admit evidence that met the admissibility requirement in ER 901(a):

General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

This violated the principles set forth in *State v. Thompson*, 2010 N.D. 10, 77 N.W.2d 616 (2010), as referenced by Karl B. Tegland in *Evidence 101 For The Family Law Practitioner*, available online at:

[https://www.kcba.org/streaming/Documents/FAMI Evidence_101_Family_Law_Practitioners_April2011.pdf](https://www.kcba.org/streaming/Documents/FAMI_Evidence_101_Family_Law_Practitioners_April2011.pdf)

The appellate court in Thomson, citing traditional principles of authentication, held that under Rule 901, the proponent is required only to present evidence sufficient to supporting a finding of authenticity. In other words, the proponent is required only to make a prima facie showing of authenticity. Thereafter, the opponent's challenges to authenticity go only to weight, not admissibility.

As the Court in Thompson held:
Rule 901(a), N.D.R.Ev., deals with the procedure for authenticating evidence and provides that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), N.D.R.Ev., is identical to F.R.Ev. 901(a), and we may consider persuasive federal authority in construing our rule. See State v. Manke, 328 N.W.2d 799, 802 (N.D. 1982).

Under the federal rule, the proponent of offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be; rather, the proponent must provide proof sufficient for a reasonable juror to find

the evidence is what it purports to be. See United States v. Hyles, 479 F.3d 958, 968-69 (8th Cir. 2007); United States v. Tin Yat Chin, 371 F.3d 31, 37-38 (2nd Cir. 2004); 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 901.02[3] (Joseph M. McLaughlin, ed., Matthew Bender 2nd ed. 2009); 5 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence §§ 9.1 and 9.2 (3rd ed. 2007); 5 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Capra, Federal Rules of Evidence Manual § 901.02[1] (9th ed. 2006).

Under N.D.R.Ev. 901(b)(1) and (4), examples of authentication include "[t]estimony of a witness with knowledge that a matter is what it is claimed to be," and "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." See Farm Credit Bank v. Huether, 454 N.W.2d 710, 713-1, (N.D. 1990) (document may be authenticated by circumstantial evidence, such as events preceding, surrounding, and following transmission of writing); State v. Haugen, 392 N.W.2d 799, 801-02 (N.D. 1986) (same).

Rule 901(a), N.D.R.Ev., treats authentication as a matter of conditional relevance to be decided under N.D.R.Ev. 104(b). R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386 (N.D. 1986). If the court decides evidence is what its proponent claims it to be, the court may admit the evidence and the question of its weight is for the trier-of-fact. Id. Appropriate authentication under N.D.R.Ev. 901 is primarily within the discretion of the district court, and we will not reverse the court's decision absent an abuse of discretion. R & D Amusement, at 386.

Although this Court has not previously considered an issue about the foundational requirements for the admissibility of text messages, other courts have held that similar electronic messages were authenticated by circumstantial evidence establishing the evidence was what the proponent claimed it to be. See United States

v. Siddiqui, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (e-mails properly authenticated when they included defendant's e-mail address, the reply function automatically dialed defendant's e-mail address as sender, messages contained factual details known to defendant, messages included defendant's nickname, and messages were followed with phone conversations on same topic); United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000) (foundational requirement for chat room conversation established when defendant admitted he used screen name "Cessna" when he participated in recorded conversations, several co-conspirators testified he used that name, and defendant showed up at meeting arranged with person using screen name "Cessna"); United States v. Simpson, 152 F.3d 1241, 1249-50 (10th Cir. 1998) (authentication established when chat room printout showed individual using name "Stavron" gave officer defendant's name and address and subsequent e-mail exchanges indicated e-mail address belonged to defendant); United States v. Safavian, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) (e-mail messages held properly authenticated when the e-mail addresses contain distinctive characteristics including the e-mail addresses and a name of the person connected to the address, the bodies of the messages contain a name of the sender or recipient, and the contents of the e-mails also authenticate them as being from the purported sender to the purported recipient); Dickens v. State, 927 A.2d 32, 36-38 (Md. Ct. Spec. App. 2007) (threatening text messages received by victim on cell phone were properly authenticated when circumstantial evidence provided adequate proof message was sent by defendant); Kearley v. Mississippi, 843 So.2d 66, 70 (Miss. Ct. App. 2002) (e-mails adequately authenticated when witness vouched for accuracy of e-mail printouts and police officer testified defendant admitted sending e-mails); State v. Tayler, 632 S.E.2d 218, 230-31 (N.C. Ct. App. 2006) (text messages properly authenticated when telephone employees testified about logistics for text

messages and about how particular text messages were stored and received and messages contained sufficient circumstantial evidence the victim was the person who sent and received the messages); *In re F.P.*, 878 A.2d 91, 93-95 (Pa. Super. Ct. 2005) (instant messages properly authenticated through circumstantial evidence including screen names and context of messages and surrounding circumstances); *Massimo v. State*, 144 S.W.3d 210, 215-17 (Tex. App. 2004) (e-mails admissible when victim recognized defendant's e-mail address, e-mails discussed things only the victim, defendant, and few others knew, e-mails written in way defendant would communicate, and third-party witnessed defendant sending similar threatening e-mail); see generally, Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, at § 901.08[3] and [4]; Christopher B. Mueller & Laird C. Kirkpatrick Federal Evidence, at § 9:9; 5 Stephen A. Saltzburg, Michael M. Martin, & Daniel J. Copra, Federal Rules of Evidence Manual, at § 901.02[12].

Based upon the foregoing, the Court erred in failing to admit the disputed Facebook posts, when appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances such as the events preceding, surrounding, and following transmission of writing supported their admission under ER 901, and when the posts were, as the Court itself implicitly acknowledged, subject to ready verification as they were posted online

VII. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, appellant respectfully requests that this Court reverse the Trial Court's rulings in every respect and remand this matter back to the Superior Court with instructions to find that Clark County violated the PRA, and to issue such further relief in the form of costs and penalties as may be appropriate.

Respectfully submitted this 3rd day of October, 2019.

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I hereby certify that on October 3rd, 2019, I caused to be served a true and correct copy of the preceding document on the party listed below at their addresses of record via Email:

Attorneys for Respondent County of Clark

Bill Richardson

s/Arthur West
ARTHUR WEST

ARTHURS WEST - FILING PRO SE

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