FILED
Court of Appeals
Division II
State of Washington
11/4/2019 2:55 PM

NO. 52843-6-II

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

ARTHUR WEST,
Appellant

v.

CLARK COUNTY,
Respondent

FROM THE SUPERIOR COURT FOR COWLITZ COUNTY

CAUSE NO.16-2-00879-9

BRIEF OF RESPONDENT

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A. INTRODUCTION

The Public Records Act (PRA) is meant to ensure transparency of government, to the effect that citizens have access to records that reveal how they were being governed. The PRA is not meant as a tool for "gotcha" games that result only in monetary gain. Our case is an example of the latter.

At the core of the Appellant's claim is a request for records that were readily available to Appellant prior to and after his PRA request. The records were commentary posted by private citizens on a Facebook site owned and controlled by a private citizen. Appellant argues that commentary was "public record" because the private citizen happened to be a member of Respondent's legislative body. Appellant ignores Respondent's lack of control over the private citizen's Facebook site, and in doing so, Appellant creates a "gotcha" game where Respondent does not have the type of control of the site required to ensure complete and accurate disclosure under the PRA. Additionally, Appellant has in-hand records copied from the Facebook site in anticipation of suing Respondent for inaccurate or incomplete disclosure.

In that context, Appellant now demands penalties against the Respondent for failing to produce records that Appellant already had in

hand. Thus the only possible beneficial result for Appellant is monetary gain. The Respondent did not create, possess, own, or use any record that is the subject of this case. Therefore, the records should not be deemed "public records" under the PRA.

B. RESPONSE TO ASSIGNMENTS OF ERROR

Assignments 1-2

Appellant claims the Superior Court erred in evaluating evidence under the standard found in the *West v. Puyallup* case. Appellant fails to clearly specify whether the claimed error is misapplication of law or misapplication of evidence, but either way, Plaintiff is wrong. The Court properly applied the standard, and in doing so, the Court properly found that Appellant's evidence was insufficient.

Regrettably, Appellant fails to grasp the eloquence of the Court's ruling. The Court ruled that a nexus must exist between the record and the decision-making process of the County. Appellant's brief fails to point out how that ruling is askew from the *Puyallup* standard. Appellant's brief also fails to point out evidence that establishes such a nexus. Therefore, Appellant's brief fails to point out any error in the underlying Court's decision.

Issue 3

Appellant claims the Superior Court erred in denying a continuance and failed to properly apply Evidence Rule 901 and 201. Regrettably, Appellant wholly fails to argue those issues in his brief. Instead, Appellant wafts in volumes of case law, most of which is not binding on this Court. Appellant then proceeds, without establishing any factual basis to show violations of those cases, to summarily claim that the underlying Court erred. In essence, Appellant demands that this Court sift through the facts of this case and apply them to volumes of case law to try to find error on the part of the underlying Court. In doing so, Appellant hamstrings any ability for the Respondent to competently argue to the contrary. In other words, how is the Respondent to respond to an argument that has not been made properly by Appellant?

Despite this hardship, Respondent will do its best to briefly address the Court's rulings under ER 901 and 201, in an effort to explain why the underlying Court was unquestionably correct in its application.

C. STATEMENT OF THE CASE

The following statement is a compilation of the statement of facts found in Respondent's Motion for Summary Judgment, summarized

herein for efficiency and found at CP[1] 8-14, and with a brief recitation of the proceedings of the underlying Court.

Appellant requested messages concerning county business posted on David Madore's Facebook page from 2013 to July 2016. Respondent properly acknowledged the request. Respondent then verified that the only Facebook page that might have responsive records was a page owned and maintained by David Madore as a private citizen. Respondent obtained an appropriate *Nissen* affidavit from Mr. Madore regarding the subject Facebook page and any records contained therein and provided the same to Appellant in a timely fashion.

Appellant filed the underlying lawsuit on August 24, 2016, in which David Madore was a party. CP 1-6. Appellant then dismissed Mr. Madore on October 3, 2016. CP 7. Respondent filed its motion for summary judgment on February 1, 2018. CP 8-14.

On April 18, 2018, Appellant filed a motion for a continuance under CR 56(f). CP 113-114. In that motion Appellant failed to explain why properly authenticated documents could not have been obtained in the 45 days since Respondent's filing of the motion for summary judgment, nor did he explain why he decided to file his motion to continue only 7 days prior to the date set for hearing. More importantly, Appellant failed

[1] CP is used to designate the Clerk's Papers on Appeal

to explain what importance the proposed documents might have in the decision on the merits.

On April 25, 2018, the Court heard arguments. RP[2] 1. In that hearing Respondent objected to Appellant's attempts to submit evidence that had not been properly authenticated. RP 1-4. Appellant responded by asking for a CR 56(f) continuance and raising ER 201 and 901 as bases for admission. RP 5-6. The Court allowed Appellant's ER 904 submissions, denied submissions outside of ER 904, and denied the requested continuance. RP 6, ll. 12-25. Appellant mentioned that he thought the ruling denying the continuance was "improper," but he did not explain why. RP 18, ll. 21-24. Appellant also argued ER 901 and 201 - mentioning that the records not submitted in his ER 904 pleading were "similar" to his ER 904 submissions and that ER 901(10) possibly allowed some emails. PR 5-6. As noted above, the underlying Court denied the continuance and the exhibits not contained in the ER 904 submission.

On November 18, 2018, the Court signed an order granting Respondent's motion for summary judgment[3]. CP 115-117. On November 19, 2018, Appellant filed a motion for reconsideration wherein he cited North Dakota case law as reason for the underlying Court to

[2] RP is used to designate Verbatim Report of Proceedings.
[3] There were oversight issues that caused the delay in the signing of the order, delays that are not germane to the issues before this Court.

reconsider evidentiary decisions. CP 118-122. No argument was made regarding the underlying court's PRA ruling. The motion was not granted, so Appellant appealed.

D. ARGUMENT

1. STANDARD OF REVIEW

The actions of an agency in responding to a PRA request are reviewed *de novo*. RCW 42.56.550(3); *White v. Clark County*, 199 Wn. App. 929, 934, 401 P.3d 375 (2017), *review denied*, 189 Wn.2d 1031 (2018). That review holds true for rulings involving summary judgment. *John Doe P v. Thurston County*, 199 Wn. App. 280, 289, 399 P.3d 1195 (2017).

When a summary ruling involves factual matters, the Court looks at the evidence in a manner that is favorable to the adverse party. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 182, 401 P.3d 468 (2017). In that review, if Defendant shows a lack of evidence to support a claim, the burden then shifts to the Plaintiff to show that a genuine issue of material fact exists. *Id.* at 83. If no factual issue is present, then the Court must determine if the moving party is due judgment as a matter of law. CR 56(c).

A court's ruling regarding a continuance is subject to an *abuse of discretion* standard. *Building Industry Ass'n of Washington v. McCarthy*, 152 Wash.App. 720, 742, 218 P.3d 196 (2009). A trial court may deny a motion for a continuance of a summary judgment hearing to allow a party to conduct additional discovery when: (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact. *Id*. at 743.

A court's application of law is generally subject to *de novo* review, and that is the standard that should be applied to the underlying Court's application of Evidence Rules 201 and 901.

2. PRA RULING

The underlying Court properly applied the *Puyallup* standard to find that Respondent was due judgment as a matter of law.

Most, if not all, of the underlying Court's analysis relied upon this Court's decision in the *West v. City of Puyallup*. RP 28, ll. 3-4. In *Puyallup* this Court went through an analysis of the Supreme Court's *Nissen* and *Vermillion* cases to confirm that "postings on a 'personal' Facebook page can constitute public

records if the RCW 42.56.010(3) definition is satisfied." *West v. City of Puyallup*, 2 Wash. App.2d 586, 593 (Div. II 2018). This Court then quickly stepped into the *Nissen* analysis regarding the definition in RCW 42.56.010(3).

In analyzing the records in *Puyallup*, this Court quickly moved past the "writing" and "information relating to the conduct of government" elements of the definition in RCW 42.56.010(3). *Id*. at 595. This Court did so because the City did not expressly dispute those elements. In similar fashion, this Court need spend little, if any, time on those elements because the Respondent does not dispute them. Instead, the issue in this case centers on whether the records were prepared, owned, used, or retained by the Respondent, which is the third and last element of the definition in RCW 42.56.010(3).

In the *Puyallup* case this Court narrowed the scope of analysis to the term "prepared" because that is what the Appellant had claimed. *Id.* at 596. Although it is not easy to discern the same limitation in Appellant's Brief, his heavy emphasis on the *Puyallup* case and failure to argue "ownership," "use," and "retention" supports a similar limitation. For the purpose of this brief, Respondent will limit its discussion to the term "prepared."

Respondent did not "prepare" the records that are the subject of this appeal. This Court's analysis in *Puyallup* focused on the "scope of employment" requirement set forth in the *Nissen* decision in determining whether the City of Puyallup "prepared" the subject records. *Id.* In doing so, this Court focused on a quote from *Nissen*, "It is worth repeating that records an employee maintains in a personal capacity will not qualify as public records, even if they refer to, comment on, or mention the employee's public duties." *Id*. Instead, the creation of the record must be (1) a requirement of employment, (2) directed by the employer, or (3) in furtherance of the employer's interest. *Id*. at 597. In the *Puyallup* case this Court found no evidence of "requirement" or "direction." In our case, this Court will similarly find no evidence of "requirement" or "direction". In that context, the *Puyallup* case boiled down to a question of whether the records furthered the interests of the City of Puyallup. There is no apparent reason to treat this case differently.

The records in this case did not further Respondent's interests. In the *Puyallup* case, the Appellant urged this Court to adopt a new standard to prove the "in furtherance" element of the *Nissen* case. *Id*. at 598. In essence, the Appellant wanted this

Court to say that any record posted by a City Council member on a Facebook page that related to a matter that would come before the Council for vote would be deemed a "public record." In our case, the Appellant is yet again urging a similar standard on this Court. Appellant's Brief at 15.

This Court did not adopt Appellant's urged standard in the *Puyallup* case, and this court should not do so in this case. Instead, this Court discussed varying aspects of evidence to determine if the records were created in an official capacity. *Puyallup* at 598. The Court noted that there was no proof that any record addressed a matter that was coming to the Council for a vote. Of interest, the Court did not say that simply discussing a matter that was coming up for vote would deem the record "public." That is likely because the Court also noted that the site was not associated with the City and was not characterized as "official." The Court will find that those factors remain true in this case. This Court also found that the posts in *Puyallup* were informative in nature. *Id*. at 599. Remarkably, the underlying Court in this case found the same. RP 28, ii. 3-11[4].

[4] Admittedly, Mr. Madore's posts were more Strident that Ms. Doors, but they remained nothing more than informative.

Having considered the Appellant's evidence, the Court's final determination in *Puyallup* was that despite a potential minimal benefit that the posts might have provided to the City, any tangential benefit was "not sufficient to establish that Door was acting within the scope of employment." *Puyallup* at 599. Respondent believes this is the same concept that is encapsulated in the underlying Court's ruling when the Court said, "Was any part of the decision making process involved or affected by what's there." RP 28, ii. 13-14. In other words, was the record used in the scope of employment? The answer is no, and Appellant has failed to produce any evidence to the contrary. Specifically, Appellant has failed to establish a necessary nexus between the subject records and the business of Respondent. In that context, the decision of this Court in *Puyallup* applies to the effect that the records are not "public records." If the records are not public records, then Appellant cannot prevail and Respondent is due judgment as a matter of law.

3. <u>QUANTUM OF EVIDENCE RULING</u>

The underlying Court properly found that Appellant failed to present sufficient evidence regarding the "public" nature of the subject records.

Appellant argues that the evidence in this case is different than the evidence in the *Puyallup* case based on the nature of the evidence. Specifically, Appellant argues that the records in this case had indications of official capacity, specific details of work, and discussions of matters coming before the Clark County Council for a vote. Appellant Brief at 19. On this basis alone, Appellant claims the records constitute "doing business."[5] The underlying Court and Respondent disagree.

Simple discussion about work is not "doing business." As discussed above, the creation of a record must further the interest of Respondent. "Further the interest" is not a well-developed area of PRA law. But it is an area that requires some argument on Appellant's part. A thorough review of Appellant's Brief does not reveal any argument showing how the records at issue furthered Respondent's interest. A thorough review of the records cited in Appellant's Brief similarly does not reveal any obvious furtherance of Respondent's interests. Instead, the only thing revealed in either

[5] In Appellant's brief he specifically states, "Unlike the very different case of Puyallup 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.

review is best stated by the underlying Court, "the best description of Mr. Madore's Facebook site is as a megaphone. Mostly it's a litany of perceived wrongs." RP 28 ll. 9-11. Mr. Madore's publication of his perceived wrongs was not in furtherance of Respondent's business; at best, it was in furtherance of Mr. Madore.

Respondent properly established that there was no evidence tending to show a nexus between the subject records and any action taken on behalf of Respondent. At that point, it was incumbent on Appellant to establish an issue of fact regarding that nexus. Appellant did not do so in the underlying Court, nor does he do that now. In the absence of a fact issue, the underlying Court was required to determine whether judgment was due as a matter of law.

This Court, after having reviewed the evidence in a light favorable to Appellant, will find an absence of any nexus between the subject records and any action taken on behalf of Respondent. In doing so, this Court will find that the underlying Court had no choice but to grant Respondent judgment as a matter of law.

Of note, Appellant wafts in an argument regarding application of Evidence Rule 201 in the later part of his argument

on this issue. Appellant's Brief at 24-25. This matter is more properly discussed in the next section.

4. CONTINUANCE AND APPLICATION OF EVIDENCE RULING

The underlying Court did not abuse its discretion in denying Appellant's request for a continuance. A trial court may deny a motion for a continuance of a summary judgment hearing to allow a party to conduct additional discovery when: (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact. *Building Industry Ass'n of Washington* at 743.

Appellant did not show a good reason for delay in obtaining evidence, nor did he show how the proposed evidence would raise a genuine issue of fact. A review of Appellant's motion for continuance[6], Appellant's argument to the underlying Court[7], and Appellant's Brief will reveal absolutely nothing to explain why Appellant was unable to gather appropriately authenticated records in a timely manner. Instead, this Court will find the statement, "it is somewhat difficult to obtain certification of these records as one would in an ordinary case" in Appellant's motion for

[6] CR 113-114
[7] RP 18-25

continuance. Standing alone, that statement does establish a good reason for delay. Specifically, it does not detail actions taken by Appellant to obtain the records, nor does it explain why obtaining the records is difficult. In that same motion this Court will find Appellant's statement admitting that the proposed records were similar in form and content to the records already submitted to the underlying Court. Based on the underlying Court's determination that the accepted evidence did not raise a factual issue, it is impossible to imagine how similar records would raise a factual issue. Therefore, it appears that the underlying Court properly denied Appellant's request for continuance in two respects.

Finally, the underlying Court properly applied Evidence rules 201 and 901 to disallow Appellant's proposed additional evidence. Appellant's argument on this issue is littered with irrelevant case citations. In an effort to avoid confusion Respondent will rely on the language of rules 201 and 901 and appropriate Washington common law.

ER 201 states, 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 be reasonably be questioned. Of interest, Appellant was not trying to submit the records to prove facts contained therein. Instead, he was submitting

the records to argue that they were "public records." Therefore, it is unlikely ER 201 actually applied to the proposed evidence in this case.

Instead, it is more likely that Evidence Rule 901 is the correct analysis mechanism for the proposed evidence. ER 901 requires authentication or identification as a condition precedent to admissibility. With regard to authentication and/or identification in this case, the records cannot be public records if they are not authored by David Madore[8]. Therefore, Appellant was required to make a prima facie showing that the records were authored by David Madore.

In this regard, Appellant argues that the records had the "appearance, contents, substance, internal patterns, or other distinctive characteristics" to support admission under ER 901. Appellant's Brief at 30. However, Appellant did not, and now does not, explain which of those characteristics prove that David Madore authored the records.

The requirement for authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. *State v. Bradford*, 175 Wash. App. 912, 308 P.3d 736 (2013), *review denied* 179 Wash.2d 1010, 316 P.3d 494. This requirement is met if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication. *Id*. Appellant does not offer anything in

[8] Noting that even records authored by David Madore in this case are not "public records," as discussed in the foregoing sections.

this case to prove the records are actually authored by David Madore, other than Appellant's assertion that he copied them from a Facebook site.

E. CONCLUSION

For the reasons stated above, the Cowlitz County Superior Court's decision on summary judgment, denial of continuance, and denial of evidence should be affirmed.

DATED this 4th day of November 2019.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I served, via electronic mail, on November 4, 2019, a true and correct copy of the foregoing documents upon the following via electronic court notification of e-filing, email, and regular U.S.P.S. mailing:

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November 04, 2019 - 2:55 PM

Transmittal Information

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Appellate Court Case Title:	Arthur West, Appellant v. Clark County, et al., Respondents
Superior Court Case Number:	16-2-00879-9

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