No. 100014-6
SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID M. VINES,

Appellant,

v.

CITY OF BLACK DIAMOND, JAMEY KIBLINGER, RYAN KELLER, MICHAEL HENRICH AND BRIAN LYNCH,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendants, City of Black Diamond, Jamey Kiblinger, Ryan Keller, Michael Henrich and Brian Lynch, respectfully requests this court to affirm the Superior Court Dismissal of the Appellant's Complaint. Since the Appellant had previously dismissed two (2) identical actions pursuant to CR 41, the Superior Court issued an order dismissing the Appellant's Complaint based upon a factual findings pursuant to CR 41(a)(4). The Court of Appeals affirmed the Superior Court's findings.

The Petition for Review does not address the causes of action asserted in the Superior Court or argue any facts that would establish that the Superior Court or the Court of Appeals decisions were in error. This Court should deny the Petition for Review, since both lowers courts properly dismissed the Petitioner's Complaint

II. STATEMENT OF THE CASE

On December 21, 2018, Clyde Erickson entered the Black Diamond Police Department to report an assault committed by Appellant David Vines. (CP 94-104). According to Mr. Erickson, he visited his sister's house on that day and the Appellant accused him of stealing items, which he denied. (*Id.*) Mr. Erickson then stated that the Appellant then proceeded to hit him in the head (*Id.*) Mr. Erickson stated that he was

punched with a closed fist. (*Id.*) Mr. Erickson then gave a recorded statement to the Black Diamond Police Department. (CP 108).

Officer Henrich, with the assistance of the King County Sheriff's Office, attempted to arrest the Appellant at his home. (CP 94-104). The Appellant was not at home during the attempted arrest. (*Id.*) Office Henrich then completed a Certificate of Probable Cause. (*Id.*) Later that day, Officer Keller contacted the Appellant after reviewing Officer Henrich's Certificate of Probable Cause. (*Id.*) Officer Keller arrested the Appellant and transported him to jail. (*Id.*).

On January 4, 2019, the Appellant's son, D. Markum Vines appeared at the Black Diamond Police Department and stated that he wished to provide a statement. Mr. Vines provided a recorded statement which corroborated Mr. Erickson's statement that an assault occurred. (CP 109).

The Appellant filed his third Complaint, which is the subject of this appeal, on January 10, 2020 asserting the following causes of action:

1. Police misconduct and entrapment;
2. Illegal arrest;
3. Malicious prosecution;
4. False imprisonment;
5. Outrageous conduct;
6. Violation of constitutional rights;
7. Protective defense;
8. Intentional infliction of emotional distress.

On January 15, 2019, Appellant filed his first Complaint against the City of Black Diamond Defendant in Cause No. 19-2-01338-9 KNT. (CP 110-118). On May 13, 2019, Appellant filed a Withdrawal. (CP 119). On June 18, 2019, the Superior Court entered an Order of Dismissal pursuant to CR 41. (CP 120-121).

On July 22, 2019, the Appellant filed his second Complaint in the King County Superior Court, Cause No. 19-2-19201-1. (CP 122-131). On January 8, 2020, the Appellant filed a Plaintiff's Withdrawal in that matter, requesting that the Court dismiss the case. The Appellant then on January 10, 2020, refiled the Complaint against the City of Black Diamond Defendants in Case No. 20-2-00927-0 KNT. (CP 1-21). All of these Complaints address the identical causes of action in this matter and involves the same Defendants.

In Case No. 19-2-19201-1 the Appellant filed a CR 41 Voluntary Dismissal on May 17, 2019. (CP 132). In granting the CR 41 Dismissal, the Court entered findings pursuant to the CR 41(a)(4) that as a second dismissal, it acted as an adjudication on the merits and dismissed the case with prejudice. (CP 133-135). The Court of Appeals affirmed the dismissal.

III. ARGUMENT

This court should deny the Petitioner's Petition for Review, as the Petitioner has presented no argument that the Court of Appeals or the Superior court's decisions were in error. The Petitioner only requests a trial and objects to dismissal on Summary Judgment, which is an insufficient basis to reverse the Court of Appeals and the Supreme Court.

A. Considerations Covering Acceptance of Review.

The Petitioner has failed to discuss any of this Court's basis for consideration of a Petition for Review as outlined by RAP 13.4(b). The Court of Appeals decision in this case does not conflict with any Supreme Court decision or conflict with another division of the Court of the Appeals. Additionally, the question in this case does not address a significant question of law under the Washington State Constitution or the United States Constitution. Finally, the Petition does not involve the substantial public interest that necessitates review by the Supreme Court. The Petitioner in this matter has failed to provide this Court with any basis justifying acceptance of review and this Court should deny review of the case.

B. Summary Judgment Standard.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. Sutton v. Tacoma School District No. 10, 180 Wn.App. 859, 864 (2014). The burden is on the moving party to demonstrate that there is no genuine dispute as to any material fact and all reasonable inferences from the evidence must be resolved against him. Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 142 (1971). The facts required by CR 56(e) are evidentiary in nature, and ultimate facts or conclusions of facts are insufficient. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60 (1988).

A non-moving party in a summary judgment cannot rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the non-moving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. Seven Gables Corp. v. MGM/UA Entm't, Co., 106 Wn.2d, 1, 13 (1986). Summary judgment is proper when the only question before the Court is one of law. Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc., 112 Wn.App. 697, 702-03 (2002).

To raise a genuine issue of material fact, the nonmoving party must allege evidentiary facts as to "what took place, an act, an incident, a reality as distinguished from supposition or opinion". Roger Crain & Assocs.,

Inc. v. Felice, 74 Wn.App. 769, 778-79 (1994). The non-moving party must provide more than uncorroborated statements in a complaint. See, e.g., Iwai v. State, 129 Wn.2d 84, 88 (2001). "A claim of liability resting only on a speculative theory will not survive summary judgment." Marshall v. Bally's Pacwest, Inc., 94 Wn.App. 372, 381 (1999). Non-moving parties will not withstand summary judgment should they fail to produce evidence "explaining how the accident occurred." Id. at 381. Summary Judgment Dismissals are reviewed de novo. Cedar W. Owners Ass'n v. Nationstar Mortg., LLC, 7 Wn.App.2d 473, 482 (2019).

C. Res Judicata Precludes the Appellant's Case.

The Appellant's case has been dismissed with prejudice and the Superior Court has already made an adjudication on the merits of the matter and, as result, Res Judicata applies. In order for the Doctrine of Res Judicata to apply, a prior Judgment must have a concurrent of identity in the subsequent action which includes:

1. Subject matter;
2. Cause of action;
3. Person and parties; and
4. Quality of the persons against whom the claim is made.

Loveridge v. Fred Meyer, 125 Wn.2d 759, 764 (1995).

In this case, all of the elements are met as the Complaints filed by the Appellant in the subsequent actions are identical to the allegations

made in this particular matter. Additionally, the prior Complaint was dismissed after an adjudication on the merits and was dismissed with prejudice. The Petitioner does not provide any legal argument that the application of Res Judicata and his case is in error. Therefore, as a result, Res Judicata bars the Appellant's Complaint for Damages, and the Appellate Court properly affirmed the dismissal of the Appellant's Complaint.

The Appellant solely argues that his third Complaint was filed prior to the dismissal with prejudice. However, the Doctrine of Res Judicata continues to apply to his case as his second lawsuit was dismissed with prejudice and was an adjudication on the merits as identified by the Superior Court. Moreover, the Appellant has not argued before the Superior Court and has not argued before this court that the Doctrine Res Judicata was inappropriately applied in this matter. Based upon the Appellant's failure to argue against the Doctrine of Res Judicata, this Court should affirm the Superior Court's dismissal based upon the Appellant's two (2) prior voluntary non-suits pursuant to CR 41 and the findings by Judge McCullough that the second dismissal was an adjudication on the merits of all of his claims against the Defendants.

D. The Appellant's Complaint Improperly Asserted Criminal Statutes as Civil Causes of Action.

The Appellant has no legal authority to assert criminal statutes against the Defendants as civil causes of action. Violation of criminal statutes may only be prosecuted by a county prosecutor and not by individual plaintiffs. To the extent the Appellant is seeking to prosecute criminal causes of actions, these causes of action were properly dismissed. The Court of Appeals properly affirmed the dismissal of these claims.

E. Probable Cause to Arrest Exists.

The City of Black Diamond Police Department and its officers had probable cause to arrest the Appellant. "Probable cause exists where the facts and circumstances with the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution and a belief that an offense has been or is being committed." Bender v. Seattle, 99 Wn.2d 582, 597 (1983).

In this case, the officers obtained a statement from an alleged victim that he had been assaulted by the Appellant. This statement established probable cause to arrest the Appellant. The Appellant offers no argument contradicting this fact. The Appellant offers no argument that his arrest was without probable cause, only arguing that a warrant was

required. Since, there is no argument that probable cause to arrest does not exist based upon the victim's statement, this court should affirm the Court of Appeals finding that probable cause for arrest was established. These causes of action were properly dismissed by the Superior Court.

F. Probable Cause is an Absolute Defense to False Arrest, False Imprisonment and Malicious Prosecution.

The Court in Fonder v. Klickitat County, 79 Wn.App. 850, 856 (1995) held that probable cause is a complete defense to malicious prosecution, false arrest and false imprisonment. To the extent the Appellant is asserting a civil cause of action for false arrest, false imprisonment and malicious prosecution as outlined above, there is probable cause for the arrest of the Appellant and this Court should affirm the dismissal of this cause of action.

G. No Evidence of Outrage.

The Appellant has insufficient factual evidence to establish that a lawful arrest with probable cause is outrageous under Washington law.

> The basic elements of the Tort of Outrage are (1) Extreme and outrageous conduct; (2) Intentional or reckless infliction of emotional distress; and (3) Actual result to the Plaintiff of severe emotional distress. Rice v. Janovich, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); Restatement (2nd) of Torts § 46 (1965). The conduct in question must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and otherwise intolerable in a civilized community. Grimsby v. Sampson, 85 Wn.2d 52, 59, 530

P.2d 291 (1975).

Keates v. City of Vancouver, 73 Wn.App. 257, 263 (1994).

"Whether conduct is sufficiently outrageous is ordinarily a question for the jury, but initially it is the responsibility of the Court to determine if reasonable minds could differ on whether the conduct was so extreme as to result in liability". Keates, 73 Wn.App. at 263 *citing*, Dicomes v. State, 113 Wn.2d 612, 630 (1989). When determining if a case should not proceed to a jury, a Court should consider the following elements:

1. The position occupied by the Defendants;
2. Whether the Plaintiff was particularly susceptible to emotional distress and if the Defendant knew this fact;
3. Whether the Defendant's conduct may have been privileged under the circumstances;
4. The degree of emotional distress caused by a party must be severe as opposed to constituting mere annoyance, inconvenience or the embarrassment which normally occur in a confrontation of the parties; and
5. The actor must be aware that there is a high probability that his conduct will cause severe emotional distress and he must proceed in a cautious disregard of it.

Keates, 73 Wn.App. at 264 *citing* Phillips v. Hardwick, 29 Wn.App. 382, 388 (1981).

In this case, the arrest of the Appellant with probable cause for assaulting his brother-in-law does not meet the test for outrageous

conduct. As such, this Court should affirm the dismissal of the claim for outrage, as there is no basis for overturning this dismissal.

H. Washington Does Not Recognize Civil Causes of Action Asserted by the Appellant.

Appellant has asserted and alleged several causes of action which are not recognized in Washington. Appellant has asserted the following causes of action:

1. Police misconduct;
2. Entrapment;
3. Protective defense.

None of these causes of action are recognized in the State of Washington and this Court should affirm the dismissal of these causes of action.

I. No Violation of Constitutional Rights Occurred.

The Appellant's Complaint does not set forth or identify a constitutional right that was allegedly violated by the Defendant. The Appellant does cite RCW 10.31.100 asserting that this statute prohibited his arrest. However, RCW 10.31.100(1) authorizes the arrest of the Appellant once an officer has probable cause to believe that an assault occurred. Since, the Appellant was arrested for assaulting his brother-in-law and there was probable cause for the officers to believe that the

Appellant committed the assault, RCW 10.31.100 authorized his arrest without a warrant.

Without identifying the specific constitutional right that was allegedly violated by the City of Black Diamond officers, this Court should affirm the dismissal of these causes of action for violation of a constitutional right.

IV. CONCLUSION

The Appellant has failed to set forth any justification in his briefing justifying his appeal in this matter. The Petitioner does not even address the legal argument that CR 41 required the dismissal of his Complaint. As such, this Court should deny the Petitioner's Petition for Review and affirm the Court of Appeals and Superior Court's dismissal of the Appellant's Complaint with prejudice as it was a proper dismissal given the Appellant's two (2) prior CR 41 voluntary non-suits.

RESPECTFULLY SUBMITTED this 27 day of August, 2021.

CARLSON & McMAHON, PLLC

By _____, WSBA #24497
PATRICK McMAHON, #WSBA 18809
Attorneys for Respondents City of Black Diamond, Jamey Kiblinger, Ryan Keller, Michael Henrich and Brian Lynch

AWC05-02463 SUPREME\PLE\ANSWER-082321

CERTIFICATION OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date give below I caused to be served in the manner noted a copy of the listed document on counsel below: RESPONDENTS' ANSWER TO PETITION FO REVIEW.

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32600 5th Avenue	[ ]	Via Hand Delivery
Black Diamond, WA 98010	[ ]	Via Fax
	[**X**]	Via U.S. Mail
	[ ]	Via Electronic Mail

SIGNED this 23rd day of August, 2021 at Wenatchee, WA.

CARRIE M. FRANKLIN

CARLSON & MCMAHON, PLLC

August 23, 2021 - 2:32 PM

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