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

RICHARD AZPITARTE, *appellant*

v.

JASON BISCAY, JANE DOE BISCAY and the marital community composed thereof and
MARVIN BURNETT, JANE DOE BURNETT, and the marital community composed thereof

**ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON, THE HONORABLE JUDGE JAMES CAYCE**

REPLY BRIEF

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STATE OF WASHINGTON
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INTRODUCTION

The defendant's reply brief is very poorly written. Most of the so-called "Statement of the Case" consists of a series of facts that are not referenced in the record, and in many cases simply fabrications. Principles of Law are listed without any reference to any authority, including laws, case law authority or court rules. The references to much of the evidence is in violation of ER 402 (Irrelevant Evidence Inadmissible, ER 403 (Exclusion of relevant Evidence on grounds of prejudice, confusion, and waste of time.) ER 404 (Character Evidence not admissible to prove conduct), and RAP 10.3 (a)(b). (Reference to the record must be included for each factual statement, argument should be supported by citations to legal authority and references to relevant parts of the record.) See *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

The respondent first moves to strike all portions of the brief of the respondents for failure to follow the above rules. What is left of the respondents' brief does not even begin to address the arguments raised by the appellant's brief.

Out of an abundance of caution, the appellant will address some of the facts and arguments raised by defendants, even though they are improperly raised in his brief. In doing so, the appellant does not waive his argument to strike and his argument that the court should not even consider these improperly raised arguments.

MOTION TO STRIKE

1. Strike the entire first paragraph of the factual summary for failure to cite to the record. (ER 10.3.) The appellant denies the accuracy of any of these statements, including allegations that the means of storage created a hazard, the number of vehicles, the amount of fine, that the cars were legally sold, that a third party to pay his fine.
2. Strike the second paragraph for failure to cite to the record. (ER 10.3), inclusion of character evidence (ER 10.4), . The submission of this evidence is simply being submitted, by the respondents own admission to show that he is acting in conformance with past conduct. The allegation that his attorney was disbarred is disputed and totally irrelevant to the issues of this case.¹

¹ The disputed so-called “disbarment” of Scannell, currently the subject of litigation in the Ninth Circuit Court of Appeals. Scannell argues that Washington lacks territorial jurisdiction to adjudicate conduct occurring before a foreign court.

3. Strike the third and fourth paragraphs for inclusion of evidence that is either irrelevant or while relevant, should be excluded because of prejudice and waste of time (ER 10.2) (ER10.3). In this paragraph the respondents claim that the prior case is being included for “fact and not for precedent” without explaining why the court should consider these facts at all other than the self admitted improper argument that Azpitarte is acting in conformance with previous conduct.
4. Strike paragraph five for being a fabrication, irrelevant, or while relevant, a waste of time and prejudicial. RAP 10.3, ER 10.2, ER 10.3. There is nothing in the quote from the brief that supports any assertion in the respondent’s contention that Mr. Azpitarte met Mr. Biscay in 2005 or 2007. Azpitarte argues that such an assertion is sheer speculation.
5. Strike paragraph six and seven for the same reasons as five. These paragraphs are essentially a continuation of the misrepresentations in five.
6. Strike paragraph eight for the same reasons as five. There is no explanation in this brief as to how collateral estoppel and/or res judicata

applies, nor can they as the suits involve different parties, at different times at different places, with none of the parties in privity.

7. Strike the entire par section entitled Factual Background to the Case. The alleged basis for the fact is the Supplemental Declaration of Jason Biscay. (CP 243 and 245). There are so many contradictions in this declaration as to render it worthless. First, Biscay states no where in his declaration as to when he bought the vehicle. He earlier claimed that the vehicle was purchased in Thurston County, (CP 243), but still has not explained how the “title” (in reality the AVR which is not a title), refers explicitly refers to the fact that the sale complied with RCW 46.55 and WAC 308.31, which requires an auction to be held in King County, the place of business for Cedar Rapids Towing.(See CP 370) The respondents claim in this paragraph that Department of Motor vehicle records are public records but do not cite to any authority or statute, therefore such assertion should be stricken. (RAP 10.3). As shown later in this reply, motor vehicle records are not public records.
8. Since the court should strike all the facts given in the respondent’s brief and have not offered any objection to the carefully documented

statement of facts offered by Azpitarte, the court should adopt the appellant's proposed statement of facts.

9. In their section entitled Basic Rules of Summary Judgment, plaintiff moves to strike the statement "this was so at the trial level." There is no reference to the record for this statement and it is not supported with any argument based on any authority, whether it be statutory, case law, or court rules.
10. Azpitarte also moves to strike the statements "In this case the trial court granted summary judgment after plaintiff failed to show that he filed his suit within the statute of limitations or after permissible delay due to delayed awareness of the claim. " Azpitarte also moves to strike "Yet, even as in his opening brief, plaintiff ha relied exclusively on speculation, argumentative assertions, opinions, and conclusory statements.(including many that are not part of the record." Both of these statements are conclusory allegations which the respondents do not support with references to the record or with legal authority.
11. Azpitarte also moves to strike all arguments with respect to statute of limitations. In their brief, the respondents rely on the non-existent principle that automobile licensing records are public records and the

undocumented assertion that Azpitarte had a conversation with the Biscays at some undetermined date that does not appear in the record.

12. Azpitarte moves to strike the assertion on page 10 of the respondent's brief where they claim that he learned in 2005 that he knew the car was sold to Biscay. There is no reference to the record that supports this assertion. There is nothing in the record to controvert Azpitarte's statement he first learned of the sale on March 27, 2009. CP(371.)
13. Azpitarte moves to strike the assertion on pages 10 and 11 that Azpitarte knew that vehicles were being sought and sold so therefore must have known that he knew Biscay's vehicle was purchased. This is sheer speculation, unsupported by the record. The record only shows that he contacted the State Patrol, and that officer Helton advised him to file for title because Helton's investigation on May 18, 2005 showed no AVR and no vehicle on the premises as required by State law. Azpitarte obtained true title on September 5, 2005. CP 370. If Biscay was somehow able to convert it in 2006, he has only demonstrated that he had collusion within the Department of Motor Vehicles, not that he had obtained it legitimately.

14. Azpitarte moves to strike the argument that there has been no showing of fraud. There is no reference to the record, no response to the arguments raised in opening brief, no reference to any case law. There are only conclusory allegations not supported by anything.
15. Azpitarte moves to strike the argument that respondents were bona fide purchasers. They have cited to no authority other than RCW 46.12.655 and their own allegations which do not cite to anything in the record. They are not bonafide purchasers because they have submitted contradictory declarations as noted in the opening brief, which they have not addressed, and cannot explain how they could have been unaware of any wrong doing, when the document they used to convert the automobile, explicitly states that the document can be used only if there has been a legal auction. They cannot explain how they used the document to create title, when DMV had already issued title three months before they did. They cannot explain how they could have been unaware of this when they would have been notified that the title was legitimately in someone else's name when they tried to convert it.

16. Azpitarte moves to strike the argument that the cases filed were “essentially identical” when the plaintiff’s cite to *Rains v. State*, 100 Wa. 2d 660. While they cite to case law to support their argument, they present no argument as to how these cases satisfy the requirements of *Rains*. It is obvious why they did not do so, because they cannot meet any of the elements. In order to establish res judicata according to *Rains*, they must show: (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. Here, none of the elements are even remotely met. An adverse judgment here will have no effect on the judgment in *Sauve* or *Spino*, because they involve different kinds of frauds, different pleadings, different dates, different places and different automobiles. There is completely different evidence used in all cases. The federal case revolved around whether the original tows were legal, not whether cars were transferred appropriately. The cases do not involve infringement of the same right, because in each case a different method was used to convert and conceal the conversion.

There was no same transactional nucleus of facts. Each conversion involved different times, dates, parties and techniques to convert and conceal the theft of the automobiles.

17. Azpitarte moves to strike all arguments based upon the principle that “one-year period for requesting that defaults be set aside under CR 60(b)(1-3). Is not absolute. They cite to no authority for this proposition, which is at odds with the explicit language of CR 60 which states that all motions to set aside must be brought within a reasonable time and for reason 1-3, not more than one year.

18. Azpitarte moves to strike all arguments based upon the court’s consideration of the Burnett Judgment. There are no references to the record, nor to relevant authority for the proposition that the court considered the default, which had the wrong date in both the notion and the order. The time for correcting this error on the basis of clerical error is long past. The record shows that the judgment in question still stands and the time for changing that is now passed because clerical errors, if any, must be corrected within a year.

19. The respondents still have not addressed any of the arguments in opening brief as to why Burnett never appeared in the action and how the

Biscay's perjured declarations cannot be used to set aside anything.

20. Azpitarte moves to strike all references on pages 17 and 18 alleging some kind of misconduct in previous unrelated cases as a basis for ruling in this case. This is brazen attempt to circumvent ER 404 prohibition against the use of character evidence.

Although the court should strike the entire brief as argued above, if the court really want to entertain the arguments of the respondents, it should note first that the respondents have not addressed any of the arguments raised by Azpitarte in his opening brief. In addition the court should note that the respondents appeared to argue as a matter of law that Azpitarte should have learned of the transfer by inspecting registration information. This ignores the fact that these records are not public documents; both the legislature and the congress have enacted a number of restrictions... RCW 46.12.635 and 18 USC §2721 which prevent the public from accessing these records so that stalkers cannot learn the addresses of potential victims.

Under Washington law, automobile titles are not public records as the term is defined in RCW 42.56, the public disclosure statute. RCW 46.12.635 puts restrictions on the release of this information that could

prove prohibitive to someone like Azpitarte:

(1) Notwithstanding the provisions of chapter 42.56 RCW, the name or address of an individual vehicle owner shall not be released by the department, county auditor, or agency or firm authorized by the department except under the following circumstances:

(a) The requesting party is a business entity that requests the information for use in the course of business;

(b) The request is a written request that is signed by the person requesting disclosure that contains the full legal name and address of the requesting party, that specifies the purpose for which the information will be used; and

(c) The requesting party enters into a disclosure agreement with the department in which the party promises that the party will use the information only for the purpose stated in the request for the information; and that the party does not intend to use, or facilitate the use of, the information for the purpose of making any unsolicited business contact with a person named in the disclosed information. The term "unsolicited business contact" means a contact that is intended to result in, or promote, the sale of any goods or services to a person named in the disclosed information. The term does not apply to situations where the requesting party and such person have been involved in a business transaction prior to the date of the disclosure request and where the request is made in connection with the transaction.

(2) Where both a mailing address and residence address are recorded on the vehicle record and are different, only the mailing address will be disclosed. Both addresses will be

disclosed in response to requests for disclosure from courts, law enforcement agencies, or government entities with enforcement, investigative, or taxing authority and only for use in the normal course of conducting their business.

(3) The disclosing entity shall retain the request for disclosure for three years.

In addition, the Federal government has implemented 18 USC §2721 which is even more restrictive:

(a) In General.— A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section

...

(b) Permissible Uses.— Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321–331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal,

State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only—

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, re-disclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or

licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

First of all, the court has no evidence before it that the plaintiff Azpitarte is a business, as he has never claimed to be one. Therefore under the state statute he is not even allowed to request the information directly. There is no case law interpreting whether a "business" under state law would include an attorney... a court could easily conclude the term business is the same as defined by federal statute, which clearly does not include an attorney. The state statute does not on its face, allow for the (b)(4) exception allowed in federal law so there is a possibility that the

court rule that (b)(4) does not apply for an attorney investigation in anticipation of investigation.

Even if a court said it would, there is also a factual question as what circumstances constitute a legitimate investigation in anticipation of litigation. The law may require an attorney to have the elements of a cause of action firmly established before he can say his investigation is in anticipation of litigation. It could be argued that an attorney has to have more than a mere suspicion before he launches a fishing expedition on 120 vehicles. This would put Azpitarte in the situation of the chicken and the egg, he would have to be able to prove fraud in order to obtain the evidence he needs to prove it.

Even if the investigation in anticipation of litigation applied, this would then raise a factual question as to whether a diligent search would include hiring an attorney to search 120 cars every few months for 5-8 years. This could be a costly and prohibitively expensive for someone in Azpitarte's position. The question of due diligence is ordinarily a question of fact, unless the issue can be decided as a matter of law if reasonable minds could reach but one conclusion. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000). Here, reasonable minds could have

concluded that a diligent search would not include hiring an attorney to continually keep looking for 120 automobiles.

2. THE RESPONDENTS HAVE NOT CITED TO ONE VALID REASON AS TO WHY THE JUDGMENT AGAINST SHOULD SOMEHOW BE SET ASIDE.

In the appellants opening brief the appellant laid out why it was too late to set aside the order of default and the order of judgment. The default order was over a year old when Burnett re-entered the case and now the judgment is over a year old,. He made a conscious decision not to participate in this lawsuit because he didn't want to pay the expense of an attorney and there is no exception in the rules for him to set it aside on the basis of excusable neglect nor is there any reason justified by the record to set it aside for any other reason. The appellant is submitting a supplemental designation of clerk's papers to show the dates of the judgment and order.

CONCLUSION

For the reasons given herein the decision of the trial court should
be reversed.

Dated this 6th day of April, 2016

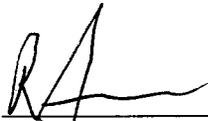


Richard Azpitarte

I certify that on this date I caused a copy of this document to be mailed to

Christopher McLeod,
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Dated this 6th day of April, 2016.



Richard Azpitarte