IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DONALD R. EARL, Appellant, v. MENU FOODS INCOME FUND and THE KROGER COMPANY, Respondent.	No. 41890-8-II UNPUBLISHED OPINION

Armstrong, J. — Donald Earl sued Menu Foods Income Fund and The Kroger Company (collectively Menu), alleging that Menu's pet foods caused his cat's death. The trial court granted Menu's summary judgment motion because Earl failed to produce any admissible evidence that Menu's pet food caused the cat's death. Earl appeals this decision together with several other rulings by the trial court. Because Earl failed to produce any admissible evidence that Menu's pet food caused the cat's death, we affirm.

FACTS

Background

In July 2007, Earl sued Menu, alleging a product liability claim. Earl claimed his cat, Chuckles, died because Menu's cat food was contaminated with acetaminophen and cyanuric acid.

Earl alleged that Chuckles, who died in January 2007, was in good health until eating Menu's Pet Pride cat food, which Earl purchased in December 2006. In March 2007, Menu voluntarily recalled some of its Pet Pride food, but the food Chuckles consumed was not

included in that recall. Earl submitted a sample of his remaining Pet Pride cat food to ExperTox for testing. ExperTox reported that the sample contained both acetaminophen and cyanuric acid.

Earl claimed various damages, including $519.71 for veterinary bills and $180,000.00 for creating a genetic clone of Chuckles. Under Menu's motion, the trial court dismissed Earl's clone theory of damages.

Discovery Motion

In a related federal court action to which Earl was not a party, the federal district court allowed Menu to dispose of stored pet food. Menu moved in this action for a similar order allowing it to dispose of the same pet food. Menu had received the food in response to its voluntary recall and split the food into three categories: (1) organized—recalled food that was identifiable; (2) raw wheat gluten—unprocessed and perishable food; and (3) unorganized—food that was returned to Menu that came in all types of containers and may not be related to the recall.

Earl conceded that the organized and raw wheat gluten categories were not relevant to his case. He argued, however, that he should be allowed to search through the unorganized pet food for evidence that the chemicals at issue here were in pet food manufactured before the recall period. The trial court granted Menu's motion, in part, because Earl had not shown the pet food was relevant to his case. Earl unsuccessfully sought discretionary review of the ruling from this court and our Supreme Court.

Back in the trial court, Earl moved to vacate the order under CR 60(b). He also moved to compel discovery of the unorganized food. The trial court denied the motions and granted

Menu's motion for attorney fees and costs. Earl again unsuccessfully sought Supreme Court review. Ruling Denying Review, *Earl v. Menu Foods*, No. 82465-7 (February 10, 2009).

Summary Judgment

Menu moved for summary judgment, asserting: (1) Earl could not prove a product defect; (2) even if Chuckles's cat food contained some acetaminophen and cyanuric acid, Earl could not prove the food caused Chuckles's death; and (3) Earl's damages, if any, were limited to Chuckles's fair market value, $100.

To support the motion, Menu submitted affidavits from Dr. Robert Poppenga and Dr. Jeffrey Hall. Dr. Poppenga stated that Earl's cat food tested negative for acetaminophen and cyanuric acid. Dr. Hall stated that the levels of acetaminophen and cyanuric acid reported by ExperTox could not have caused Chuckles's death because they were significantly less than the levels needed to cause a cat's death.[1] He also opined that Chuckles could not have died from prolonged eating of the food because the chemicals would not build up in a cat's body. Finally, Menu submitted an affidavit from an expert pet store owner that Chuckles's fair market value was between $30 and $100.

Earl moved to strike Menu's affidavits, arguing that the affidavits and opinions were not supported by documentation. He also submitted his own declaration, the ExperTox report, and several scientific articles he had downloaded from the internet.

The trial court denied Earl's motion to strike and granted Menu's summary judgment

[1]Specifically, the acetaminophen levels are 1,000 times less than the minimum necessary to be toxic to cats, and the cyanuric acid levels are 100 times less than the minimum necessary to be toxic to cats.

motion, ruling that Earl had produced no admissible evidence that Menu's cat food caused Chuckles's death.[2]

ANALYSIS

I. Summary Judgment

Earl has not explicitly assigned error to the trial court's summary judgment ruling that Earl failed to present evidence demonstrating Menu's pet food caused Chuckles's death. Nonetheless, because the issue is dispositive and entwined with the issues Earl has raised, we consider the summary judgment ruling.

We review a summary judgment de novo. A court can grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). In reviewing a summary judgment, we consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). The moving party bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton*, 115 Wn.2d at 516. "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Atherton*, 115 Wn.2d at 516. The nonmoving party may not rely on speculation, argumentative assertions of unresolved factual issues, or having its affidavits considered at face value. *Seven*

[2] In the alternative, the trial court ruled that Earl's damages would be limited to Chuckles's fair market value of $100 or less.

Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

A. Admissible Evidence

A trial court must consider the affidavits, depositions, and other evidence submitted by the parties to determine whether a genuine issue of material fact exists. CR 56(c). CR 56(e) states in pertinent part,

> [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

Thus, in opposing a summary judgment, a party must submit evidence that would be admissible at trial. *Cotton v. Kronenberg*, 111 Wn. App. 258, 266, 44 P.3d 878 (2002).

i. Expert Affidavit

Earl argues the trial court should have stricken Dr. Hall's expert affidavit because Dr. Hall did not attach all the supporting documents he relied on. Menu responds that CR 56(e) does not require an expert to attach all the documents he considered. And, even if CR 56(e) requires attaching all documents relied on, Earl cannot complain because Menu provided those articles to Earl before the summary judgment hearing.

Generally, affidavits from an expert witness may contain opinions on the ultimate issue of fact. *See Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn. App. 28, 34, 991 P.2d 728 (2000). The expert's affidavit must be "factually based and must affirmatively show competency to testify to the matters stated therein." *Pagnotta*, 99 Wn. App at 34 (citing *Lilly v. Lynch*, 88 Wn. App. 306,

320, 945 P.2d 727 (1997)). The facts may arise from the record itself or from information "reasonably relied on by others" in the expert's field. *Pagnotta*, 99 Wn. App. at 34. An expert does not have to have first-hand personal knowledge of the facts of the case as long as the facts are "made known to the expert at or before the hearing." ER 703. Nor do such facts have to be admissible in evidence if they are of the type reasonably relied on by experts in the particular field. ER 703.

Earl does not challenge Dr. Hall's qualifications to give an expert opinion on whether Menu's cat food could have caused Chuckles's death. Further, Dr. Hall's affidavit and attached report discuss the pertinent facts he used to reach his expert opinion. Dr. Hall cited the scientific documents he relied on in his report. And, on January 10, 2011, four days before the summary judgment hearing, Menu served Earl with all the documents on which Dr. Hall relied.

Earl points to *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107, 791 P.2d 537 (1990), to support his claim that Dr. Hall was required to attach all the supporting documents. *Bryant* is inapposite, however, because there the court considered an affidavit submitted in support of imposing sanctions on an attorney, not one for summary judgment. *Bryant*, 57 Wn. App. at 121-22. And, the court found the affidavit unclear because it cited several documents the court did not have, and the facts cited appeared misleading based on the other evidence before the court. *Bryant*, 57 Wn. App. at 122-23. In contrast, here Dr. Hall's factual assertions were primarily based on information submitted by Earl himself. Finally, Earl cites no case in support of his argument that a party offering an expert's opinion in support of summary judgment must attach all documents the expert may have considered, however tangentially, in reaching an opinion. The

trial court did not err in considering Dr. Hall's expert opinion.

ii. Articles[3]

Earl also argues the trial court erred when it ruled that he could not read excerpts from scientific articles he had downloaded from the internet into the record. Earl cites ER 705, 803(17), 803(18), 901, and 904 in support of his argument. Earl claimed to be an expert on the issue of "suspected problems with commercial pet foods." Clerk's Papers (CP) at 848. We need not decide whether Earl qualifies as an expert because, even if he is, the Evidence Rules would not allow him to read excerpts from the scientific articles he offered.

ER 705 allows an expert to testify to an opinion, without disclosing the underlying facts relied on in forming the opinion, unless the judge requires such disclosure. Earl was not testifying as an expert, and Menu disclosed to Earl all the information its experts used in reaching their opinions. ER 705 does not apply. ER 803(18) allows certain documents to be admitted into evidence as exceptions to the hearsay rule:

> To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Neither part of the rule helps Earl. He was not offering the readings as attachments to his own expert opinion, nor was he examining or cross-examining an expert as ER 803(18) contemplates.

[3] Earl's issue statement for this issue states that the trial court violated his equal protection rights, due process rights, and right to a jury trial. He provides no citation to law or the record to explain what specific actions by the trial court were objectionable under these three doctrines. Thus, this court need not review those claims because Earl failed to properly brief and argue them. RAP 10.3(a)(6).

ER 803(17) is another hearsay exception that allows admission of "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." None of the articles Earl cited fit into these categories; thus, ER 803(17) does not help Earl.

ER 901 and 904 address authentication of evidence. ER 901 requires authenticating evidence as a "condition precedent to admissibility" and requires the offering party to establish that the evidence is what the proponent claims. ER 904(a)(6) allows a party to authenticate documents that have "circumstantial guaranties of trustworthiness" by merely notifying the opposing side of the party's intent to offer the document. Earl is correct that on summary judgment, the proponent need only make a prima facie showing of authenticity. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 745-46, 87 P.3d 774 (2004). But Earl made no attempt to authenticate the articles, show their relevance, or establish "guaranties of trustworthiness." ER 904(6); *see also* ER 401, 702-05, 801-03; *see generally*, *Int'l Ultimate, Inc.*, 122 Wn. App. at 746; 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 900.4, at 278-79 (5th ed. 2007).

The trial court did not err in rejecting Earl's attempt to read the excerpts into the record.

B. Summary Judgment Rulings

i. Causation

We next consider whether the trial court erred in granting summary judgment for Earl's failure to produce admissible evidence that Menu's cat food caused Chuckles's death.

All of Earl's claims arise under the Washington Products Liability Act codified in chapter

7.72 RCW. RCW 7.72.030(1)-(2), makes *manufacturers* liable for harm caused by their products:

> (1) A product manufacturer is subject to liability to a claimant if the claimant's harm was *proximately caused* by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.
> (2) A product manufacturer is subject to strict liability to a claimant if the claimant's harm was *proximately caused* by the fact that the product was not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty or to the implied warranties under Title 62A RCW.

(Emphasis added.) A product *seller* is liable for harm to the claimant proximately caused by the seller's negligence, the seller's breach of express warranty, or the seller's intentional misrepresentations. RCW 7.72.040(1). Here, Menu would also be liable as the seller because "[t]he product was marketed under a trade name or brand name of the product seller." RCW 7.72.040(2)(e).

For all these claims, Earl must prove that Menu's cat food proximately caused Chuckles's death. *See* RCW 7.72.030-.040; *Ayers v. Johnson & Johnson Baby Prods., Co.*, 117 Wn.2d 747, 752, 818 P.2d 1337 (1991). Proximate cause has two components: "cause in fact and legal causation." *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 838, 906 P.2d 336 (1995). Courts have defined "cause in fact" as the "'but for' connection between an act and an injury." *Anderson*, 79 Wn. App. at 838 (quoting *Ayers*, 117 Wn.2d at 753)..

Dr. Hall stated, "There is no scientifically credible evidence that . . . [the pet foods] were causative in the death of Mr. Earl's cat Chuckles." CP at 842. Dr. Hall explained that he accepted the accuracy of the ExperTox reports, but even so, the reported levels of toxins were

insufficient to have caused Chuckles's death. Additionally, Dr. Hall concluded that even if Chuckles consumed the toxins over a long period of time, they would not have caused Chuckles's death.

Dr. Hall's opinion that Menu's cat food could not have caused Chuckles's death shifted the burden to Earl to submit *admissible* evidence that the food did cause Chuckles's death, thereby creating a genuine issue of material fact. *Atherton*, 115 Wn.2d at 516. As we have discussed above, the trial court properly rejected Earl's attempt to read into the record excerpts from the internet articles. And, Earl offered no other admissible evidence to support a finding that Menu's cat food caused Chuckles's death. Thus, Earl failed to create a genuine issue of material fact on the critical and dispositive element of causation, and the trial court properly granted summary judgment.

II. Discovery

A. Order Granting Product Retention Motion

Earl argues the trial court erred by granting Menu's motion to destroy the stored recall product. Specifically, Earl claims that the trial court violated the separation of powers doctrine and his due process rights by allowing Menu to destroy evidence.

Earl had cans of the cat food that he actually fed Chuckles, and Menu also retained samples of cat food that matched what Earl actually fed Chuckles. Thus, even if the trial court abused its discretion in allowing Menu to dispose of the pet food, the error, if any, was harmless.

B. Expenses Awarded

Earl claims the trial court erred in assessing sanctions against him for filing a CR 60(b) motion to vacate the trial court's order and a motion to compel discovery of the unorganized pet food.

CR 37 addresses circumstances where parties fail to comply with discovery requirements and allows the party seeking discovery to bring a motion to compel discovery. If the court denies a motion to compel, the court must award expenses unless the motion is "substantially justified." CR 37(a)(4).[4]

Earl titled his discovery motion as "Plaintiff's CR 26(b) Motion to Produce Discovery" because, as he argued, the unorganized pet food in Menu's warehouse was relevant to his case. Although the title of the motion fell under CR 26(b), the crux of the motion was to compel discovery, which falls within the purview of CR 37. Thus, the award of expenses for defending the motion fell within CR 37(a)(4) and was not a sanctions award as Earl suggests. Furthermore, the trial court did not abuse its discretion in determining that the CR 37(a)(4) award of expenses was appropriate because Earl's motion was not substantially justified. *See Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777-78, 819 P.2d 370 (1991) (this court reviews discovery decisions for an abuse of discretion). The trial court decided the issue in February 2008, and Earl did not file his motion until August 2008. In the meantime, Earl had sought review by our court and the

[4] CR 37(a)(4) reads:

> If the motion [to compel] is denied, the court shall, after opportunity for hearing, require the moving party . . . to pay to the party . . . who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

Supreme Court; both courts denied review. Accordingly, the trial court did not abuse its discretion in deciding that the motion from Earl was not substantially justified.[5]

III. Recusal

Earl argues the trial judge erred by not recusing from the case. We review a trial court's decision not to recuse for an abuse of discretion. *State v. Perala*, 132 Wn. App. 98, 111, 130 P.3d 852 (2006). "The court abuses its discretion when its decision is manifestly unreasonable." *Perala*, 132 Wn. App. at 111. "The trial court is presumed . . . to perform its functions . . . without bias or prejudice." *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)). "The party seeking to overcome that presumption must provide specific facts establishing bias." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004). The party seeking recusal must present evidence of a judge's "actual or potential bias" for us to overturn the judge's decision not to recuse. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172 (1992).

Earl points to several of Judge Verser's rulings to show bias, but "[j]udicial rulings alone almost never constitute a valid showing of bias." *Davis*, 152 Wn.2d at 692. Earl also points to Judge Verser's comments that Earl's action was "the pursuit of imagined conspiracy theories" and "a crusade to attempt to punish Menu Foods for . . . unconscionable practices motivated by corporate greed." CP at 384. But a judge's comments during a legal proceeding "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not

[5] In its final denial of review of this issue, the Supreme Court stated, "The trial court did not abuse its discretion by awarding attorney fees to Menu Foods." Ruling Denying Review, *Earl v. Menu Foods*, No. 82465-7 (February 10, 2009).

support a bias or partiality challenge." *Liteky v. U.S.*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

Accordingly, Judge Verser did not abuse his discretion when he denied Earl's motion to recuse because his rulings and comments fail to show bias.

Earl raises a number of other issues that have no bearing on whether Earl presented evidence that Menu's cat food caused Chuckles's death; nor do the issues pertain to Earl's ability to prepare for and meaningfully participate in the hearing on that issue. Accordingly, we need not address them.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Penoyar, J.

Johanson, A.C.J.