

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

ROY L. DENTON)	
)	
Plaintiff)	Case No. 1:07-cv-211
)	
v.)	JURY DEMAND
)	
STEVE RIEVLEY)	Collier/Carter
)	
Defendant)	

**DEFENDANT STEVE RIEVLEY’S RESPONSE TO
PLAINTIFF ROY L. DENTON’S MOTION TO STRIKE**

Comes the Defendant, Steve Rievley, in his individual capacity, (herein “Officer Rievley”) pursuant to Rule 56 of the *Federal Rules of Civil Procedure*, through counsel, and hereby files his Response to Plaintiff Roy L. Denton’s Motion to Strike. For cause, Officer Rievley would show this Court as follows.

In his Motion to Strike, the plaintiff is asking the Court to strike certain portions (paragraphs 7, 8, 10, 12, and 13) of Officer Rievley’s Affidavit as being inadmissible hearsay and thus not in conformance with the provisions of Rule 56(e) of the *Federal Rules of Civil Procedure*. Officer Rievley respectfully submits that the statements contained in Officer Rievley’s Affidavit are subject to exceptions as defined by Rule 803 of the *Federal Rules of Civil Procedure*. Further, the statements of Brandon Denton and Jessica Carbajal contained in the Affidavit are not offered to prove the truth of the matter asserted therein, but rather are intended to show that these statements were made and had an effect on Officer Rievley, giving him probable cause to arrest the plaintiff for

domestic violence.

LAW AND ARGUMENT

Rule 801(c) of the *Federal Rules of Evidence* defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Id.* Certain exceptions to the hearsay rule, however, exists and are enumerated in *Federal Rule of Evidence* 803. These exceptions include, but are not limited to, *Present Sense Impression, Excited Utterance, and Then Existing Mental, Emotional or Physical Condition.* See FED. R. EVID. § 803 (1)-(3).

Furthermore, if out of court statements are not offered to prove the truth of the matter asserted but are offered instead to show their effect on the listener, such statements are not hearsay. *United States v. Horton*, 847 F.2d 313, 324 (6th Cir. 1988) (citing *United States v. Wright*, 783 F.2d 1091 (D.C.Cir.1986) (substance of telephone call should have been admitted because it was offered not to prove the truth of the matters asserted but their effect on the listener); *United States v. Herrera*, 600 F.2d 502 (5th Cir. 1979) (threatening statements properly admissible when used to show reaction to them and not the truth of the matters asserted); *United States v. Cline*, 570 F.2d 731 (8th Cir. 1978) (statement admitted for purposes of establishing that it was said was not hearsay).

In the present case, the plaintiff is not “on trial” for the domestic assault of his son, Brandon. Rather, he has sued Officer Rievley for his arrest of the plaintiff for domestic assault. Thus, the statements made by Brandon Denton and Jessica Carbajal to Officer Rievley and contained within his Affidavit are not offered to evidence that the plaintiff did, in fact, assault his son. These statements are offered to show only that such statements were made to Officer Rievley, giving him probable cause to arrest the plaintiff for domestic assault. As the Sixth Circuit court stated in *United*

States v. Strickland, 144 F.3d 412, 415 (6th Cir.1998), “the Fourth Amendment does not require that a police officer *know* a crime occurred at the time the officer arrests or searches a suspect ... The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty.” *Id.* Moreover, Officer Rievley certainly has personal knowledge that such statements contained within his Affidavit were made to him. Accordingly, these statements are offered in Officer Rievley’s Affidavit to show that he is entitled to summary judgment as he had probable cause to the arrest the plaintiff for domestic assault based on the statements of Brandon Denton and Jessica Carbajal, the physical injuries suffered by Brandon Denton, and the physical evidence he saw on the plaintiff’s front porch (i.e. Brandon’s broken glasses).

1. Paragraph 7 of Officer Rievley’s Affidavit

In Paragraph 7 of his Affidavit, Officer Rievley states “I was then directed to and spoke with Brandon Denton. Brandon Denton lives approximately one-fourth ($\frac{1}{4}$) of a mile from the jail. Brandon went to the jail from his home after being attacked by his father and brother.” Obviously, Officer Rievley has personal knowledge that he “was then directed to and spoke with Brandon Denton.” It is apparent from this statement as well that he was informed by Brandon Denton of the location of his residence and that Brandon went directly from his home to the jail after he was attacked by his father and brother. Because Officer Rievley then traveled from the jail to Brandon’s residence, he has personal knowledge of the distance between the two locations.

The Plaintiff’s main contention with this paragraph is that he believes Officer Rievley does not “have personal knowledge” that Brandon lives at 120 6th Avenue Dayton, Tennessee. For the purposes of this Motion, it does not matter if Brandon actually lived at that address; what is important, however, is Officer Rievley’s reasonable belief that Brandon lived at that address. He

was informed by Brandon that he lived at 120 6th Avenue Dayton, Tennessee, and he spoke with Ms. Carbajal who told him that she took Brandon home to that address after work. Thus, the statements in Paragraph 7 of the Complaint are offered to show what Officer Rievley reasonably believed when he went to 120 6th Avenue Dayton, Tennessee (i.e. that Brandon lived at that address). Accordingly, such statements are proper and should not be stricken.

2. Paragraph 8 of Officer Rievley's Affidavit

In Paragraph 8 of his Affidavit, Officer Rievley states “Brandon Denton informed me that he worked at the local Taco Bell until midnight that evening. Sometime after midnight, his co-worker and friend, Jessica Carbajal, gave him a ride to his home.” This statement qualifies as an exception to the hearsay rule under FED. R. EVID. 803(1) as a “Present Sense Impression.” Rule 803(1) states in pertinent part that a “statement describing or explaining an event or condition made while the declarant was perceiving the event or immediately thereafter” is not excluded by the hearsay rule. *Id.* In this paragraph (in conjunction with Paragraph 11 of the Affidavit), Brandon Denton, the declarant, was explaining why he was at the jail, and the events leading immediately up to his arrival, i.e. that he had been at work and was taken home by a co-worker sometime after midnight. Thus, such statement is an exception to the hearsay rule and is proper.

Furthermore, as stated above, it is irrelevant whether Brandon actually worked at Taco Bell until midnight and then was taken home by a co-worker. These statements are not being offered to prove that Brandon actually worked at Taco Bell and was then taken home; instead, they offered to show, in conjunction with the rest of the information contained in Officer Rievley's Affidavit, their effect on Officer Rievley. *See Horton*, 847 F.2d at 324. Accordingly, such statements are properly included in his Affidavit and should not be stricken.

3. Paragraph 10 of Officer Rievley's Affidavit

In Paragraph 10 of his Affidavit, Officer Rievley states "Sometime after he arrived home, Brandon Denton's father, Roy Denton, and brother, Dustin Denton, began hitting him. Brandon Denton stated that his father and brother were intoxicated at the time of the attack." These statements, made by Brandon Denton to Officer Rievley, are excited utterances and therefore are exceptions to the hearsay rule pursuant to FED. R. EVID. 803(2). Rule 803(2) provides that a statement made by the declarant relating to a startling event made while the declarant was under the stress of excitement caused by the event is an exception to the hearsay rule. *Id.* In this case, Brandon made this statement at the jail after he claims he was hit by his brother and father, who, according to Brandon were intoxicated at the time. According to Brandon, he came immediately to the jail from his house after the attack occurred and thus was still "under the stress of the excitement caused by the event" as provided by Rule 803(2). Thus his statements are an exception to the hearsay rule and are therefore appropriate in Officer Rievley's Affidavit.

Moreover, as stated above, the statements made by Brandon to Officer Rievley are not being offered for the truth of the matter asserted, but are being offered to show their effect on Officer Rievley which was to give him probable cause to arrest the plaintiff for domestic assault. *See Horton*, 847 F.2d at 324. Accordingly, the statements are properly included in Officer Rievley's Affidavit and should not be stricken.

4. Paragraphs 12 and 13 of Officer Rievley's Affidavit

Paragraph 12 of Officer Rievley's Affidavit states "Brandon informed me that both his father and brother remained at their home at 120 6th Avenue Dayton, Tennessee. Brandon also told me that he wanted to retrieve some of his belongings from the home but was afraid to do so by himself after

the attack.” In Paragraph 13 of his Affidavit, Officer Rievley states “I called and spoke with Brandon Denton’s co-worker, Jessica Carbajal. Ms. Carbajal verified the Brandon Denton did not have any injuries or abrasions when she dropped him off at home, sometime after midnight.”¹ Without belaboring the point, Officer Rievley asserts that the statements made by Brandon Denton and Jessica Carbajal contained in Paragraphs 12 and 13 of his Affidavit are not being offered to prove the truth of the matter asserted, but are being offered to show their effect on the listener (i.e. Officer Rievley). Because Officer Rievley’s Motion for Summary Judgment (and supporting Affidavit) is premised, in part, on the argument that he had probable cause to arrest the plaintiff based upon the statements of Brandon Denton and Jessica Carbajal, as well as the visible injuries to Brandon, *inter alia*, the statements are appropriately included in his Affidavit and should not be stricken. *See Horton*, 847 F.2d at 324.

5. *There is no case law which would allow the “Argument” section of a party’s Motion to be stricken because the other party believes it to be improperly cited.*

Finally, the plaintiff asks this Court to strike certain portions of Officer Rievley’s Motion for Summary Judgment because the plaintiff feels that it is the work of plagiarism. First, and foremost, the attorneys for Officer Rievley deny the charge of plagiarism and have responded accordingly to the Plaintiff’s “Notice of Alleged Plagiarism.” At all times, as stated in Officer Rievley’s Response

¹The Plaintiff seems to think that there is an inconsistency in Officer Rievley’s account of Jessica Carbajal’s statement. There is not. As stated in his Affidavit, Ms. Carbajal was called and informed Officer Rievley that she took Brandon home that night after work and that he did not have any injuries. She subsequently came to the jail that night and gave a written statement to that effect. In his Responses to Requests for Admissions #7, Officer Rievley stated, “It is admitted that while Brandon S. Denton was at the jail on September 9, 2006, Jessica Carbajal was called by Officer Rievley to make a statement. It would be shown that Ms. Carbajal arrived at the jail to make said statement. It is denied that Ms. Carbajal accompanied Brandon S. Denton to the jail.” Thus, there is no inconsistency between Officer Rievley’s Affidavit and his Responses for Requests for Admissions.

to the Plaintiff's Notice of Alleged Plagiarism, attorneys for Officer Rievley properly cited the law and attached a copy of the case the plaintiff asserts the attorney plagiarized to their Motion for Summary Judgment. *See Court Doc. 42, Appendix 2.* The "Law and Argument" about which the plaintiff complains was based on the long established doctrine of *stare decisis*. As the United States Supreme Court has stated, "*stare decisis* permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2824 (quoting *Vasquez v. Hillery*, 106 S.Ct. 617 (1986)). Accordingly, as all law and argument sections of any brief are based on *stare decisis*, most, if not all, of these sections are not the "work of one's own mind" but rather are the works of others, namely the authoring judges or justices. Therefore, Officer Rievley respectfully submits that his Motion for Summary Judgment was proper and should not be stricken.

For the foregoing reasons, Officer Rievley respectfully asks this Court to deny the plaintiff's Motion to Strike in its entirety.

Respectfully submitted,

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Attorney for Defendant, Steve Rievley

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

This the 29th day of September, 2008.

Robinson, Smith & Wells

By: s/Ronald D. Wells

cc: Roy L. Denton
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