Supreme Court No. 90136-8

Court of Appeals No. 69129-5

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES C. EGAN,

Appellant,

vs.

CITY OF SEATTLE,

Respondent.

RESPONSE TO MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW AND ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

MISCELLANEOUS

COURT RULES

I. IDENTITY OF RESPONDENT

The City of Seattle ("the City"), the respondent in the Court of Appeals, files this response to the motion for extension of time to file petition for review and answer to the petition for review filed by Appellant James Egan ("Egan").

II. INTRODUCTION

Egan apparently did not read the Court of Appeals order denying his motion for reconsideration until after he had filed an untimely petition for review. After discovering his error, Egan filed a motion for an extension of time to file the petition in which he ludicrously blames the Court of Appeals for his own blunder because he "assumed" that the order denying reconsideration contained the same date as the transmittal email and cover letter. Motion for Extension of Time at 3. Egan's lame excuse for his lack of minimal diligence is not an extraordinary circumstance that would justify extending time. The Court should, therefore, deny Egan's motion for extension of time and dismiss this case.

In addition to being untimely, Egan's petition for review also fails on its merits. Egan seeks review under RAP 13.4(b)(3) and RAP 13.4(b)(4). Neither applies here. This case is not, as Egan contends, about constitutionally-protected petition and participation activity. It is about the legislatively-created right of access to information under the Washington

Public Records Act ("PRA"). RCW Chapt. 42.56. The Court of Appeals applied well-established case law in holding that the City's declaratory judgment action brought as authorized by RCW 42.56.540 for the limited purpose of determining the applicability of a statutory prohibition against the release of particular records was not a strategic lawsuit against public participation or petition within the ambit of the anti-SLAPP statute, RCW 4.24.525.

Egan argues that review is warranted under RAP 13.4(b)(3) to determine whether his efforts to seek records under the PRA were actions "in furtherance of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition." RCW 4.24.525(2)(e). Egan seeks to create a constitutional right where none exists. The Court of Appeals opinion is consistent with prior decisions of this Court and the U.S. Supreme Court holding that there is neither a constitutional right of access to government information generally nor is there a constitutional right to receive information under the PRA specifically.

Egan also argues that RAP 13.4(b)(4) applies because "the rules governing public access to video evidence of possible police misconduct present an issue of substantial public interest." Pet. at 1. That, however, was not the issue before the Court of Appeals. The issue below was

whether the City could bring an action under RCW 42.56.540 seeking the court's determination whether it had properly applied RCW 9.73.090(l)(c) to a limited subset of the many records Egan requested. This Court has held that agencies can seek a declaratory judgment in superior court under RCW 42.56.540 to determine whether a particular record is subject to disclosure under the PRA and that the requestor is a necessary party in such actions. The Court of Appeals decision is consistent with those decisions.

Egan offers nothing to support his petition except the same California anti-SLAPP cases he cited in his briefing below. The Court of Appeals considered those California cases and determined that they actually support the City's arguments.

The Court of Appeals applied established case law in reaching its decision and that decision does not present any matter of substantial public interest justifying review. While review is not merited under RAP 13.4(b), the Court need not reach the merits of the petition because Egan's motion for extension of time should be denied and the petition for review dismissed as untimely.

III. STATEMENT OF THE CASE

This case involves just one of many PRA requests that Egan has made for various types of Seattle Police Department ("SPD") records. CP

113, CP 269-70. When Egan submitted a request for 36 in-car videos, SPD provided him a copy of one of the videos because he represented the subjects of that video but denied him copies of the other 35 videos claiming exemption from disclosure under RCW 9.73.090(l)(c) (No sound or video recording made under RCW 9.73.090(1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded). Egan then wrote a letter to SPD threatening to sue the City and stating in bold-faced type that he would seek "**statutory damages at the maximum level**" if he did not receive the videos within two weeks. CP 49-50. The City brought a declaratory judgment action under RCW 42.56.540 seeking the court's determination whether it had properly applied RCW 9.73.090(l)(c). As required by this Court in *Burt v. Department of Corrections,* 168 Wn.2d 828, 836, 231 P.3d 196 (2009), the City named Egan party to the suit because he had requested the records at issue. In *Burt*, this Court held that the requestor is a necessary party and must be joined in any action brought under RCW 42.56.540.

Egan filed a special motion to dismiss the City's declaratory judgment action under RCW 4.24.525 claiming that a PRA request and threatening to sue over its denial are protected activities. CP 230-52. The

trial court found that Egan failed to meet his initial burden of showing that the City's declaratory judgment action was based on protected public participation and petition activity and denied the special motion to dismiss; it also dismissed the City's declaratory judgment action and awarded Egan attorney fees and costs under CR 11. CP 601-607. Egan appealed the dismissal of the anti-SLAPP motion, and the City separately appealed the award of fees under CR11.[1] On February 3, 2014, the Court of Appeals, issued a decision affirming the trial court's dismissal of Egan's anti-SLAPP motion. *City of Seattle v. Egan,* ___ Wn. App. ___, 317 P.3d 568 (2014). Egan sought reconsideration, which was denied on March 12, 2014. Egan filed an untimely petition for review on April 14, 2014, and filed a motion for extension of time to file petition for review on April 15, 2014, recognizing the untimeliness of his petition.

IV. RESPONSE TO EGAN'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

Egan seeks an extension under RAP 18.8(a), but that rule does not apply to a motion to extend time to file a petition for review. The correct rule is RAP 18.8(b), which provides for extension of time within which a party must file a petition for review "only in extraordinary circumstances

[1] On February 18, 2014, the Court of Appeals issued an unpublished opinion in which it held that the trial court had abused its discretion in awarding CR 11 fees and vacating the trial court's award of those fees. Egan did not seek review of that decision.

and to prevent a gross miscarriage of justice." RAP 18.8(b). Appellate courts rigorously apply the extraordinary circumstances and gross miscarriage of justice standards. *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). "Extraordinary circumstances" include instances where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. *Id.* Appellants must provide a sufficient excuse for their failure to timely file and demonstrate sound reasons to abandon the judicial preference for finality. *Schaefco, Inc. v. Columbia River Gorge Comm'n.*, 121 Wn.2d 366, 368, 859 P.2d 1225 (1993). Negligence or lack of reasonable diligence does not amount to extraordinary circumstances. *Beckman v. Dep't of Social & Health Servs.*, 102 Wn. App. 687, 693, 11 P.3d 313 (2000). This standard has rarely been satisfied in reported case law. *Reichelt,* 52 Wn. App. at 765.

Egan did not bother to read the order denying reconsideration until after he filed the petition and now has the audacity to blame the Court of Appeals for his negligence. His failure to take minimal steps to ensure that his petition for review was filed on time is not an extraordinary circumstance that would warrant extending time. See, *Beckman,* 102 Wn. App. at 696 (finding no extraordinary circumstances where the Attorney General's Office missed the deadline for appealing a $17 million judgment

because it did not have internal procedures to ensure timeliness); *Reichelt*, 52 Wn. App. at 765 (finding that mistakes of counsel resulting in an untimely filing do not constitute extraordinary circumstances).

This Court should deny Egan's motion for extension of time and dismiss the petition for review.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. No Constitutional Rights Are Implicated

Egan seeks review under RAP 13.4(b)(3), but no significant question of law under the U.S. or State Constitution is involved here that would warrant review.

Egan provided no legal support below or here for his claim that the anti-SLAPP statute applied to the City's declaratory judgment action. He simply contends that the statute applies to "any claim, however characterized" while failing to acknowledge the crucial statutory language requiring that the claim must be "based on an action involving public participation or petition." RCW 4.24.525(2). Egan's truncated reading would make any lawsuit or counterclaim subject to the anti-SLAPP statute regardless of its provenance. The Court of Appeals reasonably rejected Egan's selective reading of the statute.

In adopting RCW 4.24.525, the Legislature explicitly intended it to address "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Laws of 2010, ch. 118, §1(a). The anti-SLAPP statute applies only when a lawsuit is based on a valid exercise of First Amendment rights; thus, the Court of Appeals looked to U.S. Supreme Court cases interpreting the First Amendment to aid in determining whether the City's action was based on constitutionally-protected activity.

The Court of Appeals relied on *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978), in which the United States Supreme Court held that there is no general constitutional right of access to government information, stating: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." The Court of Appeals also relied on the even more compelling case of *John Doe. No.1 v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 2818, 177 L. Ed.2d 493 (2010), in which the Court explicitly recognized that there is no constitutional right to receive information under the Washington PRA: "The PRA is not a prohibition on speech, but instead a disclosure requirement. '[D]isclosure requirements may burden the ability to speak, but they ... do not prevent anyone from speaking.'" (citation omitted). The

Court of Appeals properly applied these precedents in holding that Egan did not have a constitutional right to the records requested; thus, his request under the PRA was not protected public participation or petition activity within the ambit of the anti-SLAPP statute. As a result, no significant question of law under the U.S. or Washington Constitution is involved here that would warrant review under RAP 13.4(b)(3).

B. Egan Cites Authority That Does Not Support His Petition

Egan attempts to support his petition by citing the same three California anti-SLAPP cases he cited below. His reliance on those cases is misplaced because the Court of Appeals properly rejected Egan's interpretation of them and, in fact, determined that they support the City's position.

The first case is *Equilon Enterprises, LLC v. Consumer Cause,* 29 Cal.4th 53, 124 Cal. Rptr.2d 507 (2002). The Court of Appeals distinguished *Equilon Enterprises* because it involved "markedly different facts" than those in this case. The litigation in *Equilon Enterprises* was not based on an actual, present legal dispute between the parties; rather, it was a direct attack on the sufficiency of a party's Proposition 65 notices.[2]

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[2] California Proposition 65 is a voter-approved initiative that enacted the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code §25249.5 *et seq.* Under Proposition 65, the state must publish a list of chemicals known to cause cancer or reproductive toxicity. *Id.,* §25249.8. Businesses, in turn, must provide warnings

The Court of Appeals observed that the City's declaratory judgment action was more closely analogous to another California case involving Proposition 65. *American Meat Inst. v. Leeman,* 180 Cal. Rptr.4th 728, 102 Cal. Rptr.2d 759 (2009). That court held that a declaratory judgment action brought by two trade associations in response to Proposition 65 notices was not a SLAPP where the associations sought a determination that the Federal Meat Inspection Act pre-empted Proposition 65. *Id.,* 102 Cal. Rptr.2d at 742. Egan not only fails to recognize distinguishing factual difference between *Equilon Enterprises* and the present action, he does not even cite *American Meat Inst.* in his petition for review.

Egan again cites a case involving an action filed against a law firm representing the estate of Audrey Hepburn. *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman,* 47 Cal. App.4th 777, 54 Cal. Rptr.2d 830 (1996). A lawyer for Hepburn's estate sent a letter to celebrities expressing an intention to lodge a complaint with the state attorney general requesting an investigation into whether a recording company had paid contractually-

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before consumers are exposed to such chemicals. *Id.,* §25249.6. A private citizen may bring an action to enforce Proposition 65 in certain instances, but at least 60 days before filing a lawsuit the citizen must give notice to the alleged violator, the Attorney General, district attorneys and city attorneys in the jurisdiction where the violation occurred. *Id.,* §25249.7.

owed royalties to charity and seeking the celebrities' support for the complaint. The recording company filed an action against the law firm. The recording company's suit did not address the underlying contractual dispute; rather, it directly attacked the lawyer's prelitigation letter claiming libel and interference with economic relationships. *Id.,* 47 Cal. App.4th at 780. The Court of Appeals properly determined that Egan's reliance on *Dove Audio* was misplaced because the underlying activity in that case was the lawyer's letter, as opposed to the actual legal controversy between the parties present in this case.

The Court of Appeals rejected Egan's interpretation of the third California case he cites as well. *City of Cotati v. Cashman,* 29 Cal. 4th 69, 52 P.3d 695, 124 Cal. Rptr. 2d 519 (2002). As Egan notes, one holding in *Cashman* is that an anti-SLAPP plaintiff need not show that his or her exercise of constitutional rights was actually chilled by the other party's action. *Id.,* 52 P.3d at 699-700. He, nonetheless, overlooks two other more pertinent holdings in that case. First, a court must look to the principal thrust or gravamen of the plaintiff's cause of action and where a claim is based on an actual, present conflict between the parties regarding the legal interpretation of particular legislation, the defendant does not meet its burden on the first prong. *Id.*, 52 P.3d at 702-03. Second, the fact that one party's protected activity may have triggered the other party's cause of

action does not necessarily mean the cause of action arose from the protected activity. *Id.*, 52 P.3d at 703. The Court of Appeals recognized that "as in *Cashman*, although the 'threat' of a suit may have pushed the City to act it was not the "gravamen" of the underlying action." *Egan,* 317 P.3d at 571.

The Court of Appeals correctly applied *Equilon Enterprises, Dove Audio,* and *Cashman* to the facts in this case and properly determined that the City's declaratory judgment action was based on an actual, present legal dispute and was not a SLAPP.

C. Egan Asserts a Public Interest Not Addressed Below

Egan argues that review is warranted under RAP 13.4(b)(4) asserting an issue of substantial public interest that was not before the Court of Appeals; i.e., "the rules governing public access to video evidence of possible police misconduct." Pet. at 1. The actual issue litigated below was whether a declaratory judgment action brought under RCW 42.56.540 to determine whether a particular record is subject to disclosure under the PRA is based on constitutionally-protected petition and participation activity within the ambit of RCW 4.24.525. The only public interest involved here is served by denying review. The Court of Appeals correctly recognized that Egan's argument would "vitiate" RCW 42.56.540.

Converting actions brought under RCW 42.56.540 into SLAPPs would have serious implications. The PRA's general injunction provision permits "an agency or its representative or a person who is named in the record or to whom the record specifically pertains" to seek an injunction to enjoin disclosure of a specific public record. RCW 42.56.540. This Court has held that a state or local government entity can seek a declaratory judgment in superior court under RCW 42.56.540 to determine whether a particular record is subject to disclosure under the PRA. *Soter v. Cowles Pub 'g. Co.*, 162 Wn.2d 716, 751, 174 P.3d 60 (2007). Egan's reasoning would convert any agency's declaratory judgment action or counterclaim in a PRA case into a SLAPP and would mean that in adopting RCW 4.24.525 the Legislature intended to implicitly repeal RCW 42.56.540. This is highly unlikely given the significant public importance of the PRA. RCW 42.56.030.

Applying the anti-SLAPP statute to actions brought under RCW 42.56.540 would affect more than just public agencies because the statute allows any person named in a record or to whom a record specifically pertains to seek an injunction to prevent disclosure. Third parties who have a legitimate interest in protecting their rights frequently bring actions under RCW 42.56.540 seeking injunctive relief to prevent disclosure of records. These third-party actions are usually brought by parties identified

in records who believe disclosure will violate their right to privacy or by businesses that seek non-disclosure of proprietary, trade secrets, and other sensitive business-related information provided to government agencies in connection with contract bidding and other transactions. Multiple reported cases have been brought by third parties asserting privacy interests. *See, e.g., Bellevue John Does v. Bellevue School Dist.,* 164 Wn.2d 199, 189 P.3d 139 (2009) (teachers who were the subject of unsubstantiated allegations of misconduct with students); *Tiberino v. Spokane Co.,* 103 Wn. App. 680, 13 P.3d 1104 (2000) (an employee seeking nondisclosure of email with highly personal content unrelated to agency business); *Brown v. Seattle Public Schools,* 71 Wn. App. 613, 860 P.2d 1059 (1993) (an elementary school principal seeking to enjoin disclosure of performance evaluation that did not reflect specific incidents of misconduct); and *Bainbridge Island Police Guild v. City of Puyallup,* 172 Wn. 2d 398, 259 P.3d 190 (2011) (a police officer seeking to enjoin disclosure of investigative records of unsubstantiated allegations of sexual assault).

Likewise, many reported cases have been brought by businesses seeking injunctive relief to prevent disclosure of trade secrets, proprietary, or other business-related information. *See, e.g., Northwest Gas Ass'n. v. Wash. Util. & Transp. Comm'n.,* 141 Wn. App. 98, 168 P.3d 443 (2007),

review denied, 163 Wn.2d 1049, 187 P.3d 750 (2008) (gas pipeline operators seeking nondisclosure of highly-detailed shapefile data that they were required by law to provide to the WUTC); *Dragonslayer, Inc. v. Wash. State Gambling Comm.,* 139 Wn. App. 433, 161 P.3d 428 (2007) (card room operators seeking to enjoin disclosure of audited financial statements provided to the State Gambling Commission); and *Ameriquest Mortg. Co. v. Wash. State Office of Atty. Gen.*, 170 Wn. 2d 418, 241 P.3d 1245 (2010) (a mortgage company seeking to enjoin disclosure of confidential customer loan file information provided to an agency).

This Court has held that a requestor must be joined as a necessary party in any action seeking to enjoin disclosure of records. *Burt,* 168 Wn.2d. at 833. Thus, an agency or third party bringing an action under RCW 42.56.540 ***must*** join the requestor. If a PRA request or threat to sue over a request is sufficient to meet the first prong of the statute, a requestor brought into court could automatically bring an anti-SLAPP motion, and the third party would be forced to respond to it. As a result, individuals and businesses will be reluctant to seek an injunction for fear that they would be forced to defend an anti-SLAPP motion in addition to pursuing the injunction action. This is doubly burdensome to third parties because they also bear the cost of the underlying injunction action. Egan's reading of RCW 42.56.540 results in an untenable result.

Nothing about the Court of Appeals decision is about the public interest propounded by Egan. There is no basis for review under RAP 13.4(b) (4).

VI. CONCLUSION

Simply assuming that an order says something without reading it does not constitute extraordinary circumstances warranting an extension of time under RAP 18.8(b). Egan's motion for extension of time to file petition for review should be denied and his petition for review should be dismissed as untimely. Moreover, review should not be granted because Egan's Petition for Review does not establish the elements of RAP 13.4(b)(3) or RAP 13.4(b)(4).

DATED this 19th day of May, 2014.

PETER S. HOLMES
Seattle City Attorney

By: Mary F. Perry
Mary F. Perry, WSBA #15376
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DECLARATION OF SERVICE

Marisa Johnson states and declares as follows:

1. I am over the age of 18, am competent to testify in this matter, am a Legal Assistant in the Law Department, Civil Division, Seattle City Attorney's Office, and make this declaration based on my personal knowledge and belief.

2. On May _____, 2014, I caused to be delivered by email as agreed to by all parties as follows:

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a copy of Response to Motion for Extension of Time and Answer to Petition for Review.

3. I declare under penalty of perjury under the laws of the State of

Washington that the foregoing is true and correct.

DATED this 20th day of May, 2014, at Seattle, King County, Washington.

Marisa Johnson

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, May 20, 2014 8:56 AM
To: 'Johnson, Marisa'
Cc: Perry, Mary
Subject: RE: James C Egan v City of Seattle - Supreme Ct. #90136-8

Rec'd 5-20-14

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From: Johnson, Marisa [mailto:Marisa.Johnson@seattle.gov]
Sent: Tuesday, May 20, 2014 8:49 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Perry, Mary
Subject: James C Egan v City of Seattle - Supreme Ct. #90136-8

Attached please find our Response to Motion for Extension of Time to File Petition for Review and Answer to Petition for Review for the following case:

James C Egan v City of Seattle
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