NO. 91105-3

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Petitioner,

v.

CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON, et al.,

Respondents.

ANSWER TO WEST'S PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

There is no basis for this Court to grant discretionary review of the Court of Appeals decision in *West v. Gregoire*, __ Wn. App. __, 336 P.3d 110 (2014). The court simply applied a basic principle of civil litigation to a Public Records Act (PRA) case, namely that a litigant must brief or argue a claim to the trial court, otherwise it will be considered abandoned. *Id.* at 114. Mr. West failed to do any of these things with respect to the various assertions of PRA violations that he now wants to litigate. The trial court concluded that the only issue Mr. West presented was whether a gubernatorial executive privilege exists and can be asserted as an exemption to the PRA. On appeal Mr. West did not assign error to this conclusion. As to the issue presented, the trial court ruled on executive privilege just as this Court later did in *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013). *Freedom Foundation* controls, and there is no issue left for this Court to decide.

II. COUNTERSTATEMENT OF THE ISSUE

Should Mr. West's Petition for Discretionary Review be granted where none of the criteria for review under RAP 13.4(b) are met?

III. COUNTERSTATEMENT OF THE CASE

This case arises out of Mr. West's request for "all of the records currently being withheld from public disclosure by the office of the

Governor under color a [sic] claim of executive privilege, from 2007 to present, to include all 35 requested described [sic] in the EFF policy letter of January 13, 2009, (attached)". CP at 565, 569. On September 13, 2010, Mr. West hand-delivered a complaint to the Governor's office that claimed records cannot be withheld based on executive privilege because it is not an actual exemption under the PRA.[1] CP at 3, 566, 599. He had not yet reviewed or arranged to review or copy the records and privilege log produced on September 3, 2010, in response to his public records request. CP at 566–67, 597, 1005.

On March 7, 2011, more than five months after obtaining records and a privilege log, Mr. West filed a motion to show cause, without briefing, again asserting generally that records cannot be withheld under the PRA on a claim of executive privilege. CP at 11-12.[2]

Six weeks later on April 20, 2011, he filed a brief in support of his motion to show cause. CP at 520. The brief was devoid of any factual allegations, supporting declarations, or arguments relevant to the specific records at issue in this case. Rather, it was a "cut and paste" version of

[1] Mr. West's complaint contains irrelevant allegations against persons not party to this case regarding records not in dispute in this case. The complaint appears to be a "cut and paste" version from another pleading.

[2] In the motion Mr. West alluded to a different case he was the litigating against the former Governor in which he attempted, unsuccessfully, to bring a test case before the Supreme Court (No. 84629-4) on the existence of executive privilege as an exemption under the PRA. CP at 12. The case was transferred to and decided by the Court of Appeals (No. 42779-6-II); the mandate issued in that case on May 23, 2013.

what he had filed in a different case, and it argued only the legal issue of whether there is a gubernatorial executive privilege in Washington. The first sentence of the introduction of the brief states the case "concerns the question of whether the Constitution of the State of Washington provides for an executive privilege that supersedes the Public Records Act." CP at 526. The introduction concludes by requesting that the court "exercise its discretion to act decisively to resolve the issue of whether the privilege exists once and for all." CP at 528.

The State responded with legal briefing and multiple declarations and exhibits related to the existence of executive privilege as an exemption to the PRA and the application of the privilege to the records at issue. CP at 1024-45, 564-606, 607-31. A hearing was held on May 6, 2011, at which time Mr. West requested a continuance, and the matter was set over to June 17, 2011. Dkt #29.

Mr. West filed a supplemental memorandum on June 2, 2011, and stated as the single issue: "Does Defendant Gov. Gregoire violate the Public Records Act by asserting the doctrine of executive privilege to justify withholding records in response to a public records request?" CP at 639. Once again, his briefing contained no factual allegations, supporting declarations, or arguments regarding the specific records in this case. Mr. West *literally* photocopied the summary judgment briefing filed

by Freedom Foundation in Thurston County Superior Court Case No. 11-2-00774-7, another case pending at the same time as Mr. West's.[3] Mr. West removed the first few pages that had factual references to Freedom Foundation and then simply taped his name over that of the Freedom Foundation wherever it appeared.

The State filed supplemental responsive briefing, a declaration, and an exhibit on behalf of the former Governor. CP at 1046-67, 662-96.

Mr. West filed declarations on April 11, June 6, and June 13, 2011. CP at 46, 661, 697. In the first and third declarations he appended the records the former Governor had produced to him after waiving executive privilege, and summarily asserted the records and exemption logs should have been produced sooner. CP at 46, 697. However, there was no argument supporting such an assertion, which incorrectly presumed (without supporting argument or authority) the former Governor was compelled in the first place to waive the privilege. In the second declaration, Mr. West stated that if the "broad claim of executive privilege is not sustained, secondary issues will remain as to backup claims asserted by the State as their 'fallback' position." CP at 661. The executive privilege exemption was sustained, and in any case, Mr. West never

[3] The *Freedom Foundation* case was accepted for direct review by the Supreme Court, resulting in the decision recognizing gubernatorial executive privilege in Washington. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013).

briefed or argued any "backup claims," did not identify with any specificity particular records he planned to dispute, and did not argue the substance of any exemption other than executive privilege.

At the oral argument on the merits on June 17, 2011, Mr. West argued the single issue of the existence of executive privilege. He began with the statement: "Whether executive privilege should be recognized in the state of Washington is a question to be determined by reference to the State Constitution and the laws." RP at 4.[4] He ended his argument requesting that the trial court "find that there is no support in the Constitution or laws of the state of Washington for the broad, far-ranging unlimited executive privilege that the State seeks to have recognized." RP at 6. No other issue was argued between those two statements.

On June 23, 2011, the trial court issued a final order dismissing the case with prejudice. CP at 1004. Conclusion of Law 1 recites that the "only issue before the Court is whether the Governor may assert a gubernatorial executive privilege, grounded in the separation of powers . . . , as an exemption to the PRA." CP at 1007. The trial court's findings of fact and conclusions of law (CP at 1004-08) are consistent with the holding ultimately adopted by the Supreme Court in *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013). The trial court

[4] "RP" references the Report of Proceedings for the June 17, 2011, hearing before Judge Tabor that was filed in the Court of Appeals on August 29, 2014.

concluded that the governor could assert a constitutionally-based executive privilege as an exemption to the PRA, and that this was the only issue before it to decide. CP at 1007-08.

Mr. West filed a Motion for Reconsideration attacking the trial court and counsel, but once again providing no factual allegations or legal arguments as to any specific record, justification for overcoming the presumption of executive privilege, or other explanation of a PRA violation. CP at 1010. The State responded, CP at 1063, and the motion was denied, CP at 1022.

Mr. West appealed the trial court's Final Order and sought direct review to the Supreme Court. The parties filed briefs in the Supreme Court. Mr. West did not assign error to Conclusion of Law 1 as required by RAP 10.3(a)(4). *See* Appellant's Opening Brief, No. 86150-1 at 4.

During this same time period, the Freedom Foundation separately was pursuing its test case against Governor Gregoire challenging the assertion of executive privilege as an exemption to the PRA. *See Freedom Found. v. Gregoire*, 178 Wn.2d 686, 310 P.3d 686 (2013). The Supreme Court heard oral argument in the *Freedom Foundation* case and issued a decision recognizing executive privilege as an exemption to the PRA. *Id.* Mr. West's case was returned to the Court of Appeals for final disposition,

and Mr. West now seeks discretionary review from that court's opinion. *West v. Gregoire*, __ Wn. App. __, 336 P.3d 110 (2014).

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals' Conclusion That Mr. West Abandoned Any PRA Claim That He Failed to Brief or Argue to the Trial Court Is Not in Conflict With Any Decision of This Court or the Court of Appeals, and Does Not Involve a Significant Question of Constitutional Law or an Issue of Substantial Public Importance

The trial court's Conclusion of Law 1 specifically stated that the "only issue before the Court is whether the Governor may assert a gubernatorial executive privilege, grounded in the separation of powers . . . , as an exemption to the PRA." CP at 1007. Mr. West did not assign error to this Conclusion of Law 1 as required by RAP 10.3(a)(4). *See* Appellant's Opening Brief, No. 86150-1 at 4. Mr. West had the opportunity before the trial court in two sets of briefing, three declarations, a motion for reconsideration, and oral arguments to refute the former Governor's evidence and arguments and present his case. He offered no facts to support overcoming the assertion of executive privilege, and none are in the record. Furthermore, he developed no arguments as to how the PRA allegedly had been violated, other than his argument that executive privilege is not an exemption to the PRA, which the trial court properly rejected. The show cause proceeding on June 17, 2011, was the hearing on the merits. At that hearing, consistent with his briefing, Mr. West, in

his own words, continued to define the issue as whether executive privilege should be recognized in the State of Washington. RP at 4-6. Mr. West's entire focus was on convincing the trial court that executive privilege does not exist. Now that *Freedom Foundation* has recognized executive privilege as an exemption to the PRA, no issue is left in this case for the Supreme Court to decide.

The Court of Appeals reached an unremarkable conclusion fully consistent with the jurisprudence of Washington appellate courts. Simply stated, a litigant who fails to brief or argue a claim to the trial court abandons it. *West v. Gregoire*, 336 P.3d at 114. *See Cano-Garcia v. King* County, 168 Wn. App. 223, 248, 277 P.3d 34, *review denied*, 175 Wn.2d 1010 (2012) (claim abandoned where litigant fails to present argument or evidence in support); *Rainier Nat'l Bank v. McCracken*, 26 Wn. App. 498, 508, 615 P.2d 469 (1980), *review denied*, 95 Wn.2d 1005 (1981) (counterclaim abandoned where defendant did not present evidence in support). This principle is no less true in a PRA case. Courts are not required to entertain speculative theories of PRA liability based on bald claims and undeveloped arguments. *West v. Thurston County*, 168 Wn. App. 162, 186-87, 275 P.3d 1200 (2012) ("passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration"). Where a plaintiff has failed to pursue alleged PRA violations in the trial

court, he cannot repackage his theory of the case on appeal in the hope of obtaining yet another bite at the apple. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 733-34,738, 218 P.3d 196 (2009) (review is limited to issues presented to the trial court).

The appellate courts have consistently applied the rules and procedures that generally govern civil cases to PRA cases. *See, e.g., Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 105, 117 P.3d 1117 (2005) (rules on intervention apply in PRA cases); *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 716-18, 261 P.3d 119 (2011) (civil rules govern discovery and court retains discretion to control discovery as it would in any other civil case); *Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 715-16, 748 P.2d 597 (1988) (live testimony allowed even though PRA provides that case can be heard on affidavits). In addition to a show cause hearing, other civil litigation tools have been used to resolve disputes involving the PRA, such as summary judgment, motion to dismiss, and writ of mandamus. *See, e.g., Newman v. King County*, 133 Wn.2d 565, 569, 947 P.2d 712 (1997) (summary judgment); *Limstrom v. Ladenburg*, 98 Wn. App. 612, 614, 989 P.2d 1257 (1999), *review denied*, 141 Wn.2d 1004 (2000) (motion to dismiss); *Seattle Times v. Serko*, 170 Wn.2d 581, 588-89, 243 P.3d 919 (2010) (mandamus). There is nothing in the PRA that

overcomes the general principle in civil litigation that if a litigant does not present his claim to the trial court supported by arguments the claim will be considered abandoned.

Mr. West suggests that the Court of Appeals decision conflicts with *Gronquist v. Dept. of Corr.*, 159 Wn. App. 576, 247 P.3d 436, *review denied*, 171 Wn.2d 1023 (2011). The contrary is, in fact, the case. In the first instance, the *Gronquist* court recognized that failure to argue an issue on appeal, even if there has been an assignment of error, is a waiver of the issue. *Id.* at 589 n.10. Here, Mr. West did not even assign error to the trial court's conclusion that the only issue before it was the existence of executive privilege as an exemption to the PRA.

Additionally, regarding whether other issues had been preserved, the *Gronquist* court remarked in a footnote that Gronquist "raised these arguments in his show cause motion, which the DOC acknowledged below." *Id.* at 589 n.11. In this case, the Court of Appeals assumed without finding that Mr. West raised other claims "in his initial pleadings," i.e. the initial complaint, but that he failed to present any argument in the show cause proceedings. *West v. Gregoire*, 336 P.3d at 113. Furthermore, in responding to Mr. West's arguments, the former Governor consistently and clearly has treated them as attempting to create a test case on the existence of executive privilege as a PRA exemption,

and Mr. West did nothing in the trial court that effectively added any additional issue for consideration. Unlike the Department of Corrections in *Gronquist*, the former Governor in this case never acknowledged that any claim, other than the existence of executive privilege, was asserted before the trial court. The Court of Appeals decision is not in conflict with *Gronquist* or any other Washington appellate decision; therefore, Mr. West's petition for discretionary review should be denied.

The Court of Appeals' application of the basic rules of civil litigation to PRA cases does not raise a significant constitutional question or issue of substantial public importance. As discussed above, the appellate courts routinely have applied civil procedures and tools to PRA litigation, and application of the civil rules in this case is unremarkable. As the Court of Appeals correctly recognized, the purpose of the PRA is not satisfied by allowing piecemeal litigation. *West v. Gregoire*, 336 P.3d at 114. The orderly administration of justice and the remedial purpose of the PRA are not served if litigants are permitted to raise new arguments after the case has been presented and the trial court is prepared to issue or has issued a ruling. The requirement that a litigant must brief and argue his claims to the trial court in order to preserve them is not novel, does not infringe upon any constitutional right, and is not a basis to grant discretionary review.

B. The Court of Appeals' Application of the Three-Part Executive Privilege Test to Mr. West's Claim Is Not in Conflict With Any Decision of This Court or the Court of Appeals, and Does Not Involve a Significant Question of Constitutional Law or an Issue of Substantial Public Importance

The requirement of demonstrating a "particularized need" to overcome a claim of executive privilege is integral to the executive privilege analysis and part of the well-settled jurisprudence on the privilege. *Freedom Found.*, 178 Wn.2d at 705. That requirement was fully briefed by both parties before the trial court. CP at 652-55, 1058-61. Mr. West, like Freedom Foundation in its case, chose not to identify any need, instead advancing the argument that there simply is no privilege or, if there is a privilege, the test does not require a showing of need. *See Freedom Found.*, 178 Wn.2d at 705. Having chosen that strategy and lost, Mr. West now is trying to recast the theory of his case to perpetuate further litigation.

The former Governor met her burden under *Freedom Foundation* for withholding records under executive privilege. The privilege applies (1) where the communications are authored, solicited, or received by the governor or her aides responsible for formulating policy advice, and (2) the communications occur for the purpose of informing policy choices. *Freedom Found.*, 178 Wn.2d at 703-04. If the governor provides a privilege log identifying the author, recipient, and general subject matter,

"the courts must treat the communications as presumptively privileged." *Freedom Found.*, 178 Wn.2d at 704-705. "Respect for a coordinate branch of government . . . requires . . . [courts] to provide some deference to a governor's decision that material falls within the ambit of executive privilege." *Id.* at 704. The presumption may be overcome only if the requester makes a showing of particularized need for the materials; otherwise, the court shall "abstain from examining material the governor determined is privileged . . . for judicial examination necessarily intrudes into the executive branch's need for confidentiality" and is inconsistent with the constitutional principle of separation of powers. *Id.* at 705-06.

Using the same analysis that the *Freedom Foundation* court ultimately applied, the trial court rejected Mr. West's claim. CP at 1007-08. The former Governor's General Counsel, Narda Pierce, engaged in the same review process and preparation of privilege logs in this case that was approved by the Supreme Court in *Freedom Found.*, 178 Wn.2d at 691, 705-06. Based on the uncontroverted declarations of Ms. Pierce and the two privilege logs provided to Mr. West and the court, the former Governor met her burden in asserting executive privilege. CP at 607, 662, 575, 667. Ms. Pierce personally reviewed each responsive record to make determinations and recommendations to the former Governor on whether any record or portion of a record was exempt under the PRA. CP at 566,

607, 608-09, 664-65. The assertion of executive privilege can depend on circumstances that might not be readily apparent from the record and in certain instances were not known to Ms. Pierce. CP at 609-10, 664-65. Consequently, she consulted with the former Governor's policy advisors who were knowledgeable about the issues discussed in the records in order to formulate her recommendations. CP at 609-10, 664-65. As a result of Ms. Pierce's review, exemption logs were prepared that identified each document withheld or redacted by page number, date, author, recipient, description of the substance of record, and an explanation of the exemption. CP at 566, 575, 610, 664-65, 667. Ms. Pierce also prepared a letter to Mr. West explaining in further detail the nature and application of executive privilege. CP at 567, 603, 610. Additionally, it should be noted that Governor Gregoire went beyond what is required under the PRA and waived the privilege for numerous documents and produced them to Mr. West. CP at 609-10, 664-65, 47-519, 701-997. Mr. West received more than what he was entitled to under the law.

Mr. West suggests that the Court of Appeals decision in this case is at odds with a prior unpublished decision in *West v. Gregoire*, noted at 170 Wn. App. 1029 (2012). In the prior case, the trial court assumed, without deciding, that executive privilege exists as an exemption to the PRA but concluded that the document in question was not a "gubernatorial

communication" eligible for the privilege. The only issue on appeal was the penalty calculation. Mr. West failed in that prior litigation to have a court expressly decide the legal issue of whether executive privilege exists as an exemption to the PRA. That failure may explain why, for his second round of litigation, he chose to request all records for which the privilege was asserted for a certain time period and chose not to make arguments as to individual records or his need for them. In this way, he might increase the likelihood that a court would address the underlying legal question.

There is no conflict or inconsistency between what Mr. West has styled as *West v. Gregoire (I)* and *West v. Gregoire (II)*. Nor does the prior case have a preclusive effect on the latter case through the principles of collateral estoppel or res judicata. The trial court in the latter case simply reached the legal issue that the prior case avoided. Mr. West had repeated opportunities to offer facts and make arguments related to a particularized need for the records at issue in this case, but he failed to do so. Rather, he relied on the single legal theory that there is no gubernatorial executive privilege exemption under Washington's PRA—a theory that was ultimately rejected by this Court in *Freedom Foundation*. There is no basis to grant discretionary review, because there is no conflict of appellate opinions.

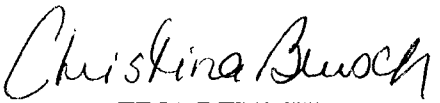
Finally, Mr. West seems to suggest that, because the trial court was faced with an issue of first impression, the application of the court's legal conclusion to his case raises a significant constitutional question or issue of substantial public importance. It does neither. The trial court did nothing more than what the Supreme Court did in *Freedom Foundation.* It interpreted and applied the law to the facts and arguments presented. And even if the trial court was faced with an issue of first impression, this Court has resolved that issue for the trial courts in Washington. Mr. West has not demonstrated any basis for discretionary review by this Court.

V. CONCLUSION

This Court should deny discretionary review.

RESPECTFULLY SUBMITTED this 16th day of January 2015.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on this date I served the foregoing document via US Mail, postage paid, and electronic mail, upon the following:

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DATED this 16th day of January 2015, at Olympia, Washington.

KRISTIN D. JENSEN
Confidential Secretary

OFFICE RECEPTIONIST, CLERK

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Subject: 91105-3; West v. Gregoire; Answer to Petition

Dear Clerk,
Attached for filing in the above matter, please find the Answer to West's Petition for Discretionary Review.

Respectfully,
Kristin

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