No. 47359-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

NORBERT SCHLECHT

Appellant,

v.

CLARK COUNTY WASHINGTON,

Respondent.

APPELLANT'S REPLY TO RESPONDENT'S RESPONSE

Norbert Schlecht, Pro Se
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INTRODUCTION

My reply will focus on three areas: perfecting the record, attorney fees (appellant) and attorney fees (respondent). As to the essence of my appeal, namely the existence of material issue, I will just briefly summarize the relevant facts/issues ("smoking guns"):

> (A) Respondent Clark County insists (supported by a backdated date stamp) that my initial public records request was not received until 11/20/2013. The United States Postal Service, an agency of the United States federal government, however insists that such public records request was delivered eight (8) days prior on 11/12/2013 - a clear violation by Clark County of the Public Records Act five day rule.
>
> (B) Respondent Clark County insists (supported by a declaration under penalty of perjury) that "the investigating officers never obtained the actual names of (subjects)", which is contradicted by an email authored by one of the investigating officers, quote "She (subject) was id'd (identified)".

PERFECTING THE RECORD

Clark County is attempting to label me as some kind of three-time loser: someone with bad luck or poor skills who consistently loses (petitioner's motion for summary judgment, motion for reconsideration and respondent's motion for summary judgment). The third issue I do not consider "lost" as it is currently being reviewed by this court of appeals. The first two issues I consider as one package. Therefore, just because one minor skirmish does not go as it should,

such does not mean that the entire war is "lost".

Respondent Clark County's response to my opening brief is seemingly based upon the theory that I, the appellant, failed to "perfect the record on appeal" and that those filings which I chose not to include with the appeal amount to some kind of track record having some kind of relevancy. Respondent Clark County has subsequently "perfected" the record via a Supplemental Designation of Clerk's Papers consisting of twenty-five (25) sub dockets.

Please note that RAP 9.6 (DESIGNATION OF CLERK'S PAPERS AND EXHIBITS) clearly states under paragraph (a)

> Any party may supplement the designation of clerk's papers and exhibits prior to or with the filing of the party's last brief. Thereafter, a party may supplement the designation only by order of the appellate court, upon motion.

Neither does such appellate court order exist nor has the supplemental designation been filed prior to or with the filing of CLARK COUNTY'S RESPONSE TO APPELLANT'S OPENING BRIEF. The supplemental designation was filed at the Superior Court on 2/19/2015, two days **after** the filing of subject brief.

Respondent Clark County seems to be confused as to who is the appellant and who is the respondent. It is clear from the record, that I am the appellant.

Therefore I get to designate what I want reviewed by the appellate court. RAP 5.3 clearly states under paragraph (a)(3)

> A notice of appeal must designate the decision or part of decision which the party wants reviewed.

I have clearly designated what I want reviewed - not more, not less.

As to "perfecting the record", I have heeded the appellate court's implicit request to keep the record simple (lean and mean). RAP 9.6 clearly states under paragraph (a)

> Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court.

Furthermore, RAP 9.6 clearly states under paragraph (b)(1)

> The clerk's papers shall include, at a minimum: ... the notice of appeal ... the summons and complaint ...

I have met the requirements of RAP 9.6 in only designating those filings which are relevant to the decision that I want reviewed.

Respondent Clark County's intention in "perfecting" the record is to bury the relevant issues in a haystack of irrelevant filings. The relevant issues I have briefly summarized in my above Introduction.

What is very revealing as to Clark County's Supplemental Designation of

Clerk's Papers is that even though irrelevant bureaucratic type of filings are included (case information cover sheet, return of service, notice of appearance, certificate of mailing, citation, motion docket, etc.), those filings ("smoking guns") which support my position of inadequate judicial review are not included.

So that there is no misunderstanding: my initial Designation of Clerk's Papers excluded all those filings which I considered to be irrelevant to the issue presented to the appellate court (solely the granting of respondent's motion for summary judgment). If however, prior decisions become an issue, then I consider certain filings to be relevant. Therefore, I too have filed a Supplemental Designation of Clerk's Papers at the trial court.

When reviewing the "full" record as supplemented, this court will find that the decisions made by the trial court prior to granting of respondent's motion for summary judgment were also questionable. Both prior decisions (petitioner's motion for summary judgment and applicable reconsideration) at a minimum did not address the outrageous violation of the public records act five day rule.

Please refer to VERBATIM REPORT OF PROCEEDINGS (CP 220-226), where the Honorable Judge Suzan Clark granted summary judgment without oral argument, quote: "*If you would like to give additional argument. My inclination*

is to grant the motion." (CP 224, line 25 through CP 225, line 1). At this point, I do not have a problem with the trial court's decision. It is entirely possible that the underlying filings are so overwhelmingly in favor of granting summary judgment that any subsequent oral argument can be ignored. Now please compare the (original) ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT (CP 213) with subsequent AMENDED ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT (CP 88-89). It is apparent that the original order was some kind of cut and paste job that went south. More significantly, I am convinced that such order was never actually reviewed and was merely "robo-signed". Therefore, I can not rule out that the underlying filings also did not receive adequate judicial attention. And the same applies to the preceding decisions of the trial court (petitioner's motion for summary judgment and motion for reconsideration).

ATTORNEY FEES (APPELLANT)

Respondent Clark County falsely interprets my demand for attorney fees. Please note that when asking for "*costs*", such was always **without** caveat. In contrast, when asking for "attorney fees", such was always **with** caveat: "*if applicable*". I understand that, in general, as pro se I am not entitled to attorney fees. I however do reserve the right to retain counsel at any time in this process,

at which point attorney fees would be applicable. As an individual with zero legal background, I know my limitations and have in the past retained counsel, for example the various authors of the Washington State Attorney General's Open Government Internet Deskbook. And if those individuals are too busy/not interested it would be somebody else (outside of Clark County).

Even though I consider the issue of attorney fees (appellant) to be a moot point, I will point out that Respondent Clark County's wild conspiracy-like theory ("*apparently anticipating that the Court will order the production of nonexistent records*") makes no sense in that "nonexistent" records can not be released because such are ... "nonexistent".

ATTORNEY FEES (RESPONDENT)

Respondent Clark County's claim as to attorney fees is based upon the false assumption that "there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there is no reasonable possibility of success" - I dispute such and again refer to the various "smoking guns" as summarized in my Introduction.

Additionally, it is one of the fundamental principles of appellate review that only issues brought up at the trial level will be considered. Attorney fees (respondent) were not an issue vis-a-vis Respondent's Motion for Summary

Judgment. Therefore, Respondent Clark County is asking for an award of attorney fees solely as a punishment to be imposed upon me for taking this matter to the appellate level. If such practice becomes precedent, then I predict a substantial decrease in the work load of the appellate courts.

Finally, please note that Clark County refers to Miller Cas. Ins. v. Briggs, 100 Wn.2d 9, 15, 665 P.2d 887 (1983). Do note that such case was not a Washington State Public Records Act case. WAC 44-14-08004(7) clearly states:

> Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.

CONCLUSION

I again respectfully urge that summary judgment was improperly granted in this case and that this matter should be remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 17TH day of March 2015.

Norbert Schlecht, Pro Se
Appellant

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORBERT SCHLECHT, Appellant,	)	
	)	No. 47359-3-II
v.	)	
	)	CERTIFICATE OF SERVICE
CLARK COUNTY, Respondent,	)	

I, the appellant Norbert Schlecht, hereby certify that on March 17th, 2015, I deposited following documents in the mails of the U.S. Postal Service, postage prepaid, directed to the below named individuals as shown below:

Original (for filing) and one copy of Appellant's ReplyBrief sent to:
David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Copy of Appellant's Reply Brief sent to:
Jane Vetto
Clark County Prosecuting Attorney, Civil Division
1300 Franklin ST., Suite 380
PO Box 5000, Vancouver, WA 98666-5000

Dated this 17th day of March 2015.

Norbert Schlecht

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