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No. 71425-2

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

ANNE BLOCK,

Appellant,

vs.

THE CITY OF GOLD BAR

Respondent.

RESPONDENT CITY OF GOLD BAR'S ANSWER TO BRIEF OF AMICI WASHINGTON COALITION FOR OPEN GOVERNMENT, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, AND ALLIED DAILY NEWSPAPERS OF WASHINGTON

Michael R. Kenyon
WSBA No. 15802
Ann Marie Soto
WSBA No. 42911
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent City of Gold Bar

ORIGINAL

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I. INTRODUCTION

Amici offer nothing new in support of Block's case.

Amici repeat the same mantra mistakenly and repeatedly relied upon by Block: namely, that Block as a public records requestor can never have the burden of proof in a Public Records Act ("PRA") action, even when Block herself moves for summary judgment.

Amici's contention is contrary to the plain language of the civil rules and decades of unremarkable case law. Even more fundamentally, Amici (again like Block) fail to address the actual posture of this case – in the trial court, the parties brought cross-motions for summary judgment. Block indisputably had the burden of proof on her motion for summary judgment, and she failed to satisfy that burden by a wide margin. Block's motion was accordingly denied. The City equally indisputably had the burden of proof on its motion for summary judgment, and the City satisfied its burden by an equally wide margin. Block offered no factual resistance, material or otherwise, in response to the City's motion.

Amici's Brief merely repeats and recycles Block's own arguments before this Court. It offers no additional insight or assistance.

II. ARGUMENT

A. Burden of Proof on Summary Judgment.

Amici and Block argue that a public agency always carries the

burden of proof in a PRA case, even when a public agency opposes a plaintiff's motion for summary judgment, and that the trial court improperly shifted the burden to Block.[1]

Amici's Brief misses the point. The parties' disagreement arises out of the question whether Block has the burden of proof as a moving party on her own motion for summary judgment based on her status as a plaintiff in a PRA case. She does.

Likewise, once the City met its initial burden on its motion for summary judgment, the burden shifted to Block to offer admissible factual evidence sufficient to raise a dispute of material fact. She did not.

The trial court heard cross-motions for summary judgment. CP 313-443; 590-612. Block had, and failed to meet, the burden on her motion. The City had, and met, the burden on its motion.

B. Block has the Burden of Proof on her Motion for Summary Judgment, Even in a PRA Case.

The initial burden on summary judgment is always on the moving party, regardless of the nature of the underlying proceedings. To some degree at least, Amici apparently, and correctly, agree. Brief of Amici at 7 ("[T]he City is correct that summary judgment standards typically apply to

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[1] As explained in greater detail below, Amici's arguments on issues not raised by Block or the City should not be considered by this Court. Coburn v. Seda, 101 Wn.2d 270, 279, 677 P.2d 173 (1984).

public records cases . . . .").

"The Rules of Civil Procedure apply in a PRA action." City of Lakewood v. Koenig, 160 Wn. App. 883, 889, 250 P.3d 113 (Div. II 2011). This specifically includes summary judgment, which "procedure is also a proper method to prosecute PDA [formerly, Public Disclosure Act] claims. . . . [A] show cause procedure is discretionary, not mandatory." Spokane Research and Defense Fund v. City of Spokane, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005). Here, Block and her able counsel simply exercised their discretion to forego a show cause hearing.

In their Brief at page 8, Amici cite to Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 720-721, 261 P.3d 119 (2011) ("Neighborhood Alliance") for the proposition that a public agency always has the burden of proof, even as the non-moving party on summary judgment. In Neighborhood Alliance, the *County* moved for summary judgment. This placed the initial burden on the County because it was the moving party, not because it was a public agency. 172 Wn.2d at 712.[2]

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[2] The Neighborhood Alliance court cites as supporting authority to Valencia-Lucena v. United States Coast Guard, 180 F.3d 321 (D.C. Cir. 1999). In that case, the Coast Guard moved for summary judgment and properly had the burden of proof, again because it was the moving party and not because it was a public agency. Id. at 325.

Amici take great pains to equate summary judgment and show cause proceedings applicable to the PRA, arguing that "there is little practical difference between the two processes as they apply to the PRA, and to treat them differently is unreasonable." Amici Brief at 9.

To the contrary, it would be unreasonable to treat equally two separate and distinct types of proceedings, as Amici argues. A summary judgment motion is distinct from a show cause hearing. A plaintiff in a PRA action now has (at least) two separate mechanisms by which to pursue his or her case. It is unclear why Amici argue that the strategic litigation options now available to a PRA-plaintiff should be cut in half.[3]

If the Legislature had intended that a show cause hearing under the PRA was the functional equivalent of a summary judgment motion under CR 56, it easily could have said so. The Legislature understandably did not do so.

Amici argue that it is appropriate in all cases to place the burden on the agency because the agency has "access to information—information which may be crucial to meeting the burden of proof." Amici Brief at 9. Like any plaintiff in any civil action, though, Block likewise had that same "access to information," and more than ample opportunity

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[3] Amici are "frequent users" of the PRA, and "are sometimes compelled to pursue litigation to achieve access to public records." Brief of Amici at 4.

to gather any necessary information through additional public records requests, and interrogatories, requests for production, depositions and the full range of discovery tools under the Civil Rules.

Amici further urge this Court to consider Federal Freedom of Information Act ("FOIA") cases because "many FOIA cases are resolved on motions for summary judgment." Amici Brief at 8 (citation omitted). The City has no quarrel with FOIA cases.

For example, in Professional Programs Group v. Dept. of Commerce, the records requestor moved for summary judgment on its FOIA claims. 29 F.3d 1349, 29 Fed.R.Serv.3d 593 (9th Cir. 1994). The Department then filed a cross-motion for summary judgment. In affirming the trial court's grant of the Department's motion and denial of the requestor's motion, the Ninth Circuit held:

> Under FOIA, the government at trial bears the burden of proving that the requested document is exempt from disclosure. However, at summary judgment the moving party bears the burden of showing there is an absence of evidence to support an element that the nonmoving party must prove at trial. Therefore, to prevail on its summary judgment motion, [Plaintiff] bears the burden of showing that there is an absence of evidence supporting the government's claimed exemption.

Id. at 1353-1354 (citing to Celotex Corp. v. Catrett, 477 U.S. 317, 325,

106 S.Ct. 2548, 2553–54, 91 L.Ed.2d 265 (1986)). *See also* Marks v. U.S. Dept. of Justice, 578 F.2d 261, 262-263 (9th Cir. 1978) ("The burden is on the moving party to establish the absence of any [material] fact. . . . However, once the Department established through sworn affidavits that no undisclosed documents [existed, Plaintiff] was obligated to controvert that showing. Conclusory allegations unsupported by factual data will not create a triable issue of fact."). Federal case law interpreting FOIA does not shift the requestor's burden as a moving party on summary judgment to a public agency.

Amici's attempt to distinguish Building Industry Assoc. of Washington ("BIAW") v. McCarthy, 152 Wn. App. 720, 218 P.3d 196 (2009), is also misplaced. BIAW supports the City here.

Just like Gold Bar and the unrefuted evidence in support of its motion for summary judgment below in this case, defendant County in BIAW moved for summary judgment with unrefuted evidence. At that point, the burden shifted to the plaintiff to offer admissible evidence, not mere conjecture or simple speculation, to defeat summary judgment. As the trial court correctly ruled, to avoid summary judgment, in answer to the County's affidavits, BIAW had to present the court with:

> 'facts . . . not just mere speculation, not wishes, not thoughts, but facts that would be admissible at trial.' [Citation omitted.]

> Because BIAW did not do so, summary judgment was proper.

BIAW, 152 Wn. App. at 736. The same situation exists here, and dictates the same result.

The City presented ample, unrefuted evidence in support of its own motion for summary judgment. The City's claims are fully supported by the declarations of Mayor Joe Beavers and City Clerk Laura Kelly (CP 243-312, 197-231), the deposition testimony of City Clerk Laura Kelly (CP 69-83, 160-165, 584-584), Anne Block's own testimony (CP 310-312), as well as the declaration of former Mayor Crystal Hill (CP 184-196). To the extent that Amici argue that the City's motion relies exclusively on former Mayor Hill's declaration, Amici are mistaken.

The City's evidence easily satisfied its burden as the moving party on summary judgment. The burden then shifted to Block to offer material, contrary admissible evidence. She did not do so, because no such evidence exists.

Amici fear that retaining the burden of proof on a plaintiff moving for summary judgment in a PRA case would "cause serious practical complications" and "impose a nearly insurmountable hurdle". Brief of Amici at 7-8. Amici's fears are easily laid to rest under the plain terms of the PRA itself – a PRA-plaintiff concerned about the burden of proof need

only file a show cause motion under RCW 42.56.550(1). In that case, the burden falls squarely and indisputably on the public agency.

Block of course had that option below. She and her able counsel chose to adopt a different litigation strategy. Block's strategic decisions are of her own making, and cannot properly now be laid at the City's door to resolve for her.

Reduced to basics, Amici's position is that a PRA-plaintiff is entitled to move for summary judgment without a shred of proof to support its claims because the burden of proof should always be on the public agency. Such a novel proposition should not stand.

C. Remaining Issues Raised Solely by Amici Should Not be Considered.

The remaining arguments set forth in Amici's Brief were not raised by Block or the City, and were not assigned as error. "Appellate courts will not usually decide an issue raised only by amicus." Noble Manor v. Pierce County, 133 Wn.2d 269, 272 n. 1, 943 P.2d 1378 (1997) (citing Coburn, 101 Wn.2d at 279). Neither Block nor the City raised an issue nor assigned error regarding the identity of the requestor or admissibility of former Mayor Hill's declaration. Although the City briefly touches upon these matters below, these two issues were not raised by Block or the City and accordingly warrant no further consideration by this Court.

1. The Hill Declaration is Wholly Based on her Personal Knowledge.

Block assigned no error regarding the admissibility of former Mayor Hill's declaration, nor -- importantly -- did Block object or move below to strike any portion of the declaration. Block accordingly waived any defect. Bonneville v. Pierce County, 148 Wn. App. 500, 509, 202 P.3d 309 (2008) (internal cites omitted). The City addresses this matter solely to address Amici's mischaracterization of the declaration.

CR 56(e) allows reliance on affidavits in support of a motion for summary judgment, provided that the affidavit is based on personal knowledge and is sworn to and certified by the affiant.

> Responses by an adverse party to a motion for summary judgment must be made on personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the declarant of such facts is competent to testify to the matters stated therein. A plaintiff may not defeat summary judgment by relating conclusions, allegations, or speculations.

Lane v. Harborview Medical Center, 154 Wn. App. 279, 286-287, 227 P.3d 297 (Div. I 2010) (citations omitted).

Amici do not argue that the Hill declaration is not based on Hill's personal knowledge. Instead, Amici appear to argue that, since former Mayor Hill is not a computer expert, the City was required to divert its

scarce financial resources to hire a computer expert to testify regarding its records search. Nothing in the PRA nor the cases cited by Amici establish such an onerous requirement, or otherwise dictate the manner in which a duly elected city council is required to expend its money.[4]

Amici mistakenly portray the Hill declaration as if it was offered as expert witness testimony. That is not the case, and the City made no effort below to qualify former Mayor Hill as a computer expert.

Rather, the City offered the Hill declaration, pursuant to CR 56(e), as that of a lay witness testifying on the basis of her *own personal knowledge* regarding the manner in which she personally searched for responsive public records. City Clerk Laura Kelly's deposition testimony offers additional corroboration of those facts. CP 71-73, 79-80.

Block offered absolutely *no* evidence to rebut the Hill declaration. None.

2. Facts Regarding Block's Behavior are Wholly Relevant to this Appeal.

Finally, although the notion that the City somehow impermissibly "distinguish[ed] among persons requesting records"[5] was again raised solely by Amici and, likewise, should not be considered by the Court,

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[4] The City also notes that the cases cited by Amici involved county and state agencies, not small cities like Gold Bar with limited financial resources. CP 249-250.

[5] "Agencies shall not distinguish among persons requesting records, ..." RCW 42.56.080.

Block's many antics regarding this matter remain wholly relevant.

The City did not condition or otherwise limit its PRA responses based on Block's identity, and Amici fail to point to *any* evidence of improper disparate treatment.

The facts as outlined by the City regarding Block's behavior accurately depict the actual circumstances surrounding the City's responses to Block's many public records requests (and many wholly unsuccessful related lawsuits and appeals), as well as the resulting upgrades to the City's previously outdated computer system. Block did not move to strike or otherwise object in any manner below. Block accordingly waived any claimed defect. Bonneville, 148 Wn. App. at 509.

To the extent that Block actually was treated differently than other requestors, it is particularly ironic to note that any such disparate treatment actually resulted in the City providing to Block *far greater and more comprehensive* service than that provided to any other records requestor. CP 243-252. Amici again offer no contrary proof to this Court.

III. CONCLUSION

A motion for summary judgment under CR 56 is separate and distinct from a motion to show cause under RCW 42.56.550. A motion for summary judgment in a Public Records Act case is no different than a

motion for summary judgment in any other civil case. The moving party on a motion for summary judgment always bears the initial burden of proof.

RESPECTFULLY SUBMITTED this 10th day of November, 2014.

KENYON DISEND, PLLC

By _____

Michael R. Kenyon
WSBA No. 15802
Ann Marie Soto
WSBA No. 42911
Attorneys for Respondent

DECLARATION OF SERVICE

I, Kathy Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 10th day of November, 2014, I sent for service a true copy of the foregoing *Respondent City of Gold Bar's Answer to Brief of Amici Washington Coalition for Open Government, Washington Newspaper Publishers Association, and Allied Daily Newspapers of Washington* on the following counsel of record using the method of service indicated below:

Michele Lynn Earl-Hubbard Allied Law Group LLC P.O. Box 33744 Seattle, WA 98133-0744	☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger - Regular ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: Michele@alliedlawgroup.com
Emily K. Arneson Witherspoon Kelley 422 West Riverside, Suite 1100 Spokane, WA 99201	☒ First Class, U.S. Mail, Postage Prepaid ☐ Legal Messenger - Regular ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail: eka@witherspoonkelley.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of November, 2014, at Issaquah, Washington.

Kathy Swoyer