NO. 95946-3

SUPREME COURT OF THE STATE OF WASHINGTON

KITTITAS COUNTY, a municipal corporation and political subdivision of the State of Washington

Plaintiff,

v.

SKY ALLPHIN, ABC HOLDINGS, INC., AND CHEM-SAFE ENVIRONMENTAL, INC.,

Petitioners,

and

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondent.

DEPARTMENT OF ECOLOGY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In asking this Court to accept review of the Court of Appeals decision below, Petitioners Sky Allphin, ABC Holdings, Inc., and Chem-Safe Environmental, Inc. (collectively, "Mr. Allphin") rely entirely on a fundamental misrepresentation of the decision. According to Mr. Allphin, the Court of Appeals shifted the burden of persuasion, requiring *him* to show that Ecology had not complied with the Public Records Act (PRA). Mr. Allphin then argues that such a requirement is contrary to the PRA and presents an issue of substantial public interest that this Court should decide. In fact, neither the trial court nor the Court of Appeals imposed any show cause burden on Mr. Allphin. The Court of Appeals decision could not be clearer: "Contrary to the suggestion of Mr. Allphin, Ecology never contended that by bringing a show cause motion it had shifted the burden of persuasion to him. . . . The trial court properly held Ecology to its burden." Thus shorn of fiction, Mr. Allphin's petition for review presents nothing more than a properly conducted, fact-based hearing under the PRA. Because it does not raise an issue of substantial public interest or meet any other criteria in RAP 13(4)(b), it does not warrant review by this Court.

II. COUNTERSTATEMENT OF THE ISSUE

While the case does not warrant review, if the Court were to accept review, the sole issue presented would be:

> Was it within the trial court's authority to order, on motion by Ecology, a show cause hearing under RCW 42.56.550(3), requiring Ecology to demonstrate that it had complied with the Public Record Act?

III. COUNTERSTATEMENT OF THE CASE

This case began in February 2013 when Kittitas County filed an action in superior court to enjoin Ecology from releasing, in response to a broad public records request made by Mr. Allphin, several records that it had identified as responsive County work product that the County had shared with Ecology. CP 270–77. The background to the action goes back at least five years, to July 2008, when inspectors from Kittitas County and Ecology discovered an unpermitted warehouse facility containing hundreds of 55-gallon hazardous waste drums. CP 1780–81. An officer of ABC Holdings and Chem-Safe Environmental, which owned and operated the facility, told the inspectors that the facility operated under a permit issued by Ecology's hazardous waste program. This was not true—the facility was in violation of solid waste permitting regulations. CP 1780; *ABC Holdings, Inc. v. Kittitas Cty.*, 187 Wn. App. 275, 284–85, 348 P.3d 1222 (2015), *review denied*, 184 Wn.2d 1014, 360 P.3d 817 (2015).

For the next two years, the County, with assistance from Ecology, worked with Chem-Safe to help bring the facility into compliance, so that it could meet the conditions for a permit and avoid enforcement. CP 1778-89. Chem-Safe resisted these efforts, and the County ultimately issued a notice of violation and required that operations cease until the facility obtained a solid waste permit. CP 1786–87; Suppl. CP 2813–19. Chem-Safe appealed and the Court of Appeals affirmed the notice of violation. *ABC Holdings*, 187 Wn. App. at 284–85.

The records requests began in October 2012. While litigating his appeal of Kittitas County's enforcement against him, Mr. Allphin made the first of many requests to Ecology and Kittitas County, seeking documents related to the subject of that litigation. CP 229; Suppl. CP 2716; *see also* CP 229–49. The scope of the requests encompassed attorney-client communications and attorney work product held by both agencies, created in preparation for the litigation over Kittitas County's enforcement against Mr. Allphin. At the County's request, Ecology delayed release of County work product in its possession, to allow the County to seek court protection of it. CP 233–34.

Litigation in this case commenced with the County's action for an injunction in February 2013. The trial court granted the County's injunction request in December 2013, CP 171–72, and shortly thereafter

allowed Mr. Allphin to bring counter-claims against the County. Suppl. CP 2698–701. The County prevailed against the counter-claims. Suppl. CP 3110–115; *Kittitas Cty. v. Allphin*, 195 Wn. App. 355, 360–61, 381 P.3d 1202 (2016), *review granted in part by* 187 Wn.2d 1001, 386 P.3d 1089 (2017), *and aff'd as amended by* 416 P.3d 1232 (June 18, 2018). Mr. Allphin then brought more claims—in October 2014, he amended his answer to bring cross-claims against Ecology. CP 37–42. For the next 22 months, until the hearing on the merits in August 2016, Mr. Allphin conducted discovery, searching for evidence to substantiate his claims. Suppl. CP 3119–20; CP 457–63; CP 438–513, CP 1526–28; CP 933; CP 2390–94; CP 1544-46; CP 2192–201.

After 14 months, Ecology sought to resolve the matter with a determination by the court as to whether it had violated the PRA. CP 99-121. On January 26, 2016, it filed a motion for an order to show cause, asking the court to order a hearing in which Ecology would carry its statutory burden to show that it had not violated the PRA. *Id.*; *see also Kittitas Cty. v. Allphin*, 2 Wn. App. 2d 782, 787, 413 P.3d 22 (Mar. 13, 2018). By that time, the litigation had been going on for almost three years, and it had been 14 months since Mr. Allphin brought cross-claims against Ecology. He had served two sets of interrogatories and requests for production on Ecology and deposed five Ecology employees. Ecology had

answered the interrogatories, provided its staff for depositions, and produced thousands of pages of records in response to the requests for production. Suppl. CP 3119-20; CP 457–63; CP 464–76; *see also Kittitas Cty.*, 2 Wn. App. 2d at 787. Mr. Allphin responded to Ecology's motion by objecting to the propriety of the motion itself, and by filing his own motion for relief, alleging PRA claims against Ecology. CP 528–41; *see also* CP 1085–107.

Ecology's motion was clear about the burden of proof under the PRA. Citing *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 720–21, 261 P.3d 119 (2011), the motion announced that, as the responding agency, Ecology had the burden to demonstrate that it had not violated the PRA. CP 109. By its request for the show cause hearing provided for under RCW 42.56.550(3), Ecology's motion sought the judicial review afforded by that statute, but did not seek an expedited hearing. Far from it—after initially noting the hearing 44 days from the date of filing, Ecology honored Mr. Allphin's immediate request to re-note it three weeks later. CP 436; CP 1339–40. Even then, the hearing did not occur for another four months due to objections and motions by Mr. Allphin, and the court's own schedule. On July 13, 2016, almost six months after Ecology filed its motion, the trial court terminated

discovery and ordered a hearing on the competing motions, which took place on August 11, 2016. CP 2191.

The trial court rejected Mr. Allphin's objections that it lacked authority to hold a show cause hearing until Mr. Allphin himself requested one. After conducting the hearing, the trial court found that Ecology had "met its show cause burden by demonstrating the reasonableness of its search and that it provided all documents located in the search," and that Ecology had not violated the PRA. CP 2654. Affirming, the Court of Appeals held that Ecology had the right to seek judicial review under RCW 42.56.550(3), and that the trial court had authority to order a hearing under that statute on Ecology's motion: "As with other civil disputes, parties have means under the civil rules for moving a dispute toward an orderly resolution. The trial court did not proceed illegally by engaging in judicial review at the request of Ecology." *Kittitas Cty.*, 2 Wn. App. 2d at 793. It also rejected the objection that the trial court had shifted the show cause burden: "Contrary to the suggestion of Mr. Allphin, Ecology never contended that by bringing a show cause motion it had shifted the burden of persuasion to him. . . . The trial court properly held Ecology to its burden." *Kittitas Cty.*, 2 Wn. App. 2d at 792.

Holding that "[a]gencies and objectors to disclosure have the same right to proceed under the Civil Rules as do record requesters," *Kittitas*

County, 2 Wn. App. 2d at 790 (citing *City of Lakewood v. Koenig*, 160 Wn. App. 883, 889–90, 250 P.3d 113 (2011)), the Court of Appeals concluded that under those rules, Ecology's show cause motion may be treated as properly brought under CR 7(b), so long as it did not prejudice Mr. Allphin, which it did not. *Kittitas Cty.*, 2 Wn. App. 2d at 792 (citing *Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474, 477 n.2 (D.N.J. 1978)). It further concluded that, "[w]hether a record requestor makes a show cause motion under RCW 42.56.550(1) or (2) or an agency makes a motion for judicial review under CR 7(b), the nature of the hearing is the same: RCW 42.56.550(3), authorizing hearings based solely on affidavits, applies to '[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 24.56.520.' " *Kittitas Cty.*, 2 Wn. App. 2d at 792.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Mr. Allphin's sole basis for review is his contention that the trial court improperly placed the burden of showing Ecology's alleged non-compliance with the PRA on him. He argues that the Court should accept review because, supposedly, in ordering a show cause hearing on Ecology's motion, the trial court "inappropriately shift[ed] the burden of persuasion from the responding agency to the [requestor]." Pet. Review 6. Because this contention is false, it cannot provide a basis for review.

Neither the trial court nor the Court of Appeals improperly shifted any burden to Mr. Allphin—he simply failed to present evidence to overcome Ecology's showing of compliance with the PRA. The mere fact that the trial court held a show cause hearing under RCW 42.56.550(3), after allowing full opportunity for discovery, ensuring that Mr. Allphin was in no way prejudiced, does not itself make this case appropriate for review, as such a hearing is expressly authorized under the statute.

Ecology moved for the show cause hearing provided for under RCW 42.56.550. In doing so, Ecology itself shouldered the burden to show cause, despite being the moving party. Ecology was clear in its motion that it had the burden of persuasion. CP 109 ("The responding agency has the burden . . . to show the reasonableness of its search, and that it disclosed responsive documents within a reasonable time frame"). The trial court held Ecology to this burden, and Ecology met it. CP 2654 ("Ecology has met its show cause burden by demonstrating the reasonableness of its search and that it provided all documents located in the search"). The Court of Appeals concluded that the trial court had held Ecology to the proper burden under the PRA, and that Ecology had carried its burden. *Kittitas Cty.*, 2 Wn. App. 2d at 792.

Mr. Allphin asserts, erroneously and without support, that the burden of persuasion must have been placed on him because show cause

motions "necessarily place the burden of persuasion on the nonmoving party," and because a show cause motion "is a burden-shifting device." Pet. Review 10, 14. While he cites to *United States Securities & Exchange Commission v. Hyatt*, 621 F.3d 687, 695 (7th Cir. 2010), that case does not support those propositions. Pet. Review 10, 14. To the contrary, courts have expressly rejected his argument. *See, e.g.*, *Chambers v. Blickle Ford Sales, Inc.*, 313 F.2d 252, 257 (2d Cir. 1963) ("show cause order does not shift the burden of proof but is merely a method of summary procedure, like a summons"); *In re Request of Rosier*, 105 Wn.2d 606, 616–17, 717 P.2d 1353 (1986) (show cause order citing requestor into court did not improperly shift the burden of proof to him). In any event, what matters is what occurred: the trial court held Ecology to its proper burden under the PRA; Ecology carried it; and there was no requirement placed on Mr. Allphin to show cause.

After Ecology had met its burden under *Neighborhood Alliance* to show that it had conducted an adequate search and had provided the responsive records it discovered, in order to avoid dismissal Mr. Allphin was required to come forward with evidence to overcome that showing, in support of his claims. *See Kittitas Cty.*, 2 Wn. App. 2d at 792 . He contends, with respect to one specific claim, that the burden placed on him to produce evidence sufficient to overcome Ecology's showing was

inappropriate. Pet. Review 13–14. In that instance, Mr. Allphin had claimed that, because he had received a particular record from Kittitas County, Ecology should possess that record, too, and therefore must be silently withholding it. *Kittitas Cty. v. Allphin*, No. 34760-5-III, slip op. at 25–26 (Mar. 13, 2018). But his "theory about the record's provenance and whereabouts [was] based entirely on his speculation." *Kittitas Cty.*, No. 34760-5-III, slip op. at 26. The burden to overcome Ecology's showing properly rested with him, and he failed to submit sufficient evidence to meet the burden. *See Forbes v. City of Gold Bar*, 171 Wn. App. 857, 867, 288 P.3d 384 (2012) ("Purely speculative claims about the existence and discoverability of other documents will not overcome an agency affidavit, which is accorded a presumption of good faith"). He failed because he submitted no evidence at all to show that Ecology had improperly withheld any documents. *Kittitas Cty.*, No. 34760-5-III, slip op. at 24–25.

Mr. Allphin also argues that, under the PRA, an agency may seek only a summary judgment hearing, not the type of hearing provided for in RCW 42.56.550. Pet. Review 15–17. His first argument for this fails because it is a mere repeat of his mistaken insistence that granting an agency's request for a show cause hearing under RCW 42.56.550 necessarily shifts the show cause burden. His second argument—that the

summary judgment procedure leaves open the possibility of trial in the event of a factual dispute—also fails. Pet. Review 16. Mr. Allphin brought his claims under RCW 42.56.550. CP 42. Where a plaintiff seeks relief under RCW 42.56.550, the underlying action is a show cause hearing, not a trial; and using the summary judgment procedure does not alter that. *Wood v. Thurston Cty.*, 117 Wn. App. 22, 28, 68 P.3d 1084 (2003).

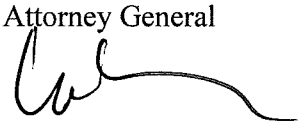
Because Mr. Allphin was not required to carry any improper burden, his petition fails to present any basis for review by this Court. Stripped of his unsupported claims about improper burden shifting, the petition presents nothing more than a straightforward, fact-based application of the PRA that the Court of Appeals properly affirmed.

V. CONCLUSION

Because Mr. Allphin's Petition meets none of this Court's criteria for granting review, Ecology respectfully requests that it be denied.

RESPECTFULLY SUBMITTED this 9th day of July 2018.

ROBERT W. FERGUSON
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July 2018, I electronically filed a true and correct copy of Department of Ecology's Answer to Petition for Review with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of July 2018, at Olympia, Washington.

Susan L Trippel

TERESA L. TRIPPEL, Legal Assistant

ATTORNEY GENERAL'S OFFICE - ECOLOGY DIVISION

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