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.

RESPONDENT'S ANSWER TO AMICI CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE MCCLATCHY COMPANY, PIONEER NEWS GROUP, SOUND PUBLISHING, DAILY SUN NEWS, THE SEATTLE TIMES COMPANY, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF APPELLANT'S MOTION FOR EXTENSION OF TIME AND PETITION FOR REVIEW

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I. INTRODUCTION

Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, McClatchy Company, Pioneer News Group, Sound Publishing, Daily Sun News, Seattle Times Company, and the Washington Coalition for Open Government ("Amici") have submitted amicus curiae briefing to support Appellant James Egan's ("Egan") motion for extension of time and petition for review. Amici impermissibly try to introduce both factual matters outside the record and an issue not addressed by the parties below. Respondent City of Seattle ("City") asks that the Court disregard Amici's newly-introduced appendices and issue.

With regard to the issues actually before the Court, Amici devote only three sentences of their briefing to Egan's motion for extension – all of which are devoid of legal support. Otherwise, Amici reiterate Egan's efforts to read key portions out of the anti-SLAPP statute to make lawsuits and counterclaims subject to the statute even when they are not "based on an action involving public participation or petition" as explicitly required by RCW 4.24.525(2). Nothing in Amici's brief should persuade the Court to accept their arguments, and by extension Egan's motion for extension of time and/or petition for review.

II. ARGUMENT

A. The Court Should Disregard Appendices Attached to Amici's Brief That Are Not Part of the Record and Argument Related to Those Appendices

Amici try to introduce factual matters outside the record. Amici Br. at 1 (discussing in their brief and attaching as Appendices A and B, pleadings and exhibits from unrelated lawsuits involving Amici). The Court should disregard the appendices and Amici's arguments related to them because they are not part of the record . *See Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument based on factual background must be supported by citation to the record). RAP 9.6; 10.3(c); 10.3(a)(8) ("An appendix may not include materials not contained in the record on review without permission from the appellate court."); *See also, Bartz v. State Dep't. of Corr. Pub. Disclosure Unit,* 173 Wn. App. 522, 528 n. 7, 297 P.3d 737, *review denied,* 177 Wn.2d 1024 (2013), *citing Witt v. Young,* 168 Wn. App. 211, 214 n.5, 275 P.3d 1218, *review denied,* 175 Wash.2d 1026, 291 P.3d 254 (2012) (Where an appellant attached a copy of her claim as an exhibit to her brief, the document was not properly before the court because it had not been included in the clerk's papers).

Amici offer Appendices A and B to their brief as support for their argument that threatening to file an anti-SLAPP motion is the only way to bring a speedy resolution of actions under RCW 42.56.540. The Court

should disregard this argument because it was raised only by Amici. *Citizens for Responsible Wildlife Management v. State,* 149 Wn.2d 622, 631,71 P.3d 644 (2003); *Sundquist Homes, Inc. v. Snohomish County Public Utility Dist. No. 1,* 140 Wn.2d 403, 413, 997 P.2d 915 (2000). "The case must be made by the parties and its course and issues involved cannot be changed or added to by friends of the court." *Bldg. Indus. Ass'n. of Wash. v. McCarthy*, 152 Wn. App. 720, 749 n.12, 218 P.3d 196 (2009) *See also,* RAP 9.12 (limiting review to issues brought to the trial court's attention). Even if Amici's argument were properly before this Court, it would fail on the merits because procedural provisions exist for speedy resolution of third-party actions under RCW42.56.540. *See,* CR 65.

Appendices A and B to Amici's brief describe two third-party actions brought by individuals seeking to enjoin disclosure of public records based on privacy concerns. In both cases, the public agencies that held the records had provided notice to the individuals named in the records it intended to release the records unless the individuals had served the agency with a court order enjoining disclosure of the records within a specified time period. If an agency intends to produce records to a requester under the Public Records Act, a person who is named in the record or to whom the record specifically pertains may seek a judicial determination that the records are exempt from production. RCW

42.56.540; *King County Dep't of Adult & Juvenile Det. v. Parmelee,* 162 Wn. App. 337, 350, 254 P.3d 927 (2011), *review denied,* 175 Wn.2d 1006, 285 P.3d 885 (2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 1732, 185 L.Ed.2d 793 (2013).

Civil Rule 65 governs the trial court procedure for obtaining an injunction under RCW 42.56.540. *Northwest Gas Ass'n. v. Wash. Utilities and Transp. Comm'n.* 141 Wn. App. 98, 113, 168 P.3d 443 (2007), *review denied,* 163 Wn.2d 1049 (2008). CR 65 also provides an expedited process for resolving injunction actions. Because an agency will be subject to penalties and fees if a requestor sues before the third party has served the agency with a court order enjoining disclosure of the records, agencies must specify a limited time period within which the third party must obtain an order enjoining disclosure of the records. *Kitsap County Prosecuting Attorney's Guild v. Kitsap County,* 156 Wn. App. 110, 120, 231 P.3d 219 (2010). A third party must obtain a temporary restraining order within the limited time specified in the agency's third-party notice. The TRO would usually expire within fourteen days, and contested issues regarding the merits of the injunction sought would be speedily resolved because a motion for preliminary injunction must be set for hearing at the "earliest possible time and takes precedence over all matters except older matters of the same character...." CR 65(b). Contrary to Amici's

argument, a process exists to speedily resolve PRA injunction lawsuits without the threat of an anti-SLAPP motion.

Amici's argument fails for another reason. The high burden and costs imposed on parties who seek to enjoin disclosure of a public record dissuade parties from pursuing meritless actions. Parties seeking a PRA injunction must first establish that a specific statutory exemption applies. RCW 42.56.070(1); *Progressive Animal Welfare Soc. v. University of Washington,* 125 Wn.2d 243,251, 884 P.2d 592 (1994) ("*PAWS*"). They must also show that examination of the record would not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. *Parmelee,* 162 Wn. App. at 350–51. In addition, they must pay for the underlying injunction action and a court has the discretion to award attorney fees to a party who prevails in dissolving a wrongfully issued TRO. *Confederated Tribes of Chehalis Reservation v. Johnson,* 135 Wn.2d 734, 758, 958 P.2d 260 (1998).

The PRA's mandate for broad disclosure is not absolute. The exemptions in the Act and other statutes, recognize certain privacy and proprietary rights that outweigh the PRA's broad policy in favor of disclosure. *Resident Action Council v. Seattle Housing Authority,* 177 Wn.2d 417, 300 P.3d 376 (2013). Agencies may not be in the best position

to assert the rights of third parties. For example, a vendor may be required to provide agency it contracts with information the vendor asserts warrants exemption under the Uniform Trade Secrets Act. RCW Chapt. 19.08. Upon receiving a request for records containing the information, an agency will provide third-party notice to the vendor because only the vendor has the first-hand knowledge to show it has taken reasonable effort to maintain the secrecy of information as required by RCW 19.108.010(4)(b). That the third-party vendor asserts the exemption does not make the information any less exempt.

Interpreting the anti-SLAPP statute as Amici propose would create a weapon to be used to dissuade all third-parties, including those with meritorious interests, from seeking PRA injunctions. Underlying Amici's argument, and Egan's appeal, is their resentment toward agencies and third parties "who sue requestors" over requests. The focus of a PRA injunction action is determining whether records must be disclosed not suing the requestor, but an agency or third party suing under RCW 42.56.540 ***must*** join the requestor as a necessary party in any action seeking to enjoin disclosure of records. *Burt v. Department of Corrections,* 168 Wn.2d. 828, 836, 231 P.3d 196 (2009). Rather than seeking to use the anti-SLAPP law as a weapon in these actions, Amici's efforts would be

better applied to seeking legislative change to more efficiently resolve PRA disputes.

B. The Gravamen of the Action Determines Whether Anti-SLAPP Law Applies

Amici ignore the gravamen of the City's declaratory judgment action and mistakenly focus on how Egan might have used the requested records. The anti-SLAPP statute provides a two-step process for deciding an anti-SLAPP motion. First, the moving party has "the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition." RCW 4.24.525(4)(b). "It is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies." *Dillon v. Seattle Deposition Reporters, LLC,* 179 Wn. App. 41, 72, 316 P .3d 1119, *review granted,* 180 Wn.2d 1009 (2014) (quoting *Martinez v. Metabolife Int'l, Inc.,* 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003).

Egan made PRA requests that he may have intended to use to engage in protected activity, but that intent does not transform his PRA request, or threat to sue over it, into protected activity. The Court of Appeals correctly determined that the gravamen of the City's suit was whether a PRA exemption applied to Egan's original request, not to suppress Egan's right to sue. *City of Seattle v. Egan,* 179 Wn. App.333,

338, 317 P.3d 568 (2014). "When the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." *Dillon,* 179 Wn. App. at 72.

Amici argue that Egan's PRA requests come within the anti-SLAPP statute because those requests were in furtherance of his right to sue. Amici cite as support *Akrie v. Grant*, 178 Wn.App. 506, 315 P.3d 567 (2013). *Akrie* does not support Amici's argument. In *Akrie,* attorneys filed recordings of telephone conversations in a federal court case, and the opposing party sued in state court asserting that recording and disseminating recorded telephone conversations in a federal case violated the Washington's privacy act causing injury to its "business, person and reputation" and seeking damages for the alleged violations. *Id.,* 178 Wn. App. at 509. The trial court determined that filing a motion in federal court was a protected activity, but the Court of Appeals did not directly address the issue because Akrie dismissed his appeal. *Id.* 178 Wn. App.at 510.

The Court of Appeals analyzed the issue in *Dillon*, which Amici notably fail to cite. *Dillon* and *Akrie* arose out of the same dispute. In *Dillon*, the individual whose conversations had been recorded and filed in the federal case in *Akrie,* sued the deposition reporting service that

transcribed the conversations, and the reporting service responded with an anti-SLAPP motion. The trial court ruled that transcribing the calls constituted actions involving public participation and petition because they were done "in connection with a judicial proceeding." *Dillon*. 179 Wn. App. at 57. The Court of Appeals disagreed. It found that the principal thrust of the claims was the act of transcribing telephone calls without the individual's knowledge, not the subsequent submission of the transcripts (or excerpts therefrom) to the federal court. *Id.* "The anti-SLAPP statute does not operate to transform unprotected activity into protected activity simply because it is undertaken during the course of a lawsuit." *Id.* 179 Wn. App. at 50. Similarly, the anti-SLAPP statute does not transform Egan's unprotected activity of making PRA requests into a protected activity simply because it was undertaken in connection with a lawsuit he might file.

C. Amici Provide No Valid Reason to Extend Time

Amici barely address Egan's motion for extension of time to file his petition for review. RAP 18.8(b) allows an extension of time "only in extraordinary circumstances and to prevent a gross miscarriage of justice." RAP 18.8(b). Amici say only that Egan did not realize the date on the cover letter differed from the date on the attached opinion. Negligence or lack of reasonable diligence does not amount to extraordinary

circumstances warranting an extension of time. *Beckman v. Dep't of Social & Health Servs.*, 102 Wn.App. 687, 693, 11 P.3d 313 (2000).

III. CONCLUSION

The Court should ignore Amici's efforts to introduce new evidence and arguments at this late stage of the proceedings. Amici raise no concerns that would warrant extending time for Egan to file his petition for review or granting his petition for review.

DATED this 10th day of July, 2014.

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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 July 10, 2014, I caused to be delivered by email as agreed to by all parties as follows:

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a copy of Respondent's Answer to Amici Curiae Brief of Allied Daily Newspapers of Washington.

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

DATED this 10 day of July, 2014, at Seattle, King County, Washington.

Marisa Johnson

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, July 10, 2014 1:44 PM
To: 'Johnson, Marisa'
Cc: Perry, Mary
Subject: RE: James Egan v City of Seattle - Supreme Ct. #90136-8

Rec'd 7-10-14

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From: Johnson, Marisa [mailto:Marisa.Johnson@seattle.gov]
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Subject: James Egan v City of Seattle - Supreme Ct. #90136-8

Attached please find Respondent's Answer to Amici Curiae Brief of Allied Daily Newspapers of Washington, in the case listed below by the below listed attorney:

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