

NO. 41694-8-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

ARTHUR WEST,

Plaintiff/Appellant,

v.

DOUG MAH, JEFFREY MYERS, JEFF KINGSBURY,
RHENDA IRIS STRUB, JOE HYER, JOAN MACHLIS,
KAREN MESSMER, CRAIG OTTAVELLI, CITY OF OLYMPIA,
WASHINGTON CITIES INSURANCE AUTHORITY,

Defendants/Respondents.

**BRIEF OF RESPONDENTS MAH, KINGSBURY, STRUB, HYER,
MACHLIS, MESSMER, OTTAVELLI AND CITY OF OLYMPIA**

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B. Did the trial court correctly rule that City Council members did not violate the Open Public Meeting Act because there was no evidence a quorum of Council members collectively intended to secretly deliberate about matters pending before the Council?

C. Did the trial court correctly rule that the City adequately responded to Mr. West’s public record requests within five business days, and by producing in installments over 40,000 pages of records and 19 compact discs containing thousands of pages more, along with descriptive exemption logs?

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I. ASSIGNMENTS OF ERROR

Respondents are the City of Olympia, and current or former members of the City Council Doug Mah, Jeff Kingsbury, Rhenda Iris Strub, Joe Hyer, Joan Machlis, Karen Messmer, and Craig Ottavelli (collectively “the City”). The City does not assign error to any of the trial court’s rulings and requests affirmance of the rulings Arthur West appeals.

II. COUNTER-STATEMENT OF THE ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

The issues on appeal, in the order raised by Mr. West, are:

A. Did the trial court correctly rule that Washington Department of Fish & Wildlife (“WDFW”) maps showing the locations of endangered species are exempt from public disclosure as set forth in RCW 42.56.430(2)(a)?

B. Did the trial court correctly rule that City Council members did not violate the Open Public Meeting Act because there was no evidence a quorum of Council members collectively intended to secretly deliberate about matters pending before the Council?

C. Did the trial court correctly rule that the City adequately responded to Mr. West’s public record requests within five business days, and by producing in installments over 40,000 pages of records and 19 compact discs containing thousands of pages more, along with descriptive

exemption logs?

D. Did the trial court correctly rule that attorney emails identified in exemption logs and reviewed by the court *in camera* were properly redacted or withheld as privileged attorney-client communications or work product?

E. Did the trial correctly apply the CR 56 summary judgment rules when concluding that Mr. West failed to meet his burden of proving all elements of his alleged causes of action?

F. Did the trial court abuse its discretion by denying Mr. West's CR 56(f) motion for a continuance of the summary judgment hearing when Mr. West failed to offer a good reason for why he did not obtain evidence during the 18 months the case was pending, did not show what evidence he hoped to obtain through further discovery, and did not show any additional evidence would raise a genuine issue of material fact?

G. Did the trial court abuse its discretion by denying Mr. West's motion to amend his Complaint by alleging new facts and occurrences a week before the summary judgment hearing?

III. STATEMENT OF THE CASE

Mr. West's complaint alleged the City violated the Public Records Act, chapter 42.56 RCW ("PRA") by failing to timely produce requested records and exemption logs, violated the Open Public Meetings Act,

chapter 42.30 RCW (“OPMA”) on six occasions from September 9 to November 23, 2008 by communicating via email and allegedly excluding him from a Council meeting, violated his First and Fourth Amendment constitutional rights by violating the PRA and OPMA, defamed him by allowing others to call him a “serial litigant,” and acted fraudulently or negligently by hiring outside counsel to occasionally represent the City. CP 5-9. The City denied these allegations, asserting several affirmative defenses. CP 1718-23.

A. Material Facts Regarding PRA Claim

Mr. West’s lawsuit is partly based on the City’s response to two public records requests he made: one on April 28, 2008, and the other on August 5, 2008. CP 5-8. Each request and the City’s responses are detailed below.

1. Mr. West’s April 28, 2008 Public Records Request

On Monday, April 28, 2008, Mr. West submitted the following public records request to the City:

1. All invoices for work performed by Jeffrey Myers, and all records of any funds paid to Mr. Myers or Law, Lyman and Bogdanovich by the City. All communications with Myers.
2. All records related to the removal from City offices of any city planning files by Mr. Myers.
3. All communications and records related to consideration or the issue of permits on September 5, and for the port marine terminal expansion and [sic] Weyerhaeuser log yard.
4. All public records requests to the City over [sic] since January

of 2006, and the responses thereto. 5. Any record or communication denying disclosure or inspection and asserting any exemption to disclosure under the PRA. 6. All communications and records related to Weyerhaeuser, the Weyerhaeuser corporation or any of its employees agents or representatives. 7. All communications and records related to or concerning the Chamber of Commerce and/or the Downtown Business Association or other such association. 8. This request covers the period from January 1, 2006 to the present.

CP 1603.

Jeffrey Myers served as outside counsel for the City in numerous matters, including litigation related to the Weyerhaeuser project. *See, e.g.*, CP 4-7, 1818-19. The Weyerhaeuser project at the Port of Olympia was the subject of much litigation, including litigation brought by Mr. West. *See, e.g.*, CP 548, 1818-19. Consequently, Mr. West's broad PRA request specifically sought potentially privileged records.

2. The City's Responses to the April 28, 2008 Request

The City responded to Mr. West's April 28, 2008 request five business days later on Monday, May 5, 2008. CP 1591, 1605-07. The response sought clarification of items 4, 6 and 7 in the request and notified Mr. West that due to the broad scope of his request and the large volume of responsive documents, production of the records would occur in installments. CP 1591, 1606-07. Mr. West was notified the City would need until Thursday, June 26, 2008, perhaps longer, to compile the

first installment. CP 1591, 1607.

On May 6, 2008, Mr. West partly clarified his requests, and the City sought further clarification regarding item 4. CP 1591, 1609-11. Mr. West provided further clarification on May 7, 2008, narrowing the number of City departments from which he sought records. CP 1613.

On May 20, 2008, the City gave Mr. West a progress report on its response and sought further clarification as to whether he was seeking records from the same City departments in response to item 5 as for item 4. CP 1591, 1615. Mr. West answered the following day, not limiting the number of departments for item 5 responses. CP 1618.

On June 12, 2008, the City gave Mr. West another progress report stating the first installment would be ready soon. CP 1591-92, 1622. On June 19, 2008, the City sought further clarification of Mr. West's request for records related to the Chamber of Commerce in item 7 because the City determined there are many Chambers of Commerce in the area. CP 1591-92, 1626-28. Mr. West responded the same day expanding his request to include all Chambers of Commerce and the "Washington association of Business." *Id.*

On Friday, June 20, 2008, the City notified Mr. West the first installment of records would be available for his inspection the following Monday, June 23, 2008, a few days earlier than initially estimated. CP

1592, 1630-31. *See also* CP 1601, 1712-15 (summary of City's responses to April 28, 2008 request as of February 17, 2009). The first installment consisted of over 18,000 pages of material, including about 1500 pages of public records requests received by the City and responses thereto, a copy of a contract with the Law, Lyman law firm and 41 pages of invoices from the firm, and about 12,250 pages of project files related to Weyerhaeuser and the port. CP 1580, 1592, 1630-31. Mr. West was notified additional installments would be forthcoming and any records deemed exempt from disclosure would be identified in an exemption log by August 20, 2008. CP 1630. He set up an appointment to inspect the first installment on June 23rd, but failed to appear. CP 1593, 1633.

On June 25, 2008, the City requested further clarification from Mr. West concerning his request for records "related to or concerning" the Chamber of Commerce and notifying him the Washington Association of Business is not a Chamber of Commerce organization. CP 1593, 1638-39, 1640. He responded the following day and set up an appointment to inspect the first installment on June 27th. CP 1642, 1647. The City replied on June 26, July 2, and July 7, 2008 notifying Mr. West his attempts at clarification were still unclear, and again requested clarification of what he was seeking related to the Chamber of Commerce. CP 1593-95, 1651, 1667, 1672-74. The City's July 7, 2008

communication also reminded Mr. West that he previously inspected City planning files allegedly “removed” by private attorney Jeffrey Myers, with the exception of one identified email string that was withheld based on the attorney-client privilege. CP 1673-74. Mr. West did not respond to the July 7th letter, including the request for further clarification concerning the Chamber of Commerce records. CP 1594.

On July 2, 2008, approximately 12,250 pages of records identified in the first installment related to Weyerhaeuser projects were inspected by Mr. West, along with several other binders containing public records requests made to the City. CP 1580, 1583, 1585-86, 1594, 1661. Mr. West paid for copies of 248 pages out of the over 18,000 pages of material produced in the first installment. CP 1580. He made several appointments to complete his inspection of this material, but failed to appear multiple times. CP 1580-81.

On July 14, 2008, Mr. West was notified a second installment was available for his inspection. CP 1595-96, 1676-78. The second installment consisted of about 11,650 pages, including about 5,125 pages of non-privileged emails private attorney Jeffrey Myers sent to the City, about 1,630 emails related to Weyerhaeuser projects, and about 4,900 pages of City responses to public records requests. *Id.* The July 14th letter notified Mr. West additional installments were forthcoming, the

City was still reviewing many emails to determine if any exemptions applied, and was still working on producing an exemption log identifying redacted or withheld emails. *Id.*

On July 21, 2008, Mr. West inspected the second installment of responsive documents. CP 1596, 1680. He requested copies of 75 pages of the 11,650 pages produced in the second installment. *Id.*

On August 20, 2008, Mr. West was notified a third installment was ready for his inspection. CP 1596-97, 1682. This installment consisted of a box of records from Deputy City Attorney Darren Nienaber related to Weyerhaeuser projects, and another box containing miscellaneous emails regarding the same. *Id.*

Mr. West was notified in the August 20th letter that he appeared to have abandoned any attempt to complete his inspection of the first installment of records because over 30 days had passed since he partially inspected those documents. *Id.* City staff told Mr. West: “If I do not hear from you by August 28, I will assume that the large volume of records you have already reviewed were sufficient to your needs and consider your request abandoned and closed.” CP 1682.

In response, Mr. West set an appointment for September 2nd to continue his review of the produced records, but failed to appear. CP 1597. On September 10th, Mr. West showed up without an appointment,

inspected the third installment of records, and requested copies of 46 pages and one compact disc (“CD”). CP 1597, 1686-89. He set another appointment for September 17th to continue his inspection, but failed to appear. CP 1597.

On October 6, 2008, the City gave Mr. West another status update advising him the remaining emails responsive to item 6 of his records request were voluminous and it could take another two months to complete the review of those emails for any exemptions from disclosure. CP 1597-98, 1693-94.

Mr. West scheduled an appointment on November 13, 2008 to continue his inspection of the first installment of records. CP 1598, 1696-1701. He failed to appear for this appointment. CP 1598.

On December 3, 2008, the City notified Mr. West a fourth installment was available for his review consisting of about 1,035 pages of emails responsive to item 6 of his request. CP 1598, 1703-04. He was told the review of additional emails was continuing, but it might take until January 30, 2009 to complete that review. *Id.* Mr. West made an appointment to inspect the fourth installment on January 20, 2009, but he failed to appear. CP 1598.

Two days later, on January 22nd, while Mr. West was reviewing records responsive to another of his records requests, the City reminded

him of his missed January 20th appointment and gave him a CD containing the 1,035 pages of emails in the fourth installment. *Id.* Mr. West had a number of other public record requests pending with the City during this time. CP 1600-01, 1709-10 (listing other public records request from Mr. West the City was responding to at this same time).¹

On January 30, 2009, the City notified Mr. West that a fifth installment was available for his inspection, consisting of 20 pages of unredacted emails and 526 pages of redacted emails from the City Attorney's office regarding Weyerhaeuser, along with an exemption log identifying the reasons for redaction for the emails in the fifth installment. CP 1599, 1706. *See also* CP 210, 279-318 (exemption log for the fifth installment). Mr. West was told there were about 900 more emails from the City Attorney's office and thousands of other documents still undergoing review. *Id.*, and CP 1600 (identifying the remaining records undergoing review at the time). Mr. West inspected the fifth installment and received a copy of the exemption log on February 4, 2009. CP 1599.

On April 15, 2009, the City gave Mr. West the final installment of documents responsive to his April 28, 2008 request, consisting of about

¹ In 2008, the City Clerk's office alone, not counting other City departments, expended about 1800 hours, or 45 forty-hour weeks, responding to public records requests (mostly from Mr. West) and had to hire temporary staff to do so. CP 1544.

620 pages and one CD of additional emails. CP 76, 1600. The City also gave Mr. West two more exemption logs identifying redacted or withheld records. CP 76, 213-31, 320-473.

In total, over 31,000 pages of documents were produced to Mr. West in response to his April 28, 2008 request. CP 1580, 1592, 1595-1600, 1630-31, 1676-78, 1682, 1703-04, 1706. Seven exemption logs were produced at various times in relation to this request. CP 173-74, 210-11, 213-31, 279-485. The redacted or withheld material mostly consisted of about 1,000 emails to and from attorneys representing the City, which amounted to about 4,000 pages of privileged attorney-client or work product communications that were withheld or redacted. *Id.* Over 5,000 pages of unprivileged emails to or from attorneys were produced to Mr. West without redactions. CP 1595.

3. Mr. West's August 5, 2008 Public Records Request

On Tuesday, August 5, 2008, Mr. West submitted the following public records request to the City: "all communications and records of any kind relating to the East Bay development projects, and amendments, all studies, project diagrams or maps, and any other records related to this project and its amendments, to include a complete administrative record." CP 1553.

The East Bay project was the subject of anticipated litigation, just

as the Weyerhaeuser project was. *See, e.g.*, CP 1818-19. Consequently, this broad request specifically sought potentially privileged records, too.

4. The City's Responses to the August 5, 2008 Request

The City responded the following day, offering for inspection all files, binders, folders, and other documents the City's Department of Community Planning and Development ("CP&D") possessed on the East Bay development project. CP 1553. Mr. West did not respond to this written offer. *Id.* Due to Mr. West's silence, the City notified him on August 7, 2008 that it would give Mr. West an estimate within two weeks of how long it would take to respond to his request to the extent it encompassed records in addition to the CP&D files. *Id.*

On August 12, 2008, the City notified Mr. West by email that responsive CP&D files would be available for his inspection on August 25th. CP 1556. This notification was reiterated in a letter dated August 13, 2008, which also requested clarification on three parts of Mr. West's request. CP 1544-45, 1556-67. Due to the volume of documents responsive to this request, as well as the time being consumed responding to Mr. West's other public records requests, the City estimated it would take until December 3, 2008 to completely respond to his latest request. *Id.* Mr. West provided clarification of his request on August 17th, indicating the "administrative record" he sought "is the record reviewed

by the decision maker, including any staff” CP 1545, 1559-60.

Mr. West inspected the CP&D file consisting of about 4,130 pages on August 25th and September 5th, 2008. CP 1545, 1581. He received copies of 143 pages he requested from this 4,130 page file. *Id.*

On September 19, 2008, the City notified Mr. West a second installment of responsive records would be available the following week. CP 1546, 1566. He was advised the City could not determine with certainty which portions of the “administrative record” were reviewed by staff. *Id.* Mr. West responded: “As for there being no identifiable record, thank you for the admission.” CP 1546, 1568.

On September 26, 2008, the City produced a second installment for Mr. West consisting of 19 CDs (identifying the material contained on each CD, including three CDs containing emails) and about 800 pages of other documents responsive to his request. CP 1546-47, 1570-71. The City memorialized this production by letter dated October 1, 2008. *Id.* The letter further advised Mr. West that additional emails were still being reviewed to determine whether any exemptions applied. *Id.*

On December 3, 2008, the City produced a third installment for Mr. West consisting of additional emails related to the East Bay development. CP 1547, 1573. He was notified there was no “administrative record” regarding the East Bay project because no one

filed an appeal with the Hearing Examiner regarding the project. *Id.* Thus, the City would interpret his request as seeking all records related to the East Bay project. *Id.* Mr. West set an appointment to inspect the third installment of records on December 16, 2008, but he failed to appear. CP 1547, 1575.

On January 9, 2009, the City told Mr. West his records request would be considered abandoned if he did not inspect the records within 30 days. CP 1547-48, 1575-76. On January 12th, Mr. West inspected the third installment and requested 83 pages for copying. CP 1548. On January 22nd, he continued his review and requested another 41 pages for copying. *Id.*

On January 29, 2009, Mr. West was notified a fourth installment of records was available for his inspection, and the final installment and exemption log would be available by February 20, 2009. CP 1548-49, 1578. The final installment consisted of about 150 emails that required review for redactions and creation of an exemption log. *Id.*

Mr. West did not set an appointment to review the fourth or fifth/final installment. CP 1548. Instead, he filed this lawsuit on February 11, 2009, and obtained an ex parte order that day to show cause why the City should not be held in violation of the PRA. CP 4-10, 11-12.

The exemption log for Mr. West's August 5, 2008 request was

produced to him on February 20, 2009, identifying 111 emails to and from attorneys representing the City, which amounted to 631 pages of redacted attorney-client or work product material. CP 181, 183-201. In total, the City produced about 9,000 pages of documents, plus 19 CDs containing thousands of pages more, in response to Mr. West's August 5, 2008 request. CP 172, 1545-47, 1570-73, 1578, 1581.

B. Material Facts Regarding OPMA Claim

Mr. West claimed the City Council violated the OPMA on six unspecified occasions between September 9 and November 23, 2008, and excluded him from one meeting. CP 6. Over the course of discovery, it became clearer that Mr. West was alleging Council members violated the OPMA by deliberating via email on "six occasions." *See* CP 6.

Mr. West made multiple discovery requests to the City, including over 30 interrogatories, 44 requests for production, and 30 requests for admission. CP 1911-12. In April 2009, about two months after Mr. West filed his lawsuit, the City responded to a discovery request by producing to Mr. West CDs that contained over 20,850 electronic files of City Council members' e-mails over a two and a half year period. *Id.* None of these emails showed that a quorum of Council members collectively intended to secretly deliberate about issues that came before the Council for a vote. *See* CP 1936-77 (compilation of the only e-mails received by

four or more Council members that were submitted by Mr. West to the trial court, many of which were outside the September – November 2008 timeframe specified in Mr. West’s Complaint).

Mr. West also obtained a letter by Timothy Ford, an Ombudsman for the Attorney General, to support his OPMA claim. The City objected to the admissibility of this letter. CP 1928. The trial court held the letter was inadmissible. RP (9/24/10, court’s oral ruling) 5.²

Regarding Mr. West’s claim that he was excluded from a public meeting, the evidence showed he left a Council meeting on his own volition after he was instructed to limit his testimony to City business, and to refrain from further personal attacks against a City employee. *See* CP 897-98, 1386-87, 1903-10, 1931.

C. Material Facts Regarding Tort and Civil Rights Claims

Mr. West alleged the City negligently hired and supervised private attorney Jeffrey Myers, City Hearing Examiner Tom Bjorgen, and City employee Laura Keehan. CP 8-9. He also vaguely claimed the “defendants committed the 7 elements of civil fraud,” “failed to act to

² The Report of Proceedings (“RP”) consists of transcripts from two hearings: the February 20, 2009 hearing on Mr. West’s first show cause motion; and the September 24, 2010 hearing on the City’s summary judgment motion seeking dismissal of Mr. West’s remaining claims after his PRA claims were dismissed. The transcript of the latter hearing is in two parts: the parties’ argument, and the court’s oral ruling. The transcripts are separately paginated. This brief cites to the RP followed by a parenthetical indicating the date of the hearing (and for the latter hearing, a reference to either the parties’ argument or the court’s oral ruling), then the relevant page number(s).

prevent violation of federally protected rights,” and defamed him by not preventing private attorneys Mr. Myers and Mr. Bjorgen from allegedly calling him a “serial litigant.” CP 7-9.

In his Complaint, Mr. West admitted he failed to file a tort claim as required by RCW 4.96.020 before filing his Complaint. CP 9 at ¶4.8. He also failed to offer any evidence supporting any of these claims. *See* CP 898-904, 1925-26, 1386-87.

D. Procedural History

1. Mr. West’s First Show Cause Motion

On February 19, 2009, the City responded to Mr. West’s first show cause motion regarding his PRA claims, which was filed the same day Mr. West filed his Complaint. CP 1530-1715. Mr. West’s first show cause motion alleged the City failed to produce records in response to his April 28th and August 5th public records request, failed to produce exemption logs, and failed to produce or assert an exemption for “WDFW records referred to in the August 27 declaration of Laura Keehan filed in City of Olympia case No. 08-0044-1.” CP 11-12.

In response, the City showed at that point it had produced over 38,000 pages of documents and 19 CDs of additional documents responsive to Mr. West’s public records requests, several exemption logs, and had notified Mr. West before he filed his lawsuit that additional

installments and exemption logs would be produced in a matter of weeks. CP 1530-1715. In regard to the Laura Keehan declaration, the City showed neither of Mr. West's public record requests encompassed the map referenced in Ms. Keehan's declaration,³ but in any event Ms. Keehan's declaration expressly asserted the following exemption: "The maps of Important Habitat for Sensitive Species were provided by WDFW [Washington Department of Fish and Wildlife] with requirements not to disclose them to the public. Such maps are exempt from public disclosure under RCW 42.56.430(2)(a)." CP 1541.

A hearing was conducted on Mr. West's first show cause motion on February 20, 2009. RP (2/20/09) 1-31. During the hearing, Mr. West asked the court to set a date certain for production of the final exemption logs, and he was agreeable to the timeline proposed by the City. *Id.* at pp. 7-8, 23-24. The court orally ruled the City's responses to Mr. West's records requests were adequate, the final installment and final exemption logs responsive to Mr. West's April 2008 records request would be due by April 15, 2009, the final installment and exemption log responsive to Mr. West's August 2008 request would be produced the day of this hearing consistent with what the City had previously told Mr. West, and the City

³ Ms. Keehan's declaration is dated August 27, 2008, three weeks after Mr. West's August 5, 2008 public records request and several months after his April 2008 request. CP 1540-41.

had standing to assert the exemption for WDFW endangered species maps. *Id.* at pp. 20-21, 25-27. The court issued a written order reiterating the court's oral ruling. CP 76.

2. The City's Motion for Partial Summary Judgment

On April 10, 2009, the City moved for partial summary judgment seeking dismissal of Mr. West's damages claims against the named City Council members based on legislative immunity pursuant to RCW 4.24.470(1) and the common law, as well as Mr. West's failure to file a tort claim as a condition precedent to seeking damages (RCW 4.96.020). CP 1725-31, 1736-39. Mr. West did not respond to the legislative immunity issue, but did oppose the tort claim issue in a two sentence response brief, claiming he did file a tort claim. CP 1735. The court granted the City's motion based on legislative immunity and dismissed all claims for damages against the City Council members, but reserved ruling on the tort claim issue. CP 486-87.

3. Mr. West's Second Show Cause Motion

On April 20, 2009, Mr. West filed a second motion to show cause requesting that the City file the exemption logs and the redacted/withheld records identified therein for an *in camera* review by the court, and that the City be penalized for withholding the endangered species map referred to in Ms. Keehan's declaration. CP 82-88. The City responded by

agreeing to file all exemption logs and producing the approximately 4,500 pages of privileged attorney emails for *in camera* review. CP 171-78. The City also argued RCW 42.56.430(2)(a) plainly provides that maps showing the locations of endangered, threatened or sensitive species are exempt from public disclosure, and produced a written agreement WDFW had required the City to sign prohibiting the City from releasing the map to the public, as well as the WDFW stamp on the map reiterating its confidentiality. CP 176-78, 202-08. As indicated in the confidentiality agreement WDFW had the City sign, and consistent with RCW 42.56.430(2)(a), all Ms. Keehan could provide was a “yes” or “no” answer concerning the existence of an endangered species on a specific site, which essentially is what she stated in the August 27th declaration Mr. West referenced. CP 16, 205.

On June 26, 2009, the court ruled the WDFW maps referred to by Ms. Keehan were exempt from public disclosure and the City did not violate the PRA by withholding them. CP 536, 546. The court ordered the City to produce the privileged records under seal by August 21, 2009 for *in camera* review. CP 536-39. The City did so. CP 541-42.

4. Order Dismissing Mr. West’s PRA Claims

On March 30, 2010, following *in camera* review, the court ruled the City did not violate the PRA by redacting or withholding any of the

emails to or from attorneys representing the City. CP 546-841 (including itemized rulings on each document). The court identified six lawsuits the redacted or withheld emails discussed. CP 548-49. *See also* CP 1814-79 (also citing numerous legal proceedings Mr. West initiated, which were discussed in the privileged communications identified in the exemption logs produced by the City).

The court ruled one document (identified as “record B-035”) of the 1,059 records redacted or withheld as exempt under the PRA was not a privileged attorney-client or work product communication, but “given the nature of” that document, no violation of the PRA occurred. CP 552-53. On May 19, 2010, Mr. West moved for reconsideration of the Court’s ruling. CP 1881-89. The City responded, arguing the court properly concluded the redacted and withheld records were exempt from public disclosure, the one document the court found was unprivileged was not responsive to Mr. West’s records request, and that document actually was privileged attorney work product as explained in the declaration of Deputy City Attorney Darren Nienaber that accompanied the City’s response to Mr. West’s motion for reconsideration. CP 1814-79.

On July 12, 2010, the court denied reconsideration and ordered the City to present an order dismissing Mr. West’s PRA claims. CP 885-86. On August 10, 2010, the court entered an order dismissing all of Mr.

West's PRA claims with prejudice. CP 890-91.

5. The City's Motion for Summary Judgment on Remaining Claims, Including OPMA Claims

On August 27, 2010, the City defendants moved for summary judgment seeking dismissal of Mr. West's remaining claims, including his OPMA, tort and civil rights claims.⁴ CP 893-904. The City argued Mr. West's OPMA claim should be dismissed because he was unable to prove a majority or quorum of City Council members collectively intended to conduct a "secret" meeting via email about any action that came before the Council for a vote on the six occasions he vaguely identified. CP 895-97, 1930-33, 1936-77.

Regarding the other aspect of Mr. West's OPMA claim, the City presented evidence showing Mr. West was not precluded from attending a City Council meeting. Instead, he left on his own volition. *See* http://olympia.granicus.com/MediaPlayer.php?view_id=2&clip_id=421 (link to audio and video of the challenged November 3, 2008 City Council meeting, which was considered by the trial court, *see* CP 897-98, 1386-87, 1931); *see also* 1903-10 (minutes from the same City Council meeting).

Regarding Mr. West's remaining tort and civil rights claims, the

⁴ On September 18, 2009, the court granted private attorney Jeffrey Myer's motion to dismiss Mr. West's claims against him for failure to serve him with a Summons and Complaint. CP 544-45. Mr. West also did not serve the other named defendant, the Washington Cities Insurance Authority ("WCIA"). There is no dispute Mr. West abandoned any claims he may have had against the WCIA. *See* CP 894.

City argued he could not prove the essential elements of those claims. CP 898-904. The City also argued (again) that Mr. West admitted in his Complaint that he did not file a tort claim against the City defendants, which is a condition precedent to filing a tort lawsuit (RCW 4.96.020). *Id.*; *see also* CP 9 at ¶4.8.

Mr. West submitted a three page brief in response to this summary judgment motion, along with numerous attachments; all of which focused exclusively on his OPMA claim. CP 906-08. At the same time, Mr. West requested a CR 56(f) continuance to try to develop additional evidence regarding his OPMA claim. *Id.* A few days later, he moved to amend his Complaint to allege daily violations of the OPMA over a twenty month period, rather than six OPMA violations over a two month period as alleged in his original Complaint. CP 1516-20. Plaintiff offered no evidence or argument in opposition to the dismissal of his tort and civil rights claims. *See* CP 906-08, 1516-20.

The City replied, opposing a continuance and leave to amend. CP 1925-34, 1978-82. The City argued a CR 56(f) continuance should be denied because: (1) Mr. West offered no reason why he failed to obtain additional evidence during the 18 months his lawsuit had been pending; (2) he failed to show what evidence would be established through further discovery; and (3) he failed to show how additional evidence would raise a

genuine issue of material fact. CP 1927-30.

The City argued leave to amend should be denied because the proposed amendment: (1) alleged entirely new facts outside the scope of the six events during two months that were challenged in the original complaint; (2) was untimely brought a week before the summary judgment hearing; and (3) would cause unfair prejudice by reopening discovery after the case had been pending for 18 months, substantially increasing fees and costs for defending the matter. CP 1979-81.

On September 24, 2010, the court granted summary judgment dismissing Mr. West's remaining claims with prejudice, and denied Mr. West's motions for a CR 56(f) continuance and leave to amend his Complaint. CP 1386-87; RP (9/24/10, parties' argument) 4-27, RP (9/24/10, court's oral ruling) 3-11. The court noted Mr. West had filed at least 63 lawsuits in recent years and was familiar with the requirements for responding to summary judgment motions. RP (9/24/10, court's oral ruling) 6-7. *See also* CP 1815, 1818-34 (partial listing of some of Mr. West's other lawsuits and litigation).

Mr. West moved to reconsider this ruling. CP 1394-1411. The City opposed reconsideration. CP 1389-92. On December 17, 2010, the court denied Mr. West's motion for reconsideration and entered a final judgment dismissing all of his claims with prejudice. CP 1412-13.

6. Mr. West's Notice of Appeal

On January 18, 2011, Mr. West timely filed a notice of appeal. CP 1414. The notice of appeal identified the trial court's September 24, 2010 order granting summary judgment dismissing Mr. West's OPMA, tort and civil rights claims, and the court's December 17, 2010 order denying reconsideration of that summary judgment order. *Id.* Additionally, the notice of appeal vaguely identified "all interlocutory and supplementary orders" followed by a handwritten asterisk stating "see attached." *Id.* Mr. West attached three other orders to his notice of appeal in addition to the two orders specifically identified in his notice of appeal: the February 27, 2009 order on the first show cause hearing; the May 8, 2009 order dismissing the damages claims against the City Council members based on legislative immunity; and the June 26, 2009 order on the second show cause hearing. CP 1415-33.

Mr. West did not identify in his notice of appeal, or attach to his notice the March 30, 2010 order dismissing his PRA claims following the court's *in camera* review, the July 12, 2010 order denying reconsideration of the March 30, 2010 order, nor the August 10, 2010 order dismissing all of his PRA claims. CP 1414-33.

IV. ARGUMENT

A. Standard of Review

Appellate courts engage in the same CR 56 inquiry as the trial court when reviewing summary judgment orders. *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Summary judgment should be affirmed if there is no genuine issue of material fact, viewing the facts in the light most favorable to the non-moving party, and the moving party is entitled to judgment as a matter of law. *Id.* Agency actions challenged under the PRA are similarly reviewed *de novo*, with the appellate court engaging in the same inquiry as the trial court. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004).

The standard of review for denial of a CR 56(f) continuance is abuse of discretion. *Molsness v. City of Walla Walla*, 84 Wn. App. 393, 400, 928 P.2d 1108 (1996). Denial of a motion for leave to amend is similarly reviewed for abuse of discretion. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). An abuse of discretion occurs if the challenged decision was manifestly unreasonable, based on untenable grounds or untenable reasons. *Mecum v. Pomiak*, 119 Wn. App. 415, 422, 81 P.3d 154 (2003).

B. The Trial Court Correctly Decided the WDFW Maps Showing Locations of Endangered Species Are Exempt from Public Disclosure

Mr. West appeals the trial court's February 27, 2009 order ruling the City had standing to assert an exemption from disclosure of WDFW endangered species maps, and June 26, 2009 order ruling the WDFW maps were exempt from disclosure. CP 1414-33 (Notice of Appeal); Appellant's Opening Brief ("Opening Br."), pp.14-16. However, he merely claims these rulings were erroneous, without any citation to authority or legal argument. *Id.*

Arguments unsupported by any authority need not be considered on appeal. *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998). On this ground alone, the trial court's rulings on the WDFW maps should be affirmed due to Mr. West's failure to provide any authority or argument to support his conclusory statements.

Alternatively, the trial court should be affirmed on the merits. As a condition precedent to providing the endangered species maps to the City, WDFW required the City to sign a confidentiality agreement prohibiting the City from disclosing the maps to the public. CP 176-78, 202-08. As a party to this agreement, the City had standing to assert the exemption it was contractually bound to assert. *See Bort v. Parker*, 110 Wash. App. 561, 572, 42 P.3d 980 (2002) (a party to a contract has standing to enforce

its terms).⁵

Moreover, RCW 42.56.430(2)(a) provides that data showing nesting sites or specific locations of endangered, threatened, or sensitive species are exempt from public disclosure. This exemption plainly includes WDFW maps identifying such locations. Therefore, the trial court did not err by ruling WDFW maps showing the locations of endangered species are exempt from public disclosure.

C. The Trial Court Correctly Decided the City Council Members Did Not Violate the OPMA Because Mr. West Failed to Prove a Quorum of Council Members Collectively Intended to Deliberate About Matters Pending Before the Council

Mr. West's OPMA claim was dismissed on summary judgment by order dated September 24, 2010. CP 1386-87. His notice of appeal specifically identifies this order. CP 1414-33.

Mr. West does not specify how City Council members allegedly violated the OPMA "on six occasions." *See* CP 6 (¶3.2 of Mr. West's Complaint). He apparently believes the OPMA is violated anytime a Council member communicates via e-mail during City Council meetings. *See* Opening Br., pp. 18-20. That is not the law.

⁵ Without any citation to the record, Mr. West claims "the WDFW itself did not seek to conceal [the maps] from the public." Opening Br., p. 16. However, WDFW not only required the City to sign a confidentiality agreement, the WDFW also placed stamps on the maps stating they are exempt from public disclosure. CP 203, 208.

To prove an OPMA violation, a plaintiff “must show (1) that a ‘member’ of a governing body (2) attended a ‘meeting’ of that body (3) where ‘action’ was taken in violation of the OPMA, and (4) that the member had ‘knowledge’ that the meeting violated the OPMA.” *Wood v. Battle Ground School Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001).

The *Wood* court elaborated on three important principles for analyzing OPMA claims. First, “[t]he OPMA is not violated if less than a majority [or quorum] of the governing body meet.” *Id.* at 564. Second, “the participants must collectively intend to meet to transact the governing body’s official business.” *Id.* at 565. “Finally, the governing body members must communicate about issues that may or will come before the Board for a vote; in other words, the members must take ‘action’ as the OPMA defines it.” *Id.* In sum, the *Wood* court held that a violation of the OPMA only occurs if (1) a majority of members (2) “collectively intend” to secretly deliberate (3) “about issues that may or will come before the Board for a vote....” *Id.* at 564-65.

Focusing on e-mail communication, the *Wood* court emphasized “the mere use or passive receipt of e-mail does not automatically constitute a ‘meeting.’” *Wood*, 107 Wn. App. at 564. “Thus, the OPMA is not implicated when members receive information about upcoming issues or communicate amongst themselves about matters unrelated to the

governing body's business via e-mail." *Id.* at 565. Also, even if members discuss official business via e-mail, there is no OPMA violation if less than a majority of the governing body are actively involved in the e-mail discussion. *Id.* at 564-65.

Mr. West can not prove any defendant violated the OPMA, let alone did so knowingly. There are seven members in the City Council, so a quorum requires four or more members. *See* CP 5. With only a few exceptions, the vast majority of the Council members' e-mails Mr. West submitted consist of correspondence between two, or at most three, Council members - - not a quorum. *See* CP 1067-1385.

The e-mails submitted by Mr. West in which four or more Council members were recipients demonstrate, at most, that Council members occasionally were merely passive recipients of another Council member's requests for additional information, or a statement of a point of view on a topic. *See* CP 1936-77 (all e-mails submitted by Mr. West that were received by four or more Council members). "[T]he OPMA is not implicated when members receive information about upcoming issues" *Wood*, 107 Wn. App. at 565. What is lacking in all of these e-mails is evidence of (1) a majority of Council members deliberating about (2) a matter that came before the Council for a vote, and (3) a collective intent

to secretly deliberate about City business.⁶ *See id.* Consequently, the trial court correctly ruled that Mr. West is unable to prove any City Council member knowingly violated the OPMA.

D. The Trial Court Correctly Decided the City Adequately Responded to Mr. West's PRA Requests within Five Business Days, and By Producing over 40,000 Pages of Records in Installments Along with Descriptive Exemption Logs

The trial court ruled the City adequately responded to Mr. West's PRA requests and timely provided exemption logs. CP 75-76, 535-36. Mr. West's notice of appeal specifically identifies these two rulings regarding Mr. West's two show cause motions. CP 1414-33.

As the trial court concluded, the City made a reasonable effort to timely respond to Mr. West's public disclosure requests. *See* RCW 42.56.550(2). Production of voluminous records may be done on an installment basis. RCW 42.56.080. If an installment is not reviewed by the requestor, the agency is not obligated to fulfill the balance of the request (RCW 42.56.120), although the City did so here in regard to plaintiff's request for the East Bay records despite his failure to inspect those records between September 19th and December 3rd, 2008. CP 1546.

⁶ ⁶ As previously indicated, Mr. West relies on a letter by Timothy Ford, an Ombudsman for the Attorney General, which he attached to his opening appellate brief. *E.g.*, Opening Br., p. 17. The trial court held the letter was inadmissible. RP (9/24/10, court's oral ruling) 5. Mr. West fails to assign error to this evidentiary ruling, let alone provide any authority or argument demonstrating the trial court abused its discretion by making this evidentiary ruling. Thus, this inadmissible letter should be disregarded on appeal.

There is no basis in fact for Mr. West's claim that it is "undisputed" the City failed to respond to his PRA requests within five business days. *See, e.g.*, Appellant's Opening Brief, pp. 22, 24, 25, 28. The evidence shows the City responded to Mr. West's requests within five business days of receiving his requests and provided reasonable estimates of the time required to respond to his requests, as required by RCW 42.56.520. CP 1544-45, 1553, 1556-67, 1591, 1605-07. Although not required to, the City also periodically updated Mr. West on its time estimates. *E.g.*, CP 1546, 1566, 1591-92, 1597-98, 1615, 1622, 1693-94.

The PRA expressly recognizes additional time to respond may be required based on "the need to clarify the intent of the request, to locate and assemble the information requested . . . or to determine whether any of the information requested is exempt." RCW 42.56.520. That is precisely what happened here. *E.g.*, CP 1544-45, 1553, 1556-67, 1591, 1605-07. If the requester fails to clarify the request, as Mr. West failed to do with his request concerning the "Chamber of Commerce," RCW 42.56.520 provides that the responding agency "need not respond to" the request. Mr. West prolonged the time to respond to his broad requests due to the need for several clarifications of his requests, his vague responses, and his multiple failures to appear for scheduled appointments to conduct inspections. *E.g.*, CP 1543-49, 1580-81, 1590-1601.

There also is no basis in fact for Mr. West's claim that the City failed to adequately identify the documents being withheld or redacted in exemption logs. *See, e.g.*, Appellant's Opening Brief, pp. 25-28. As the court stated in *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538, 199 P.3d 393 (2009), "[t]he identifying information need not be elaborate, but should include the type of record, its date and number of pages, and, unless otherwise protected, the author and recipient" The City's exemption logs plainly met these requirements, and included citations to specific statutes supporting the exemptions from disclosure along with a brief explanation of how the exemption applies as required by RCW 42.56.210(3). CP 181-201, 210-31, 279-485. The exemption logs show the City redacted portions of 1,058 records, and withheld one record. *Id.*; CP 546 (court ruling noting this fact and that these records constituted 4,444 pages in total out of the over 40,000 pages and 19 CDs containing thousands of pages of more records that were produced without any redactions). *See also* CP 1595 (over 5,000 pages of non-privileged emails to or from attorneys were produced to Mr. West without redactions).

The exemption logs were produced at the same times the City produced various installments of responsive records, most of which were produced to Mr. West before he filed his lawsuit. CP 210, 279-318, 475,

483-85, 546. The final installment of records responsive to Mr. West's April 28, 2008 PRA request and final two exemption logs were produced on April 15, 2009 (consistent with the trial court's February 27, 2009 order, CP 76). CP 210-11, 213-31, 320-473. Regarding Mr. West's August 5, 2008 PRA request, the only exemption log pertaining to that request was produced to Mr. West on February 20, 2009, just as Mr. West was told it would be before he filed his lawsuit. CP 181, 183-201.

Mr. West fails to cite any authority establishing the production of these exemption logs was untimely. In *Rental Housing Ass'n of Puget Sound*, approximately nine months elapsed between the filing of a PRA request and production of an exemption log, but the court made no comment that this timeframe was overly long. See *Rental Housing Ass'n of Puget Sound*, 165 Wn.2d at 528, 541.

Here, the first two exemption logs regarding Mr. West's April 28, 2008 PRA request were produced within three months, and the final two exemption logs were produced within a year. See CP 210-11, 475, 483-85, 213-31, 320-473. The exemption log for Mr. West's August 5, 2008 PRA request was produced about six months after he submitted his request. See CP 181, 183-201.

The City is unaware of any authority suggesting these timeframes were unreasonable, particularly given the broad scope of Mr. West's PRA

requests, which required review of over 40,000 pages and 19 CDs of material at the same time the City was responding to additional PRA requests from Mr. West and others. Thus, the trial court was correct in ruling the City met its burden of proving its responses to Mr. West's broad PRA requests, including the exemption logs, were reasonable and timely. CP 76, 546-841, 885-86, 890-91.

E. The Trial Court Correctly Decided Many Emails to and from Attorneys Representing the City Were Exempt from Public Disclosure as Privileged Attorney-Client Communications or Work Product

Mr. West did not assign error to, make any arguments, or provide any legal citations regarding the trial court's March 30, 2010 and July 12, 2010 rulings pertaining to record B-035. *See* Appellant's Opening Brief. RAP 10.3(a)(4) requires an appellant to separately identify and present legal arguments concerning each error he claims was made by the trial court. "[W]hen an appellant fails to raise an issue in the assignments of error ... *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) (italics in original). Therefore, any issues regarding record B-035 have not been appealed by Mr. West, and the City does not address that specific ruling

by the trial court.⁷

Mr. West failed to properly preserve any claim of error pertaining to the trial court's March 30, 2010, July 12, 2010, and August 10, 2010 orders regarding his PRA claims. RAP 5.3(a) requires a party seeking review to "designate the decision or part of decision which the party wants reviewed," and states the appellant "should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made" Mr. West's notice of appeal does not identify the trial court's March 30, 2010 order following *in camera* review of the exempt attorney emails, the trial court's July 12, 2010 order denying reconsideration of the court's March 30, 2010 order, or the trial court's August 10, 2010 order dismissing his PRA claims. CP 1414. He did not attach any of these three orders to his notice of appeal. CP 1415-33. This Court has discretion to decline review of these orders based on Mr. West's failure to identify them in his notice of appeal. *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 213, 962 P.2d 839 (1998), *review denied*, 137 Wn.2d 1022 (1999) (noting, however, discretion ordinarily is exercised in favor of review).

On the other hand, appellate courts have discretion to consider trial

⁷ Mr. West also did not assign error to, present any argument, or provide any legal citations regarding the trial court's May 8, 2009 order granting partial summary judgment dismissing all damages claims against the City Council members based on legislative immunity (CP 486-87). *See* Appellant's Opening Brief. Consequently, the City does not address that partial summary judgment ruling either.

court rulings argued in a brief even if those rulings were not designated in a notice of appeal. *Id.* Accordingly, the City responds to Mr. West's assignment of error and arguments regarding the trial court's orders concluding exempt attorney-client and/or work product emails were properly redacted or withheld by the City.

Mr. West does not raise any specific challenges to specific emails that were redacted. Instead, he raises general arguments that appear to challenge use of the attorney-client and work product privileges as PRA exemptions. *See* Appellant's Opening Brief, pp. 30-39.

Attorney-client privileged communications to or from attorneys representing government entities for the purpose of obtaining or providing legal advice or assistance are exempt from public disclosure pursuant to RCW 5.60.060(2)(a) and RCW 42.56.510. *Hangartner*, 151 Wn.2d at 450-53. Similarly, the work product of attorneys representing government entities is exempt from public disclosure pursuant to RCW 42.56.290 and CR 26(b)(4). *Id.* at 449-50; *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 744-45, 174 P.3d 60 (2007). Based on these authorities, the trial court correctly ruled the City properly redacted 1,059 records containing privileged attorney-client communications and work product in the course of producing about 40,000 pages and 19 CDs responsive to Mr. West's public record requests.

Over the course of seven months, the trial court conducted an *in camera* review of each page of each record the City identified as exempt in the multiple exemption logs provided to Mr. West. CP 546-841. The trial court found that most of the redacted attorney emails identified the litigation or anticipated litigation in the un-redacted portions of those emails. CP 549. Where identification of litigation was missing, the trial court considered the attorney-client privilege. *Id.*

For each redacted email found to be exempt work product, the trial court identified the litigation related to the redaction in the trial court's ruling. CP 549, 555-841. For each redacted record found to be exempt attorney-client privileged communication, the trial court affirmed the propriety of redaction only where "legal advice, planning, strategy, or tactics is evident in the context of the redacted material." CP 552.

Mr. West essentially concedes the attorney-client and work product privileges apply to his PRA requests, but argues the trial court should have nonetheless ordered production of the privileged material because his lawsuit is akin to an insurance bad faith action. Appellant's Opening Brief, pp. 30-39. Primarily relying on *Escalante v. Sentry Insur.*, 49 Wn. App. 375, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), Mr. West argues the trial court should have ordered production of the privileged material because he believes the City routinely violates the

OPMA and PRA in “bad faith.” *E.g.*, Appellant’s Opening Brief, pp. 31, 33, 35, 39. Many of his “bad faith” allegations are made without any citation to evidence in the record and, in fact, are asserted against an unrelated State agency, not the City.⁸

Further, the *Escalante* court noted insurance bad faith actions are “unique.” *Escalante*, 49 Wn. App. at 397. The insured plaintiff in a bad faith action must show the defendant insurer fraudulently denied coverage, often placing the work product of the insurer directly at issue. *Id.* at 394. No such showing of fraud or bad faith is required of a plaintiff in a PRA or OPMA case.

Even in insurance bad faith actions where work product may be directly at issue, the issue of whether an insurer’s privileged work product or attorney-client communications are discoverable requires an *in camera* review to determine whether the privileged material may be relevant to the bad faith claim. *Id.* at 396 (remanding the case for *in camera* review). Here, the trial court undisputedly conducted an *in camera* review, while recognizing Mr. West was asserting several causes of action in addition to his PRA claim. *E.g.*, CP 548 (noting “the instant case ... includes more

⁸ For example, Mr. West alleges many emails were “communications between DNR employees, merely forwarded subsequently to counsel” Appellant’s Opening Brief, p. 36. Presumably, Mr. West is referring to the State’s Department of Natural Resources (“DNR”) when making this claim. None of the City’s records identified in the exemption logs involved communications with DNR employees. *See, e.g.*, CP 554-841.

than just the PRA claim”). In other words, Mr. West received the same remedy a plaintiff in an insurance bad faith action or other discovery dispute would receive: an extensive *in camera* review by an unbiased judge to determine whether privileges were properly asserted.

Even if this case was akin to an insurance bad faith action (which it is not), the solution to Mr. West’s concerns about “bad faith” is an *in camera* review, not mandatory production of all privileged material as he appears to be advocating. Mr. West is unable to cite any authority holding that privileged material found to be exempt from public disclosure by an impartial judge following *in camera* review must be produced without redactions. If that were to become the law, the statutory exemptions in the PRA would become meaningless. Thus, there is no merit to Mr. West’s argument that the trial court should have ordered production of the privileged material either in lieu of *in camera* review, or after the trial court concluded the material was privileged following *in camera* review.

F. The Trial Court Correctly Applied the Summary Judgment Rules When Ruling that Mr. West Failed to Meet His Burden of Proving All Elements of His Alleged Causes of Action

Although somewhat confusing, Mr. West appears to claim the trial court misunderstood the summary judgment rules in CR 56 and erred by not requiring the City to put on more evidence to disprove Mr. West’s

claims. See Appellant's Opening Brief, pp. 40-41. Mr. West is incorrect.

“[A] defendant may move for summary judgment on the ground the plaintiff lacks competent evidence to make out a prima facie case”

Young v. Key Pharmaceutical, Inc., 112 Wn.2d 216, 226, 770 P.2d 182

(1989). The following burdens are imposed in such circumstances:

A defendant in a civil action is entitled to summary judgment when the party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue. In response the nonmoving party may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.

Las v. Yellow Front Stores, 66 Wn. App. 196, 198, 831 P.2d 744 (1992)

(footnotes omitted). When a summary judgment motion is brought in this manner challenging the sufficiency of the evidence, “the moving party is not required to support its summary judgment motion with affidavits.”

Guile v. Ballard Community Hosp., 70 Wn. App. 18, 23, 851 P.2d 689, review denied, 122 Wn.2d 1010 (1993).

As the trial court found, Mr. West is no stranger to these requirements for responding to summary judgment motions. RP (9/24/10, court's oral ruling) 6-7. He has litigated at least 63 lawsuits and was

recently reminded of the procedures for responding to summary judgment motions. *Id.* Further, pro se litigants are held to the same standards with respect to knowing court rules as parties represented by counsel. *See State v. Sodorff*, 84 Wn.2d 888, 890-91, 529 P.2d 1066 (1975).

Mr. West's only substantive response to the City's summary judgment motion (seeking to dismiss Mr. West's OPMA, tort and civil rights claims after his PRA claims were dismissed) focused exclusively on his OPMA claims related to email correspondence.⁹ CP 906-08. He offered no opposition to dismissal of his tort and civil rights claims, nor did he offer any evidence that he filed a tort claim contradicting the admission in his Complaint that he had not done so. *See id.*

Summary judgment is properly granted when the nonmoving party fails to offer any evidence opposing the motion. *White v. Solaegui*, 62 Wn. App. 632, 636, 815 P.2d 784, *review denied*, 117 Wn.2d 1019 (1991). Mr. West failed to offer any evidence or argument opposing dismissal of his tort and civil rights claims, or his claim that he was ejected from a public meeting. *See* CP 906-08. However, he now attempts to support his defamation and civil rights claims for the first time on appeal with citations to authority and conclusory assertions, but no evidence in the

⁹ The City's response to the OPMA claims is addressed above in section IV. C of this brief.

record.¹⁰ Appellant's Opening Brief, pp. 42-45. He is too late.

In any event, Mr. West's defamation claim was focused on former co-defendant Myers. CP 7 at ¶3.9. Even if he had alleged a City employee committed defamation, he would have to prove falsity, an unprivileged communication, fault, and damages. *Mark v. Seattle Times*, 96 Wn.2d 483, 486, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982). Statements of opinion are not actionable as defamation. *Dunlap v. Wayne*, 105 Wn.2d 529, 537, 716 P.2d 842 (1986). Moreover, Mr. West's defamation claim was addressed to statements made in the course of judicial proceedings, which are absolutely privileged. *See, e.g., McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). Mr. West was unable to come forward with any evidence establishing the essential elements of defamation. Therefore, his defamation claim was properly dismissed.

Mr. West offers no argument (before the trial court or on appeal) challenging the dismissal of his civil rights claims against the City Council members based on legislative immunity. *See* CP 486-87, 1725-31, 1735, 1736-39. Thus, his civil rights claim is directed to the City. To prove municipal liability against the City for civil rights violations, he had to show the City had an officially adopted policy promulgated by City

¹⁰ Mr. West also alleges new causes of action on appeal that were not alleged below, including failure to accommodate under the ADA, and denial of due process. *Compare* CP 8-9 *with* Appellant's Opening Brief, p. 43.

officers demonstrating deliberate indifference to Mr. West's constitutional rights, and the policy was the "moving force behind the constitutional violation." *Levine v. City of Alameda*, 525 F.3d 903, 907 (9th Cir. 2008).

Mr. West's civil rights claim against the City failed because it is improperly based on alleged violations of state laws (*e.g.*, the PRA and OPMA, *see* CP 7, ¶3.10), which are insufficient to establish a federal constitutional violation. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (42 U.S.C. §1983 only provides a remedy for deprivations of federal rights, not rights created by state law). Even if state law were relevant, Mr. West was unable to provide any evidence showing the City had an official policy of violating the PRA, the OPMA, or any other law. Mr. West failed to identify any officially adopted policy promulgated by City officers demonstrating the City was deliberately indifferent to his federal constitutional rights. Additionally, he was unable to prove some nonexistent policy was the "moving force" behind any alleged violation of his federal rights. Mr. West's municipal liability claim thus failed on multiple grounds.

Mr. West's negligent hiring or supervision claim also failed as a matter of law. An employer may be liable for harm caused by an incompetent employee only if (1) the employer knew, or should have known, that the employee was unfit and (2) the hiring, training or

supervision of the employee was a proximate cause of the plaintiff's injury. *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 20, 60 P.3d 652 (2002). The prior knowledge of risk element "require[s] a showing of knowledge of the [specific] dangerous tendencies of the particular employee" that are the subject of the later negligent hiring, training or supervision claim. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 52, 929 P.2d 420 (1997).

An employer's liability for negligent hiring, training or supervision only extends to acts of employees; not to acts of independent contractors. *See id.; DeWater v. State*, 130 Wn.2d 128, 140-41, 921 P.2d 1059 (1996). Thus, Mr. West's claim of negligent hiring of independent contractors (*i.e.*, the WCIA, private attorney Jeffrey Myers, and hearing examiner Thomas Bjorgen – *see* CP 5, 8 at ¶¶2.4, 3.15) fail as a matter of law.

The only City employee Mr. West claims was negligently hired or supervised is Laura Keehan. There is no evidence the City had prior knowledge of past dangerous acts by Ms. Keehan rendering her unfit for her job. Therefore, Mr. West's negligent hiring, training or supervision claim failed as a matter of law.

G. The Trial Court Properly Denied Mr. West's CR 56(f) Motion for Continuance

Denial of a CR 56(f) motion to continue a summary judgment

hearing to permit further discovery is proper on any one of the following grounds: “(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.” *Pelton v. Tri-State Memorial Hosp.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992). The trial court did not abuse its discretion by denying Mr. West’s motion to continue on all three grounds.

Mr. West’s lawsuit had been pending for more than 18 months when the City moved for summary judgment. *See* CP 4, 893. By May 2009, Mr. West had received over 40,000 pages of records plus 19 compact discs of additional records responsive to two public records requests related to his claims in this lawsuit, including thousands of pages of e-mail correspondence. *See* CP 76, 546. Additionally, the City responded to multiple discovery requests. CP 1911-12. In April 2009, more than 16 months before the City moved for summary judgment, the City responded to a discovery request by producing CDs to Mr. West that contained over 20,850 electronic files of City Council members’ e-mails over a two and a half year period. *Id.*

Mr. West argued a continuance was necessary to respond to the portion of the City’s summary judgment motion seeking dismissal of his

OPMA claim. CP 906-08. He offered no argument suggesting a continuance was needed to respond to the motion seeking dismissal of his tort and civil rights claims. *Id.*

All three alternative grounds set forth in *Pelton* were present supporting denial of the CR 56(f) motion to continue. First, Mr. West offered no good reason for his delay in obtaining the desired evidence. *See* CP 906-08. He had the CDs containing Council members' emails for over 16 months. He gave no explanation for why he had not obtained additional material during the 18 months the action had been pending. *See Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986) (affirming denial of a CR 56(f) continuance where the plaintiffs failed to provide good reasons for why they had not obtained desired evidence during the 16 months the action was pending).

Second, Mr. West failed to state what evidence would be established through additional discovery. *See* CP 906-08. In a conclusory fashion, he merely claimed the evidence (which he already had) may support his OPMA claim. *Id.* A conclusory statement that additional evidence *may* support a claim is insufficient to justify a continuance. *E.g.*, *Molsness*, 84 Wn. App. at 400-01 (“Vague, wishful thinking is not enough to justify a continuance.”).

Third, Mr. West failed to show how the desired evidence would

raise a genuine issue of material fact. *See* CP 906-08. Therefore, the trial court did not abuse its discretion by denying Mr. West's motion for a continuance. *See Pelton*, 66 Wn. App. at 357.

H. The Trial Court Properly Denied Mr. West's Motion to Amend His Complaint to Allege New Facts and Occurrences a Week Before the Summary Judgment Hearing

Mr. West's original complaint alleged six OPMA violations during a two month period in 2008. CP 6. On September 17, 2010, a week before the hearing on the City's summary judgment motion, plaintiff moved to amend his Complaint to allege that "[b]etween September 1, 2008 and April 16, 2010, defendants . . . on each and every day that they were Council members, conducted a pattern of unlawful violations of the OPMA" CP 1516-20. Rather than seeking a \$100 penalty for six alleged violations of the OPMA during a two month period as asserted in the original Complaint, the proposed amendment sought a \$100 penalty from each current or former Council member for each day during a twenty month period (over 600 violations for each Council member, rather than 6 as alleged in the original Complaint). *Id.*

"The touchstone for denial of an amendment [of pleadings] is the prejudice such amendment would cause the nonmoving party." *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120

(1986) (finding no abuse of discretion in denial of leave to amend Complaint when the “untimely and unfair amendment” was sought “a little more than a week before the summary judgment hearing”).

There is a “general tendency to deny motions to amend based on new facts or occurrences.” *Herron*, 108 Wn.2d at 167. In affirming denial of a motion to amend filed on the eve of summary judgment, the *Herron* court reasoned as follows:

The judicial preference for those amendments based on the underlying circumstances set forth in the original complaint – as compared with amendments raising new claims based on new factual issues – is consistent with the policies behind CR 15. When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits. When the amended complaint raises entirely new concerns, the plaintiff’s right to relief based on the facts in the original complaint is unaffected. Moreover, the defendant in the latter case is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery.

Id. (affirming denial of motion to amend a defamation complaint to add additional defamation claims occurring before and after the events alleged in the original complaint).

Here, as was similarly held in *Del Guzzi* and *Herron*, Mr. West’s motion to amend would have unfairly prejudiced the City. The proposed amendment raised “entirely new concerns” outside the scope of “the underlying circumstances set forth in the original complaint” requiring

renewal of discovery when the City's summary judgment motion was pending in a case that was filed over eighteen months previously. *Contra Herron*, 108 Wn.2d at 167. This "untimely and unfair amendment" would have caused prejudice to the City by forcing the parties to renew discovery, substantially increasing the time, fees and costs expended in defending the case. *Contra Del Guzzi*, 105 Wn.2d at 888. Therefore, the trial court did not abuse its discretion by denying Mr. West's motion to untimely amend his OPMA complaint.

V. CONCLUSION

Based on the foregoing reasons, the trial court's orders that Mr. West challenges should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of November, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on November 14, 2011, I filed the foregoing Brief of Respondents with the Clerk of the Court and arranged for the service to the parties to this action as follows:

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- Email
- Messenger
- U.S. Mail
- Overnight Mail

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