

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 24, 2012, 4:13 pm
BY RONALD R. CARPENTER
CLERK

NO. 44520-4
NO. 87393-3

RECEIVED BY E-MAIL

bjh

SUPREME COURT OF THE STATE OF WASHINGTON

VINCENT T. GRESHAM, an individual,

Appellant,

v.

ROBBINS GELLER RUDMAN & DOWD LLP, a limited liability
corporation, and THE STATE OF WASHINGTON, OFFICE OF THE
ATTORNEY GENERAL,

Respondents.

BRIEF OF RESPONDENT OFFICE OF THE ATTORNEY
GENERAL

ROBERT M. MCKENNA
Attorney General

STEVE DIETRICH
Senior Counsel
WSBA No. 21897

DAWN CORTEZ
Assistant Attorney General
WSBA No. 19568
Office of the Attorney General
PO Box 40108
7141 Cleanwater Dr. SW
Olympia, WA 98504-0108
360-586-3637

 ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF THE CASE	2
	A. The AGO’s Response to Mr. Gresham’s Records Request	2
	B. Robbins Geller’s Lawsuit for Injunctive Relief.....	5
	C. The AGO Position Before the Trial Court.....	7
III.	RESTATEMENT OF ISSUES.....	15
IV.	ARGUMENT	16
	A. Standard of Review – Summary Judgment Order	16
	B. The Summary Judgment Order Dismissing Mr. Gresham’s Cross Claims Against the AGO Should Be Affirmed Because the Agency Did Not Deny Mr. Gresham Access to Any Record and Thus According to Settled Law He Cannot “Prevail” Against the AGO in This Action.....	17
	1. There Is No Issue of Genuine Fact Regarding the AGO’s Liability for PRA Penalties, Attorneys Fees, and Costs and the AGO Is Entitled to Summary Judgment on Mr. Gresham’s Cross Claim	19
	2. Mr. Gresham’s Cross Claim for Penalties, Attorney Fees, and Costs Was Not Mooted by the Permanent Injunction Order	24
	C. The PRA Injunction Requirements Do Not Apply to Independent Injunction Remedies Under the UTSA	29
	D. Mr. Gresham’s Novel Respondeat Superior Theory of PRA Liability Does Not Provide a Basis for AGO Liability.....	33
V.	CONCLUSION	35

TABLE OF AUTHORITIES

Cases

<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38, 738 P.2d 665 (1987).....	31
<i>Brown v. Labor Ready N.W. Inc.</i> , 113 Wn. App. 643, 54 P.3d 166 (2002).....	34
<i>Confederated Tribes of Chehalis Reservation v. Johnson</i> , 135 Wn.2d 734, 958 P.2d 260 (1998).....	1, 17, 18, 24
<i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973).....	27, 28
<i>Fed'n of State Employees</i> <i>v. Office of Fin. Mgmt.</i> , 121 Wn.2d 152, 849 P.2d 1201 (1993).....	22
<i>Hudesman v. Foley</i> , 73 Wn.2d 880, 441 P.2d 532 (1968).....	16
<i>Indoor Billboard/Wash., Inc.</i> <i>v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	21, 26
<i>John Does 1-11 v. Bellevue Sch. Dist. No. 405</i> , 129 Wn. App. 832, 120 P.3d 616 (2005), <i>rev'd in part on other grounds</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	17
<i>Limstrom v. Ladenburg</i> , 98 Wn. App. 612, 989 P.2d 1257 (1999).....	23
<i>Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane</i> , 172 Wn.2d 702, 261 P.3d 119 (2011).....	16
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	1, 30, 31

<i>Wash. Fed. of State Emp. v. Office of Fin. Mgmt.</i> , 121 Wn.2d 152, 849 P.2d 1201 (1993).....	16
<i>West v. Port of Olympia</i> , 146 Wn. App. 108, 192 P.3d 926 (2008).....	2
<i>Yakima v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	29

Statutes

Laws of 2003, ch. 277, § 3.....	15
Laws of 2005, ch. 274, § 407.....	15
RCW 7.24	28
RCW 19.108	1
RCW 19.108.020	30, 31
RCW 41.05.026	15
RCW 42.17.310	15
RCW 42.30.110	15
RCW 42.56.070	1
RCW 42.56.070(1).....	30
RCW 42.56.270	15
RCW 42.56.270(1).....	14, 15
RCW 42.56.270(6).....	11
RCW 42.56.270(11).....	14, 15
RCW 42.56.540	5, 20, 29, 30

RCW 42.56.550(4).....	18, 21
RCW 43.10.065	3
RCW 43.33A.....	3

Rules

CR 54	25
CR 56(f)	27
RAP 2.5.....	34
RAP 9.12.....	16, 19, 22, 34

I. INTRODUCTION

This case is primarily about the application of the Uniform Trade Secrets Act (UTSA) to a small portion of documents responsive to a public records request. The Attorney General's Office (AGO) was a defendant below because it was the custodian of the records. The law firm that supplied the records requested and obtained injunctions ordering the AGO not to disclose the records. The AGO did not object to the production of any of the requested records, but it did comply with the court orders.

Mr. Gresham's contention that this case raises issues of first impression upon which the Supreme Court must opine to ensure adequate public oversight of public procurement processes or federal securities fraud litigation is hyperbole. There is nothing unusual about a trial court applying the UTSA to public records and long ago the Supreme Court held that "[t]he Public Records Act is simply an improper means to acquire knowledge of a trade secret."¹ Achieving the proper balance between

¹ *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). The *PAWS* Court held that the Uniform Trade Secrets Act (RCW 19.108) constituted an "other statute which exempts or prohibits disclosure of specific information or records" as that phrase is used in RCW 42.56.070. In the *PAWS* case, the trade secrets were contained in university grant applications. Other trade secret/PRA cases have involved business records relating to tribal-state compacts or leases of government property. See *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998) (trade secrets purportedly contained within tribal business records supplied to state under state-tribal compact); *West v. Port of*

transparency and intellectual property rights in Public Records Act (PRA) cases is not a novel undertaking for the trial courts. The fact that the records at issue are related to a previous public procurement process for securities litigation services does not make the trade secret issues presented by the case especially novel or significant.

The AGO expresses no opinion about whether the records at issue are legitimate trade secrets, but does believe that legitimate trade secrets can be protected from public disclosure. It also asks this Court to apply settled law and affirm the summary judgment order dismissing Mr. Gresham's PRA cross claim for penalties, attorneys fees, and costs because the AGO has not withheld any records of its own accord.

II. COUNTERSTATEMENT OF THE CASE

A. The AGO's Response to Mr. Gresham's Records Request

This case arises from a public records request sent to the Attorney General's Office (AGO) by Vincent Gresham, an attorney practicing securities law in Atlanta, Georgia. The records at issue in this appeal comprise a very small fraction of the total records that were supplied by the AGO to Mr. Gresham. They contain information about the clients and business practices of Robbins Geller Rudman and Dowd LLP (Robbins

Olympia, 146 Wn. App. 108, 192 P.3d 926 (2008) (trade secrets purportedly related to a lease of public lands).

Geller), a law firm located in San Diego, California.² The AGO received the records as part of Robbins Geller's effort to demonstrate that it was qualified to provide securities litigation services to the Washington State Investment Board (WSIB).³

In 2010, the AGO published a Request for Qualifications and Quotations (RFQQ) seeking lawyers willing to serve as part of a roster of firms available for securities litigation assignments.⁴ Robbins Geller and about two dozen other law firms responded to the RFQQ.⁵ The RFQQ warned that firms chosen for the roster may never be selected to represent the state in litigation.⁶ It stated that selected firms would not be paid for serving on the roster or for providing portfolio monitoring services to WSIB.⁷ If the AGO decided to assign a case to one of the roster firms, the RFQQ contemplated that a separate fee agreement would be negotiated.⁸ Accordingly, the RFQQ asked firms to describe their general approach to fee setting.⁹

It also allowed the responding firms to designate portions of their

² The Robbins Geller firm has represented WSIB in at least two securities fraud cases and frequently appears as class counsel in major cases. CP 157-167

³ WSIB is a state agency established by RCW 43.33A. The AGO is responsible for contracting with private law firms to provide specialized legal services to state agencies such as the state investment board. RCW 43.10.065.

⁴ CP 1754-55.

⁵ CP 1755

⁶ CP 24 and CP 1172-75

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

responses as “proprietary information.”¹⁰ The RFQQ indicated that the AGO would notify affected firms if the agency received a public records request for any of the designated proprietary information and allow such firms an opportunity to obtain a court order barring disclosure:

If a public records request is made for the information that the Respondent has marked as “Proprietary Information,” the AGO will notify the Respondent of the request and of the date that the records will be released to the requestor unless the Respondent obtains a court order enjoining that disclosure. If the Respondent fails to obtain the court order enjoining disclosure, the Respondent will release the requested information on the date specified. If a Respondent obtains a court order from a court of competent jurisdiction enjoining disclosure pursuant to RCW 42.56, the AGO shall maintain the confidentiality of the Respondent’s information per the court order.¹¹

Accordingly, shortly after receiving Mr. Gresham’s public records request, the AGO informed him that it would provide him with all of the records that he requested, unless it was prevented from doing so by a court order obtained by one or more of the affected law firms.¹² The AGO also told Mr. Gresham about two fee agreements between the agency and Robbins Geller that were beyond the scope of his original records request.¹³ At about the same time, the AGO notified all of the law firms of Mr. Gresham’s request and that all responsive records would be

¹⁰ CP 1756-57 and 1762-63.

¹¹ CP 1762-63.

¹² CP 1803.

¹³ CP 1756.

released unless they obtained a court order barring disclosure.¹⁴ Robbins Geller filed suit in Thurston County Superior Court pursuant to RCW 42.56.540 and the Uniform Trade Secret Act and named the AGO and Mr. Gresham as defendants.¹⁵

B. Robbins Geller's Lawsuit for Injunctive Relief

Robbins Geller obtained a temporary restraining order prohibiting the AGO from responding to Mr. Gresham's public records request.¹⁶ It then obtained a preliminary injunction that barred the AGO from producing four categories of information contained within the firm's RFQQ response and the fee agreement between the AGO and Robbins Geller for the Lehman Brothers case.¹⁷ After the temporary restraining order was lifted, the AGO provided Mr. Gresham with the RFQQ responses of the other law firms and the other fee agreement between the AGO and Robbins Geller.¹⁸ Eventually, the AGO convinced the trial judge that the fee agreement for the Lehman Brothers case should be released without redactions.¹⁹ Robbins Geller ultimately obtained

¹⁴ CP 1805-06. The AGO's notice to the affected law firms fulfilled the commitment it made in the RFQQ. Such third party notice is explicitly allowed by the PRA. "An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested." RCW 42.56.540.

¹⁵ CP 5-10.

¹⁶ CP 11-14.

¹⁷ CP 413-15

¹⁸ RP 13-14, 23 & 60-61 (Nov. 4, 2011).

¹⁹ RP 50-51 (Feb. 17, 2012).

permanent injunctive relief covering only a small fraction of the firm's RFQQ response.²⁰ The permanent injunction compelled the AGO to redact four categories of information from Robbins Geller's response to the 2010 RFQQ before providing that document to Mr. Gresham. Those categories were: (1) the identity of Robbins Geller's clients who participate in the law firm's portfolio monitoring program; (2) the names and telephone numbers of the law firm's institutional investor clients; (3) the law firm's fee and cost proposal; and (4) information pertaining to the law firm's liability insurance coverage limits.²¹ As directed by the court, the AGO redacted the above information from the Robbins Geller's RFQQ response and provided that document to Mr. Gresham. Again, all other records requested by Mr. Gresham and the fee agreements between the AGO and Robbins Geller related to actual cases, for which the law firm performed legal work for the state, were provided to him without redactions.²²

Despite the fact that the AGO was at all times prepared to provide him with all of the records responsive to his request and the agency did not object to the production of any requested records, Mr. Gresham asserted a

²⁰ CP 1342-44. Of the more than two dozen law firms that responded to the 2010 RFQQ, one other law firm, Murray Frank and Sailer LLP, also filed suit and obtained a temporary injunction order barring disclosure of a very small amount of similar information pertaining to that firm's RFP response. RP 5 (Nov. 18, 2011).

²¹ CP 1343.

²² *Id.*

PRA cross claim against the AGO for penalties, attorney fees, and costs.²³

Two months after Judge Pomeroy entered the permanent injunction order Judge Dixon entered a summary judgment order that dismissed Mr. Gresham's cross claim.²⁴

C. The AGO Position Before the Trial Court

In his opening brief, Mr. Gresham makes several misleading statements about the factual record to support his assertion that he is entitled to penalties, attorneys fees, and costs despite the AGO's willingness to provide the records.²⁵ He tells this court that a "rogue" AGO employee "hijacked" the agency's response and "vigorously fought disclosure" by expressing "personal views" that, according to Mr. Gresham, contradicted the agency's official position.²⁶ He contends that the same employee further "assisted Robbins by providing sample legal documents," then "drafted the AGO's pleadings so as to assist

²³ CP 434-39.

²⁴ CP 1450-52 (Judge Dixon was appointed to replace Judge Pomeroy upon her retirement).

²⁵ Mr. Gresham asks this Court to award penalties, costs, and fees solely based upon the novel theory that "[t]he AGO allowed one of its employees to interfere with Requestor's attempt to obtain public records that the AGO was willing to produce." Appellant's Opening Br. at 49.

²⁶ Appellant's Opening Br. at 10, 26, & 27. The AGO employee targeted by Mr. Gresham is Senior Counsel Steve E. Dietrich, who was responsible for the 2010 securities litigation RFQQ and is one of the attorneys representing the AGO in this case. CP 1754-55.

Robbins,” and “worked hand in glove with Robbins in discovery.”²⁷ The various portions of Mr. Gresham’s opening brief containing these allegations and the supporting citations to the record are notably vague and imprecise.²⁸

He did not bring any of these “facts” to the trial court’s attention or argue that these facts precluded summary judgment in the AGO’s favor. To the contrary, in his opposition memo provided to the trial court, he argued only that the AGO had violated a scheduling order; that his cross claim was moot; that he needed more discovery; and that one statement in one of the three declarations submitted by the AGO was not based on the declarant’s personal knowledge.²⁹

In any event, these allegations are flatly contradicted by the record. First, it is undisputed that the AGO as an agency did not oppose the release of any public record requested by Mr. Gresham.³⁰ Second, the assigned Senior Counsel did not oppose disclosure. To the contrary, that same attorney brought the existence of the contracts between the AGO and

²⁷ Appellant’s Opening Br. at 13. In addition to the records supplied in response to his public records request, the AGO also responded to voluminous written discovery requests. Although Mr. Gresham complains at length about Robbins Geller’s discovery responses, he has yet to complain about the AGO’s discovery response. Appellant’s Opening Br. at 16-19.

²⁸ Appellant’s Opening Br. at 13 & 49 (citing the court to over 70 pages of the clerk’s papers, most of which pertain to the Murray Frank case mentioned in n.21).

²⁹ CP 1417-41.

³⁰ Appellant’s Opening Br. at 22, 24 & 26 (“The AGO was willing to disclose all of the disputed information”).

Robbins Geller to Mr. Gresham's attention despite the fact that Mr. Gresham had not requested those specific records.³¹ Those contracts, which were provided to Mr. Gresham, contain the actual fee arrangements and terms negotiated by the AGO for legal services.³²

The attorney's "personal opinions" that Mr. Gresham complains about were provided under oath in response to questions directed to the attorney by Mr. Gresham at a deposition that Mr. Gresham noted.³³ At that deposition, which took place after the trial court had entered the preliminary injunction, Mr. Gresham asked whether the information that had been redacted pursuant to the trial court's preliminary injunction order was essential for public oversight of the AGO's procurement process. The actual questions and answers upon which Mr. Gresham bases his allegations of "rogue" conduct were:

Q (By Mr. Gresham) I didn't mention the Public Records Act. We can invent a hypothetical state of Olympia and – you know, and have it – it doesn't – it is not a question that is tied to any act. It is just a question of how can a citizen evaluating the job you did do so without seeing the same information you saw?

³¹ CP 1758.

³² Mr. Gresham ignores the information contained in those contracts when he tells this Court that the disputed fee information contained in the firm's RFQQ response is necessary to evaluate a public procurement and to determine the veracity of a representation regarding actual fees allegedly made by Robbins Geller in unrelated securities fraud case. Appellant's Opening Br. at 2, 12, 46, & 47.

³³ CP 1177-1180; RP 46-47 (Feb. 17, 2012).

A [By Mr. Dietrich] I think the citizen can do a more than adequate job evaluating what we did with respect to [this] procurement based on the information that the court has ordered [to be disclosed]. Even if the court ordered the redactions they did, I don't really—my personal opinion is that it is not a serious impediment . . . to somebody's ability to evaluate our procurement process. But, again, we did not—the Office did not propose eliminating or redacting any information. It proposed to send you everything and was subsequently restrained from doing that, so my answers are in that context.

....

Q [By Mr. Gresham] Can you identify any vital government function that would be substantially and irreparably impaired by the production of all the information in the Robbins Geller Washington response?

Mr. Standifer: Objection as to form.

A [By Mr. Dietrich] Again, I'm here testifying as a fact witness and I'm not prepared to state . . . the State's legal position in the litigation. I don't intend to be stating that. And in an effort to answer your question, I'm aware that some of these law firms have pointed out that they may be less likely to participate in the State's procurement process and may be—if we are unable to protect or—if they are unable to protect the information that they deem proprietary and important. So, to the extent that is a factor, it could clearly reduce the State's ability to procure the best legal services.³⁴

Mr. Gresham also complains that the AGO provided sample legal pleadings from another PRA case to Robbins Geller and that the agency

³⁴ CP 1180-81.

coordinated discovery efforts with the firm.³⁵ The legal pleading that was provided to Robbins Geller by AGO staff was prepared by a private plaintiff in another public records case.³⁶ That pleading (ironically also a public record that must be provided on request) was provided to Mr. Gresham as well.³⁷ Mr. Gresham's allegation that the AGO and Robbins Geller worked "hand in glove in discovery" is based solely on the fact that counsel for the AGO discussed the scheduling of Mr. Gresham's deposition with counsel for Robbins Geller outside of Mr. Gresham's presence.³⁸ The brief discussion was motivated by the desire to avoid having two separate depositions of Mr. Gresham.³⁹

Finally, Mr. Gresham's allegation that the AGO "drafted its pleadings so as to assist Robbins Geller" also lacks support in the record. In reality, in the trial court the AGO *disagreed* with some of Robbins Geller's legal arguments and took no position regarding other arguments made by the firm.⁴⁰ Regarding the applicability of RCW 42.56.270(6), an exemption that Robbins Geller asserted below, the AGO wrote:

³⁵ Mr. Gresham also cites the court to CP 1309-16 in support of this allegation. That part of the records deal with communication between Mr. Dietrich and an attorney representing a client in a different case.

³⁶ CP 1319-41.

³⁷ Because he lacked knowledge of Thurston County practice, AGO staff provided Mr. Gresham with citations to the local court rules as well. CP 1758.

³⁸ CP 1157-59.

³⁹ *Id.*

⁴⁰ CP 1741-52. RP 12-16 (Feb. 17, 2012).

[T]he AGO reiterates its disagreement with Robbins Geller's reliance on RCW 42.56.270(6) to bar disclosure of that information. RCW 42.56.270(6) exempts from disclosure certain financial and commercial information "supplied to the state investment board by any person when the information relates to the investment of public trust or retirement funds and when disclosure would result in loss to such funds or in private loss to the providers of this information." (Emphasis added.) Putting aside the question of whether the other requirements are satisfied here, Robbins Geller's RFQQ response which is the subject of Mr. Gresham's public records request, was supplied to the AGO, which has exclusive authority to retain attorneys for state agencies. RCW 43.10.067.

The documents were not supplied to or used by the Washington State Investment Board (WSIB) in any meaningful sense and thus RCW 42.56.270(6) does not literally apply. It is a well-established rule of construction that exemptions from disclosure are narrowly construed in favor of disclosure. *PAWS*, 125 Wn.2d 243. *For these reasons, Plaintiff may not rely upon RCW 42.56.270(6) to exempt from disclosure information related to the firm's historical and proposed fee agreements and its professional liability insurance.* Whether or not the AGO was in certain respects acting on behalf of the WSIB in procuring securities litigation counsel, the fact remains that none of the information provided by Robbins Geller in response to the RFQQ was ever provided to the WSIB.⁴¹

(Emphasis added.)

As to the fee agreement between the AGO and Robbins Geller, which the firm sought to protect, the AGO wrote the following to the trial court in its brief for the permanent injunction hearing:

⁴¹ CP 1748-49.

The Court ordered the AGO to withhold one of the two agreements, the Lehman Brothers agreement, from production so long as that litigation remained active. As discussed in the Response to Motion for Permanent (sic) Injunctive Relief, the AGO contends that *all* executed fee agreements between Robbins Geller and the State relating to specific securities cases are public records and not exempt from disclosure. ***Again, the AGO does not believe that such agreements should be exempt from disclosure and respectfully disagrees with the Court's preliminary ruling regarding this record.***

The AGO contends that the exemptions found in RCW 42.56.270(1) and (11) do not exempt legal services agreements in whole or in part. RCW 42.56.270(1) applies to “[v]aluable formulae, designs, drawings, computer source code or object code, and research data obtained by any agency within five years of the request for disclosure when disclosure would produce private gain and public loss.” Pursuant to RCW 42.56.270(11), “[p]roprietary data, trade secrets, or other information that relates to: (a) A vendor's unique methods of conducting business” or “(b) data unique to the product or services of the vendor” are exempt from disclosure.

The Lehman Brothers' fee agreement does not appear to contain valuable formulae, designs, drawings, computer source code or object code, or research data. Likewise, the fee agreement does not appear to contain a large amount of proprietary data or trade secrets. Instead, the fee agreement contains information outlining the parameters of the firm's appointment as a Special Assistant Attorney General on a specific case, including the services that Robbins Geller will provide on that case and the firm's expected compensation on that case. ***Rather than reflecting the firm's general approach to setting fees or setting forth a formula by which fees may be set in future cases, the fee agreement contains the precise fee to be charged in the case. Such information is not exempt under the Public Records Act and should be disclosed to the Plaintiff.*** Further, to the extent that any exemptions are applicable,

there is no compelling evidence of damage to any person or that disclosure would not be in the public interest, as is required by RCW 42.56.540, and thus there is no basis for enjoining the disclosure of this information.⁴²

(Emphasis added.)

Mr. Gresham does not provide much explanation for his “assistance by brief drafting” allegation in his opening brief for this Court. Mr. Gresham told the trial court that the instances of explicit disagreement between the AGO and Robbins Geller depicted above were part of a surreptitious effort by the AGO to gain credibility and bolster Robbins Geller’s RCW 42.56.270(1) and (11) arguments.⁴³ However, the record shows that with respect to Robbins Geller’s RCW 42.56.270(1) and (11) arguments, the AGO wrote:

the AGO does not oppose Robbins Geller’s Motion for Permanent Injunctive Relief to the extent it seeks to enjoin disclosure of information related to the firm’s clients pursuant to RCW 42.56.270(1) and/or .270(11)(a)-(b). To be clear, the AGO is *not* itself asserting that any of this information is exempt and it defers to the Court’s judgment in this matter. The burden therefore remains with Robbins Geller, as the sole party in this matter seeking to prevent disclosure of such information, to prove that such information is exempt from disclosure.⁴⁴

⁴² CP 1749-51.

⁴³ CP 1790.

⁴⁴ CP 1751.

III. RESTATEMENT OF ISSUES

In the trial court the AGO took no position regarding the applicability of the Uniform Trade Secret Act or the exemptions in RCW 42.56.270(1) and (11) to the disputed records.⁴⁵ Again, the AGO expresses no position here regarding Mr. Gresham's description of issues one through four or the appropriate resolution of those issues. The AGO does not disagree with Mr. Gresham's formulation of issue number five although as explained in § IV(A), he has mistakenly described the law regarding injunctions issued based on the UTSA.

Mr. Gresham's issue number six should be restated as:

Should the summary judgment order dismissing Mr. Gresham's PRA cross claim for penalties, fees and costs be affirmed because the AGO did not deny him the opportunity to inspect and copy any public record and therefore he cannot "prevail against" the AGO in this action?

⁴⁵ The AGO did not rely at any point on the exemption set forth at RCW 42.56.270(11) in responding to Mr. Gresham's public records request. The AGO similarly does not address the exemption here. To ensure the Court is fully informed, however, the AGO points out that the title of the bill enacting this exemption and its legislative history suggest that the exemption is not applicable here. *See* Laws of 2003, ch. 277, § 3 (amending RCW 42.17.310, which was later recodified at RCW 42.56.270 by Laws of 2005, ch. 274, § 407) (setting forth title of bill as "An Act relating to protection of proprietary or confidential information acquired through state health services purchasing; amending RCW 42.30.110 and 41.05.026; and reenacting and amending RCW 42.17.310"); Final Bill Report on H.B. 1444, 58th Leg., Reg. Sess. (Wash. 2003) (describing bill as protecting proprietary or confidential information acquired through state health services purchasing).

IV. ARGUMENT

A. Standard of Review – Summary Judgment Order

Summary judgment orders, such as the one dismissing Mr. Gresham's cross claim against the AGO for penalties, attorney fees, and costs are reviewed by an appellate court *de novo*. RAP 9.12 limits the scope of appellate review to the "evidence and issues called to the attention of the trial court."⁴⁶ "The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court." *Wash. Fed. of State Emp. v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993). A motion for summary judgment shall be granted if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Hudesman v. Foley*, 73 Wn.2d 880, 886, 441 P.2d 532 (1968). PRA claims may be resolved on summary judgment. *See, e.g., Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 715-16, 261 P.3d 119 (2011) ("We have previously held that, unless express procedural rules have been adopted by

⁴⁶ RAP 9.12 also requires that "[t]he order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of the counsel." There has been no supplemental order or stipulation in this case.

statute or otherwise, the general civil rules control.”).

B. The Summary Judgment Order Dismissing Mr. Gresham’s Cross Claims Against the AGO Should Be Affirmed Because the Agency Did Not Deny Mr. Gresham Access to Any Record and Thus According to Settled Law He Cannot “Prevail” Against the AGO in This Action

A public records requestor may not recover attorney fees, penalties, and costs under the PRA where the responding agency has merely obeyed court orders in withholding documents. The Washington Supreme Court has held in a case, that is indistinguishable from this case, that an agency that complies with all the PRA provisions, and does not oppose disclosure, cannot be liable to the requestor for penalties, attorneys’ fees, or costs in a case brought by a third party to protect alleged trade secrets. *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 756-57, 958 P.2d 260 (1998); *see also Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 129 Wn. App. 832, 866, 120 P.3d 616 (2005), *rev’d in part on other grounds*, 164 Wn.2d 199, 189 P.3d 139 (2008) (agency not liable for fees and penalties, in part, because it “did not oppose the Times’ disclosure request in court”). The *Confederated Tribes* case, which Mr. Gresham did not cite to this court, also involved a lawsuit filed by a third-party to protect alleged trade secrets from disclosure via the PRA. Just as here, the agency received a public records request and advised a third party about the request.

Id. at 742. Just as here, the agency did not oppose disclosure, but was prevented from doing so by court order. *Id.* at 757. Even though the records were eventually ordered disclosed, the Court held that RCW 42.56.550(4) did not “authorize an award of attorneys fees in an action brought by a private party, pursuant to [RCW 42.56.540] to prevent disclosure of public records held by an agency where the agency has agreed to release the records but is prevented from doing so by court order.” *Confederated Tribes* at 757. The Court reasoned that the requester had prevailed against the third party, not the agency, and that therefore the statute authorizing attorney fees and penalties did not apply. *Id.*

Mr. Gresham acknowledges that only prevailing parties are entitled to costs, attorneys fees, or penalties in a PRA case and that he has not yet prevailed against the AGO.⁴⁷ However, he fails to recognize that the summary dismissal order was appropriate regardless of whether the records are ultimately ordered disclosed, because the materials submitted by the AGO in support of its motion and the *Confederated Tribes* opinion demonstrate that he cannot *ever* prevail against the AGO in this case.

⁴⁷ Appellant’s Opening Br. at 49.

1. There Is No Issue of Genuine Fact Regarding the AGO's Liability for PRA Penalties, Attorneys Fees, and Costs and the AGO Is Entitled to Summary Judgment on Mr. Gresham's Cross Claim

As required by RAP 9.12, Judge Dixon's summary judgment order listed the evidence that was brought to his attention by the parties. The documents specifically identified in the order are the declarations of Mr. Gresham and three AGO employees.⁴⁸ That factual record, even when construed in the light most favorable to Mr. Gresham, shows that the AGO did not deny him the opportunity to inspect or copy a public record. The AGO declarations and its pleadings establish that the agency did not assert that any portion of the responsive records was exempt from disclosure. Instead, it promptly identified all records responsive to his request and offered to produce *all* of those records *without any redactions* for inspection and copying. Of course, as the PRA explicitly allows (and as it promised to do in the RFQQ), the AGO notified the law firms whose designated proprietary information was responsive to Mr. Gresham's request.

Robbins Geller—not the AGO—initiated this lawsuit to protect information that it deemed proprietary. As Judge Pomeroy noted at oral argument on Robbins Geller's permanent injunction motion and

⁴⁸ CP 1451.

Mr. Gresham agreed, the AGO's decision to follow the third-party notice process set out in RCW 42.56.540 does not create liability for the agency,

(Judge Pomeroy) . . . I do want to say one thing, though. I do find that the Attorney General cannot be liable as a matter of law for coming in and presenting this issue to me. Once the . . . request is made, if they want to disclose it or if they have questions, that's exactly what they're to do is just to come in or give the opportunity to whoever it is, and in this case it's Robbins Geller, it could be another one, to give them the opportunity to come in and that does not make them liable as a matter of law.

(Mr. Gresham) I certainly don't disagree with you.

(Judge Pomeroy) Okay. I just don't see the cross-claims happening on that matter, that they cannot be held liable once the person who seeks to protect tries to come in because they're just in a position to ask the court for guidance.

(Mr. Gresham) I understand that as a legal position, Your Honor. There are facts that take this outside of that. That will be addressed at the appropriate time, but I don't disagree at all with what you said.⁴⁹

As Mr. Gresham acknowledged, and *Confederated Tribes* establishes, Judge Pomeroy's comments were a correct statement of the law. Once the AGO supported its motion with admissible evidence that showed the absence of any genuine issue of fact and that it was not liable for PRA penalties, attorneys' fees, or costs, the burden shifted to Mr. Gresham to produce evidence and argument sufficient to avoid

⁴⁹ RP 24-25 (Feb. 17, 2012). Judge Pomeroy did not hear the AGO's summary judgment motion. That motion was heard by Judge Dixon after Judge Pomeroy retired.

summary judgment. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 69, 170 P.3d 10 (2007). To use the language that Mr. Gresham used before Judge Pomeroy, the deadline for his response to the AGO's summary judgment motion was the "appropriate time" for Mr. Gresham to present facts that would allegedly take this case outside of the *Confederated Tribes* holding.

In the trial court Mr. Gresham failed to carry his burden because he provided no substantive evidence and made only procedural arguments in opposition to the AGO's motion.⁵⁰ In his Opening Brief, Mr. Gresham is notably vague regarding the factual or legal grounds for his PRA cross claim for penalties, attorney's fees, and costs.⁵¹ The brief alleges three facts—that AGO pleadings in this lawsuit were drafted to assist Robbins Geller; that an AGO employee assisted Robbins Geller by providing sample legal documents; and that the AGO worked "hand in glove" with Robbins Geller during the discovery for this case.⁵² Even considered in the light most favorable to Mr. Gresham none of these facts provides a basis for AGO liability under RCW 42.56.550(4).

⁵⁰ CP 1417-1441.

⁵¹ Appellant's Opening Br. at 49-50. The factual basis of the claim is included in § V(A) of Mr. Gresham's Opening Brief.

⁵² Mr. Gresham testified during his deposition that the AGO's *disagreement* with Robbins Geller on one point of law was really a surreptitious effort to bolster other legal arguments made by the firm. CP 1790.

First, Mr. Gresham did not call any of these facts to the attention of the trial court, and thus this Court should not consider them. He did not argue to the trial court that the facts he now cites to this court as evidence of AGO interference or facilitation precluded summary judgment. Accordingly, pursuant to RAP 9.12 this Court should not consider his “interference” or “facilitation” arguments now. *Fed'n of State Employees v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993).

Second, as shown previously, Mr. Gresham’s allegations of employee “interference” and “facilitation” are not supported by any reasonable interpretation of the evidence in the record. None of the facts now identified by Mr. Gresham create a genuine issue regarding AGO liability. Few of the pages he cites in support of his “facilitation” claim even relate to this case.⁵³ And the “sample legal documents” that Mr. Gresham complains were provided to Robbins Geller were themselves public records and were provided to Mr. Gresham as well so that neither side gained any advantage from access to this information. Mr. Gresham’s evidence regarding the parties’ efforts to coordinate discovery reveals nothing more than routine logistical discussions between

⁵³ CP 1189-1231 relate to the Murray Frank case. The pleadings included there are from the 2005 case litigated by Coughlin Stoia (a predecessor of the Robbins Geller firm) that Mr. Gresham describes at pages 6-7 of his Opening Brief.

the parties' counsel.⁵⁴ As shown previously, the AGO's pleadings cannot reasonably be read to assert that any responsive record or portion thereof was exempt from disclosure.⁵⁵ Both Judge Pomeroy and Judge Dixon understood the AGO's position at all points in the litigation and that the agency was not asserting or arguing for the application of any exemptions.

Third, even if one accepts Mr. Gresham's unsupported allegations that there was some sort of improper interference or facilitation, and Mr. Gresham had made an appropriate argument to the trial judge, such conduct would not provide a basis for AGO liability unless it caused the denial of Mr. Gresham's right to inspect and copy a public record. *See Limstrom v. Ladenburg*, 98 Wn. App. 612, 616, 989 P.2d 1257 (1999) (affirming summary dismissal of PRA penalty claim where requestor brought forth no evidence showing that he needed to file suit against the agency to compel production). Mr. Gresham cites no authority for his assertion that a state agency, which does not deny or delay access to the records, can be liable for "interfering" with the requestor's efforts or for "facilitating" a third-party's efforts to protect its rights.⁵⁶ Nor is the AGO aware of any such authority. It remains undisputed that the AGO attempted to give Mr. Gresham all of the requested records (and more) and

⁵⁴ CP 1156-60.

⁵⁵ *See* pp. 12-15.

⁵⁶ Appellant's Opening Br. at 49-50.

was prevented from giving him every record that he requested by court order.

Both trial judges allowed Mr. Gresham an opportunity to conduct discovery and make his own legal and factual arguments in support of total disclosure. If the trial court had agreed with his arguments on the disputed records, the AGO would have given him those records. Similarly, if the appellate courts rule in his favor on those points, the agency will provide additional records, but even in that scenario, although Mr. Gresham would have prevailed against Robbins Geller, his cross claim against the AGO did not vindicate his right to inspect and copy records and therefore he would not be entitled to penalties, fees, and costs from the agency. *Confederated Tribes*, 135 Wn.2d at 756-57. Contrary to the suggestion at page 49 of his Opening Brief, Mr. Gresham cannot at any point in time “prevail against” the AGO in this action, and thus he is not entitled to penalties, attorneys’ fees, or costs. His cross claim was properly dismissed.

2. Mr. Gresham’s Cross Claim for Penalties, Attorney Fees, and Costs Was Not Mooted by the Permanent Injunction Order

Mr. Gresham asserts that Judge Dixon should not have ruled on the AGO’s summary judgment motion at the April hearing because Judge Pomeroy had already effectively ruled on his cross claim during the

hearing on Robbins Geller's Motion for Permanent Injunction and determined that he "did not prevail with respect to any record he sought."⁵⁷ Mr. Gresham's mootness argument is incorrect. Judge Pomeroy made no such ruling and the permanent injunction order does not even address Mr. Gresham's cross claim or the prevailing party issue. That is because, as shown above, the position Mr. Gresham now advances is different than the one he argued to Judge Pomeroy during the hearing on Robbins Geller's motion for permanent injunction. There, the *AGO* argued that the court's entry of the permanent injunction effectively ended the entire case and the agency asked the court to dismiss Mr. Gresham's cross claim for penalties, attorneys fees, and costs against the *AGO*.⁵⁸ Mr. Gresham *opposed* the *AGO*'s request, telling the trial court that it was premature to dismiss his cross claim because the cross claim was based on facts other than the *AGO*'s compliance with court orders.⁵⁹

Mr. Gresham further asserted the continued existence of his cross claim when he asked the trial court to certify the permanent injunction order under CR 54, leaving his cross claim to be resolved on the trial court.⁶⁰ Even though the trial court denied his CR 54 motion, Mr. Gresham filed a notice of appeal while the *AGO*'s summary judgment

⁵⁷ Appellant's Opening Br. at 48.

⁵⁸ CP 1746-48. RP 14-16 (Feb. 17, 2012).

⁵⁹ RP 17, 24-25, 53-58 (Feb. 17, 2012) and CP 1301-06.

⁶⁰ RP 55-57 (Feb. 17, 2012).

motion was pending and he acknowledged that his cross claim remained pending in the trial court at that time.⁶¹ As revealed in his arguments to this Court, Mr. Gresham has persistently claimed that the AGO should be liable for penalties, fees, and costs even though it did not oppose production of any requested records.⁶² He has refused to dismiss that cross claim on multiple occasions, even after the permanent injunction order was entered.

Because Mr. Gresham refused to dismiss his cross claim, even after the trial court issued the permanent injunction, and because he continued to argue that the cross claim remained viable after the injunction was entered, two months after the permanent injunction hearing, the AGO brought its summary judgment motion to force Mr. Gresham to reveal the facts regarding AGO liability. The summary judgment motion required Mr. Gresham to bring forth those other facts or see his cross claim dismissed. *Indoor Billboard*, 162 Wn.2d at 69. Instead, contradicting his previous argument to Judge Pomeroy, he argued to Judge Dixon that his cross claim should not be dismissed because it became “moot” when the permanent injunction was entered.⁶³ But, inconsistently, Mr. Gresham also argued that Judge Dixon should defer ruling because he needed time

⁶¹ CP 1355.

⁶² CP 1899-1900.

⁶³ CP 1432-34.

to conduct still more discovery regarding AGO policies and other facts that might form the basis for AGO liability.⁶⁴ Mr. Gresham did not move for a continuance under CR 56(f) or explain why, if the cross claim was truly moot, he needed more discovery.

In any event, under *Confederated Tribes*, the question of whether Mr. Gresham prevailed against the AGO on his cross claim did not turn on whether Judge Pomeroy decided that he should have all of the requested records or not. Under *Confederated Tribes*, as long as the AGO followed the trial court orders, it cannot be liable to Mr. Gresham. The scope of content of those orders is irrelevant to the issue of agency liability and so the court's entry of the permanent injunction order did not by itself render Mr. Gresham's cross claim moot or otherwise nonjusticiable.

Mr. Gresham cites no authority for his mootness argument in any published PRA case, and the authority he does cite is inapposite. Appellant's Opening Br. at 49 (citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137 (1973)). The *Ripley* case involved a declaratory action brought by a lessor against a lessee to determine liability for injuries suffered by the lessee's social guest. The *Ripley* court held that because the injured guest had not yet asserted a damage claim and the record lacked evidence from which the court could

⁶⁴ CP 1434-39.

determine the cause of the accident, there was no justiciable controversy that would support a declaratory judgment action under RCW 7.24. The *Ripley* opinion does not address mootness and only mentions the word “moot” but one time in a sentence listing the jurisdictional elements of the Uniform Declaratory Judgments Act. *Ripley*, 82 Wn.2d at 815.

This case is easily distinguishable from *Ripley*. Most obviously, it does not involve a declaratory judgment action. In this case, the trial court had jurisdiction over the subject matter and the parties. When it made the summary judgment order, there was an actual, present, and ongoing dispute in the form of a cross claim for penalties, fees, and costs asserted by Mr. Gresham against the AGO.

In sum, the order dismissing Mr. Gresham’s penalties, fees and costs cross claims should be affirmed because it does not turn on whether Robbins Geller or Mr. Gresham ultimately prevails in the dispute over the redacted documents. Summary dismissal of his cross claim was proper because Mr. Gresham brought forth no evidence creating a genuine issue of material fact regarding AGO liability for penalties, fees, and costs. If this Court reverses or modifies the permanent injunction, Mr. Gresham will receive additional records from the AGO, but as a matter of law there still would be no basis to award penalties, fees, or costs against the AGO because under the rule from *Confederated Tribes*, he cannot prevail

against the agency in this case.

C. The PRA Injunction Requirements Do Not Apply to Independent Injunction Remedies Under the UTSA

The UTSA provides an independent statutory basis for enjoining the disclosure of trade secrets, and thus the requirements of PRA injunctions are not applicable here. Case law, common sense, and sound policy demonstrate that to obtain an injunction protecting trade secrets, one must show that the information is a trade secret protected by the UTSA, but not any additional requirements in RCW 42.56.540. The PRA contains a process whereby an agency or person named in a record can seek an injunction to prevent disclosure. RCW 42.56.540 provides that the disclosure of specific public records may be enjoined if disclosure “would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions” RCW 42.56.540 does not constitute a substantive basis for an injunctive remedy, but is instead a procedural statute granting a right to seek an injunction against disclosure, and granting the trial court the authority to enjoin the release of a specific record if it falls within a specific exemption found elsewhere in the PRA. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 807-808, 246 P.3d 768 (2011). Before granting injunctive relief pursuant to

RCW 42.56.540, a court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or vital government functions. *Id.*

Mr. Gresham contends that the trial court necessarily erred by failing to make explicit “public interest” and “damage” findings before it issued the permanent injunction. In making this assertion Mr. Gresham overlooks and fails to address the independent injunction remedy provided by the UTSA at RCW 19.108.020. If as occurred below, the court relies on RCW 42.56.070(1) and an “other statute” such as the UTSA, instead of a PRA exemption, to bar disclosure, the procedural limits of RCW 42.56.540 do not apply. *See Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 263-64, 884 P.2d 592 (1994).

Instead, the court should look to the “other statute,” in this case the UTSA, for injunction requirements. The UTSA simply provides that “[a]ctual or threatened misappropriation may be enjoined.” RCW 19.108.020. Presumably, because “other statutes” such as the UTSA often protect important or fundamental rights, the remedial provisions of those statutes are available without the moving party additionally proving the PRA’s requirement that “examination would clearly not be in the public interest and would substantially and irreparably

damage any person, or would substantially and irreparably damage vital governmental functions.”

The *PAWS* court held that the UTSA “operat[ed] as an independent limit on disclosure of portions of the records at issue here that have even potential economic value.” *PAWS*, 125 Wn.2d at 262. That court also warned that “[t]he Public Records Act is simply an improper means to acquire knowledge of a trade secret.” *Id.* By enacting an “other statute” that contains an independent injunctive remedy, such as the UTSA, the Legislature effectively determined that disclosure of the information protected by the “other statute” is not in the public interest and would impermissibly damage personal or governmental interests. *See id.* at 263. Thus, for example, because important rights are at stake, an injunction will issue under the UTSA to protect a trade secret from public disclosure without a showing that disclosure would not be in the public interest and would damage personal or governmental interests. *See Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 63-64, 738 P.2d 665 (1987) (holding that trade secret owners need only prove the elements of RCW 19.108.020 to obtain injunctive relief). Mr. Gresham’s contention that, despite being protected by another statute, legitimate trade secrets must be disclosed in response to a public records request unless the court also finds that disclosure would not be in the public interest and would

damage personal or governmental interests is contrary to the law as set forth in the *PAWS* case and common sense.

Even if the Court considers the public interest issues, Mr. Gresham exaggerates the likely effect of a decision on government procurement processes and federal securities litigation. The records at issue were used to determine whether responding firms should be placed on an optional use, non-exclusive roster of law firms available for securities litigation assignments. The records do not reveal the actual fee (or any other contract term) negotiated by the AGO with any of the firms on the roster. All of the legal services contracts between the AGO and roster firms, which specify the fee and other contract terms, were provided to Mr. Gresham without any redactions.⁶⁵

And as Mr. Gresham's arguments demonstrate, determining whether the records at issue here are protected trade secrets is an extraordinarily fact-specific analysis.⁶⁶ A decision about the business information contained in these particular records is unlikely to provide useful guidance in different procurement situations. Similarly, Mr. Gresham's claim that the public interest in securities litigation

⁶⁵ Although it took no position regarding the applicability of the UTSA and the two PRA exemptions discussed in Mr. Gresham's opening brief to the records at issue, the AGO has argued throughout this litigation that all of the information in the actual contracts should be disclosed. *See* pp. 13-15.

⁶⁶ Appellant's Opening Br. at 5-10 and 32-38.

generally requires disclosure of these records is not supported by any fact in the record.⁶⁷ His suggestion that a federal judge overseeing securities fraud litigation or the litigants would need to resort to Washington's PRA to obtain relevant evidence defies common sense and he fails to explain why such evidence would not be obtainable under the federal discovery rules or by federal court order.

D. Mr. Gresham's Novel Respondeat Superior Theory of PRA Liability Does Not Provide a Basis for AGO Liability

Mr. Gresham's argument that the AGO can be liable for attorney fees and penalties based on respondeat superior should also be rejected for several reasons. First, Mr. Gresham failed to raise this issue at the trial court and thus it should not be considered by this Court. Second, Mr. Gresham fails to cite any authority for his novel claim that an agency employee can create PRA liability for an agency. Third, he cannot show that an AGO employee caused the withholding of records by the AGO because the AGO has not withheld any records in this case—it has only complied with court orders.

Mr. Gresham contends for the first time on appeal that, in the event that this Court reverses the trial court and allows the AGO to provide him with the disputed records, it should also make the AGO liable for

⁶⁷ Appellant's Opening Br. at 2, 11-13, and 45-48.

penalties, attorneys fees, and costs under the theory of “respondeat superior,” because the agency “allowed one of its employees to interfere with Requestor’s attempt to obtain public records that the AGO was willing to produce.”⁶⁸

As an initial matter, this Court should not consider Mr. Gresham’s respondeat superior argument because it was not raised below and none of the exceptions set forth in RAP 2.5 or RAP 9.12 apply.⁶⁹ However, if the Court decides to consider the “respondeat superior” argument, it will quickly see that the argument lacks merit.

In support of the argument, Mr. Gresham cites only *Brown v. Labor Ready N.W. Inc.*, 113 Wn. App. 643, 646 , 54 P.3d 166 (2002). The *Brown* case dealt with an employer’s responsibility for the actions of temporary employees. But there were no public records or state agencies involved in the case and its relevance to Mr. Gresham’s PRA cross claim is difficult to discern. There are no temporary employees involved in this case and the AGO does not dispute that under the PRA, it may be liable for the actions of its employees acting within the scope of their employment. However, as shown above there were no actions by any AGO employee that gave rise to liability and no authority cited, or of

⁶⁸ Appellant’s Opening Br. at 49-50.

⁶⁹ CP 1417-41. Mr. Gresham did not even argue why this new argument should be considered under RAP 2.5 or RAP 9.12.

which the AGO is aware, recognizing respondeat superior liability in a PRA case. Accordingly, the Court should reject Mr. Gresham's respondeat superior argument.

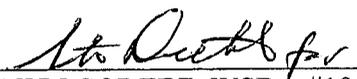
V. CONCLUSION

For the preceding reasons, the AGO asks that this Court affirm the summary judgment order dismissing Mr. Gresham's cross claim for penalties, attorneys fees, and costs.

RESPECTFULLY SUBMITTED this 24th day of October, 2012.

ROBERT M. MCKENNA
Attorney General


STEVE DIETRICH, WSBA #21897
Senior Counsel


DAWN CORTEZ, WSBA #19568
Assistant Attorney General

Attorneys for the State of
Washington

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Via E-mail to the Supreme Court and all counsels of record as follows:

supreme@courts.wa.gov; davew@rgrdlaw.com;
bomara@rgrdlaw.com; mmueller@rgrdlaw.com;
dmorrissey@lawschool.gonzaga.edu; SusanW@rgrdlaw.com;
info@alliedlawgroup.com; michele@alliedlawgroup.com;
doug@mcdermottnewman.com; Lauren@mcdermottnewman.com

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

DATED this 24th day of October, 2012, at Olympia, WA.



KEELY TAFQYA, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Tafoya, Keely (ATG)
Cc: doug@mcdernottnewman.com; Dietrich, Steve (ATG); Cortez, Dawn (ATG);
davew@rgrdlaw.com; bomara@rgrdlaw.com; mmueller@rgrdlaw.com;
dmorrissey@lawschool.gonzaga.edu; SusanW@rgrdlaw.com; info@alliedlawgroup.com;
michele@alliedlawgroup.com; lauren@mcdernottnewman.com
Subject: RE: Gresham v. Robbins Geller and AGO, #87393-3, filing with Supreme Court

Rec'd 10/24/2012

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tafoya, Keely (ATG) [<mailto:KeelyT@ATG.WA.GOV>]
Sent: Wednesday, October 24, 2012 4:06 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: doug@mcdernottnewman.com; Dietrich, Steve (ATG); Cortez, Dawn (ATG); davew@rgrdlaw.com;
bomara@rgrdlaw.com; mmueller@rgrdlaw.com; dmorrissey@lawschool.gonzaga.edu; SusanW@rgrdlaw.com;
info@alliedlawgroup.com; michele@alliedlawgroup.com; lauren@mcdernottnewman.com
Subject: Gresham v. Robbins Geller and AGO, #87393-3, filing with Supreme Court

Good afternoon,

Please find attached the Brief of Respondent Office of the Attorney General in the Gresham v. Robbins Geller and AGO matter, Supreme Court cause number 87393-3, on behalf of Senior Counsel Steve Dietrich, WSBA No. 21897, 360-664-0267, steved@atg.wa.gov.

Legal Assistant

Attorney General's Office

Government Operations Division, MS 40108

7141 Clearwater Lane

Olympia, WA 98501

360-664-2759 (direct)

360-586-3593 (fax)

keelyt@atg.wa.gov

<<BrfOfRespondent-AGO-10.24.12.pdf>>