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Court of Appeals
Division III
State of Washington
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COA No. 35555-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

TYE SHEATS,

Appellant,

v.

CITY OF EAST WENATCHEE, DOUGLAS COUNTY,
CITY OF WENATCHEE, CHELAN COUNTY, THE
WENATCHEE WORLD NEWSPAPER,

Respondents.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. Failure to file a summons and complaint

The Cities of East Wenatchee and Wenatchee argue Officer Sheats did not file a summons and complaint so the court lacked jurisdiction to hear his case. But lack of jurisdiction is a matter that does not merely controvert the plaintiff's prima facie case. It is an avoidance/affirmative defense that must be presented to the trial court or it is waived. CR 8(c); *Shinn Irrigation Equip., Inc. v. Marchand*, 1 Wn. App. 428, 432, 462 P.2d 571 (1969). The Cities did not raise this defense before the trial court and waived it. They cannot raise this defense now on appeal. See *Bosner v. Rawe*, 167 Wn. App. 509, 512, 273 P.3d 488, *review denied*, 175 Wn.2d 1003 (2012); *Nw. Cascade, Inc. v. Unique Constr., Inc.*, 187 Wn. App. 685, 693-94, 351 P.3d 172 (2015).

The trial court heard this case on the merits. The Cities did not cross appeal the court's doing so and its implicit determination it had jurisdiction to decide Officer Sheats' motion for injunction. The Cities cannot seek any affirmative relief and the jurisdictional defense is accordingly not before this court for this reason as well. RAP 5.1(d); *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 700 fn. 3, 915 P.2d 1146 (1996).

B. Finality of judgment

The Cities further argue the trial court's order was not final and not appealable. To the contrary, there was nothing further for the court to decide after it issued its written decision, which was thus a final judgment in the proceeding. RAP 2.2(a). Moreover, this decision affected a substantial right in a civil case that discontinued the action. RAP 2.2(a)(3). The appeal is properly before this court.

C. Attorney fees

The City of East Wenatchee argues it should be awarded attorney fees because the appeal is frivolous. To the extent this request is based on the jurisdictional argument, it must fail as the City waived any such defense and cannot raise it on appeal.

Bosner, 167 Wn. App. at 512.

Furthermore, the appeal is not frivolous as it presents an issue of first impression and reasonable minds can differ. Indeed, the City of Wenatchee originally took a position consistent with that of Officer Sheats. (CP 20). A case must be frivolous in its entirety before fees can be awarded on that basis. *Biggs v. Vail*, 119 Wn.2d 129, 830 P.2d 350 (1992); *Jeckle v. Crotty*, 120 Wn. App. 374, 388, 85 P.3d 931, *review denied*, 152 Wn.2d 1029 (2004).

That is not this case. Officer Sheats' appeal raises substantive and debatable issues supported by arguments on the law and facts. *In re Marriage of Zier*, 136 Wn. App. 40, 48, 147 P.3d 624 (2006), *review denied*, 162 Wn.2d 1008 (2007). This court should deny an award of fees under RAP 18.9(a).

The City of Wenatchee contends fees should be awarded under *Cecil v. Dominy*, 69 Wn.2d 289, 290, 418 P.2d 233 (1960). But the claim for a fee award was not made before the trial court and was waived. *Nw. Cascade, Inc.*, 187 Wn. App. at 693-94. The City also did not cross appeal so it cannot get affirmative relief in the form of attorney fees it did not seek below. *Phillips Bldg. Co.*, 81 Wn. App. at 700 fn. 3.

Cecil does not support an award of fees in any event because that court's purpose in imposing fees was to deter the plaintiff from seeking injunctive relief before litigating the merits of the claim. *Gander v. Yeager*, 167 Wn. App. 638, 649-50, 282 P.3d 1100 (2012). Officer Sheats did obtain an ex parte temporary injunction, but the City of Wenatchee agreed to a temporary order pending a final hearing. (CP 8, 48-49). The rationale for awarding fees in *Cecil* was in equity to allow attorney fees as damages when a party is forced to litigate in a hearing on the merits that focuses

solely on vacating a temporary injunction. *Gander*, 167 Wn. App. at 650. The final hearing here, however, did not focus on the propriety of the temporary injunction as it was an agreed order. Instead, the hearing went to the merits of Officer Sheats' claim an injunction should issue. The merits had not been addressed before. In these circumstances, the purpose for the narrow availability of fees under *Cecil* is not served. An award of attorney fees should therefore be denied. *Gander*, 167 Wn. App at 649-50.

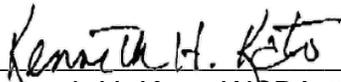
D. All Other Issues

Officer Sheats rests on his opening brief with respect to any other contentions argued by respondents Douglas County, Chelan County, Wenatchee World, and the Cities.

II. CONCLUSION

Based on the foregoing facts and authorities, Officer Sheats respectfully urges this court to reverse the trial court's order and remand for further proceedings.

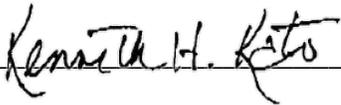
DATED this 4th day of June, 2018.



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CERTIFICATE OF SERVICE

I certify that on June 4, 2018, I served the Reply Brief of Appellant through the eFiling portal on Devin Poulson, Steven Clem, Erin McCool, Douglas Shae, and Danielle Marchant at their respective email addresses.



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