

70321-8

70321-8
RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Feb 25, 2013, 4:48 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL
70321-8
No. 87861-7

SUPREME COURT
OF THE STATE OF WASHINGTON

ANNE K. BLOCK and NOEL FREDERICK,

Appellants,

vs.

THE CITY OF GOLD BAR and CITY OF GOLD BAR CITY
COUNCIL,

Respondents.

BRIEF OF RESPONDENT

Michael R. Kenyon
WSBA No. 15802
Ann Marie Soto
WSBA No. 42911
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027-3820
(425) 392-7090
Attorneys for Respondent City of Gold Bar

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	RE-STATEMENT OF THE ISSUES	2
III.	RE-STATEMENT OF THE CASE	3
IV.	ARGUMENT	11
	A. Standard of Review on Appeal	11
	B. Open Public Meetings Act Standard.....	12
	C. In an Optional Municipal Code City Like Gold Bar, Mayor Beavers Has Sole Authority to Decide Whether to Mediate a Case. The City Council Cannot Act in Violation of the OPMA on That Subject Because the City Council Has No Authority Over the Decision Whether to Mediate.....	15
	1. Substantial Precedent Exists to Demonstrate that Litigation Management Is the Province of the Mayor.....	18
	2. Mayor Beavers Represents the Executive Branch of City Government. The Mayor Is Not a “Staff Member” to the City Council or Otherwise.....	20
	D. Executive Sessions to “Discuss” Litigation With Counsel Present Are Expressly Authorized by the OPMA.....	22
	1. The Lie Declaration Supports the City’s Argument and the Trial Court’s Order of Dismissal.....	25
	2. “Spirited Discussion” Is Permitted in Executive Session to the Same Extent as “Discussion”.....	30

3. The Mayor’s Decision to Keep the Council Informed of Litigation Developments Is Good Public Policy, and Well Supported by the Law	31
E. A Final Action by the City Council on an Issue Over Which It Has No Authority Is Ultra Vires and Void	33
F. The Claims Are Barred By Collateral Estoppel Because The Trial Court Already Adjudicated These Issues in Multiple Prior Actions	35
1. The Issues Decided in the Prior Recall Petition Cases Are Identical to the Claim in This OPMA Case.....	36
2. Final Judgment on the Merits of the Claimed OPMA Violation Was Rendered in the Prior Recall Petition Cases.....	38
3. Block Was a Party, or Was in Privity With Susan Forbes and Chuck Lie, in the Recall Petition Cases.	39
4. Application of the Doctrine Works No Injustice on Block, Who Has Been Afforded Multiple Opportunities to Fully and Fairly Litigate Her Claim.....	40
G. The Trial Court Did Not Abuse its Discretion in Denying Block’s CR 56(f) Motion	41
H. Block Fails to Show the Existence of a Genuine Issue of Material Fact.....	43
I. Block Is Not Entitled to Attorneys’ Fees	46
V. CONCLUSION.....	46

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Almay v. Kvamme</i> , 63 Wn.2d 326, 387 P.2d 372 (1963).....	12
<i>Atherton Condo. Ass'n. v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	11
<i>Bates v. Grace United Methodist Church</i> , 12 Wn. App. 111, 529 P.2d 466 (Div. II, 1974).....	46
<i>Beagles v. Seattle–First Nat'l Bank</i> , 25 Wn. App. 925, 610 P.2d 962 (Division II, 1980).....	36
<i>Board of Regents of University of Washington v. City of Seattle</i> , 108 Wn.2d 545, 741 P.2d 11 (1987).....	34, 35
<i>Cathcart v. Andersen</i> , 85 Wn.2d 102, 530 P.2d 313 (1975).....	12, 13
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	12, 43
<i>City of Spokane v. Spokane County</i> , 158 Wn.2d 661, 146 P.3d 893 (2006).....	21, 22, 32
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	23
<i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (Div. I, 1990).....	41
<i>Continental Casualty Co. v. U.S.</i> , 314 U.S. 527, 62 S. Ct. 393, 86 L. Ed. 426 (1942).....	17
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962).....	33
<i>Dunlap v. Wild</i> , 22 Wn. App. 583, 591 P.2d 834 (Division II, 1979).	40

<i>Dourousseau v. U.S.</i> , 6 Cranch 307, 3 L. Ed 232 (1810)	17
<i>Eugster v. City of Spokane</i> , 128 Wn. App. 1, 114 P.3d 1200, 1203 (Division III, 2005)	13, 46
<i>Eugster v. City of Spokane</i> , 110 Wn. App. 212, 39 P.3d 380 (Division III, 2001).....	13
<i>Feature Realty v. City of Spokane</i> , 331 F.3d 1082 (2003).....	27, 28, 29
<i>Forbes v. Gold Bar</i> , 288 P.3d 384 (Wn. App. Div. I, 2012)	5
<i>Geppert v. Washington</i> , 31 Wn. App. 33, 639 P.2d 791 (Division II, 1982)	43
<i>Greater Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267, 937 P.2d 1082 (1997).....	11
<i>Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue</i> , 106 Wn.2d 391, 722 P.2d 787 (1986).....	23
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1993).....	36, 40
<i>Haslund v. Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976).....	34
<i>In re Ackerson</i> , 143 Wn.2d 366, 20 P.3d 930 (2001)	37
<i>In re Beasley</i> , 128 Wn.2d 419, 908 P.2d 878 (1996).....	37
<i>In re Recall of Lakewood City Council Members</i> , 144 Wn. 2d 583, 30 P.3d 474, (2001).....	20, 22
<i>In re the Petition for Recall of Janet Anderson</i> , 131 Wn.2d 92, 929 P.2d 410 (1997).....	27
<i>Las v. Yellow Front Stores, Inc.</i> , 66 Wn. App. 196, 831 P.2d 744 (Division I, 1992).....	11, 43
<i>Malland v. Department of Retirement Sys.</i> , 103 Wn.2d 484, 694 P.2d 16 (1985).....	36

<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788, 64 P.3d 122 (2003).....	12, 44
<i>Miller v. City of Tacoma</i> , 138 Wn. 2d 318, 979 P.2d 429 (1999).....	24, 26
<i>Painting & Decorating Contractors of America, Inc., v. Ellensburg School Dist.</i> , 96 Wn.2d 806, 638 P.2d 1220 (1982).....	31
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	36, 40
<i>Reed v. Streib</i> , 65 Wn.2d 700, 399 P.2d 338 (1965).....	45
<i>Rettkowski v. Dep't of Ecology</i> , 128 Wn.2d 508, 910 P.2d 462 (1996).....	23
<i>Robinson v. Hamed</i> , 62 Wn. App. 92, 813 P.2d 171 (Division I, 1991).....	40
<i>Seattle v. P.B. Inv. Co.</i> , 11 Wn. App. 653, 524 P.2d 419 (Division I, 1974).....	34
<i>Smith v. State Employment Sec. Dept.</i> , 100 Wn. App. 561, 997 P.2d 1013, (Div. II, 2000).....	43
<i>South Tacoma Way, LLC v. State</i> , 169 Wn.2d 118, 233 P.3d 871 (2010).....	34
<i>Strain v. West Travel, Inc.</i> , 117 Wn. App. 251, 70 P.3d 158 (Div. I, 2003).	23
<i>Washington Public Trust Advocates v. City of Spokane</i> , 120 Wn. App. 892, 86 P.3d 835 (Div. III, 2004).....	18, 19, 20, 22, 34
<i>Wood v. Battle Ground Sch. Dist.</i> , 107 Wn. App. 550, 27 P.3d 1208 (Division II, 2001).....	13, 23
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	12, 43, 44

STATUTES

RCW 29A.56.110.....	36
RCW 29A.56.110(1).....	37
RCW 29A.56.110(1)(a)	37
RCW 29A.56.110(1)(b)	37
RCW 29A.56.140.....	37
RCW 35A.....	4, 10
RCW 35A.11.020.....	4, 16
RCW 35A.12.....	14
RCW 35A.12.100.....	4, 10, 14, 16, 17, 18, 19, 21, 35
RCW 35A.13.....	14
RCW 35A.13.030.....	14
RCW 35A.13.080.....	14
RCW 42.30.020(2).....	16
RCW 42.30.020(3).....	15
RCW 42.30.110	15, 46
RCW 42.30.110(1)(a)	32
RCW 42.30.110(1)(f).....	32
RCW 42.30.110(1)(i).....	4, 20, 22, 23, 26, 30, 32, 44

RCW 42.30.120(1).....	37
RCW 42.30.120(2).....	46
RCW 42.30.910	13

REGULATIONS AND RULES

CR 56(c).....	12
CR 56(f)	3, 10, 42, 43
RAP 10.3(a)(4).....	31

ADDITIONAL AUTHORITY

Attorney General’s Open Government Internet Manual, Chapter 4, “Case Example” at Section 4.3(g)	27
--	----

I. INTRODUCTION

This case involves just one more in a lengthy and unbroken series of baseless lawsuits filed by attorney and appellant Anne K. Block (“Block”) against Gold Bar (“Gold Bar” or “City”), a small city in Snohomish County with very limited financial resources. Gold Bar’s financial condition has materially worsened due to Block’s near-constant antics.

Against Gold Bar alone over the past three years, Block and her close allies¹ have filed this Open Public Meetings Act (“OPMA”) lawsuit, five separate Public Records Act lawsuits, and more than 300 public records requests. Additionally, between November, 2011 and June, 2012, Block and her allies filed five separate recall petitions against Mayor Joe Beavers (“Mayor”) and various members of the Gold Bar City Council.

Despite the volume of these filings, including four unsuccessful appeals, no court has ever granted any substantive relief to Block or her allies in any of these cases.

¹ See, CP 139. Block, Susan Forbes (“Forbes”), and Joan Amenn (“Amenn”) operate an online blog called the Gold Bar Reporter. Block is an attorney, and represented Forbes in a separate public records act lawsuit, the dismissal of which was affirmed by Division I of the Court of Appeals in its published decision dated November 13, 2012 (*Forbes v. Gold Bar*, 288 P.3d 384 (Wn. App. Div. I, 2012)). Under Block’s guidance, Forbes is seeking review of that decision by this Court. *Forbes v. City of Gold Bar*, Case No. 88219-3. Chuck Lie (“Lie”) is a former member of the Gold Bar City Council, now closely aligned with Block. CP 116. Since his resignation, Lie has joined Block, Noel Frederick (“Frederick”), Forbes, and Amenn in filing multiple recall petitions against Mayor Beavers, and Councilmembers Chris Wright and Florence Martin. CP 162 – 170.

In this case, as in every other case previously filed by Block, the trial court properly dismissed her claims. Here, as before, Block simply fails to offer or prove a viable legal theory to support her repeated and incorrect claims of government misconduct. As adopted by the state Legislature, the OPMA applies only to the Legislative Branch (the city council or other “governing body”) of city government. The Mayor, by contrast, is the personification of the Executive Branch of city government. Like the Judicial Branch, the Executive Branch is unregulated by the OPMA.

In this case, the City Council properly met with its legal counsel in executive session to discuss litigation, including litigation filed by Block’s ally, Forbes. The OPMA expressly authorizes those discussions. The City Council took no vote or other collective final action in executive session, and this record contains no contrary evidence. Rather, all of the evidence in this record, including the sworn declaration of Lie, another of Block’s close allies, wholly supports the City’s position and the trial court’s order of dismissal on all grounds. The trial court’s decision should be affirmed.

II. RE-STATEMENT OF THE ISSUES

A. Whether the trial court properly dismissed on summary judgment Block’s claim that the City violated the OPMA where:

1. The Mayor and City Council discussed with legal counsel in executive session a request by Block’s ally, Forbes, to

mediate litigation filed against the City by Forbes, and no prohibited action or final action occurred?

2. The Mayor is solely vested with executive authority over litigation management decisions, including whether to mediate, such that any related final action by the City Council would be void as ultra vires, and accordingly could not violate the OPMA?
3. Multiple trial court rulings denying the legal sufficiency of Block and her allies' multiple recall petitions claiming OPMA violations identical to those claimed here serve to bar this claim under the doctrines of collateral estoppel or res judicata?

B. Whether the trial court abused its discretion in denying Block's CR 56(f) Motion for a Continuance when discovery had been stayed pursuant to a properly entered and unchallenged protective order, the stated purpose of which was to permit the City to move for summary judgment on "pure legal issues" that would fully resolve the entire case without either party incurring the cost of unnecessary discovery?

C. Whether the trial court erred in finding there was no genuine issue of material fact that precluded summary judgment?

D. Whether Block is entitled to attorneys' fees and costs?

III. RE-STATEMENT OF THE CASE

This case arose from a lawsuit filed in March 2010 by Forbes, a close ally of Appellants Anne Block and Noel Frederick (“Block”). In that case, Forbes alleged multiple Public Records Act (“PRA”) violations by the City. CP 139-140. In October of 2010, Forbes suggested that the parties mediate her lawsuit. CP 140; 146.

On October 26, 2010, and as expressly permitted by the OPMA, RCW 42.30.110(1)(i), the Mayor and the City Attorney discussed with the City Council in executive session the status of current litigation, including the Forbes lawsuit. CP 140; 148 – 149. While City Councilmembers expressed their opinions in executive session about pending litigation, the Mayor “decided not to mediate the Forbes case.” CP 140.² The Mayor made that decision because “the case had no merit, and the City Attorney had already prepared a motion for summary judgment to dismiss the entire case.” *Id.*

The City Attorney communicated the Mayor’s decision to Forbes by e-mail dated October 27, 2010, stating, “I shared your mediation offer with the City Council, and am writing to let you know that while the *City*

² The City of Gold Bar is organized under the Optional Municipal Code, Title 35A RCW. CP 138. Under RCW 35A.12.100, “Duties and authority of the mayor . . .,” include “chief executive and administrative officer of the city,” and “general supervision of the administration of city government and all city interests.” *Compare* RCW 35A.11.020, “Powers vested in legislative bodies . . .,” which is silent regarding litigation management.

appreciates the constructive spirit in which the proposal was offered, the *City* respectfully declines the offer as it does not believe that it would be constructive.” (emphases added).³ CP 151.

As the Mayor had correctly forecast, the Honorable David Kurtz granted the City’s motion for summary judgment and dismissed the Forbes PRA case in January 2011. CP 140-141; 153-154.⁴

More than a year later, in January 2012, Block filed the Complaint in this case, alleging that the City and the City Council violated the OPMA by “voting” not to mediate with Forbes during the October 26, 2010 executive session. CP 393-399. Block relies on the Declaration of Charles R. Lie (the “Lie Declaration”), a former Gold Bar Councilmember who was present at the October 26, 2010 meeting. CP 386-387.

Lie’s Declaration was filed on March 9, 2012, and states:

On or about October 26, 2010, as part of my responsibilities and duties of being a city council member, I attended a special meeting at City Hall. An executive session was held in the offices of the Public Works Director. The topic of the executive session was a lawsuit filed by Susan Forbes against the city regarding public records. The option of mediation as an alternative to litigation *was discussed*. I *understood* this to require a yes or no decision *by the city*.

³ The City Attorney’s e-mail explicitly states that the “City” rejected Forbes’ offer, not the “Council” as Block contends in her Brief. *See* Brief of Appellants at 28.

⁴ Forbes appealed, and Division I of the Court of Appeals affirmed the dismissal. CP 140-141; *see also Forbes v. Gold Bar*, 288 P.3d 384 (Wn. App. Div. I, 2012).

There *was discussion* of the options. At one point, Councilperson Christopher Wright called for a vote and stated that his vote was for litigation. I pointed out that he was out of order calling for a vote in executive session and that we could only vote in public. There was no response from counsel or Mayor Beavers on the question of voting in executive session.

By the close of the meeting, a general verbal agreement had been formed by a majority of the council to proceed with litigation and not enter into mediation. I had made my input for mediation as the preferred option. I left the meeting with the *understanding* that mediation was not going to be pursued....When the council returned to chambers, no action was taken on the record.

Id. (emphases added).

On March 30, 2012, three weeks after Block filed the Lie declaration in this OPMA case, Block (together with Forbes, Lie, Frederick, and Amenn; CP 162) filed petitions in Snohomish County Superior Court seeking to recall Gold Bar Mayor Joe Beavers and two City Councilmembers based on the same OPMA violation claimed to exist here. CP 141; 162 – 167.

In the recall petitions, Block claimed that the City Council violated the OPMA by unlawfully voting in the October 26, 2010 executive session. Block alleges that this resulted in the Mayor's decision declining

to mediate with Forbes, and that the Mayor violated the OPMA by failing to reconvene to a regular session to vote in public against mediation. *Id.* The trial court rejected all three recall petitions, concluding that the central allegation – that the City Council unlawfully voted in the October 26 executive session - was factually and legally insufficient. CP 156-161.

Continuing their predictable pattern of harassment, on April 26, 2012, Forbes and Lie filed yet another recall petition against Mayor Joe Beavers, again alleging the same OPMA violation claimed to exist here. CP 141 – 142; 169 – 170.

Continuing its equally predictable and understandable pattern when addressing claims brought by Block and her allies, the trial court also dismissed that recall petition. On May 24, 2012, the Honorable Linda C. Krese held a hearing to determine the sufficiency of the recall charge. CP 142; 258 – 288. Forbes specifically argued that the City’s decision not to mediate could only mean that the City Council must have taken action. CP 276, ll. 4 – 8.⁵ This time, the Court found the charge to be not only factually and legally insufficient, but also barred by *res judicata*. More specifically, Judge Krese found that the decision whether to mediate a lawsuit fell solely within the Mayor’s authority:

⁵ Specifically, Forbes stated, “I might say that an action was taken somewhere. It was either in executive session or it was in the open. They don’t have any action recorded in the open, so where did it take place?”

The documents submitted⁶ in support of this [recall action] really do not establish a violation either. The mayor is the one who has the authority to make a decision about mediation or proceeding with litigation. The fact that that would be discussed with the council for them to have some input, as to what direction to the mayor, would not make that subject to a vote. It's still [the Mayor's] decision, and the notice that was sent that the City had decided not to proceed with mediation which the mayor had authority to decide. So even the supplemental materials does [sic] not establish there was, in fact, a violation of the Open Public Meetings Act.

CP 279 – 280, ll. 16-25 – 1-2. Judge Krese dismissed the recall petition by Order dated May 25, 2012. *Id.*

On May 11, 2012, Block noted depositions of the Mayor, councilmembers, and the City Attorney, all of whom were present at the October 26, 2010 executive session. In response, the City sought and received a protective order staying further discovery until the Court considered the City's forthcoming motion for summary judgment. CP 374 – 385. The protective order stayed all discovery:

[F]or [the] later of 45 days or until after the Court considers the City's motion for summary judgment on the pure legal issues of whether (1) the Mayor (rather than City Council) is authorized to determine whether to mediate a lawsuit in which the City is a defendant, and (b) this Court's prior

⁶ In support of their recall petition, Forbes and Lie presented the same Lie Declaration relied on by Block here. *Compare*, CP 116 and 185.

decisions adjudicating recall petitions as legally insufficient bar this action under the doctrines of res judicata and collateral estoppel.

CP 292 – 293. Block did not appeal or seek reconsideration of the protective order.

On June 15, 2012, the City filed and served its motion for summary judgment. CP 120 – 137. On July 2, 2012, Block moved for a CR 56(f) continuance in order to take the depositions of the other councilmembers present at the October 26, 2010 executive session – the exact discovery that Block previously sought, and that the trial court had specifically stayed in the May 29, 2012 protective order. CP 92 – 94.

Despite Block’s previous contention that the Lie Declaration described “exactly how the decision not to mediate the Forbes case was made,” Block now contended:

The depositions of the Councilmembers are necessary to determine what happened in the executive session in question. That is the best evidence of what happened. Without the deposition testimony of the people in the room when the events alleged in my Complaint occurred, there is no way for the Court to determine what happened.

Compare, CP 103 and CP 91.

On July 13, 2012, the trial court heard oral argument on Block’s CR 56(f) motion and on the City’s motion for summary judgment.

Relying on the properly entered and unchallenged protective order, the Honorable Thomas J. Wynne first denied Block's CR 56(f) motion. CP 22, ll. 1-3; CP 41 – 43.

Judge Wynne then granted the City's motion for summary judgment, ruling as a matter of law:

- 1) There is no genuine issue of material fact in this case.
- 2) The Complaint states claims that were previously ruled upon by the Honorable Linda C. Krese . . . and are barred by the doctrines of res judicata and collateral estoppel.
- 3) An appeal of a prior recall petition does not bar the application of the doctrines of res judicata and collateral estoppel in this case.
- 4) Executive sessions to discuss pending litigation with legal counsel are expressly authorized by RCW 42.30.110(1)(i).
- 5) Under the Optional Municipal Code, Title 35A RCW and specifically 35A.12.100, the Mayor had sole decision-making authority regarding the conduct of City litigation being discussed in executive session.
- 6) The Complaint fails to state a claim upon which relief can be granted, because as a matter of law:
 - a. The October 26, 2010 executive session of the Gold Bar City Council did not constitute a violation of the Open Public Meetings Act,
 - b. The City Council did not take a vote,
 - c. The City Council was not authorized by law to take a vote on any issue being discussed in the October 26, 2010 executive session and any vote than may have been taken by the City Council would have been ultra vires, void, and would have no force of law, and

- d. The Mayor of Gold Bar had the sole decision-making authority and sole discretion over the conduct of the lawsuit, including whether to engage in mediation in the Forbes lawsuit.

CP 12 – 16; 37 – 40. *Id.* This appeal followed.

IV. ARGUMENT

A. Standard of Review on Appeal.

Appellate review of a decision to grant summary judgment is *de novo*. An appellate court engages in the same inquiry as the trial court, which is to determine whether “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the outcome of the case depends. *Atherton Condo. Ass’n. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

In moving for summary judgment, Gold Bar had the initial burden of demonstrating the lack of any genuine issue of material fact. Gold Bar permissibly satisfied that burden, however, simply by challenging the sufficiency of Block’s evidence as to any material issue. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). In other

words, Gold Bar was not obligated even to present affidavits, deposition testimony, or other evidence to meet its initial summary judgment burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), followed in *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989).

Once Gold Bar satisfied that initial burden, Block then became obligated to set forth specific facts that would be admissible at trial in order to avoid dismissal. *See Young*, 112 Wn.2d at 225 (where no genuine issue of fact exists as to essential element of the nonmoving party's case, all other facts are rendered immaterial). Block could not rely on mere allegations and conclusory assertions to avoid summary judgment. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 122 (2003).

The purpose of summary judgment is to avoid a useless trial, and to test, in advance of trial, whether evidence to sustain the allegations actually exists. *Almay v. Kvamme*, 63 Wn.2d 326, 329, 387 P.2d 372 (1963).

B. Open Public Meetings Act Standard.

The purpose of the OPMA is to permit the public to observe the steps employed to reach a decision by a "governing body," the City Council in Gold Bar's case. *Cathcart v. Andersen*, 85 Wn.2d 102, 107,

530 P.2d 313 (1975). And, while the OPMA is to be liberally construed,⁷

Block nonetheless has the burden to prove four distinct elements:

To prevail on an OPMA claim, the plaintiff must demonstrate that: (1) members of the governing body, (2) held a meeting, (3) where the governing body took action in violation of the OPMA, and (4) the members of the governing body had knowledge that the meeting violated the statute.

Eugster v. City of Spokane, 128 Wn. App. 1, 7, 114 P.3d 1200, 1203 (Division III, 2005), citing *Eugster v. City of Spokane*, 110 Wn. App. at 222, 39 P.3d 380 (Division III, 2002) (quoting *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (Division II, 2001)).

The City acknowledges satisfaction of the first two elements – the City Council did hold a meeting, but that meeting was properly called under the plain terms of the OPMA. CP 148 – 149. The trial court properly dismissed this case, however, because the City Council did not take action in violation of the OPMA, and accordingly could not have had knowledge that the meeting violated the OPMA.

The first 16 pages of Block’s Brief of Appellant set forth hornbook discussion of legal principles generally applicable to OPMA issues. The City has no particular quarrel with that general discussion, but it does not prove or support her case here.

⁷ RCW 42.30.910.

Here, Block's arguments are premised upon a fundamental misunderstanding of the authority conferred by the Legislature on the City Council and the Mayor respectively in a mayor-council (as opposed to council-city manager)⁸ form of government under the optional municipal code city, and an even more fundamental misunderstanding of the meaning of the word "discuss" as it relates to an executive session called under the plain terms of the OPMA for the purpose of considering litigation against a city.

In Gold Bar's case, the Mayor is vested with the sole authority over procedural litigation management decisions, including whether to mediate the Forbes case.⁹ Under RCW 35A.12.100, the Mayor is "the chief executive and administrative officer of the city, in charge of all departments and employees." If a mayor decides not to attend a mediation, and directs a city attorney likewise not to attend, nothing remains to be decided. The city council has no authority to direct otherwise.

⁸ Compare, RCW 35A.12 with RCW 35A.13; see especially, RCW 35A.12.100 and RCW 35A.13.030 and .080.

⁹ The City understands that certain litigation decisions require City Council final action at an open public meeting. A decision to mediate, or not, is simply not one of those decisions. For example, the "initiation of litigation" requires "approval by majority vote of all members of the council." RCW 35A.12.100. Likewise, the City Council would have to take final action at an open public meeting to approve payment of money necessary to settle litigation.

Even so, the Legislature understandably recognized the benefit of communication between the Executive and Legislative Branches of local government on a wide range of sensitive topics, including litigation, and sensibly provided for those matters to be “discuss[ed]” in executive session and outside of the public’s view. RCW 42.30.110.¹⁰ Here, the Mayor and the City Attorney discussed “current litigation,” including the Forbes case, in executive session with the City Council. CP 148 – 149. That discussion is expressly authorized by the text of the OPMA itself.

C. In an Optional Municipal Code City Like Gold Bar, Mayor Beavers Has Sole Authority to Decide Whether to Mediate a Case. The City Council Cannot Act in Violation of the OPMA on That Subject Because the City Council Has No Authority Over the Decision Whether to Mediate.

The sole cause of action set forth in Block’s Complaint alleges that the City Council took prohibited “final action” by voting or engaging in polling in the October 26, 2010 executive session. CP 399.

Under RCW 42.30.020(3), “final action” is a “collective positive or negative decision, or an actual vote,” by the members of the City Council. The OPMA regulates conduct of the “governing body,” the Gold

¹⁰ “Nothing contained in this chapter may be construed to prevent *a governing body from holding an executive session* during a regular or special meeting: . . . (i) . . . to *discuss* with legal counsel representing the agency litigation or potential litigation” (emphases added).

Bar City Council in this case. RCW 42.30.020(2). The Mayor is not a member of the “governing body.”

Under RCW 35A.12.100, the Mayor – not the City Council – controls the day-to-day conduct of litigation brought against the City. RCW 35A.12.100, “Duties and authority of the mayor . . .,” provides that the Mayor is the “chief executive and administrative officer of the city,” with “general supervision of the administration of city government and all city interests.” The City Council has no authority to manage the City’s litigation, and accordingly could not (and did not) vote or otherwise collectively decide whether to mediate Forbes’ lawsuit. *See* RCW 35A.11.020 (“Powers vested in legislative bodies . . .,” which is silent regarding conduct of litigation).

To support her argument that all litigation decisions require prior council approval, Block points to the language in RCW 35A.12.100, which states:

[The Mayor] may cause legal proceedings to be *instituted and prosecuted* in the name of the city, *subject to approval by majority vote of all members of the council*. . . . He or she shall report to the council concerning the affairs of the city and its financial and other needs, and shall make recommendations for council consideration and action. . . .

(emphases added).¹¹ Here, of course, the City did not “institute” this lawsuit. Forbes did. The City is a defendant.

The Mayor has the obligation to defend lawsuits. RCW 35A.12.100 (“The mayor shall be the official . . . head of the city . . .”; Mayor’s authority includes . . . “general supervision of the administration of city government and all city interests.”). As the “official head of the city,” the Mayor’s obligation to supervise “all city interests” unquestionably includes the duty to defend the City after it has been sued.

This statute by its terms requires only that the Mayor obtain City Council approval prior to *initiating* lawsuits (and prosecuting them in the City’s name). City Council approval is not required for the Mayor to defend lawsuits. “Generally speaking a ‘legislative affirmative description’ implies denial of the nondescribed powers.” *Continental Casualty Co. v. U.S.*, 314 U.S. 527, 533, 62 S. Ct. 393, 86 L. Ed. 426 (1942) (Citing *Durousseau v. U.S.*, 6 Cranch 307, 314, 3 L. Ed 232 (1810)). If the legislature had intended to provide the City Council with the authority over procedural litigation matters as urged by Block, it easily could have - and would have - said so.

¹¹ Brief of Appellants, at 41.

1. Substantial Precedent Exists to Demonstrate that Litigation Management Is the Province of the Mayor.

Not surprisingly, significant additional authority exists to demonstrate that the Mayor has the authority to make litigation management decisions, especially in cases where the City is a defendant.

In *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 901-03, 86 P.3d 835 (Div. III 2004) (“*WPTA*”), the Court of Appeals addressed a claim strikingly similar to Block’s claim here. In *WPTA*, the plaintiffs claimed the city council, and not the mayor, maintained the authority to control litigation.

In rejecting that claim, the Court held:

- 1) The Mayor (and not Council) controls litigation, specifically citing to RCW 35A.12.100; and
- 2) “Council executive sessions to discuss . . . litigation would be unsurprising,” and that “prior Council approval of all decisions in these suits” was not required.

In *WPTA*, the mayor of Spokane hired outside special legal counsel to assist the city in existing litigation, in at least some of which the city was the plaintiff, as directed by the mayor.¹² *Id.* at 895 – 896. After consulting with the mayor, legal counsel dismissed certain state court claims that the city had filed in existing litigation and re-filed most of the claims in federal court. Although the special counsel regularly informed

¹² The contract for legal services was approved by the city council.

the city council of developments in the litigation, one councilmember disagreed with the mayor's handling of the litigation and argued that prior city council approval was required for litigation management decisions. The councilmember formed Washington Public Trust Advocates and filed suit against Spokane, arguing that the litigation decisions violated the OPMA because they had not been made by the city council in an open public meeting. *Id.*

Rejecting that argument - even in the context of a case where the city had initiated litigation - the Court of Appeals held:

Council "approval" of legal proceedings instituted by the Mayor does not strictly require "prior approval" of each decision in the prosecution of a suit. See RCW 35A.12.100 (providing the mayor is the chief executive and administrative officer of the city who may institute and prosecute legal proceedings in the name of the city regarding city contracts and agreements, subject to council majority approval). At any one time according to the City Attorney, the City may be involved in a hundred suits besides the RPS litigation. Given litigation time constraints, the variety and complexity of issues, and the need for client and work product confidentiality, prior Council approval of all decisions in these suits would be impractical. WPTA's contrary arguments based upon the Rules of Professional Conduct are unpersuasive.

Id. at 901 – 902.

The *WPTA* Court also noted that even if the OPMA did somehow come into play, RCW 42.30.110(1)(i) specifically “permits executive sessions for governing bodies when discussing litigation or potential litigation if public knowledge regarding the discussion is likely to result in adverse legal or financial consequences.” *Id.* at 902 – 903; *see also In re Recall of Lakewood City Council Members (“Lakewood Council Members”)*, 144 Wn. 2d 583, 587, 30 P.3d 474, 476-477 (2001) (holding executive session to discuss litigation with city council was proper, the city manager had the authority and the discretionary spending power to join a lawsuit, and the city council’s failure to block the city manager’s decision to join the lawsuit did not constitute unlawful “voting” or action in executive session).

Of particular note, neither *WPTA* nor *Lakewood Council Members* adopt Block’s strained reasoning that permitted “discussion” in executive session must only occur directly between a councilmember and legal counsel, and cannot occur among all councilmembers, the mayor, and others who may be in attendance. *See*, Section “IV. D.”, below.

2. Mayor Beavers Represents the Executive Branch of City Government. The Mayor Is Not a “Staff Member” to the City Council or Otherwise.

The City cannot let pass without comment the dismissive nature with which Block refers to the duly elected Mayor, the Hon. Joe Beavers,

as a “staff member” to whom the City Council purportedly secretly abdicated its authority regarding a decision to mediate a pending lawsuit.¹³ Even a cursory reading of RCW 35A.12.100 proves otherwise.

Mayor Beavers, of course, represents the Executive Branch, fully one-third of city governance. The Mayor is no more a “staff member” than is the Presiding Judge of the municipal court, who also represents fully one-third of city governance, or the City Council, which represents the remaining one-third.

A fundamental principle of our constitutional system is that governmental powers are divided among three branches and each is separate from the others. Like the United States Constitution, the Washington Constitution does not contain a formal separation of powers clause, but the very division of our government has been deemed to give rise to a vital separation of powers doctrine. However, this doctrine does not require that the branches of government be hermetically sealed. The doctrine serves mainly to ensure that the fundamental function of each branch remains inviolate. Otherwise, the doctrine contemplates flexibility and practicality. “[H]armonious cooperation among the three branches is fundamental to our system of government.”

City of Spokane v. Spokane County (“*Spokane County*”), 158 Wn.2d 661, 678-679, 146 P.3d 893 (2006).

¹³ See, e.g., Brief of Appellants, at 1.

The mere fact that the Mayor chose to discuss the Forbes litigation with the City Council in executive session, as expressly authorized by RCW 42.30.110(1)(i), does not constitute a delegation to the Council of the Mayor's authority.

Rather, it means simply that the Executive Branch chose to employ the "harmonious cooperation" described in *Spokane County* to update the Legislative Branch, precisely as authorized under the plain language of RCW 42.30.110(1)(i). *WPTA*, 120 Wn. App. at 902-03; *Lakewood Council Members*, 144 Wn.2d at 587.

D. Executive Sessions to "Discuss" Litigation With Counsel Present Are Expressly Authorized by the OPMA.

Next, Block argues that the October 26, 2010 executive session went beyond the permissible scope of RCW 42.30.110(1)(i). Under that section, an executive session is permissible in order, "[t]o discuss with legal counsel representing the agency litigation or potential litigation"

Initially, Block offers a novel interpretation of "discuss," arguing that the verb authorizes only discussions directly between a councilmember and counsel, and does not permit discussions among councilmembers, the mayor, and others who may be in attendance at any particular executive session. As offered by Block, the OPMA is violated any time a councilmember addresses or responds to anyone other than

legal counsel (e.g., another councilmember, the mayor, an expert witness, or others in attendance) during an executive session called for the purpose of discussing litigation.

The courts “do not resort to statutory construction methods where the statutory language is plain and unambiguous.” *Wood*, 107 Wn. App. at 558 (citing to *Rettkowski v. Dep’t of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996)). A statute is ambiguous only if it is susceptible to more than one reasonable interpretation. *Id.* at 559. “In construing statutes, we seek to effectuate the legislative intent, which we discern ‘from the statutory text as a whole, interpreted in terms of the general object and purpose of the legislation.’” *Id.* at 558 (citing to *Group Health Coop. of Puget Sound, Inc. v. Dep’t of Revenue*, 106 Wn.2d 391, 401, 722 P.2d 787 (1986). *See also Cackle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001)). A reasonable interpretation is not one that leads to absurd results. *Strain v. West Travel, Inc.*, 117 Wn. App. 251, 255, 70 P.3d 158 (Div. 1 2003).

Only one executive session exception requires the presence of legal counsel – RCW 42.30.110(1)(i). That section expressly authorizes an executive session “to discuss with legal counsel” litigation or potential litigation. The plain terms of the statute do not limit the permitted discussion to “individual discussion with legal counsel” or “discussion

only directly between one councilmember and legal counsel,” or otherwise in a manner consistent with Block’s tortured interpretation of the statute. Interpreting the exception by Block’s strained definition would render the purpose behind the exception meaningless. No purpose would be served and no public policy would be furthered by gathering the entire city council together for an executive session to discuss litigation if councilmembers were only permitted to speak directly to legal counsel. Councilmembers are already free to speak individually with legal counsel outside of executive session, and outside of an open public meeting.

Further, Block’s reading of the statute would lead to absurd results. If a councilmember expressed an opinion regarding litigation¹⁴ and another councilmember wanted to respond with his or her own opinion, they would each be required to individually direct their comments to legal counsel, who would then relay the information back to the other, even though both could hear every word being said initially. This labored interpretation simply cannot stand.

¹⁴ Expression of opinions is allowed during an executive session as long as prohibited “action” does not occur. See *Miller v. City of Tacoma*, 138 Wn. 2d 318, 328, 979 P.2d 429 (1999) (“[I]ndividual council members could express their opinions on such [executive session] matters,” but could not take final action (emphasis added).)

1. The Lie Declaration Supports the City's Argument and the Trial Court's Order of Dismissal.

Block next claims that the Lie Declaration (CP 116) establishes a “clear OPMA violation.”¹⁵ Hardly. On its face, the Lie Declaration does not state or otherwise prove that an impermissible vote or other collective action occurred in executive session. To the contrary, the Lie Declaration actually proves the City's case – the executive session consisted only of permissible discussions and the sharing of opinions by individual Councilmembers.

The Lie Declaration is remarkable for what it does *not* say. Lie, a close ally of Block¹⁶ and fellow unsuccessful petitioner in four recall attempts against the Mayor and other Councilmembers,¹⁷ does not swear under penalty of perjury in his declaration that a “vote” was taken. Lie does not swear that a “collective decision” was reached.

Rather, and in a very carefully worded statement, Lie merely states his own mental impression – reached only after listening to opinions expressed by other individual Councilmembers – that “by the close of the meeting, a general verbal agreement had been formed by a majority of the council to proceed with litigation and not enter into mediation.” *Id.*

¹⁵ Brief of Appellants, at 29.

¹⁶ CP 139.

¹⁷ The recall petitions assert the same OPMA violation as set forth in this case. All were rejected as being legally and factually insufficient and are discussed in more detail below.

Furthermore, Lie states that he understood the mediation offer to require a “yes or no decision by *the city*” (as opposed to the City “Council”). *Id.* (emphasis added).

No prohibited vote. No prohibited collective decision. No required decision by the City Council. Rather, Lie listened to the opinions offered by other Councilmembers. Based on what he heard, Lie then formed his own subjective belief based on those comments as to whether other Councilmembers favored mediation or not. If a Councilmember were to say, “I favor mediation in all cases,” and two other Councilmembers were to say, “I oppose mediation in all cases,” a listener could understandably form his or her own subjective impression that two Councilmembers are opposed to mediation and one is in favor. The permissible sharing of opinions, however, does not constitute an impermissible vote.

More to the point, the conduct described in the Lie Declaration is perfectly consistent with the law. Councilmembers are permitted to speak, which necessarily involves disclosure of opinions, during an executive session. RCW 42.30.110(1)(i); *see also Miller v. City of Tacoma*, 138 Wn. 2d 318, 328, 979 P.2d 429 (1999) (In an executive session to evaluate employee candidates: “[I]t is clear the council could *discuss and consider* the worth, quality and significance of the applicants’ *qualifications*, and

individual council members could express their opinions on such matters . . .”(emphasis added).

It may well be that the expression of such opinions means that a particular course of action becomes clear. Even so, as the Attorney General has explained, no OPMA violation occurs simply because a course of action “becomes clear” in executive session after the permissible sharing of Councilmember opinions.¹⁸

The Washington Supreme Court further weighed in on this issue in *In re the Petition for Recall of Janet Anderson*, 131 Wn.2d 92, 929 P.2d 410 (1997). There, the Court affirmed the trial court’s holding that a statement that councilmembers “kind of all shook their heads and agreed” was not factually sufficient to find that a “final decision” had been made. No prohibited vote. No prohibited collective decision.

As in *Anderson*, the fact that former Councilmember Lie formed his own impression regarding the thoughts of other Councilmembers regarding the Mayor’s decision not to mediate the Forbes litigation does not constitute prohibited final action in executive session.

Block cites to the Ninth Circuit’s decision in *Feature Realty v. City of Spokane*, 331 F.3d 1082 (2003), to support her assertion that a city

¹⁸ See, Attorney General’s Open Government Internet Manual, Chapter 4, “Case Example” at Section 4.3(g): (<http://www.atg.wa.gov/OpenGovernment/InternetManual/Chapter4.aspx>).

council's "'collective positive decision' done by informal consensus during the executive session violated the OPMA because that action was beyond the scope of the [executive session] exception."¹⁹

To the extent that *Feature Realty* is even applicable here, it is easily distinguished. In that case, and unlike with Gold Bar here, the Spokane city council apparently *did* take a prohibited final action in executive session by approving and executing a final settlement agreement. In Gold Bar, the Mayor and Councilmembers simply discussed litigation, with its counsel present by telephone, and then went home. No vote or other final action occurred.

In *Feature Realty*, the Spokane city council went into an executive session to discuss the terms of a settlement agreement. During the executive session, the city attorney expressly asked the councilmembers if they wanted to approve the settlement agreement. *Id.* at 1085. Although no official "vote" took place, the council went around the room, each expressing their approval of the agreement, and the city subsequently signed the settlement agreement without taking a vote at an open public meeting. *Id.* Later, when the city's obligations under terms of the settlement agreement were questioned, the city sought to invalidate the agreement by alleging it violated the OPMA and was therefore null and

¹⁹ Brief of Appellants, at 19.

void. *Id.* at 1085 – 1086. On appeal, the court rejected Feature Realty’s argument that the city manager had the authority to execute the settlement agreement, which would have rendered immaterial the city council’s action approving the agreement in executive session. *Id.* at 1087, n. 5.

The Court reasoned:

This assertion is belied by the express terms of the Spokane City Charter. *See* Spokane, Wa., Code § 115 (“To the extent permitted by law *the council shall have the power* to prescribe the manner, form and time by which the ... the claims for damages against the City ... shall be made, settled and paid.”) (emphasis added); *Id.* § 38 (“All written contracts ... of every kind and description to which the city shall be a party shall be executed in the name of the city by the mayor or the manager *under the direction of the city council ...*.”)

Id. (emphasis added). In *Feature Realty*, then, the City Charter expressly delegated to the city council authority to settle claims. The council’s decision to do so in executive session violated the OPMA.

Here, Gold Bar has no city charter (nor any ordinance similar to the Spokane charter provision at issue in *Feature Realty*), and the question was whether to mediate with Forbes, not to finally settle the matter. The City Council has no authority over that decision. More fundamentally, and unlike the Spokane city council, the Gold Bar City Council took no final action in executive session.

2. “Spirited Discussion” Is Permitted in Executive Session to the Same Extent as “Discussion.”

Block next argues that “spirited discussion” is somehow different than “discussion,” and that “spirited discussion” would be prohibited in an executive session. Block offers no legal authority on this point. Rather, Block cites to declarations of the Mayor and Councilmembers filed in Block’s various recall actions, which provide that “spirited discussion” occurred in the executive session. CP 55 – 63. Block apparently believes that “spirited discussion” violates the terms of RCW 42.30.110(1)(i), even though that section expressly authorizes “discuss[ions] with legal counsel.”²⁰

The City is comfortable that “spirited discussions” fall squarely within the plain meaning of “discussion,” and that the Legislature easily could have proscribed “spirited” discussion if it had so desired. The City also notes that spirited discussion is frequently a hallmark of interaction among members of the Executive and Legislative branches at all levels of government, most certainly including the municipal level.

As a preliminary matter, the referenced Councilmember declarations (CP 55 – 63) were offered in support of the City’s successful motion for protective order, and not in support of the City’s motion for summary judgment. On this appeal, Block did not assign error to the

²⁰ Brief of Appellants, at 27.

issuance of the protective order. Block cannot challenge it now. *Painting & Decorating Contractors of America, Inc., v. Ellensburg School Dist.*, 96 Wn.2d 806, 814, 638 P.2d 1220 (1982). *See also* RAP 10.3(a)(4).

Nonetheless, Block fails to explain how or why “spirited discussion” is in any substantive manner different than “discussion.” Notably, the referenced declarations do make clear that no prohibited vote or collective decision occurred in the executive session.

3. The Mayor’s Decision to Keep the Council Informed of Litigation Developments Is Good Public Policy, and Well Supported by the Law.

Block finally argues that, even if the Mayor and not the Council does have litigation management authority, the Mayor cannot permissibly “update” the Council in an executive session under the OPMA:

If the Council had no say in the litigation, there was no right to hold the secret meeting for the Mayor ‘to update’ them as the Mayor claims he did. Only discussions with an attorney are allowed, implicit in this is the understanding that the governing body members have the power to make decisions necessitating these discussions with counsel.²¹

Block offers no legal authority in support of this logic-defying proposition.

²¹ Brief of Appellants, at 28 – 29.

As previously discussed, “harmonious cooperation among the three branches is fundamental to our system of government.” *Spokane County*, 158 Wn.2d at 678 – 679. Updating the City Council on the status of litigation actively promotes such “harmonious cooperation” between the Executive and Legislative branches. Further, the City Council *should* remain apprised of current and potential litigation because the City Council may be required to take future action on a particular litigation matter.²²

In an executive session called for the purpose of considering litigation, “discussion” is an expressly permitted action. By definition, “discussion” may include an update on the status of litigation, including advising the Council that an opposing party has suggested mediation. “Discussion” does not necessarily require that any decision or final action must follow. Indeed, other executive session exceptions contemplate instances in which a decision might not necessarily follow.²³ The fact that the Mayor has the authority to direct litigation does not mean that such

²² For example, the City Council may be required to approve a settlement agreement that includes the payment of money, or to approve the institution of new legal proceedings that arise out of prior litigation.

²³ See the executive session exception in RCW 42.30.110(1)(i), “[t]o discuss with legal counsel representing the agency litigation or potential litigation . . .”, which is silent regarding action or decision. Compare RCW 42.30.110(1)(a), “[t]o consider matters affecting national security” and RCW 42.30.110(1)(f), “[t]o receive and evaluate complaints or charges brought against a public officer or employee . . .”, which are silent regarding action or decision and would not necessarily require action or decision.

litigation cannot be discussed with the City Council in executive session.

In fact, the statute expressly permits such discussion.

E. A Final Action by the City Council On an Issue Over Which It Has No Authority Is Ultra Vires and Void.

Even if Block could prove that the City Council somehow took final action in executive session regarding Forbes' request to mediate, such action would be void as ultra vires.

Block failed to address this argument before the trial court and likewise failed to address it in her Brief of Appellant. While Block did assign error to the trial court's holding that any vote taken by the City Council on the mediation issue in the October 26, 2010 executive session would have been ultra vires and void,²⁴ Block did not address this alleged error anywhere in her brief. "The supreme court will not consider an assignment of error where there is no argument in the brief in support thereof." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Nonetheless, the trial court's ruling was directly on point. Here, since the Mayor, and not the City Council, has the sole authority over litigation management decisions, any City Council vote on that question would be void. The City Council simply has no authority to act on questions of litigation management.

²⁴ Brief of Appellants, at 1.

“Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act ever existed, even where proper procedural requirements are followed.” *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). Courts distinguish between government acts which a municipality had no authority to perform and those which merely suffer some procedural irregularity. *Id.* at 122. “An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires.” *Board of Regents of University of Washington v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987) (citing *Haslund v. Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976), and *Seattle v. P.B. Inv. Co.*, 11 Wn. App. 653, 662, 524 P.2d 419 (1974)). Government acts that are truly ultra vires cannot be later validated by ratification or other events. *South Tacoma Way, LLC*, 169 Wn.2d at 123.

Block’s misunderstands the fundamental authority of the Mayor compared to the fundamental authority of the City Council. The mayor, not the city council, controls daily litigation decisions. *WPTA*, 120 Wn. App. at 901-902. Any determination otherwise would lead to inefficient litigation management:

At any one time . . . the City may be involved in a hundred suits Given litigation time constraints, the variety and

complexity of issues, and the need for client and work product confidentiality, prior Council approval of all decisions in these suits would be impractical.

Id. at 901 – 902.

Here, the City Council had no statutory authority to make a decision to mediate a lawsuit. In other words, that decision is not within the City Council’s “realm of powers.” *Board of Regents*, 108 Wn.2d at 552. Accepting solely for the purpose of argument Block’s assertion that the City Council *did* decide not to mediate with Forbes in the October 26, 2010 executive session, that action would be void as outside of the City Council’s “realm of powers.” Any decision by the City Council on this subject matter would suffer from far more than mere procedural irregularity – and would accordingly be void as an ultra vires act – because the statutory authority to act on this subject matter lies with the Mayor. RCW 35A.12.100. The Council cannot violate the OPMA by taking “final action” on a matter over which it has no authority to act.

F. The Claims Are Barred By Collateral Estoppel Because The Trial Court Has Already Adjudicated These Issues in Prior Actions.

Block next contends that the trial court erred by finding that her claims were additionally barred by res judicata or collateral estoppel. The purpose of the doctrine of collateral estoppel is “to promote the policy of

ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants.” *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993) (citing to *Beagles v. Seattle–First Nat’l Bank*, 25 Wn. App. 925, 929, 610 P.2d 962 (Division II, 1980) and *Malland v. Department of Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985)).

Collateral estoppel properly applies to bar Block’s claim here because all of the required elements exist: (1) the issue decided in the prior adjudication is identical to the one presented in the subsequent action; (2) there was a final judgment on the merits in the prior adjudication; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine will not work an injustice on the party against whom the doctrine is to be applied. *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

1. The Issues Decided in the Prior Recall Petition Cases Are Identical to the Claim in This OPMA Case.

Here, the first prong is met. The issues brought in the four previous recall actions by Block and her associates are identical to the issue before the Court in the instant action. Block and her associates on two separate occasions sought to recall the Mayor, and two

Councilmembers, for unlawfully voting and participating in the October 26, 2010 executive session. CP 141 – 142; 162 – 170.

A recall charge must be based on acts of malfeasance, misfeasance, or violation of oath of office. RCW 29A.56.110. Misfeasance and malfeasance both include “wrongful conduct that affects, interrupts, or interferes with the performance of official duty.” RCW 29A.56.110(1). Misfeasance additionally includes “the performance of a duty in an improper manner.” RCW 29A.56.110(1)(a). Malfeasance also includes “the commission of an unlawful act.” RCW 29A.56.110(1)(b). However, when a recall petition alleges that an official violated the OPMA, the petitioners must also put forth knowledge of facts indicating an intent to violate the OPMA. *In re Beasley*, 128 Wn.2d 419, 426, 908 P.2d 878 (1996); *see*, RCW 42.30.120(1) (liability for violation of OPMA only exists for action taken “with knowledge of the fact that the meeting is in violation thereof.”). While the trial court is directed only to consider the sufficiency of the charges and not the truth of the charges, the trial court must still determine whether the facts as alleged establish misfeasance, malfeasance or a violation of the oath of office. RCW 29A.56.140; *In re Ackerson*, 143 Wn.2d 366, 371, 20 P.3d 930 (2001).

Accordingly, in ruling on the prior recall petitions brought by Block and her allies alleging this same OPMA violation, the Court was

likewise bound to determine whether the facts alleged were sufficient to constitute violations of the OPMA, not simply, as Block alleges, whether the officials *intended* to violate the OPMA.

2. Final Judgment on the Merits of the Claimed OPMA Violation Was Rendered in the Prior Recall Petition Cases.

The second prong of collateral estoppel is also satisfied here. The trial court has already dismissed on the merits the claims brought by Block and her associates. The trial court found all four of the recall actions factually and *legally* insufficient, ruling that the claimed unlawful vote in executive session did not establish a violation of the OPMA (and likewise could not then establish misfeasance, malfeasance, or violation of the oath of office).

In fact, in the most recent recall action against the Mayor, the trial court explicitly stated:

The mayor is the one who has the authority to make a decision about mediation or proceeding with litigation. The fact that that would be discussed with the council for them to have some input, as to what direction to the mayor, would not make that subject to a vote. It's still his decision, and the notice that was sent that the City had decided not to proceed with mediation which the mayor had authority to decide.

CP 279, ll. 17 – 25. The trial court has already decided as a matter of law that the Mayor makes litigation management decisions, not the City Council. CP 254 – 256.

3. Block Was a Party, or Was in Privity With Susan Forbes and Chuck Lie, in the Recall Petition Cases.

Third, the parties to this action – Block and Frederick – were also parties in certain of the various recall petitions filed against the Mayor and Councilmembers. CP 162 – 167. And, while Block and Frederick were not named parties in certain other recall petitions filed against the Mayor and one or more Councilmember, they were indisputably in privity with the petitioners there, Forbes and Lie. CP 169 – 170; *see*, CP 139, and f.n. 1.²⁵

Block now asks this Court to again look at the very same issue - whether the City Council voted in the October 26, 2010 executive session in violation of the OPMA. Block and her associates present the same evidence here that they provided to the Court in the four recall actions, and two separate trial court judges have already ruled that the allegations in the recall cases were factually and legally insufficient to demonstrate an OPMA violation.

²⁵ Judge Krese noted that there was clearly no issue over the identity of persons or parties between the March recalls (in which Block and Frederick were also petitioners) and the April recalls. CP 142; 280, ll. 13 – 15.

4. Application of the Doctrine Works No Injustice on Block, Who Has Been Afforded Multiple Opportunities to Fully and Fairly Litigate Her Claim.

Finally, in order to properly apply collateral estoppel to bar Block's claim here, the City must show that application of collateral estoppel will not work an injustice on Block. It does not. Block has litigated the issue whether the City Council's executive session of October 26, 2010 violated the OPMA on multiple occasions. Rather, continuing to argue this question works an injustice on Gold Bar and its taxpayers, and certainly not on Block.

Application of collateral estoppel does not work an injustice when the party opposing estoppel has had a full opportunity to present evidence and arguments on the issue and has exercised that opportunity. *Hanson*, 121 Wn.2d at 563; *Rains*, 100 Wn.2d at 666; *Robinson v. Hamed*, 62 Wn. App. 92, 100, 813 P.2d 171 (1991); *Dunlap v. Wild*, 22 Wn. App. 583, 591, 591 P.2d 834 (Division II, 1979). In the most recent recall action, the trial court specifically found that Block did not establish an OPMA violation. CP 142; 280 – 281, ll. 22-25 – 1-3.²⁶ On that occasion, as in their multiple other recall cases, Block and her associates had a full and fair opportunity to litigate the issue of whether the City Council

²⁶ Judge Krese specifically stated, "So even the supplemental materials does [sic] not establish there was, in fact, a violation of the Open Public Meetings Act."

unlawfully voted in executive session. On all four occasion, the trial court rejected the claim of Block and her allies that the executive session in question constituted misfeasance, malfeasance, or a violation of the oath of office.

G. The Trial Court Did Not Abuse its Discretion in Denying Block's CR 56(f) Motion.

Block contends the trial court erred in not granting her motion under CR 56(f) to continue the City's motion for summary judgment. A court's denial of a CR 56(f) motion is reviewed for abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (Div. I, 1990). A trial court's decision will not be disturbed on review unless the discretion was exercised on untenable grounds or for untenable reasons. *Id.* The trial court may deny such a motion when (1) the moving party does not offer a good reason for the delay in obtaining the evidence, (2) the moving party does not state what evidence would be established through additional discovery, or (3) the evidence sought will not raise a genuine issue of fact. *Id.*

Block cites no legal authority to support her argument. Rather, Block simply asserts she had established a "clear OPMA violation," but the trial court nonetheless wrongfully denied her the opportunity to seek additional discovery regarding the executive session. Block made this

same argument in her Motion, but did not demonstrate how this differed from the relief she sought in opposing the City's Motion for Protective Order. *Compare*, CP 348 – 365 and CP 92 – 94.

Block did not seek reconsideration or discretionary review of the protective order issued on the City's motion. CP 292 – 293. Her CR 56(f) motion was nothing more than an attempt at a "second bite" at the proverbial apple. The trial court properly granted the protective order and stayed discovery in order to hear the City's motion for summary judgment on the "pure legal issues" of the Mayor's authority over litigation management decisions and the collateral estoppel effect of the prior judicial rulings on the various recall petitions. CP 292.

After considering those "pure legal issues," the trial court had no trouble dismissing Block's claim. Discovery on factual issues could not have shed any light on "pure legal issues," and Block's CR 56(f) motion offered no such illumination.

In support of her CR 56(f) motion, Block argued only that "[t]he depositions of the Councilmembers are necessary to determine what happened in the executive session." CP 91. In response to the City's motion for summary judgment, however, Block took the diametrically opposed position, arguing that the Lie Declaration "describe[ed] exactly

how the decision not to mediate the Forbes case was made [in executive session].” CP 103.

The trial court could not, and did not, abuse its discretion in failing to grant her license to fish for additional answers.

H. Block Fails to Show the Existence of a Genuine Issue of Material Fact.

Finally, Block alleges that questions of fact exist sufficient to have precluded summary judgment. In this case, Block fails to demonstrate any genuine issue regarding a *material* fact. “A ‘material fact’ for the purposes of summary judgment ‘is one upon which the outcome of the litigation depends.’” *Smith v. State Employment Sec. Dept.*, 100 Wn. App. 561, 568, 997 P.2d 1013 (Div. II, 2000) (citing to *Geppert v. Washington*, 31 Wn. App. 33, 39, 639 P.2d 791 (Division II, 1982)).

Moreover, Gold Bar brought its motion for summary judgment as a challenge to the sufficiency of Block’s evidence. CP 124; *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (Division I, 1992). Gold Bar had no obligation to present affidavits, deposition testimony, or other evidence to meet its initial summary judgment burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), followed in *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989).

Rather, Block then became obligated to set forth specific facts that would be *admissible at trial* in order to avoid dismissal. See *Young*, 112 Wn.2d at 225 (where no genuine issue of fact exists as to essential element of the nonmoving party's case, all other facts are rendered immaterial). Block could not survive summary judgment by relying on mere allegations and conclusory assertions. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 122 (2003). Block incorrectly claims that the trial court failed to construe the evidence in the light most favorable to Block.²⁷ On summary judgment, Block relied heavily, if not exclusively, on the Lie Declaration. CP 116.

Viewing the evidence in the light most favorable to Block, the Lie Declaration simply does not establish the existence of impermissible "action," and Block offered no other material, factual evidence that would be admissible at trial. The Lie Declaration establishes only the City Council "discussed" the offer to mediate as expressly permitted by RCW 42.30.110(1)(i),²⁸ as well as Lie's own "understanding" of matters and his own subjective mental impression that a "general verbal agreement had been formed." None of this proves, or even leads to a reasonable

²⁷ Brief of Appellants, at 33.

²⁸ Despite the strained interpretation of "discussion" that Block urges before this Court, she readily and understandably agreed below that "discussion" is permitted in executive session. "As described below, the City is seeking summary judgment that a *discussion* is permitted in executive session (which, of course, it is) . . ." CP 102, ll. 21-22 (italics in original).

inference, that a prohibited vote or other final action occurred in executive session.

Block gets no further “fishing expedition” to find out. The burden was on her to come forward with admissible evidence in response to the City’s motion. She failed to do so, essentially arguing only that unanswered questions remained:²⁹

[P]laintiff’s equation of “unanswered questions” with “genuine issues of material fact” belies a perhaps too frequently held misconception of the nature of the summary judgment procedure. It is true that the burden is on the party moving for summary judgment to demonstrate that there is no genuine dispute as to any material fact, and that all reasonable inferences from the evidence must be resolved against the moving party. However, this does not mean that the party moving for summary judgment is compelled to meet every speculation, conjecture or possibility by alleging facts to the contrary. . . . Although the burden is initially upon the party moving for summary judgment, once this burden is met, the nonmoving party may not successfully oppose the motion by nakedly asserting that there are unresolved factual questions. As recognized in *Reed v. Streib*, 65 Wash.2d 700, 707, 399 P.2d 338 (1965), the whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence. Accordingly, it has long been the rule that

²⁹ “The depositions of the Councilmembers are necessary to determine what happened in the executive session.” CP 91, ll. 5 – 6.

each party must furnish the factual evidence upon which he relies. The plaintiff in this case was required to set forth specific facts showing there was a genuine issue of material fact for trial if he wished to avoid this summary judgment.

Bates v. Grace United Methodist Church, 12 Wn. App. 111, 114 – 116, 529 P.2d 466 (Div. II, 1974) (citations omitted).

I. Block Is Not Entitled to Attorneys' Fees.

RCW 42.30.120(2) allows an award of fees to a person who prevails against a public agency on an OPMA violation. Since Block cannot establish an OPMA violation nor any error by the trial court, Block should not be awarded any attorneys' fees in this appeal. *Eugster*, 128 Wn. App. at 10 – 11.

V. CONCLUSION

The City and the Mayor fully embrace the purpose and policy behind the OPMA - to require the City Council to take its actions and conduct its deliberations openly, unless the topic falls squarely within the executive session provisions of RCW 42.30.110. The City, and the City Council, wholly satisfied that purpose and policy here.

While Block worries that affirming the trial court in this case “would eviscerate the OPMA” and “markedly shape the interpreted

meaning of the OPMA in the future,”³⁰ she should not fret. This case evidences only the common grant of summary judgment by the learned trial court in a case where the plaintiff offered no evidence. No higher burden or different standard applies to Gold Bar here, simply because this case involves the OPMA.

The law regarding this Court’s review of the trial court’s grant of summary judgment on appeal is clear, and falls fully in support of the City’s position here. No purpose other than the continuation of Block’s personal and erratic vendetta against the City would be served by a reversal of the trial court in this case.

After permissible “discussions” in executive session with the City Council and City Attorney, the Mayor – the one and only person with the authority to make litigation management decisions – decided not to mediate Forbes’ lawsuit because he believed Forbes’ case to be without merit. He was right.

The misguided basis for this case is the unsubstantiated belief of Block and Forbes that “there was intent to cover up, to keep things from the public here.”³¹ Nothing was covered up, and nothing was kept from the public.

³⁰ Brief of Appellants, at 7.

³¹ CP 275, ll. 19 – 20.

Block and Forbes have long, often, and unsuccessfully litigated their claim of an OPMA violation during the October 26, 2010 executive session. It is time to end this charade. The trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 25 day of February, 2013.

KENYON DISEND, PLLC

By 

Michael R. Kenyon
WSBA No. 15802
Ann Marie Soto
WSBA No. 42911
Attorneys for Respondent

DECLARATION OF SERVICER

I, Kathy I. Swoyer, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

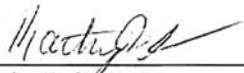
2. On the 25th day of February, 2013, I served a true copy of the foregoing *Brief of Respondent*, on the following counsel of record using the method of service indicated below:

Michele Earl-Hubbard
Allied Law Group, LLC
P. O. Box 33744
Seattle, WA 98133

First Class, U.S. Mail, Postage
Prepaid
Legal Messenger
Overnight Delivery
Facsimile
 E-Mail, per agreement of the
parties:
Michele@alliedlawgroup.com

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

DATED this 25 February 2013, at Issaquah, Washington.



Kathy I. Swoyer

OFFICE RECEPTIONIST, CLERK

To: KATHY SWOYER
Cc: michele@alliedlawgroup.com; ANN MARIE SOTO; MIKE KENYON
Subject: RE: Filing in Case No. 87861-7

Rec'd 2-25-13

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.

-----Original Message-----

From: KATHY SWOYER [<mailto:KathyS@kenyondisend.com>]
Sent: Monday, February 25, 2013 4:46 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: michele@alliedlawgroup.com; ANN MARIE SOTO; MIKE KENYON
Subject: Filing in Case No. 87861-7

Dear Sir/Madam,

Please accept for filing the attached Brief of Respondent, in Supreme Court Case No. 87861-7, Anne Block et al. v. City of Gold Bar. It includes the Declaration of Service.

This is being filed by Michael R. Kenyon, WSBA No. 15802 and Ann Marie Soto, WSBA No. 42911, e-mail address is Mike@kenyondisend.com, annmarie@kenyondisend.com, telephone number is 425-392-7090.

Thank you for your courtesies.

Kathy I. Swoyer, Paralegal
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

Tel: (425) 392-7090 ext. 2209
Fax: (425) 392-7071
kathys@kenyondisend.com
www.kenyondisend.com