68163-0

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No: 68163-0

COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

ANNE BLOCK,

Appellant,

v.

CITY OF GOLD BAR,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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2. Commissioner Gibb's erred when it held a hearing(s) without first addressing whether or not Plaintiff was properly notified of hearings.

3. Commissioner Gibb's erred when it held an Ex-Parte Hearing *After* Receiving Plaintiff's Notice of Unavailability.

Issues:

a) Whether or not an Agency can file Motions After Being Notified of Plaintiff's Unavailability?

b) Whether or not an Agency/Defendant must comply with CR 45 when issuing subpoenas for depositions?

c) Whether or not an Agency being sued pursuant to RCW 42.56 can schedule a hearing that deprives a Citizen of the right to be heard and complete access to public records after receiving notice of unavailability?

d) Whether the Plaintiff is entitled to attorney fees and costs where the evidence establishes the Agency filed motions only after Plaintiff filed a Notice of Unavailability?

B. STATEMENT OF THE CASE

I. Introduction

The appellate record is lacking here because Appellant Anne Block (Block) was not properly notified of the City of Gold Bar's motion hearings which is the heart of this appeal. The record reflects that Block filed a Notice of Unavailability with Snohomish County Superior Court prior to the City of Gold Bar filing any Motions with the trial court alleging that Block failed to appear for an improperly served CR 45 deposition. The City of Gold Bar's conduct, by and through its attorney Margaret King (King), violated Block's constitutionally protected right to be properly notified of a hearing, both under Washington State's Constitution as well as the United States Constitution's Due Process Clause, Washington Court Rules, and constitutes a Strategic Suit Against Public Participation (SLAPP).

This case resolves around a Gold Bar resident's legal right to access public records pursuant to RCW 42.56 and the City of Gold Bar's failure to comply with the Public Records Act. This case started only after Gold Bar resident Block discovered that the City of Gold Bar's attorneys' King and Ann Marie Soto were using taxpayer money to draft, write and edit a City of Gold Bar vendor's declaration in another case. Disgusted that her tax money was being misappropriated to legally assist a nonclient

and vendor for the City of Gold Bar, Block requested all public records between and among Gold Bar vendor Michael Meyers (Meyers) and Kenyon Disend. Kenyon Disend's legal bills submitted to the taxpayers of Gold Bar labeled its representation of Meyers to Gold Bar taxpayers on its attorney bills as a "Community Contribution."

Concerned that Kenyon Disend was misleading the taxpayers of Gold Bar and had actually misappropriated public monies to assist a nonclient, Block requested all records related to Kenyon Disend's "Community Contribution."

Block was also concerned that the City of Gold Bar had refused to implement a public records policy pursuant to RCW 42.56.040, and had discovered from a public records request answered by Snohomish County that Gold Bar's city council member Christopher Michael Wright (Wright) was using his private email address for government business as late as January 2011- and two years post the first public records suit filed against the City for using private email addresses in violation of this Court's holding in *Mechling v. Monroe.*

During the latter part of 2011, Block's long term partner Noel Frederick received a CD from the City of Gold Bar with public records confirming that Kenyon Disend's attorney King and Gold Bar's city contract employee Penny Brenton used Gold Bar taxpayer resources to

provide some level of assistance to former Gold Bar council member Dorothy Croshaw (Croshaw) to file a Washington State Bar (WSBA) Complaint against Block. Although the WSBA dismissed the City of Gold Bar/Croshaw's complaint, Block was still disturbed that her tax dollars were being used to assist Croshaw in her efforts to stop and harass Block from accessing public records pursuant to RCW 42.56.

On September 24, 2011, Block was notified by a sitting city council member that Gold Bar's Mayor Beavers, council member Wright and King were unlawfully using executive session calling Block a "Boston Jew Bitch", discussing how to "go after the requester", how to "pin coyote skins on the front of city hall and make an example of Anne Block", and how to "shut Block down financially." Disturbed at best, and after having sufficient evidence to establish that the City of Gold Bar was withholding public records responsive to Block's request, and had refused to comply with important open government principles pursuant to RCW 42.56, Block filed suit seeking access to public records on November 6, 2011.

Block is a solo practitioner who represents a very large number of sick Department of Energy workers, often requiring out of state and town travel. Believing that being candid and respectful to the other side in efforts to accommodate schedules regardless of which side an attorney represents honors the basic principles of an attorney's oath of office,

Block sent King an email letter letting her know that she would like to depose Wright and Mayor Beavers in December 2011. Immediately following this email letter, Block received a death threat via telephone. Block had reason to believe that either Snohomish County's Director of Emergency Management John Pennington or Wright (both have a history of abusing women) were behind the threats; Block took this threat seriously and canceled all in person hearings for the next month, filed a Notice of Unavailability with the trial court and properly served Gold Bar's city attorney King. Block also notified Gold Bar's city attorney King via email that she was canceling all in person appearances until January 2012. Within hours after notifying King via email that Block would be unavailable and canceling all appointments, King sent an email claiming that she had just sent a process server to Block's home trying to serve a CR 45 Subpoena for her deposition on November 21, 2011; King also alleged that an electronic agreement existed to exchange subpoenas via email. CP 38-39. CP 235.

Then approximately four business days (excluding day of service plus Thanksgiving holidays and weekend days) prior to King's CR 45 email deposition notice, King sent Block another CR 45 Notice changing the time from 10:00 AM to 1:30 PM. CP 252-256. CP 152. King transmitted all CR 45 Notices via email CP 38-39. Block denies that any

such Agreements existed to exchange CR 45 notices and King cannot circumvent CR 45 which mandates personal service.

II. Statement of Facts

During the latter part of November 2011, Block learned that her father's cancer had metastasized to his liver and spinal cord and his death was imminent. Block immediately notified King that she was leaving for Massachusetts as soon as possible (Block flies on employee standby from Seattle to Boston) to visit her father, daughter and grandson and would not be conducting depositions until her return in January 2012. Block also informed King that she would make herself available for Deposition upon her return and even sent King three potential dates for depositions, including January 9, 2012. By agreement, and contrary to King's declaration to the trial court, Block was deposed on January 9, 2012, voluntarily. Block was never personally served pursuant to CR 45.

Only after being notified that Plaintiff's father was terminal and after receiving Plaintiff's Notice of Unavailability, the City of Gold Bar along with the Law Firm of Kenyon Disend filed Motions with the trial court depriving Block with an opportunity to be heard. What is clear from the record is that Block filed and certified Notices of Unavailability with the Court and Kenyon Disend. CP 309-310. CP 307-208. CP 314-315.

In January 2012, Gold Bar council member Chuck Lie (Lie) resigned from the city council. By March 2012, Lie told Block that he resigned because King, Wright, and Beavers were using executive session to harm Block. Lie told Block that King and Beavers were trying to get Wright to file another WSBA complaint against Block. Lie stated that he and King had a shouting match inside executive session once King expressed a position that she and Beavers were going to "shut Block down financially." As an open government supporter, Lie believed that King was too emotionally involved, created the City's current legal problems, and should step aside.

This appeal involves four public records requests sent to the City of Gold Bar. Instead of complying with RCW 42.56, the City of Gold Bar by and through its attorneys decided the best way to answer a suit seeking access to public records that proved damaging to the law firm and the city was to file motions while Block was out of state visiting her dying father. Block's father, Stephen Block, Jr., passed away on February 13, 2012 after losing his three plus year battle with cancer.

On Defendant's Motion to Dismiss for Plaintiff's Failure to Comply with Court Order, Judge Krese ignored Plaintiff's Motion Opposing Dismissal thus viewing the facts in the light most favorable to the moving party instead of the nonmoving party.

In this appeal, Block contends that Snohomish County Superior Court Granted (1) a Motion to Compel hearing after Block filed a Notice of Unavailability with the Court; (2) Motion Granting Sanctions, Fees, Costs, and Expenses after Notice of Unavailability was filed with the Court; (2) A CR 45 Motion does not have to be physically served on a *Pro Se* Plaintiff; (3) viewed the facts in the light most favorable to moving party in a dismissal hearing, and (5) Plaintiff is not entitled to a meaningful opportunity to be heard and did not have properly serve motions on a Plaintiff in violation of Washington and US Constitutions.

III. Procedural History

In her complaint Block correctly named as defendants the City of Gold Bar. The record is lacking here because Block was not properly notified of City's proceedings that gave rise to this appeal, thus depriving Appellant Block of her due process rights, both under state and federal law.

C. ARGUMENT

1. Standard of Review: This Court Reviews De Novo The Trial Court's Order of Dismissal.

Courts conduct a *de novo* review of agency actions challenged under the PRA. RCW 42.56.550(3). Where the record consists entirely of

declarations, affidavits and other documentary evidence, the appellate court stands in the same position as the trial court and is not bound by the trial court's factual determination. *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994) *("PAWS II").* *Lybbert* v. *Grant County,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). This court can and should engage in the same inquiry as the trial court and review all of the facts in the record together with the trial court's finding *de novo* and make an independent determination of all matters found to be in error. *Ames v. City of Fircrest*, 71 Wn.App. 284, 292, 857 P.2d 1083 (1993) (with complete record, appellate court can decide issues of fact and law).

> In exercising review of *agency actions* the statute mandates that:
>
> Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

A. The Trial Court Committed Reversal Error When it Failed to View the Facts in the Light Most Favorable to the Non-Moving Party

The trial court's entry of dismissal is subject to complete and independent review and this Court is free to evaluate de novo the evidence proffered by both parties to determine whether there are actual issues to be tried and whether the law was applied correctly. *Marincovich* v. *Tarabochia,* 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Before granting a dismissal this Court must assume facts and inferences most favorable to the *non-moving party. Ruftv. County of King,* 125 Wn.2d 697, 703, 887 P.2d 886 (1995). The court cannot grant a dismissal "if reasonable minds could draw different conclusions from undisputed facts or if all the facts necessary to determine the issues are not present." *Schwindt* v. *Lloyd's of London,* 81 Wn.App. 293, 295, 914 P.2d 119 (1996).

Here, Commissioner Gibbs held an Ex-Parte Hearing ignoring facts favorable to Block which include that Block filed a Notice of Unavailability with the Court prior to the City's Motions. The City's own evidence documents that King sent a process server to Block's home to personally serve her, which contradicts King's Declarations filed with the Commissioner. CP 38-39. Judge Krese dismissed the case without viewing the facts in the light most favorable to Block, the non-moving party. CP 15-19.

The City, by and through its attorney, also failed to comply with Washington Court Rules of process of service when it did not properly

serve its subpoena pursuant to CR 45 mandated rules that it be served personally to a pro se litigant. The City's own evidence confirms that King first tried to serve Block with a CR 45 subpoena but Block was not home. CP 38-39. The record also established that King changed the time of her CR 45 Subpoena just four business days prior to the CR 45 motion and still sent it via email instead of personally serving Block. CP 252 - 256. CP 152.

This case supports Gold Bar's council member Lie's subsequent trial statements to Block that King, and Gold Bar's public officials Wright and Mayor Beavers entered into an agreement to financially shut down Block and unlawfully discussed it in executive session. Block has once again requested all records related to the issues stated herein and the City continues to thumbs its nose at RCW 42.56 which will result in additional litigation.

B. Snohomish County Commissioner Gibbs Abused His Discretion When He Allowed Defendant to Hold Hearings When Plaintiff Had Already Filed a Notice of Unavailability With the Court

a. Abuse of Discretion Standard

An abuse of discretion occurs when a court's decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *Doe I v. Washington State Patrol,* 80 Wn.App. 296, 302, 908 P.2d 914 (1996); *ACLU v. Blaine*, 95 Wn.App. 106, 975 P.2d 536 (1999).

Here, the trial Court's granting of the City's motions was inappropriate since the decision failed to assume facts and inferences most favorable to Appellant Block, the nonmoving party. Facts favorable to Block include the following facts: notices were filed with the Court; King/City's own exhibits document that King tried to personally serve Block at her home thus refuting King's Declaration to the trial court that Block and King had entered into an electronic agreement. CP 38-39. City improperly served a CR 45 subpoena via email to a pro se litigant and gave less than five day notice of deposition (King unilaterally changed the time from 10:00 AM to 1:30 PM). CP 38-39. CP 252 -256. CP 152.

If King's conduct on behalf of the City is allowed to stand, this court would set a dangerous precedent to other attorneys that it's ok to go after an open government supporter because of her belief that government officers and their contractors (including city attorneys paid for by taxpayer dollars) are accountable to "we the people." The burden of proof in public records cases is not on the requester, it is always on the Agency, but the trial court in this case placed the burden of proof to prove her actions not the Agency's actions on a Plaintiff who had filed a prior Notice of Unavailability on the record, and held an Ex-Parte Hearing with only a 24 hour notice, sent via email, to Block while she was out of state visiting her dying father.

Unlike the trial court, this Court must review the evidence in a light most favorable to Block and resolve all doubts in her favor. In this case, City's motions, especially after receiving a certified Notice of Unavailability amounts to a Strategic Suit Against Public Participation (SLAPP) and runs contrary to Our Legislature's Intent pursuant to RCW 42.56.

C. Commissioner Gibbs committed reversal error when he held that an Agency can serve via email a CR 45 Subpoena

The evidence in this case documents that the Defendants' attorney King first attempted to personally serve Block with a CR 45 Subpoena seeking her deposition. CP 38-39. This fact runs contrary to King's Declarations to the Commissioner stating that Block and King had an agreement to exchange records electronically, because if there was an agreement why would the City, by and through its attorney King, try to physically serve Block at her home instead of first serving via email? Had Block been given proper Notice and a meaningful opportunity to be heard, Block would have been allowed to argue and present conveniently left out email communication which contradicts the City and King's twisted version of the facts.

The City and its attorney King filing motions and hearings only after Block had already filed a Notice of Unavailability and without proper

notice of said hearings subjecting Block to penalties by a government entity without proper notice to present a defense or argument in dispute violates Block's due process rights.

> The Washington State Constitution provides, in pertinent part, the following:
>
> SECTION 1: POLITICAL POWER
> All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.
>
> SECTION 2: SUPREME LAW OF THE LAND
> The Constitution of the United States is the supreme law of the land.
>
> SECTION 3: PERSONAL RIGHTS
> No person shall be deprived of life, liberty, or property, without due process of law.
>
> SECTION 7: INVASION OF PRIVATE AFFAIRS OR
> HOME PROHIBITED
>
> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.
>
> SECTION 29: CONSTITUTION MANDATORY
> The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.

> SECTION 30: RIGHTS RESERVED
> The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.
>
> SECTION 32: FUNDAMENTAL PRINCIPLES
> A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free be government.

The parallels between the Washington State Constitution and the United States Constitution are obvious. One need not assert a tortious wrong to seek the protective hand afforded by the State of Washington, as is represented by the City in its motions to the trial court and runs contrary to Legislature's intent for a citizen to have complete access to public records pursuant to RCW 42.56.

Simply put, the Commissioner erred when he unquestioningly accepted the City's argument, ignored Notice of Unavailability filed by Plaintiff, and used as part of the basis of its decision granting the City's motions without affording Block a right to be heard and present a defense.

D. Commissioner Committed Reversal Error when he entered an Ex-Parte Order Granting City's Motion for Attorney Fees, Sanctions, Costs, etc. after Court and City Received Plaintiff's Notice of Unavailability

It is basic that proper notice and meaningful opportunity to be heard are fundamental to procedural due process. *See, Deering* v. *City of*

Seattle, 10 Wn.App. 832, 835-836 (1974); *see also Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 206, 314 (1950) (An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under *all* the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their obligations.") Due process must allow a party to present a defense. *Duskin* v. *Carlson,* 136 Wn.2d 550, 557 (1998). Its purpose is to "fairly and sufficiently apprise those who may be affected by the proposed action or the nature and character of the amendment so that they may intelligently prepare for a hearing." *Barrie* v. *Kitsap County,* 84 Wn.2d 579, 584-585, 527 P.2d 1377 (1975).

The essence of sufficient notice is to provide the "objective consequence upon the one who receives it, not the subjective attitude of the one who gives it." *See Glaspey & Sons, Inc.* v. *Conrad,* 83 Wn.2d 707, 712 (1974) (quoting *Knutzen* v. *Truck Ins. Exch.,* 199 Wn. 1, 8 (1939)).

Here's the City/King had prior and personal information that Block would be out of state visiting her dying father, but instead of acting within color of the law, the City, and its attorney King improperly filed Motions with the trial court and failed to properly apprise Block with notices of such hearings. This conduct is not only troubling from a WSBA ethical standpoint, but more importantly, such conduct violates basic a citizen's

basic due process rights. If allowed to stand, the City/King's conduct would encourage every agency subject to RCW 42.56 to file Motions without a citizen's knowledge to avoid compliance under the Public Records Act and would set dangerous precedent far beyond just this case.

Washington State's Constitution, Sec. 3., guarantees a citizen's right to be heard prior to deprivation of life, liberty or property. Commissioner Gibbs holding an Ex-Parte hearing without Block being properly served and having Notice of Unavailability filed with the Court 30 days prior to King's noting the motion calendar violated Block's Constitutionally protected right to be free from government deprivation of property and private affairs in violation of WA Const.

The appropriate course is to remand to the trial court to make specific findings under the proper legal analysis and provide a suitable remedy. *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993).

E. Relief Requested

In light of the foregoing argument, Block respectfully requests that this court overturn the trial court's decisions and remand this case back to the trial court for a meaningful hearing affording Block an opportunity to present a defense to the issues that gave rise to this appeal, and award attorney fees and costs for this appeal.

F. Conclusion

For the foregoing reasons, Block respectfully requests relief.

RESPECTFULLY SUBMITTED on this 16th day of November 2012.

Anne K Block, *Pro Se*
WSBA No. 37640

DECLARATION OF SERVICE

I, Krista Dashtestani, 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 November 16, 2012, I served a true copy of the foregoing Appellant Anne Block's Opening Brief on the following counsel of record using US Prepaid Postage Mail to:

Margaret J. King
Michael Kenyon
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820

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

Dated this 16th day of November 2012, at Monroe, Washington.

Krista Dashtestani