69129-5

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NO. 69129-5

IN THE COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON
DIVISION ONE

JAMES C. EGAN, *Appellant,*

v.

CITY OF SEATTLE, *Respondent.*

REPLY BRIEF OF APPELLANT

JAMES C. EGAN
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I. ARGUMENT

The purpose of Anti-SLAPP lawsuits, under RCW 4.24.525, is to establish a method of speedy adjudication of strategic lawsuits against "public participation," brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and the petition for redress of grievances. "This act shall be applied and construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010, ch. 118 § 3. In harmony with Anti-SLAPP, the PRA holds that "[t]here is a strong public policy favoring disclosure and the exemptions are to be narrowly construed." *Franklin County Sheriff's Office v. Parmelee,* 285 P.3d 67, 68-69 (2012).[1]

As misconstrued by Plaintiff and misunderstood by the trial court, Anti-SLAPP law is <u>burden shifting</u> and does not

[1] Out of thousands of laws promulgated by the legislature, only a small fraction are to be "liberally construed." Washington's Anti-SLAPP and the Public Record Act are both among those to be liberally construed, for the purpose of preventing lawsuits against public participation and for not impeding public access to public records, respectively.

render any other statute a "nullity." Although a Plaintiff's claim may be "based on Defendant's public participation," that claim will survive so long as the plaintiff establishes a likelihood of prevailing on the merits in response to an Anti-SLAPP motion.[2]

When determining if the Anti-SLAPP law applies to the present matter, the Court must first examine whether Egan's actions constitute "public participation and petition under RCW 4.24.525." Once the Court finds that Egan has met "the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition...the burden shifts to the responding party [City of Seattle] to establish by clear and convincing evidence a probability of prevailing on the claim." RCW 4.24.525(4)(b).

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[2] "The anti-SLAPP remedy is not available where a probability exists that the plaintiff will prevail on the merits." *Equilon Enterprises v. Consumer Cause*, 52 P. 3d 685 (2002). Note that once the burden shifts due to a lawsuit based on public participation, Washington's legislature sets a *higher* burden on the Washington Plaintiff than does California's legislature (clear and convincing versus preponderance of evidence likelihood of prevailing on the merits of the Plaintiff's claim).

In Egan's opening brief, Egan demonstrated that he has met this burden of showing the court that the lawsuit against him was clearly based on Egan's "public participation." See Egan's Opening Brief Page 19 Section C. The records requests tailored to obtain and publicize police misconduct, interviews with the media about those public records, and the SPD appeal process Egan participated in, are all clear evidence of Egan's "public participation and petition."

The City claims Egan had not met his low burden of establishing that his claim was based on "public participation." The City has not provided any sort of proof or evidence to the contrary. Rather, the City tries to characterize the claim as being based on language within Egan's public disclosure request that threatened to assert the legal recourse afforded by the legislature upon continued non-production of public documents in violation of the PRA. CP 310, 317-318.

Candidly, Plaintiff admits within their own pleadings that "the City's declaratory judgment action is not based on Egan's

publicity efforts, it is based on the very apparent risk to the City of potential liability" perceived from Egan's threat to sue. CP 261, lines 4-6 (emphasis added). Within their own pleadings the City has thus agreed that the "bases" of the lawsuit are Egan's "communications preparatory to or in anticipation of the bringing of an action... entitled to the benefits of [Anti-SLAPP protections]." *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App 4th 777, at 784 (1996).[3]

Whether the lawsuit is "based on" Egan's media contacts calling the SPD to task, or – as the City now says – based on Egan's threat to sue the City, both activities fall within the realm of "public participation" protected by Anti-SLAPP law. The Anti-SLAPP statute does not encourage the distinction the City tries to draw. "This section applies to any claim, however characterized, that is based on an action involving public

[3] California Anti-SLAPP law is recognized to be substantial persuasive precedent to interpreting the application of Washington's newer Anti-SLAPP law, modeled after the California statute.

participation and petition." *See* RCW 4.24.525(2), (emphasis added).

The legislature's mandate against SLAPP suits is deliberately broad. Whether characterized as not a claim involving First Amendment speech rights exercised by Egan, but characterized as merely resolving an issue of documents submitted preparatory to litigation, the City cannot be seen to have filed the claim against Egan in a vacuum, and Egan has plainly established more likely than not that the City's claim is based on Egan's public participation or petition, "however characterized."

RCW 4.24.525 (2)(d) defines public participation as "any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern."

As noted above, Egan made a series of oral statements to the media. These statements repeatedly captured local and national media attention, and included requests for the Seattle

Police Chief to be fired or to step down. Egan posted the in-car videos of his clients on his own website, which included written analyses of the videos. CP 189-190.

The City chose to file this law suit against Egan merely days after Egan disclosed these in-car videos to the media, and were viewed by tens of thousands of people on YouTube.

Spurred by the DOJ findings released in December 2011 and the dismissive response made by Chief Diaz (CP 184), Egan called for the firing of Chief Diaz during a second interview with Right this Minute, a national news outlet. The interview was run on December 29, 2011. On January 4, 2012 the City filed suit against Egan. The appearance is that the City filed suit based on the media attention Egan brought to issues the SPD was facing.

1. The City has not responded to Egan's opening brief.

Egan has fulfilled his burden by demonstrating by a preponderance of evidence how his requests for the in-car

videos (and his notice to the City of the statutory consequences of refusal) constitute public participation and petition under the statute. Under RCW 4.24.525(4)(b), after Egan has met this burden, "the burden shifts to the [Plaintiff] to establish by clear and convincing evidence a probability of prevailing on the claim."

The City has put forward no proof or evidence that it can meet its own burden under RCW 42.56.540.

The City has tried a smoke and mirrors attempt to get the court to focus on RCW 9.73.030(1)(c) which has no application in this matter. The City certainly could have appealed Judge Lum's ruling dismissing its injunction request but it chose not to. The only issue in the appeal is whether or not Egan has met the burden under Anti-SLAPP and whether the City can meet its own burden under RCW 42.56.540.

RCW 42.56.540 allows a court to issue an injunction prohibiting the release of public records only if the court finds

> "that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government functions."

The statute is not drafted to permit agencies to seek "judicial guidance" as to whether or not to disclose records requested. RCW 42.56.540 has provisions that would allow the City get the "guidance" it needed without filing a lawsuit. Namely, "[a]n agency has the option of notifying persons named in the record...that the release of the record has been requested..." *Id.* Further, the PRA contemplates the Attorney General's opinion may be sought in the event of denial of a record without resort to litigation. RCW 42.56.530.[4]

The City did not, from Egan's request or to Egan's knowledge, contact any of the 36 subjects in the specific

[4] In a curious truism, if the City Attorney revisited his opinion and officially concluded that "provisions of" criminal liability "for wrongful disclosure" of in-car videos do not and "shall not apply to police...personnel" in the "performance of [their] official duties" (as 9.73.080(2) and 9.73.090(1) read together), or, advised that "litigation which arises" means actual and not potential litigation, the PRA provides a complete bar and "disclaimer of liability" to any "cause of action" for anyone who "acted with good faith in attempting to comply" with the PRA at the City Attorney's own direction (RCW 42.56.060). Thus, the PRA conundrum before the Court is entirely of the City's invention, and lawful release of public records is among the disregarded alternatives.

requests Egan made in December 2011 or January 2012. The City certainly did not argue that it did. The City certainly did not put such requests, or answers to such requests, into the record for *in camera* review.

2. The City can not and has not put forth any evidence or proof to meet its burden under RCW 42.56.540.

Releasing the in-car videos in question is clearly in the public interest because it highlights the need for greater transparency and accountability of the SPD.

Furthermore, the City offered no evidence to show how releasing the in-car videos would substantially and irreparably damage any person. The mere possibility of substantial and irreparable damage is not enough.

RCW 42.56.540 uses the word "and" between "public interest" and "would substantially and irreparably damage any person," meaning the court must find both factors to intervene. Quite apart from the quotes out of context taken by the City, the Supreme Court in *Soter* could not have been more clear: "We

therefore clarify that to impose the injunction contemplated by RCW 42.56.540, the trial court must find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital government interest. RCW 42.56.540." Emphasis original, *Soter v. Cowles Pub. Co.*, 174 P. 3d 60, at 82. (Washington Supreme Court 2007)

Under RCW 42.56.540, if the City cannot show actual and "substantial" harm to a person, the only other way the court would have authority to issue the injunction sought by the City would be if the City could show that the release of requested in-car videos would "substantially and irreparably damage vital governmental functions." RCW 42.56.540. Again, the City failed to put forth any facts that would demonstrate how this would occur. The City cannot claim that the release of the in-car videos would in some way hamper its ability to investigate any case. There is no vital governmental function that prevents the exposure of potentially damning in-car videos to the public.

The City cited *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 174 P.3d 60 (2007), CP 35, to argue that the government facing a public records request can seek a declaratory judgment from the court.

However, the facts of that case are starkly different and completely distinguishable from the present matter. The City's interpretation is extremely broad and not in the spirit of the Court's ruling. *See* Egan's opening brief, page 38-41 for the full analysis of the case.

In the present case, the City cited RCW 42.56.540 with the notion that the court has the power to enter a preliminary injunction in any matter where municipal liability is apparently at stake. But following the holding in *Soter*, the courts must make very specific findings to enter that injunction, to include substantial harm to persons or government functions and no public interest in the documents requested.

3. The City has Briefed Two New Arguments Not Argued or Briefed at the Trial Court which Should be Disregarded.

a. The City's Claim that the PRA Does Not Implicate Constitutional Rights Should Be Stricken As the City Failed to Argue This Issue at the Trial Court.

The City did not present this argument at the trial court and this Court should not consider it on appeal. The claim before this court is simply whether or not the burden under the Anti-SLAPP statute has been met. If so, the burden shifts then to the plaintiff.

RAP 2.5(a) states in pertinent part: The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. This Court should refuse to address this new argument by the City for not meeting these criteria.

Should the Court entertain the City's new argument, again the City is attempting to mislead this court as to the issue

at hand. The Trial Court ruled that once the City sought the preliminary injunction against Egan, in violation of CR 11, the City still failed to resolve the main issue which is found in RCW 42.56.540. Under RCW 42.56.540 there is a requirement on the City to establish (1) that a specific PRA exemption exists; (2) that non-disclosure would not be in the public interest; and (3) that disclosure would substantially and irreparably damage a person or vital governmental interest. CP 604.

The City did not present any evidence that non-disclosure of these particular videos would serve the public interest. CP 604.

The City has cited *Jones v. City of Yakima Police Dept.,* 2012 WL 1899228 (E.D. Wn. Sept. 10, 2012) for the proposition that the court must "carefully consider whether the moving party's conduct falls within the 'heartland' of First Amendment activities." The City fails to include what the facts

of that case were that led the court to dismiss the Anti-SLAPP suit. The facts of this case are completely distinguishable.

In the *Jones* case, Jones sued the Yakima police officers for defamation and other claims based on statements made in a certificate for probable cause statement as well as in affidavits for search warrants.

The defendants, police officers, filed the Anti-SLAPP suit attempting to extend RCW 4.24.525 to include those same statements in the certificates and affidavits. The Court found that those statements are not protected free speech and that the Anti-SLAPP statute does not apply to any action brought by the attorney general, criminal prosecuting attorney, or city attorney acting as a public prosecutor, to enforce laws aimed at public protection. RCW 4.24.525(3).

The Court further went on to conclude that law enforcement officers performing routine criminal investigative activities are not engaged in "action involving public

participation and petition." Therefore the Court denied the motion.

The City also cites *Fielder v. Sterling Park Homeowners Assoc.,* 2012 WL 6114839 (W.D. Wn. Dec. 10, 2012) for the proposition that Egan's threat to sue is not a constitutionally protected activity, i.e. not "public participation or petition" according to RCW 4.24.525. Again, this case is completely distinguishable from the current matter.

In the *Fielder* case, the Anti-SLAPP suit was brought against a homeowners association in connection with statements made at a meeting to discuss an in-home business. The Defendants attempted to stretch RCW 4.24.525 to mean that the board meetings of the homeowners association were in fact a governmental proceeding, public forum, or public concern. The Court found that it was not.

The City has cited the *Shero v. City of Grove,* 510 F. 3d 1196 (2007) in hopes of confusing the court of what the actual issue in this appeal is. *Shero* and the other cases the City cites

regarding the distinction between the Washington PRA and the First Amendment have nothing to do with Egan's Anti-SLAPP appeal. This is another new argument to this court that was not argued at the trial court level and should not be considered.

Should the court decide to consider this new argument, the *Shero* case holds that the City of Grove, Oklahoma, was not compelled under the First Amendment to provide Mr. Shero with the requested documents, but rather was compelled to do so under state law. Mr. Shero filed a federal law suit against the City of Grove after he already won the lawsuit in the state court on the records request violation.

The *Shero* case is completely different factually and procedurally from Egan's matter. Egan has not filed a federal claim against the city for non-production of documents. Egan has not filed a state suit of any kind for the City's perceived violations of the Washington PRA. Egan was sued by the City. The City, once the case scheduling order was issued, filed an

emergency injunction against Egan to expedite the argument date and attempt to gain a litigation advantage.

Again, Egan's actions were exactly what the statute contemplated under RCW 4.24.525. Numerous examples of this public participation and petition were outlined in Egan's opening brief pages 19-27 under section C. *See also* Egan's opening brief, Substantive Facts section at pages 2-8 which also outlines all of the media interviews and other related public participation and petition.

b. The City claims that its Declaratory Judgment Action/Emergency Injunction Action was Not Based on Protected Activity: the City's claim that it Was Based on an Actual, Present Dispute is Incorrect.

The City's second new argument to this court which was not argued at the trial court level is the notion that the first analysis the court must make is a review of the pleadings, declaration and other supporting documents to determine whether the gravamen of the underlying claim is based on protected activity. See City's Response Brief page 26.

This argument should be disregarded as it wasn't argued let alone briefed at the trial court level.

RAP 2.5(a) allows this court to refuse to address new arguments not heard at the trial court, with limited exceptions. This Court should refuse to address this new argument by the City; the City has not shown one of the exceptions apply.

Should the Court decide to review this new argument, the City again has cited cases that either have no application to Egan's Anti-SLAPP claim, or actually support Egan's claim before this court.

The holding in *Kajima Engineering and Construction Inc., v. City of Los Angeles,* 95 Cal. App 4th 921, 924, 116 Cal.Rptr 2d 187 (2002) is actually similar to Egan's issue in this matter. That court went on to hold that "No lawsuit is properly subject to a special motion to strike under [the Anti-SLAPP statute] unless its allegations arise from acts in furtherance of the right of petition or free speech." *Id.* at 924.

Egan has previously established that he was sued because of his public participation and petition of the City.

The City's contention that the trial court made a finding that an actual present conflict existed, the declaratory judgment could continue, and that the initial burden on the defendant in the SLAPP suit could not be met is simply not true.

Judge Lum ruled that once the City filed the emergency injunction under RCW 42.56.540, that required the City to prove:

> "(1) a specific PRA exemption exists; (2) that non-disclosure would be in the public interest; and (3) that disclosure would substantially and irreparably damage a person or vital governmental interest. Since all three parts need to be established for the City to prevail, the lawsuit might be dismissed as a procedural matter without ever reaching the real dispute…"

Judge Lum further went on to rule that the City had failed to present any evidence that non-disclosure of these particular videos would be in the public interest. Judge Lum ultimately found that the City's initial suit against Egan and the emergency injunction was "completely unnecessary," used to

try to obtain a litigation advantage, and violated CR 11. CP 604 lines 7-20.

The City still has failed to put forth any proof that disclosure of these specific 36 videos, of officers' potentially violating citizens civil rights and engaging in police misconduct, would not be in the public interest.

4. The City misreads and misinterprets RCW 9.73.090(1)(c).

RCW 9.73.090(1)(c) states that "[n]o sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded." (emphasis added).

As argued in Egan's opening brief, starting at page 42, the City interprets this statute broadly to mean that the videos shall not be released to the public until after at least three years have passed and there is no longer a risk that the SPD may be

sued for wrongdoing that may occurred, which the video evidence may show. However, the statute states "until final disposition of any criminal or civil litigation which arises." (emphasis added).[5]

Under the plain language of the statue, and coupled with the PRA's broad mandate for disclosure, the mere possibility of litigation somewhere, someday, within the statute of limitations is not enough to prevent the release of the video. The City pointed to no such pending litigation and argued that pending litigation was irrelevant.

a. Conversations recorded during routine traffic stops are not private and therefore the exemption contained in RCW 9.73.090(1)(c) does not apply.

The City again misstates the holding in *Lewis v. State Department of Licensing*, 157 Wn. 2d 446, 461, 139 P. 3d 1078 (2006). The Washington Supreme Court held that

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[5] The City has provided to this Court Appendix B which includes the policy SPD adheres to regarding the Records Retention Schedule (deletion after 3 years, when SOL has typically expired). There is no indication why the City has supplied this. It doesn't apply to the current case. Additionally, the City has supplied RCW 13.50.050 and RCW 13.50.100 in appendix C but never actually references these statutes in the brief. Accordingly this Court should disregard these statutes.

"conversations between traffic stop detainees and police officers are not private conversations." Therefore, RCW 9.73.090(1)(c) does not apply.

b. The City has Not Shown any Evidence that Release of These Videos Would Substantially and Irreparably Damage Persons or a Vital Governmental Function.

The City claims that SPD records custodians are at risk of being charged with a crime if they were to release the videos before three years has passed under RCW 9.73.080. City's Brief page 38.

RCW 9.73.080(2) states that "[a]ny person who knowingly alters, erases, or wrongfully discloses any recording in violation of 9.73.090(1)(c) is guilty of a gross misdemeanor." Accordingly, only "wrongfully" releasing the videos would be a crime.

As shown in Egan's opening brief pages 45-46, the City's contention that "any person" who discloses these videos could be criminally prosecuted is wrong under the law, where

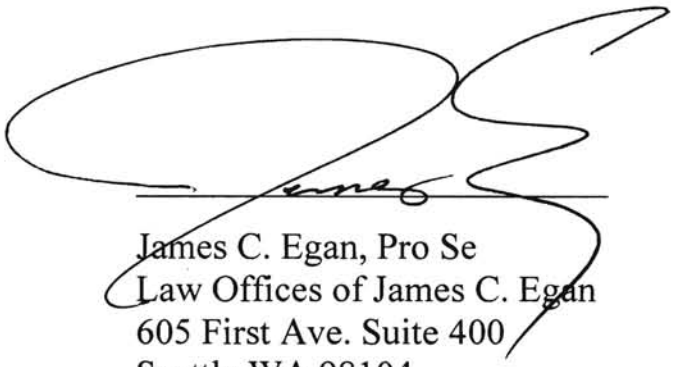
provisions of criminal liability for "wrongful disclosure" found in "RCW 9.73.080 shall not apply to police... personnel." See RCW 9.73.090(1), emphasis added.

II. CONCLUSION

The trial court's rejection of Egan's Anti-SLAPP claim should be reversed. The case should be remanded with instructions to the Trial Court to enter an order recognizing that Egan has prevailed under RCW 4.24.525 and to award attorney fees, a $10,000 sanction and costs under that statute. This Court should make an award of fees for Egan's successful appeal.

This court should disregard the City's request to overturn the trial court's decision. The City failed to meet its burden of presenting clear and convincing evidence of prevailing on its declaratory judgment action. The City still has failed to meet its burden.

DATED this 18th day of January, 2013



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