S. Ct. No. 96716-4

COA No. 35555-1

SUPREME COURT OF THE STATE OF WASHINGTON

TYE SHEATS,

Petitioner,

v.

CITY OF WENATCHEE, DOUGLAS COUNTY,
CITY OF WENATCHEE, CHELAN COUTNY,
THE WENATCHE WORLD NEWSPAPER,
Respondents.

ANSWER TO PETITION FOR REVIEW OF RESPONDENT CITY OF WENATCHEE

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I. COUNTER STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues raised by Tye Sheets, Petitioner, do not merit review under RAP 13.4(b). However, if review is accepted, the issues before this Court should include:

1. Did the court err by ruling that the City of Wenatchee waived its personal jurisdictional challenge?
2. Did the court err by ruling that the City of Wenatchee did not request attorney fees at the trial court level and, therefore, waived its right to recovery fee?

II. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

Review of the issue stated in the Petition for Review is improper under RAP 13.4(b)(4) because it is not an issue of substantial public interest that should be determined by the Supreme Court. First and foremost, the City agrees and accepts Petitioner's acknowledgement that the redacted

polygraph report must be disclosed in certain criminal cases. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

In its opinion, the Court of Appeals agreed with Officer Sheats that RCW 42.56.250(2) exempts dissemination of a pre-employment polygraph report. (Op. at 17). However, the exempt status of the record is not dispositive on the question whether dissemination should be enjoined.

Petitioner argues that the Court of Appeals improperly permits dissemination of an exempt record under the PRA for all law enforcement personnel upon request. However, the Court of Appeals merely followed RCW 42.56.540, which governs an action to enjoin examination of any specific public record. This statute provides that "the examination of any specific public record may be enjoined if, upon motion and affidavit by . . . a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, 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 governmental functions." (*Id.*) Petitioner acknowledged in his oral argument before the Douglas County Superior Court on August 14, 2017,

that he was seeking an injunction under this statute. (VP 15, lines 17-24 and 16, lines 1-4)

"RCW 42.56.540 does not constitute a substantive basis for a remedy." *Yakima v. Yakima Herald-Republic*, 170 Wash.2d 775, 806, 246 P.3d 768 (2011). The court explained that RCW 42.56.540 "is only a procedural statute granting those to whom it applies the right to seek an injunction against disclosure and granting the trial court the authority to enjoin the release of a specific record if it falls within a specific exemption found elsewhere in the act." *Id.* at 807-08, 246 P.3d 768. It explained further that "the 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." *Id.* at 808, 246 P.3d 768.

In *Service Employees International Union Local 925 v. Freedom Foundation*, Service Employees International Union Local 925 ("SEIU") filed a complaint for declaratory and injunctive relief against DSHS and Freedom Foundation requesting a permanent injunction under RCW 42.56.540 to prohibit DSHS from releasing names of childcare providers in Washington's "Family and Friends and Neighbors" program and their "state

contact" information. *Service Employees International Union Local 925 v. Freedom Foundation*, 197 Wn. App. 203, 210, 389 P.3d 641 (2016).

In *SEIU*, the court explained that "under this statute [RCW 42.56.540], the moving party must prove that (1) the record in question specifically pertains to that party, (2) an exemption applies, and (3) the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function." *Id.* The court explained further that in applying RCW 42.56.540, the trial court first determines whether a PRA exemption applies, and "only if an exemption applies does the trial court address whether an injunction is appropriate under the statutory requirements: whether disclosure would not be in the public interest and would substantially and irreparably damage a person or vital government functions." *Id.*

In such an action to enjoin production of documents, the party seeking to prevent production "has the burden to prove that the requested documents fall within the scope of an exemption." *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905 (2014).

RCW 42.56.540 and its interpreting caselaw illustrate that RCW 42.56.540 does not constitute a substantive basis for a remedy. A party may seek an injunction under the statute must prove that the record in question specifically pertains to that party, an exemption applies and that the disclosure would not be in the public interest and would substantially and irreparably harm that party or a vital government function.

Petitioner failed to carry this burden and failed to show that disclosure of the redacted polygraph would not be in the public interest and would substantially and irreparably harm him or a vital government function. The Court of Appeals explained why:

> Officer Sheats's redacted polygraph report contains numerous admissions of theft and dishonesty. Washington public policy favors hiring and retaining law abiding peace officers. This policy is legislatively recognized in RCW 43.101.095's requirement that peace officers submit a background check (including a check of criminal history), a psychological evaluation, and a polygraph test to determine their suitability for employment. The public has an interest in knowing if a current peace officer is a law abiding person.

(Op. at 17-18)

The Court of Appeals properly interpreted RCW 42.56.540 in response to the Petitioner's action to enjoin the release of his redacted polygraph. This Petition for Review, therefore, does not involve an issue

of substantial public interest that should be determined by the Supreme Court. Consequently, the Supreme Court should deny review.

III. ARGUMENT WHY THE COUNTERSTATEMENT OF THE ISSUES SHOULD BE INCLUDED IN THIS COURT'S CONSIDERATION IF THE COURT GRANTS THE PETITION FOR REVIEW

Review for the counterstatement of the issues is proper because the Court of Appeals decision is in conflict with a published decision of the Court of Appeals and it involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(2) and (4). The Court of Appeals decided that the City waived its personal jurisdictional challenge. (Op. at 13) It explained that the City's filing, "which occurred only two business days prior to the hearing on the merits, did not afford Officer Sheats sufficient opportunity to object and to respond to the issue." (Op. at 13) However, the City's filing was timely pursuant to Douglas County Superior Court Local Rule 7, which provides that "responding documents and briefs must be filed with the Clerk and copies served on all parties and the Judge of Douglas County, no later than noon (2) court days prior to the hearing." The Court of Appeals acknowledged that the City met this requirement and filed its jurisdictional challenge two business days prior to the hearing. (Op. at 13)

As a side note, the Petitioner's original motion was filed on July 26, 2017, and the City's Memorandum of Law in Opposition to Plaintiff's Motion, wherein it raised its personal jurisdiction defense, was filed August 10, 2017, only 15 days after Plaintiff's Motion was filed. Hardly enough time for the City to lose its defense of personal jurisdiction via waiver.

The Court of Appeals' decision that the City waived its personal jurisdictional challenge is inconsistent with *Castellon v. Rodriguez*, 4 Wn. App.2d 8, 418 P.3d 804 (2018), a published decision of the Court of Appeals. In the *Castellon* decision, this same division of the Court of Appeals held that "under the superior court civil rules, a defendant will waive the defense of personal jurisdiction if it is not raised in a responsive motion or pleading." *Castellon v. Rodriguez*, 4 Wn. App.2d 8, 15, 418 P.3d 804.

The *Castellon* court cited to CR 12(h) in its decision, which provides that a defense of lack of jurisdiction over the person "is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course." *Id.*, CR 12(h). The Court of Appeals acknowledged in

its decision that the City did assert the defense in a responsive pleading. (Op. at 12)

The Court of Appeals cites no basis for its decision that the City waived its personal jurisdictional challenge except for the fact that the Petitioner did not have sufficient opportunity to object and to respond to the issue. This ruling is in conflict with *Castellon v. Rodriguez*, 4 Wn. App.2d 8, 418 P.3d 804 (2018) pursuant to RAP 13.4(b)(2). Furthermore, the jurisdictional issue is an issue of substantial public interest that should be determined by this Court.

As to the other issue outlined in the Counterstatement of the Issues, review is proper because the Court of Appeals decision is in conflict with a published decision of the Court of Appeals. RAP 13.4(b)(2). The Court of Appeals decided that the City waived its right to recover fees because it did not request attorney fees at the trial court level. (Op. at 19)

The Court of Appeals' decision that the City waived its right to recover fees is inconsistent with *Kathryn Learner Family Trust v. Wilson*, 183 Wn. App. 494, 333 P.3d 552 (2014), a published decision of the Court of Appeals. In the *Kathryn Learner* decision, this same division of the Court of Appeals held that "common law requires that a party seeking attorney

fees must bring himself within the operation of some provision to be entitled to a judgment against his opponent." *Kathryn Learner Family Trust v. Wilson*, 183 Wn. App. 494, 499, 333 P.3d 552 (2014). It held that "a complaint for relief should contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled." *Id.* It held that "a pleading is insufficient when it does not give the opposing party fair notice of a claim and the ground on which it rests." *Id.*

However, the City's Memorandum of Law in Opposition to Plaintiff's Motion filed August 10, 2017, provides clearly on page 8, § 15-17 that "the City reserves it[s] right to seek attorney's fees against Plaintiff under *Doyle v. Lee*, 166 Wn. App. 397 (2012)." This was a short and plain statement of the claim showing that the City was entitled to relief coupled with a demand for judgment for the relief to which the City deemed itself entitled consistent with *Kathryn Learner Family Trust v. Wilson*, 183 Wn. App. 494, 499, 333 P.3d 552 (2014). The Court of Appeals' decision that the City waived its right to recover attorney fees because it did not request attorney fees at the trial court level is therefore in conflict with *Kathryn*

Learner Family Trust v. Wilson and review of this issue is proper under RAP 13.4(b)(2).

IV. CONCLUSION

Petitioner sought to enjoin disclosure of his redacted polygraph pursuant to RCW 42.56.540. The Court of Appeals properly made a determination whether the examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions pursuant to this statute in accordance with that statute.

This was a distinct action to enjoin release of a specific public record and does not rise to an issue of substantial public interest that should be determined by the Supreme Court. Review should be denied as to this issue.

However, if this Court grants the Petition for Review, then the City of Wenatchee is seeking review of the Court of Appeals' decisions that the City waived its personal jurisdictional challenge and its right to recover attorney fees. These issues are in conflict with published decisions from the Court of Appeals and involve an issue of substantial public interest that should be determined by Supreme Court.

Respectfully submitted this 25th day of February, 2019.

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