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NO. 63876-9

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION I

Russell L. Phillips, *Appellant/Cross Respondent*

v.

Valley Communications, *Respondent/Cross Appellant*

**REPLY BRIEF OF APPELLANT/CROSS RESPONDENT,
RUSSELL L. PHILLIPS**

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COURT OF APPEALS
DIVISION I
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APPELLANT'S REPLY BRIEF

I. PUBLIC POLICY, EXPRESSED IN THE PRA'S MANDATE FOR PUBLIC ACCESS TO GOVERNMENT RECORDS, FAVORS RUSSELL PHILLIPS BEING GRANTED ACCESS TO HIS EMPLOYER'S PERSONNEL FILES.

Russell Phillips was once employed by Valley Com. He had a disagreement with a superior that caused him trouble. Eventually, he was placed on administrative leave, evaluated by a psychiatrist, and then terminated. Russell's first PRA request was for documents in his own personnel file that he needed to defend himself in termination proceedings. Valley Com failed to comply with his request, later arguing that it did not believe the request was made pursuant to the PRA because the request made no mention of the PRA.

After his termination, Russell made a number of records requests to investigate the events leading to his discharge. He hoped the records as evidence of both his and his employer's actions prior to his dismissal. As a result of Valley Com's first failure to disclose documents, Russell clearly identified all subsequent requests as be made pursuant to the PRA.¹

¹ This habit will also be used against him by a clever government lawyer. See *Appellant's Reply Brief*, Section IV.

Again, the Petitioner stresses the purpose of the PRA, the demand for liberal disclosure of public records, and the strict construction of exemptions to such disclosure. The law states the following:

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.

RCW 42.56.550(3). Also, the Washington State Supreme Court has held the following:

The stated purpose of the [PRA] is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the [PRA], government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means or acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."

Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II) 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (internal citations omitted).

The statements above, however grand and noble in sentiment, would mean little if the PRA's mandate could be easily circumvented by a few well-paid government attorneys with their armies of assistants and

superior knowledge of the procedural intricacies compared to a pro se plaintiff.

II. RESPONDENT VIOLATED THE PRA IN ITS RESPONSES TO APPELLANT'S REQUESTS MADE AFTER FINAL JUDGMENT IN THE FIRST CIVIL ACTION.

On November 2, 2009, the trial court issued its "Findings of Fact or Mixed Findings of Fact and Conclusions of Law", Judge White found:

"The Court issued a final ruling with regard to Mr. Phillips's public records requests in Cause No. 08-2-04291-0 KNT on May 12, 2008, after reviewing the records withheld or redacted by Valley Com in its responses in camera. Mr. Phillips was notified this was a final order and he did not appeal the Court's final decision."

The appeal before the court regards sought judicial review of Valley Com's responses to PRA requests that Mr. Phillips made after the May 12, 2008. Although Mr. Phillips has also argued that a majority of these records are responsive to his 2006-2007 PRA requests, Valley Com must still meet the requirements for agency responses to the **new** PRA requests.

None of Valley Com's response letters (1) adequately describe individually the withheld records by stating the type of record withheld, date, number of pages, and author/recipient, or (2) explain which individual exemption applied to which individual record rather than generally asserting the controversy and deliberative process exemptions as

to all withheld documents. (CP 22, 35 – 41, 46 – 49, 52 – 53, 56 – 58, 68 – 82, 86 – 87, 91, 98 – 109, 111)

III. SUPERIOR COURT ERRED BY DISMISSING APPELLANT'S PETITION FOR REVIEW (MOTION FOR ORDER TO SHOW CAUSE).

The Superior Court mistakenly believed that final judgment in the first civil action occurred in November of 2008 based on pleadings from Valley Com stating the following:

“The Court's final order occurred on 11/10/08. The time for any appeal would have run after 12/10/08. Thirty days beyond that would have been 1/09/09. As explained below, all documents responsive to Phillips's 8/25/08 request were made available to him well within the estimated timeframe, the vast majority of them (if not all) being promptly provided to Phillips on 11/10/08, the same date as the Court's final order.”

(Responses to Show Cause Motion and Brief on Penalties and Motion to Dismiss, pg. 41, ll. 22 - 25; pg. 42, ll. 1 - 2) (CP 564-565). However, as soon as the Superior Court granted Valley Com's motion for sanctions, it sought the entry of a proposed order on September 14, 2009, stating the following:

“The Court issued a final ruling with regard to Mr. Phillips' public records requests in Cause No. 08-2-04291-0 KNT on May 12, 2008, after reviewing the records withheld or redacted by Valley Com in its responses in camera.”

The “Proposed Order” quoted above was the first time that Valley Com took the position that May 12, 2008, was the date of final judgment in the first civil action.

“No reasonable attorney would file a duplicate lawsuit covering the same issues previously ruled upon, to include claims or arguments Mr. Phillips could have pursued in his initial Show Cause Motion, King County Case No. 08-2-04291-0 KNT.”

Valley Com’s pleadings led the Superior Court to believe that Mr. Phillips’s June 20, 2008; July 30, 2008; August 2, 2008; August 6, 2008; August 24, 2008; and September 2, 2008 PRA requests had been addressed in the first civil action.

IV. RES JUDICATA DOES NOT APPLY TO THE CURRENT CASE AND THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN ON A PRA ACTION UNTIL THE AGENCY FULFILLS ITS RESPONSE REQUIREMENTS.

Res judicata is a doctrine that precludes the relitigation of the same claim or cause of action. In order to invoke the doctrine, Valley Com needs to persuade the Court that Mr. Phillips is seeking to relitigate the same claim or cause of action, and should not be allowed to do so. Valley Com fails to meet this burden.

Litigation addressing Valley Com's responses to PRA requests made by Mr. Phillips after the May 18, 2008, final judgment involves different *claims* and *causes of action* than were addressed in the first civil action.

Determining whether the same claim for relief is involved in both cases has often been difficult for the courts. The Washington court has quoted with approval a formulation stating the following criteria: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is [or presumably would be] presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Rains v. State*, 100 Wn. 2d 660, 674 P.2d 165 (1983).

Valley Com has violated the PRA anew with each failure to respond to public records requests as described by law. The principal requirement is whether the "same transactional nucleus of facts" (criteria number 4, above), is involved in both causes of action. Each separate request made by Mr. Phillips creates a new transactional nucleus of facts. Therefore, each violation of the PRA by Valley Com in its responses give rise to a new cause of action.

Washington courts have held that the doctrine is inapplicable to certain types of claims. These claims are usually repetitive in nature. Thus, each set of events creates a new cause of action. In an agreement calling for successive performances, but providing for acceleration upon default of performance, the acceleration provision is generally optional with the promissory and, if not exercised, does not affect the right to bring successive actions as successive performances become due. *Rasmussen v. Chase*, 44 Wn. App. 71, 720 P.2d 860 (1986) (successive actions for rent not precluded). Also, Washington courts have permitted successive actions for continuing nuisance on facts almost identical with the earlier cases which recognized the permanent nuisance notion. *Riblet v. Ideal Cement Co.*, 54 Wn. 2d 779, 345 P.2d 173 (1959); See also *Kenworth Sales Co. v. Salantino*, 154 Wn. 236, 281 P. 996 (1929) (installment sales agreement; action may be brought on installments as they fall due). Similarly, each record request made by Mr. Phillips gave Valley Com the opportunity to respond in accordance to the PRA or violate it and create a new cause of action.

Mr. Phillips brought allegations before the Superior Court that Valley Com violated the PRA when it failed to respond to his post-May 18, 2008, PRA requests within five business days. The issue of whether Valley Com's responses were timely with the meaning of RCW 42.56.520

is a separate matter, not governed by res judicata or by collateral estoppel, yet the Superior Court failed to address it.

Also, whether Valley Com met the statutory requirements of the PRA in regarding the explanations made for its withholdings in its responses to requests made after the May 18, 2008, final judgment is not an issue subject to res judicata.

The one-year statute of limitations lacks merit for a number of reasons. Firstly, Mr. Phillips sought judicial review of Valley Com's responses to PRA requests that he made after the May 18, 2008, final judgment in the first action. Secondly, Valley Com's response letters to Mr. Phillips's PRA requests have never been sufficient to constitute a proper claim of exemption and trigger the one-year statute of limitations under RCW 42.56.550(6). Under the Washington Supreme Court's holding in *Rental Housing Association v. City of Des Moines*, 165 Wn.2d. 525 (2009), Mr. Phillips could make claims for any and all of Valley Com's withholding because none have been legally sufficient.

The PRA requires an agency to provide a statement of the specific exemption and a brief explanation of the reasons for withholding a record (in whole or in part) as part of its response to a request. RCW 42.56.210(3) Failure to provide a statement of the specific exemption and a brief explanation of the reasons for withholding a record (in whole or in

part) as part of its response to a request makes it impossible for the requestor to determine if the claimed redaction or exemption is valid. RCW 42.56.210(1); See *Citizens for Fair Share v. State Dep't of Corr.*, 117 Wn.App. 411, 431, 72 P.3d 206 (2003) (requiring agency to cite statute it claims exempts record from disclosure).

An agency's response to a PRA request must meet certain requirements if the agency seeks to withhold the disclosure of any requested documents. The information detailing the record being withheld and the reason for the withholding are statutory, found in RCW 42.56.210(3), and were detailed in the Washington Supreme Court holding of *Progressive Animal Welfare Soc'y v. Univ. of Wash. (PAWS II)*, 125 wn.2d 243, 884 P.2d 592 (1994). Contrary to Valley Com's argument that the provisions of RCW 42.56.210(3) were not clear until the holding in *Rental Housing* was issued in 2009, the holding in *Rental Housing* addresses the issue of when the statute of limitations begins on an agency's withholding. The required elements of the description of the withholding has been settled law for many years.

Valley Com has not stated a proper claim of exemption to trigger RCW 42.56.550(6), the one-year statute of limitations on PRA suits, nor will it start until Valley Com provides Mr. Phillips with said privilege logs. Valley Com's response letters were insufficient to state a claim of

exemption. The state Supreme Court has stressed the need for all local governments to provide a clear exemption log providing the following information: (1) a description of the document that the local government is claiming to be exempt; (2) the date of the document; (3) the author or sender of the document; (4) the recipient(s) of the document; (5) the number of pages claimed as exempt; and (6) the specific exemption relied upon, with an explanation of how the exemption applies to the withheld document. See *PAWS II* at 271 n.18.

Valley Com argues that it has fully complied with the PRA, even though it continuously refused to disclose non-exempt, responsive records by simply claiming the record is already “in your possession”. The refusal to release records claiming that the records are already in your possession eliminates the need for the agency to justify the withholding with a description of the record and a citation to the exemption being applied. The requestor must trust that the agency is being truthful because this claim cannot be verified.

The majority of the documents the Superior Court was asked to review were not known to exist until December 26, 2008, when Valley Com released them in response to Mr. Phillips’s November 17, 2008 letter. The response letter, dated December 22, 2008, but not received until December 26, 2008, states that, “The majority of the documents

specified were non-responsive to your prior requests, but because you now appear to be requesting them, they are being provided to you.” While Valley Com’s claim that none of these records were responsive to his previous requests is incorrect, Valley Com is stipulating to the fact that it did not consider these records to be responsive to Mr. Phillips’s requests, therefore, they had never provided them to Mr. Phillips. Res judicata could not bar records that were not part of the first hearing:

In addition, the court shall review each claimed exemption asserted by Defendant through an in camera review of the relevant documents. Documents shall be bated stamped so that a uniform numbering system can be utilized which will facilitate review and keep the record clear for appellate purposes.

(Emphasis added) (CP 299). The Superior Court issued its final judgment on exemptions on May 12, 2008. Valley Com’s Records Custodian Liz Henneke stated in her June 9, 2009, declaration:

I retained copies of the responses that were made and the documents that were released...**I did not keep a master list of the documents that were provided to Russ Phillips. However, I know which documents had been provided to him because I kept binders containing copies of all the documents that he had reviewed and copies of all the records which he had received copies of.** I also maintained copies of any withheld exempt documents, a few documents that had been reviewed but which turned out to be non-responsive to his requests or were duplicates of ones that were released, and originals of redacted copies or duplicate masters.

(CP 612, 616) (Emphasis added)

Nowhere in Valley Com's pleadings is the nature of this "master list" explained. Also, Valley Com never explains that Ms. Henneke created this list in March of 2009, just prior to Mr. Phillips's beginning the second civil action.

03/02/2009 Eileen Lawrence - Call to discuss need for assistance in preparing and reviewing index of all document requests and responses to date.

03/06/2009 EML Review and respond to e-mails from client. Coordinate review of records for master index. Begin reviewing documents for master index of requested and disclosed documents.

03/09/2009 EML Meeting at Valley Com to discuss approach to Mr. Phillips threats of repeat litigation. Revise draft letter to Mr. Phillips, review communications from client, review documents to include in a master list of public records requests and responses. (6.5 hours)

03/10/2009 EML Begin preparing index of notebooks of documents provided in various disclosure requests, meeting with Liz Henneke to create master list of disclosed documents, review documents and letters accompanying disclosures and create index of the same. (7.2 hours)

03/16/2009 EML Call from Liz Henneke, review and revise index of documents.

03/17/2009 EML Complete index, call to client to discuss the same.

Mr. Phillips made a PRA request on August 6, 2008, seeking the information Ms. Henneke claims she had maintained:

“2. Valley Com has denied me access to inspect any record it claims to know I am in possession of. Therefore, I am asking for [1] Valley Com’s index detailing which records I have been provided a copy of for each of my public disclosure requests as well as [2] the index detailing which records from the Auburn Police department inspection time that I did not receive copies of.”

(CP 90). Valley Com responded: “Item #2. No such indexes exist except the one provided to you on August 1, 2008. You are in possession of that index.” (CP 91) The August 1, 2008 index is only responsive to the June 20, 2008 PRA requests, none of the previous requests.

V. APPELLANT’S NOTICE OF APPEAL OF THE FINAL JUDGMENT IN SUPERIOR COURT BRINGS UP FOR REVIEW ANY SUBSEQUENT ORDER REGARDING SANCTION OR ATTORNEY’S FEES.

Under RAP 2.4(g), “An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.” The proper procedure now is to appeal the original judgment, without waiting for an award of attorney fees. See *Cox v. General Motors Corp.*, 64 Wn.App. 823, 827 P.2d 1052 (1992)

RAP 2.4(b) is inapplicable to the appeal before the Court. Mr. Phillips’s Notice for Appeal filed on July 19, 2009, sought review of the Superior Court’s June 19, 2009 decision to dismiss the Petition for Review (Order to Show Cause) he filed against Valley Com on April 17, 2009.

The notice exception found in RAP 2.4(b) regards circumstances where an appellant sought review of Superior Court decisions not included in the notice of appeal and made prior to the decision contained in the notice. Those are not the circumstances of the appeal before the Court. Mr. Phillips seeks review of attorney's fees granted **after** the Superior Court's final judgment. Therefore, he is in agreement with Valley Com to the extent RAP 2.4(b) gives no exception for appellate court to review awards of attorney's fee not included in the appellant's Notice of Appeal.

It appears that Valley Com has confused the situation where an appellant desires review of the final judgment on appeal when his Notice of Appeal only includes the trial court's order on sanctions or attorney's fees, the focus of RAP 2.4(b), with a situation where an appellant desires review of the decision on sanction attorney's fees when his Notice for Appeal includes only the final judgment, as is the case for Mr. Phillips. In the first situation, the appellant would be denied review of the unnoticed final judgment by RAP 2.4(b), which, in the part not quoted in Valley Com's Response Brief states the following:

A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

This sentence was added as part of an amendment to RAP 2.4(b) made in order to limit the exception's wide application. Under the prior rules, a notice of appeal from sanctions imposed pursuant to Civil Rule 11 or RCW 4.84.105 also brought up for review the underlying judgment if the sanctions were based on an allegedly frivolous pleading. See, e.g., *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992), (holding that the appeal of an "amended judgment" specifying the amount of the attorney fees granted in the original judgment brought up for review the original judgment.)

In addition to the scope of review described in RAP 2.4(g), the Court should review the Superior Court's decisions on attorney's fees and sanctions as a matter of fundamental justice. A major tenet of the PRA is to allow members of public access to the courts for review of government actions. This tenet would be of little use if experienced and well-paid government attorneys with their armies of assistants and knowledge of intricacies of the rules of procedure could so easily. RAP 2.5(a) states exceptions to the general notice rule for certain classes of issues, believed so important, that they can also be raised for the first time on review, including: (1) the application of a statute or court rule; (2) a party's standing to bring an action or claim; (3) matters affecting juveniles; and (4) matters of "fundamental justice."

“Washington courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires.” *State v. Card*, 48 Wn. App. 781, 784, 741 P.2d 65 (1987). Appellate courts have considered issues of “fundamental justice,” even when raised for the first time on review. *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

Valley Com’s desire for an injunction directly challenges the Washington Supreme Court’s ruling in *Progressive Animal Welfare Society v. University of Washington (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1994). Issuing an injunction against Mr. Phillips would be in direct conflict to the legislative intent of the Public Records Act.

Valley Com is seeking a protective order that will grant them the ability to ignore the requirements of the PRA when it has not attempted to seek an injunction blocking Mr. Phillips’s access to specific records, as is the relief described in RCW 42.56.540. The Court should not grant such extraordinary relief when Valley Com has not sought to utilize the protections that already exist in the PRA. Valley Com is asking the Court to grant it the ability to ignore any request that is “clearly seeking records that are exempt under attorney-client privilege or work product” without having to provide justification for any claimed exemptions. Valley Com wants the Court to allow it to withhold any and all public records that it so

chooses to label as exempt pursuant to the attorney-client privilege or work product exemptions, and then make it impossible for Mr. Phillips to challenge Valley Com's withholdings.

CONCLUSION

For all the above arguments, Mr. Phillips asks this Court to reverse the Superior Court's rulings on the Dismissal of Mr. Phillips's Motion to Show Cause, Valley Com's Motion for Sanctions, and Valley Com's Motion for a Preliminary Injunction. Mr. Phillips also asks the Court to remand the cause to the Superior Court for findings on Valley Com's violations of the Public Records Act.

Dated this 25th day of April, 2010

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CONCLUSION

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Dated this 25th day of April, 2010



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CERTIFICATE OF SERVICE

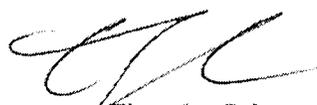
The undersigned hereby certifies under penalty of perjury of the laws of the state of Washington that I am now an at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above – entitled action, and I am competent to be a witness herein.

That on the 25th day of April, 2010. I caused to be served to the following: *Appellant's Reply Brief* and *Certificate of Service* upon the following individual in the manner indicated below:

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Dated this 25th day of April, 2010



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