

NO. 64217-1-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 1

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CHAD A. PIERCE,

Appellant,

v.

THE CITY OF DES MOINES,

Respondent.

2010 JUN 22 AM 10:32

FILED  
COURT OF APPEALS DIVISION 1  
STATE OF WASHINGTON




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BRIEF OF RESPONDENT CITY OF DES MOINES

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## I. INTRODUCTION

This case involves an individual who is seeking monetary damages under the Public Records Act despite having received all non-exempt records months before filing court action, not having properly commenced his lawsuit, and not having properly served the City. Pursuant to the holdings in Daines vs. Spokane County, 111 Wn. App. 342, 44 P.3<sup>rd</sup> 909 (2002) and Evergreen Freedom Foundation vs. Locke, 127 Wn. App. 243, 110 P.3<sup>rd</sup> 858 (2005), Judge Brian Gain dismissed Appellant's case due to his failure to state a claim upon which relief could be granted. This appeal challenges the trial court's dismissal and raises other issues, some for the first time, not ruled upon by the trial court.

## II. ISSUES PRESENTED

1. Whether the trial court properly dismissed Appellant's case for failure to state a claim upon which relief can be granted (CR 12(b)(6)) when all of records subject to disclosure were provided prior to the commencement of any court action?
2. Whether the trial court properly found that a tort claim for damages is not a condition precedent to seeking redress under the Public Records Act and is not considered the commencement of a lawsuit?
3. Whether the City of Des Moines is a proper party to this action when no Summons and Complaint was ever filed to commence a lawsuit and the City was never served as explicitly required by RCW 4.28.080(2)?

4. Whether this court can consider issues raised for the first time on Appeal?

### **III. STATEMENT OF CASE**

Appellant Chad Pierce made multiple requests for records from the City of Des Moines Police Department. CP 1-7, 36-37, 77-78.<sup>1</sup> By February 25, 2009 Appellant was provided all of the non-exempt records he requested and an exemption log for the records withheld. CP 4, 36-37. Despite this undisputed fact, Appellant filed a Motion to Show Cause in King County Superior Court alleging he was owed money damages resulting from Des Moines' failure to timely respond to his request. CP 1-7, CP 44-45. Appellant did not file a Summons and Complaint<sup>2</sup> to commence his action and did not serve the City as required under RCW 4.28.080(2). CP 77-78. Appellant's Motion did not challenge the City's exemption of certain

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<sup>1</sup> Appellant's designation of Clerk's Papers includes numerous documents never properly submitted into the record. Several of the documents were filed after the trial court's dismissal of the case. The City objects to this court's reliance upon any items not properly admitted or submitted into the record. The City submits the only documents properly submitted from the record below for this court's review of the issues are as follows:

CP 1-7 Complaint  
CP 36-37 Declaration of Chad Pierce  
CP 56-57 Affidavit of Plaintiff in Support  
CP 67-68 City's Limited Notice of Appearance and Objections  
CP 77-78 Declaration of Susan Mahoney

CP 111, 146 Order on Civil Motion

<sup>2</sup> The King County Superior Court treated the Motion to Show Cause as a Complaint and assigned the Motion a cause number. No Summons or proof of original service of process upon the City was filed.

records from disclosure such as the child victim's name, CPS records, or the child victim's medical sexual assault exam records. CP 1-7. A proper exemption log was provided. CP 77-78.

On June 30, 2009, the City received notice from King County Superior Court to appear for a Show Cause Hearing on July 24, 2007. CP 40-41, 77-78. The City entered a Limited Notice of Appearance objecting to the Court's exercise of jurisdiction over the City, to the insufficiency of the process and the service of process, and to Pierce's failure to state a claim upon which relief may be granted. CP 67-68.

A hearing was held on July 24, 2009 during which the City again raised the objections asserted in its Limited Notice of Appearance and requested dismissal of the action. The trial court requested additional briefing. Appellant has not provided a transcript of these proceedings. On August 17, 2009, the trial court properly dismissed Appellant's action finding that Mr. Pierce could not be a "prevailing party" under the Public Records Act, nor could his Motion "reasonably be regarded as necessary" to obtain records since the records at issue had been provided prior to the filing of any legal action. The Court did not rule on the issues of jurisdiction or service. CP 111, 146.

#### IV. ARGUMENT

A. **THE TRIAL COURT PROPERLY DISMISSED APPELLANT'S ACTION BECAUSE HE FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.**

The trial court properly ruled that Appellant failed to state a claim upon which relief could be granted because given the undisputed facts of this case, Appellant could not be considered a “prevailing party” nor was his Motion one that could be “reasonably regarded as necessary” to obtain the records he requested since the records were disclosed prior to the filing of any legal action. Appellant’s argument otherwise is contrary to well-settled case law and without merit.

Review of a trial court’s decision to dismiss a case due to a party’s failure to state a claim upon which relief could be granted is reviewed de novo. Hoffer v. State, 110 Wn.2d 415, 422, 755 P.2d 781 (1988); Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 717, 189 P.3d 168 (2008). Dismissal is warranted only if the court concludes, beyond a reasonable doubt, that the plaintiff cannot prove any set of facts which would justify recovery. Rodriguez, 144 Wn. App at 717. In this case, despite the limited record provided for review, it is clear the trial court properly dismissed Appellant’s case.

RCW 42.56.550 provides for the judicial review of agency actions for persons who are denied access to public records. RCW

42.56.550(4) further provides that “[a]ny person who *prevails* against an agency in any action in the courts seeking the right to inspect or copy any public record . . . “ (*emphasis added*), is entitled to recoup the costs in connection with such legal action and penalties. A person prevails under the Public Records Act if prosecution of the action could reasonably be regarded as necessary to obtain the documents sought and the action caused the agency’s release of the documents. Violante v. King County Fire Dept., 114 Wn. App. 565, 568-69, 59 P.3d 109 (2002); *see also*, Spokane Research v. City of Spokane, 155 Wn.2d 89, 117 P.3d 1117 (2005); Daines v. Spokane County, 111 Wn. App. 342, 347, 44 P.3d 909 (2002) (no remedy under the public records act for person seeking to compel production of records the agency provided to the plaintiff prior to the lawsuit).

Appellant admits that he received all non-exempt records he requested over three months prior to filing his Motion for Show Cause in June of 2009.<sup>3</sup> CP 1-7, 36-37, 77-78. Since Appellant had already received the records, the filing of a court action was not necessary and did not cause the release of the records. Accordingly, he is not entitled to monetary damages under the Public Records Act. Title 42.56 RCW;

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<sup>3</sup> The City still maintains that the proper method to institute an action under the PRA is via Summons and Complaint as required by CR 1,3 and 4.

Daines, 111 Wn. App. at 347. The trial court's proper dismissal of this action should be affirmed.

**B. THE TRIAL COURT LACKED JURISDICTION OVER THE CITY BECAUSE THE MATTER WAS NOT PROPERLY COMMENCED AND THE CITY WAS NEVER PROPERLY SERVED.**

Washington's Civil Rules govern the procedures to commence and properly serve a civil lawsuit. Failure to comply with these requirements is grounds for dismissal. More importantly, the court cannot invoke its jurisdiction unless a lawsuit is properly commenced and all parties are properly served.

Washington's Civil Rule (CR) 1 governs the procedures in the superior court for "all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81."<sup>4</sup> CR 3 regarding the Commencement of an Action provides in pertinent part as follows:

- (a) Methods. Except as provided in rule 4.1, a civil action is commenced by service of a copy of a

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<sup>4</sup> CR 81 provides:

(a) **To What Proceedings Applicable.** Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. . .

(b) **Conflicting Statutes and Rules.** Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict.

RCW 42.56.550 does not set forth a "special proceeding". It does allow for a party, once an action has been commenced, to request a Show Cause Hearing to compel the production of disputed records and consider other issues on the merit without waiting for a trial.

summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint. . . .

(c) Obtaining Jurisdiction. (Reserved 4.28.020.)

CR 4 sets forth the requirements for a Summons and the

Service of Process:

(c) By Whom Served. Service of summons and process, except when service is by publication, shall be by the sheriff of the county wherein the service is made, or by his deputy, or by any person over 18 years of age who is competent to be a witness in the action, other than a party. .

(d) Service.

(1) Of Summons and Complaint. The summons and complaint shall be served together.

(2) Personal in State. Personal service of summons and other process shall be as provided in RCW 4.28.080-.090 . . .

Service upon a municipality is governed by RCW 4.28.080 and provides as follows:

Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows . . .

(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

Failure to comply with these procedures or to obtain proper service is grounds for dismissal. Even with actual knowledge of a pending

litigation proceeding, a party who has not been properly served is not subject to the jurisdiction of the court and has no duty to intervene in the action. Meadowdale Nbh'd Comm. v. Edmonds, 27 Wn. App. 261, 268, 616 P.2d 1257. Strict compliance is required with statutes naming particular persons upon whom service of process is to be made in actions against municipalities. Meadowdale, 27 Wn. App. At 265 *citing* 17 E. McQuillan, Municipal Corporations § 49.32 (3d rev. ed. 1968).

Appellant never filed a Summons and Complaint to properly commence his lawsuit and failed to properly serve the City of Des Moines as required by the Civil Rules and RCW 4.28.080(2). CP 1-7; 56-57, 77-78. Failure to properly file a lawsuit or serve a party is grounds for dismissal and provides an alternative basis under the facts of this case to affirm the trial court's dismissal.

**C. THE TRIAL COURT PROPERLY RULED THAT A TORT CLAIM FOR DAMAGES IS NOT REQUIRED UNDER THE PRA AND DOES NOT COMMENCE LITIGATION**

The trial court properly concluded that a claim for damages form was not required before seeking redress under chapter 42.56 RCW (the Public Records Act) and did not commence litigation. Appellant's assertion that his filing of such a claim with the City of Des Moines should

be considered the commencement of legal action triggering the sanction provisions under the Public Records Act is without merit.<sup>5</sup>

Chapter 4.96 RCW governs procedures for the filing of a tort claim involving governmental agencies. These statutory requirements apply to tort claims only and are not required before a party can invoke the remedies available under the Public Records Act. Wilson v. City of Seattle, 122 Wn.2d 814, 823, 863 P.2d 1336 (1993); Matia v. City of Bellingham, 144 Wn. App. 445 (2008); Chapter 42.56 RCW.

Moreover, the filing of a tort claim for damages form with a governmental entity does not commence a lawsuit. The purpose of the claims filing statute is to put a governmental entity on notice of a potential claim and to require a sixty (60) day waiting period prior to the commencement of a lawsuit so that the entity can investigate the merits of the claim and potentially resolve it before they are sued. Troxell v. Rainier Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 351, 111 P.3d 1173 (2005). Therefore, even if a tort claim for damages had been required, the City investigated the merits of the claim and promptly responded

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<sup>5</sup> Even if a tort claim had been required, there is insufficient evidence in the record to demonstrate it was properly filed and the claim form itself was never properly admitted into evidence.

before a lawsuit to compel further action was necessary. The trial court's determination that Appellant's tort claim was unnecessary and did not commence legal action against the City should be affirmed.

**D. ISSUES RAISED FOR THE FIRST TIME ON APPEAL OR NOT SUPPORTED BY THE RECORD, CITATION TO AUTHORITY, OR ARGUMENT SHOULD NOT BE CONSIDERED**

Appellant asserts several assignments of error that cannot be considered by this court because the record is insufficient, the assignment of error is not argued or supported in his brief, or is being raised for the first time on appeal. Any such issues not properly supported or raised should not be considered by this court.

As a general rule, an issue theory, or argument neither included in the complaint nor presented to the trial court for consideration may not be considered on appeal. Martin v. Metro. Seattle, 90 Wn.2d 39 (1978); RAP 2.5(a). Moreover an assignment of error not supported by either argument or authority is deemed waived. Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986).

Appellant asserts several assignments of error in his opening brief, but failed to properly address all of them with argument, citation to authority, or citation to the record. Appellant's Opening Brief (AOB), pp. 6-7. Those assignments of error not supported by argument, citation to

authority, or afforded review on the basis of the minimal record provided should be deemed waived.

Appellant's assignments of error and arguments alleging that the City failed to produce all of the records requested, improperly withheld records, or did not provide a sufficient exemption log are all issues being raised for the first time in this appeal. Although the City is confident that its exemption of records pertaining to the identity of a child sexual assault victim and sexual assault medical examination records comports with statutory requirements and case law, a challenge to the exempted records was not raised at the trial court level. Even if this Court were to find that the issue could be raised for the first time in this appeal, the record is insufficient to allow meaningful review.

**V. CONCLUSION**

For all of the foregoing reasons, Respondent respectfully requests that the trial court's dismissal of this matter be affirmed.

**RESPECTFULLY SUBMITTED** this 21<sup>st</sup> day of

June, 2010.



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THE CITY OF DES MOINES,

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PROOF OF SERVICE

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Des Moines

*Filed  
COA  
6-22-10  
W*

I, VICKI SHECKLER, under penalty of perjury under the laws of the State of Washington, declare as follows:

1. I am a citizen of the United States of America, over the age of twenty-one, and competent to be a witness herein.

2. I have been employed by the City of Des Moines since September 1986, and am currently the Paralegal.

3. On June 21, 2010, I caused an original and a clean legible copy of Brief of Respondent City of Des Moines and one original Proof of Service to be filed with the Court of Appeals, Division 1, One Union Square, 600 University St., Seattle, WA 98101, via U.S. Mail, postage prepaid.

4. On June 21, 2010, I caused copies of the above-mentioned documents to be served upon Chad A. Pierce, 714567-KB-22-L, Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001, via regular U.S. Mail, postage prepaid.

**DATED** this 21st day of June, 2010, in Des Moines, WA.



Signature