NO. 46400-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

THE EVERGREEN STATE COLLEGE BOARD OF TRUSTEES,
STATE OF WASHINGTON

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Arthur West alleges The Evergreen State College Board of Trustees, The Evergreen State College, and the State of Washington (hereinafter referred to as the College) violated the Washington State Public Records Act (PRA) and also subjected him to false arrest, unlawful seizure, and malicious prosecution during a 2010 visit to the College to review records for one of his public records requests.

Here, as in the superior court, West provides only conclusory arguments and a record that cannot support his claims. West's PRA claims fail because the College produced all responsive records to West's many requests without unreasonable delay. West's claim that he was falsely arrested and falsely imprisoned is not only untrue and unsupported by evidence and the law, it is time barred given his failure to file a tort claim as required by RCW 4.92.100 and .110. Similarly, West fails to support, by citation to authority and facts in the record, his third assignment of error seeking reversal of the procedural and evidentiary issues.

Finally, the court did not abuse its discretion when it refused to consider West's untimely motion for reconsideration. Moreover, this appeal was not timely filed, because his untimely motion for reconsideration did not extend the time for filing his notice of appeal.

There is no reversible error and this Court should affirm the trial court's order granting summary judgment to the College, denying West a continuance of the hearing, and striking his untimely declarations.

II. ISSUES ON APPEAL

1. Whether West's appeal is untimely under RAP 5.2(a), when West filed his notice of appeal over five months after the final judgment, and where that untimely notice of appeal cannot be excused because the superior court did not decide West's motion for reconsideration due to West's failure to note that motion as required by local rules.

2. Whether the trial court properly granted the College's motion for partial summary judgment dismissing West's claims that the College failed to comply with the Public Records Act.

3. Whether the trial court properly granted the College's motion for partial summary judgment dismissing, inter alia, West's claims for false arrest and false imprisonment when West failed to file a tort claim as required under RCW 4.92.100 and .110, failed to brief the issue on appeal, and the record contains no evidence that the College police restrained West's liberty or his person.

4. Whether the trial court properly denied West's request for a continuance of the December 2013 summary judgment hearing.

5. Whether the trial court properly granted the College's motion to strike as untimely West's Declarations dated December 13 and 19, 2013.

III. RESTATEMENT OF THE CASE

West submitted three PRA requests to the College between 2010 and the date the complaint was filed on May 8, 2012. These requests occurred on March 4, 2010; May 17, 2010; and March 16, 2012. CP 225, 264. Although West's appeal is based only on the College's response to his March 16, 2012 public records request (Appellant's Opening Br. at 8), all three records requests relate to the claims in the complaint. Accordingly, West's public records requests submitted to the College in 2010 and 2012 are discussed below.

A. March 4, 2010 Request

West submitted a public records request on March 4, 2010. CP 225. The College provided documents on March 15, 2010 and May 14, 2010. CP 226. This request was completed and closed on May 14, 2010 after the College provided West with copies of all

documents. CP 226.[1] To produce the second installment of records, Patricia King, the College's public records officer, scheduled an appointment with West to view documents at the college on May 14, 2010. CP 53. West reviewed the documents and asked Ms. King to provide him copies of almost every document produced for inspection and a statement of what was requested. CP 53. All of this took place in the president's office. CP 53.

Ms. King proceeded to make copies and the requested statement while West went to the cashier's office to pay for the copies. CP 53-54. Upon his return, West repeatedly went into Ms. King's cubicle, telling her to "get the lead out" and that he had an appointment with an unknown official. CP 54. Ms. King found West to be extremely hostile and very aggressive. CP 54. Ms. King told West she did not have to take his abuse and that she was working on his request. CP 54. Ms. King asked West three to four times to sit out front until she was finished. CP 54. She eventually went to Dr. John Hurley, Vice President for Finance and Administration, to report that West was being verbally abusive and threatening. CP 54. Dr. Hurley spoke with West regarding his behavior

[1] West filed a lawsuit against the College on June 28, 2010, alleging it failed to comply with the PRA in responding to the March 4, 2010 request for records. On July 16, 2010, the Thurston County Superior Court dismissed the claim without prejudice for improper joinder. CP 243 (*West v. Eyman, et. al.*, Thurston County Superior Court Cause No. 10-2-01393-5, Order to Dismiss).

while his assistant contacted College police services and requested that a police officer be dispatched to the president's office. CP 51.

Ed Sorger, the College's Chief of Police, arrived first and spoke with West. CP 113-14. Chief Sorger then spoke with Dr. Hurley who advised him that West was being loud, threatening, and abusive toward Ms. King. CP 114. Dr. Hurley stated he wanted West to leave the president's office. CP 114. Officer Monohon responded shortly after Chief Sorger and also spoke with West. CP 114, 116-17.

During this time, Ms. King was able to copy the documents and prepare the statement requested by West. CP 54. West voluntarily agreed to leave after he received copies of the documents. CP 114, 117. The College took no further action regarding this incident. CP 52.

B. May 17, 2010 Request

On Monday, May 17, 2010, the College received a public records request from West for 15 categories of records. CP 226 (King Decl ¶ 4, Attach. 3). The public records officer considered each numbered item a separate records request and assigned each a corresponding internal number for processing. CP 226.

The public records officer scheduled a time for West to review records responsive to this request at the College on July 15, 2010. CP 226. West did not appear for this scheduled review. CP 226. West did appear for

a rescheduled appointment in 2011, reviewed the documents, and requested copies of 408 records. CP 226. However, he did not return to the College to retrieve the records after they had been copied and were ready for pick up. CP 226.

On March 15, 2012, public record's officer Anieska Timms notified West that his May 17, 2010 request was being closed as abandoned due to his failure to pick up copies of records and to schedule a time to review the remaining documents made available under this request. CP 264-65.

C. March 16, 2012 Request

On March 16, 2012, West sent Ms. Timms an e-mail in response to her March 15, 2012 correspondence. CP 248, 265. He apologized and asked Ms. Timms for the opportunity to review the four former records requests (i.e., Public Records Request (PRR) #2010-055, PRR #2010-056, PRR #2010-065, and PRR #2010-066). CP 265. West reminded Ms. Timms of the requirement in the PRA to respond within five days if the College considered this as a new request. CP 265. West also submitted an additional new public records request to the College. CP 265. In response, Ms. Timms opened the five records requests shown in the following table with the corresponding PRR numbers. CP 265.

March 16, 2012 PRA Requests	PRR#
1. Reopen former PRR #2010-066 (AW #15): A list of all persons presently on [the College's] Criminal Trespass List, and a copy of relevant policies, procedures and statutory authority for each individual case.	2012-010
2. Reopen former PRR #2010-055 (AW #4): All correspondence between [the College] administration and faculty regarding compliance with the [public records act], January 2010 to present	2012-011
3. Reopen former PRR #2010-056 (AW #5): Any records related to policies or procedures for applying the PRA or complying with requests for records concerning information maintained by [the College] administration or faculty.	2012-012
4. Reopen former PRR #2010-065 (AW #14): All public records related to faculty communications concerning Mr. Boehmer and [Mr.] Mosqueda's violations of the Social Contract and their obstruction of, and refusal to accept service of legal process from[the College] Police.	2012-013
5. New Request: [College] trespass list, and for a copy of any communications or final orders related to [the College] criminal trespass list, 2008 to present; any records of prosecution or arrest of individuals for violation of [the College] trespass policy; and a current version of [the College] trespass policy and any related WAC filing.	2012-014

Ms. Timms promptly sent West separate letters acknowledging receipt of these five records requests on March 23, 2012. CP 249. She estimated that records would be available by May 4, 2012. CP 249. On May 8, 2012, Ms. Timms provided West with documents responsive to PRR #2012-010 and PRR #2012-012; this was two business days later than the previously estimated delivery date. Also on May 8, 2012, Ms. Timms advised that no records were available for PRR #2012-013,

and provided a first installment for records responsive to PRR #2012-014 advising that additional time was needed to assemble and review the records responsive to PRR #2012-014. CP 249.

On May 18, 2012, Ms. Timms notified West that the first installment of records for PRR #2012-011 and the second installment for PRR #2012-014 were available on compact disc and could be picked up or mailed upon payment of $2.41 to the College's cashier. CP 249, 252, 254. West paid for this installment on May 31, 2012, and was provided these records. CP 249, 256. Also on this date he was advised that June 29, 2012 was the estimated date for the second installment of PRR #2012-011 and the third installment of PRR #2012-014. CP 249, 256. Ms. Timms notified West on June 29, 2012 that the second and final installment for PRR #2012-011 and the third installment for PRR #2012-014 were ready for pickup or mailing upon payment of $2.41 to the College's cashier. CP 249, 257, 259. West paid for and picked up these documents on July 20, 2012. CP 249, 261.

The College advised West on July 20, 2012 that the fourth installment of records for PRR #2012-014 would be made available on August 31, 2012. CP 249, 261. On July 27, 2012, the College notified West that based on his clarification received on May 11, 2012, it had expanded the search for records. CP 263. West was advised on this date

that due to the volume of records for PRR #2012-014, the College anticipated the final installment of records for PRR #2012-014 would be available by December 28, 2012. CP 249, 263.

D. West's Complaint Alleging Violations of the PRA and Tortious Conduct

On May 8, 2012, while the College was preparing records in response to West's March 16, 2012 requests, West sued the College. CP 4. The complaint was vague. For example, it alleged that "at various times" West submitted requests for public records to the College. CP 6. The only specific records request mentioned was an alleged a "May" 4, 2010 public records request. CP 6. As discussed above, the College did not receive a request on this date. CP 225. The complaint also vaguely alleged that the last communication received from the College regarding his public records request was "within one year" of the date of the filing of his complaint. CP 6. It also alleged that as of May 14, 2010, the College had failed to meet its own self-imposed deadline for responding to several of West's requests. CP 6. The complaint also alleged that West had been

arrested, unlawfully seized, and maliciously prosecuted by the College.[2] CP 7-8.

E. Summary Judgment on the PRA Claims

The College moved for summary judgment seeking dismissal of the PRA claims, arguing that it had complied with the PRA in responding to the two records requests received by the College in 2010. CP 9, 238-45, 225-35, 264-65.

West did not argue to the contrary or oppose the College's motions with regard to the 2010 requests. Instead, he filed a cross motion asking the court to grant summary judgment in his favor finding the College violated the PRA ***only*** in regard to his March 16, 2012 request. CP 13. The theories West presented as a violation of the PRA were limited. He argued that the College failed to meet its own initial May 4, 2012 estimate of time for production of documents in response to this request, failed to search for responsive records related to the "TESC Trespass policy," and provided "an apparently abridged Trespass Report Listing" and not a "Criminal Trespass List" in response to his request. CP 13.

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[2] Additionally, West brought an action for negligence and violation of his civil rights based on an alleged claim for fraud. CP 5. The complaint also sought damages against the College based on alleged claims of defamation and false light. CP 7-8. On March 11, 2010, West filed a tort claim for $20 million dollars against the College, claiming he had been "defamed and libeled" by professors Peter Bohmer and Larry Mosqueda resulting in emotional distress and damage to his reputation. CP 92, 95. These claims were not pursued in the appeal and are abandoned. West abandoned his claim of malicious prosecution during the summary judgment hearing conceding this did not occur. RP 28 ll.7-13 (December 20, 2013).

On July 27, 2012, the College filed a cross motion for summary judgment regarding West's March 16, 2012 public records request. CP 266, 248-65.

The superior court granted the College's motion for partial summary judgment dismissing the PRA claims after a hearing on August 3, 2012. CP 40-41, 191. The court found that the College fully responded to West's 2010 public record requests. CP 41. West does not contest this in his appeal.

As to West's arguments regarding the March 16, 2012 requests, the superior court found that the College complied with the requirements of RCW 42.56.520. CP 41. It found the College provided West an estimate of time within five business days of receiving his request. CP 41. As to the College's estimate of time, the court found that while the College did not provide records on May 4, 2012 as originally estimated, it promptly (within two business days) provided a correction of the estimate making it reasonable and in compliance with the PRA. CP 41. The Court also found that the document West received from the College was the current list of persons who had been given trespass notices by the College. CP 41.

F. Summary Judgment Dismissing West's Remaining Claims Including Those for False Arrest and False Imprisonment

On November 22, 2013, the College moved for partial summary judgment dismissing all of the remaining claims in West's lawsuit. CP 55, 51, 53. This included claims against the College for false arrest, malicious prosecution, unlawful seizure, defamation, false light, and an action for negligence and violation of his civil rights based on an allegation of fraud by the College. CP 4, 55.

West made limited arguments in opposition to the motion. He cited to the Dr. Hurley's declaration as evidence that he had been "threatened with application of an administrative 'Criminal Trespass' sanction" while attempting to acquire public records on May 14, 2010. CP 72. Without any citation to the record or relevant legal authority, West alleged "seizure, arrest, and detention" by campus police (CP 73); a "series of fraudulent and actionable tortious 'Trespasses'" (CP 74); and "defamatory statements of Boehmer and Hurley." CP 74. In his reply brief, West also moved the court for a continuance to allow further time for response and leave to amend the complaint. CP 74.

West also cross moved for summary judgment again relying on Dr. Hurley's declaration that he was threatened with an illegal sanction of trespass. CP 77. He also sought CR 11 sanctions against the College, and

requested that Judge Wickham recuse himself from the case due to an alleged lack of impartiality. CP 75-76.

On December 13, 2013, West filed a declaration with the court that included five documents identified as being from "T.C. Cause No. 89-2-00696-8." CP 82. The College moved to strike the declaration as untimely under CR 56 and LCR 5, and because the documents were not admissible into evidence absent attestation of the court clerk as required by RCW 5.44.010. CP 162. On December 19, 2013 (the day prior to the hearing) at 4:52 p.m., West filed another declaration with the court that included a number of attachments. CP 124. A copy of the declaration, without any attachments, was sent to the College's counsel at 5:08 p.m. on this date. CP 159, 161. The College moved to strike West's December 19, 2013 declaration for the reason that it was not served on defendants, was untimely under CR 56 and LCR 5, contained inadmissible evidence, and presented argument that is not proper in a declaration. CP 162.

On January 3, 2014, Judge Wickham entered an order granting the College's motion to strike West's declarations and granting summary judgment on all remaining claims in the lawsuit. CP 194. The trial court's order further denied West's motion for recusal, continuance, sanctions, and summary judgment. CP 194.

G. West's Motion for Reconsideration

West filed a motion for reconsideration of the superior court's final order on January 13, 2013. CP 177. He did not note the motion for hearing as required by LCR 59(b), nor did he file a notice of appeal within 30 days of the final order. Instead, he made multiple efforts to schedule the presentation of an order denying his motion before several trial judges. Between April 3, 2014, and June 20, 2014, West noted for presentment an order denying reconsideration four different times, before three different Thurston County Superior Court judges. CP 183, 185, 187, 300. During the presentment on June 20, 2014, Judge Wickham declined to enter the order given that the motion had never been scheduled for a hearing. CP 189.

On June 16, 2014, West filed a Notice of Appeal. CP 190. Three days later on June 19, 2014, West finally filed a notice of issue scheduling his motion for reconsideration on the court's docket for a hearing before Judge Wickham for July 27, 2014. CP 200. The College moved to strike the hearing as untimely for the reason that West had not noted the motion for a hearing when filed, as required by LCR 59(b). CP 203. The court granted the College's motion and struck the hearing on July 27, 2014. CP 210. Thus, no order was issued on West's motion for reconsideration.

IV. ARGUMENT

A. Standard of Review

An appellate court reviews orders of summary judgment de novo. *Enterprise Leasing Inc. v. City of Tacoma*, 139 Wn.2d 546, 551-52, 988 P.2d 961 (1999); *see also Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005) (PRA cases may be decided on summary judgment). In reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court. *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008). RCW 42.56.550(3) also provides that judicial review under the PRA is de novo; *see also Andrews v. Washington State Patrol*, 183 Wn. App. 644, 650, 334 P.3d 94 (2014).

In a motion for summary judgment, the moving party bears the initial burden of showing the absence of any genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. *Young*, 112 Wn. 2d at 225 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). Once the moving party meets this initial burden, the nonmoving

party must respond by setting forth specific facts showing that there is a genuine issue of material fact for trial. *Id.* The nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." CR 56(e); *see also Young* at 225-26. Summary judgment is required if the plaintiff "fails to make a showing sufficient to establish . . . an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 322). Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment. *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App 18, 25, 851 P.2d 689 (1993).

In reviewing a grant of summary judgment, an appellate court must place itself in the same position as the trial court by considering the evidence and reasonable inferences therefrom in a light most favorable to the nonmoving party. *Young*, 112 Wn.2d at 226. An appellate court may also affirm a trial court's disposition of a summary judgment motion on any basis supported by the record even though not considered by the trial court. *Heath v. Uraga*, 106 Wn. App. 506, 515, 24 P.3d 413 (2001).

A trial court's denial of a CR 56(f) motion for a continuance of a summary judgment proceeding is reviewed for an abuse of discretion. *Pitzer v. Union Bank of California*, 141 Wn.2d 539, 9 P.3d 805 (2000).

Likewise, the determination as to whether to accept an untimely affidavit in response to a summary judgment is reviewed for an abuse of discretion. *O'Neill v. Farmers Ins. Co.*, 124 Wn. App. 516, 521, 125 P.3d 134 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000)).

B. This Appeal Is Time-Barred Because West Did Not File a Timely Notice of Appeal as Required by RAP 5.2(a), and His Untimely Attempt to Pursue a Motion for Reconsideration Does Not Excuse the Untimely Notice of Appeal

A necessary prerequisite to appellate jurisdiction is the timely filing of the notice of appeal. *Buckner, Inc. v. Berkey Irrigation Supply*, 89 Wn. App. 906, 951 P.2d 338 (1998). A party is allowed 30 days to file a notice of appeal under RAP 5.2(a). *Id.* This 30-day time limit can be extended due to specific and narrowly defined circumstances (none of which apply here). RAP 5.2(a). It can also be prolonged by the filing of "certain timely motions" including timely motions for reconsideration. RAP 5.2(a), (e).

CR 59(b) establishes time limits for a motion for reconsideration:

> A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. *The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.* A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(Emphasis added). When there is a timely motion for reconsideration, RAP 5.2(c) extends the time for a notice of appeal to 30 days after entry of the order disposing of the motion. Otherwise, a notice of appeal must be filed within 30 days of the entry of the judgment or other decision the party wants reviewed. RAP 5.2(a), (c).

In this case, the trial court entered a final order granting the College summary judgment on all remaining claims in West's lawsuit on January 3, 2014. West filed a motion for reconsideration on January 13, 2014, but did not note the motion for a hearing as required by Thurston County Local Court Rule (LCR) 59(b).

LCR 59(b)(1), in effect at the time,[3] provided in pertinent part as follows in regards to the filing of a motion for reconsideration:

> Procedures for Orders for Reconsideration. Briefs and materials in support of a motion for reconsideration shall be filed and served at the time the motion is filed. ***At the time of filing, working copies of the*** motion, brief, affidavit, proposed order, and ***notice of issue shall be provided to the judge's judicial assistant. The notice of issue shall be filed and served at least fourteen days before the hearing.*** Each judge reserves the right to strike the hearing and decide the motion without oral argument . . .

(Emphasis added). This rule requires a party to note a motion for reconsideration for a hearing on the court's motion calendar at the time it is filed with the court. Here, West did not schedule a hearing on his motion until June 27, 2014, almost six months after the final order was entered. CP 200.

West anticipates this flaw in his appeal, assigning error to the superior court's decision to enforce its rules and strike his motion for reconsideration. He relies on *In re the Detention of Turay*, 139 Wn.2d

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[3] Thurston County adopted changes to LCR 59(b)(1) on September 1, 2014. The rule did not change the requirement that a motion for reconsideration be noted for hearing at the time of filing with the court. LCR 59(b)(1) now provides as follows: "*Procedures for Orders for Reconsideration*. Briefs and affidavits or declarations in support of a motion for reconsideration shall be filed and served when the motion is filed. At the time of filing, the moving party shall provide judge's copies of the motion, brief, affidavit, proposed order, and notice of issue to the judicial officer's assistant. Each judicial officer reserves the right to strike the hearing and decide the motion without oral argument. Moving parties shall comply with the state-wide rule governing reconsideration, CR 59. Briefs and materials opposing a motion for reconsideration, and reply briefs and materials shall be filed in accordance with the local rule for "service and filing of pleadings and other papers (LCR5)." (Italics in original.)

379, 986 P.2d 790 (1999), where the court held that the "failure to note a motion [filed under CR 59(b)] at the time it is served and filed does not affect the extension of time for appeal under RAP 5.2(e)." (Citing *Buckner, Inc.*, 89 Wn. App. at 916, *review denied*, 136 Wn.2d 1020, 969 P.2d 1063 (1998)).

In both *Turay* and *Buckner*, the clerk was charged with noting the matter on the court's calendar for a decision to be issued within the 30 day time period set forth in CR 59(b). "Noting the motion thus primarily serves to prompt the court to hear or consider the motion. But the ultimate timing of the court's consideration of the motion is at the court's discretion." *Buckner* at 915. This is not the case under LCR 59(b) which requires a party to file a Notice of Issue setting the matter on the court's calendar before the assigned judge, with the required 14 day notice to the opposing party.

This Court should distinguish both *Turay* and *Buckner*. Neither case dealt with a motion for reconsideration that was never heard, because of the application of a local rule that requires a party seeking reconsideration to note the motion for a hearing in court at the time of its filing. Where there is a local rule requiring such noting, the motion should not be considered timely for purposes of the exception in RAP 5.2(e).

West did not note the motion for a hearing as required by LCR 59(b) at the time of filing of his motion for reconsideration on January 13, 2014. Instead, he noted the motion for a hearing on June 27, 2014, almost six months after the final order. CP 200. The trial court properly struck the hearing on West's motion since it was not noted for hearing upon filing with the court as required by LCR 59(b). CP 210. Therefore, West's motion for reconsideration did not toll the time for the filing of his appeal and is untimely under RAP 5.2(e).

Moreover, fairness supports distinguishing *Turay* and *Buckner* in this case. In those cases, courts faced a potentially broad rule that would have trapped the unwary. In this case, West seeks to expand those cases so that he (or other parties) can ignore local rules and use a motion for reconsideration to indefinitely postpone their appeal deadlines. West's rule would allow litigants to game the system, neither appealing nor pursuing a timely motion for reconsideration. Thus, this court should hold that the exception for a timely motion for reconsideration is not met when the motion for reconsideration is not filed and noted as required by the local rules.[4]

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[4] In the event this Court determines that West's notice of appeal is timely, the Court should simply affirm the superior court on the merits. The order striking the hearing on his motion for reconsideration is not reversible error as it does not prevent this Court from affirming summary judgment dismissing the PRA and claims of tortious conduct.

C. The Trial Court Properly Rejected West's Arguments Claiming a Violation of the PRA

West has assigned error to the College's processing of only one of his public records requests, the one identified as PRR #2010-014, submitted on March 16, 2012. Appellant's Opening Br. at 8, 12. This request was for the "TESC trespass list, and for a copy of any communications or final orders related to the TESC criminal trespass list, 2008 to present; any records of prosecution or arrest of individuals for violation of the College trespass policy; and a current version of the TESC trespass policy and any related WAC filing." Appellant's Opening Br. at 8; CP 265, 271.

The superior court correctly ruled that the College complied with the PRA in responding to this request.

1. The College Responded to West's Request Within a Reasonable Time

The College complied with the PRA when it responded within five days of the request, estimated it would begin providing records on May 4, 2012, and provided the first installment of records on May 8, 2012.

West claims the College "unreasonably delayed producing a response to this request until after the filing of a complaint." Appellant's Opening Br. at 8. West, however, provides no argument and citation of legal authority in support of this claim. The Court should not consider the

argument since it was not adequately briefed on appeal. *Holland v. City of Tacoma*, 90 Wn. App. 533, 954 P.2d 290 (1998) ("Passing treatment of an issue on lack of reasoned argument is insufficient to merit judicial consideration."). Even so, the record does not establish an unlawful delay.

RCW 42.56.520 governs an agency's initial response to a PRA request and states, in relevant part:

> Within five business days of receiving a public record request, an agency . . . must respond by either (1) providing the records; (2) providing an internet address and link on the agency's web site to the specific records requested . . . (3) *acknowledging that the agency . . . has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request*; or (4) denying the public record request.

(Emphasis added). In addition, RCW 42.56.080 allows an agency to produce records on a "partial or installment basis."

It is uncontroverted that the College provided West with a timely five day response to his March 16 request on March 23, 2012. CP 249. The letter advised West that the College would provide records on Friday, May 4, 2012. CP 249. The first installment of records was in fact provided on May 8, 2012 (two business days later than the estimated date), the day West filed this lawsuit. CP 249.

Thereafter, the College notified West on May 18, 2012, that the second installment of records for this request was available for review and

purchase. CP 249. West paid for and received the second installment on May 31, 2012. CP 249. The College advised West on May 31, 2012 that a third installment of records would be provided on June 29, 2012; and in fact that installment was available by June 29. CP 249. On July 20, 2012, the day West picked up his third installment, the College sent West a letter advising that the fourth installment of records would be provided on August 31, 2012. CP 249, 261. The College advised West on July 27 that based on his clarification of May 11, 2012, it was expanding his records search to include a number of other records. CP 263. The College advised that records would continue to be provided in installments with the next installment, as previously anticipated, to be provided on August 31, 2012. CP 249, 263. The public records officer further advised West on this date that it was anticipated that all responsive records to this request would be provided by December 28, 2012. CP 249, 263.

Andrews, 183 Wn. App. 644 rejected the argument that an agency violates the PRA when it fails to comply with its own estimate of time for producing records. There, the court stated that the PRA "simply requires an agency to provide a 'reasonable' estimate, not a precise or exact estimate," recognizing that agencies may need more time than initially anticipated. *Andrews* at 652. Instead of rushing to file a lawsuit as West did here, the *Andrews* court endorsed a flexible approach, and concluded

that an agency does not violate the PRA when the agency exceeds its estimated time for response as long as the agency responds to the public records request with reasonable thoroughness and diligence. *Id.* at 653.

In this case, a delay of two business days to provide the first installment of records did not violate the PRA, given that the College was dealing with a voluminous request for records and was proceeding diligently to provide documents in response to five requests submitted by West on March 16, 2012. *See also Hobbs v. State*, 183 Wn. App 925, 335 P.3d 1004 (2014) (agency's five day letter is not required to provide the estimated date of a complete response; the letter need only include a reasonable estimate of the time it will take the agency to produce the first installment).

2. The College Did Not Require That West Submit an Additional Records Request

West claims that he was required to submit an additional records request to the College to obtain copies of police reports requested under PRR #2010-014. Appellant's Opening Br. at 9, 12.

West points to CP 17-18 in support of this assertion. CP 17-18 quotes only one of the many emails Ms. Timms set to West relating to his requests. *See* Section IV.C.1 *supra*. The superior court gave no weight to one isolated statement in light of the evidence that Ms. Timms ultimately

produced approximately 177 police services incident reports and 7,454 related emails on May 8, 2012; May 31, 2012; and July 20, 2012. CP 263. At the time the superior court heard the College's partial summary judgment motion on August 3, 2012, the College was continuing to gather and review documents responsive to West's request for police records. CP 263. The record, therefore, contradicts West's claim that the College required him to submit another request. Rather, the record substantiates that the College was processing his requests for police reports, and the superior court therefore correctly found no PRA violation.

The superior court was correct in refusing to allow West to challenge the College's response during the time the College was still producing records to West. *See Hobbs*, 183 Wn. App. at 936 (a denial of public records does not occur until "it reasonably appears that an agency will not or will no longer provide responsive records."). Here, where the College was continuing to provide West with responsive records and had explained that installments were intended to go on well after the August 2012 summary judgment hearing with an anticipated completion date of December 28, 2012, the superior court was correct to reject West's PRA claims.

3. The College Made a Reasonable Search for Records and Provided All Records Responsive to West's Request for the "Trespass List"

Next, West argues that the College "refused to make a reasonable search for the records or produce them" and speculates that "there are undoubtedly many Trespass related communications and records still being withheld to this very day." Appellant's Opening Br. at 12. The record shows that the College did not deny records and conducted searches that were more than reasonable.

This issue is limited to the only argument raised below regarding the adequacy of the College's search for documents. *See* RAP 2.5(a) (issues on appeal limited to issues raised below). At the superior court, West argued only that he had been denied a copy of the "Trespass Report Listing," and claimed this "demonstrated a failure to search for responsive records related to the TESC Trespass Policy." CP 12. West's only support for this claim was a copy of a different document that the College provided to a different records requester in 2011. CP 19, 27. Based on the older document that he already had, West argued that the document the College produced to him was "not the criminal trespass list." CP 12.

At oral argument, he stated:

> The list that they provided me was not the criminal trespass list. It was a list of police contacts. It wasn't a list of people banded. [sic] It was a list of recent contacts, and it's not a list. It's a list of contacts with the police. The list they provided to Mr. Hohnholts [sic] had a number of others names on it. I think it more accurately reflected and was the trespass list. I haven't seen any evidence, other than some self-serving declarations that the rest of these people aren't banded [sic] from the campus or that there was an update.

RP 14 ll. 23-25 (August 3, 2013). In this argument, West refers to the evidence that established that the College provided him with the "Trespass Report Listing." CP 250. When the College responded to a different records request in 2011, College police realized that its list was outdated. CP 250. Consequently, by the time of West's March 16, 2012 requests, the list had been updated; some names had been deleted from the list because the police no longer considered them "trespassed" from the College. CP 250. When West requested the trespass list in March 2012, the College provided him with the current document. CP 249-50.

There is no merit to West's argument that the document produced to him was "only a report listing" and not the "actual Trespass List" that was used by the College. Appellant's Opening Br. at 13. The document produced was the document that was responsive to his request, the College

conducted reasonable searches, and West was not denied responsive documents.

In summary, West's arguments are not supported by the record or the law. West identifies no reversible error with respect to his PRA claims.

D. The Trial Court Properly Granted the College's Motion for Summary Judgment Dismissing West's Claims for False Arrest and False Imprisonment

West also appeals the January 3, 2014 order granting partial summary judgment dismissing all other claims that remained in the lawsuit after the dismissal of his public records act claims. CP 190. He assigns error only to dismissal of claims relating to "threats, arrest, and false imprisonment" by the College. Appellant's Opening Br. at 6, 16. He argues that when he "entered onto the campus to inspect the College's records, he was threatened with the application of the College's Trespass Policy and arrested, detained, [and] falsely imprisoned for investigation of 'Criminal Trespass' pursuant to policies usages and customs of the Evergreen State College." Appellant's Opening Br. at 16. He argues that there is a genuine issue of material fact as to whether he "was seized, arrested, or unreasonably detained in violation of the 4rth [sic] Amendment." Appellant's Opening Br. at 16.

This Court should affirm summary judgment because West's claims are barred due to his failure to file a tort claim as required by RCW 4.92.100 and .110. Alternatively, the Court can affirm summary judgment on the basis that West has not supported his appeal with citation to authority or evidence in the record.

1. West's Claims for False Arrest and False Imprisonment Are Barred Due to His Failure to Comply With the Tort Claim Filing Requirements of RCW 4.92.100 and .110

West's claims of false arrest and false imprisonment are tort claims. Before filing a tort action against the state, a plaintiff must file a verified claim with the Office of Risk Management (ORM). RCW 4.92.100; *Levy v. State*, 91 Wn. App. 934, 942, 957 P.2d 1272 (1998). No action subject to the claim filing requirements of RCW 4.92.100 can be commenced against the state or its agents for damages arising out of tortious conduct until 60 calendar days after the filing of the claim. RCW 4.92.110. Strict compliance with the statute is required. *Levy*, 91 Wn. App. at 942. Dismissal is the proper remedy for failure to comply with these tort claim filing requirements. *Hyde v. Univ. of Wash. Med. Ctr.*, ___ P.3d ___ 2015 WL 1648990 (Div. I) (2015).

West is not permitted to file his tort lawsuit against the College without first filing a tort claim with ORM as required by RCW 4.92.100. West has never filed a tort claim for false arrest or false imprisonment.

West filed a tort claim with ORM on May 14, 2010, but nothing in that claim suggests someone falsely arrested or imprisoned him. CP 94-99. He stated:

> As part of a continuing pattern and policy of invidious violation of rights protected under 42 USC 1983-5 and 18 USC 241, TESC Vice president and other officials attempted to obstruct access to public records and threatened to "Trespass" West for attempting to obtain records in a reasonable time. **TESC Police were summoned and conducted an investigation although the police did not do anything of their own accord.** These continuing violations have caused substantial mental and emotional distress.

CP 99 (emphasis added). The 2010 tort claim makes no mention of seizure, arrest, or false imprisonment by the police as RCW 4.92.100 requires. CP 98.

Although the trial court dismissed West's claims on other grounds, this Court can affirm the dismissal on appeal for failure to comply with RCW 4.92.100 and .110 as the issue was argued below. *See Heath v. Uraga*, 106 Wn. App. 506, 515, 24 P.3d 413 (2001) (appellate court may affirm a trial court's disposition of a summary judgment order on any basis supported by the record even if not considered by the trial court).

2. This Court Should Decline to Consider West's Claims of False Imprisonment and False Arrest Given His Failure to Brief the Issues on Appeal in This Case

West's appeal may also be rejected based on his failure to provide any reasonable or useful argument. Pro se litigants are held to the same standards as attorneys and must comply with all procedural rules on appeal. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). When a point is asserted without argument, citation to the record, and pertinent legal authority, it is without foundation and requires no discussion by the reviewing court. *See Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998) (arguments unsupported by any authority need not be considered on appeal); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (a party abandons assignments of errors unsupported by argument and the court does not need to consider them on appeal). The Court should decline to review this assignment of error based on West's failure to provide a cogent legal argument supported by relevant authority and citation to the record as required by RAP 10.3(a)(6).

3. Even if the Record Cited by West Is Reviewed, It Shows No Evidence That West Was Arrested or Imprisoned by the College's Police

To prove false arrest, a plaintiff must show unlawful violation of a person's right of liberty or the restraint of that person without legal authority. *Bender v. City of Seattle*, 99 Wn.2d 582, 590-91, 664 P.2d 492 (1983). The gist of false arrest and false imprisonment is essentially the same; i.e., the unlawful violation of a person's right of personal liberty. *Youker v. Douglas County*, 162 Wn. App. 448, 258 P.3d 60 (2011) (citing *Heckart v. City of Yakima*, 42 Wn. App. 38, 39, 708 P.2d 407 (1985)). A false imprisonment occurs when ever a false arrest occurs. *Id.* As the party seeking summary judgment, the College demonstrated the absence of a genuine issue of material fact in regard to West's claim that he was falsely arrested and unlawfully seized based upon the alleged threatened application of the "TESC Criminal Trespass Policy" on May 14, 2010. The record in this case does not contain any evidence of West's arrest or imprisonment.

First, the record shows only that under the College's trespass policy, it may issue a notice of trespass warning to a person who presents a threat of harm to College property or to the personal safety of any member of the campus community. CP 114. Under the policy, persons served with a trespass warning are on notice that if they defy an order to

leave College premises, they can be subject to criminal arrest for trespass as provided in RCW 9A.52.070 and .080. CP 114. The College tracks persons issued a trespass warning in the list that has been called "Trespass Report Listing." CP 20. Accordingly, arguments about threats of application of the College's policy is not evidence that West was arrested, seized, or imprisoned.

Second, the material facts were uncontroverted and demonstrate West was not arrested, seized, or imprisoned. West arrived at the College on May 14, 2010, to review and obtain copies of public records. CP 51, 53. During the review, a staff member requested campus police to come to the president's office where West was waiting for copies. CP 51. West was asked to produce his identification by Officer Monohon, one of the officers who responded to the call. CP 117. Officer Monohon did not know West and was documenting his identity for this contact. CP 117. Chief Sorger and Officer Monohon asked West to leave the area after West had received the documents he had requested. CP 114. Chief Sorger declined West's request to be issued a trespass warning. CP 114. West expressed disappointment in not being issued a trespass warning and voluntarily left the president's office. CP 114, 117.

The burden shifted to West to present evidence demonstrating the existence of a genuine issue of fact regarding his claim of false arrest and

false imprisonment. *See Young*, 112 Wn.2d at 225 n.1. West did not offer testimony or evidence controverting these facts. Instead, West relied on the declaration of Dr. Hurley as evidence of his arrest and unlawful seizure. CP 69. While he filed a declaration the day before the hearing (CP 124), this was stricken as untimely and is not part of this record on appeal. CP 210.

In this Court, West offers only a conclusory statement that a genuine issue of material fact may be found by reviewing a hearing transcript dated December 20, 2012, and the declarations of Dr. Hurley, Chief Sorger, and West himself.[5] Appellant's Opening Br. at 16.

The Hurley and Sorger declarations provide no evidence of a false arrest or imprisonment. Chief Sorger stated that "[a]lthough Mr. West acted inappropriately in addressing the public records officer during the incident described, he appeared to calm down once police services became involved and did not present any concerns that warranted the issuance of a trespass warning." CP 114. Dr. Hurley reiterated this point in his declaration stating that the police chief determined that the incident "did not warrant the issue of a criminal trespass order to Mr. West prohibiting him from being on campus." CP 52. Dr. Hurley filed a second

[5] West fails to inform this Court that Judge Wickham granted the College's motion striking his declarations as untimely. CP 210. Because the trial court acted within its discretion in striking the declarations (*see* Section IV.E.2 *infra*), the declarations are not within the scope of this record on review.

declaration stating the reference to "criminal trespass order" should have been "criminal trespass warning." CP 91. Nothing about Chief Sorger's or Dr. Hurley's word choices, nor the statements contained in the rest of their declarations, show an arrest or imprisonment, or even that West was warned against a future trespass. In fact, West is free to come to the campus, and indeed has been on campus, since the May 14, 2010 incident. CP 90.

On appeal, West also cites to the second page of Officer Monohon's declaration (without argument as to what facts he is relying upon) as evidence of his arrest and unlawful seizure. Appellant's Opening Br. at 17. However, Officer Monohon explicitly states in his declaration that West was not issued a trespass warning on May 14, 2010. CP 117. While Officer Monohon asked West to produce his identification, this alone does not result in an unlawful arrest and seizure. A police officer who engages a person in conversation in a public place and asks for identification does not, standing alone, elevate a social contact to an investigative detention. *State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009). *See also State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998) (police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing). "Nor does the fact the officer is in uniform and armed, without more, convert the

encounter to a seizure requiring some level of objective justification." *State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781 (1984).

West assigns error claiming "material facts had been reasonably controverted." Appellant's Opening Br. at 17. West cites to legal authority for the principle that a court must review the facts and the reasonable inferences in the light most favorable to the nonmoving party. However, West fails to make even a single reference to the specific facts or evidence he relies upon to show the existence of a disputed issue of material fact that creates reversible error.

To demonstrate error, West must present meaningful legal analysis supported by citations to relevant authority and citations to facts in the record that support the claim of error. RAP 10.3(a)(6). West cites to *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964) as legal authority purportedly relied upon but without argument, cogent or otherwise, as to why or how this legal authority applies to the facts of this case. *Bouie* held that due process prohibits a court from retroactively applying a new construction of a criminal statute that is "unexpected and indefensible by reference to the law which had been

expressed prior to the conduct in issue." *Id.* at 354. This case has no relevance to the issues on appeal in this case.[6]

The Court should not have to sift through the record or complete legal research to find support for West's issues on appeal. In the absence of an argument in support of his assignment of error, presented with pertinent legal authority and references to relevant parts of the record, the Court should not address the issues raised in this assignment of error and consider it waived. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809.

Therefore, the Court should affirm the superior court order dismissing these claims. There is no genuine issue of fact related to these alleged torts.

E. The Trial Court Properly Denied West's Motion for a Continuance of the December 2013 Summary Judgment Hearing and Granted the College's Motion to Strike His Untimely Declarations

West's third assignment of error alleges the court erred by "failing to grant a continuance, suppressing relevant evidence, allowing the submission of inconsistent and/or perjured testimony, and in granting

[6] In addition to *Bouie v. City of Columbia*, 378 U.S. 347 (1964), West cites to *Sniadach v. Family Finance Corp. of Bayview*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969). In *Sniadach* the Supreme Court held that Wisconsin's prejudgment garnishment of wages procedures, without notice and prior hearing, violates the fundamental principles of procedural due process.

summary judgment when factual issues were disputed."[7] Appellant's Opening Br. at 6, 18. West's brief suffers from the same flaw that was addressed in regards to his second assignment of error—he does not support his assignment of error with argument or evidence in the record as required by RAP 10.3(a)(6).

1. It Was Not an Abuse of Discretion for the Trial Court to Deny West's Motion for a Continuance

In his reply brief opposing the College's motion for summary judgment, West moved the court for "an order of continuance to allow further time for response and for leave to amend the complaint should it in any manner be found to be defective." CP 74. However, West did not provide any argument below in support of his motion. Nor has he provided an argument on appeal that the trial judge abused his discretion in denying the continuance. For this reason alone, the Court should decline to review this assignment of error.

Even if the Court reviews this assignment of error, the superior court was within its discretion in denying the continuance. A motion for continuance is governed by CR 56(f) which provides as follows:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a

[7] The issues raised related to West's challenge to the grant of summary judgment were previously addressed in Sections IV.C-D *supra*.

> continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f). Denial of a motion to continue a summary judgment is reviewed for abuse of discretion. *Pitzer,* 141 Wn.2d at 556. A trial court does not abuse its discretion if: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. *Id.*

West did not submit an affidavit addressing these topics as required by CR 56(f). In the absence of an affidavit, there was no abuse of the trial court's discretion and the court's order must be affirmed on appeal.

2. It Was Not an Abuse of the Trial Court's Discretion to Strike West's Declarations

West does not identify what evidence he contends was suppressed by the trial court in support of this assignment of error. Appellant's Opening Br. at 18. The court did enter an order striking West's December 13 and 19, 2013 declarations as untimely. CP 170. If West's argument refers to these declarations, West has provided no argument or citation to legal authority in support of his contention that the court abused its discretion, a showing he is required to make on appeal.

O'Neill v. Farmers Ins. Co., 124 Wn. App. 516, 521, 125 P.3d 134 (2004) ("Whether to accept or reject untimely filed affidavits is within the trial court's discretion."). In the absence of such a showing, it cannot be established that the court abused its discretion in striking the declarations.

3. The Court Did Not Rely on Materially Altered, Inconsistent, or Perjured Testimony in Granting Summary Judgment

West cites to two declarations of Dr. Hurley in assigning error to "the submission of inconsistent and/or perjured testimony." Appellant's Opening Br. at 19. He alleges the declaration was inconsistent, "materially altered," and "may very well have been based upon suborned misleading statements of material fact." Appellant's Opening Br. at 19. However, West does not set forth any facts in support of these conclusory statements; nor could West support this patently false and unsupported argument.

As previously noted, Dr. Hurley submitted two declarations in support of the College's motion for partial summary judgment. CP 51, 90. In the first declaration filed on November 20, 2013, Dr. Hurley stated the situation on May 14, 2010 involving West did not warrant the issuance of a "criminal trespass order." CP 52. This statement was corrected in Dr. Hurley's second declaration filed on December 12, 2013, to state that the police chief determined the situation did not warrant the issuance of a

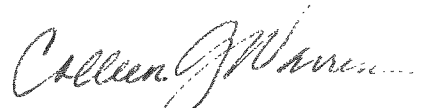
"criminal trespass *warning*" to West (not a "criminal trespass *order*"). CP 91 (emphasis added). The second declaration simply corrected the first declaration. West fails to support this assignment of error.

V. CONCLUSION

Based on the foregoing argument and authority, The Evergreen State College respectfully requests the Court to affirm the trial court's orders striking West's declarations and denial of a continuance, and orders granting summary judgment dismissing West's lawsuit.

RESPECTFULLY SUBMITTED this 29th day of April 2015.

ROBERT FERGUSON
Attorney General



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST, Appellant, v. THE EVERGREEN STATE COLLEGE BOARD OF TRUSTEES, STATE OF WASHINGTON, Respondents.	CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the state of Washington that a copy of the Respondents' Brief was served on Appellant at the following address by U.S. Mail Postage Prepaid via Consolidated Mail Service:

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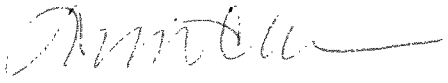

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Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Certificate of Service

Comments:

No Comments were entered.

Sender Name: Lisa M Cole - Email: lisac2@atg.wa.gov

A copy of this document has been emailed to the following addresses:

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