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No. 64217-1-I

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

CHAD A. PIERCE,
Appellant,
vs.
THE CITY OF DES MOINES
Respondent.

2010 JUL -6 AM 10:32

COURT OF APPEALS
STATE OF WASHINGTON
CLERK
3

REPLY BRIEF OF APPELLANT CHAD A. PIERCE

CHAD A. PIERCE-714567-KB-22-L
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1. THE CITY'S RESPONSE MISSTATES THE LAW, CONSISTS OF MISLEADING STATEMENTS AS TO THE PROCEDURAL AND SUBSTANTIVE CASE HISTORY, AND CONTAINS RECKLESS OMISSIONS OF FACT WHICH ARE MATERIAL TO THIS APPEAL AND WERE KNOWINGLY MADE BY THE CITY WITH RECKLESS DISREGARD FOR THE TRUTH IN ORDER TO IMPROPERLY PERSUADE THIS COURT AND THEREFORE SHOULD BE REJECTED BY THIS COURT.

A. APPLICABLE STANDARDS OF REVIEW.

Mr. Pierce appeals from an order entered on August 17, 2009 dismissing his motion for sanctions for the City's failure to timely disclose requested public records.¹ CP 144-46. In Mr. Pierce's initial opening appeal brief he assigned error to the trial court's order of dismissal entered on August 17, 2009 claiming that the court not only misinterpreted the provisions of the Public Records Act (PRA), but also failed to follow the Washington State Supreme Court's holding in PAWS II, 125 Wn.2d 243 (1994) as to the City's "silent-withholding" which has been coined as a direct violation of the PRA. In this case the City did that for almost one-year before disclosing "partial" records triggering the sanctions to mandatorially be imposed.

(i). STANDARD OF REVIEW OF STATUTORY INTERPRETATION.

Court's in interpreting the meaning of statutes conduct a de novo review where. The meaning of a statute is a question of law to which the Court's review de novo. In re Estate of Kissinger, 166 Wn.2d 120, 125, 206 P.3d 665 (2009)(citing Morgan v. Johnson, 137 Wn.2d 887, 891, 976 P.2d 619 (1999); State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

Since Pierce claims in his assignment of error that the trial court misconstrued the PRA interpretation the review of the case is de novo.

1. The Requests (2) were made to the City, the City responded stating it would produce within two-weeks, two-weeks came and went without Pierce receiving any records, Pierce drafted letters to the City which the City did not respond to, almost 1-year later Pierce commences Tort, City gives Pierce a partial set of the records requested.

(ii) STANDARD OF REVIEW OF CR 12(b)(6) DISMISSALS.

The standard of review which this Court must engage in in reaching the merits of the appeal as to dismissals under CR 12(b)(6) is de novo. Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); Suleiman v. Lasher, 48 Wn.App. 373, 376, 739 P.2d 712 (1987), review denied, 109 Wn.2d 1005 (1987).

Under CR 12(b)(6), a dismissal is appropriate only if it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery. Burton, 153 Wn.2d at 422; Suleiman, 48 Wn.App. at 376. In making this determination, a trial court must presume that the facts as stated by the plaintiff are true and may even consider hypothetical facts which are not part of the record. Burton, 153 Wn.2d at 422.

It is under this standard that the Court's review the assignment of error raised by Mr. Pierce in his appellant's opening brief.

(iii). STANDARD OF REVIEW OF THE TRIAL COURT RECORD.

When the record before the court consists entirely of "documentary evidence, affidavits and memoranda of law," the reviewing court stands in the same position as the trial court and reviews the trial court's decision de novo. Morgan v. City of Federal Way, 166 Wn.2d 747, 753, 213 P.3d 596 (2009)(quoting Limstrom v. Ladenburg, 136 Wn.2d 595, 612, 963 P.2d 869 (1998)).

Further, CR 10(c) holds, "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

Therefore, it is under these three de novo standards that this Court needs to review this case on the merits and all the pleadings that were known and before the trial court before rendering its decision.

In order for this Court to fairly decide the assignment of error set forth in Pierce's opening appeal brief, it is necessary for this Court to understand what documents and evidence in support thereof is properly filed into the trial court's record and served to the City.

That record, which is required under a de novo standard of review to be reviewed, consists of the following:

1. Pierce's Motion to Show Cause with attached evidence. CP 1-25. (It was made part of the record on June 17, 2009).
2. Pierce's Note for Docket and Notice for Hearing. CP 29-32. (It was filed as part of the record on June 17, 2009).
3. Pierce's Declaration in support of his Show cause Motion. CP 35-37. (It was filed into the record on June 17, 2009).
4. The Court's two orders for telephonic hearings dated June 18, 2009 and June 26, 2009. CP 38-39. (They were filed into the record on June 18 & 26, 2009).
5. The Court's order to the City to appear and Show Cause. CP 40-41. (It was filed into the record on June 26, 2009 after the City failed to appear for the June 26, 2009 hearing).
6. Pierce's Addendum Motion and attachments to his Show Cause motion. CP 42-54. (It was filed into the record on July 8, 2009).
7. Pierce's Affidavit in support of the addendum motion. CP 55-59. (It was filed into the record on July 8, 2009).²
8. City of Des Moines Limited Notice of Appearance. CP 60-61. (It was filed into the record on July 8, 2009).
9. Pierce's Motion to Clarify made in response to the City's Limited Notice of Appearance. CP 62-66. (It was filed into the record on July

2. This affidavit was a part of the addendum motion which established by demonstrative evidence that the City was properly served a "motion" to show cause yet failed to appear on the June 26, 2009 date without reason.

22, 2009).

On July 24, 2009, there was a Show cause hearing conducted which the City, in its response, made arguments about which Pierce asks this court to strike as it is not part of the record before this Court and the City did not make it part of the record even though it had ample opportunity to do so. See Response brief at 3.

10. City's duplicated Limited Notice of Appearance. CP 67-68. (It was filed into record on July 24, 2009).

11. City's belated motion to dismiss under CR 12(b)(6). CP 69-76. (It was filed into record on August 4, 2009).

12. Susan Mahoney's declaration in support of her motion to dismiss. CP 77-79. (It was filed into record on August 4, 2009).

13. Pierce's Motion and attached exhibits to provide the court with guidance and objection to the City's belated motion to dismiss where the City decided to remain silent. CP 80-110. (It was filed into the record on August 4, 2009).

14. Court's August 17, 2009 order of dismissal. CP 111.

The record before this Court establishes that a show cause hearing commenced on July 24, 2009. The record equally establishes that the City had failed to repond to Pierce's show cause motion by that date and failed to appear at the June 26, 2009 prior hearing only appearing once forced by court order. The record also holds that the City was allowed, at its own request not the court's directives, to respond to Pierce's show cause motion after the July 24, 2009 hearing to which the City filed a motion to dismiss. CP 29-32, 38-41, 55-59, 69-79.

The record is equally clear that Pierce noted an objection to the

City being allowed to file a belated motion to dismiss after the show cause hearing had already commenced. CP 92-93.

The most important error visible in the record is the trial court's August 17, 2009 order of dismissal which was entered contrary to the time requirements found under CR 6(d), CR 12(b), and CR 56(c) which hold that the City's belatedly filed motion to dismiss was to: (a) have been filed as a summary judgment motion triggering the time requirements of CR 56(c) which hold that the motion to dismiss was to have been served upon Pierce not later than 28 days prior to the set hearing, not 11 days after the hearing as done in this case; (b) that the trial court was to allow Pierce to respond to the City's dismissal motion 11 days before the hearing, not refuse to allow Pierce to respond and then enter an order of dismissal on August 17, 2009.

Therefore, the City's motion to dismiss was not properly before the trial court and therefore needs to be rejected by this Court.

The trial court has violated the most basic fundamental fairness principles establishing bias towards Pierce and favoritism towards the City.

Therefore, in addressing the assignment of error as applied to the case facts, Pierce asks that this Court accept his designation of the following Clerk's papers: 1-25, 29-32, 35-79, 111, 112-46. All of these documents are part of the trial court record and were properly served upon the City and need to be part of the record on review.

This court should therefore reject the City's misleading assertion that the designated CP's were not properly made part of the record. As the City offers no evidence to support its contention which the record

establishes is clearly erroneous and misleading in hopes to have this court disregard vitally material evidence needing reviewed to make a proper determination of the merits of this appeal.

Further, even though the City objected falsely to the CP's which Pierce designated, the City uses CP's 40-41, and 44-45 in its response. See Response Brief at 2-3.

Pierce will ask this Court to disregard and strike the following CP's from the record as immaterial. CP 26-28, and 33-34.

B. THE CITY'S RESPONSE IS MISLEADING AS IT RECKLESSLY OMITTS THE CASE HISTORY TIMELINE ESTABLISHING THE CITY VIOLATED THE PRA AND THAT SHOULD NOT BE OVERLOOKED BY THIS COURT.

The City, without disclosing the date, said Pierce requested the records from the Des Moines Police Department (DMPD) and on February 25, 2009 Pierce was provided all of the non-exempt records with an exemption log sheet. Response at 2. The City further alleges, without supporting the assertion with demonstrative evidence, that despite Pierce having received the requested records (Two different PRA requests) he filed a Show cause Motion seeking monetary damages resulting from the City's failure to timely respond. Id.

For several reasons the City's statement of the case must be rejected and Pierce's Statement of the case accepted as set forth in his appeal brief. First of all Pierce made two PRA requests which were not responded to in a timely manner and instead only responded to almost one-year later after the City's silent-withholding caused Pierce to commence a tort claim for damages at which time the City partially disclosed some of the requested records. Mr. Pierce's show cause motion was misconstrued by the Court to mean that Pierce sought records, but as the motion holds

Pierce was damaged by the one-year silent-withholding and sought to seek damages and sanctions for the City's failure to strictly comply to the PRA provisions. CP 1-25, 35-37, 42-59, 62-66, 80-110.

Therefore, both the City and Court's assertions that Pierce could not be considered a prevailing party are improper assertions of the facts before the court and required under the PRA which this Court should reject.

Pierce hereby realleges, adopts, and incorporates the truthfully stated statement of the case set forth in the appellant's opening brief pursuant to CR 10(c). See Appellant's Opening brief pp.7-14.

The statement of the case set forth by the City, which is severely contradicted by the record before this court, needs to be rejected on the merits.

C. THE CITY INCORRECTLY ASSERTS IN ITS RESPONSE THAT THE TRIAL COURT PROPERLY DISMISSED PIERCE'S MOTION FOR SANCTIONS DUE TO PIERCE FAILING TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED AND THEREFORE THIS COURT SHOULD REJECT THE CITY'S ARGUMENT AND REVERSE THE DISMISSAL ORDER.

This court's standard of review, as set forth supra, is de novo. Using that standard this court must decide whether or not the City timely responded to Pierce's two PRA requests and whether or not the trial court misconstrued Pierce's motion for sanctions asserting that Pierce sought to obtain the records when instead Pierce sought sanctions for the City's silent-withholding of the requested records for almost one-year and only releasing the requested records when Pierce filed a tort claim for damages which violated the PRA found under RCW 42.56 et seq subjecting the City to a mandatory sanction imposition-not an outright dismissal of the sanctions request.

For the purposes of this argument, Pierce hereby realleges, adopts and incorporates by reference the argument set forth in the appellant's opening brief in support of the proposition that the City's response brief is highly misleading and inaccurate. See Appellant's Brief at 17-22, 24-29.

Further, our Supreme Court has rejected any argument that silent-withholding is okay under the PRA and instead held that if silent-withholding occurs sanctions are mandatory regardless of whether or not a tort claim was commenced and then the records were produced. See Oliver v. Harborview Medical Center, 94 Wn.2d 559, 564, 618 P.2d 76 (1980); Coalition v. Department of Public Safety, 59 Wn.App. 856, 862, 801 P.2d 1009 (1990).

Therefore, the Court's order of dismissal is made in misconstruing the PRA statutes and is further based upon a misinterpretation of the motion for show cause contents **and** should be reversed on the merits due to the City's failure to disclose the requested records in a timely manner.

D. THE PUBLIC RECORDS ACT DOES NOT REQUIRE A CIVIL LAWSUIT IN ORDER TO OBTAIN SANCTIONS FOR VIOLATIONS OF THE ACT. ALL THAT THE ACT REQUIRES IS AN EX-PARTE MOTION TO THE SUPERIOR COURT WHERE THE RECORDS ARE MAINTAINED AND THEREFORE THIS COURT SHOULD REJECT THE CITY'S ARGUMENT TO THE CONTRARY.

In the City's response the City incorrectly states as its basis requesting this court to uphold the trial court's dismissal is that the PRA requires a summons and complaint to be commenced and served on an entity in order to properly litigate a PRA issue. See Response at 6-10.

The City's position is not backed up by law or fact and needs to

rejected by this Court as frivolous.

Under RCW 42.56.550(1), and the entire Act found under RCW 42.56 et. seq, all that a person is required to do is file a "motion" with the Superior Court in the County within which the records are retained in order to obtain sanctions for PRA violations. Noting in the Act requires a costly civil lawsuit to commence in order to obtain relief.

Therefore, this Court should reject the City's argument to the contrary.

E. THE CITY INCORRECTLY ASSERTS THAT ISSUES MAY NOT BE RAISED FOR THE FIRST TIME ON DIRECT APPEAL AND THEREFORE ANY ARGUMENT FRAMED BY THE CITY MUST BE REJECTED.

It is true that court's ordinarily do not consider arguments for the first time on appeal. RAP 2.5(a); State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). But RAP 2.5(a) is discretionary, not absolute, and does not bar review of an issue raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

The appellant, Mr. Pierce, is a layman of the law proceeding pro se and assigned one assignment of error in the opening brief. The issues assigned to that assignment of error and the arguments related to the assigned error are set forth in the opening brief with clarity and are related to the one assignment of error asserted.

Therefore the City's argument to the contrary must be rejected.

Next, the City contends that the issue with regard to the City's violation of the PRA by failing to disclose all of the records is being raised for the very first time on appeal by Pierce.

This argument must be rejected because Pierce made argument about this in the lower court record prior to this appeal commencing and it was never addressed. CP 88, 117, 131-32 .

Therefore this Court should address the exemptions that the City failed to properly state the reasons it relied upon to not disclose the requested records and since Pierce at the time of the PRA requests did not name any subject in the records, the City must produce all of the records. See Koenig v. City of Des Moines, 158 Wn.2d 173, 142 P.3d 162 (2006).

F. THE CITY'S ASSERTION IN ITS RESPONSE BRIEF THAT THE TRIAL COURT REQUESTED ADDITIONAL BRIEFING WHICH IS WHERE THE CITY'S MOTION TO DISMISS AROSE FROM AFTER THE HEARING COMMENCED IS NOT ONLY KNOWINGLY MISLEADING BUT IS MADE WITH DELIBERATE DISREGARD FOR THE TRUTH IN AN ATTEMPT TO IMPROPERLY PERSUADE THIS COURT INTO A FAVORABLE RULING AND THEREFORE NEEDS REJECTED.

In the City's response the City stated:

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."**

See Response Brief at 3. (emphasis added to false statements).

For the purpose of establishing the City's assertion is not only made with knowledge of its falsity, but also with intent to deceive this Court as to the City's Motion to Dismiss being improperly ruled on by the lower court, Pierce includes the actual CD of the hearing commenced on July 24, 2009 which clearly holds that the City's lawyer, Ms. Susan Mahoney, requested to file an untimely motion to dismiss, not the trial court making the request.

Therefore, the trial court erred in admitting the motion to dismiss and the City's lawyer has made known false statements to this Court which should be stricken from the record and rejected.

Pursuant to RAP 10.9(a), Pierce provides this Court and the City with notice of his intent to use CD format of the July 24, 2009 PRA Sanction hearing. The purpose of this CD being produced is due to the blatant material false statements made by the City in its response and failure to produce the hearing transcripts to support the false claim. See enclosed CD which Pierce certifies under penalty of perjury to be a true and correct copy of the July 24, 2009 proceedings.

2. MR. PIERCE REQUESTS THAT THIS COURT STAY THE PROCEEDINGS AS REQUIRED UNDER RAP 10.4(d) PENDING THE DECISION OF THE SUPREME COURT AS TO THE INTERLOCUTORY DISCRETIONARY REVIEW PENDING IN THAT COURT.

Pursuant to RAP 10.4(d), Pierce motions this court as part of this brief to stay the proceedings until the resolution of the interlocutory discretionary review which was received by the Supreme Court on June 14, 2010 and set for the consideration of the Supreme Court on the Court's August 12, 2010 Motion calendar without oral argument.

The stay should have been automatically conducted by this Court due to Pierce's challenge to this Court's May 27, 2010 ruling that an appendix of the lower court record cannot be used on direct appeal if deemed appropriate by Pierce. The decision if favorable to Pierce will undoubtedly require the currently filed briefs to be re-completed and filed with the use of an Appendix instead of the CP's on file.

However, if the Supreme Court rules that the appendix of the trial court record may not be used, the briefs currently filed will stand and the case may proceed on the merits. Therefore the stay under these circumstances is appropriate.

3. CONCLUSION.

Based upon the trial court's misunderstanding of the Motion to Show

Cause as to why the City should not be sanctioned for failing to timely disclose the requested public records until almost one-year later and after a tort claim was commenced, and due to the City's improperly stated arguments that the City produced the records in a timely fashion and that Pierce could not obtain relief because he obtained the sought after records, which was not the substance of Pierce's Show cause motion, this Court should rule that the trial court misconstrued and misinterpreted the PRA provisions under RCW 42.56 et seq and erred in dismissing Pierce's request for sanctions and grant the appropriate relief as deemed necessary by this Court as requested in the appeal brief.

Dated this 28th day of June, 2010.

Chad A Pierce
Chad Pierce

CERTIFICATE OF SERVICE

I, Chad Pierce, hereby declare under penalty of perjury that I caused a true and correct copy of this reply brief to be deposited into the Airway Heights Correction Center Federal mail System on the 30th day of June, 2010. The reply was caused to be delivered to the below interested parties of record:

1. Susan Mahoney
21630-11th Avenue South, Suite C
Des Moines, Wa 98198

Chad A Pierce
Chad Pierce

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