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NO. 66741-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

GYLES LONG,

Appellant

v.

KING COUNTY METRO TRANSIT,

Respondent.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

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ORIGINAL

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A. RESPONSE TO PLAINTIFF'S ASSIGNMENTS OF ERROR

King County Metro Transit (properly "King County"), Respondent, responds to plaintiff's assignments of error by pointing out that the Notice of Appeal in this case is limited to the court's decision to grant defendant's Motion for Summary Judgment because plaintiff never personally served his summons and complaint on King County. Plaintiff now purports to also challenge the trial court's rulings denying a motion for default and denying a request to obtain a privileged investigative report recommending denial of plaintiff's claim. These assignments of error should be dismissed as not properly preserved. RAP 2.4.

B. ISSUES PRESENTED

1. Whether the trial court's grant of summary judgment of dismissal should be affirmed when it is undisputed that plaintiff did not personally serve King County with a summons and complaint and King County timely asserted this affirmative defense in both its Answer to Complaint and Answer to Amended Complaint.

2. Whether the trial court's grant of summary judgment of dismissal should be affirmed when plaintiff did not file or serve any written opposition to the motion for summary judgment?

3. Whether the trial court's grant of summary judgment of dismissal should be affirmed when King County did not waive its affirmative defense based on plaintiff's failure to properly serve King County.

4. Whether the trial court's grant of summary judgment of dismissal should be affirmed when there is no basis for equitable estoppel.

5. Whether the trial court properly exercised its discretion to deny plaintiff's motion for default when that motion was untimely and when King County answered the complaint before the motion for default hearing despite plaintiff's failure of personal service.

6. Whether the trial court properly denied plaintiff's request for disclosure of King County's privileged recommendation report to deny plaintiff's claim for damages when that report was exempt because it was a privileged attorney-client communication, prepared at the direction of counsel in anticipation of litigation, when plaintiff failed to propound discovery requests for the information he sought, and it was untimely.

C. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

This civil case arose from an alleged altercation on May 31, 2007 between plaintiff and a transit operator. CP 4. Plaintiff Gyles Long claims an unidentified male transit operator verbally and physically

assaulted him when he attempted to board a Route 39 bus he had earlier exited after falling asleep and missing his stop. CP 4-5. Plaintiff's claim for damages number 41633 was denied on January 30, 2008 by King County's Office of Risk Management because no evidence was found of negligence or liability on the part of King County. CP 126.

On May 29, 2009, Mr. Long filed a Summons and Complaint with King County Superior Court. CP 1-16. The Summons he filed was unsigned. *Id.* Mr. Long mailed a copy of his summons and complaint to King County's Risk Management Program. CP 30. However, it is undisputed that Mr. Long did not personally serve King County by serving a copy of his summons and complaint on the Clerk of the King County Council as required by applicable law. CP 181-182. On June 15, 2009 Mr. Long filed an Amended Complaint that he did not sign. CP 17 - 29. He did not ever personally serve this Amended Complaint on King County. CP 181-182.

On June 19, 2009 counsel for King County filed a Notice of Appearance without waiving affirmative defenses including those related to personal service. CP 84-85. King County's Certificate of Service that the Notice of Appearance was mailed to Mr. Long on June 18, 2009 was also filed with the Notice of Appearance. CP 82-83. On June 26, 2009 Mr. Long mailed a document entitled "Amended: Terminology v. Cause

of Action" to counsel for King County containing a list of terms and definitions and page 5 of his amended complaint. CP 180.

2. PROCEDURAL FACTS

A. Motion for Default Denied. Despite Mr. Long's failure to personally serve a summons and complaint on King County, he filed a motion for default on August 17, 2009, CP 30-31, and a Note for Motion Docket on August 19, 2009 noting the motion for default for August 28, 2009. CP 89-90. This motion for default was untimely because Mr. Long did not serve counsel for King County with these documents until August 21, 2009, only five court days before the hearing date. CP 91-119. On August 26, 2009 King County filed its Answer to Complaint. CP 32-42. This Answer was served on Mr. Long by both regular and certified mail. CP 42. The Answer included King County's affirmative defenses of no proper service and statute of limitations as to some of the alleged claims. CP 40.

King County opposed Mr. Long's Motion for Default on the grounds that it was untimely and without merit. CP 91-94. The trial court denied plaintiff's motion for default on August 28, 2009. CP 43.

After receiving King County's Answer including the affirmative defenses related to lack of service and statute of limitations, Mr. Long still did not serve King County with a summons or complaint. CP 181-182. In

addition, Mr. Long did not propound any discovery requests to King County regarding these affirmative defenses or anything else. CP 138.

After obtaining the unsigned Amended Complaint directly from the court file and despite Mr. Long's failure to properly serve any summons or complaint on King County, on June 21, 2010 King County filed and served an Answer to Amended Complaint. CP 159-170. This Answer also including affirmative defenses of lack of personal service, statute of limitations as to some of the alleged claims, lack of service on any Jane Doe or John Doe, and also that "Plaintiff's Amended Complaint is unsigned." CP 169.

As of June 21, 2010, Mr. Long still had sufficient time to correct the jurisdictional deficiencies in his lawsuit prior to the expiration of the three year statute of limitations applicable to the majority of his case. He was first put on notice of these deficiencies when he received King County's Answer to Complaint more than nine months earlier on August 27, 2009. CP 32-42. August 27, 2009 was 90 days after filing of the lawsuit. Personal service on that date would have related back to the filing date and preserved all causes of action. King County properly asserted its affirmative defenses in both responsive pleadings.

B. Motion to Compel. On April 15, 2010 Mr. Long filed a "Motion for Compelling (sic) Disclosure of Documents Pursuant to the

Public Records Act." Mr. Long's Motion to Compel was untimely because he did not serve it on counsel for King County until April 16, 2010, only 4 court days before the date he noted his motion for consideration. CP 136-146. Mr. Long sought an order requiring disclosure of a privileged investigative report dated January 30, 2008. *Id.*

Disclosure was properly denied under the Public Records Act, RCW 42.56.290 and RCW 5.60.060(2)(a) because the record was privileged and, therefore, exempt because it was an attorney-client communication and made under the direction and control of counsel and in anticipation of litigation. CP 147-152. Mr. Long had made public records act requests directly to King County and objected that this document was withheld as privileged. *Id.* The trial court denied Mr. Long's motion and held that the document was privileged and therefore exempt from disclosure CP 156-158. "The report sought by plaintiff under the PRA was one prepared by Risk Management at the request of METRO's counsel in anticipation of litigation. It is work product and thus is exempt from disclosure under the PRA." CP 157.

C. Summary Judgment of Dismissal Granted. King County filed a motion for summary judgment based on no personal service on August 30, 2010. CP 173-178. Contrary to the various dates stated in the Brief of Appellant, Mr. Long was served by legal messenger with King

County's motion for summary judgment on August 31, 2010. CP 183-189. Mr. Long did not respond and did not file or serve any written opposition to King County's motion. CP 56-57. Mr. Long himself conceded that he did not serve King County with any written opposition to the summary judgment motion. CP 61. On September 30, 2010 counsel for King County submitted a supplemental declaration with proof of service of the motion. CP 183-189. Mr. Long now claims without any proof that he filed an opposition memorandum on September 30, 2010 but that it was taken out of the court file. Brief of Appellant, pp. 11, 26-28. According to the docket, his only such filing was on July 8, 2011, well after this appeal was filed. CP 63-71. There is no evidence to the contrary.

On October 1, 2010 the trial court considered without argument and granted King County's motion for summary judgment because of lack of personal service and no resulting jurisdiction. CP 56-57. The court's order includes that "No opposition pleadings from plaintiff were received." CP 56. The trial court found the matter was time-barred and dismissed Mr. Long's claims with prejudice. *Id.* Unfortunately, the note for motion form used with King County's motion was inadvertently for the downtown Seattle courthouse rather than the Maleng Regional Justice Center in Kent. CP 171-172. However, Mr. Long was at the downtown courthouse more than 30 minutes before the 10:00 a.m. time for the

motion hearing in Kent. CP 190 -195. He now claims he was unable to contact the trial judge's courtroom at all on October 1, 2010.

D. Motion for Reconsideration Not Considered. This was the sole basis for his attempt to seek relief in his Motion for Reconsideration. CP 58-61. He filed but never noted a motion for reconsideration. *Id.* Mr. Long failed to comply with the applicable rules for noting motions for consideration and for providing the court with working papers even though at the outset of this lawsuit Mr. Long was provided with written instructions from the court about the applicable rules including those for motions and pleadings. CP 76-81. Contrary to Mr. Long's current argument that he was never aware of the October 1, 2010 Summary Judgment Order dismissing his lawsuit, Mr. Long sought to have that very order vacated in his Motion for Reconsideration filed October 8, 2010:

"Plaintiff Pro Se Gyles R. Long moves this court . . . for an order vacating the judgment entered on October 1, 2010 . . . " CP 58.

E. Entry of Judgment for King County. On January 7, 2011 King County noted this case for entry of judgment by filing and sending for service on Mr. Long a Note for Motion Docket for January 21, 2011 together with a proposed judgment including the October 1, 2010 summary judgment order and King County's cost bill. CP 196-200. Mr. Long concedes he received these pleadings but claims not to have

understood them. Brief of Appellant, pp. 22-23. Mr. Long did not file or serve any opposition to entry of judgment. Judgment was entered in King County's favor on January 21, 2011. CP 201-202. Mr. Long appealed the summary judgment on February 18, 2011. CP 62.

D. AUTHORITIES AND ARGUMENT

1. STANDARD OF REVIEW

a. Civil Rule 56 Motion for Summary Judgment.

A motion for summary judgment as a matter of law is proper if, after viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Review on appeal is *de novo*. When reviewing a CR 56 motion for summary judgment as a matter of law, the Court of Appeals applies the same standard as the trial court. CR 56(c). *See also O'Neill v. Farmers Insurance Co. of Wash.*, 124 Wash. App. 516, 125 P.3d 134 (2004).

b. Civil Rule 55 Motion for Default.

“The rule is well established in this state that the granting of or refusal to grant a motion for default rests within the sound discretion of the trial court.” *Bown v. Fleischauer*, 53 Wn. 2d 419, 425, 334 P.2d 174 (1959). A trial court abuses its discretion if it “exercise[s] its discretion on untenable grounds or for untenable reasons” or if “the discretionary act

was manifestly unreasonable.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794, P.2d 526 (1990). Under Civil Rule 55(a)(2), if the party opposing the motion has appeared, that party “may respond to the pleading or otherwise defend at any time before the hearing on the motion.” Furthermore, a trial court abuses its discretion if it grants a motion for default and enters an order of default when the opposing party has appeared and responds to the motion before the hearing. *Mecum v. Pomiak* 119 Wn.App. 415, 422, 81 PP.3d 154 (2003).

c. Public Records Act De Novo Standard of Review.

Judicial review of actions under the Public Records Act, RCW 42.56, is de novo. *See, e.g., Koenig v. Pierce County*, 151 Wn. App. 221, 229, 211 P.3d 423 (2009); *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn. 2d 243, 252, 884 P.2d 592 (1994).

d. Pro Se Litigants Are Held to the Same Standards as Attorneys.

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).

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2. KING COUNTY WAS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW BECAUSE IT IS UNDISPUTED THAT PLAINTIFF FAILED TO PERSONALLY SERVE HIS LAWSUIT ON KING COUNTY.

RCW 4.28.080 states in relevant part:

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:

(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

K.C.C. Ch. 4.12.080(a) provides: "Service of a summons and complaint on the clerk of the council shall constitute service on the county for purpose of state law, RCW 4.28.080." At no time during this lawsuit has Mr. Long served the summons and complaint, or any other pleading, on the clerk of the council. Therefore, Mr. Long has not personally served King County and service of process is insufficient.

3. KING COUNTY DID NOT WAIVE ITS RIGHT TO CONTINUE TO MAINTAIN ITS TIMELY AFFIRMATIVE DEFENSE BASED ON OF LACK OF PERSONAL SERVICE.

Mr. Long claims that King County waived this defense by engaging in discovery and waiting until after the statute of limitations tolled before filing a motion for summary judgment. However, King

County reserved this defense in both its original and amended answer, and conducted only one discovery deposition that took place only after both answers were filed with the defense clearly stated. No representations were ever made to the contrary regarding the absence of personal service. Mr. Long never propounded any discovery requests on this issue or any other issue in this case. Consequently, under the applicable case law, King County did not waive the affirmative defense.

The defense of insufficient service of process can be waived as a matter of law if the defendant's counsel has been dilatory in asserting the defense, or if defendant's assertion of the defense is inconsistent with the defendant's previous behavior. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). This is to prevent a defendant from "lying in wait" and allowing the plaintiff to assume that service of process was sufficient before obtaining a dismissal on these grounds after the statute of limitations has tolled. *Id.* at 40. However, unlike the *Lybbert* case, here King County did include the defense of insufficient service in both the original and amended answer. There is no requirement that King County file a motion to dismiss at a time when such a motion would be a useless act. So long as the defense is asserted in the answer and no representations to the contrary are made, King County is entitled to make its motion when the motion will be effective. A defendant is not dilatory

in raising a defense if it is included in the answer. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002); *French v. Gabriel*, 116 Wn.2d 584, 593, 806 P.2d 1234 (1991). Service of process is not waived if the plaintiff receives notice of the defense before the expiration of the statute of limitations and before discovery. *O'Neill v. Farmer's Insurance Co.*, 124 Wn.App. 516, 529, 125 P.3d 134 (2004).

Mr. Long's initial summons and complaint was filed on 5/29/2009. King County filed its answer less than three months later on August 26th, 2009 and included the defense of lack of personal service. King County filed an answer to Mr. Long's unsigned and unserved amended complaint on June 21st, 2010 which also contained the affirmative defense of lack of personal service. Although the two year statute of limitations on Mr. Long's assault claim expired prior to the day he received King County's Answer no discovery had yet occurred. Had Mr. Long personally served King County within 90 days of filing (by August 27, 2009) his lawsuit would have been deemed commenced on the date of filing then the statute of limitations would not apply. In any event, Mr. Long still had sufficient time to perfect service on the rest of his claims even after receiving both answers. This is in direct contrast to the cases cited by Mr. Long, all of which involve defendants who did not claim the affirmative defense in their answer or who waited to file the answer until well after the statute of

limitations had tolled. *Lybbert*, 141 Wn.2d at 44; *Romjue v. Fairchild*, 60 Wn.App. 278, 280-81, 803 P.2d 57 (1991); *Blankenship v. Kaldor*, 114 Wn.App. 312, 315, 57 P.3d 295 (2002). King County did not "lie in wait" in order to prevent Mr. Long from perfecting service. Instead Mr. Long was notified of the defense two different times in two separate responsive pleadings. As a *pro se* litigant he was and is held to the same standards as an attorney in such matters. *In re Marriage of Olson, supra*.

A defendant may waive the defense of insufficient service if defendant's prior behavior is inconsistent with the defense. *Lybbert*, 141 Wn.2d at 39. Extensive discovery efforts may be considered evidence of inconsistency. *Id.* at 32-33; *King*, 146 Wn.2d at 423. However, conducting minimal discovery will not waive the defense of insufficient service. *Meade v. Thomas*, 152 Wn.App. 490,495, 217 P.3d 785 (2009); *French*, 116 Wn.2d at 594. In *Meade*, the defendant requested one set of interrogatories, sent an e-mail and a letter, and asked about plaintiff's deposition. 152 Wn.App at 495. The defendant in *French* took only one deposition. 116 Wn.2d at 594. Their defenses were not waived.

In contrast, a defendant who includes the affirmative defense in its answer may still waive the defense if there is extensive discovery, mediation, or if the defendant ignores plaintiff's attempts to clarify the defense. *King*, 146 Wn.2d at 423. The defendant in *King* refused to

answer an interrogatory request to further describe the basis of the defense claimed, and then proceeded to litigate for four more years, conducting 18 depositions and going through mediation before filing for summary judgment on insufficient service. *Id.* This is much different than Mr. Long's case. Here, King County conducted minimal discovery consisting of only one deposition and a request (refused by Mr. Long) for a medical records stipulation. Mr. Long propounded no formal discovery requests at all. King County deposed Mr. Long only after filing two answers that both contained the service of process defense. King County's minimal discovery requests were not inconsistent with the defense of lack of service of process.

King County did not waive the affirmative defense of service of process. The defense was consistently claimed by the county in both its original and amended answer, both of which Mr. Long received before the statute of limitations tolled on the majority of his claims. In no way was the minimal discovery conducted by the county inconsistent with the service of process defense. The only motions practice involved two motions by Mr. Long, both successfully opposed by King County. Consequently, under the applicable case law including *Lybbert*, King County did not waive its affirmative defense and the summary judgment dismissal for lack of service of process should be affirmed.

4. KING COUNTY WAS NOT EQUITABLY ESTOPPED FROM MAINTAINING ITS AFFIRMATIVE DEFENSE OF LACK OF SERVICE.

King County is not equitably estopped from asserting the defense of lack of personal service in this case under the applicable law including the *Lybbert* case, erroneously relied upon by plaintiff:

The elements of equitable estoppel are: “(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Board of Regents v. City of Seattle*, 108 Wash.2d 545, 551, 741 P.2d 11 (1987). Where both parties can determine the law and have knowledge of the underlying facts, estoppel cannot lie. *Chemical Bank v. Washington Pub. Power Supply Sys.*, 102 Wash.2d 874, 905, 691 P.2d 524 (1984). Equitable estoppel must be shown “by clear, cogent, and convincing evidence.” *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wash.2d 816, 831, 881 P.2d 986 (1994).

Lybbert, supra, at 35. The court in *Lybbert* held that even Grant County's undertaking discovery and trial preparation without answering the complaint or a specific interrogatory answer regarding the service issue could not support a claim of equitable estoppel because the statute setting forth the requirement of personal service on a county, RCW 4.28.080, was explicit and a clear statutory mandate such that any reliance to disregard the requirement “was not at all reasonable, much less justifiable”. *Id.* at

36. *See, also, Davidheiser v. Pierce County*, 92 Wash.App. 146, 154, 960 P.2d 998 (1998).

Mr. Long is held to the same standard as an attorney with respect to the laws applicable to his lawsuit. As such, the requirements to initially commence his case apply as equally to him as to any other attorney. His continued disregard for the clear and reasonable requirement required dismissal in this case. No representation or action contrary to King County's lack of service defense was made. Appearing in this lawsuit and opposing Mr. Long's motion for default and motion to compel are all actions King County was entitled to take. These actions were required for the proper representation of King County and not taken in any way to confuse Mr. Long. Likewise, King County was not precluded from taking plaintiff's deposition before the discovery deadline in this case. Mr. Long had amply time to either properly serve King County or propound discovery regarding the affirmative defenses. However, he chose neither action and reliance he now claims was unreasonable and unjustified.

5. PLAINTIFF'S MOTION FOR RECONSIDERATION WAS NOT PROPERLY PRESENTED FOR CONSIDERATION BY THE COURT NOR WAS IT EVER SERVED ON KING COUNTY.

King County Local Civil Rules (LCRs) clearly require motions for reconsideration to be made and noted for consideration in the same

manner as other motions under LCR 7(b)(4). "The form of the motion and notice of hearing shall conform to LCR 7(b)(4). . . ." LCR 59(a).

LCR 7(b)(4)(A) requires motions to be filed and served no later than six court days before the date for consideration. Working copies of motions shall be delivered to the trial judge at the same time they are served on opposing counsel. LCR 7(b)(4)(F). A Note for Motion is required under LCR 7(b)(5)(A) and no such note accompanied Mr. Long's Motion for Reconsideration. In addition, "[n]o response to a motion for reconsideration shall be filed unless requested by the court." LCR 59(b). Hence, Mr. Long's motion for reconsideration was never properly before the trial court. There is also no proof in the record that this motion was ever served on King County. Moreover, it is clear that Mr. Long took no steps to determine why his motion was not considered by the court as his November 15, 2010 trial date came and went with no action because his case was dismissed. Under these circumstances, Mr. Long was not entitled to have his Motion for Reconsideration considered. Even if his motion had been considered, his sole basis for relief was not attending oral argument in Kent when he went to the downtown Seattle courthouse. Based on the undisputed evidence that no personal service was ever made in this case and King County's preserving of the issue in its Answers, at set

forth elsewhere in this brief, the trial court's entry of summary judgment was proper.

6. PLAINTIFF'S UNTIMELY AND MERITLESS MOTION FOR DEFAULT WAS PROPERLY DENIED BY THE TRIAL COURT.

Plaintiff's Motion for Default was stricken as without merit and was also untimely because it was not served on the office of undersigned counsel until Friday, August 21, 2009, only five court days before the date it was noted for hearing, August 28, 2009. Mr. Long now adds a new argument that King County required leave of court to file its Answer to Complaint after the motion for default was filed. This is incorrect. In fact, the opposite is true. Under Civil Rule 55(a)(2) states, in pertinent part, "If the party has appeared before the motion is filed, *he may respond to the pleading or otherwise defend without leave of court.*" (Emphasis added). A party, who has appeared and responded "before the hearing[,] cures the default and allows the court to consider the merits of the case." *In re Marriage of Pennamen*, 135 Wn.App. 790, 799, 146 P.3d 466 (2006); see *Tacoma Recycling, Inc. v. Capitol Material Handling Co.*, 34 Wn.App. 392, 395, 661 P.2d 609 (1983). Here, King County filed and served a Notice of Appearance on June 19, 2009 and was, consequently, entitled to answer the complaint before the hearing date noted for the motion for default. Moreover, service of the motion was untimely.

Contrary to Mr. Long's arguments on appeal, King County also complied with CR 12(h)(1) by including its lack of proper service and service of process defenses in its responsive pleadings, the Answer to Complaint and Answer to Amended Complaint. Therefore, the trial court properly denied Mr. Long's motion for default. In addition, Mr. Long did not include this ruling in his Notice of Appeal which purported to appeal from only the summary judgment in this case. On this further basis, this assignment of error should be denied. See, RAP 2.4.

7. THE TRIAL COURT PROPERLY DENIED ACCESS TO KING COUNTY'S PRIVILEGED WORK PRODUCT REPORT REGARDING DENIAL OF PLAINTIFF'S CLAIM.

A. Plaintiff's Motion to Compel was Properly Denied on the Merits.

Plaintiff's motion "pursuant to RCW 42.56" to compel disclosure of a privileged report of the claims investigator was properly denied by the court. Mr. Long did not seek the report through a request for production under CR 34 but instead directly from King County's Office of Risk Management as part of a Public Records Act (PRA) request. CP 136-146. Although Mr. Long mentions in his Brief of Appellant other PRA requests he has made including to the King County Department of Transportation, these requests were never brought to the attention of the trial court. *Id.*

The trial court properly denied the motion to compel and decided that the report was exempt from disclosure because it is privileged work product made in reasonable anticipation of litigation. CP 156-158.

This exempt document was first identified for plaintiff in timely response to his PRA request in a privilege log as a January 30, 2008 investigation report from King County Tort Claims Investigator Christine Oh to Transit Claims Manager Karen Graham and Senior Deputy Prosecuting Attorney Linda Gallagher, undersigned counsel with citations to the applicable exemptions and a brief explanation of how the exemptions apply. CP 131. This report was made at the request, direction and control of undersigned counsel for King County and contains Ms. Oh's recommendation that Mr. Long's claim be denied. CP 137. King County opposed disclosure of this three page document based on both the privileged work product exemption and the exemption for protected attorney-client communication. CP 136-146; CP 147-153.

"Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party pending in the superior courts are exempt" from public disclosure. RCW 42.56.290. *Koenig v. Pierce County*, 151 Wn. App. 221, 229-230, 211 P.3d 423 (2009); *Limstrom v. Ladenburg*, 136 Wn. 2d 595, 611, 963 P.2d 869 (1998) (plurality opinion). Ms. Oh's opinions, impressions and summary

of her investigation of plaintiff's claim, conducted at the request and direction of King County's counsel, constitute both attorney work product and an attorney-client communication, and are, therefore, exempt from disclosure. In *Limstrom* the court interpreted Civil Rule 26(b)(4) as including within the definition of work product "formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation." *Id.* at p. 611. See, also, *Koenig* at p. 230. Such work product as defined under the civil rule is protected from disclosure unless the requester is able to demonstrate a substantial need and an inability to obtain the documents from other sources." *Id.*

Plaintiff did not, and cannot, make such a showing in this case. He did not seek *any* discovery in this case in the form of interrogatories, requests for production or depositions seeking information about witnesses or other facts related to his claimed injury. His attempt to instead obtain the work product impressions and opinions of Ms. Oh as expressed in her report was properly denied by the trial court.

"The work product doctrine protects *documents* and tangible things prepared in anticipation of litigation, and it protects those documents that tend to reveal an attorney's thinking almost absolutely." *Soter v. Cowles Publishing Co.*, 162 Wn. 2d 716, 742, 174 P.3d 60 (2007) (emphasis in

original). In *Soter* this work product protection was applied to both the attorneys and the investigator working on behalf of the attorneys. The facts in *Soter* involved a newspaper seeking documents, including notes taken by attorneys and an investigator for the Spokane School District who had conducted an investigation in anticipation of litigation following the tragic death of a student during a field trip. The court upheld exemptions based on attorney-client communication and the attorney work product doctrine.

"The attorney-client privilege exists to allow clients to communicate freely with their attorneys without fear of later discovery. . . . The privilege encourages free and open communication by assuring that communications will not later be revealed directly or indirectly." *Soter* at p. 745. These exemptions were applied to an investigation started almost immediately after the occurrence because litigation was reasonably anticipated. "General arguments that either attorney-client privilege or the work product doctrine should not apply when a record is being sought under the Public Records Act are more properly directed toward the legislature, which is in a position to change the law if it sees fit." *Id.* at p. 749. Therefore, Ms. Oh's investigative report met the exemptions for attorney work product and attorney-client communication and the trial court properly decided it was exempt from disclosure.

Furthermore, Mr. Long did not include this ruling in his Notice of Appeal which purported to appeal from only the summary judgment in this case. On this further basis, this assignment of error should be denied. See, RAP 2.4.

B. Plaintiff's Motion to Compel was untimely and could also have been denied on this basis.

Plaintiff's Motion to Compel was also untimely because it was not served on the office of King County's counsel until Friday, April 16, 2010, only four court days before the April 22, 2010 noting date. CP 136. Plaintiff's Notice for Hearing form also incorrectly lists the day of the week for April 22, 2010 as "Friday". CP 120. Even if the Notice for Hearing was construed as noting this motion for consideration on Friday, April 23, 2010, service was made only five court days prior to this date. Local Civil Rule 7(b)(4)(A) Dates of Filing, Hearing and Consideration, provides, in part:

The moving party shall serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered.

Plaintiff failed to comply with the minimum notice requirement and his motion was, therefore, untimely.

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E. CONCLUSION

For these reasons, King County asks this Court to affirm the trial court's decisions and dismiss plaintiff's appeal.

DATED this 24th day of October, 2011.

RESPECTFULLY submitted,

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By: 

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