

NO. 47359-3-II

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

NORBERT SCHLECHT,

Appellant,

v.

CLARK COUNTY, WASHINGTON,

Respondent.

CLARK COUNTY'S MOTION ON THE MERITS

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I. IDENTITY OF MOVING PARTY

Respondent Clark County by and through its attorney-of-record, Jane E Vetto, Deputy Prosecuting Attorney, asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Respondent respectfully requests that this Court dismiss Appellant Norbert Schlecht's (hereinafter "Schlecht") appeal and determine that the prior three hearings held by the trial court and that court's three separate determinations that Clark County conducted a reasonable search but has no documents responsive to Schlecht's public records request, should be a final determination on the merits. Clark County asks that this Court find that Schlecht's attempt to resuscitate his cause of action is improper, and a waste of judicial time and resources, and, therefore, should be denied.

III. FACTS RELEVANT TO THE MOTION

Clark County relies on the statement of facts and legal authority submitted in its response brief, and citations thereto. To briefly summarize the relevant facts, however, Schlecht's litigation first commenced with a suit alleging Clark County violated the Public Records Act by not producing records which identified the names of individuals who were the subject of a 911 call.¹ In its Answer, Clark County confirmed that it had no records responsive to Schlecht's request.² On March 12, 2014 Schlecht filed a Summary Judgment Motion which was heard and argued on April 11, 2014.³ The trial court denied Schlecht's Motion for Summary Judgment.⁴ Schlecht filed a Motion for Reconsideration, which was also denied by the trial court.⁵ Clark County then filed a Motion for Summary Judgment on June 13, 2014 which plaintiff responded

¹ CP 3-27.

² CP 32-37.

³ CP 38-64; CP 104-118.

⁴ CP 119.

⁵ CP 121-134; CP 167.

2014.⁶ The hearing was held on July, 18 2014 at which time the trial court granted Clark County's Motion for Summary Judgment.⁷ Schlecht now appeals the trial court's dismissal of this lawsuit.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Respondents have Satisfied the Requirements of RAP 18.14.

The court may grant a motion on the merits to affirm, in whole or in part:

If the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant facts, including whether the issues on review (a) are clearly controlled by settled law, are factual and supported by the evidence, or are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.⁸

The motion on the merits is warranted for numerous reasons in this particular case. First, Schlecht has failed to provide this Court with an adequate record for reviewing the issues. As the appellant, Schlecht has the burden of perfecting the record on appeal so that the Court has before it the information and evidence relevant to the issues he raises. *RAP 9.2(b)*. *Bulzomi v. Dept. of Labor & Industries*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Failure to provide an adequate record precludes review of the alleged errors. Here, Schlecht filed a portion of the record relevant to its motion, but excluded any mention of, or documents related to, the fact the trial court reviewed his request and evidence not once, but on three separate occasions.

Second, the material evidence supports the trial court's dismissal of Schlecht's lawsuit. In Public Records Act cases, the agency's burden is to establish beyond material doubt the reasonableness of its search for documents, and to do so may rely on reasonably detailed affidavits submitted in good faith. See *Neighborhood Alliance of Spokane Clark County v.*

⁶ CP 142-163; CP 168-198.

⁷ CP 204.

⁸ Wash. RAP 18.14(e) (1).

Spokane Clark County, 172 Wn.2d 702, 720-21, 261 P.3d 119 (2011). The material evidence, documented in the declaration of the Sheriff's Office Records Unit supervisor submitted by Clark County, demonstrates that Clark County has met its burden of showing the reasonableness of its search. On three separate occasions the trial court reviewed the steps the County took to search for responsive records, along with Schlecht's various and unsubstantiated theories about what "probably" happened at the scene of the 911 call.⁹ In reviewing the evidence on three separate motions brought in front of her, the trial court found Petitioner's theories were suppositions rather than facts, and were not in the record before her nor supported by any document Schlecht submitted. Given the extensive review that the evidence in this matter has already been given, and the fact that further review will not lead the production of responsive documents, because the material evidence shows that none exist, granting a motion on the merits is warranted in this case.

In addition, Schlecht has made unfounded claims against Clark County alleging, either as fact or argument that Clark County officials have acted improperly. In *Allen v. Asbestos Corp.*, 138 Wn. App. 564, 569-579, 157 P.3d 406 (2007), the court approved a trial court's rejection of unsupported facts. *See also, by analogy, CR 56(e)*. Appellant's allegations in its appeal are wholly unsupported. There are material facts in the record sufficient to support the trial court's dismissal of his case pursuant to CR 56. Therefore, a Motion on the Merits is appropriate in this case.

V. CONCLUSION

The trial court provided three separate opportunities for Schlecht to submit material evidence in support of his claim that Clark County failed to comply with the Public Records Act. He failed to do so. No party is guaranteed a victory. While Plaintiff seeks that this case be

⁹ CP 115, lines 4-15.

remanded back to the trial court for further review of the evidence, the evidence has already been reviewed three times. The court determined based on her extensive review that Clark County has met its burden of showing it made a reasonable search but has no responsive documents to produce. The present appeal is Schlecht's fourth attempt to argue his unsubstantiated claims that Clark County is withholding public records. Clark County requests that this Court grant this Motion on the Merits and dismiss Schlecht's appeal.

Respectfully submitted this 17th day of February, 2015.

RESPECTFULLY SUBMITTED:

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CLARK COUNTY PROSECUTOR

February 17, 2015 - 2:45 PM

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