

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARRY DAY,

Appellant,

v.

PIERCE COUNTY PROSECUTING
ATTORNEY'S OFFICE,

Respondent.

No. 40730-2-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Larry Day sued the Pierce County Prosecuting Attorney's Office for alleged violations of the Public Records Act.¹ The Prosecuting Attorney's Office successfully moved for summary judgment. Day appeals, arguing that (1) the Act requires the Prosecuting Attorney's Office to produce an exemption log, (2) the Prosecuting Attorney's Office withheld non-exempt documents from production, (3) the Act requires in camera review of exempt documents, (4) the trial court erred in not awarding Day discovery sanctions, (5) the trial court's order granting summary judgment is insufficient because it lacks findings of fact and conclusions of law, and (6) the trial court erred in not granting Day's motion for default and default judgment. The Prosecuting Attorney's Office argues that the trial court correctly dismissed the case because Day did not serve the County. We agree with the Prosecuting Attorney's Office and affirm.

¹ Ch. 42.56 RCW.

FACTS

Under the Act, Day requested 49 records from the Prosecuting Attorney's Office relating to its criminal prosecution of Day.² The Prosecuting Attorney's Office responded to Day's records request by letter, identifying the records Day requested and disclosing that it had a total of 144 pages of responsive documents. But it explained that those 144 pages of documents were attorney work product and, thus, exempt from production.

Although, the Prosecuting Attorney's Office waived its attorney work product exemption for 65 pages of documents, on August 26, 2009, it declined to waive its attorney work product exemption for the remaining 79 pages of documents responding to several of Day's requests. Day challenged this denial, but the Prosecuting Attorney's Office affirmed its decision not to produce those documents on September 25. The Prosecuting Attorney's Office further informed Day that the exempt documents were available from other sources, which it identified.

Two months later, Day served Pierce County Prosecuting Attorney Mark Lindquist with a summons and a document entitled, "Verified Petition-Complaint for Public Records Act Violations," in which Day named the Pierce County Prosecuting Attorney's Office as the defendant. Clerk's Papers at 2-6, 26. Thereafter, Day filed his "Verified Petition-Complaint for Public Records Act Violations" with Pierce County Superior Court. Day never served the Pierce County Auditor. Day's process server averred that unnamed workers at both the Auditor's and the Prosecuting Attorney's Offices informed him that Prosecuting Attorney Lindquist was the

² Because Day appeals an order granting the Prosecuting Attorney's Office's motion for summary judgment, we set out the facts in the light most favorable to Day. *Jones v. Dep't of Health*, 170 Wn.2d 338, 342 n.1, 242 P.3d 825 (2010).

proper party to serve. Day's process server further averred that staff at the Auditor's office refused his attempted service.

Although it never filed an answer, about six weeks after Day filed his complaint, the Prosecuting Attorney's Office filed a notice of appearance in which it explicitly stated that it did not waive the potential defense of insufficient service of process. Thereafter, the Prosecuting Attorney's Office moved for summary judgment. Alternatively, the Prosecuting Attorney's Office asked the trial court to dismiss the case for insufficient service of process because Day did not serve the Auditor. The trial court granted the Prosecuting Attorney's Office's motion for summary judgment and dismissed Day's case with prejudice. Day timely appealed.

ANALYSIS

I. Standard of Review

We review challenged agency action under the Act de novo. *Gronquist v. Dep't of Corr.*, 159 Wn. App. 576, 582, 247 P.3d 436 (2011). Similarly, we review orders granting summary judgment de novo, performing the same inquiry as the trial court and considering all facts in the light most favorable to the nonmoving party. *Steinbock v. Ferry County Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 484, 269 P.3d 275 (2011); *Gronquist*, 159 Wn. App. at 582-83. Summary judgment is proper if the record shows there is no genuine question of material fact and the moving party is entitled to judgment as a matter of law. *Gronquist*, 159 Wn. App. at 583; CR 56(c). We may affirm an order granting summary judgment on any basis supported by the record. *Steinbock*, 165 Wn. App. at 485.

II. Summary Judgment

Although Day makes several arguments in support of his claim that the trial court erred in granting the Prosecuting Attorney's Office's motion for summary judgment, we affirm the trial court based on Day's insufficient service of process. Br. of Appellant at 12-25.

Counties are capable of being sued. RCW 36.01.010. But county departments cannot be sued unless the laws creating those departments allow them to be sued directly. *Roth v. Drainage Improvement Dist. No. 5*, 64 Wn.2d 586, 588, 392 P.2d 1012 (1964). A trial court has personal jurisdiction over a defendant only if the plaintiff properly serves a summons and complaint on that defendant. RCW 4.28.020; *Weber v. Associated Surgeons*, 166 Wn.2d 161, 163, 206 P.3d 671 (2009). In order to properly serve a defendant county, a plaintiff must personally serve "the county auditor or . . . the deputy auditor" during regular business hours. RCW 4.28.080(1). This statutory requirement that service on a county must be on the county auditor or deputy auditor is explicit and reasonable. *Nitardy v. Snohomish County*, 105 Wn.2d 133, 135, 712 P.2d 296 (1986).

Here, it is undisputed that Day named the Pierce County Prosecuting Attorney's Office as the defendant. Pierce County did not designate the Prosecuting Attorney's Office as an independent legal entity capable of being sued. Pierce County Code 2.06.030(A)(2), (C). Thus, the Prosecuting Attorney's Office is not a proper defendant. Next, it is undisputed that

Day did not serve the auditor. Because Day did not follow the explicit statutory requirement that a person suing a county must serve the auditor, Day's service of process was insufficient.³

Under the Act, a person denied access to public records must bring suit within either one year of the date the agency claims that those documents are exempt or the date the agency last produces a record on an installment basis. RCW 42.56.550(6); *Tobin v. Worden*, 156 Wn. App. 507, 509-10, 233 P.3d 906 (2010). Here, the Prosecuting Attorney's Office did not produce Day's requested records on an installment basis, but it did claim that the 79 pages of withheld documents were exempt on August 26, 2009. The Prosecuting Attorney's Office renewed its claim that the records were exempt on September 25, 2009. Thus, considering the facts in the light most favorable to Day, the statute of limitations for his suit began to run on September 25, 2009. Although Day had five months after the trial court dismissed his suit on summary judgment

³ Day argues that the Prosecuting Attorney's Office is equitably estopped from arguing insufficient service of process because an unnamed person at the auditor's office refused service and told him to serve the prosecutor and because the Prosecuting Attorney's Office told him that the prosecutor was the proper party to serve. We disagree. In order for Day to assert equitable estoppel, he must show that the Prosecuting Attorney's Office's (1) acted or made an admission that is inconsistent with its current position, (2) upon which Day relied, and (3) Day would be injured if the Prosecuting Attorney's Office was not estopped from repudiating its earlier admission. *Davidheiser v. Pierce County*, 92 Wn. App. 146, 153, 960 P.2d 998 (1998). However, beyond showing a lack of knowledge of the facts, Day must also show that there was no convenient and available means for him to learn those facts. *Davidheiser*, 92 Wn. App. at 153. Accordingly, equitable estoppel does not normally apply to assertions of law. *Davidheiser*, 92 Wn. App. at 153.

Here, Day was statutorily required to serve the county auditor. RCW 4.28.080(1). Day's reliance on the statements of two unnamed people that the prosecutor, not the auditor, was the proper party to serve did not alter the statutory requirement that he serve the county auditor. See *Davidheiser*, 92 Wn. App. at 154-55. Because the statutory service requirements are clear and readily available, Day could not reasonably rely on the alleged misstatements of law that the prosecutor was the proper party to serve. *Davidheiser*, 92 Wn. App. at 154. Thus, Day's equitable estoppel argument fails.

No. 40730-2-II

during which he could have filed and properly served Pierce County, he did not do so.

Accordingly, because Day's service was improper and because the one year statute of limitations to file suit under the Act lapsed over 18 months ago, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Armstrong, J.

Van Deren, J.