NO. 42712-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHAWN D. FRANCIS,

Appellant/Cross-Respondent,

v.

DEPARTMENT OF CORRECTIONS,

Respondent/Cross-Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. REPLY 1

A. To Define "Bad Faith" According To Black's Law Dictionary Runs Counter To The Tenants Of Statutory Construction And The Intent Of The Legislature 1

B. Using the *Yousoufian* Test To Determine "Bad Faith" Would Impermissibly Broaden The Statutory Term 5

C. The Amount Of Penalties Imposed By Other Courts Has No Bearing On Whether The Trial Court's Decision In This Case Was Supported By The Evidence Presented 7

II. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Associated Gen. Contractors v. King County,
124 Wn.2d 855, 881 P.2d 996 (1994) 5

Bricker v Department of Labor and Industries,
164 Wn. App. 16, 262 P.3d 121 (2011) 7, 8, 9

Department of Ecology v. Campbell & Gwinn, LLC,
146 Wn.2d 1, 43 P.3d 4 (2002) 2

Estate of Bunch v. McGraw Residential Center,
__ Wn.2d __, 275 P.3d 1119, No. 85679-6 (May 3, 2012) 1

Fix v. Fix,
33 Wn.2d 229, 204 P.2d 1066 (1949) 6

Flight Options, LLC v. Department of Revenue,
172 Wn.2d 487, 259 P.3d 234 (2011) 1

Kunkel v. Median Oil, Inc.,
114 Wn.2d 896, 792 P.2d 1254 (1990) 8, 9

Ockerman v. King County Dep't of Developmental & Envtl. Servs.,
102 Wn. App. 212, 6 P.3d 1214 (2000) 2, 6

Prison Legal News, Inc. v. Department of Corrections,
154 Wn.2d 628, 115 P.3d 316 (2005) 2

Progressive Animal Welfare Society v. U.W.,
114 Wn.2d 677, 790 P.2d 604 (1990) 5

Rental Housing Association of Puget Sound v. City of Des Moines,
165 Wn.2d 525, 199 P.3d 393 (2009) 3

Rest. Dev., Inc. v. Cananwill, Inc.,
150 Wn.2d 674, 80 P.3d 598 (2003) 2

Senate Republican Campaign Committee v. Public Disclosure Commission,
133 Wn.2d 229, 943 P.2d 1358 (1997) 5

State ex rel. Citizens Against Tolls (CAT) v. Murphy,
151 Wn.2d 226, 88 P.3d 375 (2004) 1

Washington Public Ports Association v. Department of Revenue,
148 Wn.2d 637, 62 P.3d 462 (2003) 3

West v. Port of Olympia,
146 Wn. App. 108, 192 P.3d 926 (2008) 7, 9

West v. Thurston County,
No. 41085–1–II, 2012 WL 1604838 (Wash. Ct. App. Div. II, May 8, 2012) 6

Whatcom County v. City of Bellingham,
128 Wn.2d 537, 909 P.2d 1303 (1996) 2

Yakima v. Yakima Herald-Republic,
170 Wn.2d 775, 246 P.3d 768 (2011) 1

Yousoufian v. Office of Ron Sims,
152 Wn.2d 421, 98 P.3d 463 (2004) 2, 7, 8, 9

Yousoufian v. Office of Ron Sims,
168 Wn.2d 444, 229 P.3d 735 (2010) 6, 9

Statutes

RCW 42.56.565 3

RCW 42.56.565(1) 3, 5, 7, 9

S.B. Rep. on SB 5025, 62nd Leg., Reg. Sess. (Wash. Jan. 14, 2011) 4

SB 5025, 62nd Leg., Reg. Sess., § 1(5) (Wash. 2011) 4

SSB 5025, 62nd Leg., Reg. Sess. § 1(1) (Wash. 2011) 4

I. REPLY

A. To Define "Bad Faith" According To Black's Law Dictionary Runs Counter To The Tenants Of Statutory Construction And The Intent Of The Legislature

Mr. Francis argues that the term "bad faith" in the inmate penalty statute is ambiguous, and therefore, that this Court should follow the Black's Law Dictionary to ascertain the definition of the term. Brief of Cross-Respondent at 9. The Department agrees that the term is ambiguous; however, Mr. Francis' argument for his suggested definition disregards the rules of statutory interpretation, and the intent of the Legislature.

A court's "fundamental objective" when interpreting a statute "is 'to discern and implement the intent of the legislature.'" *Estate of Bunch v. McGraw Residential Center*, __ Wn.2d __, 275 P.3d 1119, No. 85679-6 (May 3, 2012) (citing *Flight Options, LLC v. Department of Revenue,* 172 Wn.2d 487, 500, 259 P.3d 234 (2011)); *Yakima v. Yakima Herald-Republic,* 170 Wn.2d 775, 797, 246 P.3d 768 (2011). If a statute's meaning is plain on its face, this Court must give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy,* 151 Wn.2d 226, 242, 88 P.3d 375 (2004). A court may also glean plain meaning "from all that the Legislature has said in the statute and related statutes which disclose legislative intent

about the provision in question." *Department of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *see also Ockerman v. King County Department of Developmental & Envtl. Servs.,* 102 Wn. App. 212, 217, 6 P.3d 1214 (2000). If the statute is susceptible to more than one reasonable interpretation, this Court may then consider cannons of statutory construction, relevant case law, and legislative history, including "the circumstances surrounding [the statute's] enactment" to assist in interpretation. *Rest. Dev., Inc. v. Cananwill, Inc.,* 150 Wn.2d 674, 682, 80 P.3d 598 (2003); *Yousoufian v. Office of Ron Sims,* 152 Wn.2d 421, 433-34, 98 P.3d 463 (2004) (*Yousoufian* II); *Campbell & Gwinn,* 146 Wn.2d at 12.

Mr. Francis asks this Court to follow Black's Law Dictionary and define "bad faith" as "lack of diligence and slacking off, [and] willful rendering of imperfect performance." Brief of Cross-Respondent at 11. In essence, Mr. Francis argues that *any* violation of the PRA---intentional, negligent, or otherwise---constitutes "bad faith". But such a definition would make the term "bad faith" superfluous, which a court cannot do. *See Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005) (citing *Whatcom County v. City of Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("[s]tatutes must be interpreted and construed so that all the language used is given effect,

with no portion rendered meaningless or superfluous.")). Instead, this Court must consider the term "bad faith" in the context of the statute. *See Washington Public Ports Association v. Department of Revenue,* 148 Wn.2d 637, 645, 62 P.3d 462 (2003) (the "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, *as well as* from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole) (emphasis added); *see also Rental Housing Association of Puget Sound v. City of Des Moines,* 165 Wn.2d 525, 536, 199 P.3d 393 (2009) ("[i]n construing the PRA, [this Court must] look at the Act in its entirety in order to enforce the law's overall purpose."). In this way, the Legislature clearly intended the term "bad faith" to provide a distinction between the lower strict liability standard that gives rise to overall liability and the much higher "bad faith" standard that allows an inmate to receive penalties. Thus, to hold as Mr. Francis suggests would be to ignore wholesale the 2011 amendment to RCW 42.56.565.

This intention is consistent with relevant case law (discussed in the Department's Response) and supported by the statute's legislative history, and the circumstances surrounding the proposal to amend RCW 42.56.565(1) to severely limit an inmate's ability to recover penalties under the PRA. The inmate penalty amendment first appeared in Senate

Bill 5025 as a complete ban on receiving penalties: "A court shall not award penalties. . . in any action where the request for public records was made by or on behalf of a person serving a criminal sentence in a state, local, or privately operated correctional facility." SB 5025, 62nd Leg., Reg. Sess., § 1(5) (Wash. 2011). Testimony in support of the amendment outlined that inmate PRA litigation comprises two-thirds of the PRA cases the Department must defend, litigation that is motivated not by a need or desire for records, but by money. S.B. Rep. on SB 5025, at 2, 62nd Leg., Reg. Sess. (Wash. Jan. 14, 2011). This intent to deter profit-oriented inmate requests was corroborated by the fact that this provision did not remove the requirement that an agency provide responsive records. *See id.* Senate Bill 5025 was subsequently amended on February 8, 2011 to create "bad faith" as the one, narrow exception to the ban on penalties:

> [a] court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

SSB 5025, 62nd Leg., Reg. Sess. § 1(1) (Wash. 2011). While the senate committee provides no explanation for this amendment, the progression of the bill is instructive. The simple fact that the bill started as an outright bar on penalties for inmate requestors and changed only slightly to create

this very limited exception shows that the Legislature intended "bad faith" to serve as a heightened standard, something more than inadvertent error or mere carelessness. This further supports that this Court must interpret "bad faith" as an intentional, wrongful withholding of public records.

B. Using the *Yousoufian* Test To Determine "Bad Faith" Would Impermissibly Broaden The Statutory Term

Mr. Francis also argues that the *Yousoufian* test is the proper means to decide "bad faith" because the test's principal factor is bad faith. Brief of Cross-Respondent at 2-6. But this argument overlooks that the test is composed of fifteen additional factors, and that to accept Mr. Francis' argument would require this Court to impermissibly broaden the definition of "bad faith" under RCW 42.56.565(1).

It is unequivocal that a court cannot broaden a statute beyond its plain terms. *Senate Republican Campaign Committee v. Public Disclosure Commission,* 133 Wn.2d 229, 275, 943 P.2d 1358 (1997); *see also Associated Gen. Contractors v. King County,* 124 Wn.2d 855, 865, 881 P.2d 996 (1994). This is because "courts may not create legislation in the guise of interpreting it." *Associated Gen. Contractors,* 124 Wn.2d at 865 (citing *Progressive Animal Welfare Society v. U.W.,* 114 Wn.2d 677, 790 P.2d 604 (1990)). "Only the legislature can amend or expand its definition of a [statutory term]. It is not for the courts to do so because

'[the Courts] cannot make laws. Courts can only apply the laws which the legislature makes to the facts in a particular case.'" *West v. Thurston County*, No. 41085–1–II, 2012 WL 1604838 at n.25 (Wash. Ct. App. Div. II, May 8, 2012) (citing *Fix v. Fix*, 33 Wn.2d 229, 231, 204 P.2d 1066 (1949)); *see also Ockerman v. King County Department of Development and Environmental Services*, 102 Wn. App. 212, 218, 6 P.3d 1214 (2000) ("[n]o interpretation of [the PRA], no matter how liberal, allows this court to modify by judicial fiat the plain wording of the statute.").

Although "bad faith" is a principal factor of the *Yousoufian* test, "bad faith" is only one of sixteen factors. *See Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian* V). *Yousoufian* factors include public importance of the issue to which the request is related, economic loss, the existence of systems to track requests, and proper training of personnel---factors completely unrelated to and beyond the scope of "bad faith", even under Mr. Francis' overly-broad definition. *Id.*, at 467-68. Thus, employing the *Yousoufian* test as a means of determining "bad faith" impermissibly undermines the Legislature's decision to employ the term, and to employ a term that forces inmates to meet a much greater standard in order to receive penalties.

C. The Amount Of Penalties Imposed By Other Courts Has No Bearing On Whether The Trial Court's Decision In This Case Was Supported By The Evidence Presented

The per-day penalty a trial court awards under the PRA is reviewed for abuse of discretion. *Yousoufian v. Office of Ron Sims,* 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004) (*Yousoufian* II). In contrast, a trial court's interpretation of "bad faith" in RCW 42.56.565(1), as discussed in the preceding sections of this brief, is reviewed *de novo*. *Id.* at 430 (questions of law are reviewed *de novo*). Here, the trial court erred as a matter of law in its interpretation of RCW 42.56.565(1). Applying the "bad faith" threshold in RCW 42.56.565(1) as the Legislature intended—to distinguish between the lower strict liability standard that gives rise to liability and the much higher "bad faith" standard that allows an inmate to receive penalties—Mr. Francis is not entitled to penalties at all because he has not demonstrated that the Department's actions crossed the "bad faith" threshold. Therefore, this Court need not address Mr. Francis' argument that he was entitled to greater penalties as a result of the trial court's findings.

Mr. Francis nevertheless makes that argument, relying on the penalty assessments in two recent PRA cases, *Bricker v Department of Labor and Industries*, 164 Wn. App. 16, 262 P.3d 121 (2011), and *West v. Port of Olympia*, 146 Wn. App. 108, 192 P.3d 926 (2008). Brief of Cross-

Respondent at 19. This argument fails to take into account the nature and very limited scope of review of penalties in PRA cases: a trial court's determination of appropriate daily penalties is an exercise of discretion and can only be overturned if its decision is manifestly unreasonable or based on untenable grounds. *Yousoufian* II, 152 Wn.2d at 431. This standard means that the reviewing court is restricted to determining if substantial evidence supports the trial court's conclusion by examining the trial court's findings of fact and conclusions of law, and not permitted to compare the trial court's facts, findings, or conclusions in part or as a whole to the decisions of other courts. *Id.; Kunkel v. Median Oil, Inc.*, 114 Wn.2d 896, 903, 792 P.2d 1254 (1990). As such, whether the cases cited by Mr. Francis are or are not analogous is of no consequence to this Court's determination of whether the trial court here abused its discretion in awarding penalties.

It is undisputed that a "trial court's determination of appropriate daily penalties [under the PRA] is properly reviewed for an abuse of discretion." *Yousoufian* II, 152 Wn.2d at 431. In the nine years since *Yousoufian* II, ten PRA cases, including two Washington State Supreme Court cases, have cited *Yousoufian* II for this concept, and even more that have upheld this concept, including the two cases cited by Mr. Francis. *See Bricker,* 164 Wn. App. at 21 (citing *Yousoufian v. Office of Ron Sims,*

168 Wn.2d 444, 458, 229 P.3d 735 (2010) (*Yousoufian* V); *West*, 146 Wn. App. at 122 (citing *Yousoufian* II). The appellate court in both *Bricker* and *West* limited its consideration to whether substantial evidence supports the trial courts' conclusions, precisely the standard outlined in *Yousoufian* V and *Kunkel*. *See Bricker,* at 24-29; *West,* at 122-124.

II. CONCLUSION

For the reasons set forth above, the Department respectfully asks that this Court hold that the trial court applied an incorrect legal test in determining "bad faith" under RCW 42.56.565(1). This Court should hold that a finding of "bad faith" under RCW 42.56.565(1) is appropriate only if an inmate plaintiff can demonstrate both that the agency knows it has responsive records that should be disclosed, and intentionally fails to disclose them.

RESPECTFULLY SUBMITTED this 9th day of July, 2012.

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT on all parties or their counsel of record on the date below as follows:

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TO:

SHAWN D. FRANCIS #749717
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 19th day of July, 2012, at Olympia, Washington.

Katrina Toal

KATRINAL TOAL
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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