70992-5

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No. 70992-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

UNIVERSITY OF WASHINGTON,

Appellant,

vs.

ISABELLE BICHINDARITZ,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA J. BENTON

REPLY BRIEF OF APPELLANT

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355

Special Assistant Attorney General

Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

GARVEY SCHUBERT BARER

By: Seth J. Berntsen
WSBA No. 30379

Special Assistant Attorney General

1191 Second Avenue, Suite 1800
Seattle, WA 98101
(206) 464-3939

Attorneys for Appellant

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I. INTRODUCTION

The Public Records Act requires agencies to review public records for exemptions before producing them. The trial court penalized the University of Washington $723,290.50 for not producing 12,000 pages the day it received Respondent Isabelle Bichindaritz's June 2011 public record request based on the erroneous finding that the University's previous "assembly" of responsive documents in response to Bichindaritz's 2009 request, which she had closed, made the documents "ready for distribution."

Bichindaritz does not defend the trial court's confusion of "production" and "assembly" under the PRA, but instead argues that the University's allegedly untimely response to her 2009 request justifies the penalty. But the trial court dismissed all of Bichindaritz's claims "associated with or arising from" the University's handling of her 2009 request in an unappealed summary judgment order that is now the law of the case.

Even if sanctions were warranted, the trial court misapplied the PRA in tying its $723,290.50 penalty to the sheer size of Bichindaritz's request rather than basing it on the number of days a "record" was withheld, as RCW 42.56.550(4) requires. The trial court also erred in finding that the existence of separate litigation

between the University and Bichindaritz, over which the trial court did not preside, was an aggravating factor that justified this extraordinary penalty.

On de novo review, this Court should hold that the University did not violate the PRA. At a minimum, the Court should vacate the $723,290.50 penalty as a manifest abuse of discretion because it is contrary to the PRA's terms and its policies.

II. REPLY ARGUMENT

A. De novo review applies in PRA cases where, as here, the record consists entirely of documents.

Washington appellate courts have consistently reviewed de novo PRA decisions based on documentary evidence.[1] Bichindaritz ignores this authority, citing a PRA case that did not address *any* standard of review for the trial court's factual findings because they were unchallenged, *Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 52, ¶ 15, 313 P.3d 457 (2013), *rev. denied,* 180 Wn.2d

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[1] *See Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 488, ¶ 38, 300 P.3d 799 (2013) ("Appellate courts review a trial court's decision that relies exclusively on affidavits, declarations, and other documents in making its determination de novo."); *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 522, ¶ 13, 326 P.3d 688 (2014) ("Our review of both the agency action and the court opinions below is de novo.") (citing RCW 42.56.550(3)); *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 720, ¶ 8, 328 P.3d 905 (2014) ("appellate review of PRA decisions based solely on documentary evidence without testimony is de novo and the appellate court may decide both issues of fact and law").

1016 (2014) and a non-PRA case, *Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003). (Resp. Br. 20)

In *Rideout,* the Court reviewed for substantial evidence findings on a documentary record that a parent violated a parenting plan because "local trial judges decide factual domestic relations questions on a regular basis." 150 Wn.2d at 351 (quotation omitted). The *Rideout* Court emphasized that this "narrow exception" to de novo review of a documentary record applies only "in cases *such as this.*" 150 Wn.2d at 351 (emphasis added). By contrast, in PRA cases after *Rideout*, the Washington Supreme Court has confirmed that appellate courts must continue to review a documentary record de novo, *see* n.1, *supra,* and this Court has reversed PRA decisions, independently assessing the evidence with no deference to the trial court's findings.[2]

Moreover, Bichindaritz does not dispute the core facts of this case – the timing of her request, and the dates the University produced and she retrieved documents. *See Ameriquest*, 177 Wn.2d at 478, ¶ 16 ("The application of a statute to a fact pattern is a

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[2] *See Robbins*, 179 Wn. App. at 721, ¶ 10 (reversing finding that documents sought under PRA contained trade secrets); *Wright v. State*, 176 Wn. App. 585, 593-94, ¶ 14, 309 P.3d 662 (2013); *Ockerman v. King Cnty. Dep't of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000) (rejecting "argument that our review is confined to deciding whether the trial court's findings of fact are supported by substantial evidence").

question of law fully reviewable on appeal."); *Faulkner v. Dep't of Corr.*, ___ Wn. App. ___, ___ P.3d ___, 2014 WL 4086310 at *4 (August 19, 2014). Bichindaritz concedes that "approximately 12,000 [pages] remained for review and production" when Bichindaritz filed a request in June 2011, after closing her 2009 request four months earlier. (Resp. Br. 1) Thus, whether the University violated the PRA does not turn on "credibility," as she maintains. (Resp. Br. 19) This Court should review the trial court's decision de novo.

B. The University complied with the PRA by staying in constant communication with Bichindaritz while it produced tens of thousands of pages to her.

1. The University complied with the PRA by reviewing "assembled" documents for exemptions before "producing" them.

The PRA unequivocally provides that agencies are allowed "[a]dditional time . . . to determine whether any of the information requested is exempt." RCW 42.56.520. *See Wright*, 176 Wn. App. at 593, ¶ 13 ("The [PRA] was enacted to allow the public access to government documents once agencies are allowed the opportunity to determine if the requested documents are exempt from disclosure.") (quoting *Hangartner v. City of Seattle,* 151 Wn.2d 439, 448, 90 P.3d 26 (2004)). The trial court erroneously found

that the University violated the PRA because it had "assembled" the documents responsive to Bichindaritz's 2011 request in October 2009, reasoning that they were "ready for distribution" on the very day Bichindaritz submitted her June 2011 request even though the University had not yet reviewed them for exemptions:

> The University is liable under the PRA for failing to produce 12,000 documents that were assembled and *ready for distribution by October 2009*.

(CP 1149 (emphasis added); *see also* CL 2.12, CP 1143 ("the University violated the PRA in failing to produce 12,000 documents assembled in 2009 until the end of 2011"), CL 2.17, CP 1146 ("plaintiff's request could have been met the next day, June 7, 2011, given completed *assembled* documents") (emphasis added)). *See West v. Dep't of Licensing*, ___ Wn. App. ___, ¶ 46, 331 P.3d 72 (2014) (rejecting argument that agency could immediately produce documents "at its fingertips").

The trial court's misinterpretation of the PRA was the foundation for its conclusion that the University violated the PRA. Its judgment must be reversed. *Perrin v. Stensland*, 158 Wn. App. 185, 193, ¶ 16, 240 P.3d 1189 (2010) (trial court "necessarily" errs "if it bases its ruling on an erroneous view of the law").

2. The trial court erroneously found that the University violated the PRA in responding to Bichindaritz's 2011 request based on its actions in 2009.

Bichindaritz does not defend the trial court's conflation of the University's "assembly" and "production" of documents. Instead, she argues it is "irrelevant whether there were records yet to review" in 2011 (Resp. Br. 27), alleging that the University's purported delays in responding to her 2009 request means that the University violated the PRA in responding to her 2011 request. (Resp. Br. 25-32) But the trial court dismissed "all claims associated with or arising from the University's response to Plaintiff's September 9, 2009 public records act request" under the PRA's one-year statute of limitations, RCW 42.56.550(6). (CP 70) That order of dismissal is the law of the case.

The trial court did not "modify" that ruling, as Bichindaritz argues. (Resp. Br. 24) Bichindaritz cites Conclusion of Law 2.1, which states only that "interlocutory orders that resolve fewer than all claims are subject to revision at any time before entry of final judgment," (CP 1139; Resp. Br. 24-25), but she cites no order that "modified" or revised the summary judgment order. The trial court in fact *rejected* Bichindaritz's request to modify its summary judgment order, holding her request was an untimely and improper

motion for reconsideration. (CP 2373) Bichindaritz did not appeal that ruling. The trial court's dismissal of all claims arising from the 2009 PRA request bars Bichindaritz's argument that the trial court's penalties may be affirmed based on the University's response to her 2009 request. *Beltran v. State Dept. of Social and Health Services,* 98 Wn. App. 245, 254, 989 P.2d 604 (1999) (unappealed summary judgment is "the law of the case"), *rev. granted*, 140 Wn.2d 1021 (2000).

Loeffelholz v. Univ. of Washington, 175 Wn.2d 264, 285 P.3d 854 (2012) does not support Bichindaritz's argument that the University violated the PRA in 2011 based upon its actions in 2009. (Resp. Br. 25) *Loeffelholz* involved a hostile work environment claim, which the Supreme Court recognized is "unique" because it is not a singular event, but "the cumulative effect of individual acts," and thus "unrecoverable conduct is admissible as *background evidence* to give context" to recoverable conduct. 175 Wn.2d at 273, 278 (emphasis added). The PRA takes the opposite approach; "each written request for records under the PRA [is] a single request" distinct from other requests. *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 150, ¶ 32, 282 P.3d 1175 (2012).

The PRA's one year statute of limitations has no meaning if parties can file and then withdraw a PRA request, fail to timely bring suit, and then recover on the time-barred request by bringing suit on a new request. Even if the 2011 request is considered a "reactivation" of Bichindaritz's 2009 request (Resp. Br. 10, 20 n.2, 31), – and it is not – the University cannot be liable directly or indirectly for its response to the 2009 request.

3. The University complied with the PRA in responding to both the 2009 and 2011 requests.

Were this Court to consider it at all, the University's response to Bichindaritz's 2009 request confirms that at no point did the University violate the PRA. The University's Office of Public Records and Open Public Meetings (OPR) quickly assembled the documents responsive to Bichindaritz's broad and complex request, began producing them just a month later, and then continuously produced documents to her while keeping her informed of its progress reviewing the exemption-rife documents.

This Court recently confirmed that the PRA allows an agency to promptly acknowledge a complex PRA request and produce documents in stages over a period of several months. *West v. Dep't of Licensing*, ___ Wn. App. ___, 331 P.3d 72 (2014); *see also*

Andrews v. Wash. State Patrol, __ Wn. App. __, __ P.3d __, 2014 WL 4627656 at *1 (Sept. 16, 2014) (courts apply a "flexible approach that focuses upon the thoroughness and diligence of an agency's response" in determining compliance with the PRA). In *West*, as here, the DOL's employees "reviewed records to determine whether they were responsive and whether they should be produced, disclosed, redacted, or withheld," initially producing some documents 44 days after receiving the request. *West*, ¶¶ 37-39. The agency then produced additional documents in stages, ultimately producing 47,363 pages over nine months. *West*, ¶¶ 39-40.

This Court held that DOL did not violate the PRA because it "continued to contact [the requestor] and provide periodic updates and installments of documents." *West*, ¶ 40. This Court emphasized that "[t]he request was complex and broad" and thus the agency was allowed additional time under RCW 42.56.520 "to determine whether any of the information requested was exempt." *West*, ¶ 41. This Court found critical the declaration of an agency employee that "[t]he scope, type and volume of records requested in Request # 1 were not routine. Responding . . . could not be accomplished at any faster rate." *West*, ¶ 41.

Here, as in *West*, Bichindaritz's request was broad and complex. She asked for "a complete copy of all my personnel files and public records," including the documents generated as a result of her three tenure reviews, as well as "every email related to me" amongst 96 University staff spread across eleven University departments and two separate campuses. (CP 314-15, 323, 819, 1166-67; FF 1.3, CP 1129) That request required University personnel to first assemble and then to review documents for exemptions pertaining to the privacy rights of other faculty and of students. (CP 314, 322; App. Br. 7-9, 24-26)

As in *West*, the University produced tens of thousands of pages of documents, many of which were properly redacted, on a rolling basis while staying in constant communication with Bichindaritz. The University did not provide "[r]outine extensions with little or no action to fulfill the request," as Bichindaritz asserts (Resp. Br. 23, 28), but rather produced thousands of pages at regular intervals while alerting Bichindaritz of the need for additional time to complete its production. (CP 315-16, 323, 407, 409, 415, 419, 669, 1172-76, 1180, 1186-87, 1191-92, 1208-10, 1222, 1227-29, 1231, 1233, 1235, 1240-41, 1250-51, 1253, 1258-59)

Bichindaritz ignores the primary reason for delay: she waited months to retrieve documents or never retrieved them at all. (App. Br. Appx. C) RCW 42.56.120 expressly provides that an agency may produce documents on "a partial or installment basis" and when a requestor fails to claim an installment, "the agency is not obligated to fulfill the balance of the request." The University did not violate the PRA by continuing to produce documents *after it had no obligation to do so* and it cannot be penalized for the alleged delays caused by Bichindaritz's own dilatory conduct.

Bichindaritz also disingenuously claims that the University did "nothing" between July 30, 2010, when it produced its fifth installment of documents, and June 2011, and that 12,000 pages of documents assembled in July 2010 "***still***" remained for production in June 2011. (Resp. Br. 2, 16, 26 (emphasis in original)) Twelve thousand pages "still" remained because Bichindaritz, rather than retrieve over 4,000 pages produced by the University on December 9, 2010, did nothing for two months before closing her 2009 request on February 7, 2011. (CP 316, 318, 423) Had Bichindaritz picked up the documents made available to her six months earlier they would not have "still" awaited production when she submitted her June 7, 2011, request.

The *West* court made clear that *Violante v. King County Fire Dist. No. 20,* 114 Wn. App. 565, 59 P.3d 109 (2002), did not hold that an agency's failure to meet its production estimates is a violation of the PRA, as Bichindaritz argues. (Resp. Br. 28) (*Compare West*, ¶ 47 *with* Resp. Br. 28; *see also Andrews*, 2014 WL 4627656 at *5 ("the statute does not envision a mechanically strict finding of a PRA violation whenever timelines are missed")). *West* rejected as "not persuasive" the very argument Bichindaritz makes here – that an agency's "failure to abide by original time estimates constitute[s] a violation" of the PRA.

Likewise, that some of the University's extension letters (accurately) stated it needed additional time "to locate, assemble and review additional information" is not a violation of the PRA.[3] (*Compare* Resp. Br. 25-27 *with West*, ¶ 47 (rejecting argument that agency violates the PRA by "fail[ing] to 'provide justification'" for extensions); *Ockerman v. King Cnty. Dep't of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 217, 6 P.3d 1214 (2000) (PRA does not "requir[e] an explanation of the estimate of time to provide the

[3] All but one of the letters sent by the University in response to Bichindaritz's 2011 request – the only request properly at issue – accurately stated additional time was needed to review documents or to "review or assemble" documents. (CP 1231-35, 1253) Bichindaritz largely ignores these letters in claiming she was somehow "misled" by the University's statement that it needed additional time "to locate, assemble and review additional information." (Resp. Br. 25-27)

records"); *cf. Progressive Animal Welfare Soc. v. University of Washington,* 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (declining to penalize agency for failing to cite proper basis for exemption). Moreover, at no point prior to its penultimate production did the University represent that its next production would "complete its production/response." (*Compare* Resp. Br. 29 *with* CP 1227-29, 1240-41 (identifying "stage" of production and stating that "additional" documents were forthcoming), 1250-51 (enclosing third "stage"; noting that the "fourth and final stage" was forthcoming), 1258-59 (producing "fourth and final stage"))

Bichindaritz's attempt to support the trial court's findings that the University violated the PRA is laden with other factual misstatements contradicted by the record. For example, Bichindaritz alleges that the University failed to produce documents before its "projected July 20, 2011 deadline, without even seeking another extension beforehand." (Resp. Br. 27) The University in fact informed Bichindaritz that it needed additional time on July 20, 2011. (CP 1222) The University then produced, two days earlier than its projection, 4,379 pages for Bichindaritz's review. (CP 1227-29) Nor did the University "miss" deadlines in the fall of 2011. (Resp. Br. 28) In each instance the University either produced

thousands of pages to Bichindaritz or informed her that it needed additional time to review documents. (CP 1233, 1235, 1240-41, 1250-51, 1253, 1258-59)

Bichindaritz concedes that a major underpinning of the trial court decision is erroneous – the finding that the University created its withholding index prior to July 2011. (App. Br. 30-31) This error was not "harmless" (Resp. Br. 30 n.4), but was critical to the trial court's finding that "the 12,000+ documents could have been produced in June 2011." (CL 2.11, CP 1143) The University's OPR produced over 25,000 pages on a rolling basis, while staying in constant communication with Bichindaritz. This Court should reverse the trial court's finding that the University violated the PRA.

C. The PRA does not authorize the trial court's $723,290.50 penalty calculated on a *per-page* basis.

The rule advanced by Bichindaritz to support this $723,290.50 penalty – the larger the request, the larger the penalty – finds no support in the language or the policy of the PRA. No appellate court has ever approved multiplying a "daily" penalty by every page responsive to a request, as the trial court did here.

The trial court's penalty conflicts with RCW 42.56.550(4)'s instruction that courts should penalize an agency "for each day that [the requestor] was denied the right to inspect or copy said public

record." RCW 42.56.550 does not, as Bichindaritz argues, give trial courts "discretion" to ignore the language of the PRA by imposing penalties for every page of a record. (Resp. Br. 35-36) To the contrary, a PRA penalty is calculated by first "determin[ing] the amount of days the party was denied access" and second by "determin[ing] the appropriate per day penalty" up to the statutory maximum of $100 per day. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 459, ¶ 26, 229 P.3d 735 (2010). The trial court's per-page penalty misinterpreting the PRA, is untenable, and necessarily constitutes an abuse of discretion. *See Sargent v. Seattle Police Dep't*, 179 Wn. 2d 376, 397, ¶ 37, 314 P.3d 1093 (2013).

The trial court improperly tied its penalty to the size of Bichindaritz's request rather than the extent of the University's culpability. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 435-36, 98 P.3d 463 (2004). The trial court's penalty, if allowed to stand, will encourage sweeping requests in the hopes of obtaining six or seven-figure penalties that can be easily "calculated" by multiplying the thousands of pages such requests generate by a "modest" daily penalty. Requestors will submit voluminous requests, not out of a genuine desire to learn about the governance

of our State, but in the hopes of obtaining a windfall "penalty" against a public agency that is ultimately paid by taxpayers.[4]

Even if the PRA could be construed as authorizing penalties based on the nature of the responsive "record," RCW 42.56.550(4) grants the trial court limited discretion to group materials based on their subject matter and to impose a penalty for each group. *See Sanders v. State*, 169 Wn.2d 827, 864, ¶ 67, 240 P.3d 120 (2010) (affirming decision not to impose penalties for each withheld document and to instead impose penalty for "two records, as grouped broadly by subject matter."); *Double H, L.P. v. Washington Dep't of Ecology*, 166 Wn. App. 707, 713-15, ¶¶ 11-17, 271 P.3d 322 (trial court did not abuse its discretion "in deciding one group existed based on subject matter when calculating the PRA penalty"), *rev. denied,* 174 Wn.2d 1014 (2012); *Bricker v. State, Dep't of Labor & Indus.*, 164 Wn. App. 16, 23-24, ¶ 14, 262 P.3d 121 (2011) (affirming trial court's penalty based on two groups of records).[5]

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[4] Bichindaritz's conclusory assertion that the University has "vast financial resources" – even if it were supported by the record – is *not* relevant to determining a penalty. (*Compare* Resp. Br. 37, 44 (citing CL 2.17, CP 1146) *with Yousoufian*, 168 Wn.2d at 467-68, ¶¶ 44-45)

[5] The PRA's definition of "record" in RCW 42.56.010(3)-(4) is not helpful in this case because it focuses on defining the types of media that can constitute "records," rather than on what constitutes a "record" within each given medium.

These cases do not give trial courts "discretion" to impose penalties entirely disproportionate to an agency's violation by arbitrarily subdividing a responsive record without regard to its content. (Resp. Br. 35-36) Bichindaritz requested at most two records: one for her "personnel files" and another for "email[s] related to me." (CP 1166-67; FF 1.3, CP 1129) This distinction is not "arbitrar[y]," (Resp. Br. 36), but is dictated by Bichindaritz's request, which she alone controlled.

Had the trial court imposed a single $.50 "per day" penalty, rather than its $.50 per-day *and* per-page penalty, Bichindaritz's assertion that the trial court's penalty was "near the lowest possible amount" (Resp. Br. 3) might be true. But because it multiplied its "daily" penalty by the tens of thousands of pages responsive to Bichindaritz's request (many of them duplicative), the trial court effectively imposed a $4,464.76 daily penalty, well over the $100 statutory maximum. RCW 42.56.550(4) (penalty may not "exceed one hundred dollars for each day"). Indeed, had the trial court imposed the maximum $100 per day penalty, it would have totaled $16,200 – 2% of the penalty it actually imposed.

The PRA does not give trial courts discretion to impose penalties that bear no reasonable relationship to the agency's

actions. *Bricker*, 164 Wn. App. at 24, ¶ 15 (2011) ("the total penalty clearly is a legitimate consideration"). This Court should vacate the trial court's penalty, which reflects the breadth and complexity of Bichindaritz's request, not the University's culpability.

D. The University did not act in bad faith.

1. The trial court erred in finding the University acted in bad faith based on separate litigation between Bichindaritz and the University.

The existence of litigation between an agency and a requestor is not a basis for finding bad faith. In pinning its finding of bad faith to the "ongoing [federal] litigation" (CL 2.17, CP 1146), the trial court ran afoul of RCW 42.56.080's directive that "[a]gencies shall not distinguish among persons requesting records." (*See also* CL 2.17, CP 1146 ("This litigation was known to the University") (emphasis in original))

"[T]he public records act was not intended to be used as a tool for pretrial discovery." *Limstrom v. Ladenburg*, 136 Wn.2d 595, 614 n. 9, 963 P.2d 869 (1998); *see also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants"). The PRA is instead a tool for *all* citizens to "remain [] informed so that they

may maintain control over the instruments that they have created." RCW 42.56.030; RCW 42.56.080. Suing an agency on non-PRA claims does not place the agency on notice that "time [is] of the essence in the production of . . . PRA documents" nor does the reasonableness of an agency's response turn on discovery deadlines in separate litigation. (CL 2.7, 2.19, CP 1142, 1148; Resp. Br. 40-43)[6]

For the same reason, it is irrelevant *why* Bichindaritz submitted her public record request. (Resp. Br. at 1, 41) Requests are not entitled to super-priority because a requestor intends to use responsive documents in litigation. Regardless, the OPR's staff could not have acted in bad faith based on Bichindaritz's intent because they did not know that intent. (CP 319, 328)

Likewise, the relevance of responsive documents to contested issues in separate litigation cannot be the litmus for agency bad faith. (Resp. Br. 40, 43; FF 1.37, 1.40, CP 1137-38; CL 2.17, 2.20, CP 1146-48) The PRA does not require agencies to review documents for their relevance to a requestor's claims in another lawsuit; it requires agencies to review documents for exemptions. RCW 42.56.070(1); *see also West*, ¶ 46 (agency has no "obligation to provide the installments in any particular order").

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[6] Bichindaritz concedes that she submitted her 2011 request *the day after federal discovery closed.* (Resp. Br. 43)

Keying a "bad faith" finding to the relevance of requested documents to claims asserted in other litigation encourages speculation about the motives and actions of parties in proceedings over which the PRA court has not presided. Here, the trial court did not preside over Bichindaritz's Title VII lawsuit and did not even review Bichindaritz's discovery requests in federal court, but nonetheless accepted Bichindaritz's contention that the University purposefully withheld documents of "import" in the federal litigation. Judge Lasnik – who actually presided over that litigation – rejected that contention on multiple occasions. (*Compare* FF 1.37, CP 1137; CL 2.17, 2.19, CP 1146-48 *with* App. Br. Appx. D at 4; CP 1321-22) The trial court also erroneously speculated that the timing and content of the University's productions "permitted [the University] to argue in the federal litigation that no one had complained that she was a victim of gender discrimination." (Resp. Br. 13 (citing FF 1.40, CP 1138)) But Judge Lasnik found that the University produced "ample evidence of complaints and concerns

regarding gender issues" with which Bichindaritz cross-examined the University's witnesses. (App. Br. Appx. D at 3-4)[7]

As Judge Lasnik noted, "the liberal rules of federal discovery gave [Bichindaritz] an opportunity to obtain documents in this venue separate and apart from the PRA." (App. Br. Appx. D at 3) Bichindaritz's remedy for the University's purported "fail[ure] to produce" "pertinent" documents during discovery in the federal litigation was in federal court. (Resp. Br. 39-41; CL 2.17, CP 1146) Bichindaritz recognized as much in asking Judge Lasnik to vacate his judgment. Judge Lasnik refused because Bichindaritz did not seek in discovery two (of 25,000) pages of documents that she claimed were withheld from her and because a third document was cumulative of other evidence produced by the University. (App. Br. Appx. D at 4)[8] The trial court erred in imposing PRA penalties as discovery sanctions in litigation over which it did not preside.

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[7] Bichindaritz is correct that the ultimate issues decided by Judge Lasnik and the trial court differed. (Resp. Br. 41-42) But in holding that the University did not commit a fraud on the court, Judge Lasnik's findings of what transpired in the litigation over which he presided bear directly on this litigation and should be considered under RAP 9.11. (RAP 9.11 Motion)

[8] Judge Lasnik found that Bichindaritz chose not to assert a national origin claim of her own accord, irrespective of the University's productions in federal court and under the PRA. (CP 1321) Bichindaritz's complaint that when she "filed her federal lawsuit without the national origin claim, she did not have [the] benefit of the two emails," contravenes that finding. (Resp. Br. 40, 43)

2. The trial court erred in finding bad faith without holding an evidentiary hearing.

The trial court erred in imposing a $723,290.50 penalty without allowing the University to defend its actions with the live testimony of its employees or by challenging on cross-examination Bichindaritz's allegations of bad faith, particularly her hearsay allegation "that the responsive documents were in the possession of the Attorney General's Office." (FF 1.24, CP 1133; App. Br. 42-45)

Bichindaritz's argument that the trial court did not base its finding of bad faith "on a finding of intentional concealment" ignores the record. (Resp. Br. 44-45) The trial court found that "[t]he nurse-related email was . . . not produced until after the June 2011 discovery cutoff in the federal suit, highly illustrative of intentional delay." (CL 2.19, CP 1148; *see also* FF 1.37, 1.40, CP 1137-38) That finding lacks support in the record. The OPR's employees testified that they did not intentionally withhold documents from Bichindaritz or even know why she requested them. (CP 319, 328) The trial court erred in relying on Bichindaritz's hearsay and speculation without conducting an evidentiary hearing to resolve a disputed issue of fact. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (App. Br. 43).

E. The trial court erred in approving Bichindaritz's inflated fee request without scrutiny.

The trial court erred by "unquestioningly" accepting Bichindaritz's counsel's hourly rate of $550, which was based on her counsel's experience in employment litigation, not PRA cases. *See Berryman v. Metcalf*, 177 Wn. App. 644, 657, ¶ 27, 312 P.3d 745 (2013), *rev. denied,* 179 Wn.2d 1026 (2014) (App. Br. 45-46). In accusing the University of "offer[ing] no authority" to support its position, Bichindaritz ignores the case cited by the University in its opening brief. *See West v. Port of Olympia*, 146 Wn. App. 108, 123, ¶ 30, 192 P.3d 926 (2008) (hourly rate cannot be based on "special expertise" unless that expertise is required in instant case), *rev. denied*, 165 Wn.2d 1050 (2009) (App. Br. 46-47).

Bichindaritz accepts that she did not prevail on her claim that the University improperly redacted 485 pages of documents, but nonetheless argues that her fee award should not be reduced at all. (App. Br. 47) That is not the law – fee awards are reduced to reflect unsuccessful efforts. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 616, 963 P.2d 869 (1998) (fee award must exclude fees for "portion of the requested documents found to be exempt"). This Court should remand with instructions to reduce the lodestar hourly rate and the award for time spent on unsuccessful efforts.

F. The State is not liable for judgment interest at 12% on a PRA penalty.

State agencies are not liable for judgment interest "absent a clear waiver of sovereign immunity." *Jenkins v. Washington State Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 302, ¶ 35, 157 P.3d 388 (2007). *Union Elevator & Warehouse Co., Inc. v. State ex rel. Dep't of Transp.*, 171 Wn.2d 54, 65, 248 P.3d 83 (2011) (Resp. Br. 48-49), refused to find an implied waiver because the statute at issue "limits what it creates." Similarly, RCW 42.56.550(4) creates exclusive remedies of a daily penalty, attorney's fees, and costs.

Bichindaritz does not dispute that "interest is generally disallowed on punitive damages." *Blake v. Grant*, 65 Wn.2d 410, 413, 397 P.2d 843 (1964). She instead tries to distinguish the cases cited by the University because they refused to award prejudgment interest. Those cases did not turn on the type of interest, but on the type of damages – the fact that punitive damages were at issue. Because a PRA "penalty" is, by definition, punitive, Bichindaritz's argument in support of post-judgment interest fails.[9] *See also Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 527, 598 P.2d

[9] No published decision holds that the PRA waives the State's immunity from liability for interest. The court authorized post-judgment interest in *Zink v. City of Mesa*, 162 Wn. App. 688, 256 P.3d 384 (2011), *rev. denied*, 173 Wn.2d 1010 (2012) (Resp. Br. 50), but the agency did not raise sovereign immunity as a defense and the court did not address it.

1372 (1979) (failing to distinguish between state's liability for pre- and post-judgment interest).

Bichindaritz likewise fails to explain why, if interest runs at all, it should not be at the tort rate of 2.061% established by RCW 4.56.110(3)(a) for "[j]udgments founded on the tortious conduct of a 'public agency.'" (App. Br. 49-50) Bichindaritz concedes that bad faith was a major basis for the trial court's six-figure penalty. (CL 2.17, 2.19, CP 1145-48) And contrary to Bichindaritz's assertion (Resp. Br. 50), a judgment premised on bad faith sounds in tort, even outside the insurance context. *See, e.g., Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn.2d 595, 564 P.2d 1137 (1977) (landlord's bad faith refusal to repair premises was tortious).

III. CONCLUSION

This Court should hold that the University did not violate the PRA, or at a minimum vacate the trial court's $723,290.50 penalty.

Dated this 19th day of September, 2014.

SMITH GOODFRIEND, P.S. GARVEY SCHUBERT BARER

By: _____ By: _____

Howard M. Goodfriend
WSBA No. 14355

Seth J. Berntsen
WSBA No. 30379

Special Assistant Attorneys General

Ian C. Cairns, WSBA No. 43210

Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 19, 2014, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail
Seth J. Berntsen Garvey, Schubert & Barer 1191 2nd Ave Ste 1800 Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
John Patrick Sheridan David J. Whedbee MacDonald Hoague & Bayless 705 2nd Avenue, Suite 1500 Seattle, WA 98104	___ Facsimile ___ Messenger X U.S. Mail X E-Mail

DATED at Seattle, Washington this 19th day of September, 2014.

V. Vigoren

Victoria K. Vigoren