No. 33920-3-III

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JOSEPH JONES

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Jones signed a document that stated he was entitled to a copy. He asked for a copy only to be told he would have to request it from the Department's Public Disclosure Unit ("PDU") in Olympia. He sent in a request that day and it was shortly received in Olympia. Between the time Jones sent his request and when it was actively searched for about one month later, the document was lost. The trial court ruled there was no Public Records Act ("PRA") violation because Jones could not show whether the document was lost before or after his request was received by the PDU.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its order granting the Motion to Show Cause on October 13, 2015.

2. The trial court erred in entering its order denying Jones' motion for reconsideration on November 2, 2015.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it ruled that the evidentiary burden was on Jones to establish that the Department lost its Form 05-794 titled Classification hearing Notice/Appearance Waiver after it received his request for the document? (Assignments of Error Nos. 1 and 2).

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On November 3, 2014, Jones was ordered to report to his Classification Counselor, Jennifer Lynch. CP 181. At this meeting, Lynch requested that Jones sign a Classification Hearing Notice/Appearance Waiver ("CHN/AW") form and stated that he had a classification hearing set for November 5, 2014. *Id.* On this form are various rights with check boxes next to them. CP 190. As his counselor went through the notice, she would check the boxes. One of the boxes on the waiver form states that "I have the right to submit a written request for review of all pertinent official records in the offender file through the Records Manager, using DOC 05-066 Request for Disclosure of Records." *Id.* Jones did not waive his appearance at the hearing. CP 181.

The CHN/AW form bore language entitling the inmate a copy of the form listed on the distribution section at the bottom of the one-page document. CP 190. Jones asked Lynch for a copy. CP 181, 194. She stated that he would have to make a public records request if he wanted a copy.[1] *Id.* Jones then informed Lynch that he would be submitting the public records request to Olympia that day. CP 181. Jones followed up and sent

[1]The Department requires inmates requesting documents other than their central or medical file to make their requests to the PDU in Olympia.

the request to the PDU the same day. CP 182. The request stated the following:

> Today my Corrections Counselor Jennifer Lynch had me sign Classification Hearing Notice/Appearance Waiver. The bottom of the form states a copy is to be provided to the inmate. I asked Ms. Lynch for my copy and she stated I must obtain this through the public disclosure unit. Please send me my copy of the Classification Hearing Notice/Appearance Waiver per Ms. Lynch's directive.

Id.; CP 2.

The Department received the request from Jones on November 10, 2014. CP 34. Lori Wonders, Public Disclosure Coordinator, sent the five day letter to Jones on November 10, 2014. *Id.* In this letter, Jones was informed he would be contacted before December 10, 2014. *Id.* Almost a month later, an email was sent on December 8, 2014 from Wonders to Lynch asking for a copy of the document Jones requested. CP 35-36. In response, Lynch informed Wonders that it had been forwarded to the CPM's (Correctional Program Manager) office for scanning. CP 35. As of December 11, 2014, the document had not been received by the CPM's staff. CP 37-38. On December 12, 2014, Jones received a letter from Wonders informing him that the document he had requested was not in the Department's possession. CP 39. It is unknown how the document went missing. Lynch personally handed the signed CHN/AW form to Classification Counselor III Westerfall. CP 194. He was supposed to

forward the document to the Custody Unit Supervisor for scanning. *Id.* Lynch does not know whether or not the CPM received the form from Westerfall. *Id.* The Department supplied no evidence establishing when the Department destroyed the requested document.

B. PROCEDURAL POSTURE

The Department filed a show cause motion with declarations and exhibits. CP 8-180. Jones filed his response with declarations and exhibits. CP 181-314. Both parties filed supplemental pleadings. CP 315-334, CP 362-66. The trial court issued a letter opinion. CP 335-36. An order was then filed. CP 227-342. In this order, the trial court stated that "There is inadequate evidence to establish that the document was lost after the Public Records Act request was properly submitted." CP 5. Jones then filed a motion for reconsideration. CP 343-47. This motion was denied. CP 348-350. A timely notice of appeal was filed. CP 351-60.

IV. SUMMARY OF THE ARGUMENT

Jones will show that the presumption that a record is disclosable must be extended to establish the rebuttable presumption that the Department had possession of the missing document when it received Jones's request. He will then show that the justification and policy supporting the general application of res ipsa loquitur requires its application under these circumstances. He finally argues that the Public

Records Act is a special situation requiring special handling because the agency has full control over evidence of how a record has been handled including its destruction.

V. ARGUMENT

A. STANDARD OF REVIEW

Appellate courts review agency actions under the PRA *de novo*. RCW 42.56.550(3). This Court "stands in the same position as the trial court where the record consists only of affidavits, memoranda of law, and other documentary evidence." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1995) ("*PAWS*"). Therefore, it is not bound by the trial court's factual findings on whether or not an agency violated the PRA.

Granting summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact. The moving party is then entitled to judgment on the issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). When reasonable minds could reach but one conclusion regarding the claims of disputed facts, such questions may be determined as a matter of law. *Corbally v. Kennewick Sch. Dist.*, 94 Wn. App. 736, 740, 937 P.2d 1074 (1999). Any doubt as to the existence of genuine issue of material fact will

be resolved against the movant. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact is a fact upon which the outcome of case depends, in whole or in part. *Clements v. Travelers Indem. Co.*, 121 Wn.2d. 243, 249, 850 P.2d 1298 (1993) (citation omitted). When a trial court makes a evidentiary determination on summary judgment the appellate court conducts the same inquiry as the trial court. *Folsom v. Burger King*, 135 Wn .2d 658, 663, 958 P.2d 301 (1998).

B. JUDICIAL REVIEW OF AN AGENCY'S RESPONSE TO A PUBLIC RECORDS ACT REQUEST IS REVIEWED WITH ALL INFERENCES TO BE CONSTRUED IN FAVOR OF THE PARTY SEEKING THE RECORDS.

The Public Records Act is set forth in RCW 42.56 et seq. "The purpose of the PRA is to preserve 'the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.'" *O'Connor v. Dept. of Soc. & Health Servs.*, 143 Wn.2d 895, 25 P.3d 426 (2001) (*quoting PAWS*, 125 Wn.2d at 251).

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

RCW 42.56.030.

It is "a strongly worded mandate for broad disclosure of public records." *Prison Legal News, Inc. v. Dept. of Corr.*, 154 Wn.2d 628, 635, 115 P.3d 316 (2005). The PRA provides that "'[j]udicial review of all agency actions taken or challenged under [RCW 42.56.030 through 42.56.520] shall be *de novo*." *O'Connor*, 143 Wn.2d at 904 (*quoting PAWS*, 125 Wn.2d at 252; RCW 42.56.550(3)).

The Supreme Court in *PAWS* emphasized that "[a]gencies have a duty to provide 'the fullest assistance to inquirers and the timeliest possible action on requests for information.'" *PAWS*, 125 Wn.2d at 252 (quoting RCW 42.17.290 (now RCW 42.56.100)). It is abundantly clear that "[l]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

> Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.

RCW 42.56.550(1); *Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 794, 791 P.2d 426 (1990); RCW 42.56.550(3). Finally, an agency "shall not distinguish among" requesters. RCW 42.56.080.

C. THE ONUS IS ON THE DEPARTMENT TO ESTABLISH THAT THE MISSING DOCUMENT WAS DESTROYED BEFORE JONES' REQUEST WAS RECEIVED.

The legislature established the purpose of the Public Records Act – free and open examination of records by citizens – to serve the public interest. RCW 42.56.550(3). To meet this lofty purpose, courts reviewing agency responses to public records requests "start with the presumption that all public records are subject to disclosure." *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737, 740 (2015). The Supreme Court held that "[a]gencies can withhold a record only if it falls within one of the PRA's specific, limited exemptions." *Id.* (citing RCW 42.56.070(1)). "[T]he PRA does not allow agencies to destroy records that are subject to a pending records request." *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010). "[A]gencies "shall retain possession of the record, and may not destroy or erase the record until the request is resolved." RCW 42.56.100.

1. The Public Records Act Requires a Rebuttable Presumption that the Department Lost the Requested Record After the Request Was Made.

In granting the show cause motion, the trial court ruled that since Jones could not show when the record was destroyed, he did not prevail. This holding turns the Public Records Act on its head because (1) it establishes a presumption against Jones when evidence required to rebut

that presumption was available to the Department and not Jones, and (2) all other presumptions are against the agency. In other words, the court shifted the evidentiary burden of persuasion to Jones. Given the presumption that records are disclosable unless the agency shows otherwise, there must also be the presumption that destruction of a record violates the PRA unless the agency can show otherwise. Given this presumption, the Department's failure to show that the record was destroyed before it was requested imposes liability on it.

Of course, any such presumption is rebuttable. A rebuttable presumption is challenged by the presentation of evidence to the contrary. This is because "[a] presumption is not evidence; its efficacy is lost when the opposite party adduces prima facie evidence to the contrary." *Amend v. Bell*, 89 Wn.2d 124, 128, 570 P.2d 138 (1977) (citing *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960)). The presumption of premature destruction may be overcome by an agency's prima facie showing that a document was destroyed at an appropriate time using evidence available to the agency. Upon such a showing, the burden would shift to the requester to show that the record was actually destroyed after the request was received by the agency. Here, the Department failed to provide any evidence showing how or when the document was destroyed.

It failed to make the proper evidentiary showing to overcome the rebuttable presumption.

2. Because an Agency Has Total Control Over Documents In Its Possession, a Requester Is Entitled to Have a Court Apply Res Ipsa Loquitur to the Public Records Act.

In other areas of law where evidence of wrongdoing is only available to the defendant, courts permit a presumption against the defendant as to that evidence. For example, Courts permit the inference of negligence when evidence of the cause of an injury is available to the tortfeasor but not the injured party under the doctrine of res ipsa loquitur. *Pacheco v. Ames*, 149 Wn.2d 431, 436, 69 P.3d 324 (2003). In the Supreme Court's understanding,

> [t]he doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.

Id. This Court should do no less.

Courts allow a party to rely on the doctrine of res ipsa loquitur to fill in evidentiary gaps created by the destruction of a piece of evidence where the facts and demands of justice make its application essential. *See Curtis v. Lein*, 169 Wn.2d 884, 239 P.3d 1078 (2010). In *Curtis*, the plaintiff was injured when she fell through the defendant's dock, which the defendant subsequently destroyed. *Id.* at 888-89. The defendant, by

removing the dock, deprived the plaintiff of evidence with which to meet her burden. In light of this, the Court allowed the plaintiff to shift the evidentiary burden to the defendant (a rebuttable inference of negligence) despite the existence of possible causes other than the plaintiff's negligence that may have affected the dock's failure. *Id.* at 895. The Court found, as additional basis for granting the inference, (1) the fact that the evidence was in the exclusive control of the defendant, and (2) that the plaintiff did not contribute to the accident. *Id.*

Here, Jones is similarly deprived of the evidence he needs to meet his burden – information related to the destruction of the record he requested. By contrast, the Department is the source and custodian of all evidence related to the retention and destruction of the record. Moreover, the record was in the exclusive control of the Department from the time when Jones made his verbal request at the hearing to when the Department received his written request. Finally, because the record was in the exclusive control of the Department, there is no way that Jones could have contributed to its destruction. Consequently, justice demands that Jones be relieved of the burden of proving that the record was not destroyed before the Department received his records request. The doctrine of res ipsa loquitur provides ample basis for such relief.

The PRA involves a special type of action where the defendant agency is in sole possession of documents subject to the request, and all relevant evidence about that request is in the possession of the agency. This evidence is relevant to whether the document exists or was destroyed. If a record exists and was not produced or partially produced, the agency must provide evidence to the trial court to show that its actions were appropriate or otherwise face penalties for its actions. By the same token, if a requested record was destroyed, then a presumption of premature destruction must also be established against the agency. The agency may then rebut the presumption by showing that the record was destroyed before the request was received, using evidence it is uniquely suited to provide.

3. An Agency's Possession of All Evidence Relating to the Destruction of a Requested Record Is a Special Situation, Imposing a Special Obligation on the Agency.

In allocating evidentiary burdens, courts must consider whether a party has sole access to information necessary to meet that burden. See e.g. *U.S. Oil v. Department of Ecology*, 96 Wn.2d 85, 633 P.2d 1329 (1981). In *U.S. Oil*, the Department of Ecology ("DOE") was charged by statute with the duty to collect penalties for unlawful waste discharges. Under the waste regulatory scheme of Chapter 90.48 RCW, the DOE had to rely on industry self-reporting to discover violations. *Id.* at 92. Not

surprisingly, U.S. Oil failed to properly report its unlawful discharges. When the DOE suspected that monitoring reports were inaccurate and began investigating, it was finally determined that U.S. Oil had unlawfully discharged waste. *Id.* Unfortunately, the DOE's discovery was subsequent to the expiration of the statute of limitations, preventing it from collecting penalties from U.S. Oil for its violations. *Id.* at 87.

To even the playing field, the Court found that without the discovery rule, industries could discharge pollutants and escape penalties by failing to report violations. *Id.* at 92. The *U.S. Oil* Court pointed out that "[w]here self-reporting is involved, the probability increases that the plaintiff will be unaware of any cause of action, for the defendant has an incentive not to report it. *Id.* at 93. To ameliorate this problem, the Supreme Court applied the discovery rule to situations involving self-reporting. This Court should take to heart the simple truth leading to the *U.S. Oil* decision – control over the evidence requires an adjustment in how the evidence is treated. To extend *U.S. Oil*'s holding to this case requires an agency to produce evidence of how and when the record was destroyed. In other words, it must be presumed that the record existed at the time of the request was received by the agency unless proved otherwise. Not applying this rule "would penalize the [requester] and reward the clever [agency]." *Id.* at 94. One can imagine many

circumstances where the evidence of what happened to a particular document will never be produced – either though inadvertence or malevolence. The burden of production concerning the timing of the destruction of the record must not be placed on the requester because it ignores precedent and contravenes the purpose of the Public Records Act.

D. JONES IS ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS.

If this Court finds the Department in violation of the PRA when it responded to Jones's request, Jones asks that reasonable attorneys fees and cost be granted. RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. The Washington Supreme Court had determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990). Jones also asks this Court to grant reasonable attorney fees and costs on appeal and to remand to the trial court determine those fees and costs.

VI. CONCLUSION

For the reasons stated above, this Court must find that the Department violated the Public Records Act and remand this case back to the trial court for determination of penalties and attorney fees and costs.

Jones asks this Court to award reasonable attorney fees and costs on appeal.

Respectfully submitted this 10th day of February, 2016.

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on February 10, 2016, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

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