No. 96219-7

SUPREME COURT OF THE STATE OF WASHINGTON

ZINK,

v.

CITY OF MESA.

REPLY TO PETITION FOR CONDITIONAL CROSS-PETITION

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I. RESPONSE TO CONDITIONAL CROSS-PETITION

1. The City of Mesa's Request Does Not Meet the Requirements of RAP 13

Based solely on whether this Court accepts review of Zink's petition, the City of Mesa (Mesa) requests that this Court review Division III's opinion that capping penalties at 1% of an agencies budget is not an appropriate function of a Court of Appeals and would violate the separation of powers doctrine (Petition A20-21; Answer pg. 115, 19). Mesa's request does not meet the standard for review of an Appellate Court decision.

Pursuant to RAP 13 a petition for review will be granted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
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> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
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> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1-4). Mesa has failed to identify any portion in Division III's opinion that conflicts with a decision of this Court or any other Court of Appeals. In fact, the Division III opinion is in accord with this Court's decisions concerning separation of powers and "caps" on penalty assessments other than those legislatively created.

Mesa has not identified a significant question of law under the Constitution of the State of Washington or the United States that conflicts with Division III's opinion. Further, by placing a condition on a grant of review "[i]f the Court does

elect to accept review (and only if this is the case)" (Answer. pg.3) "it otherwise grants the Zinks' petition" (Answer. pg. 14)," Mesa has shown there is no issue of substantial public interest which should be determined by this court.

2. Granting Mesa's Request To Cap Penalties at 1% of An Agencies Budget Would Violate the Separation of Powers Doctrine

Based on this Court's decision in *Perez-Farias* as well as this Court's decision in *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009), Division III opined that a court violates "the separation of powers doctrine when we assume "tasks that are more properly accomplished by other branches.'" Making clear that "[i]f a cap is to be imposed, it will have to be imposed by the legislature." (Petition. A21).

This Court has repeatedly opined that:

> One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments – the legislative, the executive, and the judicial – and that each is separate from the other. State v. Osloond, 60 Wn. App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991). Washington's constitution, much like the federal constitution, does not contain a formal separation of powers clause. See Osloond, at 587. Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.

Carrick v. Locke, 125 Wn. 2d 129, 134-35, 882 P.2d 173 (1994) (footnote removed). It is the fundamental principle of our system of government that the legislature enacts laws. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, ¶2, 174 P.3d 1142 (2007). While the function of our courts is to interpret the laws enacted by our legislature. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). As properly opined by Division III, Mesa's request for the Court to disregard well established statutory law enacted by our legislature

concerning assessment of penalties in lieu of a 1% "cap" on penalty assessment based on an agencies budget restriction and tax payer base violates the separation of powers doctrine.

> "The brilliance of our constitution is in its multiplicity of checks and balances." State v. Evans, 154 Wn.2d 438, 445, 114 P.3d 627 (2005). "At least 26 distinct provisions of the federal constitution are founded on the separation of powers principle." In re Salary of Juvenile Dir., 87 Wn.2d 232, 238, 552 P.2d 163 (1976).

Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, ¶12, 198 P.3d 1021 (2009).

> In response to this desire for a stronger yet limited national government, the delegates adopted a plan based largely on the concept of separation of powers. They hoped to ensure liberty by defusing and limiting power. **Separation of powers created a clear division of functions among each branch of government, and the power to interfere with the exercise of another's functions was very limited**. In re Juvenile Dir., 87 Wn.2d at 238; see also Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). The doctrine recognizes that each branch of government has its own appropriate sphere of activity. Philip A. Talmadge, Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems, 22 Seattle U. L. Rev. 695 (1999). It ensures that the fundamental functions of each branch remain inviolate. Carrick, 125 Wn.2d at 135.

Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, ¶13, 198 P.3d 1021 (2009)(emphasis added).

Our legislature has addressed the issue of assessment of penalties for failure to comply with the PRA; setting mandatory minimum and maximum penalties in enacting RCW 42.56.550(4). Our legislature has determined that the maximum penalty that can be assessed is $100 per day for violations of the PRA. Mesa's request that this Court disregard legislatively created law in lieu of judicially created law is frivolous and must be denied.

3. PRA Penalties are Assessed Against the Agency Not the Tax Payers

Mesa argues that it is the tax payers who pay the PRA penalties (Answer pg. 14). Although the penalties are paid out of an agencies budget,[1] once tax money is collected from the tax payer by an agency the tax payer loses control of how that money is spent except at the ballot box. No tax payer has ever been required to pay the penalties assessed against a public agency for violations of the PRA.

Next Mesa argues that large agencies acting as badly as Mesa in responding to requests for public records are not being penalized as badly as Mesa. However, Mesa also argues that because of this Court's ruling in *Wades Eastside Gun Shop, Inc. v. Dep't of Labor and Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016)(Answer. pg. 18), massive penalties can now be assessed against public agencies; claiming this Court must place upper limits on what qualifies as a reasonable penalty. As discussed above, our legislature has already placed upper limits on what qualifies as a reasonable penalty under RCW 42.56.550(4) with a maximum penalty amount of $100 per day.

Our Courts have determined that our laws apply equally to all.

> [P]ersons similarly situated with respect to the legitimate purpose of the law must receive like treatment.

State v. Johnson, 194 Wn. App. 304, 307, 374 P.3d 1206 (2016). Under the clear and unambiguous language of RCW 42.56.550(4) and well-established case law interpreting RCW 42.56.550(4)(*Amren v. City of Kalama*, 131 Wn.2d 25, 38, 929 P.2d 389 (1997); *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 229 P.3d 735 (2010); *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010)),

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[1] Unrestricted tax revenue is the portion of an agencies budget that is not designated to be used for public services, salaries or other expenses. It is unreserved.

agencies found to have acted in bad faith in responding to public records (including but not limited to silently withholding records, destroying records and refusing to release records even under court order (Petition A21-22)) should receive the same high per diem penalties of $100 per day. While agencies acting in good faith should receive the same lower per diem penalties. Penalty assessment is based on factors which determine an agency's culpability (good or bad faith). Despite these clear mandates, Mesa claims that assessing penalties based on the established per day penalty amounts set forth in RCW 42.56.550(4) causes a massive disparity (Answer. pg. 17).

In this case, Mesa was found to be acting in the worst bad faith in withholding records for approximately 23,117 days over a five-year period of time.[2] The maximum amount of per day penalties that could be assessed against Mesa is $100 per day.[3] The maximum amount of penalties which could be assessed against an agency as large as King County for the same response is $100 per day. RCW 42.56.550(4). Therefore, the maximum amount of penalties which could have been assessed against King County, or any agency, if all penalty days are assessed at $100 per day, something not done in the Mesa case, is $2,311,700; not $224,000,000. A penalty of $2,311,700 is only 0.00074% of King County's budget of 3.1 billion as determined by Mesa (Answer pg. 16). By placing a cap of 1% of its 3.1 billion annual budget ($31,000,000) the Court

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[2] This action was initiated in April 2003 (Petition A3). The City withheld records until November 2008 (*Zink v. City of Mesa*, 162 Wn. App. 688, ¶30-31, 256 P.3d 384 (2011)

[3] The vast majority of the penalties initially assessed against Mesa prior to the trial courts global reduction were set far lower than $100 per day; with the majority being set at $5 per day (Zink Opening Brief Appendix A).

would be increasing the maximum allowed under RCW 42.56.550(4) as determined by our legislature.

While a maximum penalty assessment of 1% of an agencies annual budget may decrease penalty assessment for small agencies it would increase the maximum penalty assessment for large agencies. This would cause a massive disparity which our legislature did not authorize our courts to do.

4. Strict Assessment of Penalties Assures Agency Compliance

Mesa cites to *Vasbinder v. Scott*, 976 F.2d 118, 121 (2nd Cir. 1992) in support of its argument that "[a] penalty is sufficient to serve as a deterrent when the penalty exceeds the amount the agency would need to spend on compliance" therefore, "[a] penalty that exceeds an agency's available revenue is by definition more than an amount needed to deter future violations because the agency could not spend more than 100% of its budget on PRA compliance;" anything greater than that is wasteful (Answer. pg. 15). Mesa's argument is nonsensical.

Deterrence is only effective if it in fact deters an agency from violations of the PRA. How much an agency spends on compliance through penalty assessment reflects the degree to which an agency complies or does not comply with the act. Here, Mesa ignored the threat of $5 to $100 per day penalties and refused to comply with the PRA even after being court ordered to provide the requested records. *Zink v. City of Mesa*, 162 Wn. App. 688, ¶30-31, 256 P.3d 384 (2011). Had Mesa complied with the act they would have been assessed considerably less penalties or no penalties at all. It is Mesa's refusal to comply which has caused the amount of the penalties assessed. To claim that Mesa will

not get a "pass" or otherwise minimalize its violations of the PRA if they are not held to the same standard as all other agencies is disingenuous to say the least.

Further, Division III, citing to this Court's decision in *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 530, 286 P.3d 46 (2012), rightly dismissed Mesa's argument that the Court must "cap" penalty awards that are oppressive or patently excessive. In that case, this Court addressed questions certified by the Ninth Circuit Court of Appeals (*Perez-Farias v. Glob. Horizons Inc., 499 F. App'x,* 735, 737 (9th Cir. 2012)) and "rejected an argument that it should impose a cap on the statutorily-authorized penalty" (Petition A20-21).

> The legislature has declined to create such a cap. We find nothing in either Washington case law or the statutes to support capping an award of damages under these circumstances. A contrary holding would be inconsistent with the overall purposes and aim of the statute. We hold no state public policy or due process principles require reduction in the total damages mandated by statute.

Perez-Farias at 533 (footnote omitted). Mesa has not shown that Division III's opinion is in conflict with this Court's opinion in Perez-Farias and, in fact, Division III's opinion is in accord.

5. Purpose of Penalty Assessment Under RCW 42.56.550(4) Is Compliance

Mesa argues that imposition of mandatory penalties under the PRA, as set forth by our legislature, is in opposition to the PRA's purpose of allowing the people to maintain control over their government. This is an illogical reading of the provisions set forth by our legislature to promote compliance.

This Court has identified the "public interest" in access to public records as "full access to information concerning the conduct of government on every level" which "must be assured as a fundamental and necessary precondition to

the sound governance of a free society." *Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283, (1989). This Court instructed courts to be "mindful of … the desirability of the efficient administration of government, the provisions of the act are to be liberally construed to promote full access to public records so as to assure continuing public confidence in governmental processes, and to assure that the public interest will be fully protected. (*Id.*).

With full knowledge that public agencies consist solely of elected officials, appointed officials, and staff our legislature set out harsh penalties to be assessed against an "agency" should that agency's officials and staff chose to not comply with the PRA. None the less, Mesa argues that the "PRA penalties are not paid by the bad actors" (City officials and staff) and therefore penalty awards should not waste tax payer money (Answer 18). Mesa cites to *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, 422 P.3d 466 (2018), a second Division III case decided approximately six weeks after the decision in this case, to support its contention that "penalty should be set based on the "overarching concern for deterrence" not the misconduct of [a] single employee" (Answer 19 *fn.* 17).

In the *Hoffman* case, Division III determined that this Court's decision in *Yousoufian v. Office of Ron Sims, King County Executive*, 168 Wn.2d 444, 229 P.3d 735 (2010) altered this Court's decision in *Amren v. City of Kalama*, 131 Wn.2d 25, 38, 929 P.2d 389 (1997) such that the primary factor courts are to consider is deterrence rather than bad faith (*Hoffman* at ¶29). Based on this new standard for assessment of penalties, Mesa argues that a liberal interpretation allows a court to place a presumptive cap to further "the purposes of the PRA by avoiding excessive penalties, paid for by the taxpayers, not wrongful actors." (Answer. pg. 20).

The *Amren* Court made clear that the principle factor courts must consider in assessing penalties is evidence of an agency's bad faith.

> When determining the amount of the penalty to be imposed "**the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.**" Yacobellis, 64 Wn. App. at 303 (the court determined that the trial court erred in its award determination of one dollar per day because it did not consider evidence of the city's bad faith when determining the amount of the award).

Amren 37-38 (emphasis added). Rather than change the principle factor, the *Yousoufian* Court set out mitigating and aggravating factors to aid courts in determining culpability levels (good and bad faith):

> **Our court has stated that the PRA penalty is designed to " 'discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute.' "** Yousoufian II, 152 Wn.2d at 429-30 (alteration in original) (quoting Hearst Corp. v. Hoppe, 90 Wn.2d 123, 140, 580 P.2d 246 (1978)). "When determining the amount of the penalty to be imposed 'the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider.' " Amren v. City of Kalama, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997) (alteration in original) (quoting Yacobellis v. City of Bellingham, 64 Wn. App. 295, 303, 825 P.2d 324 (1992)). **However, no showing of bad faith is necessary before a penalty is imposed on an agency and an agency's good faith reliance on an exemption does not insulate the agency from a penalty.**

Yousoufian v. Office of Ron Sims, King County Executive, 168 Wn.2d 444, ¶28, 229 P.3d 735 (2010)(emphasis added). This Court clarified that the factors were to be based on the agency's culpability not on deterrence as argued by Mesa.

> There are other considerations that bear on the determination of a penalty in addition to good faith or bad faith. They are factors, discussed below, relating to the basis for setting PRA penalties: agency culpability. See Yousoufian II, 152 Wn.2d at 435 ("**the [PRA's] purpose [of] promot[ing] access to public records ... is better served by increasing the penalty based on an agency's culpability**").

Id, ¶29(emphasis added). In this case, records withheld by Mesa were produced over five years after the Zinks initiated litigation in April 2003.

> In the trial court's November 2008 order, Mesa was ordered to produce within seven days of the entry of the order all public records that had not yet been produced.

Zink v. City of Mesa, 162 Wn, App. 688, ¶30, 256 P.3d 384 (2011). During that five-year period Mesa officials and staff: 1) were aware of Zinks' litigation; 2) knew per day penalties between $5 to $100 would be assessed against them for violations; and 3) at all times were at liberty to provide the records and stop per diem penalties from accruing. Despite the legislatively created deterrent (mandatory penalties under RCW 42.56.550(4)), Mesa refused to comply. The deterrent set forth by our legislature simply did not deter Mesa from non-compliance. Mesa had the opportunity to comply, knew the risks, and refused. As mandated by our legislature, agencies refusing to comply must be assessed mandatory penalties for that non-compliance; including smaller agencies.

While the deterrence of mandatory penalty assessment of $5 to $100 per day set out by our legislature did not deter Mesa, assessing penalties based on Mesa's actions (officials and staff bad faith) should illicit compliance from other agencies (both large and small) who believe they too will be afforded preferential treatment (decreased penalty assessments) for willfully refusing to disclose and produce public records.

While liberal construction of the PRA favors compliance, liberal construction does not give the courts the authority to alter unambiguous laws relating to penalty assessment based on the culpability (actions) of the agency or alter statutory penalty amounts. Division III properly applied settled law to the issue of establishing a 1% cap on penalty assessment and refusing to further

decrease penalty assessments against Mesa, when it rejected Mesa's claim on appeal.

II. CONCLUSION

Whether this Court takes up Mesa's conditional cross-petition should not be a factor in whether this Court takes up review of Zinks' petition.

The Zinks set forth clear conflicts between Division III's opinion and opinions of this Court in the retroactive application of SHB 1899 to penalty assessment under RCW 42.56.550(4). This issue is not only of substantial public concern it is a constitutional issue. The Zinks set forth clear conflicts between Division III's opinion and the opinions of this Court concerning deterrence to global reduce the overall penalty assessment after proper application of Yousoufian Factors. The issue of whether a deterrence is the principle factor that can be used to decrease proper penalty assessment is of substantial public interest.

While Mesa has not shown how the opinion of Division III concerning the adoption of a 1% presumptive cap is in conflict with any Supreme or Appellate Court decision, is a constitutional issue or of any substantial public interest.

Zink respectfully request this Court to take up review of the issues set forth in their petition and deny review of Mesa's petition.

RESPECTFULLY SUBMITTED this 2nd day of October 2018.

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