No. 96286-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 35091-6-III

RANDALL HOFFMAN,

Petitioner,

v.

KITTITAS COUNTY, a local agency,
and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency,

Respondents.

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY

Randall Hoffman sought police reports from the Kittitas County Sheriff's Office under the Public Records Act ("PRA"), chapter 42.56 RCW. The Office's Public Records Clerk, a 10-year veteran, withheld the reports because Hoffman was not a party involved in the incidents. All parties agree that this withholding was legally erroneous. After an eight-month delay in getting the reports, Hoffman filed suit under the PRA, which authorizes courts to impose penalties for violations of the law.

The trial court ruled that withholding the records violated the PRA, but that the withholding had not been in bad faith. The court selected a penalty at the low end of the statutory range. *See* RCW 42.56.550(4).

On appeal, Hoffman chose not to challenge the trial court's underlying factual findings. Instead, cognizant that this Court has said bad faith is the "principal factor" in setting a PRA penalty, *Neighborhood Alliance of Spokane Cty. v. Spokane Cty.*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011), he argued that the trial court had applied an erroneous legal standard when determining that records had not been withheld in bad faith.

In a split published opinion, the Court of Appeals majority affirmed. In the process, it reached three conclusions. First, a trial court's determination about bad faith is reviewed for abuse of discretion. *See* Appendix ("App.") at 7–8. Second, bad faith was once—but is no

longer—the principal factor in setting a PRA penalty. *See id.* at 9–11. Third, a trial court need not support its PRA penalty determination with factual findings. *Id.* at 7–8 & n.2.

Chief Judge Lawrence-Berrey concurred in the result. He would have reviewed the trial court's determination about bad faith for substantial evidence, *id.* at 17–20, but noted that the proper standard of review "awaits clarification" from this Court. *Id.* at 20. He also disagreed with the majority on the importance of bad faith. He would have held that bad faith remains the principal factor in setting penalties. *See id.* at 16–17.

Review of the decision below is warranted. Its holding on the standard of review conflicts with other Court of Appeals decisions, as well as decisions from this Court, and the disagreement among the panel below reveals confusion that only this Court can resolve. In holding that bad faith is no longer the principal factor in setting PRA penalties, it created a direct conflict with this Court's precedents. And in holding that a trial court need not support its PRA penalty with factual findings, it contradicted this Court and created the potential for turmoil in the lower courts. In addition, this appeal gives the Court an opportunity to articulate the legal standard for bad faith under the PRA—an important issue it has not yet addressed.

IDENTITY OF PETITIONER

Randall Hoffman, Plaintiff below, asks this Court to accept review

of the Court of Appeals' decision terminating review.

CITATION TO COURT OF APPEALS DECISION

The published Court of Appeals decision was filed July 24, 2018 and amended August 20, 2018. The order amending the decision, along with the decision itself, is attached as an Appendix to this Petition.

ISSUES PRESENTED FOR REVIEW

1. What standard of review applies to a trial court's determination of whether an agency's withholding under the PRA was in bad faith?
2. Is bad faith the principal factor to consider in assessing a penalty under the PRA?
3. What is the legal standard for bad faith under the PRA?
4. When a trial court imposes a penalty under the PRA, is it required to make findings of fact to support the amount of the penalty?

STATEMENT OF THE CASE

I. Facts

Randall Hoffman wanted to show that a person named Erin Schnebly had a pattern of reckless behavior. In June 2015, he submitted a public records request to the Kittitas County Sheriff's Office, asking for all "police reports and other info available" on Schnebly, including photographs and videos. CP 13; CP 891, ¶ 2; CP 866, ¶ 11.

Carolyn Hayes, the veteran Public Records Clerk for the Sheriff's Office, handled Hoffman's request. CP 891, ¶ 3. Hayes searched for

records and identified seven incident reports, but no photos or videos. App. at 3. She called Hoffman and told him that there were no responsive photographs and videos. CP 891, ¶ 5. She also said that because Hoffman was not a party involved in the police reports, "privacy interests" prevented her from providing him with the full reports. CP 891, ¶ 5. She said that she could give him only the police reports' "face sheets," which would show the type of incident that was being reported, as well as its date and location. CP 891, ¶ 5. Relying on what Hayes told him, Hoffman said that he would accept just the face sheets. CP 896, ¶ 4.

Everyone now agrees that Hayes misinformed Hoffman. A reasonable search, the trial court found, would have turned up responsive photographs and videos. CP 896–97, ¶ 7. Hayes was also wrong as a matter of law to withhold the police reports on "privacy" grounds. CP 892, ¶ 6; *see also* Br. of Appellant at 28 (explaining why Hayes's withholding was legally unjustifiable).

Kallee Knudson, a trainee with the Sheriff's Office, overheard Hayes's half of the phone conversation with Hoffman. CP 892, ¶ 7. She could not understand why Hayes had refused Hoffman the police reports. CP 520; App. at 4. Even after a 15-minute conversation with Hayes, Knudson still did not understand Hayes's reasoning. CP 520. Knudson had never noticed Hayes saying anything like this before. App. at 4.

The day after the phone call, Hayes produced the police reports' face sheets to Hoffman, although with "significant and improper redactions." *Id.*

About three months later, in September 2015, Knudson brought her concerns about Hoffman's request to her supervisors' attention. CP 893, ¶ 10. The supervisors instructed Knudson, and then Hayes, to contact Hoffman "to determine if he received what he requested." CP 902, ¶ 4. Hoffman told Knudson that "he did get his request," but Knudson did not share her concerns with Hoffman or tell him that she thought he was entitled to more documents. CP 893–94, ¶ 10. Hayes also contacted Hoffman to ask if he received what he needed, App. at 4, and he answered that he had. Like Knudson, Hayes never told him that he was entitled to the full police reports. CP 426 at 35:2–5.

Hoffman returned to the Sheriff's Office in February 2016. App. at 5. He told Knudson he was entitled to more documents and resubmitted his original request, which was properly processed. *Id.*

II. Procedural history

A. Proceedings in the trial court

After Hoffman filed this PRA action against the County, the parties conducted limited discovery and submitted the action to the bench based on stipulated facts, exhibits, and written testimony. *See* App. at 6.

In the course of discovery, depositions of Hayes and Knudson were taken. In her deposition, Hayes did not attempt to justify her withholding of the police reports. Instead, when she was asked whether she had "suggested that [Hoffman] get less than the full [police] report," she responded, "No." CP 419 at 28:11–13.

The trial court, however, found that Hayes *had* told Hoffman that he was not entitled to the full police reports. CP 891, ¶ 5; CP 905. And it determined that the Sheriff's Office had improperly redacted and withheld 126 records for 246 days. App. at 6. It also concluded, however, that this withholding was the result of Hayes's negligence, not bad faith. *Id.*

The court, stating that a penalty depends "primarily" on "whether the agency acted in bad faith," CP 910, ¶ 2, chose a penalty on the low end of the statutory range of zero to $100 per day. RCW 42.56.550(4). It ordered the County to pay $0.50 per day for each of the 126 records it had improperly redacted and withheld. Because the records had been withheld for 246 days, the total penalty was $15,498. App. at 6–7.

B. The Court of Appeals' published split decision

On appeal, Hoffman argued that the trial court had applied an erroneous legal standard in making its determination about bad faith. The Court of Appeals, however, affirmed the trial court in a published opinion. Judge Pennell wrote for the majority, and Chief Judge Lawrence-Berry

concurred in the result only.

The majority applied an "extremely deferential" abuse-of-standard in reviewing the trial court's decision, App. at 7–8, while acknowledging that Hoffman did not challenge the underlying factual findings, *id.* at 11.

The majority also held that "a trial court's choice of how to label agency noncompliance"—i.e., whether the trial court determines that the agency complied in bad faith or good bad faith—could not serve as a basis for reversing a penalty decision. *Id.* at 11. It reached this holding largely because it determined that *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 44, 229 P.3d 735 (2010) ("*Yousoufian II*") had abrogated earlier decisions holding that bad faith was the "principal factor" in a PRA penalty determination. App. at 9. Because bad faith was no longer the principal factor, "the exact nature of Hayes's individual fault" was not important, even though "the problems leading up to the County's PRA violation were attributable solely to Hayes." *Id.* at 12. Because the majority deemed the penalty chosen to be reasonable, it affirmed the trial court. *Id.* at 13.

Chief Judge Lawrence-Berrey concurred in the result because he "agree[d] that the evidence supports the trial court's culpability findings." *Id.* at 15. He disagreed with the majority, however, on two of its key holdings. First, he disagreed on the proper standard of review, while also noting that it was "***open for judicial debate and awaits clarification from***

our highest court." *Id.* at 20 (emphasis added). He argued that while a trial court's ultimate PRA penalty determination is reviewed for abuse of discretion, the factual findings that underlie that penalty are reviewed for substantial evidence, at least where competing documentary evidence must be weighed. *See id.* at 17–20. Chief Judge Lawrence-Berrey also disagreed with the majority's view that "culpability determinations"—i.e., determinations of bad faith or good faith—"are mere labels." *Id.* at 16. Rather, such determinations are "an important factor in assessing PRA penalties." *Id.*

GROUNDS FOR REVIEW

I. By reviewing the issue of bad faith for abuse of discretion, the decision below conflicts with precedents from this Court and the Court of Appeals on an issue of substantial public interest.

The trial court determined that the County had not withheld records in bad faith. The majority of the Court of Appeals reviewed this determination for abuse of discretion. App. at 7–8. In doing so, it diverged from precedent on what the concurrence below correctly described as "an important legal issue." *Id.* at 17; *see* RAP 13.4(b)(1), (2), (4). Review of the issue is warranted.

A. The Court of Appeals majority's opinion creates a conflict with other precedents from the Court of Appeals.

When deciding whether an agency had withheld public records in bad faith, both Division Two and Division Three of the Court of Appeals

have held that when the "underlying facts are uncontested," an appellate court applies "de novo review to ascertain whether the facts amount to bad faith." *Faulkner v. Wash. Dep't of Corr.*, 183 Wn. App. 93, 102, 332 P.3d 1136 (2014); *accord Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 939, 361 P.3d 749 (2015); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 52, 313 P.3d 457 (2013). In its opinion below, however, the majority of the Court of Appeals diverged from these cases. It acknowledged that "Hoffman does not challenge any of the factual findings underlying the trial court's penalty assessment," App. at 11, but still applied what it called the "extremely deferential" abuse-of-discretion standard, *id.* at 7.

Like this case, moreover, *Adams* and *Faulkner* were submitted to the bench solely on a written record. *See Adams*, 189 Wn. App. at 934–35; *Faulkner*, 183 Wn. App. at 98–99. While *Francis* was decided on summary judgment, 178 Wn. App. at 49, neither *Adams* nor *Faulkner* concluded that this procedural difference mattered. Instead, they followed *Francis* in applying a de novo standard to bad faith.

Unlike this case, *Adams*, *Faulkner*, and *Francis* were PRA cases involving state prisoners, but that is a distinction without a difference. Although RCW 42.56.565(1) provides that state prisoners cannot receive PRA penalties "unless the court finds that the agency acted in bad faith," that provision simply gives the issue of bad faith added importance in such

cases. The issue's added importance cannot change the standard under which it is reviewed. Certainly the Court of Appeals here did not explain why it should change the standard of review.

The decision below cannot be reconciled with the Court of Appeals' decisions in *Adams*, *Faulkner*, and *Francis*. This conflict warrants review under RAP 13.4(b)(2).

B. The Court of Appeals majority's opinion creates a conflict with this Court's precedents.

By applying the "extremely deferential" abuse-of-discretion standard to the trial court's determination of good faith, App. at 7, the Court of Appeals also created a conflict with this Court's precedents.

The conflict arises because the issue of bad faith asks the appellate court to apply a legal standard to a given set of facts. As *Francis* noted, answering the question of bad faith requires the appellate court to apply "legal precepts (the definition of 'bad faith') to factual circumstances (the details of the PRA violation)." 178 Wn. App. at 52. That is a classic "mixed question of law and fact." *Id.* at 51-52. This Court has reached the same conclusion with respect to a similar issue: whether a party has failed to negotiate in good faith. *See Pasco Police Officers' Ass'n v. City of Pasco*, 132 Wn.2d 450, 469, 938 P.2d 827 (the issue raises "a mixed question of law and fact").

More broadly, this Court has consistently applied de novo review to mixed questions of fact and law. *E.g.*, *Humphrey Indus., Ltd. v. Clay Street Assocs., LLC*, 170 Wn.2d 495, 501–02, 242 P.3d 846 (2010); *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278 (2010). Hence, it has determined on its own what legal conclusions flow from the facts. *See State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 Seattle U. L. Rev. 11, 28 (1994). And where, as here, the facts are undisputed, a mixed question becomes a pure question "of law for the court," which the courts "review[] . . . de novo." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008).[1]

This standard does not change merely because the trial court's *ultimate* determination—the amount of the PRA penalty—is reviewed for abuse of discretion. For one of the ways a trial court may abuse its discretion is by basing its decision "on an incorrect standard or [if] the facts do not meet the requirements of the correct standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). In determining

[1] The County has argued that the facts are not undisputed because the parties contested certain of the facts *before the trial court*. This argument does not make sense. Even if some facts were disputed before the trial court, the appellate court must accept the trial court's findings as verities on appeal if, as here, they are not challenged. The appellate court must then answer "whether the trial court derived proper conclusions of law from those findings," a legal question that is determined de novo. *Armenta*, 134 Wn.2d at 9.

whether a trial court made this kind of legal error, an appellate court does not defer to the trial court. Rather, ***legal questions, as always, are subject to de novo review***—as this Court's case law makes clear.

For example, while a trial court's distribution of property at the end of a committed intimate relationship is reviewed for abuse of discretion, the legal conclusions that led to that distribution are reviewed de novo. *Soltero v. Wimer*, 159 Wn.2d 428, 433, 150 P.3d 552 (2007).

A similar result was reached in *Farmer v. Farmer*, 172 Wn.2d 616, 259 P.3d 256 (2011). There, one party argued that a court's division of assets at dissolution, including an award of damages, is reviewed for abuse of discretion, while the other argued that it was reviewed de novo. This Court responded that, "in a sense," both sides were "correct." *Id.* at 624. For while a court's ultimate remedy in a dissolution proceeding is reviewed for abuse of discretion, an abuse of discretion includes an error on a legal question, which is reviewed de novo. *See id.* at 624–25 (citing *Shoemake v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010)); *Shoemake*, 168 Wn.2d at 198 (question of law is reviewed de novo).

The abuse-of-discretion standard does not transform subsidiary questions of law into questions on which the trial court is accorded deference. In determining otherwise, the Court of Appeals created a conflict with this Court that warrants review under RAP 13.4(b)(1).

C. The proper standard of review is an issue of substantial public interest that only this Court can resolve.

This Court has repeatedly stated that "the principal factor" in setting a PRA penalty is "[w]hether an agency withheld records in bad faith."[2] *E.g.*, *Neighborhood Alliance*, 172 Wn.2d at 717. Because PRA penalties are an issue of substantial public interest, the standard of review that applies to bad faith is itself an issue of substantial public interest.

On this issue, the disagreement in the Court of Appeals reveals confusion in the lower courts that only this Court can resolve. The majority reviewed the trial court's determination about bad faith for abuse of discretion. App. at 7–8. The concurrence disagreed, noting correctly that factual findings are reviewed for substantial evidence. *Id.* at 15. The problem is that the concurrence's analysis went no further.

While the concurrence correctly stated that a trial court's factual findings are reviewed for substantial evidence, it assumed without analysis that the trial court's determination about bad faith is properly characterized as a factual finding. *See id*. The concurrence cited no authority to support this assumption, and a case on which it heavily relied, *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014), shows why that

[2] The panel majority in the Court of Appeals concluded that these statements are no longer good law, App. at 9—a conclusion with which the concurrence disagreed, *id.* at 16–17. As Hoffman will explain, the majority's conclusion is not only wrong, but also deserving of review. *See infra* Grounds for Review § II.

assumption is wrong. In *Kipp*, this Court reaffirmed that "where the facts are undisputed," an appellate court reviews de novo whether a conversation is private under the privacy act, chapter 9.73 RCW. *Id.* at 728. De novo review was proper because "whether the 'facts' are encompassed by the statutory protections presents a question regarding statutory interpretation"—that is, a legal question. *Id. Kipp* thus held that the application of the privacy act's statutory protections to a given set of facts should be reviewed de novo. Likewise, the application of the legal standard for bad faith to a given set of facts should be reviewed de novo.

II. In holding that the existence or absence of bad faith is no longer the principal factor to consider in setting a PRA penalty, the Court of Appeals created a conflict with this Court's decisions.

The Court of Appeals affirmed the trial court because it held that *Yousoufian II* had abrogated this Court's earlier cases. Under those earlier cases, the Court of Appeals stated, bad faith had been "considered the 'principal factor'" in setting PRA penalties. App at 9. According to the Court of Appeals, however, *Yousoufian II* changed the law on that point, making bad faith just one factor to consider among others. *Id.* This holding warrants review under RAP 13.4(b)(1).

A. Only the Supreme Court has the authority to determine that Supreme Court precedent is no longer binding.

In *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997), this Court held that "the existence or absence of [an] agency's bad faith is

the principal factor which the trial court must consider" in determining a PRA penalty. *Id.* at 37–38 (quotation marks and citation omitted). *Yousoufian II* did not overrule *Amren*. To the contrary, it quoted *Amren*'s "principal factor" language with approval. *Yousoufian II*, 168 Wn.2d at 460. That language was repeated in *Neighborhood Alliance*, 172 Wn.2d at 717, decided after *Yousoufian II*. Yet the decision below held that *Yousoufian II* had effectively abrogated *Amren*. *See* App. at 9.

Only this Court, and not the Court of Appeals, may overrule Supreme Court precedent. "[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled *by this court*." *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (emphasis added); *see also State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). The Court of Appeals erred when it overruled *Amren*, and review is warranted under RAP 13.4(b)(1) to correct that error.

B. This Court has reaffirmed, both in Yousoufian II *and thereafter, that degree of fault remains the principal factor to consider in setting a PRA penalty.*

Yousoufian II restated and reaffirmed *Amren*'s holding that "bad faith is the principal factor which the trial court must consider" when setting a PRA penalty, 168 Wn.2d at 460, and that statement was repeated the next year in *Neighborhood Alliance*, 172 Wn.2d at 717. That statement remains good law.

Yousoufian II's reasoning is consistent with that statement. The Court's main criticism of the trial court was that it "based its assessment on the county's '"gross negligence"' but failed to impose a penalty proportionate to the county's misconduct." *Yousoufian II*, 168 Wn.2d at 463. This reasoning suggests that degree of fault[3]—including bad faith if it is present—remains the principal factor that a trial court must consider in setting a PRA penalty. The Court's emphasis on gross negligence also suggests that, just as elsewhere in the law, an agency's degree of fault is not a "mere label[]," as the concurrence below correctly noted. App. at 16. It *mattered* that the King County Executive's Office was guilty of gross negligence. Indeed, because the Court pointed above all to the agency's gross negligence to justify what "was by all accounts the largest [penalty] ever assessed under the PRA," *Yousoufian II*, 168 Wn.2d at 471 (Owens, J., dissenting), an agency's degree of fault *must* matter.

The majority below, however, asserted that it was correctly following *Yousoufian II*. The majority was wrong.

The majority observed, for example, that *Yousoufian II* increased a trial court's penalty assessment even though the agency had not been guilty of bad faith. App. at 9. This Court did reaffirm that a penalty may

[3] Hoffman uses the term "degree of fault" to refer to different mental states or degrees of carelessness (e.g., good faith, gross negligence, bad faith, etc.).

be imposed in the absence of bad faith. Yet, from the conclusion that a penalty may be imposed *without* bad faith, it does not follow that the *presence* of bad faith is not important to assessing an appropriate penalty. To the contrary: by criticizing the trial court for imposing a low penalty despite the agency's gross negligence, *Yousoufian II*'s reasoning emphasizes that an agency's degree of fault, including bad faith, retains principal importance.

The Court of Appeals also thought that by listing factors *other* than bad faith, *Yousoufian II* necessarily held that degree of fault was no longer the principal factor to consider. App. at 9. But this Court has commonly established or recognized multifactor legal standards under which one of the factors is the most important. *See, e.g.*, *Watson v. City of Seattle*, 189 Wn.2d 149, 160, 401 P.3d 1 (2017); *In re Marriage of Kovacs*, 121 Wn.2d 795, 800, 854 P.2d 629 (1993). Likewise, *Yousoufian II*'s decision not to assess statutory penalties based *solely* on degrees of fault, *see* App. at 9–10, simply means that other factors should be considered. It does not mean that an agency's degree of fault, including bad faith if it is present, is no longer the principal factor to consider in assessing penalties.

The Court of Appeals next noted that *Yousoufian II* did not scrutinize whether the trial court had correctly labeled the agency's degree of fault. *Id.* at 10. That should not be surprising, however, because that

label was not at issue. By the time of *Yousoufian II*, it was the law of the case that the agency had acted with gross negligence. *See Yousoufian v. Office of Ron Sims*, 137 Wn. App. 69, 78, 151 P.3d 243 (2007), *aff'd as modified*, 168 Wn.2d 444, 229 P.3d 735; *see also Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 439, 98 P.3d 463 (2004).

The Court of Appeals reasoned, too, that if "precise labels" for degrees of fault had been important, "the Supreme Court would have criticized the trial court for refusing to find bad faith based merely on the absence of intentional noncompliance." App. at 10 n.3. The Supreme Court had no reason to do so. Again, it was law of the case that the agency had been guilty of gross negligence, and no one argued that gross negligence was the same as bad faith.

In sum, *Yousoufian II* reaffirms that an agency's degree of fault, including bad faith if it is present, remains the principal factor to consider in assessing a PRA penalty. By concluding otherwise, the Court of Appeals created a conflict with this Court's case law that warrants review under RAP 13.4(b)(1).

III. This appeal also gives this Court its first opportunity to set a standard for bad faith under the PRA.

While this Court has consistently stated that the principal factor in PRA penalties is bad faith, it has not yet explicitly articulated the legal

standard for bad faith. *See Neighborhood Alliance*, 172 Wn.2d at 717–18; *Yousoufian II*, 168 Wn.2d at 460–61; *Amren*, 131 Wn.2d at 36–38. Granting review will give the Court an opportunity to articulate that legal standard and apply it to the undisputed facts of this case. Because bad faith is the principal factor in setting PRA penalties, the legal standard for bad faith presents an issue of substantial public interest warranting review under RAP 13.4(b)(4).[4]

IV. By holding that a trial court need not make findings of fact to support a PRA penalty, the Court of Appeals departed from this Court's precedent on an issue of substantial public interest.

The Court of Appeals held that "there is no requirement that a trial judge make findings in [the] context" of a PRA penalty assessment. App. at 7–8. This holding contradicts not only CR 52(a)(1), which requires factfinding, but also *Amren*, 131 Wn.2d at 38, "which held that a penalty decision should be supported by trial court findings." App. at 8 n.2.

The Court of Appeals justified its overruling of *Amren* by pointing to *Yousoufian II*, where, it said, the "Supreme Court imposed [a] penalty of $45 per day without issuing any findings or conclusions." *Id.* at 8. But this Court decided on a penalty itself because the trial court had already issued factual findings—findings on which this Court relied for its penalty assessment. *See Yousoufian II*, 168 Wn.2d at 463. Nor did *Yousoufian II*

[4] For a discussion of the proper legal standard, see Br. of Appellant 22–23, 24, 26–27, 31.

purport to overrule *Amren*'s requirement for factual findings. The Court of Appeals had no authority to overrule *Amren* on its own, and its decision to do so merits review under RAP 13.4(b)(1).

Review of this issue is also warranted under RAP 13.4(b)(4). The holding that factual findings are not required for PRA penalty assessments licenses trial courts to issue decisions that are effectively unreviewable on appeal because their rationale is not apparent. *See Amren*, 131 Wn.2d at 38 (noting that it could not review the propriety of a PRA penalty without findings on bad faith and economic loss). Arbitrariness at the trial-court level, and confusion at the appellate-court level, will likely follow the Court of Appeals' decision. These consequences are of substantial public interest and necessitate review.

CONCLUSION

Review of the Court of Appeals' decision is warranted under RAP 13.4(b)(1), (2) and (4). This Petition should be granted.

RESPECTFULLY SUBMITTED this 21 of August, 2018.

KELLER ROHRBACK L.L.P.

Benjamin Gould, WSBA #44093

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on August 21, 2018, I caused a true and correct copy of the foregoing PETITION FOR REVIEW to be served on the following via email, pursuant to RAP 18.5(a) and CR 5(b)(7):

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RANDALL HOFFMAN, Appellant, v. KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency, Respondents.	)	No. 35091-6-III ORDER AMENDING OPINION

IT IS ORDERED that the third, fourth and fifth sentences in the second paragraph on page 12 (lines 11 through 15) of the majority opinion filed July 24, 2018, are amended as follows: "In addition, the ultimate penalty of $15,498.00 amounted to an assessment of almost $0.34 per Kittitas County resident on a per capita basis.[4] This is commensurate with other PRA violation assessments. *See Zink v. City of Mesa*, 4 Wn. App. 2d 112, 128, 419 P.3d 847 (2018) (penalty assessment of $0.19 per resident)."

PANEL: Judges Pennell, Korsmo, Lawrence-Berrey

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RANDALL HOFFMAN, Appellant, v. KITTITAS COUNTY, a local agency and the KITTITAS COUNTY SHERIFF'S OFFICE, a local agency, Respondents.	)	No. 35091-6-III PUBLISHED OPINION

PENNELL, J. — Trial courts have broad discretion to select appropriate penalties for violations of Washington's Public Records Act (PRA), chapter 42.56 RCW. In limited cases, we will overturn a trial court's exercise of authority on appeal. But this is not one of them. After finding Kittitas County and the Kittitas County Sheriff's Office (collectively the County) violated the PRA, the trial court considered the relevant PRA penalty factors and, based on substantiated facts, selected a reasonable penalty assessment. Nothing more was required for a fair exercise of PRA penalty discretion. We therefore affirm.

BACKGROUND

Facts[1]

Randall Hoffman submitted a public records request to the Kittitas County Sheriff's Office on June 29, 2015. The request sought police reports referencing an individual named Erin Schnebly. The request was received by Carolyn Hayes, the designated public records clerk for the sheriff's office. Hayes had 10 years of experience and training responding to PRA requests directed to the sheriff.

Hayes conducted an initial search for records and identified seven incident reports. Her initial search did not locate photos or videos. A careful review would have revealed the existence of numerous photos and two videos responsive to the request.

Hayes called Hoffman about his request. Hayes's primary concern was that her review did not show Hoffman had any involvement in the seven incidents. Hayes told Hoffman that because he was not involved in the incidents, she could not provide him the majority of the documents he requested. As the parties now agree, this information was incorrect. Based on Hayes's misinformation, Hoffman limited his request to face sheets of reports, which identified the type of incident, date, and location.

Kallee Knudson, a records clerk who began training under Hayes in the sheriff's office earlier that June, overheard Hayes's phone call to Hoffman. She could hear what

[1] The facts are based on the trial court's uncontested findings.

Hayes said but not what Hoffman said. Specifically, Knudson heard Hayes tell Hoffman she "would not be able to provide the majority of documents" per specific statutes. Clerk's Papers (CP) at 15-16, 459. Knudson had never noticed Hayes saying anything similar to this before, and it did not make sense to her.

Knudson questioned Hayes about Hoffman's request. Hayes discussed a statute that she believed supported her position. She also added that Hoffman had agreed to limit his request to the face sheets.

Hayes made the following notation on Hoffman's PRA request: "2009-2015 face sheet only." CP at 13. Hayes, relying on a statute that the parties now agree did not apply to the request, made significant and improper redactions to the face sheets. The next day, Hayes provided the redacted face sheets to Hoffman.

In early September 2015, Knudson was cleaning Hayes's desk prior to Hayes's pending retirement. Knudson saw a stack of PRA requests in Hayes's desk, including Hoffman's. Because she was still troubled by how Hayes handled Hoffman's request, Knudson discussed the request with her two supervisors. Both supervisors instructed Knudson to call Hoffman, to tell him that she was reviewing past requests, and to determine whether Hoffman was satisfied with the response of the sheriff's office.

Knudson called Hoffman. After Hoffman told her he had received records responsive to his request, Knudson thanked him and ended the call. Knudson did not express her concerns to Hoffman about the handling of his request.

Several days later, Hayes spoke with the same two supervisors about Hoffman's PRA request. Like what was told to Knudson, the supervisors instructed Hayes to call Hoffman to see if he was satisfied with what he received. Hayes called Hoffman to confirm he had received what he needed. Hoffman indicated that he had, but explained he had been looking for an incident where Schnebly allegedly ran someone over. Hayes remained on the phone with Hoffman while she looked for the report, but was unable to locate it.

On February 25, 2016, Hoffman returned to the sheriff's office. He told Knudson he should have received more documents in response to his June 2015 request, that he could sue, and that he might want to make another records request. Hoffman claimed Hayes and the person whom he sought information about, Schnebly, were drinking buddies, and this relationship was the reason he did not receive all appropriate records. Hoffman left with a blank PRA request form and said he needed to talk to some folks.

Although Hayes knew who Schnebly was, the two did not socialize. The fact that Hayes knew of Schnebly was not a factor in Hayes's handling of Hoffman's PRA request.

On February 29, 2016, Hoffman submitted a new request, which is not at issue in this appeal. The same day, he also resubmitted his old request. Knudson properly processed both requests and provided all documents to Hoffman on March 1, 2016. The documents relating to the resubmitted request total 126 records, and consist of 29 pages

of reports, 2 videos, and 95 photos.

Procedure

Two days after receipt of the response to his final PRA request, Hoffman filed this PRA action against the County. He asserted that Hayes and the County acted in bad faith when Hayes withheld the records he requested.

Hoffman filed a motion for summary judgment, but it was never heard. Instead, the parties conducted limited discovery and then agreed to waive their right to a jury trial and submit the matter to a bench trial based on stipulated facts, concessions of the parties, exhibits, and testimony through depositions, affidavits or declarations.

After reviewing the written submissions of the parties and hearing argument of counsel, the trial court ruled in Hoffman's favor, finding the sheriff's office improperly redacted and withheld 126 records for 246 days. The court concluded, however, that Hayes's error was a result of negligence, not bad faith. The court found that Knudson had not acted negligently, that the sheriff's office had provided appropriate supervision, and that the response to Hoffman's PRA request was timely, though inadequate.

The trial court weighed the penalty factors set by the Supreme Court in *Yousoufian v. Office of Ron Sims, King County Exec.*, 168 Wn.2d 444, 229 P.3d 735 (2010) (*Yousoufian* II), and ordered the County to pay Hoffman his reasonable attorney fees and a penalty of $0.50 per day for each document that the sheriff's office had failed to produce or improperly redacted. Because the penalty days totaled 246, and the number of

records totaled 126, the penalty totaled $15,498. Hoffman appeals the penalty award.

ANALYSIS

This case is governed by the applicable standard of review. Unlike a substantive PRA violation decision, a PRA penalty determination is reviewed for abuse of discretion. *Compare* RCW 42.56.550(3) ("Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo.") *with* RCW 42.56.550(4) ("[I]t shall be within the discretion of the court to award" PRA penalties.); *Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 431, 98 P.3d 463 (2004) (*Yousoufian* I) ("[T]he trial court's determination of appropriate daily penalties is properly reviewed for an abuse of discretion.").

The abuse of discretion standard is extremely deferential. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279, 372 P.3d 97 (2016) ("The plain language and legislative history of the PRA support trial courts having broad discretion to set appropriate penalties."). We will reverse a trial court decision under this standard only if the decision applies the wrong legal standard, relies on unsupported facts, or adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

The applicability of the abuse of discretion standard of review does not change because a trial judge, such as the judge here, decides to issue written findings of fact in support of a PRA penalty assessment. For one thing, there is no requirement that a trial

judge make findings in this context. *See Yousoufian* II, 168 Wn.2d at 468-69 (Supreme Court imposed penalty of $45 per day without issuing any findings or conclusions).[2] It would therefore be curious for us to engage in a heightened critique of a trial court's discretionary penalty decision simply because the court chose to articulate its decision in a way that was more transparent than necessary. But in addition, the abuse of discretion standard encompasses the ability to review a trial court's factual findings or assumptions. A trial court abuses its discretion when it relies on unsupported facts in issuing its decision. *Hundtofte v. Encarnación*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). An abuse of discretion also occurs if the factual assumptions made by a trial court do not meet the requirements of the governing legal standard. *Id*. As long as some factual basis exists to support a trial court's decision, the abuse of discretion standard is met and further scrutiny is unwarranted, regardless of how the trial court chooses to articulate its decision.

Viewed in the context of the applicable standard of review, Hoffman's main argument is that the trial court used the wrong legal standard in assessing PRA penalties. According to Hoffman, the primary consideration that must guide a trial court's PRA penalty assessment is the presence or absence of bad faith. Hoffman argues the record

[2] In imposing a penalty assessment without accompanying findings of fact or conclusions of law, *Yousoufian* II deviated from a prior decision in *Armen v. City of Kalama*, 131 Wn.2d 25, 38, 929 P.2d 389 (1997), which held that a penalty decision should be supported by trial court findings.

indisputably shows the County engaged in bad faith when processing his PRA request. Thus, the trial court should have imposed a higher daily penalty amount.

Hoffman's myopic focus on bad faith is misplaced. Prior to the Supreme Court's decision in *Yousoufian* II, bad faith was considered the "principal factor" to be considered in a PRA penalty determination. 168 Wn.2d at 460. However, the *Yousoufian* II court took a more nuanced approach. *Yousoufian* II reversed a trial court's penalty assessment because it was too reliant on the absence of bad faith. Rather than focus on the presence or absence of bad faith, the Supreme Court held that trial courts should be guided by a series of aggravating and mitigating factors, only some of which address a violator's level of culpability. *See also Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 398, 314 P.3d 1093 (2013) (reversing PRA penalty decision that focused solely on bad faith).

Not only did *Yousoufian* II hold that agency culpability is merely one of a series of factors to be taken into account in assessing a PRA penalty, the court also declined to recognize bad faith as the primary type of relevant culpability. Instead, the Supreme Court listed agency "good faith" as a relevant mitigating factor and an agency's "negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA" as a relevant aggravating factor. *Yousoufian* II, 168 Wn.2d at 467-68.

Although *Yousoufian* II listed various tiers of culpability that might be attributed to an agency's PRA violation, the court declined to define the contours of each different level of culpability. As explained by the court, "culpability definitions do not lend

themselves to the complexity of PRA penalty analysis." *Id*. at 463. Rather than define each type of agency culpability that might be relevant to a trial court's penalty assessment, *Yousoufian* II took a broad approach and simply recognized that trial courts should impose "a penalty proportionate to the [agency's] misconduct." *Id.*

Given that *Yousoufian* II framed the issue of agency culpability in a broad, relative manner, we should not be overly critical of a trial court's choice of how to label agency misconduct. Indeed, *Yousoufian* II did not engage in this type of scrutiny. The trial court in *Yousoufian* II determined the defendant agency had engaged in prolonged negligence that "'amounted to a lack of good faith.'" *Id*. at 456. The trial also concluded "the [agency] did not act in 'bad faith' in the sense of intentional nondisclosure." *Id*. On appeal, both this court and the Supreme Court treated the trial court's conclusions as a determination of "gross negligence." *Id.* at 457; *see id*. at 474 (Owens, J., dissenting) (criticizing the majority for not differentiating between negligence and gross negligence). Despite the competing nature of these assessments, *Yousoufian* II did not find fault with any of the various culpability classifications that had been attributed to the agency.[3] Instead, the Supreme Court assessed the trial court's penalty decision holistically and

[3] Had precise labels been important, one would expect the Supreme Court would have criticized the trial court for refusing to find bad faith based merely on the absence of intentional noncompliance. After all, the court itself listed "bad faith" and "intentional" noncompliance as distinctive levels of relative culpability. *Yousoufian* II, 168 Wn.2d at 468. Yet the Supreme Court specifically upheld the trial court's finding of no bad faith in *Yousoufian* I. 152 Wn.2d at 435-36.

found the trial court's assessment inadequate in light of the totality of relevant circumstances.

The lack of precise culpability findings in the general PRA context contrasts with what is required in the circumstances of a PRA claim brought by an incarcerated person. Under RCW 42.56.565(1), a court is prohibited from awarding PRA penalties to an incarcerated person unless the court makes a specific finding of bad faith. Given the singular importance of bad faith in the context of incarcerated persons, our courts have appropriately analyzed the contours of what constitutes bad faith in the context of RCW 42.56.565(1). *See Faulkner v. Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014); *Francis v. Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013). However, such precision is simply not necessary in the general PRA context.

Based on the foregoing, a trial court's choice of how to label agency noncompliance should not be the basis for affirming or reversing a penalty decision. Instead, it is sufficient under *Yousoufian* II for a trial court to recognize that culpability exists in matters of degree and that more culpable conduct merits a higher PRA penalty than less culpable violations.

Having clarified the nature of the trial court's legal inquiry, we turn to its application in the present case. Because Hoffman does not challenge any of the factual findings underlying the trial court's penalty assessment, our review is limited to the legality of the trial court's approach and overall reasonableness of its selected remedy.

We find no reversible error in the trial court's culpability assessment. Regardless of the exact nature of Hayes's individual fault, the trial court appropriately observed that the problems leading up to the County's PRA violation were attributable solely to Hayes and, given Hayes's retirement from employment, a large penalty would not be necessary to deter future PRA violations. Contrary to Hoffman's assertions, the trial court's culpability assessment need not have focused solely on Hayes's level of culpability. Hoffman cites *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 269, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion) for the proposition that an agency's PRA violation should be assessed according to the agency's "weakest link." Br. of Appellant at 4. However, *PAWS* dealt only with issues of PRA liability, not a penalty. When it comes to liability, an agency's weakest link can cause a PRA violation. But because the question of penalty is guided by an overarching concern for deterrence, *Yousoufian* II, 168 Wn.2d at 462-63, it is appropriate for a trial court to consider an agency's overall level of culpability, not just the culpability of the worst actor. Looking at the County's overall level of culpability here, the trial court appropriately found that agency culpability was merely a moderately aggravating factor, thereby justifying a moderate penalty assessment.

In addition, the trial court fairly characterized the response of the sheriff's office to Hoffman's PRA request as "timely." CP at 903, 920. Unlike what may be true in some PRA violation cases, the sheriff's office maintained prompt contact with Hoffman

throughout the pendency of his PRA inquiry. It responded to each of Hoffman's PRA requests within five working days. In addition, Hayes and Kundson both acted immediately when requested by their supervisors to contact Hoffman for follow-up. While the response of the sheriff's office to Hoffman's initial PRA request was incomplete, that was not an independent aggravating factor. It is instead what caused the PRA violation in the first place. Based on the failure of the sheriff's office to provide an accurate response, the trial court awarded Hoffman daily penalties for 246 days. No further enhancement was required based on a lack of timely compliance.

In the end, the penalty chosen by the trial court was reasonable. Although the daily penalty was low, the court maximized the number of records eligible for the penalty by assessing an award for each individual page that had not been disclosed. In addition, the ultimate penalty of $15,498.00 amounted to an assessment of almost $3.00 per Kittitas County resident on a per capita basis.[4] This is commensurate with other PRA violation assessments. *See Zink v. City of Mesa*, ___ Wn.2d ___, 419 P.3d 847, 855 (2018). Given that Mr. Hoffman suffered no financial harm as a result of the County's PRA violation, and that the subject matter of Mr. Hoffman's PRA request was not of

[4] We take judicial notice of the most recent estimates from the U.S. Census Bureau calculating the population of Kittitas County, Washington as 46,205. *Quick Facts: Kittitas County, Washington*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/kittitascountywashington,US/PST045217 (last visited July 18, 2018).

public importance, the trial court's overall penalty amount was not unreasonably small.[5] The award was commensurate with the County's PRA violation and sufficient to deter future violations. Based on this overall reasonableness, we lack any basis to disturb the trial court's assessment.

CONCLUSION

The trial court appropriately exercised its discretion in assessing PRA penalties against the County. The matter is affirmed. Hoffman's request for attorney fees on appeal is denied.

Pennell, J.

I CONCUR:

Korsmo, J.

[5] Indeed, because the legislature has eliminated a statutory floor to PRA penalty assessments, the trial court could have refused to issue a penalty altogether. *Zink*, 419 P.3d at 855.

LAWRENCE-BERREY, C.J. (concurring in result) — I agree that the evidence supports the trial court's culpability findings and, because of this, its assessment of Public Records Act (PRA), chapter 42.56 RCW, penalties should be affirmed.

I write separately because the majority errs by reviewing culpability findings for an abuse of discretion. Findings are never reviewed for an abuse of discretion. Neither party argues for such a standard. Kittitas County (County) correctly argues that we should review culpability findings for substantial evidence.

A. THE ABUSE OF DISCRETION STANDARD OF REVIEW PERTAINS ONLY TO THE TRIAL COURT'S ASSESSMENT OF THE PER DIEM PENALTY RANGE; IT DOES NOT EXTEND TO THE FACTUAL FINDINGS THAT IMPACT THE RANGE

The majority correctly notes that we review a trial court's PRA penalty determinations for an abuse of discretion. *See, e.g., Yousoufian v. Office of King County Exec.*, 152 Wn.2d 421, 430-31, 98 P.3d 463 (2004) (*Yousoufian* I). *Yousoufian* I explains that the abuse of discretion standard comes from former RCW 42.17.340(4) (1992),[1] which provides in relevant part, "'it shall be within the discretion of the court to award such person [a penalty range] for each day that he was denied the right to inspect or copy said public record.'" *Id.* at 430. The majority errs by extending this deferential standard beyond the trial court's assessment of the per diem penalty range. The majority extends

[1] Recodified as RCW 42.56.550 per the Laws of 2005, chapter 274, section 103, effective July 1, 2006.

this deferential standard to any of the trial court's factual findings that impact the per diem penalty range, including the trial court's culpability findings. Nothing in RCW 42.56.550 supports this extension.

B. IN PRA LITIGATION, CULPABILITY FINDINGS ARE MORE THAN MERE LABELS

Hoffman assigns error to the trial court's findings[2] that the County acted negligently and that he failed to prove that the County acted in bad faith. Assignments of Error 1 & 2, Br. of Appellant at 5. Throughout his brief, Hoffman extensively argues that Carolyn Hayes's actions constituted bad faith, that Kallee Knudson's actions constituted bad faith or negligence, and that the County's culpability should have been assessed in accordance with the worst actor, Hayes. Br. of Appellant at 22-43. The County responds by addressing the facts that support the trial court's culpability findings. Br. of Resp't at 25-27. The majority mostly ignores the parties' arguments by minimizing the importance of the trial court's culpability findings. Specifically, the majority holds that culpability determinations are mere labels for assessing PRA penalties.

I disagree. In PRA litigation, an agency's culpability is an important factor in assessing PRA penalties.

> "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."

[2] Findings of fact erroneously denominated as conclusions of law are reviewed as findings of fact. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

Yousoufian v. Office of Ron Sims, King County Exec., 168 Wn.2d 444, 460, 229 P.3d 735 (2010) (*Yousoufian* II) (alteration in original) (internal quotation marks omitted) (quoting *Amren v. City of Kalama*, 131 Wn.2d 25, 37-38, 929 P.2d 389 (1997)).

Nor is culpability a mere label. A determination of culpability is of sufficient consequence that the absence or incorrectness of a culpability finding warrants remand. This point was made clear in *Amren*.

> The Appellant argues that certain actions by the City constitute bad faith and asks this court to determine the penalty amount . . . . [W]e decline to resolve this issue. A determination of the amount of the award necessitates a fact finding concerning the allegations made by the Appellant that the City has acted in bad faith and any potential evidence of economic loss incurred by the Appellant as a result of the delay. No findings of fact were made regarding these issues for this court to review on appeal. Since it is not the province of this court to engage in fact finding, we remand the issue of the proper penalty amount to the trial court to resolve.

Amren, 131 Wn.2d at 38.

C. IN PRA CASES DECIDED ON COMPETING WRITTEN EVIDENCE, WE REVIEW A TRIAL COURT'S FINDINGS OF FACT FOR SUBSTANTIAL EVIDENCE

The parties raise an important legal issue that is subject to reasonable debate: *In PRA cases decided on competing written evidence, what is the appropriate standard of factual review?* Hoffman argues that we must review a trial court's findings of fact de novo. The County argues that we must review the trial court's findings of fact for substantial evidence. Neither party argued for the abuse of discretion standard adopted by the majority. Nor, in my opinion, does any precedent support it.

The PRA states, "Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3).

In *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994) (*PAWS*) (plurality opinion), the Supreme Court noted that the PRA permitted a trial court to decide the case based on competing documentary evidence. Citing former RCW 42.17.340(3)—RCW 42.56.550(3) as amended—and *Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969), a plurality of the court held, "Under such circumstances, the reviewing court is not bound by the trial court's findings on disputed factual issues." *PAWS*, 125 Wn.2d at 253.

More recently, in *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014), the Supreme Court construed *Smith* but arrived at a different standard for appellate review. The court held, "'[W]here competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate.'" *Kipp*, 179 Wn.2d at 727 (quoting *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011)).

There is obvious tension between *PAWS* and *Kipp*. Both cases discuss appellate review of trial court findings based on competing documentary evidence. Both cases arrive at different standards of review. For two reasons, I believe *Kipp* is correct.

First, the statement in *PAWS* is dicta. There, the Supreme Court was not asked to review any findings of fact. Instead, the lower court granted summary judgment, and a plurality of the court reversed because it found there were genuine issues of material fact. *PAWS*, 125 Wn.2d at 253; *see also Fisher Broadcasting-Seattle TV LLC v. City of*

Seattle, 180 Wn.2d 515, 521-22, 326 P.3d 688 (2014) (reviewing PRA summary judgment de novo); *Gendler v. Batiste*, 174 Wn.2d 244, 250-51, 274 P.3d 346 (2012) (reviewing PRA summary judgment de novo).

Second, RCW 42.56.550(3)'s grant of de novo review likely applies only to a superior court's review of an agency's actions. A court's goal in interpreting a statute is to effectuate the legislature's intent. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007). We effectuate the legislative intent by ascertaining the plain meaning of the statute. *Id.* "Plain meaning [of a statute] is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole." *Id.*

RCW 42.56.550 provides in relevant part:

> **Judicial review of agency actions.** (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, *the superior court* . . . may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. . . .
>
> (2) Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request or a reasonable estimate of the charges to produce copies of public records, *the superior court* . . . may require the responsible agency to show that the estimate it provided is reasonable. . . .
>
> (3) Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest . . . . *Courts may examine any record in camera in any proceeding brought under this section. The court may conduct a hearing based solely on affidavits.*
>
> (4) . . . [I]t shall be within the discretion of *the court* to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

(Emphasis added.)

In discussing judicial review, subsections (1) and (2) explicitly describe superior court authority, not appellate court authority. Subsections (3) and (4) strongly imply superior court authority, not appellate court authority. *See also Yousoufian* I, 152 Wn.2d at 430-31 (construing former RCW 42.17.340(4), now RCW 42.56.550(4), as not describing appellate court authority).

Also, only superior courts review agency actions. Appellate courts review superior court decisions. If the legislature intended appellate courts to exercise de novo review, RCW 42.56.550(3) would read, "Judicial review of all agency actions *and trial court decisions* . . . shall be de novo." But RCW 42.56.550(3) does not say this.

For these reasons, I would construe RCW 42.56.550(3)'s grant of de novo review of agency actions as descriptive of superior court review, not appellate court review.

Here, the trial court made findings of fact after reviewing competing documentary evidence. In accordance with *Kipp*, I would review the trial court's challenged findings for substantial evidence. But the appropriate standard of review is open for judicial debate and awaits clarification from our highest court.

Lawrence-Berrey, C.J.

KELLER ROHRBACK LLP

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