NO. 97297-4

SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES WOLFE,

Petitioner,

v.

WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

WASHINGTON DEPARTMENT OF TRANSPORTATION'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

As part of his long running and multifaceted dispute with the Washington Department of Transportation (WSDOT), Petitioner Charles Wolfe (Wolfe) made a public records request in 2008 for records pertaining to a bridge upstream from his property where State Route 4 spans the Naselle River. Believing it had produced all the responsive records to Wolfe, WSDOT staff closed the request in August 2008. Three years later, that belief turned out to be mistaken. In response to a different and more specific request from Wolfe, three records pertaining to a 1998 "rip-rap" project near the bridge were uncovered and provided to him.

In 2012, Wolfe filed this suit alleging that WSDOT had violated the Public Records Act (PRA) in responding to his 2008 request. The Court of Appeals, Division II, in a unanimous Unpublished Opinion (Op.), held that the one-year statute of limitations barred all of Wolfe's claims. The Court of Appeals further found that equitable tolling did not save Wolfe's untimely claims specifically noting the superior court's finding that WSDOT made an honest attempt to try to comply with the Public Records Act.

Wolfe now asks this Court to create a special test for equitable tolling in the context of PRA claims. Instead of the usual test requiring bad acts by the defendant and diligence by the plaintiff, Wolfe suggests that a

simple "incentive" to withhold records should suffice to invoke equitable tolling. Alternatively, Wolfe asks this Court to revisit its decision in *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016), and essentially decide that case differently, adopting a "discovery rule" for commencement of the limitation period.

Review by this Court is not warranted. This case involves a straightforward application of existing Supreme Court precedent regarding the statute of limitations and the doctrine of equitable tolling. Neither the facts or the legal theories advanced by Wolfe present an issue of substantial public interest justifying review by this Court. This Court should deny the Petition for Review (Pet.).

II. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case is not appropriate for review by this Court under RAP 13.4(b). If review were granted, the issues presented would be:

1. Should the one-year statute of limitations on PRA claims be equitably tolled where an agency fails to produce records—but later uncovers and produces them in response to a different request, where there is no evidence of bad faith or false assurances and the superior court explicitly found that WSDOT had made an honest attempt to comply with the PRA?

2. Should the common law "discovery rule" regarding the accrual of a cause of action apply under the PRA, where RCW 42.56.550(6) and its interpreting case law establish that the statute of limitation begins to run upon the final agency action?

III. COUNTERSTATEMENT OF THE CASE

In May of 2012, Wolfe filed a complaint in Thurston County Superior Court alleging that WSDOT had violated the PRA by failing to disclose records responsive to a request he had made in 2008. Op. at 4. In response to this request, WSDOT had produced various records to Wolfe and made others available for inspection and copying before closing the request in August 2008. Op. at 2-3. As part of the request, Wolfe had asked for records regarding any work done on the Naselle River bridge on State Route 4, including any work since 1986 on or within 500 feet of the bridge. Op. at 3. At the time of the request, WSDOT personnel were not aware that there had been a rip-rap project near the bridge in 1998, and did not disclose three records pertaining to it. Op. at 10. These three records were later uncovered and disclosed to Wolfe in response to a subsequent request in 2011. Op. at 5. Wolfe's Complaint alleged that WSDOT violated the PRA by not disclosing these specific three records, and also alleged that WSDOT had not included several boxes of records in the items it had produced for his inspection in 2008. CP at 185-215; Op. at 4.

The superior court found WSDOT liable for the three specific "rip-rap" records, but dismissed all of Wolfe's remaining claims. Op. at 6. On the allegedly undisclosed boxes of records, the superior court ruled these claims were barred by the one-year statute of limitations in RCW 42.56.550(6). Op. at 6. But on the claim regarding the three rip-rap records, the superior court rejected WSDOT's statute of limitations defense based on the 2011 disclosure. Op. at 6; CP at 3269-70. Despite finding that WSDOT had made an honest attempt to comply with the PRA, it found WSDOT liable for failing to perform an adequate search, awarding penalties and attorney fees to Wolfe. Op. at 6; CP at 3268-73.

The Court of Appeals, Division II, found that all of Wolfe's claims were barred by the one-year statute of limitations in RCW 42.56.550(6). Op. at 2. Notwithstanding the 2011 disclosure in response to a different request, the Court of Appeals recognized that WSDOT gave its final definitive response in August 2008 and Wolfe knew at that time WSDOT was not going to provide any more records. Op. at 9.[1] Thus, the critical question was whether or not equitable tolling applied to Wolfe's claims. Op. at 9.

[1] In the view of the Court of Appeals, Wolfe did not directly challenge this, noting that, "[b]oth parties appear to agree that the statute of limitations bars Wolfe's claims unless equitable tolling applies." Op. at 9.

The Court of Appeals determined that equitable tolling did not apply under the circumstances. Op. at 12. The court applied the usual test for equitable tolling, requiring the proponent to demonstrate two elements: (1) bad faith, deception, or false assurances by the defendant; and (2) the exercise of diligence by the plaintiff. Op. at 7-8 (citing *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)). The Court of Appeals determined that Wolfe had failed to demonstrate the first element of equitable tolling, noting the superior court's finding that WSDOT had made an "honest attempt to try and comply with the Public Records Act." Op. at 10; CP at 3273. Further, the court noted that WSDOT would not have had an incentive to withhold records in 2008 related to a tort suit that Wolfe did not file until 2010. Op. at 11. The court found no evidence that the applicable WSDOT personnel knew about these records in 2008. Op. at 10. The court also rejected Wolfe's illogical argument that an incorrect statement made by counsel for WSDOT in 2012, while before the Court of Appeals in oral argument addressing another of Wolfe's lawsuits, was sufficient evidence of bad faith, deception, or false assurances by WSDOT. Op. at 11.

Based on all of the evidence, the Court of Appeals ruled that Wolfe had not carried his burden to show the kind of bad faith, deception, or false assurances necessary to invoke equitable tolling. Op. at 12. The court did

not address the second element concerning diligence by the plaintiff. Op. at 12. The court also declined to invoke the "discovery rule," noting that Wolfe had not directly raised this issue on appeal. Op. at 9.

Wolfe now seeks review in this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Wolfe fails to establish any of the appropriate grounds supporting review by this Court. Wolfe seeks discretionary review solely under RAP 13.4(b)(4) as an issue of "substantial public interest" that should be determined by this Court. Wolfe is mistaken.

This appeal involves a straightforward application of the statute of limitations using clear Supreme Court precedent regarding equitable tolling. The decision below does not conflict with the case law, and the questions of law and public policy that Wolfe identifies have already been addressed by this Court.

A. The Petition for Review Does Not Raise an Issue of Substantial Public Interest That Should Be Determined by the Supreme Court

This Court may accept review of a Court of Appeals decision if it involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). There are few cases explaining this standard, but those allowing for review typically involve novel issues and a clear public interest on issues that are widely applicable.

See, e.g., *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, (mem.)–414 (2016) (review appropriate where it "will avoid unnecessary litigation on an issue of common confusion"); *Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017) (review of horizontal stare decisis rule among the divisions of the Court of Appeals and removal of an entire class of sex offenders from registration requirements); *In re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016) (whether state statute implementing the Indian Child Welfare Act applies to non-Indian parents). Wolfe presents no such issue.

Rather, the issues Wolfe presents have already been determined by this Court. To the extent the PRA's one-year statute of limitations is not directly addressed in RCW 42.56.550(6), its operation is further explained in *Belenski*. *Belenski* also clarified that equitable tolling may be available under the PRA, if the facts are present to support it. 186 Wn.2d at 462. The necessary elements of equitable tolling are clearly described in *Millay*. The Court of Appeals applied these uncomplicated principles to this case. Wolfe attempts to complicate matters in order to suggest that this Court should revisit these prior decisions and modify their holdings. This does not satisfy RAP 13.4(b)(4).

1. Wolfe does not raise a substantial issue of public interest regarding equitable tolling because *Millay* already describes the doctrine

The Court of Appeals applied the test for equitable tolling set forth in *Millay*, requiring the proponent to demonstrate: (1) bad faith, false assurances, or deception by the defendant, and (2) diligence by the plaintiff. 135 Wn.2d at 206. The Court of Appeals determined that Wolfe failed to satisfy the first element for essentially four reasons. Op. at 9-12.

First, the record does not show that WSDOT knew about the rip-rap records in 2008 when it made the final production of records in response to Wolfe's request. Op. at 10. The final response to Wolfe's request occurred on August 12, 2008, after Michelle Ewaniec (Erickson) sent Wolfe the fourth and final installment of records. CP at 1316 (declaration); CP at1466 (letter). Following this, WSDOT closed request PDR 08-0455 on August 13, 2008. CP at 1318. Wolfe knew at that time WSDOT was not going to be providing any further records in response to this request. Op. at 9. Wolfe knew his request had been closed in August 2008 because he sent a letter on September 19, 2008, complaining that "WSDOT has NOT fully complied with my request to research the cause(s) of the erosion activity affecting our property." Op. at 3; CP at 1858. While this portion of the letter does not specifically reference the PRA, it nonetheless

demonstrates Wolfe's belief that WSDOT had not fully complied with his request.[2]

Second, the Court of Appeals rejected the argument that WSDOT had an "incentive" to withhold records because of another lawsuit Wolfe filed against WSDOT in Pacific County. Op. at 11. This separate lawsuit was filed in 2010 – nearly two years after the last disclosure of records under PDR 08-0455 in 2008. Op. at 10. Thus, WSDOT staff in 2008 would not have known of Wolfe's separate lawsuit and would therefore have no incentive to withhold records from Wolfe. *Id.*

Third, Wolfe argues that counsel for WSDOT made inaccurate statements in this separate case that no other bridge work had been done and that false assurances need not be intentional to invoke equitable tolling. Pet. at 16-17 (citing *State v. Duvall*, 86 Wn. App. 871, 940 P.2d 671 (1997)). But again, WSDOT statements in 2012 could not have – and did not – confuse Wolfe about the status of his public records request back in 2008. This case is therefore critically different from *Duvall*, where the statement at issue actually induced action that made application of the

[2] Wolfe argues that WSDOT mischaracterized the letter, trying to characterize the letter *solely* as a threat to sue for property damage and not relating to the PRA request. Pet. at 13 n.7. But the actual language of the letter does not make this clear, particularly given the wording of Wolfe's original request as one for information, records, and meetings about the cause of erosion. CP at 1858-61 (letter dated September 19, 2018); CP at 1839-41 (original correspondence from May 2008, designated as PDR 08-0455). Moreover, the letter was just one piece of evidence in the record that the Court of Appeals considered.

statute of limitations inequitable. *Duvall*, 86 Wn. App. at 875.[3] Additionally, the *Duvall* case specifically stated that mere "excusable neglect" was not sufficient to allow for equitable tolling. *Id.* Consequently, the Court of Appeals correctly rejected Wolfe's argument that WSDOT's actions in 2010 and 2012 should excuse his failure to file this lawsuit in 2009. Op. at 11.[4]

Fourth, and most importantly, the superior court found that WSDOT had made an "honest attempt to try to comply with the Public Records Act," thereby explicitly rejecting Wolfe's assertions of bad acts by WSDOT. Op. at 10; CP at 3346. Although the superior court did not need to reach the elements of equitable tolling at that time, it nonetheless disagreed with Wolfe's arguments that WSDOT had acted in bad faith.

> It's been stated to me a number of times in various pleadings by the petitioner that the State lied when they said that they didn't have - - that there was no other project. And then they find out that there was a project. Well, I don't think that they knew that there was another project. And when they learned that there was this rip rap project, they did turn that over. I

[3] Mr. Duvall's attorney incorrectly stated that his client "agreed" to a restitution order, and based on this, the sentencing court entered the order outside of his presence. *Duvall*, 86 Wn. App. at 875. It was not until after the 60-day time period for entering a restitution order had passed that Mr. Duvall objected, the prior order was set aside, and a new one entered. *Id.* at 873. Thus, the circumstances supported equitable tolling to allow the second restitution order. *Id.* at 876.

[4] Wolfe also argues that his threats of litigation in 2008 were sufficient to create an incentive to withhold records. Pet. at 13. A state agency like WSDOT receives threats of litigation almost daily. If every threat of litigation, no matter how remote, triggered equitable tolling, the statute of limitations would virtually never apply.

> don't believe that that's evidence that there was a purposeful lie, but I don't guess that's before me today, either.

CP at 3348.[5]

Based upon these factual findings and the other evidence in the record, the Court of Appeals determined that Wolfe had failed to show the kind of bad faith, deception, or false assurances necessary to invoke equitable tolling. Op. at 12. This is a straightforward application of *Millay* and the equitable tolling doctrine which does not warrant review by this Court.

2. It is Wolfe's view of equitable tolling, not the Court of Appeals decision, that is out of step with precedent

Wolfe argues that this case presents a substantial issue of public interest in clarifying how equitable tolling applies in PRA cases. Pet. at 11-18. Equitable tolling is a doctrine that "should be used sparingly and [that] does not extend broadly to allow claims to be raised except under narrow circumstances." *In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008).[6] This Court has applied the same rule from *Millay* for tolling in both

[5] In the penalty proceeding, the superior court similarly found that "the department did appear to be helpful in the sense of trying to comply. The efforts the department made to search and to provide access to records that were responsive to Mr. Wolfe's request were substantial; however, clearly these three records were missed." CP at 3364.

[6] The dissent in *Bonds* referenced the test stated by the U.S. Supreme Court, which allows for equitable tolling when the proponent can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Bonds*, 165 Wn.2d at 146 (Sanders, J., dissenting) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). Wolfe can hardly say that some extraordinary circumstance stood in his way regarding this case.

civil and criminal cases, allowing it only when the predicate elements are met and justice requires, usually because of some kind of malfeasance. *See Bonds*, 165 Wn.2d at 141-42; *Trotzer v. Vig*, 149 Wn. App. 594, 606, 203 P.3d 1056 (2009) (single false statement in a letter without evidence of bad faith or deception was not sufficient to invoke equitable tolling). Given the superior court's finding that WSDOT had made an honest attempt to comply with the PRA, *Millay* and the equitable tolling doctrine would need to be severely strained in order to accommodate Wolfe's claims.

While Wolfe makes lengthy arguments and citation to dicta from *Belenski* to argue that operation of the statute of limitations should not incentivize agencies to intentionally withhold information, none of these policy arguments provide the missing facts that would justify tolling in this case. Further, unlike *Belenski*, the superior court already made factual findings that WSDOT personnel did not know about the undisclosed documents in 2008 and did not purposefully lie to Wolfe. CP at 3348. Thus, there is no need to remand for this determination as there was in *Belenski*. Further, Wolfe's policy arguments about deterring intentional withholdings by agencies are pure conjecture here where the superior court explicitly found there was not an intentional withholding. Despite his arguments, Wolfe has shown little more than a *hypothetical* incentive to withhold documents. This situation is virtually indistinguishable from any other

inadvertent non-disclosure of records, where records were missed after a substantial, good faith search. Allowing tolling on these facts would only undermine the statute of limitations set out by the Legislature, encourage untimely filing, and "unjustifiably expand the narrow equitable tolling exception." *Bonds*, 165 Wn.2d at 143. This Court should decline Wolfe's invitation.

3. This Court should decline to address the discovery rule based on the record

The Court of Appeals declined to directly address the application of the discovery rule to Wolfe's claims, noting that Wolfe had apparently abandoned or conceded this issue on appeal. Op. at 9. However, the Court of Appeals noted that the discovery rule normally applies when the statute does not specify a time at which a cause of action accrues; that the PRA *does* specify such a time as stated by *Belenski*; and that no Washington courts appear to have applied the discovery rule in the context of the PRA. Op. at 8. This Court should decline to address the discovery rule issue that Wolfe did not adequately raise and which the Court of Appeals did not directly address.

Moreover, Wolfe's policy arguments about the inequity of what he terms as a "strict" operation of the statute of limitations are largely hyperbolic. The logic underlying the traditional discovery rule is to protect

against the kind of "grave injustice" that can sometimes result from literal application of a statute of limitations. *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 220, 543 P.2d 338 (1975). This potential for injustice is not present to the same extent in PRA cases. These actions are not like a tort suit where the statute of limitations can deprive an injured plaintiff of his or her only opportunity for recovery.[7] In PRA actions, a requester need only resubmit the request in order to either obtain access to the records or revive his or her claim and start the clock running anew. Here for instance, Wolfe resubmitted a new request and received the three rip-rap records at issue in 2011. Thus, there is not the same kind of grave inequity in applying the statute of limitations in this context as Wolfe argues.

B. This Court Should Reject Wolfe's Suggestions that Additional Unspecified Issues Militate in Favor of Review

Wolfe makes reference to various unspecified issues he believes "may need to be addressed" if this Court were to grant review. Pet. at 11. He also implies that there are still factual disputes on issues that have long since been determined. Compare Pet. at 4, 6 (suggesting that the number of records available for inspection and copying is still disputed), with CP at 3343 (Superior court stating: "I am finding that the State has

[7] For example, this Court first adopted the discovery rule for medical malpractice claims where a plaintiff alleged a surgeon had negligently left a surgical sponge in her abdomen, which remained there for 22 years. *Ruth v. Dight*, 75 Wn.2d 660, 667, 453 P.2d 631 (1969), *superseded by statute*, RCW 4.16.350.

presented sufficient evidence through the declarations of various parties that the documents were present at the time the review took place by Mr. Wolfe in a number of boxes."). This Court should decline Wolfe's invitation to grant review based on issues that have not been fairly presented. RAP 13.7(b).

Similarly, Wolfe takes the opportunity to paint WSDOT in the worst possible light to bolster his bad faith allegations and skew equity in his favor. For example, Wolfe chides both WSDOT and the Court of Appeals for what he describes as adopting "arguments that WSDOT had made for the first time in its reply brief." Pet. at 10. This refers to the argument that WSDOT would not have had an incentive to withhold information that it did not know existed in 2008. *Id.* Op. at 11. Wolfe neglects to explain that this argument is in strict reply to the "incentive" arguments in his briefing.[8] This was a fair argument and this Court should not credit Wolfe's characterizations towards his request for review.

V. CONCLUSION

The Petition for Review fails to present sufficient grounds to warrant review by this Court under RAP 13.4. The record is clear that on

[8] *See* Reply Brief of Appellant/Cross-Respondent at 12, 14 (arguing about WSDOT's alleged incentive to withhold records); Reply Brief of Respondent/Cross-Appellant at 5-6 (arguing that "this 'incentive' cannot be true because of its own incongruent timing").

August 13, 2008, Wolfe's request for public records was closed by WSDOT and Wolfe was well aware of that fact. Wolfe did not file this lawsuit claiming violation of the PRA until 2012. The Court of Appeals correctly decided that Wolfe failed to justify the untimely filing of his lawsuit because he has not shown bad acts by WSDOT to justify equitable tolling of the statute of limitations. Accordingly, the Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 26th day of July 2019.

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CERTIFICATE OF SERVICE

I, Angela M. Boggs, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day true copies of Washington Department of Transportation's Answer to Petition for Review and this Certificate of Service were served via electronic mail, per agreement, on:

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

DATED this 26th day of July 2019, at Tumwater, Washington.

ANGELA M. BOGGS
Legal Assistant

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

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