NO. 98728-9

**SUPREME COURT OF THE
STATE OF WASHINGTON**

KIMBERLYN DOTSON, Appellant

v.

PIERCE COUNTY, Respondent

PIERCE COUNTY'S ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

In this Public Records Act case, the Court of Appeals correctly held that Pierce County's closing letter, which was issued after the County produced records in installments and claimed exemptions, that informed the record requester that the County was closing the request, triggered the one-year statute of limitations under RCW 42.56.550(6), notwithstanding the County's immediate production of a later discovered record first found four months later. The Court of Appeals correctly applied *Belenski v. Jefferson County*, 186 Wn.2d 452 378 P.3d 176 (2016), which held the one-year statute of limitations "begins to run on an agency's definitive, final response to a PRA request." *Id*. at 457.

The Court of Appeals further held Dotson waived equitable tolling when she informed the trial court it need not reach that issue. The Court of Appeals also held that other documents produced to Dotson by the County after the PRA suit was commenced were not subject matter responsive, and that the issue of whether those post-litigation produced records were responsive had been previously resolved against Dotson and in favor of the County in companion litigation ruled upon by the Court of Appeals with finality where the Supreme Court subsequently denied review.

WELA's memorandum does not support discretionary review as it nowhere addresses or even cites to RAP 13.4(b) criteria. WELA does not argue that the Court of Appeals decision is in conflict with *Belenski*. Instead, WELA seeks to relitigate *Belenski* and convince this Court to adopt the "discovery rule." WELA is alone in seeking review of that issue. Dotson nowhere raises the discovery rule in her petition. Nor was it preserved below. WELA believes this Court wrongly decided *Belenski,* a claim not raised by Dotson in her petition. Further, WELA misrepresents the record by claiming – falsely – that Pierce County did not claim exemptions. Yet, the record shows, and Dotson agrees, that Pierce County did claim exemptions, which under RCW 42.56.550(6) caused accrual of the action and triggered the statute of limitations.

II. ARGUMENT

A. WELA FAILS TO ADDRESS RAP 13.4 CRITERIA GOVERNING ACCEPTANCE OF DISCRETIONARY REVIEW

The issue before this Court is whether discretionary review is warranted under RAP 13.4(b), which provides: A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (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 (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

WELA does not cite or address any RAP 13.4 criteria. That is understandable given that WELA's arguments do not meet the criteria.

B. THIS COURT SHOULD REJECT WELA'S ARGUMENT SEEKING REVIEW ON THE ISSUE OF APPLICATION OF THE DISCOVERY RULE IN PUBLIC RECORD CASES WHEN PETITIONER HAS NOT RAISED THAT ISSUE

WELA seeks discretionary review on whether the "discovery rule" should apply to PRA actions. WELA asks this Court to abandon application of equitable tolling in PRA actions, which it characterizes as "a poor substitute for the discovery rule." Mem. at 8. The request is unwarranted. Just four years ago this Court adopted equitable tolling in *Belenski* after a careful balancing of competing interests.

WELA's attempt to relitigate *Belenski* to a different outcome does not support review. WELA contends the "discovery rule" should "toll the statute of limitations" when "silent withholding" occurs, and argues its adoption "would avoid the need to rely on 'equitable tolling' and would have led to a just results in *Belenski* and the present one." WELA Mem. at 8. This Court addressed that argument in *Belenski*, and held that although Jefferson County had silently withheld records, the one-year statute of

limitations was triggered by its final response, regardless of whether the response was truthful or correct. *Belenski*, 186 Wn.2d at 461.

Arguments favoring and opposing application of the "discovery rule" were extensively briefed in *Belenski*.[1] After balancing competing interests of record requesters and agencies, this Court ruled as follows:

> Belenski and amici raise legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations. On one hand, we recognize that such an incentive could be contrary to the broad disclosure mandates of the PRA and may be fundamentally unfair in certain circumstances; on the other hand, certain facts in this specific case indicate that Belenski knew the County possessed IAL data, yet he inexplicably waited over two years before filing his claim. In light of these issues, we remand this case to the trial court to resolve any factual disputes and to determine whether the doctrine of equitable tolling applies to toll the statute of limitations in this case.

Belenski, 186 Wn. 2d at 461–62. There is no reason to relitigate *Belenski*.

[1] Belenski and amici argued in favor this Court adopting the discovery rule in *Belenski*. *See* Supplemental Brief of Petitioner pp. 11-16; Amicus Curiae Brief of Allied Daily Newspapers of Washington, The Washington Newspaper Publishers Association, The Bellingham Herald, The Olympian, The News Tribune, The Tri-City Herald, and The Washington Coalition For Open Government in Support of Appellant Belenski (pp. 19-20, filed April 11, 2016). Government interest groups filed briefs opposing the discovery rule. *See* Memorandum of Amicus Curiae Washington State Association of Municipal Attorneys in Support of Jefferson County, (pp. 9-12,); and Brief of Amicus Curiae Washington Association of Prosecuting Attorneys (pp. 7-9). *See* Courts.WA.GOV. *See* http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.searchRequest&courtId=A08.

WELA is also mistaken in asserting Dotson would benefit from the discovery rule in this case. Generally, a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Haslund v. Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976). This right to apply for relief arises when the plaintiff can establish each element of the action. *Id*. The discovery rule postpones accrual of a cause of action and is traditionally applied in negligence cases. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn. 2d 805, 813, 818 P.2d 1362, 1366 (1991). Where a statute does not specify a time at which a cause of action accrues, the general rule is that an action accrues when plaintiff discovers or reasonably should discover all the essential elements of a cause of action. *Douchette*, at 813. Knowledge of the existence of a legal cause of action itself is not required, but merely knowledge of the facts necessary to establish the elements of the claim. *Id*. at 814.

First, the legislature in RCW 42.56.550(6) clearly specified the events that trigger accrual of a PRA action. The legislature knows how to enact the discovery rule, but it chose not to do so in RCW 42.56.550(6).[2]

[2] *See* RCW 4.16.080(4) (fraud action accrues from discovery of facts constituting fraud); RCW 4.16.080(6) (action for misappropriation of public funds accrues upon discovery of acts creating liability); RCW 4.16.340 (action for childhood sexual assault accrues within three years of time victim discovered injurious act).

Second, Dotson had no need for the "discovery rule" based upon her admissions to the trial court that her case was ripe for litigation in June of 2016. The following exchange took place before the trial court:

> COURT: When could you have brought this lawsuit in the first instance? When was it ripe for you to bring?
>
> DOTSON: It could have been brought under June 23rd—a year from June 23rd, but when the County issued its next installment, it's clearly an installment that was responsive to this request. That extended—that brought the—that made a new bright line under the statutory prong of [RCW 42.56.550(6).]

VRP at 18-19. As acknowledged, Dotson knew her claims had accrued for litigation as of June 23, 2016. Her complaint filed sixteen months later on October 25, 2017, bolsters that conclusion. Her claims were premised upon facts known to her by not later than June 23, 2016. CP 1-6. Two of Dotson's claims alleged the County: 1) "failed to identify a date certain by which its response to Plaintiff's Records Request would be made" in its 5-day letter; and 2) failed to undertake an adequate search because the County's 5-day letter indicated it would limit the scope of its search to the County agency where Dotson submitted her request (Pierce County Planning and Land Services), rather than search all county agencies. CP 2-6. Dotson knew of these PRA claims well before June 29, 2016.

Dotson's complaint also alleged the County had "silently withheld" records she believed, incorrectly, were used at an administrative

hearing on October 26, 2016, which she considered responsive to her request. CP 2-6. She based that claim upon Mary Van Haren's reference at the hearing to Habitat Assessment Report" and Van Haren's determination that the stream on Dotson's property was an "F1" type based on her review of a "final approval" documents she had obtained from file 553137, an application number pertaining to a parcel adjacent to Dotson's parcel. CP 304-305. The "final approval" document Van Haren used and referenced at the hearing contained an internal reference to a Habitat Assessment Report. CP 395-398. Van Haren had not "used" the Habitat Assessment Report at the hearing, but merely acknowledged the contents of the distinct final approval document that she had reviewed. Critically, Dotson the "final approval" document used by Van Haren and referenced in her testimony was produced to Dotson by Sharon Predoehl in the last installment she delivered to Dotson on June 23, 2016. CP 395-398, 416-417. Dotson consistently claimed that the Habitat Assessment Report and other 553137 file records were responsive to her request. The County produced the remaining 553137 file records post-suit on November 2, 2017, and March 2, 2018, but maintained they were not responsive, and the Court of Appeals agreed with the County. What is clear, however, is that the County made Dotson aware of the 553137 file records and the Habitat Assessment Report in the June 23, 2016,

installment. Accordingly, Dotson had sufficient information to pursue her silent withholding[3] and other PRA claims as of June 29, 2016, when the County issued its closing letter, as she acknowledged to the trial court.

It is critically significant that Petitioner Dotson does not seek review of the discovery rule in her petition for review.[4] Pet. at 1-2. Nor does Dotson seek to overturn *Belenski* concerning equitable tolling. Instead, Dotson confines her petition to whether equitable tolling applies in this case, and whether she preserved the issue. (Pet. at 1-2). Dotson never raised the discovery rule before the trial court in her briefing or at oral argument. Accordingly, it is not preserved under RAP 2.5(a).

WELA alone seeks to have this Court grant review on the issue of the discovery rule. WELA alone seeks to have this Court reverse itself on equitable tolling as adopted in *Belenski.* This Court has observed it "will not address arguments raised only by amici." *Sundquist Homes, Inc. v. Snohomish Cty. Pub. Util. Dist. No. 1*, 140 Wn. 2d 403, 413–14, 997 P.2d 915, 920 (2000).

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[3] Dotson stated in part as follows to the trial court at the summary judgment hearing in describing her PRA claims:

Ms. Lake: Your Honor, actually these claims relate not so much to the June 23rd documents, even the October 26th documents, they pertain to the November 2nd documents and the March 2nd 2018 documents ....

[4] While Dotson's petition does cite to *Douchette v. Bethel School Dist. No. 403*, *supra*, she cites only to the discussion of equitable tolling found on page 812 of that decision, and only for purposes of discussing whether she met the elements of equitable tolling. See Petition at 12-13.

C. PIERCE COUNTY ASSERTED EXEMPTIONS THAT TRIGGERED THE ONE-YEAR STATUTE OF LIMITATIONS; WELA'S CONTRARY REPRESENTATION TO THIS COURT IS CONTRADICTED BY THE RECORD AND DOTSON

RCW 42.56.550(6) provides that "[a]ctions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis." A claim of exemption triggers the one-year statute of limitations. RCW 42.56.550(6); *Rental Housing Authority of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009); *Klinkert v. WA State Criminal Justice Training Comm'n*, 185 Wn. App. 832, 837, 342 P.3d 1198, 1200 (2015).

WELA asserts "[h]ere, Pierce County claimed no exemptions and produced some responsive records on June 23, 2016, and then closed the request on June 29, 2016." Mem. at 4. The record contradicts WELA's representations. On June 23, 2016, public records officer Sharon Predoehl produced an installment of records to Dotson that included four partially redacted records that exempted the identity of a citizen who reported Dotson's alleged land use violations. CP 617-624, 804. Predoehl provided a brief explanation to Dotson, which read "confidential complainant information" and "complainant requested non-disclosure"

with a citation to RCW 42.56.240(2) exempting the identity of a witness who files a complaint with an investigative agency.[5] CP 617-624.

Dotson has never disputed that Pierce County claimed exemptions in response to her request. Rather, she attempted to avoid the accrual effect of the claimed exemptions by informing the Court of Appeals that "Ms Dotson's lawsuit is not contesting the County's redactions from the pre-June 23, 2016 records." Appellant's Opening Brief at 21. Regardless, RCW 42.56.550(6) plainly provides that Pierce County's exemption claims triggered the statute of limitations, whether contested or not.

III. CONCLUSION

WELA's desire to relitigate *Belenski v. Jefferson County* does not justify discretionary review under RAP 13.4. Review should be denied.

DATED this 1st day of October, 2020.

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[5] Dotson has at no time challenged the exemption brief explanation provided or the adequacy of the exemptions claimed by Pierce County.

CERTIFICATE OF SERVICE

On October 1, 2020, I hereby certify that I electronically filed the foregoing PIERCE COUNTY'S ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION with the Clerk of the Court, which will transmit electronically to Appellant, and I delivered a true and accurate copy via email to the following:

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