No. 48186-3-II (consolidated with
48311-4-II, 48326-2-II, and 48372-6-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER COOK, KEVIN EVANS, JOSEPH JONES AND CHRISTOPHER ROBINSON,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. RCW 42.56.565(1) Only Allows Penalties When the Denial of Records Was the Result of Bad Faith 2

B. The Trial Court's Findings Regarding the Department's Compliance or Non-compliance with Policy Is Not Relevant Because No Party Contests the Absence of Causation 9

C. The Department Is Not Judicially Estopped from Arguing RCW 42.56.565(1) Has a Causal Element Based on Its Concession That the Requested Records Were Public Records 11

D. Respondents Cannot Raise Evidentiary Issues Because They Failed to Object in the Trial Court and the Evidence Was Considered by the Trial Court 13

III. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Adams v. Washington State Dep't of Corr.,
189 Wn. App. 925, 361 P.3d 749 (2015) 4, 6

Arp v. Riley,
192 Wn. App. 85, 366 P.3d 946 (2015) 11, 12

City of Lakewood v. Koenig,
182 Wn.2d 87, 343 P.3d 335 (2014) 7

Faulkner v. Washington Dep't of Corr.,
183 Wn. App. 93, 332 P.3d 1136 (2014) 4, 6, 7

Francis v. Washington State Dep't of Corr.,
178 Wn. App. 42, 313 P.3d 457 (2013) 4, 5

Lamon v. McDonnell Douglas Corp.,
91 Wn.2d 345, 588 P.2d 1346 (1979) 13

Martini v. Post,
178 Wash. App. 153, 313 P.3d 473 (2013) 14

Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane,
172 Wn.2d 702, 261 P.3d 119 (2011) 7

Podbielancik v. LPP Mortgage Ltd.,
191 Wash. App. 662, 362 P.3d 1287 (2015) 13

Ralph v. State Dep't of Nat. Res.,
182 Wn.2d 242, 343 P.3d 342 (2014) 4

Yakima v. Yakima Herald-Republic,
170 Wn.2d 775, 246 P.3d 768 (2011) 7

Yousoufian v. Office of Ron Sims,
152 Wn.2d 421, 98 P.3d 463 (2004) 4, 5

Statutes

House Bill Report Substitute Senate Bill 5025, (Wash. 2011) 8

Laws of 2011, ch. 300, § 1 8

Public Records Act (PRA) 2, 6

RCW 42.56.550(4) 2

RCW 42.56.565(1) ..... passim

Senate Bill 5025, 62nd Leg. Reg. Sess., § 1(5) (Wash. 2011) 8

I. INTRODUCTION

The trial court erred in awarding penalties to inmate Respondents without finding that the denial of the requested records was the result of bad faith. Instead, the trial court concluded that the Department's position that inmate phone logs were not public records was objectively reasonable but that two aspects of the Department's response constituted bad faith, despite uncontested evidence that neither aspect of the response caused the denial of the records.

Focusing on a number of issues that were not raised by the Department in its opening brief, Respondents argue that a trial court can impose penalties if it finds bad faith in any isolated aspect of the agency's response and also raise an untimely objection to evidence presented below. Respondents' interpretation of RCW 42.56.565(1) would expand the availability of penalties to inmates to circumstances in which non-incarcerated requesters would not otherwise be able to recover such penalties. Their interpretation is inconsistent with the statutory language as well as the policy and legislative history of RCW 42.56.565(1).

The trial court erred in awarding penalties because the court's own findings showed that the alleged bad faith did not result in the denial of the requested records. This Court should reverse.

II. ARGUMENT

A. RCW 42.56.565(1) Only Allows Penalties When the Denial of Records Was the Result of Bad Faith

RCW 42.56.565(1) allows for the award of penalties when the agency's bad faith resulted in the denial of records. This interpretation is based on the statutory language which requires a finding "that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record." RCW 42.56.565(1). This interpretation is also confirmed by the legislative history of the provision which was passed in order to limit penalties available to inmates under the PRA.

Respondents[1] do not seriously contest the Department's interpretation of the statutory language or that the trial court awarded penalties without evidence of causation. Indeed, Respondent Cook agrees with many aspects of Department's interpretation of RCW 42.56.565(1). Cook's Response Brief, at pp. 3-4. Cook agrees that the use of the phrase "denying the person an opportunity to inspect or copy public record" must be interpreted in light of the similar language in RCW 42.56.550(4). Cook's Response Brief, at p. 4. Cook also agrees that an inmate is entitled to penalties only for a denial of records and not for an inadequate or

[1] Because Respondents Kevin Evans, Joseph Jones, and Christopher Robinson are represented by a different attorney than Respondent Christopher Cook, there were two briefs filed by Respondents. This brief refers to all Respondents collectively unless otherwise specified.

untimely response.[2] Cook's Response Brief, at p. 6. Cook, however, argues that the causation requirement is unsupported by the statutory language and prior cases interpreting RCW 42.56.565(1). This argument miscomprehends the causation requirement and the statutory language. A finding that the denial of records was the result of bad faith is a prerequisite to an award of penalties based on the plain statutory language. The statutory language explicitly defines the type of bad faith that must be present to award penalties and that is bad faith "*in denying* the person the opportunity to inspect or copy a public record." RCW 42.56.565(1) (emphasis added). This language demonstrates that the key inquiry is whether the denial of records itself was the result of bad faith.

To get around the statutory language, Cook argues that this Court should interpret RCW 42.56.565(1) to state that the requester only needs to show that the agency acted in bad faith "in the course of" denying an inmate the ability to inspect or copy records. Cook's Response Brief, at p. 10. This proposed interpretation would require the Court to ignore the express terms of the statute. If RCW 42.56.565(1) is interpreted to only require a showing of bad faith in any isolated, portion of the agency's response, the last phrase of the statute ("in denying the person the opportunity to inspect or copy a public record") would be rendered

[2] The appellate courts have repeatedly left open whether a non-incarcerated individual would be entitled to freestanding daily penalties based on an inadequate response.

meaningless. When interpreting statutes, courts do not ignore the express terms of a statute or adopt an interpretation that would render a portion of the statute superfluous. *See Ralph v. State Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014). Furthermore, Cook's proposed interpretation would add additional words to the statutory language. *See Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 437, 98 P.3d 463 (2004) (noting that courts do not add words to unambiguous statutory language). Therefore, this Court should reject Cook's proposed interpretation of RCW 42.56.565(1).

Respondents also argue that the prior case law interpreting RCW 42.56.565(1) forecloses the Department's interpretation. They are incorrect. In each of the three Courts of Appeals' decisions which have considered RCW 42.56.565(1) the focus of the Court's inquiry was on the conduct central to the actual denial of records, and it was uncontested in the two appellate cases in which courts found bad faith that the alleged bad faith resulted in the denial of records. *See Francis v. Washington State Dep't of Corr.*, 178 Wn. App. 42, 313 P.3d 457 (2013), *as amended on denial of reconsideration* (Jan. 22, 2014); *Adams v. Washington State Dep't of Corr.*, 189 Wn. App. 925, 361 P.3d 749 (2015); *Faulkner v. Washington Dep't of Corr.*, 183 Wn. App. 93, 332 P.3d 1136 (2014).

In *Francis*, the Court found that the agency acted in bad faith when it conducted a cursory search and failed to produce responsive records as a result of that cursory search. *Francis*, 178 Wn. App. at 63-64. Although the *Francis* Court acknowledged that the trial court looked to the *Yousoufian* factors in considering bad faith, it did not specifically hold that these factors should be considered in determining bad faith. *Id.* at 63. Rather the Court focused its own bad faith analysis on the fifteen minute search and noted that the factors were "logically relevant to the reasonableness of the Department's actions and its bad faith." *Id.* It was uncontested that the failure to do a more thorough search resulted in the denial of records and the *Francis* Court did not award penalties without a finding that the denial of records was the result of bad faith. *Francis*, 178 Wn. App. at 63-64.

Furthermore, the Court's discussion in *Francis* of the totality of the agency's conduct is consistent with the Department's argument. *Francis*, 178 Wn. App. at 64. The Department's argument is not that a failure to search or other factors cannot be considered in making a bad faith determination under RCW 42.56.565(1). Rather, the Department's argument is that a court cannot impose penalties without concluding that the bad faith resulted in the denial of records. Therefore, as long as the

Court ultimately concludes that the agency's bad faith resulted in the denial of records, the Court can consider other factors.

Similarly, in *Adams*, the Court held that the agency's position that RAP sheets were exempt from the PRA was "legally indefensible" and that the denial of records in accordance with this position amounted to bad faith. *Adams*, 189 Wn. App. at 945-48. In making this determination, the Court concluded that the agency's bad faith resulted in the denial of records because it was the agency's indefensible position that resulted in the denial of records. *Id.* Although the Court discussed other aspects of the Department's conduct and noted that these findings were "relevant to its conclusion that [the agency] acted in bad faith," this discussion must be viewed in light of the fact that the alleged bad faith resulted in the denial of records. *See id.* at 939. The *Adams* Court's ultimate finding of bad faith was focused on the denial of records and the Court did not award penalties without a showing that the purported bad faith resulted in the denial of records.[3]

Finally, in *Faulkner* where the Court of Appeals found the agency did not act in bad faith, the Court focused its inquiry on the agency conduct which actually resulted in the denial of records. Specifically, the Court noted "[t]he error in production was the result of an inadvertent

[3] In contrast to *Adams*, the trial court in this case specifically concluded that the Department's position was reasonable. None of the Respondents contest this conclusion on appeal.

mistake in summarizing the request." *Faulkner*, 183 Wn. App at 107. Although the *Faulkner* Court discussed other aspects of the agency's response in the opinion, the Court focused on whether the denial of the record was the result of bad faith. *Id.* at 107 (holding that the agency did not act in bad faith when it inadvertently omitted two words when requesting the records from another agency employee). Therefore, the prior case law supports the interpretation that a court must conclude that the denial of records was the result of bad faith prior to award penalties to an inmate.

In the end, Respondents' argument would significantly expand the ability of inmate's to recover penalties to include circumstances in which non-incarcerated individuals may not be entitled to penalties. *See*, *e.g.*, *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 809, 246 P.3d 768 (2011) ("penalties are authorized only for denials of 'the right to inspect or copy'"); *City of Lakewood v. Koenig*, 182 Wn.2d 87, 343 P.3d 335 (2014) (same; declining to award penalties for an insufficient brief explanation); *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 261 P.3d 119 (2011) (declining to award daily penalties for a freestanding violation for an inadequate search). Indeed, Respondents Evans, Jones, and Robinson specifically advocate for an interpretation of RCW 42.56.565(1) that would allow inmates to recover penalties for the

failure to search without the denial of records. Response Brief of Kevin Evans, Joseph Jones, and Christopher Robinson ("Evans' Response Brief"), at pp. 18-19. This interpretation is contrary to the legislative history which shows that the provision was intended to narrow the circumstances in which an inmate could recover penalties, not expand it.[4] *See* Senate Bill 5025, 62nd Leg. Reg. Sess., § 1(5) (Wash. 2011); Laws of 2011, ch. 300, § 1 (adding RCW 42.56.565(1)); House Bill Report Substitute Senate Bill 5025, *available at http://app.leg.wa.gov/DLR/billsummary/default.aspx?Bill=5025&year=2011*.

Here, the trial court in this case imposed penalties without finding that the denial of records was the result of bad faith. The Department denied the records based on its interpretation that inmate phone logs were not public records unless pulled and used in agency business. The trial court expressly found that this position was reasonable and not in bad faith. Cook CP 148; Evans CP 244-247; Jones CP 520-523; Robinson CP 313-316. The trial court went on to award penalties for failing to search to determine if the records had ever been pulled from the phone contractor's system and failing to inform the requesters of the entirety of

[4] Respondents Evans, Jones, and Robinson contend that the award of penalties is necessary in these circumstances because requesters would not otherwise know of the existence of records. This argument is slightly disingenuous. Jones obviously knew of the Department's position regarding inmate phone logs because he had previously litigated the same issue in Franklin County.

the Department's position. Cook CP 148; Evans CP 248; Jones CP 524; Robinson CP 318. However, it was uncontested in both the trial court and on appeal that the Department's response to the Respondents' requests would have been the same regardless of whether it had conducted a search or informed the Respondents of their policy because the only place in which Respondents' records were actually located was within the GTL system. *See* Cook CP 217-234; Evans CP 319-353; Cook's Response Brief; Evans' Response Brief. In other words, the denial of records was based on the Department's good faith policy, not any failure to search. Under these circumstances, the trial court erred in imposing penalties in the absence of a finding that the denial of records was the result of bad faith.

B. The Trial Court's Findings Regarding the Department's Compliance or Non-compliance with Policy Is Not Relevant Because No Party Contests the Absence of Causation

The trial court made a number of findings regarding the Department's policy for responding to public record requests for phone logs, including that it was an objectively reasonable position. Cook CP 148; Evans CP 244-247; Jones CP 520-523; Robinson CP 313-316. Respondents argue that the trial court appropriately awarded penalties based on the failure to follow the Department's policy for searching and that the Department cannot contest the trial court's finding because it is a

verity on appeal. *See* Cook's Response Brief. This argument misses the point. Even if the trial court correctly interpreted the Department's policy, the policy does not change the fact that the trial court imposed penalties without finding the alleged bad faith resulted in the denial of records.

As Cook points out, the trial court found that the Department's policy required a search to determine if records had been used for agency business. Cook CP 148; Evans CP 248; Jones CP 524; Robinson CP 317. Although this finding was contradicted by the evidence presented by the Department in the trial court, it is irrelevant to the issues on appeal. It is uncontested that none of Respondents' records were used in agency business. Cook CP 217-234; Evans CP 319-353. In other words, even if the Department had searched for records—as the trial court believed its policy required—it would not have changed the Department's response.

Neither of Respondents' briefs actually contests that even if the Department had acted in complete conformity with the policy as interpreted by the trial court, the Department would not have produced the requested phone logs because none of them had been pulled from GTL servers for agency business and its position was that phone logs on the GTL system were not public records. *See* Cooks' Response Brief; Evans' Response Brief. Again, the trial court found this policy reasonable. Therefore, the Department's purported failure to search in accordance with

its policy is irrelevant because it does not change the fact that the trial court awarded penalties without a finding that the Department denied the records as the result of bad faith.

C. The Department Is Not Judicially Estopped from Arguing RCW 42.56.565(1) Has a Causal Element Based on Its Concession That the Requested Records Were Public Records

Respondents' argument that the Department is estopped from arguing there was no causation between the bad faith conduct and the denial of records represents a fundamental misunderstanding of the Department's concession in the trial court and its argument before this Court. The Department's concession that it should have produced the requested phone logs is not inconsistent with its argument that a finding of bad faith requires that the bad faith actually resulted in the denial of records. Because of this, judicial estoppel is not applicable in this case.

Judicial estoppel "precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arp v. Riley*, 192 Wn. App. 85, 91, 366 P.3d 946, 949 (2015). In considering whether to apply judicial estoppel courts consider: "(1) if the party asserts a position inconsistent with an earlier one, (2) if acceptance of the position would create the perception that a party misled a court in either proceeding, and (3) if the party asserting the

inconsistent position would derive an unfair advantage or impose an unfair detriment." *Id.*

In arguing the Department is estopped from arguing that the allegedly bad faith conduct did not cause the denial of records, Respondents Evans, Jones and Robinson inaccurately frame the Department's argument as "arguing that the records are not public records and penalties should not be awarded because of the lack of causation." Evans' Response Brief, at p. 12. Evans, Jones, and Robinson also argue that the Department cannot relitigate the issue of whether their phone logs are public records. Evans' Response Brief at pp.10-12. This is not the Department's argument at all. Nowhere in the Department's brief does it reargue the issue of whether inmate phone logs are public records.

Rather, as discussed above, the Department conceded in the trial court that the requested records were public records and should have been produced in response to Respondents' requests. Cook CP 11-12; Evans CP 14-15; Jones CP 17-18; Robinson CP 196-197. The Department, however, argued that Respondents were not entitled to penalties because its policy regarding inmate phone log was reasonable. Cook CP 12-20; Evans CP 15-18; Jones CP 18-21; Robinson CP 199-204. Consistent with these arguments, the trial court agreed that the Department's legal position was not reached in bad faith. Cook CP 148; Evans CP 244-247;

Jones CP 520-523; Robinson CP 313-316. On reconsideration and before this Court the Department is not arguing that the records were not public records as Respondents claim. Rather, the Department argues that the denial of records was not in bad faith because of the Court's determination that its legal position (that they were not public records unless retrieved from the GTL system) was reasonable, and the trial court could not award penalties without a finding that the denial of records was the result of bad faith. Opening Consolidated Brief of Appellant, at pp. 14-28; Cook CP 12-20; Evans CP 15-18; Jones CP 18-21; Robinson CP 199-204. This argument is not inconsistent with its concession that the requested phone logs were public records and should have been produced by retrieving them from the GTL system. As such, judicial estoppel does not apply to this case.

D. Respondents Cannot Raise Evidentiary Issues Because They Failed to Object in the Trial Court and the Evidence Was Considered by the Trial Court

Failure to raise objections or move to strike declarations in the trial court waives any error or deficiency that exists. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346, 1350 (1979); *Podbielancik v. LPP Mortgage Ltd.*, 191 Wash. App. 662, 666, 362 P.3d 1287, 1290 (2015). Such a failure precludes a party from challenging its admissibility for the first time on appeal. *Id.* Moreover, "[g]enerally,

nothing in CR 59 prohibits the submission of new or additional materials on reconsideration." *Martini v. Post*, 178 Wash. App. 153, 162, 313 P.3d 473, 478 (2013). In light of this, it is within a trial court's sound discretion to consider additional evidence submitted on reconsideration. *Id.*

Respondents cannot challenge the admissibility of declarations filed with the Department's motions for reconsideration because they failed to raise the issue below. *See* Cook CP 217-234; Evans CP 319-353. In responding to the Department's motions for reconsideration, none of the Respondents objected to the submission or the content of the declarations attached thereto. *Id.* As such, Respondents are precluded from challenging the admissibility of these declarations for the first time on appeal.

Moreover, even if Respondents could challenge the submission of declarations with a motion for reconsideration for the first time on appeal, consideration of this additional evidence is within the discretion of the trial court and Respondents have not shown the court abused its discretion. In its briefing related to the show cause proceeding below, the Department focused on the issue of whether its action were bad faith because its policy regarding phone logs was objectively reasonable. The Respondents' briefing below similarly focused on this issue. Cook CP 72-136; Evans CP 94-222; Jones CP 148-163; Robinson CP 280-296. Indeed,

Cook "did not brief the question of the adequacy of the search." Cook August 18, 2015, VRP at 14-15. The trial court's ruling, however, addressed that issue and created a situation in which it awarded penalties without a finding that the denial of records was the result of bad faith, i.e. an award of penalties without causation. At that point, the Department filed a motion for reconsideration to address this new issue and the trial court appropriately considered the evidence presented in the motion.

Cook argues that the additional evidence was not considered by the trial court. Cook's Response Brief at p. 12. To the contrary, in each of the orders denying the Department's motions for reconsideration, the trial court considered the Department's motion for reconsideration and all attached documents. Cook CP 236-237; Evans CP 293; Jones CP 460-461; Robinson CP 391. Moreover, in the two cases where the Court heard argument on the Department's motions for reconsideration, the trial court engaged in colloquy with counsel about these additional declarations and addressed the evidence submitted with the Department's motions for reconsideration. Cook October 9, 2015, VRP at 7; Jones November 6, 2015, VRP at 24.

Therefore, because Respondents failed to raise objections or move to strike the declarations submitted in support of the Department's motions for reconsideration in the trial court, Respondents have waived any

arguments regarding their admissibility. Even if they did not waive such objections, the trial court did not abuse its discretion in considering such evidence.

III. CONCLUSION

The trial court erred when it found bad faith and awarded penalties under RCW 42.56.565(1) despite the fact that the purported bad faith did not result in the denial of any records. The trial court's award of penalties under these circumstances is contrary to the statutory language and structure, the policies of the bad faith provision, and the existing case law interpreting the bad faith provision. This Court should reverse and remand for the trial court to enter a finding that the Department did not act in bad faith and for the trial court to evaluate the award of attorney's fees and costs in light of the finding of no bad faith.

RESPECTFULLY SUBMITTED this 29th day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the REPLY BRIEF OF APPELLANT with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following participants:

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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.

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