

FILED  
Court of Appeals  
Division II  
State of Washington  
7/13/2018 12:30 PM

No. 51787-6-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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JIMMY and DEBORAH HILLIARD

Appellants,

v.

LEWIS COUNTY WATER & SEWER DISTRICT #5,  
VIRGIL FOX, CAROL FOX, and KRISTINE CARTER

Respondents.

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BRIEF OF RESPONDENTS  
VIRGIL FOX, CAROL FOX, and KRISTINE CARTER

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## **I. INTRODUCTION**

In 2016, the Washington Legislature amended the Washington Open Public Meetings Act, RCW 42.30 (“OPMA”). The amended OPMA authorizes a single, personal civil penalty “in the amount of five hundred dollars for the first violation,” if a public official is found to have knowingly violated the Act. RCW 42.30.120(1). It permits a \$1,000 penalty for “any subsequent violation.” RCW 42.30.120(2).

In 2017, the Hilliards brought this lawsuit under RCW 42.30.120(1) seeking more than \$270,000 in unauthorized civil penalties against Virgil and Carol Fox and Kristine Carter, who are current and prior commissioners of Lewis County Water District No. 5 (“the Individual Defendants”). CP 4-159. The Hilliards alleged that each time two commissioners signed a Lewis County voucher form to process payment of the District’s bills and payroll, they conducted a secret meeting in violation of the OPMA. They argue that the Foxes and Carter should pay a \$500 civil penalty for every time they used a voucher form, dating back to 2013. CP 12-15, 156-57.

The record below showed that the Foxes and Carter did not violate the OPMA, let alone knowingly and intentionally, but paid for operating expenses authorized in the annual budgets, adopted in open meetings. The Lewis County voucher forms were just forms used to facilitate payment of

such approved expenses. Moreover, because the Foxes and Carter have not previously been found to have violated the OPMA, they cannot be subject to more than a single penalty in the amount of five hundred dollars “for the first violation.” RCW 42.30.120(1). For these reasons, and others, they asked for summary judgment, which the trial court properly granted.

This is *not* a case about fraud or embezzlement of public funds. The Hilliards did not plead or argue that the Respondents paid themselves for services they did not provide or for things that were not needed to run the water district. They alleged that the Foxes and Carter violated the OPMA when they submitted voucher forms for payment of the District’s day-to-day bills. CP 12-15. As such, it is not accurate when the Hilliards say that the lawsuit was brought because “the Commissioners secretly paid themselves for work they claimed had been done on behalf of the District.” Appellants’ Opening Brief (“OB”) 1. The District paid for things like the electric and phone bills and the wages of Virgil Fox, the district manager, and Kristine Carter, the district secretary—items included in the publicly-adopted annual budgets. CP 578-82, 669-687. The trial court properly found that: “the decisions were made in open public meetings and then it was just the administrative act of carrying out those actions of paying those bills” and “there’s nothing in this record that indicates that something other than that happened.” RP 45-46.

## **II. RESTATEMENT OF THE ISSUES**

A. It was undisputed on summary judgment that the District used the Lewis County Treasurer's forms to request that the county process payments for its operating expenses, all of which had been approved as part of its annual budgets in open public meetings. Did the trial court properly find that, in signing the county forms to process these payments, the commissioners were administratively implementing prior decisions taken in open public meetings and not conducting secret meetings to redundantly re-decide whether to pay the District's expenses, in violation of the OPMA?

B. The Foxes and Carter submitted declarations stating that they did not understand that signing voucher forms to process payment of openly-approved operating expenses violated the OPMA, and the Hilliards produced no evidence showing a knowing and intentional violation. Did the trial court properly grant summary judgment where the undisputed facts showed that the commissioners had an understanding that using the Lewis County voucher forms was a proper procedure to implement payment of operating expenses approved in open public meetings?

C. The Hilliards did not file a separate motion or note a request for relief under CR 56(f), nor did they identify with any particularity what discovery they needed to show a material issue of fact, but argued

generally for CR 56(f) relief. The trial court issued no ruling on their request. May they appeal the lack of any ruling, and if so, did the trial court abuse its discretion in failing to rule or in not granting their request?

D. The OPMA provides for a \$500 civil penalty against a public official for “the first violation” of the Act by that official if it is found to be knowing and intentional. RCW 42.30.120(1). Did the trial court properly hold that the statute allows only a single penalty in the amount of \$500 to be assessed against any individual defendant in this case?

E. The parties agree that the two-year catch-all statute of limitations at RCW 4.16.130 applies, but the Hilliards argued it should be tolled because they did not discover the public fact that public agencies in Lewis County must deposit income and process payment for their expenses through the Lewis County Treasurer using forms signed by two commissioners. Did the trial court correctly find that the two-year statute of limitations was not tolled and that it barred any claims arising more than two years prior to the complaint’s filing date of February 3, 2017?

F. Did the trial court properly grant the District’s motion for summary judgment, joined by the individual defendants, on December 20, 2017, where the undisputed facts showed there was no notice requirement for a meeting to respond to an emergency and no evidence of any intentional violation of the OPMA?

G. The OPMA provides no authority for an imposition of fees against individual public officials, but only against the agency. Are Respondents entitled to fees and costs to be assessed against the Individual Defendants?

### III. RESTATEMENT OF THE CASE.

**A. In 1987, Virgil and Carol Fox begin to build the small Birchfield Development and its water system, and then serve as commissioners for Lewis County Water & Sewer District No. 5, which purchases the water system in 2003 in a transaction that is later ratified by a new board of commissioners.**

In 1987, Virgil and Carol Fox purchased 1,300 acres in Lewis County with the intention of developing a self-contained master-planned community that they named Birchfield. CP 314, 643. Mr. Fox owned American Water Resources which installed a water system to serve the Birchfield community. CP 315. He thereafter created a sewer district for Birchfield that became Lewis County Water & Sewer District No. 5. *Id.* The development is extremely small: there are a total of 6 houses built out of the 90 lots on the 1,300 acre development, and only 18 water connections. CP 575, 644. Because very few people lived in the District, Virgil and Carol Fox have served as commissioners, and Virgil also serves as the District Manager. CP 573. Kristine Carter served as District Secretary from November 2010 to December 2015 and served as an elected commissioner from December 2013 until she resigned in January 2016 as a result of Appellant Jimmy Hilliard's harassment. CP 501. On

September 5, 2003, American Water Company sold the Birchfield water system to the Lewis County Water District No. 5 for \$314,000, which was less than its appraised value. CP 574, 873. This transaction was later ratified by a Board that did not include the Foxes. CP 421-430, 575, 645.

**B. The District adopts annual budgets in open public meetings and processes payment of approved operating expenses through the Lewis County Treasurer's office, using the forms required by the county.**

Each year, the District creates an annual budget, based on its rates, expected revenues, information from other districts and its expected costs. CP 576. The District's 2016 budget was approved in an open public meeting on December 9, 2015, using a Lewis County Budget Appropriations Worksheet, and forwarded to the County Auditor. CP 578, 587. The minutes show that Appellants were in attendance. CP 587. The District's 2015 budget was similarly approved on October 8, 2014, in an open meeting that the Appellants attended. CP 579, 600-601.

In an open meeting on June 11, 2014, the commissioners delegated limited authority to the Secretary, Kristine Carter, to pay all routine bills.

CP 582. The minutes state:

Commissioner VRF suggested that in the future all bills should be presented for approval at a commissioners meeting. It was recognized that since our meetings are bimonthly some bills would be paid late if they were held for official Commissioner approval at a meeting therefore it

was decided that the secretary would be authorized to pay all normal bills such as power, phone, etc., and simply report that action at the regular meeting. In the case of unusual bills, such bills would be held for official Commissioner approval at the next meeting.

CP 633-34. On August 6, 2014, the commissioners authorized the District Manager, at the time Virgil Fox, to have spending approval authority in his capacity as District Manager to spend \$300 per month for repair parts and incidental necessities. CP 638. It was also resolved that Fox would provide his management work and perform minor repairs for no compensation. *Id.*

The District maintains no bank account of its own. CP 576. The funds that it receives are deposited with the Lewis County Treasurer. *Id.* To pay bills for routine operating expenses as they become due, the District submits a voucher form to the County Treasurer. *Id.* This procedure is used throughout Lewis County and the information is publicly available and has been posted on the Lewis County treasurer web site since around 2012. The web site says:

The County Treasurer holds a key position of public trust in the financial affairs of local government. Acting as the “bank” for the county, school districts, fire districts, water districts and other units of local government, the treasurer’s office receipts, disburses, invests and accounts for the funds of each of these entities . . . As the depository for all funds and fees collected by other county offices as well as those collected by the various districts, are forwarded to the treasurer for custody.

CP 2805-807.

At the bottom of the voucher form used by the Lewis County Treasurer, there are two signature lines for two commissioners. CP 1042-1045. The certification there says: "...the materials have been furnished, the services rendered, or the labor performed as described herein and that the claim is a just, due, and unpaid obligation against the County of Lewis and that I am authorized to authenticate and to certify to said claim." *Id.*

Payroll rates were set by resolution in 2010 and also included as a line item in the annual budgets. CP 409, 2249. Similar to operating expense voucher forms, a payroll timesheet form was also submitted to the Lewis County Treasurer and signed by commissioners with a certification that "the above payroll is a true and correct record of employee salary and compensable hours worked." CP 1431.

During her tenure as the District's secretary, Kristine Carter was responsible for preparing vouchers for payment of routine operating expenses. CP 502-513. The practical effect of the Board's delegation of authority to Carter was that she could submit a voucher to the Lewis County Treasurer for payment of bills when due, rather than presenting a packet of invoices at a meeting, which might cause a bill to be paid late. CP 502, 633-34. Each of the voucher forms that she submitted during 2015 – 2016 was for an expense authorized by the budget that was

adopted in an open public meeting, and later approved in financial reports. CP 579, 669-687. For example, in 2015, there were 24 separate payments to Toledo Telenet for phone and internet services, totaling \$854.13. CP 670-77. Similarly, the District made regular payments for electricity, well within the budgeted amount. CP 669-687. It also made regular payments for Kristine Carter's modest earnings as secretary, which did not exceed the amount approved in the annual budget. *Id.* There were payments for chlorine necessary for the public health, well within the budgeted amount for supplies. *Id.* There were also less regular payments for services, such as legal services, but again, these were within the budget and did not require deliberation or a vote by the board. *Id.* The District began to generally report payment of such bills in its public meetings in 2015, in response to the Hilliards' concerns. CP 706.

**C. In 2011, Jimmy Hilliard resigns as a commissioner and complains about the operation of the District, and Virgil Fox asks the state auditor to help him "identify any deficiencies and take corrective action" to properly manage the District, resulting in a series of audits and a finding of no OPMA violations in 2013 or thereafter.**

The Hilliards moved into the Birchfield development in 2010. CP 575. Mr. Hilliard served as a District commissioner from April to December 2011. *Id.* During that time, he began to investigate the District and opined that there were conflicts of interest inherent in the fact that

Virgil Fox had owned American Water Resources which sold its system to Birchfield while he was a Commissioner. *Id.* After resigning, Hilliard complained to a number of people about the Foxes, including the County Sheriff, State Auditor, and State Attorney General. CP 575-577. No prosecution or penalty resulted from Hilliard's complaints. *Id.* The County Prosecutor found no basis for any prosecution. *Id.*

In 2011, Virgil Fox asked the state auditor to audit the District to help him "identify any deficiencies and take corrective action." CP 320, 346. The auditor published its findings on September 5, 2012 which included a finding that the District had failed to advertise public meetings until 2006 and had never kept minutes. CP 347-365. These issues had been resolved as of the state's 2013 audit, reported on February 27, 2014 and they are not related to the current suit. CP 381. In 2015, the Individual Defendants underwent OPMA training. CP 582, 698. On May 9, 2016, the state auditor issued a final report covering the period of January 1, 2014 to December 31, 2015. It audited OPMA compliance and reported no OPMA issues. CP 397-404.

The Hilliards have served 81 Public Record Act requests related to the District. CP 576. In 2013 and 2017, Jimmy Hilliard ran unsuccessfully to be elected as a commissioner for the District. *Id.* The Foxes and Kristine Carter have been forced to call the Lewis County

Sheriff to respond to incidents involving Mr. Hilliard. CP 579-581.

**D. In 2017, the Hilliards file a 155-page complaint alleging that every time Virgil and Carol Fox and Kristine Carter signed a Lewis County form to process payments for expenses approved in the District budget, this constituted a secret meeting, subjecting the individuals to personal liability for civil penalties of over \$270,000.**

In their complaint, the Hilliards alleged that every voucher and payroll form submitted to the Lewis County Treasurer constituted an official “action” under the OPMA and required a public meeting because the forms required the signature of two commissioners. CP 4-158. As such, they prayed for the following relief:

- A. Find that the Defendants violated the OPMA on the 269 occasions alleged in the complaint;
- B. Find that the Foxes and Kristine Carter violated the OPMA on numerous separate occasions, that the defendants acted with knowledge of the fact that meetings were in violation of the OPMA and that they had the knowledge required for personal liability;
- C. Find that the Foxes and Kristine Carter violated the OPMA by conducting meetings via email, that the defendants acted with knowledge of the fact that meetings were in violation of the OPMA and that they had the knowledge required for personal liability;
- D. Declare that all actions taken by the District in violation of the OPMA are null and void;
- E. Order Virgil Fox to pay a penalty in the amount of \$500 for each of the alleged 269 violations of the OPMA under RCW 42.30.120(1)-(3) totaling more than \$130,000;

- F. Order Carol Fox to pay a penalty in the amount of \$500 for each of her more than 211 violations under RCW 42.30.120(1)-(3) totaling more than \$105,000;
- G. Order Kristine Carter to pay a penalty in the amount of \$500 for each of her more than 70 violations of the OPMA under RCW 42.30.120(1)-(3) totaling more than \$35,000;
- H. Award Plaintiffs the penalties paid by Virgil Fox, Carol Fox and Kristine Carter;
- I. Order that Virgil Fox, Carol Fox and Kristine Carter be personally liable for the penalties awarded in this action and that the District, and taxpayers and ratepayers of the District, not indemnify them or reimburse them for those penalties;
- J. Award Plaintiffs all costs, including reasonable attorney's fees, incurred in connection with the action, as provided in RCW 42.30.120(4);
- K. Order Virgil Fox, Carol Fox and Kristine Carter to reimburse the District, and the taxpayers and ratepayers of the District, for any fees or costs paid by the District or taxpayers or rate payers of the District in connection with this action, whether incurred as a payment to Plaintiffs pursuant to RCW 42.30.120(4) or in defense of Virgil Fox, Carol Fox, and Kristine Carter; Respondents Virgil and Caroline Fox and Kristine Carter were named as individual defendants in the underlying lawsuit.

CP 156-158.

- E. **On September 15, 2017, the trial court grants summary judgment to the Foxes and Carter finding no intentional and knowing violation of the OPMA, that the two year statute of limitations bars any stale claims alleged, and that the OPMA permits no more than a \$500 penalty against any individual for “the first violation,” and disposes of the sole remaining claim on December 20, 2017.**

The Foxes and Carter filed a motion for partial summary judgment on June 2, 2017, arguing that: (1) the OPMA does not authorize more than a \$500 penalty against any Individual Defendant; (2) the Act does not permit attorneys' fees to be awarded against the Individual Defendants; and, (3) any of Appellants' claims based on actions more than two years' prior to the filing of the complaint are barred by the statute of limitations. CP 2753-2756. The District joined the motion for partial summary judgment on June 6, 2017. CP 2779. The motion was re-noted for September 15, 2017. CP 2808. The District then submitted a separate motion for summary judgment on August 11, 2017. CP 291. On August 16, 2017, the Foxes and Carter joined in the District's motion and filed a second motion for summary judgment. CP 546. This motion argued that submitting voucher forms for payment of approved expenses was not subject to the OPMA because it did not involve both deliberation and action. It further argued that there was no evidence that the Foxes or Carter had knowingly and intentionally violated the OPMA. CP 554-567.

After oral argument on September 15, 2017, and a presentation hearing on September 29, 2017, the Court entered an order granting in part and denying in part the three motions for summary judgment, and dismissing all claims "except for the single claim that the District failed to post notice of the August 19, 2016 special meeting in the manner

required by RCW 42.30.080 . . .”. CP 2362-2367. The trial court made the following rulings:

1. In approving payment vouchers and payroll time sheets identified in the complaint, the District was implementing prior decisions taken in open public meetings and did not violate the Open Public Meetings Act (OPMA), Ch. 42.30 RCW.
2. The two-year statute of limitations at RCW 4.16.130 bars all claims of the plaintiffs arising on or before February 2, 2015. Neither the discovery rule nor the doctrine of equitable tolling apply in this case.
3. Commissioner Denos Eros was appointed and took the oath of office in open public meetings of the District. The District did not violate OPMA by subsequently completing and filing a certificate of appointment or oath of office with Lewis County.
4. There is no summary judgment evidence that the District used email in any manner that violated the OPMA.
5. There is a disputed question of material fact as to whether the District posted notice of the August 19, 2016 special meeting in the manner required by RCW 42.30.080.
6. The plain language of RCW 42.30.120 allows only a single penalty in the amount of \$500 to be assessed against any

individual defendant in this case.

7. There is no summary judgment evidence that any individual defendant acted with knowledge that any conduct at issue in this lawsuit was in violation of the OPMA.

*Id.* After counsel for the Individual Defendants requested clarification about the scope of the ruling during the presentation hearing, the trial court ruled that all of the Individual Defendants were dismissed with prejudice. CP 2467. On reconsideration, the court withdrew this part of its ruling on October 18, 2017. CP 2471.

On November 3, 2017, the District filed a motion for summary judgment regarding the sole remaining claim that the District failed to post the notice of the August 19, 2016 special meeting in the manner required by statute. CP 2472-2486. On December 20, 2017, after argument, the trial court granted summary judgment terminating the case. CP 2613-2614.

### **III. STANDARD OF REVIEW**

An appellate court reviews a trial court's grant of summary judgment de novo. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). The appellate court engages in the same inquiry as the trial court and only considers the evidence and issues raised below. Wash. Federation of State Employees v. Office of Financial Mgt., 121 Wn.2d 152, 157, 849

P.2d 1201 (1993). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Hash v. Children’s Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

#### IV. ARGUMENT

**A. The trial court properly found that, in approving payment vouchers and payroll time sheets identified in the complaint, the District was implementing prior decisions taken in open public meetings and did not violate the Open Public Meetings Act.**

The OPMA mandates that: “All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.” RCW 42.30.030. The statute provides the following relevant definitions:

(3) “Action” means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. “Final action” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) “Meeting” means meetings at which action is taken.

RCW 42.30.020. The issue here is whether completing a voucher form to

process payment for an expense previously approved in an open meeting falls within the definition of “action,” although there is no further deliberation or decision making required to do so.

**1. Administrative action without deliberation does not constitute a public meeting.**

The Hilliards erroneously assert that each time two commissioners signed voucher forms for the budgeted expenses of the District, they engaged in a secret meeting in violation of the OPMA. OB 25. According to Appellants: “three elements must be present for a violation to be found—action, meeting, and governing body.” *Id.* This formulation is wrong because it excludes the single most essential characteristic of a meeting subject to the OPMA: deliberation or decision-making.

In 1971, shortly after the OPMA was enacted, Washington’s attorney general issued an opinion emphasizing that both “deliberation and action” are “dual components” of an action subject to the OPMA. 1971 Op. Att’y Gen. No. 33 p.1. The attorney general cited a Florida Court of Appeals decision holding that, in light of precedent and the purpose of Florida’s Sunshine Act, “the legislature could only have meant to include therein the acts of deliberation, discussion and deciding occurring prior and leading up to the affirmative ‘formal action’ which renders official the final decisions of the governing bodies.” *Id.* at p.2, quoting Times

Publishing Company v. Williams, 222 So. 2d 470, 474 (1969) (emphasis in original). In 1975, the Supreme Court of Washington held that “the purpose of the Act is to allow the public to view the decision making process at all stages.” Cathcart v. Andersen, 85 Wn.2d 102, 107, 530 P.2d 313 (1975). In 1999, it again emphasized the deliberative aspect of proceedings subject to the OPMA in Miller v. City of Tacoma, holding that the Act seeks “to ensure public bodies make decisions openly.” 138 Wn.2d 318, 324, 979 P.2d 429 (1999). In its most recent analysis of the OPMA, the Supreme Court of Washington cited Cathcart and Miller, and observed that: “In order to ensure this oversight of government entities, the OPMA requires that ‘[a]ll meetings . . . be open and public.’” Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 434, 395 P.3d 1031, 1038 (2017). This precedent teaches that the OPMA is concerned with secret decision-making—not with mundane administrative acts such as processing payment of the monthly electric bill that do not involve any deliberation or decision.

The Hilliards simplistically argue that literally any activity is subject to the OPMA, so long as it involves enough governing members of a political body to form a quorum. Washington precedent precludes this argument. The Washington Supreme Court, en banc, decided in Citizens Alliance for Prop. Rights Legal Fund, Nonprofit Corp. v. San Juan Cnty.,

Mun. Corp., that communications among a quorum of councilmembers did not constitute a meeting of the council because they contained “no indication that the participants had the requisite collective intent to meet.” 184 Wn.2d 428, 447, 359 P.3d 753 (2015) citing Battle Ground School Dist. v. Wood, 107 Wn. App. 550, 565, 27 P.3d 1208 (2001) (“the participants must collectively intend to meet to transact the governing body’s official business” for the OPMA to apply) (citing 1971 Op. Att’y Gen. No. 33.) It follows that an action such as processing payment of operating expenses does not become a “meeting” subject to the Act merely because a quorum of commissioners is involved with it. If the commissioners did not intend to “meet” and the action did not require any decision making or deliberation, then it is not the sort of action that the Legislature intended to make subject to the OPMA. An action is “administrative” if it merely executes or pursues a plan already adopted by the legislative body. Washington Public Trust Advocates v. City of Spokane, 120 Wn. App. 892, 900, 849 P.2d 1201 (2004). An administrative action that merely executes a plan already adopted through an open deliberative process cannot be subject to the OPMA because it lacks the “dual components” of both an action and deliberation and decision-making by a quorum.

The OPMA is not concerned with the actions of a public entity in isolation from deliberation and decision making. Thus, for example, in Snohomish Improvement Alliance v. Snohomish County, there was no OPMA violation found where the Snohomish County Council, after a public hearing and vote to overturn a hearing examiner's decision, prepared written findings that were "much more expansive and detailed than the councilmembers' discussions." 61 Wn. App. 64, 71, 808 P.2d 781 (1991). The Court said that it was "to be expected" that the findings would be more detailed than the wording of the motion the council had adopted, and that:

The important aspect is that the [final written] decision be consistent with the issues discussed in open hearing and the oral decision made at that time. That occurred here.

*Id.* at 172.

Here, as in Snohomish, "the important aspect" is that the payments were "consistent with" the budgets that had been discussed, deliberated upon, and approved in open hearing, and the decision "made at that time." Snohomish Improvement Alliance, 61 Wn. App. at 172.

For example, once the 2015 annual budget was passed approving payment of the monthly bill for internet and phone services, no deliberation was required to administer the monthly payment of \$106.50. CP 670-77. The signature of two commissioners on the Lewis County

voucher form was an administrative action executing a prior decision that required no further deliberative process.

The OPMA does not require redundant open public meetings to implement a decision, and the trial court correctly held that: “In approving payment vouchers and payroll time sheets identified in the complaint, the District was implementing prior decisions taken in open public meetings and did not violate the Open Public Meetings Act (OPMA), Ch. 42.30 RCW.” CP 2362.

**2. Use of the Lewis County Treasurer’s voucher forms does not constitute a meeting of a quorum to deliberate or decide.**

The Hilliard’s theory literally elevates form over substance: they assert that signing the Lewis County voucher and payroll forms constitutes a meeting subject to the OPMA because the forms require the signature of two commissioners. CP 1042-1045. This is wrong for numerous reasons. First, neither the forms nor the statute require a quorum to approve the use of the form to process payment for expenses previously approved in an open meeting. Second, under Washington precedent on point, there was no “meeting” created by the forms because there was no deliberation or decision necessary to use the forms to process such payments.

**a. The forms do not require a redundant meeting.**

The Lewis County Treasurer uses voucher and payroll forms to process payments for local entities as authorized by RCW 36.22.090.

The statute states:

All warrants for the payment of claims against diking, ditch, drainage and irrigation districts and school districts of the second class, who do not issue their own warrants, as well as political subdivisions within the county for which no other provision is made by law, shall be drawn and issued by the county auditor of the county wherein such subdivision is located, upon proper approval by the governing body thereof.

RCW 36.22.090.

Because the statute does not specify how the governing body must make “proper approval” of a warrant for claims, the governing body must determine the method. For example, in a public meeting, a governing body might vote to enter into a service agreement requiring monthly payments to a vendor. A voucher form in that case implements the “final action” that occurred at the meeting but requires no deliberation.

County voucher forms are used with flexibility to serve their practical purpose. For example, they may be batched together, but this does not constitute a batch of secret meetings. 1965 Op. Att’y Gen No. 8 (“The transmittal or blanket method of voucher approval by which the approval of county vouchers by the board of county commissioners is

indicated on a transmittal form attached to a group of vouchers rather than on the face of each is permitted under the laws of this state.”)

Notably, a water district may be composed of up to five commissioners. RCW 57.12.015. Thus, if the District had increased the number of commissioners from three to five, as it has the ability to do, there would be no argument that a “quorum” signed a voucher form. As such, the Hilliards are inaccurate when they say that the voucher requires a “quorum.” It requires two signatures, and that is all.

The Hilliards are also incorrect when they say that a voucher required two commissioners to “approve” the payment. The signature line on the voucher forms is only a verification that: “...the materials have been furnished, the services rendered, or the labor performed as described” and that the signer is authorized to certify the claim. CP 1042-1045. It is well within the realm of the administrative to verify that a payment for a budgeted item is properly presented.

In this case, consistent with RCW 36.22.090, the governing body approved annual budgets and other specific expenditures in open public meetings. Neither the statute nor the County forms required an additional meeting to use the forms to process payment of these previously-approved operating expenses.

**b. The signing of a voucher form by two commissioners does not create a meeting under Washington precedent.**

The OPMA does not provide a detailed definition of the term “meeting.” Citizens Alliance, 184 Wn.2d at 437 (“it actually does no more than specify when meetings are subject to the OPMA without clarifying what a ‘meeting’ itself is.”) As a result, Washington courts broadly interpret what constitutes a “meeting” under the OPMA, in order to effectuate the purpose of the statute. Wood, 107 Wn. App. at 562-64. However, in every decision that has interpreted the Act, the touchstone of the analysis has been whether the meeting involved deliberation or decision making—not on mechanically taking a head-count to see if a quorum might be involved. In Wood, this Court looked to various state statutes when analyzing whether rolling emails could constitute a “meeting.” 107 Wn. App. at 564 n.5. It observed that the California’s open meeting statute defined “meeting” to include the use of technological devices “to develop a collective concurrence as to action to be taken. . .”. *Id.*, quoting Cal. Gov’t Code § 54952.2(a). Likewise, it noted that Iowa defines “meeting” as “a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body’s policy-making duties.” *Id.*

quoting Iowa Code Ann. § 21.2(2) (1993). Similarly, Tennessee defines “meeting” as: “the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision.” *Id.* quoting Tenn. Code Ann. § 8-44-102(b)(2) (1998). Florida courts have held that “application of the Sunshine Act depended on the decision-making nature of the act performed, not the make-up of the board or its proximity to the final decisional act.” Dascott v. Palm Beach County, 877 So. 2d 8 (Fla. Dist. Ct. App. 2004).

This Court should not extend the OPMA to the use of county voucher forms in this case because there is no evidence that their use constituted collective deliberation. Analysis of “the decision-making nature” of the act performed does not begin and end with the fact that the voucher form requires two commissioners to sign it. There is no fact in the record suggesting that the voucher forms were used by one commissioner to propose payment of an item not within the publicly-approved budget by signing a voucher form and then delivering it to a second commissioner to develop a consensus. The commissioners were not secretly deciding to pay the phone bill each month when they signed voucher forms. They were administering the budget, which had been publicly approved. Such action did not implicate the OPMA. “[T]he important aspect” was that the payments were consistent with the budgets

approved in earlier public meetings and the decisions “made at that time.”

Snohomish Improvement Alliance, 61 Wn. App. at 172.

**B. Because the undisputed facts showed that the commissioners understood that submitting county voucher forms was a proper administrative method to implement payment of budget items approved in open public meetings, the Hilliards could not show an intentional violation of the OPMA, and summary judgment was appropriate.**

Under the OPMA, a civil penalty cannot be imposed against an individual public official unless there is a finding that there was an intentional violation of the Act. RCW 42.30.120(1). The trial court found that there was no summary judgment evidence “that any individual defendant acted with knowledge that any conduct at issue in this lawsuit was in violation of the OPMA.” CP 2362-2367. There is no support for the Hilliards’ arguments that the record proved that each of the Individual Defendants intended to violate the OPMA, or for their alternative argument that the trial court abused its discretion in not permitting them additional discovery to establish intent. OB 28-29.

**1. The evidence showed only that the Foxes and Carter did not knowingly or intentionally violate the OPMA.**

Civil penalties are inappropriate when officials believe they were acting within the law. Miller v. City of Tacoma, 138 Wn.2d 318, 331, 979 P.2d 429 (1999). “Under the OPMA, individual members of a governing body are subject to civil penalties only if they attend a meeting knowing

that it was in violation of the OPMA.” Wood, 107 Wn. App. at 566.

When accusing a public official of intentional wrong doing, a plaintiff bears the burden of producing facts proving the official had knowledge of and intent to commit an unlawful act. In re Recall of Telford, 166 Wash.2d 148, 158, 206 P.3d 1248 (2009). Thus, when a petitioner sought to recall public officials for violating the OPMA, the Supreme Court of Washington required that the petition contain a factual basis for both the proposition that the official intended to commit the act and that the official intended to act unlawfully. Matter of Recall of Boldt, 187 Wn.2d 542, 551, 386 P.3d 1104 (2017). The council members facing recall submitted declarations stating that they had relied on the county attorney’s advice and had not intended to violate the OPMA. *Id.* The court rejected the OPMA claim, holding that: “[i]f a board member believed that he or she was acting appropriately under the law, he or she is not subject to civil penalty under the OPMA.” Similarly, in Cathcart, the court of appeals held that civil penalties were not appropriate where uncontroverted affidavits established that the attorney general had advised law school faculty that their meetings did not violate the OPMA. 10 Wn. App. at 436-437.

The Foxes and Carter moved for summary judgment because the Hilliards lacked any evidence to prove that they intentionally violated the

OPMA. CP 561-563. The record showed that Virgil Fox had reached out to the state auditor to help him “identify any deficiencies and take corrective action.” CP 320, 346. In 2012, the state auditor identified OPMA violations, which were resolved by the date of its next audit report. CP 356. In 2015, the commissioners underwent OPMA training. CP 453, 155 and 340. In May 2016, the state auditor issued a final report covering a period of January 1, 2014 to December 31, 2015 that found no OPMA issues. CP 367-384.

On summary judgment, the Foxes and Carter submitted declarations stating that they had no understanding that submitting vouchers for District expenses that had been previously approved in open meetings violated the OPMA. CP 502-503; 587-590; 700. Kristine Carter stated that it was her understanding that any forms she signed off on were authorized by the budget, and that she was properly following the process that had been approved at the June 11, 2014, public meeting. CP 502-503. Carol Fox stated that she understood signing the county forms was an administrative act as opposed to a decision being made as a commissioner. CP 700. She stated that nothing in the OPMA training she received made her think otherwise. *Id.* Moreover, during 2015 and 2016, the bills that were paid by voucher were reported in open meetings. CP 502.

Thus, the trial court was presented with a scenario such as in Boldt and Cathcart where, not only did the plaintiff fail to present evidence of intent, but the defending officials presented declarations and other evidence establishing a lack of knowledge or intent. RP 42-44. Moreover, the State Auditor had worked closely with the District and, as of December 31, 2015, reported no OPMA violations. CP 367-384. On this record, it was appropriate to find that there was no evidence of knowing violations of the OPMA.

The Hilliards argue, against authority, that they were not required to prove intent, but that “[a]ll that is required is that the Commissioners were aware of the facts that made their actions illegal, not that they intended to break the law.” OB 29. The Supreme Court of Washington said the very opposite thing in Boldt: “[w]here commission of an unlawful act is alleged, the petitioner must show facts indicating the official had knowledge of and intent to commit an unlawful act.” Boldt, 187 Wn.2d at 551, (citation omitted) (emphasis in original.) In Boldt, the appellants argued that the very fact that a contract had been signed was evidence that an illegal vote had occurred in executive session prior to signing it. *Id.* The Supreme Court of Washington held that such evidence fell short of proving intent. The Hilliards similarly argue in this case that the fact that two commissioners signed a voucher form proves they intended to conduct

an illegal meeting. As in Boldt, this argument is not evidence of intent. Appellants carried the burden to produce evidence of both knowledge of the facts and an intent to violate the OPMA. The trial court properly found that they failed to carry this burden.

**2. The court properly declined to enter a ruling regarding Rule 56(f) relief because it was never properly requested.**

As a back-up argument, the Hilliards told the trial court that they should be granted CR 56(f) relief. CP 722-23. The request was not noted or properly made, nor did the Hilliards offer persuasive oral argument in support of this idea. RP 24-25. To the contrary, they argued that the record established an issue of fact. RP 24. In its discretion, the court did not enter a ruling addressing the request for CR 56(f) relief. CP 2362-2367. Appellants now admit that: “Such an order was irrelevant to the case since no violation was found.” OB 33 n.2. Nevertheless, they argue that the court abused its discretion. OB 30-33.

This Court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). Because the Hilliards did not properly seek Rule 56(f) relief, the Court may decline to consider that issue on appeal. If this Court considers this issue on appeal, it should find that the trial court did not abuse its discretion. A trial court does not abuse its discretion by

denying a CR 56(f) motion to permit further discovery if based on any one of the following three reasons: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wn. App. 350, 356, 831 P.2d 1147 (1992) (quoting Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)). Appellants failed on all counts, and the trial court properly declined to grant their request.

In asking for CR 56(f) relief, the Hilliards could not argue they had been denied sufficient discovery. They had received substantial discovery. CP 2358. On June 23, 2017, after considerable time and effort, the District produced thousands of pages of documents on a compact disc. CP 766-775. The Hilliards argued that they “didn’t get everything that we wanted.” CP 722, RP 23-25. But during the four months from June to September while the motions for summary judgment were pending, Appellants’ counsel did not request a discovery conference to address any of the discovery items it later claimed it needed to oppose summary judgment. CP 2358. Thus, Appellants could not show good cause.

In addition, a party seeking CR 56(f) relief must identify what discovery they seek and show that it will create a material issue of fact.

Appellants failed to do this. First, they claimed that they wanted the state's on-line OPMA training material to be produced by Respondents. CP 722. This was available to them on the internet on the web site for the Washington State Office of the Attorney General. CP 2358; see <http://www.atg.wa.gov/open-government-training>. Second, they claimed that responses to their written discovery had not been satisfactory. CP 722. However, they did not specify what discovery was deficient or how different responses could create a material fact. *Id.* Instead, they attached all the discovery to the declaration of Appellants' counsel and urged the trial court to read it. *Id.* Finally, they asked the trial court to defer ruling on the issue of intent until depositions were conducted. CP 723. However, Appellants provided no reason to think that deposing the Foxes and Carter would uncover any information different than what had been presented in their declarations or create a material issue of fact.

Appellants' vague CR 56(f) request simply did not provide the trial court with a sufficient basis to grant CR 56(f) relief. Because Appellants did not properly request such relief and failed to identify the specific information that they wished to discover that would create a material issue of fact or carry their burden to show good cause, the trial court did not abuse its discretion. Moreover, because the court had properly ruled that submitting vouchers did not constitute a secret meeting in violation of the

OPMA, the request was moot.

**C. The trial court properly rejected the Hilliards’ claim for multiple penalties of \$500 against the Individual Defendants because RCW 42.30.120(1) permits only a single \$500 penalty against a public official for “the first violation” of the OPMA that is found to have been knowing and intentional.**

Applying the statute as written, the trial court properly rejected the Hilliards’ theory that the OPMA authorizes a \$500 penalty against the Foxes and Carter for each of the alleged 269 OPMA violations, amounting to hundreds of thousands of dollars in penalties. This court reviews de novo the trial court’s interpretation and application of a statute to undisputed facts. Heller v. McClure Sons, Inc., 92 Wn. App. 333, 337, 963 P.2d 923 (1998). When statutory language is plain, the statute is not open to construction or interpretation. Green River Comty. Coll. Dist No. 10 v. Higher Ed. Personnel Bd., 95 Wn. 2d 108, 622 P.2d 826, modified on rehearing, 95 Wn. 2d 962 (1980).

The Supreme Court of Washington, in interpreting the OPMA, has stated that: “[p]lain language analysis also looks to amendments to the statute’s language over time.” Riverkeeper, 188 Wn.2d at 440. In this case, the Court may fruitfully begin its analysis by examining the way the statute was amended in 2016 to create two tiers of penalty levels, depending on whether the official has been previously sanctioned for violating the Act. It says:

(1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him or her, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of five hundred dollars **for the first violation.**

(2) Each member of the governing body who attends a meeting of a governing body where action is taken in violation of any provision of this chapter applicable to him or her, with knowledge of the fact that the meeting is in violation thereof, and **who was previously assessed a penalty** under subsection (1) of this section in a final court judgment, shall be subject to personal liability in the form of a civil penalty in the amount of one thousand dollars **for any subsequent violation.**

RCW 42.30.120(1)-(2) (emphasis added) (See Appendix A hereto, SB 6171 showing amended language). The prior iteration of the statute is cited by the Hilliards. OB 34. The past version called for only a one-hundred-dollar penalty and did not contain the limiting phrase “for the first violation.” S.B. 6171 at 1, 64<sup>th</sup> Leg., Reg. Sess, (Wash. 2016). It also did not contain subsection (2) adding a one-thousand-dollar penalty for “any subsequent violation.” *Id.* With the addition of this new language, the statute was significantly altered to provide two tiers of civil penalties: (1) a single penalty of \$500 for the first time a public official is found to have violated the Act, and, (2) a \$1,000 penalty for any subsequent violation after the assessment of the first penalty.

If the manner of the amendment left any question about the Legislature's intent to create a two-tiered hierarchy for OPMA civil penalties, the plain language would allow for no other conclusion except that a single penalty of \$500 is authorized for "the first violation." A statute will be held to mean exactly what it says, and rules of construction will not apply, where its language is free from ambiguity. Shelton Hotel Co. v. Bates, 4 Wn. 2d 498, 104 P.2d 478 (1940). The Legislature employed the word "the," a definite article, to specify a singular noun: "the first violation," in subsection (1). It eschewed the use of a more general phrase such as "a" or "any first violation," and chose instead to limit the application of the \$500 penalty in that subsection to one particular violation: "the first violation." The Legislature employed precise language, which must be held to mean exactly what it says.

Although there is no ambiguity in the statute, the canons of construction would also compel the conclusion that a single \$500 penalty is authorized for "the first violation." First, the statute must be read as a whole and construed so that all the language used is given effect. Stone v. Chelan County Sheriffs Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). The meaning of a particular word in a statute "is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole." State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040

(1994). Here, the Legislature’s authorization of \$500 for “the first violation” in subsection (1) stands in contrast to its authorization of \$1,000 for “any subsequent violation” after the first penalty is assessed in the new subsection (2). The first contains a definite article specifying a singular noun, thus allowing for no plurality, whereas, the second more general phrase is an indefinite article, permitting a plurality. The definite article, “the,” used before a noun, has a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article “a” or “an.” The contrast between the two operative clauses—“the first violation” versus “any subsequent violation”—makes clear that the intention of the Legislature was to provide public officials with a “warning shot” penalty of \$500 for the first adjudicated violation. Thereafter, if the behavior is not corrected, a public official faces a potential penalty of \$1,000 for “any” subsequent violation pursuant to subsection (2).

A second canon of construction applicable here is that penal statutes are read narrowly. State v. Bell, 83 Wn.2d 383, 388, 518 P.2d 696 (1974) (fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused.) Here, significant penalties are involved and can only be imposed upon a showing of an intentional and knowing violation. The trial court properly interpreted and applied

the penal aspect of the statute as it is written, rather than enlarging upon the terms to permit numerous penalties to be “stacked” where that is not expressly authorized by the statute.

Lacking authority to overcome the plain language of the statute, the Hilliards’ counsel submitted a declaration stating that in her 20 years of practice, “it has always been understood that the ‘civil penalty’ in the OPMA was to be imposed on a per-meeting basis.” CP 726-727. This declaration did not constitute authority or evidence and the trial court properly ignored it. Still without authority on appeal, Appellants’ counsel again cites to her personal experience that the penalty “was always viewed as” a per-meeting penalty. OB 34. However, Appellants’ counsel is necessarily referring to her experience with the pre-2016 version of the statute, and her anecdotal opinion loses whatever persuasive value it might have had in light of the 2016 amendment of RCW 42.30.120. The Hilliards acknowledge that the 2016 amended version of the statute has not been previously interpreted by our courts. OB 35.

The Hilliards turn next, in vain, to the legislative history of the 2016 amendment of RCW 42.30.120. Legislative history is not used to construe a statute unless its meaning cannot be discerned from its plain language, and in this case, it can be. Riverkeeper, 188 Wn.2d at 440. To get around this fact, the Hilliards argue that the 2016 amendments to

RCW 42.30.120 created an ambiguity. OB 35. They ask the Court to find in the legislative history an intention to assess multiple \$500 penalties against public officials for “the first violation” under RCW 42.30.120 (1). *Id.* 35-36. However, the legislative history does not support their argument.

The Hilliards first refer to a statement from the Washington State Attorney General FAQ about the OPMA stating that the penalty in subsection (1) was increased in order to have a deterrent effect. OB 36, Appx. E. This statement is not legislative history and it does not support the Hilliards’ argument for multiple penalties of \$500. The legislature only decided, and the Attorney General only said, that a \$500 penalty would have a deterrent effect. There is no mention of multiple penalties.

The Hilliards also point to the summary of a statement by an assistant attorney general who said in public testimony that “[i]t is not cost effective or reasonable to litigate cases with such a small penalty.” OB 36, Appx. D. The summary of her testimony also states: “This is the same civil penalty as when the OPMA was introduced in 1971, and now lacks deterrent effect.” *Id.* In other words, the “small penalty” she referred to was the \$100 penalty in the 1971 statute—she was not advocating for multiple \$500 penalties, as the Hilliards suggest. In fact, a review of the entire length of the video excerpts of legislative history

cited by the Hilliards shows there is no discussion of multiple or “stacked” civil penalties for a first-time violation. The discussion among the legislators and witnesses concerned only whether the single penalty of \$100 ought to be raised to \$500 to adjust for inflation since the OPMA’s enactment. OB 36, n. 22, for links to video.

As such, if it was determined that any of the Individual Defendants violated the OPMA, it would be “the first violation” for any of them, subject to a civil penalty of not more than \$500. The Foxes and Carter were entitled to partial summary judgment against the Hilliards’ claim for \$270,000 in penalties, and a ruling that they could not be subject to more than a single penalty. This Court should find the plain meaning of RCW 42.30.120(1) does not permit multiple penalties of \$500 for “the first violation” and affirm the trial court’s ruling.

**D. The trial court properly applied the statute of limitations because all the facts needed for accrual were public and discoverable in the exercise of diligence.**

Respondents concede on appeal, as they did below, that their claims are subject to the two-year statute of limitations in RCW 4.16.130. OB 17, RP 31-33. Under this statute, “An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.” RCW 4.16.130. See, e.g., Garrett v. City of Seattle, No. C10-00094 MJP, 2010 WL 4236946, at \*4 (W.D.

Wash. Oct. 20, 2010) (applying RCW 4.16.130 to OPMA claim.) A party must exercise reasonable diligence in pursuing a legal claim and, if such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations. Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 772, 733 P.2d 530 (1987). This Court reviews de novo the statute of limitations applicable to a claim and whether that statute bars an action. Woodward v. Taylor, 185 Wn. App. 1, 6, 340 P.3d 869 (2014), rev'd on other grounds, 184 Wn.2d 911, 366 P.3d 432 (2016).

The Hilliards February 3, 2017 complaint sought civil penalties for alleged OPMA violations that occurred as long ago as December 2013. CP 4. Under the applicable two-year statute of limitations, any claims arising from alleged violations prior to February 3, 2015 are time-barred. Thus, a significant number of the 269 violations alleged by the Hilliards were untimely. CP 302.

In an attempt to avoid the statute of limitations, the Hilliards argued two things: (1) that the statute should be equitably tolled because the Lewis County Treasurer's voucher system was "deliberately hid" from them, and, (2) that under the discovery rule, their claims should be deemed to have accrued when they first learned that Lewis County requires use of the voucher forms. OB 18. The trial court properly rejected these arguments because there was no legal authority supporting equitable

tolling or tolling under the discovery rule, and “given the fact that all of these records with regard to the vouchers were public records through the County.” RP 45, CP 2362.

**1. The court properly denied equitable tolling relief.**

Equitable tolling is sparingly applied and requires a showing of bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. Finkelstein v. Sec. Props., Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161, review denied, 127 Wn.2d 1002 (1995). Ignorance of the law does not support equitable tolling. Kingery v. Dep’t of Labor Indus., 132 Wn.2d 162, 175, 937 P.2d 565 (1997). It does not apply to cases of “garden variety” excusable neglect. City of Bellevue v. Benyaminov, 144 Wn. App. 755, 761, 183 P.3d 1127 (2008). When a mistake as to facts related to a claim is made by a claimant, equitable tolling should not apply. Harmon v. Dep’t of Labor, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) (“The mistakes that occurred under the facts of this case are largely the responsibility of Ms. Harman.”) The party asserting equitable tolling bears the burden of proof. City of Bellevue, 144 Wn. App. at 767.

Equitable tolling was not available to the Hilliards because they could have easily discovered the fact that water districts and all other local governmental agencies in Lewis County deposited all of their funds and

processed all of their payments through the Lewis County Treasurer's office. Mr. Hilliard states that he had become concerned about the District finances and been investigating it since at least 2011. CP 391. Nothing prevented him from discovering the specific method by which payments were processed through Lewis County. Mr. Hilliard had the opportunity to educate himself about the voucher system while he served as a commissioner himself during 2011. CP 928. He admits that at a December 28, 2010 commissioner's meeting, it was announced that Lewis County had increased the District's credit to \$25,000 and that:

The Lewis County Financial Committee had oversight of these loan funds. The funds were deposited with the Treasurer's Office. The Auditor's Office processed payments for the District of appropriate billings.

CP 931. Thus, the Hilliards were aware that at least some payments were processed through Lewis County, which belies their claim that they thought the District wrote its own checks on its own bank account. Moreover, information on the voucher process and its application to all local governmental entities in Lewis County has been published on the Treasurer's website since 2013. CP 2805-807. The Hilliards claim they eventually learned of the voucher process by inspecting records at Lewis County. CP 717. The trial court was thus correct in its finding that equitable tolling was unavailable "given the fact that all of these records

with regard to the vouchers were public records through the County.” RP 45. The undisputed facts permitted no other conclusion.

The Hilliards did not carry their burden to show they were affirmatively misled and thus entitled to equitable estoppel. Mr. Hilliard asserted that someone told him that the District secretary paid the bills. CP 932. But this does not show concealment—such a statement was accurate because the secretary was authorized to pay the bills and did so through the Lewis County voucher system. Hilliard specifically did not represent to the trial court that a District representative told him that the District had its own checking account and used it to pay its bills. Instead, he admitted that he incorrectly inferred this wrong conclusion. “Due to the manner that payments were made from an open-ended note, I was led to believe that the District had its own banking account and the funds obtained from Lewis County were in a special account.” CP 932.

The Hilliards’ confusion and self-proclaimed ignorance of public facts does not demonstrate concealment supporting equitable tolling under Washington law. For example, in Harmon, the appellant filed her worker’s compensation claim too late, and claimed that someone at her doctor’s office had misled her about the time she had to file it. The Court found: “At best, the record merely reflects that Ms. Harman thought someone from Dr. Hazel’s staff informed her that she had seven years to

file a claim under the IIA.” 111 Wn. App. at 927. The court noted that ignorance has never been an adequate defense and that it was due to Harman’s misunderstanding of the law that she missed her deadline. As a result, the court found there was no grounds for tolling because “[t]he mistakes that occurred under the facts of this case are largely the responsibility of Ms. Harman.” *Id.* As in Harmon, the mistakes that occurred here concern a misapprehension of public, legal facts. These mistakes are the responsibility of the Hilliards, making equitable tolling inappropriate. 111 Wn. App. at 927. The trial court properly ruled that equitable tolling was unavailable, and this Court should affirm that ruling.

**2. The court properly rejected the Hilliard’s novel argument for delayed accrual under the discovery rule based on an affirmative obligation for the District to disclose public facts to them.**

Appellants alternatively argue that if the statute of limitations is not equitably tolled, this Court should find that, under the discovery rule, their claim did not accrue until June, 2016, when they received a response to a request for public records that they served on Lewis County and “first learned of the voucher system and the voucher and timesheet events. . .”.

OB 18-19.<sup>1</sup> Under the discovery rule, a cause of action accrues “when the plaintiff discovers, or in the reasonable exercise of diligence should

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<sup>1</sup> It should be noted that they argued below that their claim accrued in May 2015, when they “first learned of the voucher system and the voucher and timesheet events when they inspected records at Lewis County.” CP 717.

discover, the elements of the cause of action.” 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 575, 146 P.3d 423 (2006) (citing RCW 4.16.005). The burden is on the plaintiffs to show that the facts giving rise to the claim could not be discovered by diligence within the limitation period. G.W. Constr. Corp v. Prof’l Serv. Indus., 70 Wn. App. 360, 367, 853 P.2d 484 (1993). “[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all facts which reasonable inquiry would disclose.” Green v. A.P.C., 136 Wn.2d 87, 98, 960 P.2d 912, (Wash. 1998) quoting Hawkes v. Hoffman, 56 Wn. 120, 126, 105 P. 156 (1909). The trial court correctly held that any claims older than two years prior to the complaint’s filing date of February 3, 2017, were time-barred under RCW 4.16.130, “given the fact that all of these records with regard to the vouchers were public records through the County.” RP 45.

The Hilliards argue that the accrual date for their claims against the Foxes and Carter must be tolled because the Foxes and Carter controlled the information they needed and concealed it from them. OB 23. They make the novel legal argument that as commissioners, the Individual Defendants were in a special relationship with them and thus owed them an affirmative obligation to disclose the fact that the Lewis County Treasurer handled the District’s receipts and payments and that two

commissioners signed the voucher forms. *Id.* The Hilliards attempt to find support in U.S. Oil & Refining Co. v. Dep't of Ecology, 96 Wn 2d 85, 633 P.2d. 1329 (1981). In that case, U.S. Oil violated a self-reporting statute for unlawful waste discharges which DOE discovered after the statute of limitations had run. The discovery rule was applied because under the waste regulatory scheme, "DOE must rely on industry reporting to discover violations." 96 Wn.2d at 92. The Hilliards argue that this analysis should apply here. The weakness in that argument is that this case involves nothing similar to a self-reporting statute, but the opposite: public records that were available for inspection (CP 933, 1042-45) and information the Lewis County Treasurer had published on its website. CP 2805. These facts were not capable of concealment because they were part of the public record and discoverable in the exercise of diligence. Dowgialla v. Knevage, 48 Wn.2d 326, 336, 294 P.2d 393 (1956) ("One cannot be heard to say that he did not know of these matters which were open, obvious, and of public record."). The Hilliards had the means and ability to ascertain the facts in the exercise of diligence. As such, they are "deemed to have notice of all acts which reasonable inquiry would disclose." Green, 136 Wn.2d at 98.

The Hilliards' argument is similar to that made in Giraud v. Quincy Farm Chemical, 102 Wn.App. 443, 6 P.3d 104 (2000). There, farmer

Giraud discovered what appeared to be damage to his young potato crop after pesticide was applied by Quincy Farm Chemical, but Quincy assured him that it was cosmetic and temporary. In fact, there was substantial damage at harvest time. Four years later, Giraud read the label for the pesticide and determined that its improper application had caused the damage. He asserted that Quincy owed him a duty of disclosure arising from a special relationship, and had fraudulently concealed the information, thus requiring tolling under the discovery rule. The court rejected this argument, concluding: “Even if we accept the Girauds’s argument that there was a special relationship between Mr. Biersner and the Girauds such that he had an affirmative duty to disclose to them the possible problem with the [pesticide] application, we cannot accept their argument that they had no duty to protect their own interests by familiarizing themselves with the [pesticide] label.” 102 Wn.App. at 456. In other words, they had the reason and the means to discover an openly available fact in the exercise of diligence. The argument that there was a special relationship did not alter the analysis of the statute of limitations in that case, nor does it here.

**E. The trial court properly granted the motion for summary judgment regarding the sole remaining claim concerning notice for an emergency pump repair.**

On November 3, 2017, the District filed a motion for summary

judgment regarding the sole remaining claim that the District failed to post the notice of the August 19, 2016 special meeting in the manner required by statute. CP 2472-2486. On December 20, 2017, after argument, the trial court granted summary judgment terminating the case. CP 2614. The Foxes and Carter join in and incorporate by reference the arguments in the District's response brief regarding this motion.

**F. RAP 18.1 request for fees on appeal.**

The OPMA does not authorize an award of fees against an individual public official. The only section of the statute addressing fees in a civil action states:

Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including reasonable attorneys' fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency which prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause.

RCW 42.30.120(4). An OPMA civil claim is created by statute, and limited to its terms. Here, there is no explicit authorization for an award of fees against individual public officials. In the trial court, the Hilliards abandoned their argument that fees could be imposed against the Foxes and Carter, and retreated to the position that trial court retained inherent

authority to award fees in any case. RP 39. The trial court held that the OPMA does not authorize fees against individual officials. RP 47.

RAP 18.1 permits an award of fees only when they are authorized by law. This Court should not award fees to Appellants.

## **V. CONCLUSION**

The Lewis County payroll and expense voucher forms are just forms. When used to implement previous decisions made in public meetings in the manner the District did, they were administrative tools, and did not constitute deliberative actions subject to the OPMA. As such, the trial court properly judged that using the forms to pay operating expenses items contained in the district's publicly-approved annual budget did not implicate the OPMA or support a suit for civil penalties. As an additional basis for rejecting the claim for individual penalties against the commissioners, the court properly found there was no evidence of an intentional violation to rebut the evidence and testimony of the commissioners. This ruling was consistent with other Washington cases where the plaintiff failed to carry its burden to show intentionality.

The trial court also properly rejected the Hilliards' overreaching demand for over \$270,000 in penalties to be assessed against the three commissioners of this tiny water district because it is not supported by the plain language of the statute, as amended in 2016. Only a single \$500

penalty is authorized for a first knowing violation. Nor would such an exorbitant penalty effectuate the purpose of the statute. At a minimum, the Court should affirm the trial court's ruling that the amended OPMA authorizes only a single penalty, as a matter of law.

Finally, the trial court correctly rejected the Hilliards' effort to avoid the statute of limitations. If they had exercised reasonable diligence, Appellants could have seen a Lewis County voucher form at any time, and their professed ignorance of public facts does not toll the statute of limitations.

The trial court properly interpreted and applied the OPMA to effectuate the purposes of that statute, and its rulings should be affirmed.

Respectfully submitted this 13th day of July, 2018.

TIERNEY & CORREA, P.C.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below a copy of the foregoing document on all counsel of record in this case:

- Via U.S. Mail
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**TIERNEY & CORREA**

**July 13, 2018 - 12:30 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51787-6  
**Appellate Court Case Title:** Jimmy Hilliard, et ux., Appellants v. Lewis County Water & Sewer District #5, et al., Respondents  
**Superior Court Case Number:** 17-2-00111-1

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