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No. 54656-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN BOGEN, Appellant,

v.

CITY OF BREMERTON, Respondent

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

John Bogen had no idea when he filed this lawsuit one year after the day the last rejection came from the City of Bremerton that the trial court would reject that CR 6(a) and RCW 1.12.040 determined the accrual date for the Public Records Act (PRA) statute of limitations (SOL) specified in RCW 42.56.550(6). The trial court relied instead its interpretation of the language of RCW 42.56.550(6) to determine the accrual date to be the day the agency's last claim of exemption or the last production of a record on a partial or installment basis. Bogen asks this Court to reject this interpretation and clarify that the day after the last production or rejection starts the SOL for the PRA.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in granting the City of Bremerton's CR 12(b)(6) motion to dismiss for failure to state a claim as barred by the statute of limitations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Is the language of RCW 42.56.550(6) unambiguous as to require the Public Records Act accrual date for the PRA statute of limitations be one year from the day after the last production or rejection?

2. If the language of RCW 42.56.550(6) is ambiguous should the lack of legislative intent to specify a accrual date different than RCW 1.12.040 require accrual date for the PRA statute of limitations be one year from the day after the last production or rejection?

3. Should the public policy behind the PRA as set forth in RCW 42.56.030 support a clearly understood statute of limitations where the accrual date run from the date following the last day an agency's claim of exemption or last production?

4. Is Bogen entitled to statutory fees and costs on appeal?

III. STATEMENT OF THE CASE

On November 16, 2018, John Bogen submitted a public records request for various records related to a City of Bremerton cell phone. CP 4 (Complaint at ¶ 4.1). Over the course of the next two months, the City provided Bogen with two installments of responsive records. CP 4 (Complaint at ¶¶ 4.2 - 4.4). On January 28, 2019, the City sent Bogen a message stating that no further responsive records had been located and the request was considered fulfilled and closed. CP 5 (Complaint at ¶ 4.7). On January 28, 2020, Bogen filed an action pursuant to the Public Records Act (PRA) in Kitsap County Superior Court. CP 7.

The City of Bremerton filed a CR 12(b)(6) motion to dismiss based on an alleged violation of the statute of limitations of RCW 42.56.550(6). CP 7-10. The argument was based on the claim that the accrual date for the PRA statute of limitations (SOL) begins on the day of the final response to a request, not the day after.

Bogen responded, arguing that the language read in conjunction with RCW 1.12.040 made the accrual date uncertain, requiring the court to follow the statutory requirements. CP 11-15. He also argued that since the legislature gave no reason for adopting an accrual date for the PRA SOL in its adopting of it, legislative history and public policy favor having a uniform SOL for the Public Records Act. CP 18-21.

IV. SUMMARY OF THE ARGUMENT

Bogen first shows that the statute of limitations is unambiguous and must be interpreted to start the day after the last even. He then shows that even if this Court finds it ambiguous, legislative history supports the application of RCW 1.12.040 to RCW 42.56.550(6). Finally, he shows that good public policy supports a standardized application of statutes of limitation unless the legislature specified otherwise.

V. ARGUMENT

A. THE STANDARD OF REVIEW OF A 12(b)(6) MOTION.

Under CR 12(b)(6), "[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove 'any set of facts which would justify recovery.'" FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014) (quoting Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962, 17 P.2d 104 (1998)); Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). "All facts alleged in the plaintiffs complaint are presumed true." Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 717, 189 P.3d 168 (2008). However, if the claim is legally insufficient based on the alleged facts, "dismissal pursuant to CR 12(b)(6) is appropriate." FutureSelect Portfolio Management, Inc., 180 Wn.2d at 963. Review of a dismissal pursuant to CR 12(b)(6) is reviewed de novo. Id. at 962.

B. THE PRA'S ONE YEAR STATUTE OF LIMITATIONS MUST BE INTERPRETED AS STARTING THE DAY AFTER THE TRIGGERING EVENT.

1. The Word "Within" Used in RCW 42.56.550(6) Is Not Ambiguous and Must Be Interpreted With Common Usage.

At issue is how to interpret the words "within a year." Bremerton would have you believe RCW 42.56.550(6) includes the triggering date. The PRA statute of limitations states the following:

> Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

RCW 42.56.550(6). But common usage of these terms establish them to be unambiguous and starts the statute of limitations the day after that event. See Johnson v. Riddle, 305 F.3d 1107 (10th Cir. 2002).

Johnson involved a case related to a Fair Debt Collection Practices Act (FDCPA) statute of limitations. In Johnson, the debtor paid the bounced check amount and penalty to Riddle on August 24, 1998. On August 24, 1999, she sued for a violation of the FDCPA. Riddle defended himself by raising a SOL defense. Johnson, 305 F.3d. at 1113. This defense was based in part on the argument that Johnson had failed to file "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Riddle had argued that Fed. R. Civ. Proc. 6(a)(1)(A), which excludes the day of the triggering event, did not apply.[1] Johnson, 305 F.3d. at 1115. The Tenth Circuit refused to consider this argument because standard practice using Fed. R. Civ. Proc. Proc. 6(a)(1)(A) excludes this date. But it went on to point out the common usage of the term "within a year" is unambiguous.

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[1] Fed. R. Civ. Proc. 6(a)(1) is similar to our CR 6(a) in that it "exclude[s] the day of the event that triggers the period."

> Whenever one speaks of something occurring "within a day," of an event, everyone would understand that to mean the next day after the event, not solely on the same day as the event. Similarly, requiring suit "within one year" of an event means that the suit must be filed on or before the anniversary date of the event, not the day before the anniversary.

Id. (emphasis added). Having established that using the word "within" is common usage to exclude the event date triggering the statute of limitations, Johnson's lawsuit was considered timely.

In Washington, statutory language "is afforded a sensible, meaningful and practical interpretation." In re Det. of Danforth, 173 Wn.2d 59, 72, 264 P.3d 783 (2011). "The use of common experience as a glossary is necessary to meet the practical demands of legislation." Id. at 73 (quoting Sproles v. Binford, 286 U.S. 374, 393, 52 S.Ct. 581, 76 L.Ed. 1167 (1932)). Dictionary meanings may define nontechnical terms. State v, Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). "When words are not defined by statute, the court may refer to dictionary definitions and to common usage in light of the context in which the word is used." Armstrong v. State, 91 Wn. App. 530, 538, 958 P.2d 1010 (1998) (citing Mustappa v. Department of Fisheries, 67 Wn. App. 790, 793, 840 P.2d 235 (1992)). Since the terms of RCW 42.56.550(6) has the same unambiguous terms with a common usage as Johnson, this Court must find that Bogen's lawsuit was timely filed.

2. If the Language of RCW 42.56.550(6) Is Ambiguous, Legislative Intent Mandates the Statute of Limitations Run From the Day After the Triggering Event.

The Supreme Court examined a similar statute of limitations for workers compensation claims. Kovacs v. Department of Labor & Indus, 186 Wn.2d 95, 375 P.3d 669 (2016). The statute in question required an application be filed "within one year after the day upon which the injury occurred." RCW 51.28.050. The Supreme Court acknowledged the word "after" contained in the statute and still held that the language was ambiguous without considering RCW 1.12.040 (and CR 6(a)). Kovacs, 186 Wn.2d at 98-99. The Kovacs court rejected a general vs. specific statute argument because the statute was ambiguous. Id. at 99. If the statute containing the word "after" is ambiguous, then the language "within one year" must also be ambiguous.

If statute is ambiguous, courts "resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003, 1006 (2014) (citing Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)). Harmon v. Dep't of Soc. & Health Servs., 134 Wn.2d 523, 542, 951 P.2d 770 (1998).

In 2005, the Washington legislature passed 2SHB 1758 (Chapter 483, Sec. 5), amending the PRA to add RCW 42.56.550(6).[2] (former RCW 42.17.340). The initial bill report for 2SHB 1758 provided a brief summary of the bill. CP 18-21. It stated in the summary that the bill "[i]mposes a one year statute of limitations for certain suits brought under the Public Disclosure Act." It later cited the same language which is currently present in the statute. Clearly, the legislature desired to impose a one-year statute of limitations, not one year minus one day. There is absolutely no evidence showing that the legislature wanted to establish a one year minus one day SOL that the trial court found. Examination of the legislative enactment RCW 42.56.550(6) requires this Court to find the Washington Legislature did not intend for the accrual date for the statute of limitations to start the day of the last response by the agency.

Statutory interpretation also requires trying to harmonize two statues as to give meaning to both. Miller v. King County, 59 Wn.2d 601, 605, 369 P.2d 304 (1962). Harmonizing RCW 1.12.040 and RCW 42.56.550(6) requires no stretch of imagination – RCW 1.12.040 sets the accrual date and RCW 42.56.550(6) sets the length of the PRA SOL.

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[2] Before recodification of the PRA done concurrently with 2SHB 1758, RCW 42.56.550 was formerly RCW 42.17.340.

C. PUBLIC POLICY REQUIRES THE ACCRUAL DATE FOR THE STATUTE OF LIMITATIONS BE THE DATE FOLLOWING BREMERTON'S LAST DENIAL.

The Public Records Act started as an citizens initiative. Laws of 1973, ch. 1, p. 1 (Initiative 276, approved Nov. 7, 1972). In 1992, the Legislature passed RCW 42.56.030, formerly RCW 42.17.251, which states that

> This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected."

RCW 42.56.030. Every action taken by a court interpreting how this language applies to the PRA must further the stated policy goal of liberal construction to permit an informed public. As the Supreme Court stated, "[t]he PRA is a strongly worded mandate for disclosure of public records." Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn.2d 270, 277, 372 P.3d 97 (2016). It is contrary to the public policy goals of the PRA as stated in RCW 42.56.030 to permit an agency to deny a PRA lawsuit that was properly filed pursuant to RCW 1.12.040.

The PRA attracts many pro se litigants and lawyers who especially depend on the court rules to interpret the starting date of the SOL. If Bremerton is permitted to prevail on its argument, it will potentially exclude citizens and lawyers who rely on standardized accrual dates when the statute is not specific. Such an interpretation would also promote the

non-uniformity of the law. Other jurisdictions have interpreted that a general rule excluding the day of the signaling event prevails over bad legislative drafting when the legislature had stated no intent to do otherwise when passing the enactment in question. See Wixted v. Fletcher, 192 Cal.App.2d 706, 13 Cal.Rptr. 734 (1961).

At issue in Wixted was the interpretation of the accrual date for a SOL requiring filing the lawsuit "within one year." Id. at 707. Like Washington, California also has a general time computation statute. Id. In rejecting the SOL violation, the California court rejected the narrow interpretation because there was no clearly expressed desire by the legislature to have it interpreted so narrowly.

> The gravest considerations of public order and security require that the method of computing time be definite and certain. Before a given case will be deemed to come under an exception to the general rule, the intention must be clearly expressed that a different method of computation was provided for.

Id. at 708 *(*quoting Ley v. Domengeaux, 30 Cal. App.2d 266, 273, 86 P.2d 127 (1939)). As the Wixted court so elegantly explained:

> There are already enough legal subtleties without adding the further refinement that one rule of time computation must be applied to certain statutes of limitation and still another to procedural situations.

Wixted, 192 Cal. App.2d at 709. Rules must not be complicated as to trap the unwary, especially when the legislature made no particularized finding

of need. Good public policy requires consistent rules governing the accrual date of statute of limitations.

D. IF BOGEN IS THE PREVAILING PARTY HE IS ENTITLED TO STATUTORY FEES AND COSTS.

RAP 18.1 permits attorneys fees and costs on appeal if the applicable law grants this right for an appeal. The Washington Supreme Court had determined that under the PRA, an individual who prevails against the agency is entitled to all costs, including reasonable attorney fees. RCW 42.56.550(4); Progressive Animal Welfare Soc'y v. Univ. of Wash., 114 Wn.2d 677, 690, 790 P.2d 604 (1990). If this Court finds Bogen did not violate the statute of limitations, Bogen asks that reasonable attorneys fees and cost for this appeal be granted.

VI. CONCLUSION

It is clear that the unambiguous language "within one year" denotes a year starting the day after the triggering event. Even if this Court considers the language of RCW 42.56.550(6) ambiguous, it is also clear that the legislature did not intend to make the Public Records Act statute of limitations to be an outlier to other statutes of limitation. Finally, it is good public policy to have uniformity for statutes of limitation where the legislature has expressed no specific desire for a result contrary to RCW 1.12.040.

DATED this 21st day of August, 2020.

Respectfully submitted,

/s Michael c. Kahrs
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Attorney for Appellant Bogen

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Brett Jette, City of Bremerton and Kylie Purves, Templeton Horton Weibel and Broughton, PLLC, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

/s Michael c. Kahrs
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