No. 92161-0

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

MIKE BELENSKI,

Appellant

v.

JEFFERSON COUNTY,

Respondent,

RESPONDENT'S ANSWER TO AMICUS CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, THE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE BELLINGHAM HERALD, THE OLYMPIAN, THE NEWS TRIBUNE, THE TRI-CITY HERALD, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This memorandum responds to the Amicus Curiae memorandum filed by the various newspapers and media advocates. Amici fail to present any compelling reason for the Court to review the decision of the Court of Appeals. *Belenski v. Jefferson County,* 187 Wn.App. 724, 350 P.3d 689 (2015).

The issues presented in *Belenski v. Jefferson County* were predominantly whether "internet access logs" (IALs) automatically generated by the County's firewall program in its computer system constitute "public records" under the Public Records Act. The Court of Appeals decided that they are public records as defined by the Act and that issue is resolved.

In the course of seeking IALs, Belenski made numerous records requests. The County attempted to work with him to provide available information, but when his request sought 94 million records, the County disputed whether IALs were in fact "public records" as defined by the Public Records Act. That was the heart of the dispute underlying Mr. Belenski's November 2010 records request. The parties never disputed that IALs were generated by the County's firewall system. Indeed, Belenski has acknowledged under oath that he has previously requested and received such logs in prior requests. CP 120, ¶4.

Despite the dispute as to whether IAL constitute "public records" under the relevant definition, Belenski failed to bring his lawsuit challenging the County within two years from the County's response to his request. The Court of Appeals correctly held that the Plaintiff's claims arising from his September 2010 records request would be barred by the two year catchall statute of limitations found in RCW 4.16.130.

II. ARGUMENT

A. THE ISSUES WERE NOT PROPERLY PRESERVED OR BRIEFED IN THE COURT OF APPEALS.

Amici first contend that the issues concerning application of RCW 4.16.130 were properly preserved in the Court of Appeals Briefing. In support of this contention, Amici cite trial court briefing contained in the clerk's papers and pages 20-21 of the Appellant's Reply Brief. Amici 1. Amici are simply wrong in this contention.

Petitioner's briefing in the Court of Appeals did not contest the application of RCW 4.16.130 or seek application of discovery rule. Indeed the briefing contained at pages 20 to 21 of the Petitioner's Reply Brief did not mention either RCW 4.16.130 or the principal case cited by the County in support of application of the two year catchall statute of limitations, *Johnson v. Department of Corrections*, 164 Wn.App. 769, 265 P.3d 216 (2011). Instead, Belenski argued that RCW 42.56.550(6) was

not applicable because the County had neither claimed an exemption nor produced records on a partial or installment basis. Belenski did not brief the issue of why RCW 4.16.130 did not apply and compel dismissal of his claim arising from his September 2010 request.

Belenski first mentioned RCW 4.16.130 and a "discovery rule" in his Motion for Reconsideration. For this reason alone, the Court need not consider this issue. *Building Industry Association of Washington v. McCarthy*, 152 Wn.App. 720, 738, 218 P.3d 196, 204-205 (2009); *Wesche v. Martin,* 64 Wn.App. 1, 6–7, 822 P.2d 812 (1992) (issues first raised in motion for reconsideration need not be considered on appeal).

To the extent that the Petitioner and amici attempt to incorporate trial court briefing, this is also inadequate to preserve the issue for appeal, which must be briefed and argued under the Rules of Appellate Procedure. See RAP 10.3(a)(5). Briefs presented to the trial court cannot be incorporated by reference in appellate briefs. *U.S. West Comm. Inc. v. Utilities and Transp. Comm'n*, 134 Wn.2d 74, 111-112, 949 P.2d 1337 (1997); *Patterson v. Superintendent of Public Instruction*, 76 Wn.App. 666, 676, 887 P.2d 411 (1994).

B. AMICUS MISCONSTRUES THE FACTS OF THE CASE.

Amici mischaracterizes the nature of the factual dispute between Belenski and the County. Belenski concedes that he knew that the

County's computer system generated IALS, as aptly demonstrated by his recurring requests for such logs. He concedes that he had made similar requests and had received these in smaller volumes prior to his September 2010 request. CP 120. His dispute was never about whether the IALs existed but whether they were "public records" that the County had an obligation to provide under the Public Records Act, an issue of first impression for our courts. *Belenski v. Jefferson County,* 187 Wn. App. 724, 735, 350 P.3d 689, 695 (2015). The Public Records Act only requires agencies to disclose "public records" as defined under the statute. RCW 42.56.080.

Amici incorrectly asserts that the County has admitted that its response to Belenski was untrue. Brief at 5. No such admission has been made nor is any citation provided for such an admission. This stems from Amici's apparent confusion about the nature of the dispute, which was always about whether IALs constituted "public records" as defined by the Act required to be provided in response to Belenski's requests.

Amici later contends that it would have been impossible to bring a challenge to the County's response within the two year statute of limitations without violating CR 11. Brief at 9. No support for this speculative assertion exists and it is contrary to admitted facts, including those advanced by Amici. Belenski has conceded that he knew about the

existence of these records nearly a year before the expiration of the two year statute of limitations and simply sat on his rights to challenge the County's responses. Amici's own brief contends that Mr. Belenski knew of the existence of these records by January 3, 2012, 9 months prior to the expiration of the statute of limitations. Brief at 6.

During much of this time, it is uncontested that the County was trying to work with Mr. Belenski to afford access to information in its computer systems, even though the County believed that it was not "a public record". As noted by the Court of Appeals opinion, the County went so far as to purchase software to generate reports to provide Belenski access to the requested information and offered such information to him. *Belenski*, 187 Wn.App. at 730; CP at 226. The dispute crystalized only after Belenski refused to accept the provision of IAL's via the WebSpy software purchased by the County. The contention that he could not have timely challenged the September 2010 response is simply false.

C. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH PRIOR SUPREME COURT OR COURT OF APPEALS DECISIONS.

Amici's primary contention in support of seeking review of this case is that the Court of Appeals decision conflicts with this Court's decision in *Rental Housing Ass'n of Puget Sound v. City of Des Moines,* 165 Wn.2d 525, 536, 199 P.3d 393 (2009) and Division I's opinion in

Tobin v. Worden, 156 Wn. App. 507, 513, 233 P.3d 906, 908 (2010). The Court of Appeals decision is in conflict with neither of these decisions.

Rental Housing Association did not apply the two year catch all statute of limitations found in RCW 4.16.130, which formed the basis for the Court of Appeals ruling here. Instead, *Rental Housing Association* involved a question as to whether the one year statute of limitations in RCW 42.56.550(6) was triggered by a claim of exemption that did not individualize the documents claimed to be exempt. No such claim of exemption was made in this case.[1] *Rental Housing Association* is distinguishable both on its facts and on the statute used to decide the case.

Likewise, *Tobin v. Worden* did not involve any consideration of RCW 4.16.130. The lawsuit in *Tobin* was filed prior to the running of any two year statute of limitations. The sole question was whether the plaintiff's claims were barred by the one year statute of limitations in RCW 42.56.550(6). Hence, there is no conflict with the decision in this case because application of the two year catchall statute of limitations was not presented or decided under the facts in *Tobin.*

An additional distinction between this case and those amici relies upon is that neither *Rental Housing Association* nor *Tobin* presented a

[1] This case involved records that the County alleged did not constitute public records. There is no requirement to provide a log of non-responsive records or records that are not "public records" and are not claimed to be exempt. *Forbes v. City of Gold Bar*, 171 Wn.App. 857, 869, 288 P.3d 384 (2012).

dispute as to whether or not records were "public records" as defined by the Public Records Act. As such, there is no conflict between the Court of Appeals ruling here and these two cases.

D. THE COURT OF APPEALS CORRECTLY HELD THAT CLAIMS ARISING FROM THE SEPTEMBER 2010 REQUEST WERE BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS IN RCW 4.16.130.

The Court of Appeals decision in this case reflects well settled precedent applying the two year catchall statute of limitations to this case. Where the one-year statute is not triggered (as Belenski contended in his reply brief), Washington law applies the two year "catch all" statute in RCW 4.16.130. *Johnson v. Department of Corrections,* 164 Wn. App. 769, 776, 265 P.3d 216, 219 (2011).

This Court has been presented with numerous opportunities to review application of RCW 4.16.130 and public records cases, principally by *Johnson* itself. However this Court denied review in *Johnson.* 173 Wn.2d 1032 (April 24, 2012). Likewise, the Court has denied review of the application of RCW 4.16.130 in *Mahmoud v. Snohomish County*, review denied, 182 Wn.2d 1027 (April 29, 2015). [2]

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[2] *Bartz v. Department of Corrections*, 173 Wn.App. 522, 297 P.3d 737 (2013) and *Tobin v. Worden*, 156 Wn.App. 507, 233 P.3d 906 (2010) involved lawsuits filed more than one year, but less than two years from the agency's response. Only the one year statute of limitations in RCW 42.56.550(6) was at issue in these cases. Here, the court relied on a different statute of limitations, RCW 4.16.130.

The evident purpose of the legislature in adopting statute of limitations is to require prompt adjudication of cases and resolution of disputes. In adopting RCW 42.56.550(6) the legislature clearly intended to impose strict limits on when Public Records Act cases adopting a one year statute of limitations that is one-half of the limitation provided under RCW 4.16.130. The Court of Appeals decision correctly applied the two year period where RCW 42.56.550 is inapplicable.

In his reply brief, at 20-21, Belenski argued that RCW 42.56.550(6) was never triggered and therefore did not apply under the facts of this case. What Belenski failed to do was to contest the application of the two year catch-all statute of limitations in RCW 4.16.130. Having failed to do so, the Court of Appeals correctly agreed with the County's position, supported by *Johnson,* that claims arising from the September 2010 request were barred by the two year statute of limitations. Claims arising from his other requests, including requests for IALs made in December 2011 ("Request # 2") were not barred and were remanded to the trial court. 187 Wn. App. at 739-40.

The Court of Appeals position correctly aligns itself with the legislatively adopted policies providing repose in public records cases and requiring prompt adjudication of these issues. Citizens, including Belenski and amici (who are frequent PRA plaintiffs), have the

responsibility not to sleep on those rights. The goals of the PRA do not include promoting gamesmanship or the exploitation of stale claims in order to exact cumulative penalties and attorney fees from shorthanded local governments.

Amici's argument here seems to be that where no records are provided by the agency's response, the Plaintiff has an unlimited period of time in which to bring his claims. This is contrary to the clear legislative purpose in adopting statutes of limitations, both under the Public Records Act, and generally under the two year catchall statute of limitation in RCW 4.16.130. The legislature's adoption of RCW 42.56.550(6) drastically reduced the limitations period under the PRA from five years to one. *Bartz*, 173 Wn.App. at 537. Indeed, it is an absurd result to argue that the legislature intended no statute of limitations in PRA cases involving production of no records after such a drastic curtailment of the PRA statute of limitations. *Id.; see also, Johnson*, 164 Wn.App. at 777.

Finally, Amici argues that the holding of Division II in this case is "unnecessarily burdening our courts with suits that might have been avoided...". Brief at 9-10. This argument is illogical and nonsensical. Elimination of the two year statute of limitations and leaving claims without any limitation as advocated by the Amici would in fact increase the number of suits that burden the courts by defeating the policy of

repose evident in 4.16.130. If Amici's position were to be adopted, it would allow stale and old claims to be brought, often after evidence of the response was discarded, and vitiate the policy of repose underlying all statutes of limitation.[3]

III. CONCLUSION

The Court should deny the Petition for Review and allow the correct decision of the Court of Appeals to apply RCW 4.16.130 to stand.

Respectfully submitted this 7th day of December 2015.

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[3] Not coincidentally, the records retention period established by the State Archivist for responses to public records requests is two years after the records request is fulfilled. Local Government Common Records Retention Schedule (CORE) - Version 3.2 (August 2015), at 144, Section GS2010-014, Rev. 2. Thus, it is likely that evidence concerning records requests will no longer exist if claims can be brought more than two years after the agency's response.

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date specified below, I served a copy of the following document upon Petitioner, via e-mail per service agreement of the parties:

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

As follows:

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Michele Earl-Hubbard
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Attorney for Amici

Dated this ___ day of December, 2015 at Tumwater, Washington.

Jeffrey S. Myers

OFFICE RECEPTIONIST, CLERK

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Attached for filing on behalf of Respondent Jefferson County, please find:

1. RESPONDENT'S ANSWER TO AMICUS CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, THE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE BELLINGHAM HERALD, THE OLYMPIAN, THE NEWS TRIBUNE, THE TRI-CITY HERALD, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT
2. The Declaration of Service is subjoined at the end of the document.

Please let me know if there are any questions or further issues with this filing.

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Subject: filing -- Belenski v. Jefferson County -- No. 92161-0

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1. MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE BELLINGHAM HERALD, THE OLYMPIAN,
THE NEWS TRIBUNE, THE TRI-CITY HERALD, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF BELENSKI'S PETITION FOR REVIEW; and

2. AMICUS CURIAE MEMORANDA OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, THE WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, THE BELLINGHAM HERALD, THE OLYMPIAN, THE NEWS TRIBUNE, THE TRI-CITY HERALD, AND THE WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF BELENSKI'S PETITION FOR REVIEW;

3. and certificates of service appended to the end of each document.

These documents are being filed on behalf of prospective Amicus Curiae Allied Daily Newspapers of Washington, The Washington Newspaper Publishers Association, The Bellingham Herald, The Olympian, The News Tribune, The Tri-City Herald, and the Washington Coalition for Open Government by attorney Michele Earl-Hubbard, WSBA # 26454. My contact information is listed below.

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