97297-4

Court of Appeals No. 50894-0-II

WASHINGTON SUPREME COURT

CHARLES WOLFE,

Petitioner,

v.

WASHINGTON DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR REVIEW

William John Crittenden, #22033
Attorney at Law
12345 Lake City Way NE 306
Seattle, Washington 98125-5401
(206) 361-5972
bill@billcrittenden.com

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II. COURT OF APPEALS DECISION

Petitioner Wolfe seeks review of the *Unpublished Opinion* of the Court of Appeals, Division II, in *Wolfe v. Washington State Department of Transportation*, No. 50894-0-II dated May 7, 2019, a copy of which is attached as **Appendix A**.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the one-year statute of limitations for claims under the Public Records Act, Chap. 42.56 RCW (PRA), should be equitably tolled where an agency fails to perform a reasonable search for records, gives the requestor false assurances that there are no more records, and then relies on its own failure to locate relevant records in order pursue a meritless defense in a related tort case.

B. Whether the discovery rule applies in PRA cases, and if not, whether the doctrine of equitable tolling should be liberally applied in PRA cases.

IV. INTRODUCTION

In *Belenski v. Jefferson County*, 186 Wn.2d 452, 378 P.3d 176 (2016), this Court settled the issue of how the one-year statute of

limitations for claims under the Public Records Act, RCW 42.56.550(6), applies where an agency has failed to produce all responsive records:

> We hold that the one year statute of limitations in the PRA applies to Belenski's claim and that this limitations period usually begins to run on an agency's final, definitive response to a records request. However, we remand this case for the trial court to determine whether equitable tolling should toll the statute of limitations.

Belenski, 186 Wn.2d at 454-455. This holding was based on the Court's recognition that the short statute of limitations in PRA cases must not give agencies an incentive to improperly withhold records:

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

Belenski, 186 Wn.2d at 461-62. The Court remanded the issue to the trial court without indicating what the necessary elements of equitable tolling might be in a PRA case. *Id*.

In this case, appellant Charles Wolfe made PRA requests to the Washington State Department of Transportation (WSDOT) for records relating to WSDOT's 1986 construction of a bridge that Wolfe believed was causing erosion on his riverfront property. WSDOT failed to conduct

a reasonable search for records, gave Wolfe false assurances that there were no records of more recent WSDOT bridge work, and then relied on its own failure to produce records to pursue a meritless defense in a related tort case. WSDOT finally produced the responsive records after the one-year statute of limitations had elapsed. This was exactly the situation with which *Belenski* was concerned. But the Court of Appeals interpreted *Belenski* very strictly, and held that equitable tolling did not apply to Wolfe's PRA claims against WSDOT.

Wolfe seeks review of the Court of Appeals' interpretation and application of *Belenski* under RAP 13.4(b)(4).

V. STATEMENT OF THE CASE

Starting in May 2008, Wolfe made a series of PRA requests for records to WSDOT seeking records relating to WSDOT's 1986 construction of the SR4/Naselle River Bridge in Pacific County. Wolfe was concerned that WSDOT's bridge work was causing erosion on his property. *Unpublished Opinion* at 1. In July 2008 Wolfe expanded his request to include any records of any work on the Naselle River Bridge done by WSDOT since 1986. *Id.* at 3. Unknown to Wolfe at the time, WSDOT had worked on the SR 4 bridge much more recently than 1986, having obtained a permit for such work (hereafter the 1998 HPA) from the Department of Fish and Wildlife in 1998. CP 1950-1954.

WSDOT made some records available to Wolfe at its Kelso office in July and August of 2008. It is undisputed that WSDOT failed to produce the responsive 1998 HPA records at that time. *See Unpublished Opinion* at 4. The factual question of which other records were provided is disputed.[1] Wolfe made another PRA request in 2008, which also failed to produce the records he was looking for. *Id.* at 3.

By letter dated September 19, 2008 Wolfe complained to the Washington Attorney General that WSDOT had not adequately researched the cause of the erosion on Wolfe's property. CP 1858-61. In that letter Wolfe specifically threatened to sue WSDOT over the erosion issues. CP 1861; *Unpublished Opinion* at 3.

In June 2010 Wolfe sued WSDOT in Pacific County for property damage as well as violations of the PRA. The PRA claims were dismissed without prejudice on jurisdictional grounds. *Unpublished Opinion* at 3-4.

In July 2011, WSDOT moved to dismiss Wolfe's tort claims in the Pacific County case. CP 2948-2962. WSDOT argued, *inter alia*, that the case should be dismissed because more than 10 years had elapsed between WSDOT's construction of the new bridge in 1986 and Wolfe's claim filed in 2010. WSDOT's motion was explicitly based on WSDOT's

[1] Wolfe argues that WSDOT withheld several whole boxes of records from Wolfe. WSDOT argues that all responsive records were made available to Wolfe. *See Unpublished Opinion* at 5.

representation—now known to be ***false***— that WSDOT had not worked on the bridge since 1986. CP 2950, 1946-1947; *see Unpublished Opinion* at 4. The Pacific County Superior Court dismissed Wolfe's tort claims. CP 1988. Wolfe appealed that ruling to the Court of Appeals.

In August 2011, a technical expert hired by Wolfe discovered physical evidence that WSDOT has placed large rock rip-rap around the bridge, and that this rip-rap was not shown on the 1986 plans. CP 1752. In September 2011, Wolfe made another PRA request for documents relating to the rip-rap. CP 1754, 1948. In response to this PRA request, on December 2, 2011 WSDOT finally produced records relating to a 1998 permit (1998 HPA) issued to WSDOT by the Department of Fish and Wildlife. CP 1950-1954, 3230. These records indicated that WSDOT had obtained a permit to address erosion by placing rock rip-rap around one of the bridge piers. *Id*. It is undisputed that these records were responsive to Wolfe's 2008 PRA requests. *Unpublished Opinion* at 4. These records demonstrated that, contrary to WSDOT's claims in the tort case, WSDOT had worked on the bridge much more recently than 1986. *Id*.

Wolfe filed this case against WSDOT on May 22, 2012, more than one year after his 2008 PRA requests were closed, but less than six months after WSDOT produced the responsive 1998 HPA records. CP 7-10.

Meanwhile, despite claiming that it did not know about the 1998 HPA until the Fall of 2011, CP 1308, 1525-26, WSDOT never sought to correct its false factual statements, in the Pacific County tort case, that WSDOT had not worked on the SR 4 Bridge since 1986. On the contrary, WSDOT opposed Wolfe's attempts to correct the record. CP 2982. In October 2012, at oral argument on appeal from the dismissal of Wolfe's tort claims, WSDOT's attorney was asked if any work had been done since 1986 and answered "no," which was false. CP 1753; *see Unpublished Opinion* at 4. On January 29, 2013, the Court of Appeals (Division II) issued its opinion affirming the dismissal of Wolfe's tort claims. CP 1792-1799; *Unpublished Opinion* at 4.

Meanwhile, in this case, after WSDOT's motion to stay discovery was denied, WSDOT finally made thirteen (13) entire boxes of responsive records available to Wolfe in February 2013. CP 1751, 2648-49. The factual question of whether WSDOT had previously made these boxes available was and is disputed. *Unpublished Opinion* at 5. The trial court denied the parties' dispositive motions in March 2013. CP 1686-87.

The superior court held a hearing on May 1, 2015. No witnesses were called at the hearing, which was based on declarations and the arguments of the parties. CP 2025, 3228. At the hearing WSDOT admitted that it had failed to produce the 1998 HPA records in response to

Wolfe's 2008 PRA requests, but WSDOT argued that it had performed a "reasonable search" for those records. *Unpublished Opinion* at 5. The trial court rejected WSDOT's "reasonable search" argument, and also rejected WSDOT's statute of limitations argument with respect to the 1998 HPA records. CP 3269-3270.

However, the trial court found "sufficient evidence" that all the other records were provided to Wolfe in Kelso in 2008. CP 3270. In addition, the court held that the statute of limitations barred Wolfe's claims for the other records. *Id*. As the Court of Appeals noted, it is unclear how the trial court applied the statute of limitations to some records but not others. *Unpublished Opinion* at 9.

The court's oral ruling on May 1, 2015, was not immediately reduced to a written order. A successor judge (Skinder) declined to revisit Judge Tabor's ruling on the merits. On August 25, 2017, Judge Skinder adopted Judge Tabor's oral ruling, awarded attorney fees to two of three of Wolfe's attorneys, and awarded PRA penalties of $20 per day for each of the three 1998 HPA records. CP 3228-3297.

On September 1, 2016, more than a year after the show cause hearing on May 1, 2015, this Court issued its opinion in *Belenski*, 186 Wn.2d 452. This Court settled the issue of whether or when the one-year statute of limitations in RCW 42.56.550(6) would apply:

> We hold that the one year statute of limitations in the PRA applies to Belenski's claim and that this limitations period usually begins to run on an agency's final, definitive response to a records request. However, we remand this case for the trial court to determine whether equitable tolling should toll the statute of limitations.

Belenski, 186 Wn.2d at 454-455. This holding was based on the Court's recognition that the statute of limitations must not give agencies an incentive to improperly withhold records:

> Belenski and amici raise legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to intentionally withhold information and then avoid liability due to the expiration of the statute of limitations. On one hand, we recognize that such an incentive could be contrary to the broad disclosure mandates of the PRA and may be fundamentally unfair in certain circumstances…

Belenski, 186 Wn.2d at 461-62. Apart from discussing the competing policy implications under the PRA the Court did not indicate what the necessary elements of equitable tolling might be in a PRA case. *Id*. This Court did not cite any cases on the doctrine of equitable tolling. *Id*.

The related issue of whether the "discovery rule" should apply in PRA cases was extensively briefed in *Belenski*.[2] But this Court did not

[2] The discovery rule was addressed in the following briefs in *Belenski*: *Petition for Review* (8/28/15) at 11-14; *Answer to Petition* (9/30/15) at 12-17; *Supp. Br. of Petitioner* (2/9/16) at 10-16; *Supp. Br. of Respondent* at (2/8/16) 4-11; *Amicus Brief of Allied Daily Newspapers et al.* (3/28/16) at 19-20; *Amicus Brief of WAPA* (4/11/16) at 7-9; *Pet. Answer to Amicus WAPA* (4/27/16) at 15-16; *Resp. Answer to Amicus Allied Daily Newspapers et al.* (4/27/16) at 19 n.4. These briefs are available on this Court's website at http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08 (last visited May 23, 2019).

reach that issue, or even mention it in the Court's opinion. *See Belenski,* 186 Wn.2d 452.

In September 2017, Wolfe appealed to the Court of Appeals, and WSDOT cross-appealed. Because this Court's 2016 decision in *Belenski* appeared to preclude the application of the discovery rule in PRA cases—leaving only the doctrine of equitable tolling—Wolfe argued that the statute of limitations was equitably tolled under *Belenski* with respect to all of Wolfe's claims. *App. Br.* at 25-29.[3] Wolfe argued, *inter alia*, that

> [A]s noted in Belenski, WSDOT had a clear incentive to withhold the records that would have shown that WSDOT worked on the SR 4 Bridge as recently as 1998. WSDOT not only failed to produce these records, but affirmatively relied on their failure to produce these records to argue that Wolfe's claims were barred by a 10-year statute of limitations. CP 2950-2951. Even after WSDOT claimed to have discovered the 1998 Bridge work in the Fall of 2011, WSDOT never corrected the factual record in the Pacific County case, and continued to misstate the facts during the appeal. CP 1753, 2982. This is exactly the situation in which justice requires the application of equitable tolling.

App. Br. at 28. WSDOT argued that equitable tolling was not applicable, and that all of Wolfe's claims were barred by the statute of limitations. Both parties raised additional issues. *See Unpublished Opinion* at 12.

[3] In the absence of any guidance from *Belenski* opinion Wolfe argued that equitable tolling generally requires (i) bad faith, deception or false assurances by the defendant, and (ii) the exercise of reasonable diligence by the plaintiff. *App. Br.* at 28 (citing *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)).

The Court of Appeals issued its *Unpublished Opinion* on May 7, 2019, holding that equitable tolling did not apply, and that the one-year statute of limitations barred all of Wolfe's PRA claims. Based, in part, on arguments that WSDOT had made for the first time in its reply brief the Court held:

> Wolfe has not shown that the WSDOT had an incentive to "intentionally withhold information," knew these records existed in 2008, or that the WSDOT acted in bad faith or in a deceptive manner.

Unpublished Opinion at 11.

The court did not address the second element of equitable tolling, whether Wolfe exercised diligence in pursuing his claims.[4] *Id*. Because the court held that all of Wolfe's PRA claims were barred by the statute of limitations the court did not reach any of the other issues in the case. *Id*.

Pursuant to RAP 13.4(b)(4) Wolfe seeks review in this Court.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Pursuant to RAP 13.4(b)(4) a decision of the Court of Appeals warrants further review by this Court where the petition for review raises

[4] On the issue of diligence Wolfe documented his extraordinary efforts to locate the records that he needed for his investigation and litigation relating to the SR4 bridge, and noted that he brought this case less than six months after WSDOT finally produced the 1998 HPA records. *App. Br*. at 29. In response, WSDOT misrepresented Wolfe's September 19, 2008 letter as evidence that Wolfe somehow knew in 2008 that WSDOT had violated the PRA. *Resp. Br*. at 22. In fact that letter requests additional records, demonstrating Wolfe's diligent pursuit of the records, but does ***not*** contain any allegation that WSDOT has already wrongfully withheld records from Wolfe.

issues of "substantial public interest that should be determined by the Supreme Court." Both the elements of equitable tolling under *Belenski* as well as the uncertain fate of the discovery rule in PRA cases are issues of substantial public importance that should be determined by this Court.

If review is granted there are other issues that may need to be addressed. Although the Court of Appeals did not reach those issues, those issues have been fully briefed. Because the trial court's ruling was made after a hearing based on documentary evidence this Court's review is *de novo*. RCW 42.56.550(3).[5]

A. The question of how equitable tolling applies to the one-year statute of limitations on PRA claims is an issue of substantial public interest that should be determined by this court.

As the Court of Appeals noted, the two basic elements of equitable tolling are: (i) bad faith, deception or false assurances by the defendant, and (ii) the exercise of reasonable diligence by the plaintiff. *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998); *Unpublished Opinion* at 8. But *Millay*, which was not cited in *Belenski*, deals with equitable tolling in a very different context from the present case. *See* 135 Wn.2d at 206 (holding that the statutory redemption period when the redemptioner in possession submits a grossly exaggerated statement of the sum required

[5] In the Court of Appeals Wolfe requested an award of reasonable attorney fees pursuant RCW 42.56.550(4) and RAP 18.1. *See App. Br*. at 34. If review is granted Wolfe will renew his request for attorney fees on appeal.

to redeem). The issue in this case is how the doctrine of equitable tolling should apply to PRA claims where, as here, responsive records are discovered more than one year after an agency closes a PRA request.

The Court of Appeals correctly noted that the plaintiff claiming equitable tolling has the burden of proof. *Unpublished Opinion* at 11 (citing *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009)). Wolfe has never argued otherwise.[6] The issue before both the Court of Appeals and this Court is ***what, exactly, is a PRA requestor who asserts equitable tolling required to prove?*** That is not a factual question but a legal issue.

The Court of Appeals declined to address the second element of equitable tolling: the requirement that the plaintiff exercise reasonable diligence in pursuing the claim. *Unpublished Opinion* at 8. On the first element, the Court of Appeals held that *Belenski* was distinguishable from this case, and rejected the application of equitable tolling for four reasons:

- that Wolfe had not shown that WSDOT had an incentive to "intentionally withhold information" in 2008,

[6] Wolfe's reply brief noted that WSDOT had failed to respond to Wolfe's argument about equitable tolling, specifically that WSDOT had "failed to explain why equitable tolling should not apply where WSDOT relied on its own failure to locate the 1998 HPA records in order to present a statute of limitations defense in a related lawsuit between Wolfe and WSDOT." *Wolfe Reply Br*. at 13. Wolfe was objecting to WSDOT's failure to properly respond to Wolfe's arguments about the elements of equitable tolling in its response brief. *Id*. The Court of Appeals apparently misunderstood Wolfe's argument as an assertion that WSDOT had the factual burden of proof. *See Unpublished Opinion* at 11.

- that Wolfe had not shown that WSDOT "knew" the records existed in 2008,
- that WSDOT had not acted in bad faith or in a deceptive manner, and/or
- that Wolfe would have lost his tort case against WSDOT in any event.

Unpublished Opinion at 11.

First, the court's determination that WSDOT had no ***incentive*** to withhold records is contrary to the undisputed evidence. WSDOT argued, for the first time in its reply brief,[7] that WSDOT did not know about Wolfe's tort action in 2008 because Wolfe's tort lawsuit was not actually filed until 2010. *WSDOT Reply Br.* at 5. WSDOT ignored the undisputed fact that Wolfe had ***threatened*** to sue WSDOT over the erosion issues in a letter dated September 22, 2008, well within the one-year limitation. CP 1770. Unfortunately, the Court of Appeals accepted WSDOT's improper reply argument without realizing that the argument was factually erroneous in light of Wolfe's September 2008 letter.[8]

[7] Wolfe's opening brief explained that WSDOT had an incentive to withhold the records in order to claim, in the tort case, that WSDOT had not worked on the SR4/Naselle bridge since 1986. *App. Br.* at 28. WSDOT failed to directly respond to this argument in its response brief. In addition, WSDOT mischaracterized Wolfe's September 2008 letter, in which Wolfe threatened to sue WSDOT over the SR 4 bridge construction, as a threat to sue WSDOT for PRA violations. *WSDOT Resp. Br.* at 22; CP.1667-1770. Wolfe highlighted WSDOT's lack of response in Wolfe's reply brief, and reminded the Court of Appeals that WSDOT was ***not*** permitted to make new arguments in its reply brief. *Wolfe Reply. Br.* at 14-15.

[8] The *Unpublished Opinion* at 3 specifically notes that Wolfe threatened to sue WSDOT in 2008, but ignores that fact in its holding, on page 11, that WSDOT did not know about

Second, the Court of Appeals erroneously assumed that *Belenski* required Wolfe to prove that WSDOT "knew" the missing records existed in 2008. *Unpublished Opinion* at 11. The Court of Appeals conflated the question of whether an agency has an improper incentive to withhold records with a strict requirement that the requestor prove that the agency intentionally violated the PRA. *Belenski* does ***not*** require proof that one or more agency employees know that the agency is violating the PRA. On the contrary, in *Belenski*, the agency failed to produce the records because the agency employees who knew the records existed mistakenly assumed that the agency was not required to produce the records. *Belenski*, 186 Wn.2d at 455-56. In both *Belenski* and in this case the agency's failure to locate the record resulted in false assurances to the requestor that there were no other records. *Belenski* is not distinguishable from this case. In both cases, false assurances from the agency left the requestor to wonder whether records that should have been provided were misplaced, destroyed or wrongfully withheld. Furthermore, unlike the agency in *Belenski*, WSDOT failed to conduct a reasonable search for the missing records. CP 3269-3270; *see Belenski v. Jefferson County*, 187 Wn. App. 724, 746, 350 P.3d 689 (2015), *reversed on other grounds*, 186 Wn.2d 452

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the tort case until 2010. If the Court of Appeals meant to hold that no agency can have an incentive to withhold records unless and until a lawsuit is actually filed against the agency, the court provided no authority or reasoning to support such an argument.

(2016) (holding that agency performed a reasonable search). WSDOT's erroneous responses to Wolfe's PRA requests were sufficient "false assurances" for purposes of equitable tolling under *Belenski*.

The Court of Appeals misinterpretation of *Belenski* is shown by its comment that "unlike in *Belenski*, this is not a silent withholding case." *Unpublished Opinion* at 11. The Court of Appeals in *Belenski* specifically held that the agency had ***not*** silently withheld records. 187 Wn. App. at 747. This Court mentioned the requestor's 'silent withholding' argument exactly once, but did not address it. 186 Wn.2d at 457. The issue is ***not*** whether the agency's conduct should be characterized as "silent withholding," but whether the agency has given the requestor false assurances that all records have been produced.

Third, the Court of Appeals' holding that Wolfe failed to show "that the WSDOT acted in bad faith or in a deceptive manner," *Unpublished Opinion* at 11, omits the "false assurances" mentioned in *Millay*, suggesting that mere false assurances are not sufficient and that a requestor is required to prove some additional bad faith or deceptive conduct. The Court of Appeals never explained why an incentive to withhold records combined with false assurances that all records have been produced is not enough to equitably toll the statute of limitations.

This Court should grant review to clarify exactly what the doctrine of equitable tolling requires in a PRA case.

This Court should reject the notion that equitable tolling requires the requestor to prove that one or more agency employees knows that the agency is violating the PRA. Requestors who have received false assurances that records do not exist often have no way of knowing that they have not received all responsive records. And even requestors who suspect that an agency is lying or intentionally violating the PRA cannot easily prove such facts. To obtain such evidence a requestor would have to file a PRA case, without any evidence that the agency has actually violated the PRA, and then attempt to use discovery, before the case is dismissed, to prove that the agency has withheld records in bad faith.

State v. Duvall, 86 Wn. App. 871, 940 P.2d 671 (1997), cited by the Court of Appeals, confirms that equitable tolling does ***not*** require proof of ***intentionally*** false assurances. In *Duvall*, an agreed restitution order was entered against a criminal defendant within the 60-day period required by former RCW 9.94.A.142(1). The defendant subsequently argued, through new counsel, that he had not authorized his prior counsel to agree to the order or nor waived his right to be present at the hearing. The Court of Appeals held that equitable tolling applied to allow the late entry of the restitution order:

> The signature of Duvall's counsel on the first "agreed" restitution order, ***however mistaken***, was a false assurance that induced the court to believe a hearing in Duvall's presence was unnecessary.

85 Wn. App. at 875. In other words, a ***mistaken*** (not intentional) false assurance is sufficient for equitable tolling. Proof that the defendant knows they are violating the law is ***not*** required.

Even if additional evidence of bad faith were required, the undisputed facts show such bad faith on the part of WSDOT. After WSDOT produced the 1998 HPA records in the Fall of 2011, WSDOT made no attempt to correct its erroneous statements that it had not worked on the SR 4 bridge since 1986. CP 1753, 2982. This confirms that WSDOT acted in bad faith and had an incentive to withhold the records.

Finally, the Court of Appeals' observation that Wolfe still would have lost his tort case against WSDOT is irrelevant to the question of equitable tolling. Once again, the Court of Appeals erroneously accepted an argument that WSDOT made for the first time in a reply brief. *See WSDOT Reply Br.* at 6-7. Under the *Belenski*, the issue is whether WSDOT had an ***incentive*** to withhold the 1998 HPA records in the fall of 2008 when it falsely assured Wolfe that no records existed. Wolfe's explicit threat to sue WSDOT, in his letter dated September 19, 2008, establishes that WSDOT had exactly the sort of incentive addressed in

Belenski ***at the time*** WSDOT gave the Wolfe false assurances that there were no more records. CP 1770. The fact that WSDOT explicitly argued in the tort case that WSDOT had not worked on the bridge since 1986 merely confirms that WSDOT had such an incentive and that it acted upon that incentive. The fact that WSDOT eventually won on a different legal theory is irrelevant to the question of whether WSDOT had an incentive to withhold records at the time it gave Wolfe false assurances that all records had been provided. Nothing in *Belenski* suggests that equitable tolling requires a requestor to prove that an agency has withheld records that would have changed the outcome of particular litigation.

The Court of Appeals strict interpretation of *Belenski* is impractical, inconsistent with other cases on equitable tolling, and actually rewards WSDOT for its failure to conduct a reasonable search for records. Pursuant to RAP 13.4(b)(4) this Court should grant review to clarify the elements of equitable tolling under *Belenski*.

B. The questions of whether the "discovery rule" applies in PRA cases and, if not, why not, are issues of substantial public interest that should be determined by this Court.

Although the possible application of the "discovery rule" was extensively briefed in *Belenski*, neither the majority nor the dissent addressed that issue. In this case the Court of Appeals surmised that the discovery rule is not applicable to PRA cases because RCW 42.56.550(6),

as interpreted in *Belenski*, specifies that a cause of action under the PRA ***accrues*** when the agency gives its final, definitive response. *Unpublished Opinion* at 8. According to the appellate court's reasoning, the discovery rule could not apply to make a cause of action "accrue" later, but the doctrine of equitable tolling can still toll the limitations period once is has commenced. *Id.*

But this Court's *Belenski* opinion gives no indication of why this Court apparently rejected the discovery rule in PRA cases. This Court might have agreed that the discovery rule was inapplicable for the reasons stated by the Court of Appeals, or the Court might have rejected the rule for some other reason relating to the language or policy of the PRA. In addition to the analytical differences between the discovery rule and equitable tolling—accrual vs. tolling—the required elements are different. While the discovery rule focuses on when the plaintiff knew or should have known that a cause of action has accrued, the doctrine of equitable tolling asks whether it would be "equitable" to allow the limitations period to elapse in light of the defendant's conduct. *Unpublished Opinion* at 8.

The doctrine of equitable tolling applies in a variety of contexts where an action by the defendant makes it inequitable to allow the statute of limitations or other deadline to elapse. *See Millay*, 135 Wn.2d at 206 (redemptioner's submittal of grossly inflated redemption amount); *Duvall*,

85 Wn. App. at 875 (mistaken belief that defendant had waived right to be present at hearing). Apart from noting that agencies should not have an "incentive" to withhold records, *Belenski*, 186 Wn.2d at 461, the Court has provided little guidance on when equitable tolling should apply in PRA cases. While some cases suggest that equitable tolling should not apply to "garden variety claims of excusable neglect," the doctrine does ***not*** require proof of intentionally false assurances. *Duvall*, 86 Wn. App. at 875.

Furthermore, as this Court has repeatedly observed, the PRA explicitly directs the Court to interpret the PRA liberally. *Nissen v. Pierce County*, 183 Wn.2d 863, 887, 357 P.3d 45 (2015). If the discovery rule is unavailable in PRA cases then the doctrine of equitable tolling must be liberally applied in PRA cases to avoid injustices created by the Court's ruling, in *Belenski*, that the statute of limitations "normally" begins to run when an agency gives its final, definitive response to a PRA request.

Only this Court can explain its apparent rejection of the discovery rule in *Belenski*. Pursuant to RAP 13.4(b)(4) this Court should grant review to clarify the elements of equitable tolling under *Belenski* in light of this Court's apparent rejection of the discovery rule.

RESPECTFULLY SUBMITTED this 5th day of June, 2019.

By: 

William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
12345 Lake City Way NE 306
Seattle, Washington 98125-5401
(206) 361-5972
bill@billcrittenden.com

Attorney for Appellant Wolfe

Certificate of Service

I, the undersigned, certify that on the 5th day of June, 2019, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

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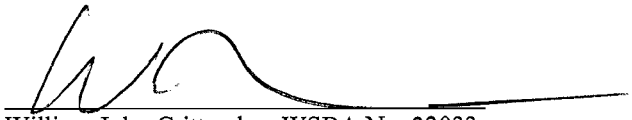
David D. Palay, Jr., AAG:	DavidP4@atg.wa.gov
TPC EF Mailbox	TPCef@atg.wa.gov
Melissa Calahan, Legal Assistant:	MelissaE1(@atg.wa.gov



William John Crittenden, WSBA No. 22033

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May 7, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHARLES WOLFE, Appellant/Cross-Respondent, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, Respondent/Cross-Appellant.	No. 50894-0-II UNPUBLISHED OPINION

TRICKEY, J.P.T.[*] — Charles Wolfe requested records from the Washington State Department of Transportation (WSDOT) pursuant to the Public Records Act (PRA), ch. 42.56 RCW. He sued the WSDOT, alleging that it violated the PRA in its responses to his requests. The superior court held a show cause hearing. The superior court ruled that the WSDOT failed to produce a few records.

Wolfe appeals. He argues that (1) the WSDOT failed to provide entire boxes of records in response to his May 2008 PRA request, (2) the superior court erred in ruling that Wolfe's PRA claims (except for three records) were barred by the statute of limitations, (3) the superior court erred in denying attorney fees for Allen Miller, and (4) the superior court erred in denying

[*] Judge Michael Trickey is serving as a judge pro tempore of the Court of Appeals pursuant to CAR 21(c).

Appendix A

sanctions against the WSDOT. Wolfe also argues that he is entitled to additional attorney fees on appeal under RCW 42.56.550(4).

The WSDOT cross appeals. The WSDOT maintains that (1) all of Wolfe's claims are barred by the statute of limitations, (2) the WSDOT conducted an adequate search for the records, (3) the superior court erred in awarding Wolfe attorney fees because they were not reasonable, and (4) the superior court erred in assessing penalties of $20 per day. Because we hold that the statute of limitations bars all of Wolfe's claims, we reverse and vacate the trial court's granting of penalties and fees without considering the other issues.

FACTS

Wolfe owns riverfront property downstream from the SR4/Naselle River Bridge in Pacific County. Wolfe became concerned that bridge construction and the angle of the bridge piers changed the flow of the river causing erosion on his property.

I. MAY 2008 PUBLIC RECORDS ACT REQUEST—PDR-08-0455

In May 2008, Wolfe submitted his first PRA request to the WSDOT. He asked for permits and certifications that the WSDOT received for the bridge in 1986. The WSDOT designated this PRA request as number PDR-08-0455.

The WSDOT assigned Kelso Project Engineer Denys Tak, Southwest Region Assistant Regional Administrator for Engineering Bart Gernhart, and Public Records Coordinator Michelle Ewaniec to locate the records for this request. The WSDOT sent Wolfe three record installments (May 15, June 2, June 30). The WSDOT closed the request on June 30.

On July 9, Wolfe expanded his request by identifying categories of records he wanted. Tak gathered more records and put them in the WSDOT Kelso office for Wolfe to inspect.

On July 13, before inspecting the records, Wolfe expanded his request again. He specifically sought

> all WSDOT files related to the bridge that have NOT been sent to the archieves [sic] . . .
> Specifically, are there any bridge related files in your Raymond, Kelso, Vancouver, or Olympia offices? I am particularly interested in any files at the Olympia Hydrogeology and the Olympia Hydraulics Section offices.
> *Likewise, I am interested in any files the [sic] relate to any work that WSDOT has done on the bridge or within 500 feet, both upstream and downstream, of the bridge since 1986.*

Clerk's Papers (CP) at 224, 1764 (emphasis added).

On July 17 and August 12, Wolfe reviewed the WSDOT records at the Kelso office. The WSDOT then closed PDR-08-0445 on August 13.

II. SEPTEMBER 2008 PUBLIC RECORDS ACT REQUEST—PDR-08-0856

On September 19, Wolfe wrote a letter to the WSDOT alleging that the "WSDOT has NOT fully complied with my request to research the cause(s) of the erosion activity affecting our property." CP at 1858. In the letter, Wolfe requested additional documents. Wolfe also stated, "Any civil action I take will be from the standpoint of a citizen whose property is the source of that sedimentation pollution." CP at 1861. The WSDOT acknowledged that this letter contained specific requests for additional records and treated this as a new PRA request on September 25. The WSDOT assigned this request number PDR-08-0856.

III. JUNE 2010 PACIFIC COUNTY LAWSUIT

In June 2010, Wolfe sued the WSDOT in Pacific County. Wolfe brought claims alleging that the WSDOT damaged his property as well as claims that the WSDOT violated the PRA. The WSDOT moved to dismiss Wolfe's tort claims because the agency alleged that the claims were time barred under both the 10-year prescriptive period and the 2-year statute of limitations.

On August 19, the Pacific County Superior Court held a summary judgment hearing. The superior court dismissed Wolfe's tort claims. It also dismissed the PRA claims without prejudice on jurisdictional grounds based on the WSDOT's argument that the records were not located in Pacific County.

Wolfe appealed the superior court's summary judgment dismissal of his tort claims to this court. In October 2012, at oral argument, we asked the WSDOT's attorney if work had been done on the bridge since 1986, and she responded no. We affirmed the dismissal of Wolfe's tort claims.

IV. 2011 PUBLIC RECORDS ACT REQUEST—PDR-11-1498

In 2011, Wolfe made another PRA request (PDR 11-1498) for documents. He made this request based on evidence discovered by an expert that the WSDOT had placed rip rap[1] around the bridge. When responding to this request, the WSDOT found three records responsive to Wolfe's May 2008 PRA request. These three records were related to a 1998 "rip-rap" project. The WSDOT then produced these records to Wolfe.

V. PROCEDURAL HISTORY

In May 2012, Wolfe filed this current PRA case in Thurston County. He alleged that the WSDOT violated the PRA by withholding boxes of records in 2008. Wolfe filed an amended complaint that included additional PRA violation claims.

The WSDOT moved to dismiss Wolfe's claims based on the statute of limitations. The WSDOT also moved the superior court to stay Wolfe's discovery requests until the superior court

[1] "Rip rap" is "a foundation or sustaining wall of stones thrown together without order (as in deep water, on a soft bottom, or on an embankment slope to prevent erosion)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1960 (2002).

considered the WSDOT's motion to dismiss. The superior court denied the WSDOT's motion to stay.

In February 2013, Wolfe moved for partial summary judgment. The superior court held a hearing on March 8 and denied both the WSDOT's motion to dismiss and Wolfe's motion for partial summary judgment.

On February 20, 2015, the superior court issued an order to show cause. The superior court held a show cause hearing on May 1. At the hearing, Wolfe argued that the WSDOT withheld whole boxes of responsive records, specifically 58 records.[2] Wolfe argued that the statute of limitations did not bar these claims.

The WSDOT's show cause hearing brief admitted that it failed to produce three records (the 1998 "rip rap" records) until Wolfe's 2011 PRA request. However, the WSDOT argued that it made a reasonable search for those records. The WSDOT also argued that Wolfe's claims should be dismissed because of the statute of limitations.

The parties presented conflicting evidence as to whether the WSDOT provided whole boxes of records for Wolfe to review in 2008. The WSDOT primarily relied on Tak's declaration and the WSDOT's Southwest Region Design Services Engineer David Bellinger's declaration. Wolfe relied on a WSDOT spreadsheet. Wolfe also relied on an October 30 to 31, 2008 e-mail thread.

[2] Wolfe filed an amended list of withheld records on March 12, 2015 that includes a list of 58 items that he claims the WSDOT withheld.

A. SUPERIOR COURT'S RULING

The superior court ruled that the WSDOT did not timely produce the three 1998 records in response to Wolfe's May 2008 PRA request. The superior court rejected the WSDOT's argument that the statute of limitations barred Wolfe's claims with respect to the three records. It found that the WSDOT produced the records 1,305 days late. The superior court held that the statute of limitations barred the remaining claims. The superior court further ruled that the remaining records "were present at the time that the review took place by Mr. Wolfe in a number of boxes." CP at 3270. The superior court's oral rulings were later adopted into a written order. The superior court ordered a hearing on the attorney fees and penalties for the three PRA record violations.

B. ATTORNEY FEES AND PENALTIES

On July 14, 2017, the superior court awarded attorney fees and costs to Wolfe. The superior court awarded Wolfe $102,892.08 in attorney fees and costs. The superior court also awarded statutory penalties of $20 per record (three responsive 1998 records) for 1,305 days for a total penalty of $78,300.

The superior court granted Wolfe attorney fees for Allied Law Group and Greg Overstreet but not for Miller. Miller was Wolfe's attorney for the Pacific County case. The superior court reasoned that for Miller "there is absolutely no way to differentiate what that billing consists of based upon the attachment that was included." CP at 3286.

Wolfe also asked the superior court to impose sanctions against the WSDOT "for lack of candor towards both the Pacific County trial and Division II appeals courts (RPC 3.3)" when misrepresenting that no work had been done on the bridge since 1985 and 1986. CP at 2731. The

trial court denied Wolfe's request for sanctions and did not award Wolfe any just compensation or property damage repair or restoration costs.

Both parties appealed.

ANALYSIS

I. STATUTE OF LIMITATIONS

Wolfe argues that the superior court erred in ruling that the statute of limitations under RCW 42.56.550(6) barred Wolfe's claims (except for the three 1998 "rip rap records"). He also asserts that we should apply the doctrine of equitable tolling. The WSDOT maintains that the superior court correctly ruled that the statute of limitations barred these claims.

Furthermore, the WSDOT argues in its cross appeal that the three 1998 "rip rap" records are subject to the statute of limitations so that all of Wolfe's claims are barred. We agree with the WSDOT that all of Wolfe's claims are time barred.

A. PRINCIPLES OF LAW

The PRA establishes a one-year statute of limitations. "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). The PRA also specifies that "[j]udicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo." RCW 42.56.550(3).

The statute of limitations begins to run "on an agency's final, definitive response to a public records request." *Belenski v. Jefferson County*, 186 Wn.2d 452, 460, 378 P.3d 176 (2016). However, it may be subject to equitable tolling. *Belenski*, 186 Wn.2d at 462. The doctrine of equitable tolling allows a court to toll the statute of limitations when justice requires. *Millay v.*

Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). "The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay*, 135 Wn.2d at 206. The party who asserts equitable tolling bears the burden of proof. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379, 223 P.3d 1172 (2009). The doctrine of equitable tolling is to be used only sparingly. *State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997).

"Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action." *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (footnote omitted). A discovery rule is generally applied where "the statute does not specify a time at which the cause of action accrues." *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991). However, the PRA specifies a time at which its causes of action accrue as defined by *Belenski* as the time of the agency's final, definitive response. 186 Wn.2d at 460. It appears that no Washington courts have applied the discovery rule in the context of the PRA.

B. ALL OF WOLFE'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

The superior court ruled that the statute of limitations did not bar Wolfe's claims regarding the three 1998 "rip rap" records. The WSDOT located these three records during a search for responsive records relating to a PRA request that Wolfe made in 2011. The superior court reasoned, "I think it has to do with the last production and when the State closed the request and there were three requests. . . . And each [of] those were ultimately closed with, obviously, the reopening in 2011 as to the documents 1, 2, 3." CP at 3276.

It is unclear from the superior court's ruling what its basis was for applying the statute of limitations to the other records but not applying the statute of limitations to the three 1998 "rip rap" records. The WSDOT argues that the superior court was applying the discovery rule to these three records and that the discovery rule does not apply to this case. The WSDOT gave its final definitive response to Wolfe's May 2008 request in August 2008, and therefore Wolfe knew at that time that the WSDOT was not going to provide any more records. Wolfe appears to concede that the discovery rule does not apply here.[3] We accept Wolfe's concession that the discovery rule does not apply.

Both parties appear to agree that the statute of limitations bars Wolfe's claims unless equitable tolling applies.

Wolfe argues that equitable tolling applies to all of Wolfe's claims, not just the three records, because both the elements of equitable tolling are met: (1) bad faith, deception, or false assurances by the defendant and (2) the exercise of diligence by the plaintiff. *Millay*, 135 Wn.2d at 206. The WSDOT argues that all of Wolfe's claims are barred by the statute of limitations, including the three 1998 "rip rap" records and that equitable tolling does not apply here.

C. BAD FAITH, DECEPTION, OR FALSE ASSURANCES

First, Wolfe contends that the first element of equitable tolling is met because the WSDOT acted in bad faith, deception, or made false assurances. Relying on *Belenski*, Wolfe argues that the WSDOT had an incentive to withhold the records because of the Pacific County lawsuit, and the WSDOT relied on its failure to produce these records to argue that Wolfe's claims were barred

[3] Wolfe argued below that the one-year statute of limitations began when the WSDOT provided the three rip rap documents in 2011 and the case was filed in 2012. However, Wolfe appears to have abandoned that position on appeal.

by the 10-year statute of limitations in the Pacific County case. Wolfe further argues that there is evidence of bad faith, deception, or false assurances based on the fact that the WSDOT never corrected the factual record in the Pacific County case to admit that work had been done on the bridge since 1986.

The WSDOT argues that Wolfe failed to show that the WSDOT acted in bad faith, in a deceptive manner, or gave false assurances. Specifically, the WSDOT argues that Wolfe makes assertions without evidence that the WSDOT silently withheld records to defeat Wolfe's Pacific County claims. And with respect to the three 1998 "rip rap" records, the record does not show that the WSDOT knew about them in 2008 when the WSDOT produced all records they knew to exist. Additionally, the WSDOT notes that the WSDOT did not have an "incentive" in 2008 to withhold documents because Wolfe's Pacific County suit was not filed until 2010. *Wolfe v. Dep't of Transp.*, 173 Wn. App. 302, 304, 293 P.3d 1244 (2013). The WSDOT also relies on the superior court's statements (later adopted into findings) that this was an "honest attempt to try to comply with the Public Records Act." CP at 3273.

In *Belenski*, the appellant requested public records from the county regarding Internet access logs (IAL). 186 Wn.2d at 455. The county responded that it had no responsive records. *Belenski*, 186 Wn.2d at 455. Later, Belenski discovered e-mails between county employees admitting that IALs existed but suggesting that the county did not need to provide them because they were not "natively viewable." *Belenski*, 186 Wn.2d at 455. Our Supreme Court remanded to the trial court to determine whether equitable tolling applied. *Belenski*, 186 Wn.2d at 462. The court in *Belenski* said,

> Belenski and amici raise legitimate concerns that allowing the statute of limitations to run based on an agency's dishonest response could incentivize agencies to

> intentionally withhold information and then avoid liability due to the expiration of the statute of limitations. On one hand, we recognize that such an incentive could be contrary to the broad disclosure mandates of the PRA and may be fundamentally unfair in certain circumstances; on the other hand, certain facts in this specific case indicate that Belenski knew the County possessed IAL data, yet he inexplicably waited over two years before filing his claim.

186 Wn.2d at 461-62.

Belenksi is distinguishable from this case. Although *Belenksi* emphasizes how allowing the statute of limitations to run could incentivize agencies to withhold information, here, unlike in *Belenski*, this is not a silent withholding case. Wolfe has not shown that the WSDOT had an incentive to "intentionally withhold information," knew these records existed in 2008, or that the WSDOT acted in bad faith or in a deceptive manner.

In his reply, Wolfe argues that the WSDOT has failed to explain how it would be equitable to permit the WSDOT to assert the statute of limitations. However, the party who asserts equitable tolling bears the burden of proof. *Nickum*, 153 Wn. App. at 379. Here, Wolfe contends that the WSDOT might have had an incentive to withhold records, but fails to show any acts of bad faith, deception, or false assurances. The WSDOT did not have an "incentive" in 2008 to withhold documents because Wolfe's Pacific County suit was not filed until 2010. *Wolfe*, 173 Wn. App. at 304. Wolfe has not shown that the WSDOT's failure to correct its assertion made in oral argument before this court in a separate lawsuit that it had not worked on the bridge since 1986 rises to the level of bad faith, deception, or false assurances.

Even if Wolfe used the 1998 "rip rap" records in the Pacific County case, he still would have lost that case. The 10-year statute of limitations was not at issue, but we noted in the Pacific

County case that "[t]he Wolfes do not directly contest application of this two-year statute of limitations to their negligence claim" and held that the 2-year statute of limitations barred this claim. *Wolfe*, 173 Wn. App. at 306. Additionally, we held that Wolfe's inverse condemnation claim failed because of the subsequent purchaser rule. *Wolfe*, 173 Wn. App. at 309. We further stated that the Wolfes did not show that that government action contributed to the erosion of the riverbank since they purchased the properties in *2003* and *2004*. *Wolfe*, 173 Wn. App. at 309 (emphasis added).

Therefore, we hold that Wolfe has not met his burden of proof that the doctrine of equitable tolling applies to these claims. Because Wolfe has not shown bad faith, deception, or false assurances by the WSDOT, we do not address whether Wolfe exercised diligence.

We hold that equitable tolling does not apply, and therefore the statute of limitations bars Wolfe's claims. Accordingly, we reverse the superior court and hold that all of Wolfe's claims, including the three claims regarding the 1998 "rip rap" records, are time barred. Because the claims are time barred, we do not reach the other issues raised by Wolfe and the WSDOT.

II. ATTORNEY FEES

RAP 18.1(a) allows us to grant attorney fees if authorized by statute. RCW 42.56.550(4) allows the prevailing party to be awarded costs and attorney fees.

Wolfe argues that if he prevails, then he is entitled to attorney fees. Because the statute of limitations bars Wolfe's claims, he is not the prevailing party. Accordingly, he is not entitled to attorney fees.

CONCLUSION

In conclusion, we hold that all of Wolfe's claims are barred by the statute of limitations and Wolfe is not entitled to costs and attorney fees. We reverse and vacate the trial court's granting of penalties and fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Trickey

TRICKEY, J.P.T.

We concur:

, A.C.J.

LEE, A.C.J.

Sutton, J.

SUTTON, J.

Appendix A

WILLIAM JOHN CRITTENDEN

June 05, 2019 - 10:52 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Charles Wolfe, App./Cross-Respondent v. Dept. of Transportation, Res./Cross-Appellant (508940)

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